

**UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

GEORGIA AQUARIUM, INC.,

Plaintiff,

v.

PENNY PRITZKER, et al.,

Defendants.

CASE NO. 1:13-cv-03241-AT

**DEFENDANTS' REPLY IN SUPPORT OF
CROSS-MOTION FOR SUMMARY JUDGMENT**

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Argument

The only question for the Court in this appeal is whether the National Marine Fisheries Service (“NMFS”) articulated a rational and lawful basis for its decision to deny the Aquarium’s application for a permit to import 18 live-captured beluga whales from Russia. NMFS did so.

NMFS reasonably found that the Aquarium did not satisfy its burden of proof that the proposed activity, in combination with other activities, was not likely to have an adverse impact on the Sakhalin-Amur stock. According to the Aquarium’s own import permit application, the stock formerly was the largest in the Sea of Okhotsk but now was much smaller than the Shantar stock, indicating that the Sakhalin-Amur stock had declined and that the total level of removals and other mortality to the stock exceeded its normal growth rate. On these facts and given the lack of monitoring in the region, the agency reasonably declined to assume there was no other human-caused mortality to the stock as the Aquarium contends. The agency further found that there was no recent series of reliable population estimates for the Sakhalin-Amur stock, and that the current population size of the stock was likely less than 30% of its historical maximum. In such situations, harvest cannot be deemed sustainable according to recognized criteria.

NMFS also reasonably found that the Aquarium had not shown that the Russian capture operation would not take additional belugas from the Sakhalin-Amur stock to replace the belugas proposed for importation. There have been hundreds of live captures from the stock over the past several decades, and thus there is every reason to believe that shipment of the 18 beluga whales to the United States will lead to replacement of those animals by the foreign shipper.

NMFS also reasonably found based on the scientific literature that five of the belugas (estimated to be only 1.5 years old at capture) likely were still dependent on their mothers for sustenance and therefore could not be imported.

The Aquarium's reply brief fails to address any of the agency's concerns regarding the proposed imports. The Court should uphold NMFS' decision.

I. The Aquarium Failed to Show That the Imports, in Combination with Other Activities, Are Not Likely to Have a Significant Adverse Impact

NMFS articulated a rational basis for finding that the Aquarium had failed to show that “[t]he proposed activity by itself or in combination with other activities, will not likely have a significant adverse impact on the species or stock.” 50 C.F.R. § 216.34(a)(4). The Aquarium's arguments on reply – several of which rely on extra-record evidence – fail to overcome any of the agency's reasonable grounds for finding that this criterion had not been met.

A. The Aquarium’s “Absence of Evidence” Argument Regarding Other Human-Caused Mortality Fails

The Aquarium compared its calculation of potential biological removal (“PBR”) for the Sakhalin-Amur stock solely to the reported levels of live-capture removals from the stock. Decision at 17445. NMFS found that comparison inappropriate given the lack of monitoring of other take in the region and the evidence of several other sources of take, including subsistence hunting and mortality from fishing and live captures. *Id.* at 17423, 17445-46. The Aquarium continues to dispute NMFS’ determination that the Aquarium’s PBR comparison was not appropriate, resting almost its entire case on the lack of monitoring of other human-caused mortality in the region. *See* ECF No. 83 (“Pl. Reply”) 2, 12, 14 (“There is no evidence in the A.R. of other removals and so the debate on this issue should end there.”), 24. The Court should reject the Aquarium’s argument.

First, there is evidence of other human-caused mortality to belugas in the Sea of Okhotsk, including reports of subsistence hunting and incidental mortality from fishing and live captures. *See* ECF No. 59-1 (“Fed. Br.”) 20-21. For mortality other than subsistence hunting, the Aquarium argues that there are “only a few removals in the past 100 years and only one in recent years.” Pl. Reply 10-11. But that wrongly assumes that such mortality is being tracked and counted. Decision at 17445-47. As to subsistence hunting, the Aquarium again claims that the reports of

such take are only from the Shantar region. Pl. Reply 11-12. But the Shantar and Sakhalin-Amur areas are adjacent on the coast, and there is no reason to believe that villages in one area hunt but villages in the other do not. AR Doc. 8915 at 13779. Indeed, there are reports of hunting in the coastal area that comprises both the Shantar and Sakhalin-Amur areas. AR Doc. 9221 at 21548 (stating that from “Sakhalinsky to Udskeya bay” “around 20-30 whales can be taken annually by locals.”). Sakhalinsky Bay includes the area occupied by the Sakhalin-Amur stock. Id. at 21544, 21540. At most, there is a lack of evidence regarding the exact amount of other human-caused mortality given the lack of monitoring.¹

Moreover, the decline in the population size of the Sakhalin-Amur stock in relation to that of the Shantar stock is evidence that other human-caused mortality is adversely affecting the Sakhalin-Amur stock. Fed. Br. 11-14. NMFS’ analysis showed that the Sakhalin-Amur stock likely had declined from 1990-2010 in a manner that cannot be explained by live captures alone. Id.; Decision at 17447-50, 17452-53. On the basis of this analysis and the evidence that subsistence take and other incidental human-caused mortality exists in the region, NMFS rationally

¹ The Aquarium also improperly relies on extra-record evidence for its argument that subsistence hunting does not occur in the Sakhalin-Amur area. See Fed. Br. 20, n.6; pp. 10-11 below.

found that the Aquarium's PBR comparison allowed "no buffer to account for other sources of human-caused mortality." Decision at 17445.²

And even if there is a lack of evidence regarding the extent of other human-caused mortality, "[w]hen there is a lack of evidence . . . the inference must be drawn against Plaintiff, whose burden it is to prove her case." Eidem v. Target Corp., No. EDCV 10-01000 VAP(DTBx), 2011 WL 3756144, at *9 (C.D. Cal. Aug. 24, 2011); see also Hickson v. Northern Crossarm Co., 357 F.3d 1256, 1260 (11th Cir. 2004). The Aquarium bore the burden of showing that its application should be granted under the standards articulated by the Marine Mammal Protection Act ("MMPA") and NMFS' regulations. See 16 U.S.C. 1374(d)(3); 50 C.F.R. § 216.34. The Aquarium's claim that NMFS is subject to a "substantial evidence" standard improperly attempts to shift that burden. Pl. Reply 3. In fact, the Aquarium was required to show through evidence submitted with its permit application that "[t]he proposed activity by itself or in combination with other activities, will not likely have a significant adverse impact on the species or stock."

² The Aquarium argues that "the recovery factor in the PBR formula . . . already provides a buffer to account for uncertainty." Pl. Reply 13. But that factor is not intended to account for unmonitored human-caused mortality. As the IUCN panel of beluga experts recognized, all human-caused mortality must be separately accounted for. See Fed. Br. 25-26 (citing AR Doc. 8915 at 13786 ("[a]ny animals taken by humans . . . should be considered"). The recovery factor accounts for the stock's status and other uncertainties, such as in the net productivity rate used. Further, NMFS staff and the U.S. Marine Mammal Commission found that the Aquarium's 0.5 recovery factor was too high for this stock. Fed. Br. 49, n.16.

50 C.F.R. § 216.34(a)(4) (emphasis added). The Aquarium failed to make this showing in its application, and now touts an “absence of evidence” as its primary argument why the permit should have been granted. The Court should reject this line of attack as contrary to the MMPA’s regulatory scheme.

