

# Breathing Life into a Dormant Statute: Using the Case of the Pink Dolphins to Forge a Path Forward for Environmental Legal Protections in Hong Kong

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I.  
INTRODUCTION

Hong Kong’s pink dolphins are majestic, intelligent, and beautiful. Unfortunately, Hong Kong’s coastal waters are no longer suitable for pink dolphin populations. Vessel traffic, water pollution, land reclamation projects, and localized construction-blasting activity all contribute to the declining stability of their habitat. These destructive impacts on the marine environment derive from Hong Kong’s generally inadequate political and regulatory protections, increased tourist use of polluting river boats to view the dolphins, ambivalent local perceptions of the problem, and a growing human population, which together make environmental protection increasingly more difficult. Despite this unequivocally bleak future, legal tools exist that can help improve and preserve their habitat. Although litigation under Hong Kong’s environmental statutes is rare, bringing suit under existing laws can create meaningful change for the pink dolphin. The Wild Animals Protection Ordinance contains provisions that may lead to a prohibition of local vessels navigating through dolphin marine habitat.

In order to carry out this litigation strategy and others like it, parties need more exposure and a better understanding of the legal actions available to them. This comment demonstrates how parties can successfully litigate under the Wild Animals Protection Ordinance for the protection of pink dolphins despite Hong Kong's current political climate. Part II describes the Hong Kong pink dolphin and major threats to dolphin populations. Part III analyzes Hong Kong's history of delayed proactivity, regulation, litigation, and enforcement of environmental and animal welfare matters. Part IV develops a potential case under the Wild Animals Protection Ordinance for better protection of Hong Kong's pink dolphins. Part V summarizes other legal avenues available for protection of pink dolphins and other marine species. Finally, Part VI concludes by encouraging government agencies and private parties to bring novice environmental cases under existing legislation and to press for statutory amendments where necessary to better protect Hong Kong's natural resources, habitat, and species.

## II.

### THE PINK DOLPHIN AND ITS DECLINING POPULATION IN HONG KONG FROM A BIOLOGICAL PERSPECTIVE

The Indo-Pacific humpback dolphin, also referred to as the Chinese white dolphin or the Hong Kong pink dolphin, inhabits temperate and tropical waters ranging from central China and Australia to South Africa.<sup>1</sup> Unfortunately, pollution, incidental bycatch, loss of prey, habitat degradation, disturbance, and tourism threatens their existence globally.<sup>2</sup> Although the dolphins are not recognized as endangered on all existing international species lists, they have suffered population declines in several areas.<sup>3</sup> The pink dolphin is designated an

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1. *Sousa chinensis*, IUCN RED LIST, <http://www.iucnredlist.org/details/20424/0> (last visited May 10, 2014).

2. See generally Julie Bloch, *Conservation in A Concrete Jungle: Political, Legal and Societal Obstacles to Environmental Protection in Hong Kong*, 6 GEO. INT'L ENVTL. L. REV. 593 (1994).

3. Stephen Leatherwood & Thomas Jefferson, *Dolphins and Development in*

Appendix I endangered species, requiring “highest protection” on the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) species list.<sup>4</sup> They are “Near Threatened” species on the International Union for the Conservation of Nature and Natural Resources (IUCN) Red List of Threatened Species.<sup>5</sup> In Mainland China they are a Grade 1 National Key Protected Species.<sup>6</sup> In Hong Kong, the pink dolphins are “protected species” under the Wild Animals Protection Ordinance.<sup>7</sup>

The first data collection project regarding cetaceans in Hong Kong occurred in 1973.<sup>8</sup> At that time the Agriculture and Fisheries Department only collected data pertaining to stranded individuals.<sup>9</sup> Then, in 1989, the World Wide Fund developed a system for recording certain pink dolphin sightings.<sup>10</sup> It was not until 1993 that any long-term, directed research on Hong Kong cetaceans was initiated.<sup>11</sup> Recent research generated by the Hong Kong Dolphin Conservation Society indicates that the number of dolphins utilizing Hong Kong waters significantly declined in the past decade.<sup>12</sup> In 2011, approximately 78 dolphins were present on any given day in Hong Kong waters.<sup>13</sup>

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*Hong Kong: A Case Study in Conflict*, 7 IBN REPORTS 57, 60, available at [http://swfsc.noaa.gov/uploadedFiles/Divisions/PRD/Publications/Leatherwood&Jefferson97\(36\).pdf](http://swfsc.noaa.gov/uploadedFiles/Divisions/PRD/Publications/Leatherwood&Jefferson97(36).pdf).

4. *Chinese White Dolphins*, GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION, AGRICULTURE, FISHERIES, AND CONSERVATION DEPARTMENT, available at [http://www.afcd.gov.hk/english/conservation/con\\_mar/con\\_mar\\_chi/con\\_mar\\_chi\\_chi/con\\_mar\\_chi\\_chi\\_con\\_pro.html](http://www.afcd.gov.hk/english/conservation/con_mar/con_mar_chi/con_mar_chi_chi/con_mar_chi_chi_con_pro.html) (last updated Aug. 27, 2013).

5. *Id.*

6. *Id.*

7. Leatherwood & Jefferson, *supra* note 3, at 60.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 58.

12. *See generally* HONG KONG DOLPHIN CONSERVATION SOCIETY, <http://www.hkdc.org> (last visited May 10, 2014).

13. SAMUEL K.Y. HUNG, MONITORING OF MARINE MAMMALS IN HONG KONG WATERS 33 (2013), available at [http://www.afcd.gov.hk/english/conservation/con\\_mar/con\\_mar\\_chi/con\\_mar\\_chi\\_chi/files/FinalReport201213pt1.pdf](http://www.afcd.gov.hk/english/conservation/con_mar/con_mar_chi/con_mar_chi_chi/files/FinalReport201213pt1.pdf) [hereinafter HUNG 2013].

One year later in 2012, this average dropped to 61 dolphins per day utilizing Hong Kong waters, the lowest figure since recordkeeping began.<sup>14</sup> Since insufficient continuity still plagues the data collection process, the reasons for dolphin population decline are not yet fully conclusive. Nonetheless, the data is highly suggestive of the primary threats responsible for population decline.

Studies indicate that the dolphins residing in Hong Kong's coastal waters are most vulnerable to the immense vessel traffic occurring to and from the ports.<sup>15</sup> Evidence demonstrates that the sound pressure from vessel noise and the high speed of the boats trigger behavioral changes in the dolphins.<sup>16</sup> In addition, researchers frequently attribute physical abrasions to boats colliding with dolphins.<sup>17</sup> Jefferson et al. argues that the vessel traffic's high noise levels can lead to severe injuries or death.<sup>18</sup>

Dolphin experts specifically fear that motorboats, nicknamed "walla-wallas," are harmful to the Hong Kong pink dolphin.<sup>19</sup> Walla-wallas are small, noisy speedboats that conduct dolphin-watching tours.<sup>20</sup> Since the walla-wallas run as a local village operation, the tours are less luxurious and significantly cheaper than competitor companies, such as the Hong Kong Dolphinwatch Ltd.<sup>21</sup> To compensate for low tour prices, the walla-walla operators attempt to squeeze in as many tours per day as possible; they also satisfy tourists by positioning their

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14. *Id.*

15. SAMUEL K.Y. HUNG, MONITORING OF MARINE MAMMALS IN HONG KONG WATERS 7 (2012), available at [http://www.afcd.gov.hk/english/conservation/con\\_mar/con\\_mar\\_chi/con\\_mar\\_chi\\_chi/files/FinalReport2011to12pp1to120.pdf](http://www.afcd.gov.hk/english/conservation/con_mar/con_mar_chi/con_mar_chi_chi/files/FinalReport2011to12pp1to120.pdf) [hereinafter HUNG 2012].

16. *Id.* at 50.

17. *Id.*

18. Jefferson et al., *Protecting small cetaceans from coastal development: Impact assessment and mitigation experience in Hong Kong*, 33 MARINE POLICY 305, 306 (2009), available at <http://www.sciencedirect.com/science/article/pii/S0308597X08001255>.

19. See generally *Frequently asked questions*, HONG KONG DOLPHINWATCH LTD., <http://www.hkdolphinwatch.com/faq.php#q7> (last visited May 10, 2014).

20. HUNG 2012, *supra* note 15, at 106.

21. Choi Kim Lui, *The Development of Motorboat Services in Hong Kong* (2000) available at <http://www.mbta.org.hk/8.3guest.html#eng>.

boats close to the dolphins.<sup>22</sup> Further, these walla-wallas operate at alarmingly high speeds, in attempts to reach dolphin groupings quickly and return to complete more trips daily.<sup>23</sup>

Research suggests that the speed and noisiness of these watercrafts along with their tendency to maneuver in and out of dolphin groups are likely disruptive for the dolphins.<sup>24</sup> First, the engines of these small speedboats are especially noisy,<sup>25</sup> which can interfere with the dolphins' acoustic senses.<sup>26</sup> Dolphins echolocate for prey detection, communication with other group members, and navigation.<sup>27</sup> Evidence suggests that the dolphins will be less able to perform these critical behavioral functions if noise levels and sound pressure interfere with their echolocation.<sup>28</sup> For example, dolphins near Florida's coast increase their rate of whistle production and swim in tighter groups when vessels are approaching.<sup>29</sup> Another study found that the abundance of dolphins at a study site declined with increased exposure to dolphin-watching vessels, but not to research boats, which have lower water noise levels than dolphin-watching vessels.<sup>30</sup> The larger sizes and higher speeds of the tour boats likely also contribute to their deterrent effect on

22. Communication with Samuel Hung, Chairman, Hong Kong Dolphin Conservation Society (2013) (on file with author) [hereinafter Hung, Communication]; see also Sophie Tang, *In the pink of health?*, ACTION ASIA, (2009), available at <http://actionasia.com/articles/in-the-pink-of-health>.

23. *Id.*

24. HUNG 2012, *supra* note 15, at 46.

25. Sofie M. Van Parijs & Peter J. Corkeron, *Boat traffic affects the acoustic behaviour of Pacific humpback dolphins, Sousa chinensis*, 81 J. MARINE BIOLOGICAL ASS'N U.K. 533, 536 (2001).

