

Section-by-Section Analysis of Proposed Albatross and Petrel Conservation Act of 2009

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

Section 1 of the bill establishes the title of the bill as the “Albatross and Petrel Conservation Act of 2009” (subsection (a)) and provides the table of contents (subsection (b)).

SEC. 2. FINDINGS AND PURPOSES.

Section 2(a) lists the findings, including the importance of and need to conserve albatrosses and petrels; the high risk of extinction faced by albatross and most petrel species; how the birds’ natural history traits exacerbate threats to the species; efforts by the domestic fishing industry to reduce incidental bycatch of the birds; and other issues, such as invasive species, marine debris, and other threats.

Section 2(b) provides a statement of purpose for the Act, including the achievement and maintenance of a favorable conservation status for albatrosses and petrels; to work cooperatively with international organizations/nations; and to ensure that conservation measures are not postponed due to a lack of full scientific certainty as to threats, effects, or the effects of conservation measures being contemplated.

SEC. 3. DEFINITIONS.

Section 3 sets forth definitions of key terms in the bill, including terms specific to the structure of the Agreement for the Conservation of Albatrosses and Petrels (“Agreement”), in addition to the following:

- breeding site, defined as a location in the wild at which albatross or petrel eggs, tended by the parent birds, have successfully hatched at any time in the previous five years, or a location where re-establishment of breeding albatrosses or petrels is underway;
- conservation status, defined as the sum of the influences acting on albatrosses and petrels that may affect their long-term distribution and abundance;
- disturbance, defined as any act that causes disruption of natural behavioral patterns, including but not limited to, migration, brooding, nesting, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered;
- habitat, defined as any area, within the range of the species, that contains suitable living conditions for albatrosses and petrels, including appropriate nesting and foraging areas;
- significant adverse effect on a population, defined as an effect that could diminish the capacity of a population to sustain itself at a biologically viable level;

- take, defined as to harass, harmfully interfere with, disturb, pursue, hunt, shoot, wound, kill, trap, capture, destroy, or collect, or to attempt to engage in any such act ; and
- trade, defined as the purchase, sale, import, export, or offer to purchase, sell, import, or export any albatross or petrel, alive or dead, or part, product, or derivative thereof in intrastate, interstate, or foreign commerce.

TITLE I – SCOPE AND APPLICABILITY

SEC. 101. SCOPE.

Section 101(a) states that the Act shall apply to all albatrosses and petrels that are listed in Annex 1 to the Agreement, the multilateral agreement that seeks to improve conservation of these birds and that entered into force on February 1, 2004.

Subsection (b) provides that the Secretary of the Interior (Secretary), in consultation with the Secretary of Commerce, may: designate any albatross or petrel species, subspecies, or populations that is not listed on Annex 1 of the Agreement and that the Secretary determines would benefit from the provisions of the Act, as being subject to the Act, and establish a process for making such a determination.

SEC. 102. APPLICABILITY.

Section 102(a) delineates those persons and vessels that fall under the jurisdiction of this Act, including:

- any person subject to the jurisdiction of the United States at the time he or she engages in conduct referred to in this Act; or
- any vessel of the United States whether the conduct referred to within this Act occurs within or without the United States; and
- any vessel within waters subject to the jurisdiction of the United States at the time that such vessel engages in conduct referred to in this Act.

Section 102(b) provides that the Act shall not apply to vessels and aircraft entitled to sovereign immunity under international law. This subsection also provides that the head of the relevant Federal agency shall ensure that United States vessels or aircraft entitled to sovereign immunity under international law shall act in a manner consistent with the Agreement so far as reasonable and practicable, and may determine that some or all of the provisions of this Act apply to such vessels or aircraft.

Section 102(c) includes an international law savings clause providing that "[a]ny action taken under this Act shall be taken in accordance with treaties to which the United States is a party and other international obligations of the United States." The Administration proposes that the congressional report language clarify that this provision is intended to be a general policy statement of congressional intent that the Executive Branch follow international law as accepted by the United States. It is not intended to create private rights of action or other enforceable

individual legal rights in U.S. Courts regarding the meaning and applicability of international law.

TITLE II – CONSERVATION MEASURES

SEC. 201. RE-ESTABLISHMENT OF SPECIES.