The Aquarium’s burden-shifting also is at odds with the purposes of the MMPA. As the legislative history makes clear, the permit applicant has the burden of showing that the proposed activity “will not work to the disadvantage of the species or stock of animals involved.” Fed. Br. 8 (citing H.R. Rep. No. 92 – 707, *supra* note 7, at 18, reprinted in 1972 U.S.C.C.A.N. 4151). Congress intended that marine mammals be given the benefit of the doubt in situations where the available data do not allow NMFS to conclude that there will be no adverse impact on the stock. Congress did not intend that a permit applicant be able to exploit a lack of information about a stock to the detriment of that stock.

B. NMFS Reasonably Relied on the ICES Framework

As additional support for its decision, NMFS applied the International Council for the Exploration of the Sea (“ICES”) framework. Under this framework, no removals are permitted from a “data poor” stock, *i.e.*, one that lacks a recent time series of at least three population estimates, if the most recent population estimate for the stock is less than 30% of the stock’s historical maximum population size. Decision at 17450-51. NMFS found that to be the case

for the Sakhalin-Amur stock, and therefore concluded that the live-capture removals from the stock were not sustainable. Id. Specifically, NMFS compared the Sakhalin-Amur stock's current minimum population size (2,972) to an estimate of its historical maximum population size – conservatively, 10,000 belugas, but more likely “at least 13,000-15,000” based on the whaling data from prior to WWII. Pl. Reply 17; Fed. Br. 23 (citing Decision at 17452). This comparison is exactly what the ICES criteria calls for: comparison of the current size of the stock to its historical maximum size. Decision at 17450-51.

The Aquarium asserts that comparing a “maximum” to a “minimum” is inappropriate “if one wants to know by what percent the population has actually increased or decreased.” Pl. Reply at 17. But the ICES criteria are not used for that purpose. Rather, the criteria are used to evaluate whether the stock's current size is below 30% of its historical level before removals and other human-caused mortality. Decision at 17450-51. The entire point of the comparison is to determine whether the stock has reached a low level – compared to its historical level before human impacts – such that further removals should not occur when data regarding the stock is poor. Further, as explained in our opening brief, NMFS properly used the more conservative estimate of the stock's current population (its minimum size) to determine whether the stock was below 30% of its historical size and thus

additional removals should not occur under the ICES criteria. Fed. Br. 24-25. NMFS therefore made a proper comparison under the ICES framework.

The Aquarium also argues that NMFS improperly based its estimate of the historical maximum size of the stock on 1989 estimates that incorporate the inflated 12x correction factor for whales missed in surveys, while using a current population size for the stock that employs a 2x correction factor. Pl. Reply 15-16. That is not true. The Aquarium first cites its opening brief, which claims that “the 10,000 number comes from an estimate by Berzin and Vladimirov (1989). . . . That estimate was derived by multiplying the number of whales sighted on the surface during an aerial survey, about 700, by 12.” ECF No. 55-1 at 20; Pl. Reply 15.³ The Aquarium then points to NMFS’ statement that, “[u]sing the existing . . . estimate of 10,000 whales, this is below the ICES harvest reference point of 30%.” Pl. Reply 15-16. But on the same page of NMFS’s decision, two paragraphs down, the agency acknowledges that “[t]here are significant differences between the 1989 estimates of beluga whales in the Sea of Okhotsk and the results of the more recent surveys.” Decision at 17451. The agency discusses the “use of different survey methodologies and application of correction factors between surveys,” and states that it has “little confidence in the estimate of 10,000 whales in the Sakhalin-Amur

³ Berzin and Vladimorov in fact estimated that the Sakhalin-Amur stock was 7,000-10,000 whales, not precisely 10,000. Decision at 17451; AR Doc. 8909 at 13692.

stock by Berzin and Vladimorov (1989) because of the high correction factor used.” The agency then goes on to state that, “[h]owever, it is highly likely that an historical maximum of this stock is even greater than this estimate. . . . Based on the more reliable commercial [whaling] data, the population had to be at least 13,000-15,000 whales during this period Therefore, we consider 10,000 as below the lower end of an historical maximum.” Decision at 17451-52. The foregoing shows that NMFS did not rely on the 1989 population estimate using a 12x correction factor in estimating the historical maximum size of the Sakhalin-Amur stock. Rather, it found that 10,000 was a conservative estimate of the historical maximum based on the whaling data indicating that the stock was even larger (“at least 13-15,000 whales”).

Contradicting their argument that NMFS relied on the 1989 population estimate from Berzin and Vladimorov, the Aquarium switches tack and asserts for the first time on reply that NMFS overstated the amount of whaling take prior to WWII. Pl. Reply 18-19. But “[c]ase law is legion for the proposition that it is generally improper for a litigant . . . to present a new, previously available argument for the first time in a reply brief.” Steele v. Heard, 487 B.R. 302, 316 n.20 (S.D. Ala. 2013) (citations omitted); see also Bruce v. PharmaCentra, LLC, No. 1:07-CV-3053-TWT, 2008 WL 1902090, at *1 (N.D. Ga., Apr. 25, 2008).

Further, the Aquarium improperly relies on extra-record evidence for this new argument. The Aquarium claims that “[a]lthough Defendants rely on the Shpak [2011] report . . . they elected to not include the entire report, or even the part they cite, in the A.R.” Pl. Reply 18, n.14. As we explained, NMFS did not “exclude” parts of Shpak 2011 from the record. Fed. Br. 20, n.6. Different versions of Shpak 2011 exist. The shorter version in the record is the only version of Shpak 2011 that the Aquarium submitted to NMFS and all that NMFS considered for its decision. AR Doc. 8934 at 15896-932.⁴ The longer version of Shpak 2011 is extra-record and should not be considered for that reason alone. In addition, the Court set a May 2, 2014 deadline for motions regarding the record. ECF No. 23 at 2. The Aquarium filed a motion to supplement the record, but did not include the longer version of Shpak 2011 in its motion. ECF No. 29-1 at 19-20. “When a party claims that the administrative record presented by the agency is incomplete . . . the party must move to supplement the record if it wants the court to consider those

⁴ The version of Shpak 2011 in the record totals only 37 pages. AR Doc. 8924. The Aquarium’s excerpts from the longer version start on page 44. ECF No. 55-8 at 3; ECF No. 84-1 at 3-5. The Aquarium asserts that the longer version “was in Defendants’ possession because it was distributed at a workshop attended by Defendants’ scientists.” Pl. Reply. 12. The Aquarium provides no support for that assertion, but the issue is not whether the agency “possessed” the document, but rather whether it was considered for the decision (which it was not). See Fund for Animals v. Williams, 245 F. Supp. 2d 49, 57 n.7 (D.D.C. 2003), aff’d, 428 F.3d 1059 (D.C. Cir. 2005); Native Ecosystems Council, 848 F. Supp. 2d at 1227.

documents.” Native Ecosystems Council v. Weldon, 848 F. Supp. 2d 1207, 1227 (D. Mont. 2012) (citations omitted), vacated on other grounds, 2012 WL 5986475 (D. Mont. 2012). The Aquarium failed to do so. Therefore, the extra-record version of Shpak 2011 and the arguments based on it should be disregarded by the Court.