26. Jefferson et al., *supra* note 18, at 309.

27. *Id.*

28. J.A. David, *Likely sensitivity of bottlenose dolphins to pile-driving noise*, 20 WATER & ENV'T J. 48, 51 (2006).

29. Kara Buckstaff, *Effects of watercraft noise on the acoustic behavior of the bottlenose dolphins, Tursiops truncatus, in Sarasota Bay, Florida*, 20 MARINE MAMMAL SCIENCE 709, 720 (2004) available at <http://www.beamreach.org/research/buckstaff04.pdf>.

30. Lars Bejder et al., *Decline in Relative Abundance of Bottlenose Dolphins Exposed to Long-Term Disturbance*, 20 CONSERVATION BIOLOGY 1791, 1795 (2006).

the dolphins.<sup>31</sup>

Studies conducted in Hong Kong support these findings. Sound pressure levels at one of the primary dolphin study sites in Fan Lau fell “well within the lower audible range of common bottlenose dolphins.”<sup>32</sup> Since researchers suggest that bottlenose dolphins have similar vocal repertoires to those of pink dolphins, the sound generated from vessels and those from the dolphins likely interfere.<sup>33</sup> Similarly, noise and sound pressure recordings were louder in study sites containing walla-walla operations than ambient noise levels in other study sites along West Lantau.<sup>34</sup> Noise and sound pressure levels near walla-wallas were even louder than ambient noise levels in the South Lantau Vessel Fairway containing other types of vessel traffic.<sup>35</sup>

Second, studies indicate that vessel traffic, especially from those that approach rapidly and in close proximity to dolphin groups, can be very startling and agitating to the dolphins.<sup>36</sup> Data demonstrates that the pink dolphins continue to inhabit smaller and smaller areas.<sup>37</sup> An increasingly plausible explanation for this behavior is that they are trying to avoid vessel disturbances.<sup>38</sup> Hong Kong Dolphin Conservation Society (HKDCS) researchers ultimately expect the dolphins to die or migrate elsewhere in the Pearl Delta due to these disturbances.<sup>39</sup> The one-year decline in estimated local populations from 78 in 2011 to 61 in 2012 supports this premise.<sup>40</sup> Moreover, the same data shows that 2011 marked the lowest percentage of dolphin socializing activities recorded in the last decade.<sup>41</sup> Again, the disruptive effect of vessel traffic seems to provide the most plausible explanation for why dolphins are unable to adequately

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31. *Id.*

32. HUNG 2012, *supra* note 15, at 45.

33. *Id.*

34. *Id.* at 46.

35. *Id.*

36. *Id.*

37. *Id.* at 26.

38. *Id.* at 56.

39. Hung, Communication, *supra* note 22.

40. HUNG 2013, *supra* note 13, at 33.

41. HUNG 2012, *supra* note 15, at 34.

socialize. These declines are problematic for the dolphins, which depend on social activity to find mates and reproduce.<sup>42</sup>

Finally, photo-identification work and studies of stranded dolphins reveal that noticeable abrasions and injuries are “consistent with blunt-force trauma injuries caused by vessel collisions.”<sup>43</sup> Walla-walla vessel operations are a likely culprit, because they maneuver in and out of dolphin groupings at high speeds and at close proximities. No animal is comfortable with fast, large objects approaching unpredictably towards them.<sup>44</sup>

Unlike the disruptive walla-walla behavior, “eco-friendly” tour companies and research vessels contrastingly maintain adequate distances from the dolphins, operate at slow speeds, and follow straight, predictable paths.<sup>45</sup> For example, HKDCS, an organization aimed at the conservation of the pink dolphins and finless porpoises, operates research vessels<sup>46</sup> with minimal disturbance to the dolphins.<sup>47</sup> Similarly, dolphin boat tours led by Hong Kong Dolphinwatch Ltd. (Dolphinwatch) operate to, amongst other goals, “raise awareness of the plight of the pink dolphins” and “to generate revenue for research and campaigns.”<sup>48</sup> In contrast, walla-walla operators do not mitigate their effects on the dolphins.<sup>49</sup> Dolphinwatch notes that “[w]e have witnessed frequently that these speed boats crowded around to fight for sightings and their behaviors definitely add to

42. *Id.*

43. *Id.* at 50.

44. Jeffrey Rushen, Allison A. Taylor, & Anna Marie de Passille, *Domestic Animals' Fear of Humans and its Effect on their Welfare*, 65 APPLIED ANIMAL BEHAV. SCI. 285, 286 (1999).

45. See generally *Frequently Asked Questions*, HONG KONG DOLPHINWATCH LTD., <http://www.hkdolphinwatch.com/faq.php> (last visited May 10, 2014).

46. See generally *Our Mission*, HONG KONG DOLPHIN CONSERVATION SOCIETY, [http://www.HongKongdcs.org/en/m\\_en/who/mission.html](http://www.HongKongdcs.org/en/m_en/who/mission.html) (last visited March 15, 2014).

47. See generally *HKDCS Research Projects*, HONG KONG DOLPHIN CONSERVATION SOCIETY, [http://www.hkdcs.org/en/m\\_en/research/research\\_items.html](http://www.hkdcs.org/en/m_en/research/research_items.html) (last visited May 10, 2014).

48. See generally *About Hong Kong Dolphinwatch Ltd.*, HONG KONG DOLPHINWATCH LTD., <http://www.hkdolphinwatch.com/aboutus.php> (last visited May 10, 2014).

49. *Frequently Asked Questions*, *supra* note 45.

the list of threats the dolphins are facing [sic].”<sup>50</sup> Put simply, unregulated walla-walla ecotourism and healthy pink dolphin populations cannot coexist in Hong Kong waters.

### III.

#### HONG KONG’S DIFFICULT POLITICAL AND REGULATORY ENVIRONMENT

Although Hong Kong supports impressive biodiversity and ecosystems, the political and regulatory regime tasked with protecting its natural beauties is disappointingly weak. As a result, species like the pink dolphin are not getting the protection they need from dangerous environmental disturbances. A complex combination of Hong Kong’s political atmosphere, cultural norms, responsibilities under international law, and relationship with China have resulted in an environmental law regime lacking in enforceability and public participation. Particularly troublesome is the fact that plaintiffs rarely bring suits pertaining to environmental and animal welfare matters. The following subsections briefly describe the origins and history of Hong Kong’s apathetic approach to environment and species protection problems, in order to provide sufficient background to understand the compounding effect a suit under the Wild Animal Protection Ordinance can have.

#### A. *Hong Kong’s Prioritization of Consumerism and Development Over the Environment*

Politically, Hong Kong is comprised of Hong Kong Island, southern Kowloon Peninsula, the New Territories, and over 230 offshore islands.<sup>51</sup> Most of the population, however, is condensed in a 225 square kilometer area where Hong Kong’s internationally-recognized financial center and major port at Victoria Harbor are located.<sup>52</sup> Hong Kong’s rugged topography is

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50. *Id.*

51. *Hong Kong*, ENCYCLOPEDIA BRITANNICA ONLINE (2012), <http://www.britannica.com/EBchecked/topic/270971/Hong-Kong>; see also Brian Morton, *Protecting Hong Kong’s Marine Biodiversity: Present Proposals, Future Challenges*, 23 ENVTL. CONSERVATION 55 (1996), available at <http://hub.hku.hk/bitstream/10722/44712/1/24367.pdf?accept=1>.

52. Jessica C. Stabile, *Clashes Between Economies and Environments:*

partially responsible for this density.<sup>53</sup> The twenty percent of Hong Kong's landmass that is highly urbanized contains a population density of approximately 6,380 people per square kilometer.<sup>54</sup> To accommodate this high population density, Hong Kong has become the most "vertical" city in the world. Additionally, Hong Kong has made a practice of reclaiming land from the sea in order to expand livable areas near the financial center.<sup>55</sup> This reclamation further facilitates Hong Kong's consistent growth in size.<sup>56</sup> Reclamation projects are also politically appealing, because they generate revenue, create jobs, and improve the efficiency of importing and exporting goods.<sup>57</sup>

Unfortunately, Hong Kong's major reclamation and development projects generate air pollution, waste runoff into coastal waters, and noise from blasting and piling.<sup>58</sup> Hong Kong's western territorial waters are greatly affected by its natural hydrography, including the Pearl River which accumulates sewage and effluent pollution runoff from Shenzhen, Guangdong, and Hong Kong.<sup>59</sup> Further exacerbating the pollution problem is the fact that Hong Kong's coastal waters are a "central transition zone" of interacting water bodies that result in temperature, salinity, and oxygen stratification.<sup>60</sup> The water and vessel pollution is particularly harmful to marine life residing in the

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*Consumerism Versus Conservation in Taiwan and Hong Kong*, 7 *ASIAN-PAC. L. & POL'Y J.* 125, 132 (2006).

53. *Id.*

54. *Id.*

55. *Id.* at 147.

56. *Id.*

57. J.H. Liu & Peter Hills, *Environmental Planning, Biodiversity and the Development Process: The Case of Hong Kong's Chinese White Dolphins*, 50 *J. OF ENVTL. MGMT.* 351, 354 (1997).

58. *Id.*; see also Thomas A. Jefferson et al., *Protecting Small Cetaceans from Coastal Development: Impact Assessment and Mitigation Experience in Hong Kong*, 33 *MARINE POLICY* 305, 306 (2009).

59. See generally Peter Hills, Lei Zhang & Jianhua Liu, *Transboundary Pollution between Guangdong Province and Hong Kong: Threats to Water Quality in the Pearl River Estuary and Their Implications for Environmental Policy and Planning*, 41 *J. ENVTL. PLANNING & MGMT.*, 375, 376-396 (1998).