This section authorizes the Secretary of the Interior, in consultation with the Secretary of Commerce, to carry out activities, based on the best available scientific information, to re-establish albatrosses and petrels within their ranges.

SEC. 202. MANAGEMENT OF NON-NATIVE SPECIES.

This section authorizes the Secretary or the Secretary of Commerce, as appropriate, in consultation with each other and other relevant Federal agencies, to carry out activities to prevent the introduction of, eradication, or control of terrestrial and aquatic invasive and non-native species that are having or may have an adverse effect on albatross or petrels.

SEC. 203. HABITAT CONSERVATION AND RESTORATION.

This section authorizes the Secretary and the Secretary of Commerce to carry out conservation and restoration activities related to albatrosses and petrels. Subsection (a) authorizes the Secretary to use all authorities to conserve, protect and restore albatross and petrel breeding sites; provides the Secretary with additional authority to acquire by purchase, donation, or otherwise, lands, waters, or interests therein that have been identified as habitat important to bird conservation; and authorizes the Secretary to develop and implement management plans and undertake measures for the conservation of albatross and petrel habitat. These latter two provisions are to be carried out in consultation with the Secretary of Commerce, where appropriate, but particularly if acquisition of marine habitat is involved.

Paragraph (4) of subsection (a) also authorizes the Secretary of Commerce to acquire by purchase, donation, or otherwise, waters or interests therein in marine areas that have been identified as habitat important to the conservation and protection of albatrosses and petrels. This paragraph is to be carried out in consultation with the Secretary.

Subsection (b) provides the Secretary of Commerce, in consultation with the Secretary, authority to develop and implement management plans for the conservation of albatross and petrel marine habitats and to undertake conservation measures in marine habitats in order to ensure the sustainability of living marine resources that provide food for albatrosses and petrels and conserve other marine areas deemed critical for albatrosses or petrels. The Secretary of Commerce is also authorized to use all authorities to conserve and protect marine habitat, including the National Marine Sanctuaries Act, as amended (16 U.S.C. 1431 et seq.) and the Magnuson-Stevens Fishery Conservation and Management Act, as amended (16 U.S.C. 1801 et seq.).

Meaningful consultation between the two Departments is essential to the effective, efficient, and

coordinated implementation of this Act, particularly in those instances where actions taken under this Act by the Secretary or the Secretary of Commerce may affect resources subject to the management of, or overlap with other authorities exercised by, the other.

SEC. 204. MANAGEMENT OF HUMAN ACTIVITIES.

Section 204(a) contains specific authorization for the Secretary, in consultation with the Secretary of Commerce, where appropriate, to determine whether discharges of pollutants are having an adverse effect on albatrosses and petrels, and for the Administrator of the Environmental Protection Agency to minimize the discharge of pollutants from land-based sources and from vessels. The Secretary, the Secretary of Commerce, the Secretary of the Department in which the Coast Guard is operating, and the Administrator of the Environmental Protection Agency are all authorized to undertake scientific research to assess the effects of pollutants and marine debris on albatrosses and petrels, and the Secretary and the Secretary of Commerce are authorized to develop and implement conservation measures to minimize the effects of marine debris on albatrosses and petrels.

Subsection (b) contains authorities for both the Secretary and the Secretary of Commerce to minimize disturbance to albatrosses and petrels, in consultation with each other, by regulating the proximity of human approach to albatrosses and petrels and establishing areas important to the conservation of albatrosses and petrels and regulating human activities in those areas in order to maintain them free from disturbance in United States territory and in waters subject to the jurisdiction of the United States.

This subsection also provides the Secretary and the Secretary of Commerce, again in consultation with each other, with authority beyond waters subject to the jurisdiction of the United States, to minimize disturbance of albatrosses and petrels by vessels and nationals of the United States. In order to ensure appropriate coordination and effective management, the subsection requires that the Secretary of the Department in which the Coast Guard is operating be notified of any actions taken under this subsection.

Subsection (c) provides authority for the Secretary of Commerce or the Regional Fishery Management Councils, in consultation with the Secretary, to develop and undertake measures to minimize bycatch of albatrosses and petrels. In coordination with the Secretary and the relevant Regional Fishery Management Councils, the Secretary of Commerce is also authorized to engage in bycatch monitoring and data collection activities.