A document in the record also supports NMFS’ finding that the Sakhalin-Amur stock historically numbered at least 10,000 belugas based on the commercial whaling data. The Aquarium takes issue with NMFS’ statement that “[t]he average annual take in this [whaling] harvest was approximately 1,000 beluga whales ranging from 607-2,817 over a 20 year period.” Decision at 17452. But literature in the record from the same researcher (Shpak 2013), relied upon by NMFS,⁵ states almost exactly the same: “Large scale beluga whaling started in Sakhalinsky Bay in 1915 and lasted at least to 1937” and “[t]he average annual take was approximately 1000 belugas ranging from 607 (in 1917) to 2817 (in 1933) whales.” AR Doc. 9221 at 21548. The record evidence that was before the agency at the time of its decision thus supports NMFS’ finding.⁶

⁵ The Aquarium points out that NMFS cited Shpak 2011 for the commercial whaling data, Decision at 17452. That citation was an error on NMFS’ part. The shorter version of Shpak 2011 in the record does not contain any whaling data. AR Doc. 8924. The correct citation for NMFS’ statement is and should have been Shpak 2013, which contains (almost word-for-word) what NMFS stated in its decision regarding whaling take.

⁶ Even looking at the extra-record version of Shpak 2011 relied upon by the Aquarium, the Sakhalin-Amur stock was easily larger than 10,000 belugas before

If the Aquarium believes that other information regarding the extent of whaling would support a different outcome, it should provide that information to NMFS as part of a new permit application, not attempt to rely on extra-record evidence in this appeal. “The last thing a reviewing court should do is to encourage parties not to submit pertinent information to an agency and then seek the judicial overturning of agency action based on the failure to consider what the petitioning party supposedly knew but did not tell the agency.” Sw. Ctr. for Biological Diversity v. Babbitt, 131 F. Supp. 2d 1, 6 (D.D.C. 2001).⁷

C. The Aquarium Admitted In Its Application That The Sakhalin-Amur Stock Has Declined In Size Relative to the Shantar Stock

NMFS found that data regarding the population trend for the Sakhalin-Amur stock over time were very limited. But as explained in our opening brief, what information was available indicated that the stock likely had declined due to the

human exploitation. The Aquarium’s selected excerpts from that document include a narrative discussion that shows between 1917 and 1937, the total number of belugas taken by whaling exceeded 13,000 and was certainly higher given that no data were available for 1932 and 1933 (two years in the middle of the most intensive whaling during that period). ECF No. 84-1 at 4. Assuming that take in 1932 and 1933 was the midpoint of the take in 1931 and 1934, total whaling take between 1917 and 1937 was at least 17,000 whales. To support take at that level, the Sakhalin-Amur stock clearly numbered above 10,000 whales.

⁷ NMFS is considering a petition to designate the Sakhalin-Amur stock as depleted. Fed. Br. 7, n.3. In that context, NMFS is reconsidering information regarding the historical size of the stock. But the Court’s review here is “limited to the record before the agency at the time of its decision.” Geyen v. Marsh, 775 F.2d 1303, 1309 (5th Cir. 1985).

live capture removals and other untracked mortality. Fed. Br. 11-14. Specifically, according to the Aquarium's own application, the Sakhalin-Amur stock had been the largest in the Sea of Okhotsk in 1990, but by 2010 was much smaller than the Shantar stock. AR Doc. 8927 ("Application.") at 14316, 14321.

For the first time on reply, the Aquarium brings a series of new technical challenges to NMFS' finding that the change in the relative sizes of the Sakhalin-Amur and Shantar stocks indicated a decline in the Sakhalin-Amur stock. Pl. Reply at 19-25. The Court should disregard these new arguments since they were not advanced in the Aquarium's opening brief. Steele v. Heard, 487 B.R. at 316 n.20 Bruce v. PharmaCentra, LLC, 2008 WL 1902090, at *1. But even if the Court were to consider these new arguments, they fail.

First, the Aquarium relies on the same extra-record evidence that this Court already rejected in connection with the Aquarium's motion to supplement the record. Pl. Reply 20-21 (asserting that extra-record data show that one of the Shantar bays was not effectively surveyed in the 1980s); Plaintiff's Reply Brief on Motion to Supplement the Administrative Record, ECF No. 36 at 22 (making the same argument). Consistent with its order denying the motion to supplement the record with this information, ECF No. 52, the Court should disregard this extra-record evidence and the Aquarium's arguments based on it.

The Aquarium also completely contradicts itself. In its application, the Aquarium stated and cited supporting scientific literature that in 1989, the Sakhalin-Amur aggregation of belugas was “the largest group anywhere in the Sea of Okhotsk.” Application at 14316. The Aquarium also provided information regarding current population sizes for the two stocks. It stated that based on surveys taken in 2009-10 and a science review by an expert panel, “the best population estimate for the Sakhalin-Amur area is 3,961 and for the Shantar area is 6,661 (Reeves et al. 2011),” i.e., that that the Shantar stock was the largest of the two stocks currently. Application at 14321. Now the Aquarium inconsistently asserts that the Sakhalin-Amur stock was not the largest in 1989, and that the Shantar stock is not the largest today. Pl. Reply 19-22.

The Aquarium cannot advance new factual arguments for the first time on appeal that contradict the statements and information it provided to the agency. Steele v. Heard, 487 B.R. at 316 n.20; Confederated Tribes of Grand Ronde Cmty. v. Jewell, No. 13–849 (BJR), 2014 WL 7012707 (D.D.C. Dec. 12, 2014) at *15 (“To preserve a legal or factual argument, . . . [a] proponent [must] have given the agency a ‘fair opportunity’ to entertain it in the administrative forum before raising it in the judicial one.”). It would be unfair and contrary to administrative law to allow the Aquarium to advance an entirely new position on appeal that was never considered by the agency.

The Aquarium's unexplained reversal of position also has no support in the record. With respect to the current population size of the two stocks, the Aquarium argues that "Defendants ignore the 2009 population survey showing a Sakhalin-Amur population of 4,586, 44% larger than the Shantar population of 3,176." Pl. Reply 19 (citing AR Doc. 8911 at 13708). The Aquarium has cherry-picked the results of one survey and presented those results as the definitive population numbers for 2009. Pl. Reply 19 (citing AR Doc. 8911 at 13708). When in fact, beluga researchers performed three surveys of the Sakhalin-Amur stock during 2009-10 (on Sept. 13, 2009, Aug. 8, 2010, and Aug. 23-24). AR Doc. 8915 at 13782, 13805. The expert panel of beluga scientists found it necessary to average the three survey results to yield the correct population estimate for the stock. Application at 14321; AR Doc. 8915 at 13782. Researchers similarly averaged the results of the two surveys for the Shantar stock. AR Doc. 8911 at 13708. The Aquarium admitted that this method produced the best population estimates. Application at 14321.⁸

⁸ The Aquarium asserts the varying results between individual surveys "mean[] the Shantar and Sakhalin-Amur groups are one population." Pl. Reply at 20 n.16. But survey results may vary for any number of reasons including error, which is why researchers perform more than one survey and average the results. The Aquarium also has waived the claim in its complaint that the two stocks are one population by not briefing this issue on appeal. ECF No. 1 at ¶¶ 72-74; Federal Sav. & Loan Ins. Corp. v. Haralson, 813 F.2d 370, 373, n.3 (11th Cir. 1987) ("issues that clearly are not designated in the appellant's brief normally are deemed abandoned").