60. Morton *supra* note 51; see also BRIAN MORTON, *THE MARINE FLORA AND FAUNA OF HONG KONG AND SOUTHERN CHINA II*, VOLUME I 9 (1990).

harbors.<sup>61</sup> The pink dolphin is an example of an endangered species in Hong Kong that has suffered immensely from this industrial activity and has been inadequately protected by existing legislation.<sup>62</sup>

Hong Kong's dedication to consumerism, development, and industrialization, combined with its population growth, continues to delay environmental movements and more effective regulation.<sup>63</sup> Hong Kong's major harbors in Victoria, Aberdeen and Tolo, coupled with its growing financial center, produce urban congestion at the expense of conservation efforts.<sup>64</sup> Additionally, Hong Kong's population grew from 5.2 million to nearly 7.2 million between 1981 and 2013, and estimates indicate 1.7 million immigrants from China will have moved to Hong Kong by 2017 since the 1997 handover.<sup>65</sup> Vehicle ownership and factory construction have also rapidly increased since 1997.<sup>66</sup> Hong Kong residents continuously resist sacrificing commercial activities and urban conveniences for environmental safeguards.<sup>67</sup> Only as recently as 2001 did an Appellate tribunal hold for the first time against a corporate project on the basis of public environmental concerns.<sup>68</sup> The pink dolphins are not likely to survive the continued degradation of their marine environment if Hong Kong continues to be a bystander to conservation efforts.

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61. Jefferson et al., *supra* note 58, at 306.

62. *Id.*

63. Stabile, *supra* note 52.

64. S. Nicholson et al., *Pollution in the Coastal Waters of Hong Kong: Case Studies of the Urban Victoria and Tolo Harbours*, 25 WATER AND ENV'T J., 387, 393 (2010).

65. *Hong Kong, The World FactBook, CIA (2013)*, <https://www.cia.gov/library/publications/the-world-factbook/geos/hk.html> (last updated Apr. 17, 2014); *see also* Stabile, *supra* note 52, at 131.

66. Stabile, *supra* note 52, at 141.

67. Bloch, *supra* note 2, at 593.

68. YUE-MAN YEUNG, *THE FIRST DECADE: THE HONG KONG SAR IN RETROSPECTIVE AND INTROSPECTIVE PERSPECTIVES* 329 (2007).

B. *Hong Kong's Animal Welfare and Environmental Protection Laws Lag Behind*

Environmental conscientiousness and regulation were already considerably developed in Britain by the mid-1900s when Hong Kong was under British control.<sup>69</sup> Nonetheless, Britain failed to apply similar environmental programs to Hong Kong before the 1997 handover to China.<sup>70</sup> In fact, Hong Kong's environmental regulation only began to formalize around the time the Basic Law was being developed between 1982, when the Sino-British Joint Declaration was signed, and 1997, when Hong Kong was actually handed back to China.<sup>71</sup> As a result, Hong Kong's environmental laws rarely reflect the robust environmental regime in force in the United Kingdom today. A year before Hong Kong reverted back to China, a 1996 study conducted by Friends of the Earth indicated that Hong Kong ranked as the least environmentally conscious among the 39 countries included in the study.<sup>72</sup> Moreover, Hong Kong only had a few active environmental organizations at the time.<sup>73</sup> Historically, the British were more focused on developing Hong Kong's economy than on implementing environmental protection laws.<sup>74</sup> In other words, environmental protection was ancillary to development.<sup>75</sup>

In addition to the sparse environmental protection laws in place in 1997, animal welfare laws also lagged.<sup>76</sup> Unlike Hong Kong's environmental laws, which substantially lack British influence, Hong Kong modeled its original animal welfare laws

69. SUSAN WOLF & NEIL STANLEY, *WOLF AND STANLEY ON ENVIRONMENTAL LAW* 13 (6th ed. 2010).

70. *Id.*

71. Benjamin L. Liebman, *Autonomy Through Separation?: Environmental Law and the Basic Law of Hong Kong*, 39 HARV. INT'L L. J. 231, 238 (1998).

72. *Id.* at 239-40.

73. Cameron Thurber, *Will Retrocession to A Communist Sovereign Have A Detrimental Effect on the Emphasis and Enforcement of Laws Protecting Hong Kong's Environment? The Czech Experience As Contraposition*, 11 J. TRANS-NATIONAL L. & POL'Y 39, 48-49 (2001).

74. Communication with Amanda Whitfort, Assoc. Professor, The University of Hong Kong Faculty of Law (2013) (on file with the author).

75. *Id.*

76. *Id.*

after Britain's 1911 Protection of Animals Act.<sup>77</sup> Unfortunately, it took Hong Kong fourteen years to finally replicate the act.<sup>78</sup> As a result of the delay, Hong Kong's version failed to reflect the extensive changes made by the British to their own animal protection regime<sup>79</sup>—shortly after Hong Kong finally developed its animal law regime, the British Protection of Animals Act was entirely replaced due to its shortcomings and ineffectual protections.<sup>80</sup> Unlike the replacement act that markedly heightened the legal standard, essentially mandating positive treatment, Hong Kong has been extremely slow to make similar revisions to its animal laws.<sup>81</sup> This lag is attributable, in part, to the fact that pre-1997 colonial control pushed for Hong Kong's development and expansion rather than animal law revisions.<sup>82</sup>

Hong Kong's delayed receptiveness to environmental and animal welfare concerns is reflected in the Basic Law, which only fleetingly refers to environmental matters.<sup>83</sup> Only Articles 7, 97, and 119 of the Basic Law address the environment. Article 7 designates land and natural resources within the Hong Kong Special Administrative Region (HKSAR) as state property.<sup>84</sup> Article 97 assigns HKSAR's district organizations responsibility

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77. Protection of Animals Act, 1911, 1 & 2 Geo. 5, c. 27, § 5, available at <http://www.legislation.gov.uk/ukpga/Geo5/1-2/27>; *Animal welfare law in the UK*, BBC ETHICS GUIDE, [http://www.bbc.co.uk/ethics/animals/defending/legislation\\_1.shtml](http://www.bbc.co.uk/ethics/animals/defending/legislation_1.shtml) (last visited May 10, 2014).

78. *Animal Welfare Law in Hong Kong*, SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, <http://www.sPCA.org.hk/en/animal-welfare/what-is-animal-welfare/animal-welfare-in-hong-kong> (last visited May 10, 2014).

79. AMANDA WHITFORT & FIONA WOODHOUSE, REVIEW OF ANIMAL WELFARE LEGISLATION IN HONG KONG 8-9 (2010), available at <http://www.law.hku.hk/faculty/staff/Files/Review%20of%20Animal%20Welfare%20Legislation%20in%20HK.pdf>.

80. *Id.*

81. *See Animal Cruelty and Hong Kong Law*, SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, <http://www.sPCA.org.hk/en/inspectorate/animal-cruelty-hk-law> (last visited May 10, 2014).

82. Bryan Bachner, *Conserving A Legal Heritage in Hong Kong: Environmental Regulation After 1997*, 19 LOY. L.A. INT'L & COMP. L. J. 363, 365 (1997); see also Tsui-Auch, Lai, *Has the Hong Kong Model Worked? Industrial Policy in Retrospect and Prospect*, 29 DEV. & CHANGE 55, 56 (2002).

83. Liebman, *supra* note 71, at 250-54.

84. XIANGGANG JIBEN FA art. 7 (H.K.), available at [http://www.basiclaw.gov.hk/en/basiclawtext/images/basiclaw\\_full\\_text\\_en.pdf](http://www.basiclaw.gov.hk/en/basiclawtext/images/basiclaw_full_text_en.pdf).

for environmental sanitation.<sup>85</sup> Finally, Article 119 requires the Hong Kong government to develop laws and policies for environmental protection.<sup>86</sup> As will be discussed later, Article 151 does not mention the environment in the long list of “appropriate fields” in which Hong Kong is permitted to internationally engage.<sup>87</sup>

There are multiple potential reasons why the Basic Law only vaguely addresses the environment. First, drafters of the Basic Law likely did not anticipate the magnitude of environmental issues that would arise.<sup>88</sup> Second, the government primarily pushed for commercial and industrial development at the expense of protection.<sup>89</sup> Finally, public participation in policy-making was not yet possible for Hong Kong residents,<sup>90</sup> which in practice prevented citizen concerns over the environment from being represented.<sup>91</sup> In an effort to clarify vague environmental objectives, the Environmental Protection Department (EPD) was established in 1986 to govern air, water, noise, and waste pollution, respond to complaints, enforce environmental laws, and initiate inspections where necessary.<sup>92</sup>

### C. *Hong Kong’s Relationship with China and its Status in International Law Impede Environmental Progress*

Since the signing of the 1984 Sino-British Joint Declaration, Hong Kong and China operate as “one country [with] two systems.”<sup>93</sup> As such, the HKSAR was granted fifty years of

85. *Id.* art. 97.

86. *Id.* art. 119.

87. *Id.* art. 151.

88. Lisa A. Royee, *The Basic Law of Hong Kong and Its Effect on the Environment*, 9 CURRENTS: INT’L TRADE L. J., 55, 56 (2000).

89. *Stabile supra* note 52, at 128, 147.

90. *Id.* at 156.

91. *Id.*

92. *See generally* THE GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION, ENVIRONMENTAL PROTECTION DEPARTMENT, SUMMARY OF ENVIRONMENTAL LEGISLATION (2012) available at [http://www.epd.gov.hk/epd/english/laws\\_regulations/envir\\_legislation/laws\\_overview.html](http://www.epd.gov.hk/epd/english/laws_regulations/envir_legislation/laws_overview.html); Liebman *supra* note 71, at 238.

93. *The Sino-British Joint Declaration was formally signed in 1984*, CCTV

autonomy over all domestic matters, including its capitalist structure and political regimes.<sup>94</sup> Article 2 of Hong Kong's Basic Law further formalized the privilege to "exercise a high degree of autonomy and enjoy executive, legislative, and independent judicial power, including that of final adjudication."<sup>95</sup> Hong Kong has exercised its Basic Law rights in managing its own common law-based judicial system and independently regulating the city's economic and trade programs.<sup>96</sup> Moreover, Hong Kong has a different currency, language, municipal management program, and educational system than China.<sup>97</sup>

Despite general domestic independence from China, Hong Kong's environmental laws still carry its influence. First, Hong Kong maintains weak environmental controls similar to China to prevent the migration of businesses from Hong Kong to China.<sup>98</sup> Hong Kong would likely suffer economically if its environmental regulatory barriers were more stringent, and thus more expensive, than China's.<sup>99</sup> Fortunately, as China marginally improves its environmental protections, Hong Kong will be provided the ability to follow suit while avoiding the realistic risk of economic loss.<sup>100</sup>

Second, ambiguities over Hong Kong's status in international law provide China with avenues to interfere with Hong Kong's

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NEWS ENGLISH, <http://english.cntv.cn/program/documentary/20110413/107870.Shtml> (last visited May 10, 2014); Liebman, *supra* note 71, at 235; Patricia Palumbo, *Analysis of the Sino-British Joint Declaration and the Basic Law of Hong Kong: What do they Guarantee the People of Hong Kong after 1997?*, 6 CONN. J. INT'L L. 667 (1991).