Finally, subsection (d) of section 204 authorizes the Secretary, the Secretary of Commerce, the Secretary of Defense, the Administrator of the EPA, and the Secretary of Homeland Security, as appropriate, to develop and implement measures, including the issuance of regulations, recommended by the Secretary in consultation with the Secretary of Commerce, to prevent, minimize or mitigate the adverse effects of activities under their jurisdiction deemed to be detrimental to the conservation status of albatrosses or petrels. The Secretary and the Secretary of Commerce are authorized to develop and implement these measures for activities under their respective jurisdictions, in consultation with each other.

SEC. 205. RESEARCH AND MONITORING.

Section 205 authorizes the Secretary of the Interior and the Secretary of Commerce, as appropriate and in cooperation with each other, to undertake research and monitoring, both at sea and on land, and facilitate the development of improved research and monitoring techniques to enhance the understanding of threats to the conservation status of albatrosses and petrels.

SEC. 206. EDUCATION AND PUBLIC AWARENESS.

This section provides the Secretary and the Secretary of Commerce, in consultation with relevant Regional Fishery Management Councils and others, as appropriate, to make information on the conservation status of albatrosses and petrels, the threats facing them and the activities taken under the Agreement available to the public and any interested parties, including local authorities, other decision-makers, Parties to the Agreement, and other neighboring nations; to cooperate with other Parties, the Secretariat, and other persons to develop training programs and general information products, and exchange resource materials; and to provide training programs to ensure that responsible personnel have adequate knowledge for effective implementation.

TITLE III – PROHIBITED ACTS, PERMITS AND EXEMPTIONS

SEC. 301. PROHIBITED ACTS.

Section 301 provides that is unlawful for any person, unless authorized under this Act, to—

- violate any provision of the Act, or any regulation or permit issued under the authority of the Act or attempt to commit, solicit another to commit, or cause to be committed, any offense herein;
- take albatrosses or petrels, or their breeding sites;
- ship, transport, offer for sale, trade, or have custody, control or possession of, any albatross or petrel;
- refuse to permit any authorized officer to board, search, or inspect any vessel, aircraft, vehicle, or shoreside facility that is subject to the person's control for purposes of conducting any search, investigation, or inspection in connection with the enforcement of this Act or any regulation or permit issued under this Act;
- forcibly assault, resist, oppose, impede, intimidate, or interfere with any authorized officer in the conduct of any search, investigation, or inspection;
- resist a lawful arrest or detention;
- interfere with, delay, or prevent, by any means, the apprehension, arrest, or detention of another person, knowing that such other person has committed any act prohibited herein.

SEC. 302. AUTHORIZATION OF DELIBERATE TAKE, POSSESSION, OR TRADE.

Section 302(a) provides authority for the Secretary to authorize, by permit or regulation, the deliberate take, possession, or trade in albatrosses or petrels upon a finding that there is no other satisfactory course of action. Such take, possession, or trade may be authorized for purposes to enhance the propagation, re-establishment, or survival of the species; for scientific, educational,

or similar purposes; to accommodate the traditional needs of indigenous people; or in other exceptional circumstances. Additional specific requirements for permits are included in this section. Such permits must be precise, limited in time and space, and not operate to the detriment of the conservation status of albatrosses and petrels.

Section 302(b) provides for the take of covered birds for purposes of assistance and salvage.

SEC. 303. OTHER TAKE AUTHORIZATIONS.

Subsection (a) of this section authorizes incidental take of covered albatrosses and petrels by personnel of the Department of Defense or the United States Coast Guard through military activities. The section requires that the head of a Component of the Department of Defense or the Commandant of the United States Coast Guard, as the case may be, must confer and cooperate with the Secretary, who in turn is required to consult with the Secretaries of Commerce and State, to develop and implement appropriate conservation measures to minimize or mitigate impacts of such activities that he determines may significantly adversely affect a population of albatrosses and petrels. The Secretary is required to suspend any such authorization of take if, after the conference discussed above and following consultation with the Secretaries of Commerce and State, he determines that incidental take from the activities would result in a significant adverse effect to albatrosses and petrels. Prior to suspending any authorization, however, the Secretary must provide written notice to the Secretary of Defense or the Secretary of the Department in which the Coast Guard is operating. The subsection also provides a mechanism for cancelling such a suspension of authorized take of albatrosses and petrels.