The Aquarium also argues (again, for the first time on reply) that NMFS made errors in, or drew improper inferences from, its analysis of the reasons for the change in the relative sizes of the two stocks from 1990-2010. The Aquarium claims that NMFS' back-calculated 1990 population estimate for the Sakhalin-Amur stock using data from the 2009-2010 surveys "disproves [NMFS'] theory that the Sakhalin-Amur population was historically larger than the Shantar population." Pl. Reply 22. First, that is not "NMFS' theory"; it is what the Aquarium itself stated. Application at 14316. Further, NMFS correctly found that the back-calculated 1990 population estimate for the Sakhalin-Amur stock (1,314) could not be reconciled with the current size of the Shantar stock. Given the information cited by the Aquarium that the Sakhalin-Amur stock was larger historically, the Shantar stock had to be smaller than 1,314 whales in 1990 in this comparison. But a Shantar stock of less than 1,314 whales could not increase to its current size of over 6,000 whales. Fed. Br. 13. NMFS thus reasonably identified a discrepancy in the Aquarium's application.

In attacking NMFS' analysis, the Aquarium also asserts that NMFS relies on "historical estimates that Defendants have already said are unreliable and unknown." Pl. Reply 23. The Aquarium is referring here to NMFS' acknowledgement that the absolute numbers of whales estimated for the two stocks

in the late 1980s were not reliable due to the use of inflated correction factors by the Russian researchers to adjust for whales missed in surveys. Decision at 17451. But as NMFS correctly found, this did not affect the reliability of the researchers' conclusions regarding the sizes of the two stocks "on a relative scale." Decision at 17447 (emphasis added). Regardless of the correction factor, the relative sizes of the stocks stay the same. For example, if researchers count 500 whales for stock A, and 1000 for stock B, as a matter of simple math, stock B is larger regardless of whether those counts are multiplied by two or twelve to adjust for missed whales. The Aquarium's argument therefore fails.⁹

The Aquarium also broadly asserts that NMFS' finding of a likely decline in the Sakhalin-Amur stock based on the change in the relative sizes of the two stocks is wrong because there is allegedly "no evidence" of other human-caused

⁹ The Aquarium also claims (again for the first time on reply) that NMFS improperly used the Shantar stock's current population estimate of 6,661 to back-calculate its 1990 population. Pl. Reply 24. But the Aquarium identified 6,661 as the best estimate for the stock, based on analysis by the panel of beluga experts. Application at 14321. In any event, if one back-calculates from the figure advocated by the Aquarium (4,794), the 1990 population for the Shantar stock is 2,118. The Sakhalin-Amur stock in relative terms was over four times larger than the Shantar stock in the late 1980s (even if one divides the reported 1989 population figures for the two stocks by 12 and multiplies by 2 to use the lower 2x correction factor). AR Doc. 8909 at 13692. Multiplying a back-calculated 1990 population size of 2,118 for the Shantar stock by only two yields a 1990 population size for the Sakhalin-Amur stock of 4,236. That is much larger than its current minimum population size (2,972), indicating that the stock declined. The Aquarium's argument makes no difference to the analysis.

mortality. Pl. Reply 23-24; see also id. at 14. This is just disagreement with the agency's analysis, nothing more. NMFS' analysis showed that the reversal in the relative sizes of the two stocks cannot be explained based on the live captures alone. Thus, other untracked mortality likely is occurring. Decision at 17447-50 ("All scenarios suggest that something in addition to the reported level of live-capture removals has limited the growth of the Sakhalin-Amur stock since 1989").

D. NMFS Has No Practice of Relying on PBR In This Context And Where There is Other Evidence of An Adverse Impact

Continuing to rely on scientific research permits for two species and native subsistence take that is exempted from the MMPA, the Aquarium misleadingly asserts that "Defendants have determined" that PBR "is the most applicable measure of significance for the direct effects [of removals]" Pl. Reply 7. But as NMFS has stated, in the limited instances where it has considered PBR outside of U.S. fisheries management, the agency has treated it as only one "quantitative tool" that "does not make up the entirety of [its] impact assessment." Fed. Br. 32 (citing Proposed Rule, Taking Marine Mammals Incidental to Southwest Fisheries Science Center Fisheries Research, 80 Fed. Reg. 8166, 8222 (Feb. 13, 2015)).

In the cases cited by the Aquarium, NMFS did not rely solely on PBR, but cited other evidence indicating there would be no adverse impact from the proposed activity. Fed. Br. 30, n.9, 31. Though the Aquarium points again to the

environmental assessments for northern fur seal subsistence take, Pl. Reply 9, there, NMFS found that “all of the harvested animals, with very few exceptions, are nonbreeding males and therefore do not contribute to the population growth.” Fed. Br. 31. Here, by contrast, NMFS found that the live captures and other human-caused mortality likely have caused a decline in the stock and PBR is being exceeded. Fed. Br. at 11-14; Decision at 17449.

Nothing in the MMPA and regulations requires NMFS to rely on PBR for import permits for public display, let alone where doing so would be contrary to the purposes of the MMPA. Section 104(d)(3) of the MMPA requires that “[t]he applicant for any permit under this section must demonstrate . . . that the taking or importation of any marine mammal under such permit will be consistent with the purposes of this chapter” 16 U.S.C. § 1374(d)(3). The purpose of the scientific research cited by the Aquarium was to obtain information to help recover marine mammals that were listed as the threatened or endangered species under the Endangered Species Act (“ESA”).¹⁰ Such research is consistent with the purposes

¹⁰ ECF No. 55-2 at 2 (“The objective of the proposed action is to collect information on the ecology and biology of threatened and endangered Steller sea lions that would improve understanding of management needs for recovering the species to the point that it can be removed from ESA listing.”); Final Programmatic Environmental Impact Statement (May 2007), at ES-1, available at <http://www.nmfs.noaa.gov/pr/pdfs/permits/eis/fpeis.pdf> (“The purpose of the research on [Steller sea lions] and [northern fur seals], as stated in the Steller Sea Lion Recovery Plan (NMFS 1992) and Northern Fur Seal Conservation Plan

of the MMPA. Allowing imports from a stock for public display where the available data indicates that live-capture removals for public display and other human-caused mortality is adversely impacting the stock would be inconsistent with the purposes of the MMPA, as the agency found here in denying the permit. Decision at 17416, 17421. The Aquarium wrongly attempts to equate scientific research to help recover ESA-listed marine mammals with removals for public display that NMFS found are likely contributing to a stock's decline.

E. NMFS Did Not “Proffer” Two New Standards

The Aquarium further argues that NMFS has “proffered” two new standards for assessing the sustainability from a stock that is either “declining, stable, or its status is unknown.” Pl. Reply at 25. Not so. NMFS simply applied to the facts of this case the standard in its regulations, *i.e.*, whether the applicant has shown that “[t]he proposed activity by itself or in combination with other activities, will not likely have a significant adverse impact on the species or stock.” 50 C.F.R. § 216.34(a)(4). NMFS has not articulated any different standard.