94. David M. Corwin, *China's Choices: The 1984 Sino-British Joint Declaration and Its Aftermath*, 19 LAW & POLY INT'L BUS. 505 (1987); Sino-British Joint Declaration art. 3, Dec. 19, 1984, 23 I.L.M. 1366.

95. XIANGANG JIBEN FA art. 2 (H.K.).

96. Dick Thornburgh, *The Rule of Law in Hong Kong: Some Implications for U.S. Policy*, 18 U. PA. J. INT'L ECON. L. 15, 16 (1997); see also JUS DUMORTIER, CCH INTERNATIONAL ENCYCLOPEDIA OF LAWS/CYBER LAW, HONG KONG 2 (Wolters Kluwer ed., 2013).

97. Lawrence L. C. Lee, *Integration of International Financial Regulatory Standards for the Chinese Economic Area: The Challenge for China, Hong Kong, and Taiwan*, 20 NW. J. INT'L L. & BUS. 1, 38 (1999).

98. Liebman *supra* note 71, at 241.

99. *Id.*

100. *Id.*

environmental progress. Article 153 explicitly authorizes China to decide whether to apply new treaties to Hong Kong for which China is already or intends to be a signatory.<sup>101</sup> China makes these decisions on the basis of Hong Kong's regional circumstances.<sup>102</sup> As explained previously, Article 153 grants China significant power to influence Hong Kong's involvement in international environmental affairs, because the "environment" is not listed among the appropriate fields of international agreements for which Hong Kong may independently engage.<sup>103</sup> The omission of the environment among the list of collaborations in which Hong Kong can independently participate creates uncertainty about whether Hong Kong can unilaterally sign and ratify international environmental agreements absent China's approval.

Uncertainty about Hong Kong's international status extends beyond the language of the Basic Law. First, the Sino-British Joint Declaration is only enforceable between the United Kingdom and China, while the Basic Law is only controlling between China and Hong Kong, which combine to create uncertainties as to whether Hong Kong has the independent authority to accept or reject international treaties.<sup>104</sup> Hong Kong's international law framework also creates conflict of law issues between China and Hong Kong.<sup>105</sup> For example, China's decision to implement an international treaty in Hong Kong may be in direct conflict with Hong Kong's objective to refrain from certain international engagements.<sup>106</sup> These conflicts are exacerbated by inconsistent classifications of Hong Kong on the basis of vastly different definitions of "developing countries"

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101. XIANGGANG JIBEN FA art. 153 (H.K.).

102. *Id.* art. 151, 153; Liebman, *supra* note 71, at 248.

103. *Id.*

104. *Id.* at 254.

105. Guobin Zhu, *Inter-regional Conflict of Laws under "One Country Two Systems": Revisiting Chinese Legal Theories and Chinese and Hong Kong Law, with Special Reference to Judicial Assistance*, 32 HONG KONG L.J. 615, 616 (2002).

106. XIANGGANG JIBEN FA art. 153 (H.K.).

throughout these treaties.<sup>107</sup> Also, customary international law is an accepted principle in Hong Kong, but not in China.<sup>108</sup> Finally, although China has ratified most treaties that Britain applied to Hong Kong, the treaties are not self-executing in Hong Kong like they are in China.<sup>109</sup> Instead, Hong Kong must implement these treaties through domestic law.<sup>110</sup> For example, Hong Kong implements CITES through its domestic law, the Protection of Endangered Species of Animals and Plants Ordinance.<sup>111</sup> Unfortunately, the Basic Law fails to discuss methods for resolving these potential international status disputes.<sup>112</sup> Hong Kong's ability to initiate environmental progress is impaired because of this uncertainty surrounding its environmental authority.<sup>113</sup>

Despite numerous conflict of law issues, Hong Kong's status in some international environmental treaties is not contested. Among the international environmental law treaties the United Kingdom applied to Hong Kong upon its handover to China are CITES, the Ramsar Convention, the Basel Convention, and the Sino-British Joint Liaison Group.<sup>114</sup> The United Kingdom did not, however, require Hong Kong to ratify the Climate Change and Biodiversity Conventions.<sup>115</sup> Hong Kong has also joined other relevant environmental treaties in its independent capacity, including the Convention on Biological Diversity, the International Convention for the Regulation of Whaling, the Convention on the Conservation of Migratory Species of Wild Animals, and the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter.<sup>116</sup>

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107. Liebman *supra* note 71, at 234.

108. *Id.* at 277.

109. *Id.* at 248, 276.

110. *Id.*

111. *Protection of Endangered Species*, GOVHK, <http://www.gov.hk/en/residents/environment/conservation/protectendangerspecies.htm> (last updated Jan. 2014).

112. *See generally* XIANGGANG JIBEN FA (H.K.).

113. Royce, *supra* note 88, at 55, 59.

114. Liebman *supra* note 71, at 244-45.

115. *Id.*

116. *Treaties and International Agreements*, DEPARTMENT OF JUSTICE—THE GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION, <http://>

Unfortunately, these international mechanisms contain no effective means of protecting pink dolphins from the threat of vessel traffic in Hong Kong.

D. *Issues with Hong Kong's Environmental Impact Assessment Process Impair Environmental Progress*

The environmental impact assessment process has also been criticized for failing to give a real, substantive opportunity for the public to challenge development projects based on environmental or species concerns.<sup>117</sup> Critics assume projects will “proceed regardless of the environmental consequences because of the overarching presumption in favor of development” and government effort to prevent excessive delays.<sup>118</sup> The vast amount of new, large development projects recently commenced in Hong Kong supports this point. Among the recent major projects are the Chek Lap Kok Airport “Third Runway” project,<sup>119</sup> the Tonggu Waterway,<sup>120</sup> the Hong Kong-Zhuhai-Macau Bridge,<sup>121</sup> the Tuen Mun-Chek Lap Kok Link adjacent to the Sky Pier, and the Hong Kong Boundary Crossing Facilities construction.<sup>122</sup> When projects like these fail to satisfy environmental requirements, courts are routinely sympathetic to offenders.<sup>123</sup> When enforced, penalties are low.<sup>124</sup>

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[www.doj.gov.hk/eng/laws/treaties.html](http://www.doj.gov.hk/eng/laws/treaties.html) (last updated Jul. 15, 2013).

117. Christopher Wood & Linden Coppel, *An Evaluation of the Hong Kong Environmental Impact Assessment System*, 1 IMPACT ASSESSMENT AND PROJECT APPRAISAL 21, 23 (1999).

118. Yan Ki, Bonnie Cheng & Jolene Lin, *The Tseung Kwan O Landfill Controversy*, 40 H.K. L. J. 537, 544 (2010).

119. Ann Paylor, *EIA Process Begins for Hong Kong's Third Runway*, AIR TRANSPORT WORLD (May 29, 2012), <http://atwonline.com/airports-amp-routes/eia-process-begins-hong-kong-s-third-runway>.

120. MARINE DEPARTMENT, HONG KONG, MARINE TRAFFIC RISK ASSESSMENT HONG KONG WATERS (MARA STUDY) 19 (2004), available at <http://www.mardep.gov.hk/en/publication/pdf/marars.pdf>.

121. *Hong Kong-Zhuhai-Macao Bridge & Related Projects*, THE GOVERNMENT OF THE HONG KONG SPECIAL ADMIN REGION HIGHWAYS DEPARTMENT, [http://www.hyd.gov.hk/eng/road\\_and\\_railway/hzmb\\_projects/6835th](http://www.hyd.gov.hk/eng/road_and_railway/hzmb_projects/6835th) (last visited May 10, 2014; see also HUNG 2012, *supra* note 15, at 17).

122. HUNG 2012, *supra* note 15, at 57.

123. Liebman, *supra* note 71, at 240.

E. *Glimpses of Hope for Environmental Progress that can Indirectly Help Protect the Hong Kong Pink Dolphin*

Outdated animal welfare laws, underdeveloped environmental laws, deficient enforcement procedures, major industrial developments, and weak public participation have undoubtedly impeded protection efforts for the Hong Kong pink dolphins. Despite this problematic environment, an existing Hong Kong statute—the Wild Animals Protection Act—can markedly help protect the pink dolphins, provided litigants bring dolphin protection cases to court.

Before proceeding, it is important to understand at this juncture how other forces and changes in Hong Kong are likely to help mobilize the courts to accept new, innovative types of animal and environmental protection cases. First, Hong Kong citizens are slowly retreating from unwavering Confucian idealism.<sup>125</sup> As a result, citizens are growing more open to defending the environment through inventive political and legal avenues in opposition to the dominant cultural values.<sup>126</sup> The small but growing body of Hong Kong law dedicated to animal and environmental protection reflects this ideological change. There are now over eight Hong Kong statutes specifically addressing animal welfare.<sup>127</sup> Furthermore, these laws are tackling a variety of critical environmental issues, including air pollution, dumping at sea, noise control, and hazardous waste.<sup>128</sup>

Second, Hong Kong's ecotourism industry has become more proactive about environmental protection since their businesses rely entirely on natural resources, geological features, and diverse species.<sup>129</sup> Finally, it is increasingly more difficult to ignore the noticeable impacts on Hong Kong's degrading environment.<sup>130</sup> Landfills are at capacity, the air is polluted, and

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124. *Id.*

125. Stabile *supra* note 52, at 164.

126. *Id.*

127. See *Protection of Endangered Species*, *supra* note 111.

128. See generally *Environmental Laws & Regulations*, GOVHK, <http://www.gov.hk/en/residents/environment/business/laws.htm> (last updated Apr. 2014).

129. Liebman, *supra* note 71, at 238.

130. Bloch, *supra* note 2, at 594.

coastal waters are frequently not swimmable. These health effects are growing much more real and imminent.<sup>131</sup>

Hong Kong could greatly benefit from more proactivity, better utilization of existing legal regimes, and promotion of new environmental movements for the protection of the pink dolphin. Moreover, the judiciary needs legal precedent so that parties can feel more comfortable and capable of regularly bringing other meritorious environmental claims to court. The following simulated case for protecting the pink dolphins under the Hong Kong Wild Animals Protection Ordinance can serve as a template for future litigation regarding the maltreatment of Hong Kong species.