Subsection (a) also makes clear that nothing in the section is intended to limit the Coast Guard's law enforcement authority, including under 14 U.S.C. 89, and provides authority to address incidental take of albatrosses and petrels during Coast Guard emergency response activities.

Subsection (b) provides that it is not a violation of this Act for any person to take albatrosses and petrels as bycatch incidental to otherwise lawful fishing activities. Because section 204(c) of this Act authorizes the development and implementation of measures to minimize the bycatch of albatrosses and petrels, and amends the Magnuson-Stevens Fishery Conservation and Management Act to include seabirds among the types of bycatch that must be minimized under 16 U.S.C. 1853(a)(11), application of a prohibition on this activity under this Act is unnecessary.

Subsection (c) provides generally that the Secretary may authorize the take of albatrosses or petrels, not otherwise provided for and incidental to otherwise lawful activities, pursuant to the terms of a permit authorized under this subsection.

SEC. 304. PRE-ACT EXEMPTION.

Section 304 provides that, excepting the prohibition on trade, the prohibitions in section 301(d) of the Act shall not apply with respect to any albatross or petrel that is lawfully taken before the effective date of this Act.

TITLE IV –PENALTIES AND ENFORCEMENT

SEC. 401. CIVIL PENALTIES.

Section 401 provides that any person who is found by the Secretary or the Secretary of Commerce, after notice and opportunity for a hearing, to have committed any act prohibited by section 301 of this Act shall be liable to the United States for a civil penalty, and provides that the amount of the civil penalty shall not exceed \$ 250,000 for each violation. Civil penalties may be either administrative or judicial.

The Secretaries may compromise, modify, or remit, with or without conditions, any civil administrative penalty which is subject to imposition or which has been imposed under this section. The section also provides for hearings for the assessment of civil administrative penalties and appeal of civil administrative penalty assessments.

SEC. 402. CRIMINAL OFFENSES.

Section 402 authorizes criminal penalties for violations of section 301, providing, among other things, that any person, other than a foreign government or any entity of such government, or a Federal agency, who knowingly violates any provision of this Act or who uses a dangerous weapon, engages in conduct that causes bodily injury to any officer authorized to enforce the provisions of this chapter, or places any such officer in fear of imminent bodily injury may be charged with a criminal offense.

SEC. 403. ENFORCEMENT.

Subsection (a) of this section provides that the provisions of this Act shall be enforced by the Secretary, the Secretary of Commerce, and the Secretary of the Department in which the Coast Guard is operating. It authorizes the Secretaries, by agreement, on a reimbursable basis or otherwise, to utilize the personnel, services, equipment (including aircraft and vessels), and facilities of any other Federal agency.

Subsection (b) provides that any authorized officer or employee may, in enforcing the provisions of this Act carry out activities, including activities to —

- secure, execute, and serve any order, warrant, subpoena, or other process;
- search without warrant any person, place of business, vehicle or aircraft subject to the jurisdiction of the United States where there is probable cause;
- with or without a warrant, board and search or inspect any vessel of the United States or vessel subject to the jurisdiction of the United States;
- seize without warrant any evidentiary item, albatross or petrel, or vessel of the United States; and
- exercise any other authority which such officer or employee is permitted by law to exercise.

Other subsections include provisions relating to the treatment of seized property or items, the forfeiture of property; and the application of the customs laws.

SEC. 404. DISTRICT COURT JURISDICTION.

Section 404 provides the district courts with jurisdiction over any actions brought by the United States arising under this Act. For the purpose of this Act, American Samoa is included within the judicial district of the District Court of the United States for the District of Hawaii.

SEC. 405. DISPOSITION OF FINES.