Furthermore, the Aquarium's arguments have no application to the facts. The Aquarium argues that NMFS' rejection of its PBR comparison is “illogical” because “a removal level below the net reproduction level allows the population to

(NMFS 1993), is to promote the recovery of the species' populations to levels appropriate to justify removal from ESA listings (SSL) and to delineate reasonable actions to protect the depleted species under MMPA.”).

increase toward its optimum sustainable population.” Pl. Reply 25-26. But when a stock is declining, that means removals are exceeding net production (which is the natural growth in the population, or births minus deaths). And that is what NMFS found was likely occurring in this case. Decision at 17449 (“we believe that total removals . . . have [likely] exceeded . . . the total net production . . . resulting in a small, but steady and significant decline over the past two decades”).

The Aquarium then tries to twist the agency’s finding into a purported new standard: “that total removals cannot exceed total net production” and anything below that level is acceptable. Pl. Reply 27. Contrary to this argument, NMFS has not found that removals all the way up to total net production are sustainable. NMFS has simply found that where removals exceed the stock’s natural growth, it clearly cannot find that the activity is sustainable because removals at that level cause the stock to actually decline. Decision at 17453.

II. The Aquarium Failed to Show That Replacement Takes Would Not Occur From the Sakhalin-Amur Stock of Beluga Whales

NMFS also reasonably found that the Aquarium had failed to show that the proposed imports would not result in additional takes from the Sakhalin-Amur stock, contrary to 50 C.F.R. § 216.34(a)(7). Decision at 17440. Between 1990 and 2010, ongoing Russian capture operations have caught and sold at least 237 beluga whales. Decision at 17444. There is every reason to conclude that this practice will

continue and that as belugas are sold and/or exported, more will be caught to replace them. In its reply brief, the Aquarium does not even claim that the proposed imports would not result in additional take from the Sakhalin-Amur stock, let alone identify any evidence that would support such a finding.

A. NMFS' Established Interpretation Is That Permit Applicants Must Show That Replacement Takes Will Not Occur

Rather than point to any evidence that replacement takes will not occur, the Aquarium disputes that NMFS has applied that interpretation of 50 C.F.R. § 216.34(a)(7) in the past. Pl. Reply 38-39. The Aquarium is wrong. In hearing transcripts dating to just before the regulations were adopted, agency officials stated their clear intention to require permit applicants to show that “replacement takes” will not occur. Fed. Br. 40. Indeed, the Aquarium itself purported to use that standard in its permit application in this case, and also used it for a prior permit. Fed. Br. 39-40 (quoting the Aquarium’s statement that “[t]he importation will not result in the collection of beluga whales from the wild nor will replacement animals be collected by [the foreign shipper].”).

In claiming the agency is wrong about its own practice, the Aquarium relies on the environmental assessments for prior U.S. imports of belugas from Mexico and Canada. Pl. Reply 39-40. But those show that NMFS granted the permits where assurances had been provided that replacement takes would not occur. ECF

No. 84-2 at 5 (stating that Mexican shipper “has stated in a written letter . . . that the park has no intentions of acquiring belugas to be housed at the facility”); ECF No. 84-3 at 4 (stating that “Marineland of Canada has provided written assurance that they have no plans to import beluga whales from the wild or other facilities to replace those animals being offered to Sea World and NMFS has [no] reason, at this time, to question this assurance”). Similarly, for other U.S. imports of marine mammals, including a beluga whale and dolphin from Germany, NMFS found that the import permit applicant had provided assurances that replacement animals would not be obtained by the foreign shipper.¹¹

NMFS’ longstanding interpretation of 50 C.F.R. § 216.34(a)(7) is controlling unless plainly erroneous or inconsistent with the regulation. Sierra Club v. Johnson, 436 F.3d 1269, 1274 (11th Cir. 2006). NMFS’ interpretation is not inconsistent with the regulation, which requires a showing that “any requested import or export will not likely result in the taking of marine mammals . . . beyond those authorized by the permit.” 50 C.F.R. § 216.34(a)(7) (emphasis added). NMFS’ interpretation also is grounded in the purposes of the MMPA. Where

¹¹ See Exhibit 1 at 5 (NMFS found shipper provided letter that it “has no intentions of acquiring substitute animals for either species from the wild or from other facilities”); Exhibit 2 at 5 (recent U.S. import of a dolphin from Japan; NMFS found shipper “provided a signed affidavit stating that [it] had no plans to replace the animal to be imported”).

replacement take occurs, there is the potential for additional harm to the stock that has not been analyzed by the agency as part of the permit application.

B. The Aquarium Does Not Claim That Replacement Takes Will Not Occur, or Submit Any Evidence In Support of That Claim

Faced with the agency's reasonable interpretation of its regulation, the Aquarium instead asserts that NMFS does not "offer a shred of evidence that international demand is affected by the outcome of the Aquarium's permit application." Pl. Reply 41. First, NMFS did not require a showing that foreign demand for belugas will change. It required assurance that the shipper will not take additional belugas to replace those shipped to the United States. But more importantly, it was the Aquarium's burden to make that showing, and it has not even attempted to do so. Further, there is every reason to believe that if the 18 beluga whales are shipped to the United States, the ongoing Russian capture operation will replenish its inventory with additional captures. That operation is the main global supplier of belugas today. Fed. Br. 3.

C. The Aquarium's "Extraterritoriality" Argument is Unavailing

The Aquarium also relies on an argument that has no legal or factual basis: that NMFS' enforcement of the MMPA's ban on U.S. imports of marine mammals, with limited exceptions where the applicable permit requirements are met, represents an "extraterritorial" application of the MMPA.

It is well established “that Congress has the authority to enforce its laws beyond the territorial boundaries of the United States,” but there is a canon of statutory interpretation “that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.” EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991). But the canon has no application where Congress seeks to regulate conduct that occurs within the territorial jurisdiction of the United States. “By definition, an extraterritorial application of a statute involves the regulation of conduct beyond U.S. borders.” Stevens v. Premier Cruises, 215 F.3d 1237, 1242 (11th Cir. 2000) (citation omitted); Reyes-Fuentes v. Shannon Produce Farm, 671 F. Supp. 2d 1365, 1371 (S.D. Ga. 2009). Thus, “the presumption against extraterritoriality does not apply ‘when the conduct [at issue] occurs within the United States.’” Morrison v. Nat’l Australia Bank Ltd., 561 U.S. 247, 282 (2010) (Stevens and Ginsburg, concurring).

The Aquarium asserts that NMFS is attempting to regulate conduct outside of the United States. Pl. Reply 36. But in denying the Aquarium’s application, the only conduct that NMFS has foreclosed is the importation of the 18 belugas into the United States. The act of U.S. importation occurs in U.S. territory. Therefore, the regulated conduct is in the United States and the presumption against extraterritoriality has no application. Further, the presumption, like any canon of statutory construction, is directed at discerning what Congress intended. Here,

Congress plainly sought to ban U.S. imports of marine mammals, except where such imports were consistent with the purposes of the MMPA and met all statutory and regulatory requirements. Thus, the canon has no application or usefulness here.