#### IV.

##### BREAKING THE LOG JAM: A TEST CASE UNDER THE WILD ANIMALS PROTECTION ORDINANCE

###### A. *Protecting Against Harmful Vessel Traffic Under the Wild Animals Protection Ordinance*

Most of Hong Kong's animal welfare laws prohibit physical abuse, takings, and trade of wildlife.<sup>132</sup> Unfortunately, these statutes rarely account for the indirect effects of development, urban activity, and marine vessel traffic that threaten animals. However, the Wild Animals Protection Ordinance may help protect the pink dolphin against harmful walla-walla conduct. Section 4 of Chapter (Cap) 170 prohibits any person "except in accordance with a special permit, [from] hunt[ing] or willfully

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131. Chi-Sun Poon & Dixon. Chan, *The use of recycled aggregate in concrete in Hong Kong*, 50 *RESOURCES, CONSERVATION AND RECYCLING* 293, 297 (2007); see also T.W. Wong et al., *Associations between daily mortalities from respiratory and cardiovascular diseases and air pollution in Hong Kong, China* 59 *OCCUPATIONAL ENVTL. MED.* 650 (2002); Brian Morton, *Pollution of the Coastal Waters of Hong Kong*, 20 *MARINE POLLUTION BULLETIN*, 310, 311-13 (1989).

132. *E.g.*, Wild Animals Protection Ordinance, (1997) Cap. 170 (H.K.); The Prevention of Cruelty to Animals Ordinance, (1960) Cap. 169 (H.K.), Public Health (Animals and Birds) Ordinance, (1997) Cap. 139 (H.K.); The Dogs and Cats Ordinance, (1999) Cap. 167 (H.K.); the Pounds Ordinance, (1997) Cap. 168 (H.K.); The Rabies Ordinance, (1997) Cap. 421.

disturb[ing] any protected wild animal.”<sup>133</sup> Section 4 has traditionally been used to control hunting of wildlife and to prohibit traps in country parks that endanger humans and animals.<sup>134</sup> Thus, while there is precedent for cases brought as a Section 4 “hunting” violation, no claim has yet been brought on a theory of “willful disturbance.” Parties are likely averse to bringing these new claims to court because the term “willful disturbance” is ambiguous, and there is no case law on point to clarify the standard. Plaintiffs likely do not want to take the risk of expensive and time-consuming litigation when they simply do not know what constitutes a willful disturbance and how likely their novice arguments under Section 4 are to succeed. In order to encourage parties to bring these claims, the next section describes how a case might successfully be brought under Section 4 of the Wild Animals Protection Ordinance to protect the pink dolphins against harmful walla-walla operations.

#### B. *The Legal Standard for Holding Parties Liable Under Section 4 of Cap 170*

While Cap 170 lawsuits are typically government initiated criminal prosecutions brought by the Agricultural, Fisheries, and Conservation Department,<sup>135</sup> common law allows any private citizen to institute a criminal prosecution in the public interest.<sup>136</sup> Although private prosecutions are therefore permissible under Cap 170, none have yet been initiated.<sup>137</sup> Also, even if citizen suits were filed, the Department of Justice retains the power to intervene and take over the suit.<sup>138</sup> At that point

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133. Wild Animals Protection Ordinance, (1997) Cap. 170, § 4 (H.K.).

134. Richard J. Ferris, Jr., *Aspiration and Reality in Taiwan, Hong Kong, South Korea, and Singapore: An Introduction to the Environmental Regulatory Systems of Asia's Four New Dragons*, 4 DUKE J. COMP. & INT'L L. 125, 157 (1993); see also AMANDA S. WHITFORT ET AL., A REVIEW OF HONG KONG'S WILD ANIMAL AND PLANT PROTECTION LAWS 2 (2013).

135. Communication with Whitfort, *supra* note 74.

136. *Prosecution Code*, DEPARTMENT OF JUSTICE, THE GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION, <http://www.doj.gov.HK/eng/public/pubsoppapcon.html#7>.

137. Communication with Whitfort, *supra* note 74.

138. *Prosecution Code*, *supra* note 136.

the Department would determine whether the case should move forward or be dismissed.<sup>139</sup> In deciding this matter, the Department would consider, among other things, public interest, wishes of the parties, potential for success on the merits, and conflicting precedent.<sup>140</sup> Since Cap 170 lawsuits are criminal cases, the standard of proof is “beyond a reasonable doubt,” a higher threshold than required for civil cases.<sup>141</sup> The burden of proof is on the person charged with the offense.<sup>142</sup>

Section 4 says any person “shall not, except in accordance with a special permit, hunt or willfully disturb any protected wild animal.”<sup>143</sup> A “protected wild animal” under the statute is any animal listed in Schedule 2 of Cap 170.<sup>144</sup> All species of all genera and families of cetacea are included (dolphins, whales, and porpoises).<sup>145</sup> The “hunt” aspect of Section 4 is not applicable to this case because walla-walla operators are not engaging in dolphin hunting activities.<sup>146</sup> They are, however, likely “willfully disturbing” the dolphins without a permit authorizing them to do so. Willful disturbance conceptually can be broken down into two distinct elements. The first element, “willfully,” addresses the defendant’s state of mind when performing the act at issue. The second element, “disturb” addresses the severity of the act performed. The plaintiff must prove both to establish a violation of Section 4. Because the standard is not defined in the statute, the multitude of tools of statutory interpretation, in addition to comparisons to conceptually analogous cases, will be necessary to build an effective case.

139. *Id.*

140. *Id.*

141. Communication with Dr. Ivan K.K. Chan, Marine Conservation Officer, AFCD, HKSAR (2013) (on file with the author).

142. *Id.*

143. Wild Animals Protection Ordinance, (1997) Cap. 170, § 4 (H.K.).

144. *Id.*

145. *Local Protected Wild Animals*, THE GOVERNMENT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION, AGRIC., FISHERIES AND CONSERVATION DEPARTMENT, [http://www.afcd.gov.HK/english/conservation/con\\_fau/con\\_fau\\_local/con\\_fau\\_local.html](http://www.afcd.gov.HK/english/conservation/con_fau/con_fau_local/con_fau_local.html) (last visited May 10, 2014); see generally Wild Animals Protection Ordinance, (1997) Cap. 170, § 4 (H.K.).

146. Tang, *supra* note 22.

The first step in interpreting any statute requires a detailed analysis of the plain language itself.<sup>147</sup> At this stage, a court may look at the commonly used, ordinary meaning assigned to the word or phrase.<sup>148</sup> The statute may still remain ambiguous after this initial analysis if the word has multiple basic definitions, the definitions are inadequately specific or applicable to the case at hand, or the statute supports two different interpretations.<sup>149</sup> If this analysis fails to clarify the statute, a court may examine the legislative history to determine the intent of the statute.<sup>150</sup> When intent still remains unclear, the court may then engage in a reconstructive process, seeking to discern how the legislature would have addressed the precise situation at hand, had it been brought to its attention during the legislative process.<sup>151</sup> When prior courts have already interpreted ambiguous terms, courts are more likely to defer to those interpretations than engage in the interpretive process anew.<sup>152</sup>

### C. *The “Willfully” Standard*

A plaintiff must first prove that the walla-walla operators acted “willfully.” Prior case law adequately illuminates the definition of “willfully.” The standard for proving willfulness in Hong Kong cases derives from the British case *R. v. Sheppard*.<sup>153</sup> In *R v. Sheppard*, a young couple was alleged to have violated the Children and Young Persons Act of 1933 in failing to provide medical attention to their son.<sup>154</sup> This failure to provide medical care resulted in their son’s hypothermia-induced death. The court held that a person willfully fails to provide medical

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147. *Statutory Construction*, LEGAL INFORMATION INSTITUTE, CORNELL LAW SCHOOL, [http://www.law.cornell.edu/wex/statutory\\_construction](http://www.law.cornell.edu/wex/statutory_construction) (last visited May 10, 2014).

148. *Id.*

149. *Id.*

150. This is a common tool of interpretation used by courts in many jurisdictions. See, e.g., *Int’l Harvester Co. v. Ruckelshaus*, 478 F.2d 615, 648 (D.C. Cir. 1973).

151. *Id.*

152. *Statutory Construction*, *supra* note 147.

153. *R v. Sheppard*, [1981] A.C. 394.

154. *Id.*

attention for a child if he (i) deliberately does so, knowing that the child's health may suffer unless he receives attention or (ii) does so because he does not care whether the child may need medical attention or not.<sup>155</sup> The court qualified this statement by noting that a legitimate failure to acknowledge the necessity of medical care for the child due to stupidity, ignorance, or personal inadequacy does not qualify as willful behavior.<sup>156</sup>

This British standard was similarly applied in the Hong Kong case *Shum Kwok Sher v. HKSAR*, where the defendant was sued for failing to disclose a conflict of interest that arose from her familial relationship with the directors and shareholders of an affiliated company in violation of the Civil Service Branch Circular No. 19/1992.<sup>157</sup> The court held that “a public official culpably misconducts himself if he willfully and intentionally neglects to perform a duty to which he is subject by virtue of his office or employment without reasonable excuse or justification.”<sup>158</sup> The court concluded that the reach of willfulness extends both to acts of nonfeasance as well as misfeasance. The court ultimately held that the defendant acted “willfully” in unlawfully failing to disclose the conflict of interest that arose from his official position.<sup>159</sup>

#### D. *Establishing the Walla-Walla Operators Acted “Willfully”*

In light of case precedent on the term “willfully,” a party bringing a claim against the walla-walla operators will likely succeed in proving this element. The first method of proving “willful” conduct requires a showing that the defendant deliberately engaged in activity with the knowledge the activity would likely result in negative consequences. As applied to the walla-walla operators, it is difficult to imagine that they are not aware that dolphins will suffer injury from their disruptive practices.

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155. *Id.*

156. *Id.*

157. *Shum Kwok Sher v. HKSAR*, [2002] 5 H.K.C.F.A.R. 381 (H.K.).