This section establishes an account within the Treasury, the “Albatross and Petrel Conservation Fund,” which consists of all amounts recovered under the Act and received by the United States in the form of penalties or fines collected under this authority. Funds are to be made available yearly and the Secretary of Treasury is required to proportionately distribute the total amounts in the Fund to the Secretary and the Secretary of Commerce based on the amounts recovered by the two Departments in fines and penalties. The section provides a list of measures for which funds may be appropriately spent, but the section also includes general language authorizing funds to be used for any measure necessary to carry out the obligations under the Agreement.

The section makes clear that the funds are made available without further appropriation, shall remain available until expended, and shall be in addition to any other amounts appropriated under law.

TITLE V –AGREEMENT AUTHORITY, EMERGENCY MEASURES, COOPERATION, AND GRANTS

SEC. 501. AGREEMENT AUTHORITY.

Section 501 establishes the United States Authority under the Agreement, providing that an office or program from both the U.S. Fish and Wildlife Service and the National Oceanic and Atmospheric Administration shall be designated to function as the U.S. Authority to undertake, monitor, and control all activities carried out in the implementation and enforcement of the Agreement. The Authority shall, among other things, monitor all activities that may have an impact on the conservation status of those albatrosses and petrels for which the United States is a range state and shall each designate a Contact Point for communication with the Secretariat.

The Secretaries are also required to jointly designate a United States Representative in accordance with Article IX of the Agreement.

SEC. 502. EMERGENCY MEASURES.

Section 502 provides an authorization to adopt immediate conservation measures if, on the basis of the best scientific information available, either Secretary, in consultation with the other, deems such action necessary to prevent a significant threat to, or to avoid deterioration of, the conservation status of one or more albatrosses or petrels, and provides a process for informing other Parties to the Agreement and the Secretariat of the measures taken. Emergency regulations to implement such conservation measures, and notices to terminate such measures, would be published in the Federal Register and are exempt from rulemaking requirements of the

Administrative Procedure Act, 5 U.S.C. 553. Extensions of emergency regulations would be conducted consistent with 5 U.S.C. 553. The section also provides a mechanism for working to address emergencies involving other Parties, and provides for publication of any emergency regulations.

SEC. 503. REPORTING.

Section 503 establishes reporting requirements to Congress, requiring the Secretary, in cooperation with the Secretary of Commerce, the Secretary of State, and any other appropriate Federal agency, to report, within twelve months after the effective date of this Act and every 4 years thereafter, to the Congress the list of species subject to the provisions of this Act, current status of those species, and actions taken and those conservation measures necessary to assure a favorable conservation status of such species.

A synthesized report may be provided by the Secretary and the Secretary of Commerce to the Advisory Committee of the Secretariat.

SEC. 504. GENERAL COORDINATION.

This section furthers the ideal that effective implementation of appropriate sections of this Act require meaningful consultation between the Secretary and the Secretary of Commerce, and between the Secretaries and other Federal agencies. Section 504 provides general authority to the Secretary and the Secretary of Commerce to work together and gives both Secretaries the authority to request other Federal agencies to take certain actions to achieve or maintain a favorable conservation status for albatrosses or petrels.

To avoid potential conflicts among Federal agencies in their common goal of advancing the purposes of this Act, this section also requires that both Secretaries consult with the head of a relevant Federal agency when taking actions on lands or waters owned by the United States and under the jurisdiction of that agency.

SEC. 505. AGREEMENTS AND GRANTS.

Section 505 authorizes the Secretary and the Secretary of Commerce, in consultation with each other, to enter into cooperative agreements, contracts, or other agreements with, or make grants or transfer funds to or receive funds from, States, local governments, Indian Tribal governments, educational institutions, or any other persons to carry out the purposes and policies of the Act.

TITLE VI– INTERNATIONAL COOPERATION AND ASSISTANCE

SEC. 601. COOPERATION BETWEEN NATIONS.

This section provides an authorization for the Secretary, the Secretary of Commerce, and the Secretary of State to cooperate with and provide training, technical, and financial support, among other things, to other nations in order to achieve and maintain a favorable conservation status of albatrosses and petrels.

SEC. 602. COOPERATION WITH INTERNATIONAL BODIES.

Section 602 provides that the Secretary of State, in cooperation with the Secretary and the Secretary of Commerce, as appropriate, may promote the objectives of the Agreement and develop and maintain coordinated and complementary working relationships with relevant international, regional and sub-regional bodies, including those concerned with the conservation and management of albatrosses and petrels and their habitats and other living marine resources.