Unsurprisingly, the Aquarium does not cite a single case where a court has found that enforcement of a U.S. import restriction represents extraterritorial application of a statute. In fact, courts have found that regulation of U.S. imports or even conduct that affects U.S. foreign trade does not involve extraterritorial application of a statute. See Palmer v. Brown, 376 F.3d 1254, 1258 (11th Cir. 2004) (holding that although federal copyright law has no extraterritorial effect, it reaches U.S. imports because “the importation of the infringing work is an infringing act occurring in the United States”); Cont’l Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 705 (1962) (presumption against extraterritoriality not controlling “[s]ince the activities of the defendants had an impact within the United States and upon its foreign trade”).¹²

The Aquarium ultimately is confusing the regulated conduct with the foreign effects of that regulation. “Even where the significant effects of the regulated conduct are felt outside U.S. borders, the statute itself does not present a problem

¹² The Aquarium cites States v. Mitchell, 553 F.2d 996 (5th Cir. 1977), but that case dealt with the taking of dolphins in the Bahamas. The court specifically noted that “[n]one of the dolphins were imported into the United States.” Id. at 997.

of extraterritoriality, so long as the conduct which Congress seeks to regulate occurs largely within the United States.” Reyes-Fuentes, 671 F. Supp. 2d at 1371 (quotation omitted). Many statutes regulate U.S. imports and may have an effect on conduct outside U.S. borders. In enacting the MMPA and including an import ban subject to limited exceptions, Congress plainly intended to have an effect on management of foreign stocks. But that does not mean that Congress is regulating conduct outside U.S. borders. It is regulating the act of importing marine mammals into the United States. Such express U.S. import regulation by Congress does not implicate the presumption against application of statutes outside U.S. territory.

III. The Aquarium Failed to Show That Five Belugas Were Independent of Their Mothers at the Time of Capture

Based on the scientific literature, NMFS found that five of the belugas (approximately 1.5 years old) likely were nursing at the time of capture and thus could not be imported. Decision at 17425-26. The Aquarium contends that under agency policy, the issue is whether “nursing” means “any nursing or only obligatory nursing required for survival.” Pl. Reply 42. But that does not resolve the issue. The agency still had to examine whether such nursing included belugas that rely on a diet of their mother’s milk, supplemented with other food. Fed. Br. 46. NMFS reviewed the scientific literature and found that juveniles between the ages of one and two rely on such a mixed diet and thus are still dependent on their

mothers for part of their food. Fed. Br. 46-47. Based on this literature and the age of the five captured animals here (about 1.5 years old), NMFS found they were likely still nursing for subsistence. That finding is not inconsistent with the “obligatory” nursing policy cited by the Aquarium.

Without citing any scientific support, the Aquarium posits that any nursing by these juveniles at the time of capture was not necessary because the juvenile belugas took food after capture. Pl. Reply 42. But under the MMPA, the question is whether the juveniles were “nursing at the time of taking.” 16 U.S.C. § 1372(b)(2) (emphasis added). The Aquarium is trying to make the test whether juveniles, once removed from their mothers, can become “non-nursing” after capture. That is contrary to the plain language of the statute and the clear intent of this prohibition to protect nursing animals in the wild.

The Aquarium further claims that because the capture operation did not approach any mother-calf pairs, then no nursing belugas could have been captured. Pl. Reply 44-45. But as we pointed out, that procedure would still allow the capture of nursing belugas that were physically apart from or not observed with their mothers at the time of capture. Fed. Br. 47. The Aquarium claims that Defendants “have no evidence to support such speculation.” Pl. Reply 44. Once again, the Aquarium is trying to shift the burden to NMFS. Defendants merely are pointing out an unwarranted assumption in the Aquarium’s claim of proof. Specifically,

asserting that no mother-calf pairs were approached is not proof that no nursing animals were taken because they could have been apart from their mothers.

The Aquarium now also claims that “if any calf was present in a group of animals, no effort was made to collect animals from that group.” Pl. Reply 44-45 (citing Application at 14378). But the Aquarium’s application states only that the “collection team would not engage any group if mother-calf pairs, calves, large adults, or juveniles less than one year old were identified.” Application at 14378 (emphasis added). Thus, the capture team did approach if the group contained juveniles older than one year, and here the five captured belugas were aged 1.5 years old. The capture procedures used thus did not avoid belugas aged between 1 and 2 that NMFS found likely still rely in part on their mothers’ milk for food.

IV. The Aquarium’s Requested Remedy Is Not Available

If the Court finds some error in the agency’s analysis, it should remand the permit decision, not order NMFS to issue the permit as the Aquarium asks. “[E]xcept in rare circumstances,” the proper remedy in APA cases is to remand the decision to the agency for reconsideration. Fla. Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985); Sierra Club v. Leavitt, 368 F.3d 1300, 1307 (11th Cir. 2004). Many of the issues raised by the Aquarium are technical, and thus even were the Court to find some error, a remand is necessary for the agency to apply its expertise and make new findings that do not incorporate that error.

At bottom, the Aquarium asks the Court to itself make findings – that the live-capture removals are sustainable, that replacement takes from the stock are not likely (or adopting the Aquarium’s new test, that additional U.S. imports of belugas are not likely), and that belugas aged 1.5 years are not dependent on their mothers for sustenance. It is simply not the Court’s role to make such findings, which Congress has entrusted to NMFS.¹³ The lack of support for this request is shown by the inapposite case law the Aquarium cites. Two of its principal cases cited on reply do not even involve review of agency decisions. Levinson v. Reliance Standard Life Ins. Co., 245 F.3d 1321, 1327 (11th Cir. 2001); Zervos v. Verizon New York, Inc., 277 F.3d 635, 648 (2d Cir. 2002).

Conclusion

NMFS articulated a rational basis for its decision that comports with the purposes of the MMPA. The Court should uphold the decision.

Dated: June 30, 2015

Respectfully Submitted,

JOHN C. CRUDEN
Assistant Attorney General

¹³ See Immigration & Naturalization Serv. v. Orlando Ventura, 537 U.S. 12, 16, 17 (2002) (the lower court “committed clear error . . . [by] seriously disregard[ing] the agency’s legally mandated role” and not remanding the case to the agency for decision); Nippon Steel Corp. v. USITC, 345 F.3d 1379, 1380, 1381 (Fed. Cir. 2003) (lower court “exceeded its authority” by foregoing remand to the agency and instead “refinding the facts” and “interposing its own determinations on causation and material injury”).

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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such to the attorneys of record.

/s/ Clifford E. Stevens, Jr.
Clifford E. Stevens, Jr.

Exhibit 1



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
Silver Spring, MD 20910

JUL 23 2004

MEMORANDUM FOR: F/PR - Laurie K. Allen

FROM: F/PR1 - Stephen L. Leathery 

SUBJECT: Review of public display permit application (File No. 116-1729) submitted by Sea World, Inc., under the authority of the Marine Mammal Protection Act: Recommendation for Issuance

Abstract

Sea World, Inc. requests a permit to import one beluga whale (*Delphinapterus leucas*) and one Commerson's dolphin (*Cephalorhynchus commersonii*) from the Duisburg Zoo, Germany, to its park in San Diego, California, for purposes of public display. Sea World, Inc. will be taking custody of these animals and incorporating them into Sea World's breeding and exhibition program.