158. *Id.*

159. *Id.*

First, information about the harmful effects of vessel traffic on dolphins has been of public concern both internationally and locally in Hong Kong. As discussed in Part III(a), several studies have analyzed the behavioral changes dolphins undergo in response to vessel traffic. The ample public information available puts the walla-walla operators on notice that their actions may be harmful. Not only is this information fully accessible to the walla-walla operators through public domains, but also activists and government officials have personally informed them of updated data regarding their impact on dolphins. Chairman of Hong Kong Dolphin Conservation Society, Samuel Hung, and Marine Conservation Officer of the Agriculture, Fisheries, and Conservation Department, Dr. Ivan Chan, have independently emphasized to the walla-walla operators that willful disturbance of the dolphins is prohibited and that their operations are questionable. The inevitable conclusion is that walla-walla operators act with the knowledge that their conduct may be detrimental to the dolphins.

The walla-walla operators may counter that, like the parents in *R v. Sheppard*, they “failed to appreciate” that the dolphins would be harmed by the walla-walla operations due to ignorance and stupidity. This argument will likely fail if the court legitimately considers the underlying facts. The parents in *R v. Sheppard* genuinely believed their child’s diminished appetite and vomiting was normal infant behavior because of their limited knowledge and exposure to childcare and medical concerns. Whether they should have known these symptoms were worrisome is a different question. The reality was that the parents simply did not have the capacity to know or understand what those symptoms meant. Unlike the parents in *R v. Sheppard* that raised the ignorance defense, the walla-walla operators have been informed repeatedly that their conduct negatively impacts dolphin communities. Even if the walla-walla operators disagree with the overwhelming scientific evidence presented to them, this does not mean they are completely ignorant or unaware of that possibility. To act willfully simply requires that they know their conduct or omission will potentially harm the dolphins, yet they engage in it anyway. Therefore, the walla-walla operators likely acted willfully in (1)

operating their boats at high speeds too close to the dolphins and (2) in failing to alter their operating behavior.

E. *Establishing that the Walla-Wallas “Disturb” Dolphins*

After successfully proving that walla-walla operators behaved willfully, a party bringing a claim must then show that they disturbed the dolphins. This element will be somewhat more challenging to prove than willfully. Like “willfully”, the term “disturb” is also not defined within the statute.<sup>160</sup> However, unlike “willfully,” which had ample case law interpreting the term, there is no directly on point precedent interpreting “disturb.” Therefore, a plain meaning analysis of the word will likely be required, buttressed by other sources of meaning.<sup>161</sup> The Collins English Dictionary contains a variety of descriptive definitions of the term “disturb,” including “to interrupt the quietness or peace of,” “to upset or agitate,” and “to inconvenience.”<sup>162</sup>

A party would likely prevail in arguing that the walla-walla operators have “disturbed” the dolphins in accordance with the ordinary dictionary meaning of the term. The data documenting population declines discussed in Part II supports the premise that the speed and proximity by which the walla-wallas approach the dolphins “interrupt the quietness or peace” of the dolphin community. These unpredictable approaches can be frightening to the dolphins, and disrupt their critical use of echolocation. Moreover, walla-walla traffic may have detrimental long-term effects on dolphin health.

Part II provides ample scientific evidence to support a finding that walla-wallas “agitate” dolphins. Data indicates that socializing, mating, and foraging activities decline in areas of high vessel traffic. Also, physical injuries have been attributed to vessel collisions with the dolphins. Since walla-walla operators have been recorded operating their vessels in close proximity to

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160. Wild Animals Protection Ordinance, (1997) Cap. 170, § 2 (H.K.).

161. *Id.*

162. *Disturb*, COLLINS ENGLISH DICTIONARY, <http://www.collinsdictionary.com/dictionary/english/disturb> (last visited May 10, 2014).

individual dolphins, it is likely these abrasions are at least in part caused by contact with walla-wallas. Finally, the walla-walla engines are noisier than most other vessel engines, and likely interfere with dolphins' ability to echolocate.<sup>163</sup> Hung concluded from his studies that dolphin "acoustic behavior has likely been affected by the higher levels of noise generated from intense vessel traffic, and they may be displaced from their favourable habitats to avoid the risk of vessel collision or overall noise disturbance."<sup>164</sup> Indeed, Hung's analysis, conducted with no eye towards establishing a claim under the Wild Animal Protection Ordinance, expresses the startling effects of vessel traffic as a "disturbance" to the mammals. Therefore, a court will have ample evidence to hold that walla-walla conduct constitutes a disturbance under Section 4.

The walla-walla operators may counter with a plea for lenity—since there has yet been no line drawn in Section 4 for determining the threshold of harm necessary to amount to a disturbance, they should not be held criminally liable. Although this argument may provoke some sympathy for the walla-walla operators, it is likely to fail. The word "disturb" plainly encompasses harmful activities that do not necessarily rise to the level of substantial physical harm or death. Had lawmakers intended this heightened threshold, they would have used those terms in place of "disturb." For example, the United Kingdom's 1996 Wild Mammals (Protection) Act states that "[i]f, save as permitted by this Act, any person mutilates, beats, nails, or otherwise impales, drowns, drags or asphyxiates any wild mammal with intent to inflict unnecessary suffering he shall be guilty of an offence."<sup>165</sup> This language mandates the act be deeply physically damaging to constitute a violation. Correspondingly, less-physically intrusive acts like chasing, yelling, or feeding would be unlikely to result in a violation. If the United Kingdom wanted behaviors with less-cognizable effects on mammals to similarly constitute a violation, it would

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163. HUNG 2012, *supra* note 15, at 50.

164. *Id.* at 57.

165. Wild Mammals (Protection) Act, 1996 c. 3, § 1 (U.K.), available at <http://www.legislation.gov.uk/ukpga/1996/3>.

have included that language in its list of prohibited activities. Section 4 has done just that. The lawmakers specially used a term that was capable of encompassing a broad range of lesser impact behaviors.

This argument is strengthened when looking at Section 4 as a whole. Included in the provision is also the prohibition against “hunt[ing].”<sup>166</sup> Since “hunt” encompasses activities that kill protected animals, it necessarily follows that “disturb” was likely intended to encompass different and less-harmful activities than those causing death. Therefore, the plain meaning of “disturb” and the construction of the provision in light of the statute as a whole suggests that even marginal influence on the dolphins could constitute a disturbance. The scientific evidence demonstrating that walla-walla traffic agitates and inconveniences dolphins should be sufficient to meet this standard.

#### F. *Contextualizing the Statute in History*

Although it would be difficult for the walla-walla operators to overcome this conclusion, contextual evidence surrounding the adoption of the Wild Animals Protection Ordinance in 1976 may provide additional support.<sup>167</sup> At that time, Hong Kong was under British control.<sup>168</sup> The United Kingdom was considered a leader in animal protection laws at this time, after creating the first statute against animal cruelty in 1822, and many others over the following decades.<sup>169</sup> The 1822 statute prohibited any person from “wantonly and cruelly beat[ing] or ill-treat[ing] [any] horse, mare, gelding, mule, ass, ox, cow, heifer, steer, sheep, or other cattle.”<sup>170</sup> While the British development of laws

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166. Wild Animals Protection Ordinance, (1997) Cap. 170, § 4 (H.K.).

167. *Local Protected Wild Animals*, *supra* note 145.

168. Ming K. Chan, *Hong Kong: Colonial Legacy, Transformation, and Challenge*, 547 ANNALS AM. ACAD. POL. & SOC. SCI. 11, 12 (1996).

169. David Favre, *Overview of the Historical Materials*, ANIMAL LEGAL & HISTORICAL CENTER (Sept. 2002), <http://www.animallaw.info/historical/articles/ovushistory.htm#The%20British%20Set%20the%20Stage>.

170. *Id.*; see also HAROLD D. GUITHER, HISTORY AND SCOPE OF A RADICAL SOCIAL MOVEMENT 2 (1998).

mandating positive treatment towards animals was not adequately reflected in Hong Kong's first generation animal welfare laws in the early 1900s, as noted earlier in Part II(b), those laws do constitute evidence of Hong Kong attempting to model its own animal protection laws on those in the United Kingdom.<sup>171</sup> Therefore, it is reasonable to infer that the Wild Animals Protection Ordinance of 1976, a conceptual outgrowth and solidification of prior Hong Kong and British animal protection laws, was at least intended to approach the level of protection embodied in the United Kingdom's prohibition of maltreatment of animals. The operation of noisy, high-speed machinery at close distances to individual dolphins fits safely within the conception of maltreatment prohibited under British law. Therefore, enjoining and penalizing walla-walla operators for this conduct is likely consistent with the intent underlying the ordinance.

### G. *The Remedy*

As the preceding arguments indicate, a plaintiff has a legitimate chance at success in proving that walla-walla operators "willfully disturb" a protected wild animal, the pink dolphin, in violation of Section 4 of the Wild Animals Protection Ordinance. If a court finds the walla-walla operators liable for violating Section 4, Section 18 specifies that "Any person who (a) contravenes Section 4. . . shall be guilty of an offence and (i) in the case of a contravention of section 4. . . shall be liable on conviction to a fine at level 6 and to imprisonment for 1 year."<sup>172</sup> Level 6 monetary penalties can be up to \$100,000 HKD.<sup>173</sup> Although environmental penalties are typically inadequate, these are likely more than sufficient to deter future violations by walla-walla operators.

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171. AMANDA WHITFORT & FIONA WOODHOUSE, REVIEW OF ANIMAL WELFARE LEGISLATION IN HONG KONG 8-9 (2010).

172. Wild Animals Protection Ordinance, (1997) Cap. 170, § 18 (H.K.).

173. *Local Protected Wild Animals*, *supra* note 145; *see also* Bloch, *supra* note 2, at 614.

H. *An Alternative Solution: Amending the Statute for Increased Stringency and Specificity*

Up to this point, Part IV has demonstrated how a case might be brought under Section 4 to hold the walla-walla operators liable for their conduct. Given that no case has been brought on these grounds, however, making success uncertain, another possible solution is an amendment to improve the clarity and accessibility of the “willfully disturb” prohibition.