TITLE VII – BYCATCH AND EQUIVALENT CONSERVATION MEASURES

SEC. 701. BYCATCH.

This section amends section 3 of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. §1802) by inserting at the end of paragraph (2), "The term also includes any seabirds incidentally taken in a fishery."

SEC. 702. PROTECTED LIVING MARINE RESOURCES.

This section amends section 610 of the High Seas Driftnet Fishing Moratorium Protection Act (16 U.S.C. §1826k) by --

(1) striking in paragraph (e) "(e) Protected living marine resources defined" and all that follows through "Fauna; but"; and

(2) inserting in its place –

“(e) PROTECTED LIVING MARINE RESOURCE DEFINED.—In this section the term “protected living marine resource”—

(A) means non-target fish, sea turtles, seabirds, or marine mammals that are protected under United States law or international agreement, including the Marine Mammal Protection Act, the Endangered Species Act, the Shark Finning Prohibition Act, and the Convention on International Trade in Endangered Species of Wild Flora and Fauna; but ...”

TITLE VIII – MISCELLANEOUS PROVISIONS

SEC. 801. REGULATORY AUTHORITY.

This section provides general authority for the Secretary and the Secretary of Commerce to issue regulations, in consultation with each other, to implement the provisions of this Act. The section also requires that in developing regulations under this authority, the Secretary and the Secretary of Commerce shall seek the concurrence of the Director of the National Science Foundation, or his designee, on implementation matters related to Antarctica.

SEC. 802. SAVINGS PROVISION.

The idea of meaningful consultation between the Department of the Interior and the Department of Commerce, which both believe is a key component to successful and coordinated implementation of this Act, has been discussed in other sections of this analysis. In addition to recognition of this important consultative prerequisite, the overlap of jurisdiction created by some provisions of this Act with authorities exercised independently by each Secretary, and the possible intersection of actions taken by one Department under this Act with the mission-related activities carried out by the other under existing authorities, necessitates a robust savings provision. Both Departments determined, and this section is intended to ensure, that authorities exercised independently by each Secretary, and the jurisdiction that springs from those authorities, are not to be impinged by actions taken or activities carried out by the other under the provisions of this Act.

Section 802 is intended to address this issue by recognizing that nothing in this Act is to be construed as repealing, superseding, overriding, or modifying any provision of Federal law, noting in particular those laws that give each Department jurisdictional primacy over a particular resource or area. With regard to the Department of the Interior, this section recognizes that laws providing the Secretary with the authority to conserve and manage resources, including regulating access, on lands and in waters under the management jurisdiction of the Department of the Interior; and to conserve and manage migratory birds, are not affected by this Act. With regard to the Department of Commerce, the section recognizes that laws providing the Secretary of Commerce with authority to conserve and manage marine resources in waters under the management jurisdiction of the Department of Commerce; to conserve and manage marine fisheries; and to minimize bycatch are not affected by this Act.

Subsection (b) of this section provides each Department additional protection for particular areas under their respective management jurisdictions. This subsection requires that no provision of the Act shall be construed as authorizing either Secretary to carry out any activities under this Act on lands or in waters under the area-based management jurisdiction of the other, unless both Secretaries concur. In areas where the Secretary and the Secretary of Commerce share area-based management jurisdiction, they are required to carry out the provisions of the Act consistent with existing laws, Presidential Proclamations, Executive Orders, memoranda, or other agreements in place for that purpose. Finally, the subsection requires that, in those areas where neither the Secretary nor the Secretary of Commerce has explicit area-based management jurisdiction, they must carry out the provisions of the Act in consultation with each other.

SEC. 803. SEVERABILITY PROVISION.

Section 803 will ensure the operation of the Act if a particular provision is successfully challenged.

SEC. 804. EFFECTIVE DATE.

Section 804 provides that the Act and its provisions will take effect 180 days after enactment.

SEC. 805. AUTHORIZATION OF APPROPRIATIONS.

Section 805 provides an authorization for appropriations for “such sums as are necessary” for fiscal years 2009 through 2014 to the Secretary and the Secretary of Commerce to implement the Act.