Chronology

September 24, 2003	Date of application
November 25, 2003	Application complete
January 23, 2004	Application distributed
January 29, 2004	Application published in the <u>Federal Register</u>
March 1, 2004	Close of public comment period
March 29, 2004	Marine Mammal Commission comments received

Comments

The Marine Mammal Commission (MMC) recommended approval of the application:

- provided the Service, in consultation with the Animal and Plant Health Inspection Service (APHIS), is satisfied that the applicant's plans and facilities for transport and maintenance of the requested animal are adequate to provide for its health and well-being;
- provided the Service is satisfied that the applicant's education program is acceptable (*i.e.*, that a program is in place as a component of the proposed public display; that the basic message of the program is accurate and consistent with the policies of the Marine Mammal Protection Act (MMPA); and that the program includes accurate information about the life history and other aspects of the species); and
- recommends the Service consult with the applicant to determine that the transfer of these



older animals from their present location and circumstances to a new facility is unlikely to cause them undue stress or compromise their health and well-being.

The Commission believes that the activities for which it has recommended approval are consistent with the purposes and policies of the MMPA. The MMC requests the opportunity to review and comment on any supplemental information on the age/transport concerns before the Service makes a determination on issuance.

Based on the response by Sea World, the MMC recommended that the Service ask Sea World, in the future, to provide examples of successful transfers of similarly situated animals to support its contention that moving these animals to a new facility at this point in their lives will not be unduly stressful.

Applicant's Response: Sea World's veterinarians have reviewed the health status of each of the animals and have determined that they are in generally good health and fit for travel. Sea World has engaged in the transport of hundreds of animals from around the world and have the experience and expertise to transport these animals safely. Sea World will adhere to all applicable standards and regulations for transport and would not attempt to move these animals if their health and well-being were in jeopardy.

The transfer of these animals will result in significantly improved living conditions and thus is in the best interests of the animals. Sea World houses other animals of the same species and these animals would be integrated into these groups. Finally, transferring these animals to Sea World ensures that they are not released into the wild which would be detrimental due to their age.

OPR Response: The Service (NMFS) has consulted with APHIS and is satisfied that the applicant's plans and facilities for transport and maintenance of the requested animal is adequate to provide for its health and well-being. Sea World, Inc. is an American Zoo and Aquarium Association (AZA) accredited institution as well as a member of the Alliance of Marine Mammal Parks and Aquariums (Alliance). Notice to accept professional standards of the AZA and Alliance was published in the Federal Register on October 6, 1994 (59 FR 50900). As such, NMFS is satisfied that the applicant offers a sufficient program for education and conservation.

The Service requested additional information regarding the potential stress or risk to the animals' health and well-being of transport due to their age. Sea World responded stating that Sea World veterinarians have reviewed the health records of these animals and concluded that they are able to be transported. Based on previous comments received from APHIS, Special Condition B.1.d. requires that the travel plan be documented and the animal be accompanied by a health certificate signed within 10 days of the transport.

Based on MMC review of the additional information provided by the applicant, the Service has further added in the cover letter of the permit the recommendation that Sea World document this transport and identify other similar transports to assist reviewers in assessing the ability of older animals to adapt to transport. This is not a permit condition as care and maintenance issues fall under the purview of APHIS.

The USDA Animal and Plant Health Inspection Service (APHIS) verifies that the transport arrangements meet or exceed current Animal Welfare Act (AWA) requirements and the attendants are well qualified to transport these animals. At this time all AWA regulations and standards for this proposed transport appear to have been met. The enclosures found at Sea World , San Diego, meet or exceed all current AWA space requirements for these species.

Public Comments: Two public comments were received regarding this application. These comments are summarized below.

- *Animal Rights Foundation of Florida* commented that “profits from public display do not justify the transfer and confinement of whales and dolphins. The experience of being removed from the water is traumatic, and is never routine. When transferred, the mortality rates for captive whales and dolphins are extremely high and are comparable to those reported for newly captured whales and dolphins. ”

OPR Response: These comments are beyond the scope of issues to consider under the MMPA. Animal care, maintenance and transport issues are covered under the AWA and are under the purview of APHIS. APHIS has commented on the application based on the requirements and standards of the AWA.

- *Whale and Dolphin Conservation Society/ Humane Society of the United States* recommends that this permit request be denied based on international trade and transport concerns:

International Trade Issues: NMFS’s decisions regarding imports play an important role in the international arena of supply and demand of dolphins and require the highest level of scrutiny through the permitting process. Although Sea World claims that no wild captures are planned to replace the animals, it is unclear whether the Duisburg Zoo has plans to transport additional animals to the Duisburg Zoo from other captive facilities. Any transport of animals to the Duisburg Zoo increases the demand for the acquisition of more animals either through captive breeding and/or wild captures.

Section 104 of the MMPA, requires that any captures and imports must specify the location and manner of capture, including stock assessments. The original capture permits provided for these animals does not indicate how the animals were captured or the status of the stocks at the time of capture. This number may have a significant impact on local populations including the number of animals that are injured, accidentally killed or whose health is compromised due to capture operations.

Specifically considering the capture of Commerson’s dolphins for the Duisburg Zoo, it is noted that of 17 dolphins originally taken only one (the subject animal) is currently surviving and most died within one year of capture. In addition, there are potential illegalities and irregularities associated with the dolphin captures and subsequent transfers.

Specifically considering the international trade in live beluga whales, there are concerns regarding continuing wild captures occurring in Russia for export to Canada and Thailand.

Supporting this concern is the 1999 conclusion reached by the International Whaling Commission that only 4 of 29 beluga populations are 'stable.' Belugas are threatened by oil and gas development, over-hunting, over-fishing, vessel traffic, industrial development and pollution.

The current quotas for beluga whales set by Russia are based on unreliable population estimates. Information regarding the status of the species in Russian waters is lacking and studies to investigate the size and status of the population and sustainable levels of removal have not been conducted. It is suspected that the Russian CITES Scientific Authority is unable to make 'non-detriment' findings for any beluga exports under CITES.

The IUCN Cetacean Specialist Group has suggested that the removal of live cetaceans for captive display and/or research should be analyzed as incidental or deliberate killing, as those animals are no longer available to contribute to the population growth. Captive breeding has not resulted in the return of animals and/or genetic material back to the wild to aid in the conservation of the species, therefore all imports of wild caught animals should be viewed as a directed take from the wild.

Dolphins should not be removed from a wild population unless the status of the population has been assessed and it is determined that collection will not reduce the long term viability of the population. Furthermore, these assessments should be conducted by an independent group of scientists prior to any collections. Collectors and receiving facilities must invest substantial resources in assuring that the collections are ecologically sustainable. U.S. facilities should not be profiting from the potential local or regional depletion of a population. Collections of the past have been conducted without the support of scientific data regarding the potential effects of removal. Given recent unregulated and unreported collections are occurring world-wide, it is imperative that NMFS avoid complicity in supporting a trade that continues to devastate local populations of small cetaceans.

Transport: Under Article IV.2.c. of CITES, the Management Authority of the state of the export must be satisfied that any living specimen will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment. IATA's Live Animals Regulations are deemed to meet to CITES guidelines. The IATA regulations contain conditions specific to marine mammals including experienced handlers, minimization to noise, and holding areas. WDCS and HSUS believe that transportation of marine mammals should only take place where urgently needed improvements are required in an animal's enclosure or in the best interests of an animal's health and welfare.