It is useful to look to the U.S. Endangered Species Act (ESA) and the United Kingdom’s Wildlife and Countryside Act of 1981 for methods of revising and enforcing Cap 170. Under the ESA, Section 9 states that “it is unlawful for any person subject to the jurisdiction of the United States to . . . take any such species within the United States or the territorial sea of the United States.”<sup>174</sup> In the definitions section of the statute, “take” is defined as “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or to attempt to engage in any such conduct.”<sup>175</sup> Section 9 prohibits all “persons” from engaging in those actions whether they are private parties or public agencies.<sup>176</sup> It also gives private parties the ability to sue for non-compliance of the “take” provision.<sup>177</sup> Unlike the Section 4 language in Cap 170, the “take” provision is both defined in the statute and is further articulated in the regulations.

The Senate Report accompanying the ESA explains that “take is defined in the broadest possible manner to include every conceivable way in which a person can ‘take’ or attempt to ‘take’ any fish or wildlife.”<sup>178</sup> The Secretary of Interior, charged with enforcing and implementing the ESA, issued regulations that further defines “harass” to mean “an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns, which include, but are not limited to,

174. Endangered Species Act, 16 U.S.C. § 1538 (2012).

175. *Id.* § 1532.

176. *Id.*

177. *Id.* § 1540(g)(1).

178. S. Rep. No. 93-307, at 5 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989, 2995.

breeding, feeding, or sheltering.”<sup>179</sup> Further emphasized in the House Report accompanying the ESA was a statement that “harassment” would be a violation whether or not it was intentionally conducted.<sup>180</sup> The report even provided an example where harassment constitutes a take: “Activities of birdwatchers where the effect of those activities might disturb the birds and make it difficult for them to hatch or raise their young.”<sup>181</sup> The Secretary similarly defined “harm” within the “take” provision to include any act resulting in “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavior patterns.”<sup>182</sup>

Unlike “take” in the ESA, “disturb” is not defined in the definitions section of Cap 170.<sup>183</sup> Thus, on its face, it may be difficult for government departments and private parties to discern whether “disturb” carries the breadth the ESA “take” provision contains. In the ESA, activities that do not necessarily rise to the level of death or physical injury are distinctly encompassed in Section 9, as evidenced by the long list of actions included in its definition.<sup>184</sup> Even an “attempt to engage” in any of those ten activities would constitute a Section 9 violation of the ESA. Conversely, a plaintiff attempting to raise a claim under the “willfully disturb” part of Section 4 of the Wild Animals Protection Ordinance has little guidance as to the range of activities the law is intended to cover. Therefore, legislators should consider including “disturb” in the definitions section with a detailed explanation that at least establishes the boundaries of the term. One step further, the legislators could try to incorporate the Secretary’s definition of “harm” and “harass” in their definition of “disturb” in Cap 170.

In addition to designing an ordinance with more specificity and definition, the EPD should consider issuing guidance that

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179. 50 C.F.R. § 17.3 (2006); *see also* Albert Gidari, *The Endangered Species Act: Impact of Section 9 on Private Landowners*, 24 ENVTL. L. 419, 458 (1994).

180. H.R. REP. No. 93-412(1973).

181. Gidari *supra* note 179, at 458.

182. *Id.* at 473.

183. Wild Animals Protection Ordinance, (1997) Cap. 170, § 2 (H.K.).

184. 16 U.S.C. § 1538(a)(1)(D).

elaborates on Cap 170. For example, in the ESA context, the Secretary implemented a regulation that defined “harass” within the ESA to mean any “intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns, which include, but are not limited to, breeding, feeding, or sheltering.”<sup>185</sup> If “disturb” was defined with such specificity in Cap 170 or through agency guidance, there would be little doubt that the walla-walla conduct would amount to a violation for disrupting normal behaviors, including feeding, breeding, and sheltering. Scientific data, discussed earlier, weighs in favor of a finding that walla-walla operations “annoy [wildlife] to such an extent as to significantly disrupt” their sheltering and feeding patterns.<sup>186</sup> Moreover, the walla-walla operators “negligently” disrupt these patterns by affirmatively operating high-speed, noisy vessels in unpredictable pathways through the dolphin groups and by failing to mitigate those harmful operations. Therefore, walla-walla operators would likely be prohibited from engaging in this conduct under the ESA.

Though not as thorough as the ESA, the United Kingdom’s Wildlife and Countryside Act (WCA) narrows the scope of activities constituting a “disturbance” more effectively than does Cap 170.<sup>187</sup> Pursuant to the WCA:

“a person is guilty of an offence if intentionally or recklessly (a) he damages or destroys any structure or place which any wild animals specified in Schedule 5 uses for shelter or protection; (b) he disturbs any such animal while it is occupying a structure or place which it uses for shelter or protection; or (c) he obstructs access” to that place.<sup>188</sup>

The statute thus restricts disturbances to specific “protected species” and to those activities that specifically take place in the

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185. 50 C.F.R. § 17.3; *see also* Giradi, *supra* note 179, at 458.

186. 50 C.F.R. § 17.3.

187. NATURAL ENGLAND, DISTURBANCE AND PROTECTED SPECIES: UNDERSTANDING THE LAW IN ENGLAND AND WALES 1 (Aug. 24, 2007), *available at* [http://www.naturalengland.org.uk/Images/esisgd\\_tm6-3774.pdf](http://www.naturalengland.org.uk/Images/esisgd_tm6-3774.pdf).

188. Wildlife and Countryside Act, 1981 c. 69 (U.K.), *available at* <http://www.legislation.gov.uk/ukpga/1981/69>.

animal's primary habitat.<sup>189</sup> Though the WCA could also use clarification of the term "disturb," it would be somewhat easier to hold walla-walla operators liable under the WCA because the conduct occurs in dolphin shelter or protection area. Moreover, the United Kingdom has ample case law to rely on in evaluating whether a claim constitutes a disturbance under the statute, a luxury lacking in Hong Kong. Therefore, the legislature should strongly consider revising Section 4 of Cap 170 to better delineate what "willfully disturb" entails.

Currently, the language of Section 4 of Cap 170 leaves a lot of room for defendants to argue their behavior does not amount to a willful disturbance. Adopting the stricter Section 9 language of the ESA or the narrower scope of the WCA would make it much easier for plaintiffs to bring meritorious cases. Without the revision, the ambiguity and uncertainty regarding the "willfully disturb" standard will likely continue to deter parties from bringing lawsuits because they do not understand what types of activities the ordinance covers. Moreover, should a plaintiff raise a "willfully disturb" claim, the amendments would make it more likely for that party to prevail on the arguments presented in the previous sections.

## V.

### OTHER METHODS FOR PROTECTING THE PINK DOLPHIN

Although the Wild Animals Protection Ordinance is the most directly applicable statute to the protection of the pink dolphin, parties should always try to address species concerns by appealing to a variety of statutory hooks and political avenues. For example, both the Country Parks Ordinance (Cap 208) and the Forest and Countryside Ordinance (Cap 96) have the potential to indirectly protect endangered species through habitat conservation.<sup>190</sup> These statutes respectively designate country parks and special areas for tourism, recreational activities, and historic site maintenance and conserve forest and

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189. *Id.*

190. Forest and Countryside Ordinance (1997), Cap. 96A (H.K.); Country Parks Ordinance (1976), Cap. 96 (H.K.).

natural vegetation.<sup>191</sup> Therefore, these statutes can be used to seek legal recourse in similar ways the Wild Animals Protection Ordinance was previously analyzed.

#### A. *Marine Parks Ordinance*

In the case of the pink dolphin, the Marine Parks Ordinance (Cap 476) can be used to supplement arguments made under Cap 170. Cap 476 designates, controls, and ultimately conserves marine areas for designated uses.<sup>192</sup> The primary purpose of the Ordinance is to protect and conserve the marine environment, including the flora and fauna it sustains.<sup>193</sup> Cap 476 serves educational, recreational, scientific, and preservation purposes by banning or restricting activities that may degrade the marine environment or threaten marine species; marine reserves are more stringently protected than marine parks.<sup>194</sup> The process of designating marine parks begins when professionals, the public, or the Marine Parks Authority submit recommendations for new marine protected areas.<sup>195</sup> The Marine Parks Authority will then evaluate the recommendations for feasibility of designating the specific area a marine park by considering the uniqueness, viability, and crucial condition of the habitat, in addition to the legal implications of that designation.<sup>196</sup> The recommendations are then reviewed by a series of Committees, the Country and Marine Parks Board (CMPB), and the Executive Council.<sup>197</sup> If approved, the Council will draft a map of the park that can be altered by the CMPB in response to evaluations by the public and environmental organizations.<sup>198</sup>

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191. *Id.*; see also Bloch, *supra* note 2, at 616.

192. See generally Marine Parks Ordinance, (2007) Cap. 476 (H.K.).

193. *Id.*

194. *The Facts, Country Parks and Conservation*, GOVHK, [http://www.gov.hk/en/about/aboutHK/factsheets/docs/country\\_parks.pdf](http://www.gov.hk/en/about/aboutHK/factsheets/docs/country_parks.pdf) (last visited May 10, 2014); see also Liu et al. *supra* note 7.

195. See Marine Parks Ordinance, (2007) Cap. 476, § 7 (H.K.).

196. *Id.* § 3.

197. *Id.* § 1.

198. *Id.* §§ 7-16.

Once an area has been designated a Marine Park, the Secretary of the Environment under Section 20 of the statute has the power to implement regulations for a range of environmental issues.<sup>199</sup> The Secretary can restrict the “killing, hunting, trapping, molesting or disturbance of any form of marine life within a marine park . . . the possession of equipment or implements used for hunting or fishing, the taking of, destruction of or interference with the marine life within a marine park or marine reserve.”<sup>200</sup> The Secretary can also forbid the “entry into, or movement within, marine parks . . . or persons, vehicles, vessels and animals.”<sup>201</sup> Despite these regulations, the Marine Parks Authority can exercise some discretion in permitting or prohibiting certain activities.<sup>202</sup> However, without such permission, violations of any regulation will be subject to high-level fines and one-year imprisonment.<sup>203</sup> Continuing offences as established by the court are punishable at a rate of \$400 per day.<sup>204</sup> Currently, there are four marine parks and one marine reserve in Hong Kong: Tung Ping Chau, Sha Chau and Lung Kwu Chau, Yan Chau Tong, and Hoi Ha Wan Marine Parks and the Cape D’Aguilar Marine Reserve.<sup>205</sup> Together, these areas amount to 2,430 hectares.<sup>206</sup> Marine Park or Reserve designations can provide protection for the pink dolphins and other threatened species like the porpoise. For example, bottom trawling and high-speed boating are prohibited in marine parks.<sup>207</sup> Vessels may not go faster than 10 knots within a park or reserve.<sup>208</sup> As a result, harmful motorboats like walla-wallas are prohibited from conducting tours in these areas unless they comply with these speed restrictions.

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199. *Id.* § 20.

200. Marine Parks Ordinance, (2007) Cap. 476, 9 § 20(1)(d) (H.K.).

201. *Id.* § 20(1)(g).

202. Marine Parks Ordinance, (2006) Cap. 476A § 17 (HK.).

203. Marine Parks Ordinance, (2007) Cap. 476, 9 § 20(2) (H.K.).

204. *Id.*

205. *Country Parks and Conservation*, *supra* note 201.

206. *Id.*

207. Jefferson et al. *supra* note 18, at 306.

208. *Id.*

Unfortunately, the pink dolphins reside in a much broader range than current parks protect. While the dolphins reside throughout the western waters of Hong Kong, they are particularly concentrated in the north Lantau area at Sha Chau and Lung Kwu Chau, Chek Lap Kok, Tai O Peninsula, Sham Shui Kok, and Castle Peak. They have been sighted at Fan Lau and they also occasionally appear in South Lantau.<sup>209</sup> Among these areas, only Sha Chau and Lung Kwu Chau was designated a marine park for the purpose of protecting the pink dolphins.<sup>210</sup> While this marine park is instrumental to their protection, the dolphins have been recorded in high densities outside these designated areas.<sup>211</sup> The marine park designations in some, but not all, parts of the dolphin habitat range may result in habitat fragmentation. Fragmentation can have debilitating effects on the population.<sup>212</sup> Designating more dolphin habitat as marine parks could be very useful for sustaining the dolphin population in Hong Kong.<sup>213</sup> The HKDCS has been pushing for additional marine parks in Southwest Lantau and the Soko Islands and the Secretary is currently considering these proposals.<sup>214</sup> Moreover, HKDCS requests these marine parks be connected to decrease the fragmentation of dolphin habitat.<sup>215</sup> The Secretary already plans in a few years to designate areas around the Brothers Island a Marine Park to compensate for habitat loss that resulted from a reclamation project elsewhere in Hong Kong.<sup>216</sup>

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209. *Chinese White Dolphin – Protection Status*, WORLD WILDLIFE FUND, <http://www.wwf.org.HK/en/whatwedo/conservation/species/chiwhitedolphin/status> (last visited May 10, 2014); see also HUNG 2012, *supra* note 15, at 35.

210. *Chinese White Dolphin – Protection Status*, *supra* note 209.

211. See HUNG 2012, *supra* note 15, at 5-6.

212. See Susan Harrison & Emilio Bruna, *Habitat Fragmentation and Large-Scale Conservation: What Do We Know for Sure?*, 22 *ECOGRAPHY* 225, 229 (1999).

213. Cf. Brian Morton, *Protecting Hong Kong's Marine Biodiversity: Present Proposals, Future Challenges*, 23 *ENVTL. CONSERVATION* 55, 60 (1996) (predicting that the establishment of marine parks and reserves would lead to enhanced protection for fish nurseries and inshore fish stocks).

214. See Jefferson et al., *supra* note 18, at 306; HUNG 2012, *supra* note 15, at 36, 57.

215. HUNG 2012, *supra* note 15, at 57.

216. *Id.* at 36.

B. *Hong Kong's Environmental Impact Assessment Ordinance as it Relates to Cetaceans*

The Environmental Impact Assessment Ordinance (EIAO) can also be used to seek protections for pink dolphins. Under the EIAO (Cap 499), developers must submit environmental impact assessments and acquire environmental permits for development projects.<sup>217</sup> The Environmental Impact Assessments (EIAs) must identify all relevant and potential impacts the project may have on Hong Kong species and habitat.<sup>218</sup> EIAs require both qualitative and quantitative assessments of potential impacts as well as ongoing monitoring programs.<sup>219</sup> The quantitative data must reflect up-to-date monitoring mechanisms and data collection methods.<sup>220</sup> Moreover, the data is typically required to cover a nine to twelve month study period to account for seasonal changes.<sup>221</sup> The importance of the quantitative data requirement was emphasized in *Shiu Wing Steel Ltd. v. Director of Environmental Protection and Airport Authority*, where a party challenged a previously-approved EIA for inadequately quantifying the hazardous risks of the project.<sup>222</sup> The court held that the Authority failed to satisfy the EIA requirement of addressing low-risk scenarios that could result in catastrophic events.<sup>223</sup>

The EIA must also describe alternatives or mitigation tactics that can be utilized to minimize the impacts on the environment or, in this case, the pink dolphin population.<sup>224</sup> Once the Director approves the EIAO Report, it is made publicly available for

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217. See generally *A Guide to the EIA Ordinance*, ENVIRONMENTAL PROTECTION DEPARTMENT, <http://www.epd.gov.HK/eia/english/guid/index1.html> (last updated Apr. 18, 2011) (Providing a detailed overview of EIAO procedures).

218. Jefferson et al., *supra* note 18, at 307.

219. *Id.*

220. *See id.*

221. *Id.*

222. See generally *Shiu Wing Steel Ltd. v. Dir. of Env't Prot. and Airport Auth.*, 9 HKCFAR 478 (2006).

223. *Id.*

224. Jefferson et al., *supra* note 18, at 307.

review.<sup>225</sup> This can be important in seeking better protections for dolphins because within 30 days of notice of approval, any person may appeal the decision.<sup>226</sup> A majority of the Appeals Board decides any factual matters brought on appeal. If the issue is a question of law, the Chairman of the Board can decide in his own capacity whether or not the EIAO should be approved.<sup>227</sup>

There are a few problems with the EIAO process that make pursuing environmental protections more difficult. First, there are automatic approval provisions in place whereby a development project will only be rejected if the Environmental Protection Department decides to intervene within the statutory time limit.<sup>228</sup> This element typically makes developers confident their projects will be approved.<sup>229</sup> Second, most development projects are initiated or funded by government departments and agencies, entities that are rarely penalized for EIAO breaches.<sup>230</sup> Moreover, on the rare occasion they are penalized, the fines imposed on government agencies are low.<sup>231</sup> This limits the usefulness of the environmental impact assessment process. Third, projects that were approved years ago when EIAs were not fully disclosed to the public continue to operate today. Public participation in the EIA process has only recently become fully available.<sup>232</sup> Finally, where the Board deems the particular project to be especially important, the economic growth objectives often supersede environmental concerns.<sup>233</sup>

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225. Charu Sharma, *Environment Versus Development: the Long Valley Case*, 5 J. OF CHINESE AND COMP. L. 275 (2002).

226. *Id.*

227. *Id.*

228. Christopher Wood & Linden Coppel, An evaluation of the Hong Kong environmental impact assessment system, 17 IMPACT ASSESSMENT AND PROJECT APPRAISAL 21, 29 (1999).

229. *See id.* at 17 (stating that “[i]n practice, EIA reports have almost always been endorsed and the approval of major projects was simply prolonged until any disputed matters were resolved.”).

230. *Id.* at 28.

231. *Id.*

232. *Id.* at 28-30.

233. Wood & Coppel, *supra* note 228, at 27.

Despite these disadvantages, EIAs are publicized much more widely today and environmental groups as well as other citizens are becoming increasingly more proactive during the comments period of the EIA process.<sup>234</sup> As a result, the EPD may, in the future, scrutinize submitted EIAs and request revisions before distributing them for public review in order to limit objections and delays. This would correspondingly encourage developers and consultants to engage in a more thorough analysis of the impacts of their project on the environment, species, and natural resources to reduce the possibility of having to revise their EIA, or even begin the process anew.

In order to achieve these improvements in the EIA process, dolphin researches and experts should play a bigger role in the EIA comments phase. Although it will be rare for the EPD to entirely enjoin development projects, the EIA process may at least mandate that the developers substantially mitigate their impacts. For example, the EPD may require the re-routing of vessel traffic to and from development sites so that boats do not travel directly through important dolphin habitat and range. Other mitigation measures could include requiring the construction of a “bubble curtain” to partially absorb blast shocks that impact noise-sensitive marine species, mandating low-noise engines for vessels involved in the project, restricting blasting activities to certain time periods, and demanding the implementation of monitoring systems for continued tracking of environmental impacts.<sup>235</sup>

## V.

### CONCLUSION

Although Hong Kong has numerous barriers to environmental and animal protection, there are legal tools available today to help preserve the declining populations of Hong Kong pink dolphins. Courageous litigants must innovatively use these existing environmental laws, such as the Wild Animals Protection Ordinance. Moreover, proactive government initiation

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234. *Id.* at 28-29.

235. Jefferson et al., *supra* note 18, at 309.

of these claims would both establish an enforcement presence and build legal precedent that Hong Kong citizens and environmental groups can employ in future lawsuits. In light of the increased receptiveness to environmental concerns in Hong Kong courts, and assuming claims are brought before the court with greater frequency going forward, we may be on the precipice of a dramatic increase in favorable, far-reaching judgments for environmental plaintiffs. Similar trends have manifested in the United States, Canada, and Europe.

A case for protecting the pink dolphins under the Wild Animals Protection Ordinance is a first step in the direction of broader environmental protection and leadership for a region of immense natural value. While Hong Kong has a reputation for being a densely concentrated hub of urbanization, in much of the territory the reality is more complex. The truth is that much of the land is replete with wetlands, marshes, beaches, intricate geological landforms, and other areas of scenic and natural importance that are worthy of protection. Law can help reduce public health threats, facilitate ecotourism opportunities, and preserve the natural aesthetics of the city.

The Hong Kong pink dolphin is an example of an endangered species that has not been afforded adequate legal protection from Hong Kong's countervailing industrial and economic goals. However, this comment demonstrates that there are already mechanisms in place that may be able to better protect them. Undoubtedly, Hong Kong's environmental laws are often vague, and finding existing legal hooks for protecting other animals, natural resources, or habitat can be tedious. However, until the legislature institutes a sweeping revision to Hong Kong's environmental regulatory regime, legal challenges have the power of forcing court clarifications of existing standards. Moreover, the influx of environmental cases brought to court may exert pressure on the legislature to amend those ineffective laws.