The subject animals in question are estimated to be 30 (beluga) and 33 (dolphin) years old. Given these animals advanced ages, it is questionable whether these animals will be able to participate in a breeding program, the stated purpose of the application, or is in the animals' best interest. Transport is an intensely stressful experience and the transports of other cetaceans provide evidence of this fact. These examples include the transport delays of "Tula" and "Ulysses," bodily injury to "Tanouk," and the distress of "Bjossa"-all killer whales that have been moved internationally. Research conducted on acclimation periods suggest that the same amount of acclimation time is required of dolphins that are moved among facilities as those first transferred to a facility from the wild. The ages of these animals and the distance of travel to a new facility with new conspecifics which may show aggression or dominance toward these animals may be excessive and adversely affect their health.

In a letter writing in 1999, Reinhard Frese, director of the Duisburg Zoo, concluded that because of the age of the animals, "the risk of transport to a different location is too high and irresponsible." Although these animals are reported to be in good health, it is encouraged that NMFS exercise caution in authorizing the shipment of these animals given their age and the distance of transport. It is doubtful that these animals will contribute to a captive breeding program and considering the statements made by the zoo director, it is requested that the permit be denied or at a minimum, an explanation regarding the zoo director's comments are necessary.

Applicant's Response: The applicant contends that the only relevant comment is that of concerns whether these animals can be safely transported from Germany to the Sea World facility in California. The transport of these animals poses no material risks to the health and well-being of the animals. To the contrary, the transfer of these animals will result in an improved quality of life and perhaps a longer life span, for both animals will be integrated into same species communities and they will be provided with expert veterinary care.

Sea World's veterinarians have reviewed the health status of each of the animals and have determined that they are in generally good health and fit for travel. Sea World has engaged in the transport of hundreds of animals from around the world and have the experience and expertise to transport these animals safely. Sea World will adhere to all applicable standards and regulations for transport and would not attempt to move these animals if their health and well-being were in jeopardy.

The statements by Reinhard Frese submitted by WDCS/HSUS were taken out of context. This statements were made in response to a request for the animals to be moved to another facility for later release to the wild. Mr. Frese's letter refers to the entire process of transport, adaptation to a new environment and subsequent release to the wild. Mr. Frese has written a letter supporting Sea World's request to import the animals and believes that it would be beneficial for the animals to be relocated.

The transfer of these animals will result in significantly improved living conditions and thus is in the best interests of the animals. Sea World houses other animals of the same species and these animals would be integrated into these groups. Finally, transferring these animals to Sea World ensures that they are not released into the wild which would be detrimental due to their age.

OPR Response: Regarding international trade of marine mammals, the MMPA provides NMFS with authority to issue permits for the importation and holding marine mammals in captivity for public display purposes (16 U.S.C. 1374; Section 104 (c)). Reinhard Frese, director of the Duisburg Zoo, has stated in a written letter that the zoo has no intentions of acquiring substitute animals for either species from the wild or from other facilities. The long term collection planning for the zoo does not include keeping either species in the future. The applicant has demonstrated that the collection of the subject animals was conducted legally through permits issued by the countries of origin. Under MMPA Section 102 and current regulations (50 CFR 216.12 (c)(5)), among other criteria, NMFS must demonstrate that the original "take" of the marine mammal from the wild was inhumane in order to determine that it is unlawful under the MMPA to import the marine mammal. There is no substantial evidence to conclude that the collection of either animal was inhumane.

The Service requested additional information regarding the potential transport-related stress or risk to the animals' health and well-being due to their age. Sea World has responded that Sea World veterinarians have reviewed the health records of these animals and are able to be transported. Transport of these animals is under the purview of APHIS and is covered under the AWA. APHIS has reviewed the application and is satisfied that transport arrangements meet or exceed current Animal Welfare Act (AWA) requirements and the attendants are well qualified to transport these animals. Based on previous comments received from the U.S. Department of Agriculture, Animal and Plant Health Inspection Service (APHIS), Special Condition B.1.d. requires that the travel plan be documented and the animal be accompanied by a health certificate signed within 10 days of the transport.

Other Applicable Regulations

Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES): The requested species are listed on Appendix II of CITES. Special Condition B.1.e. requires a CITES export permit from Germany prior to import.

National Environmental Policy Act (NEPA): Public display permits are, in general, categorically excluded from the requirement to prepare an Environmental Assessment or Environmental Impact Statement (NOAA Administrative Order Series 216-6, May 20, 1999) since, as a class, they do not have a significant effect on the human environment.

In reviewing these permit requests, NOAA Fisheries has determined that this action falls within NOAA's categorical exclusion for scientific research, enhancement, photography and public display permits issued under Section 101(a)(1) and 104 of the MMPA (NOA 216-6 Section 6.03(f)(2)(a)). NMFS determined that public health and safety are not affected; no unique geographic area is affected; and the effects of this import are not highly uncertain, nor do they involve unique or unknown risks. Issuance of this permit will not set a precedent for future actions with significant effects, nor does it represent a decision in principal about a future consideration. There are no individually insignificant but cumulatively significant impacts associated with the proposed action, and there is no adverse affect on historic resources. The Permit requires that AWA requirements for handling and transport be met to avoid unnecessary stress and to provide sufficient veterinary care to insure the health and welfare of the animal.

NMFS, therefore, concludes that consistent with applicable criteria, issuance of the requested permit, as conditioned, is categorically excluded from the requirement to conduct further NEPA analysis.

RECOMMENDATION

The proposed importation for public display is consistent with the purposes and policies of the MMPA. NMFS has determined that SeaWorld, Inc. 1) offers a program for education or conservation purposes that is based on professionally recognized standards of the public display community, 2) holds a license issued under 7 U.S.C. 2131 *et seq.*, and 3) maintains facilities for the public display of marine mammals that are open to the public on a regularly scheduled basis with access not limited or restricted other than by charging an admission fee. No adverse impact

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to the populations or to the ecosystem as a result of the authorized activity is anticipated. For these reasons, I recommend that you sign the Permit.

cc: Sloan

Exhibit 2



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
 NATIONAL MARINE FISHERIES SERVICE
 Silver Spring, MD 20910

JUN 27 2014

MEMORANDUM FOR: F/PR – Donna S. Wieting
 Director, Office of Protected Resources

FROM:  F/PR1 – Jolie Harrison
 Acting Chief, Permits and Conservation Division

SUBJECT: Report on the Application for a Public Display Permit (File No. 17754): Recommendation for Issuance

I recommend the National Marine Fisheries Service (NMFS) issue a public display permit, pursuant to the Marine Mammal Protection Act of 1972 as amended (MMPA; 16 U.S.C. 1361 *et seq.*) and the regulations governing the taking and importing of marine mammals (50 CFR Part 216). The permit was requested by Sea World LLC, 9205 South Park Circle, Suite 400, Orlando, Florida 32819 [Brad Andrews, Responsible Party].

Summary of requested activities

Species: One female, captive-born Pacific white-sided dolphin (*Lagenorhynchus obliquidens*).

Objectives: Importation of the subject animal for public display purposes.

Location: Transport from the Kamogawa SeaWorld, Chiba, Japan to Sea World San Antonio in Texas.

Methods: Air transport subject to the Animal Welfare Act.

Duration: The permit would be valid for three years from the date of issuance.

Chronology of processing

August 28, 2012	Date of application
January 11, 2013	Application complete
February 04, 2013	Application published in the <u>Federal Register</u>
February 04, 2013	Application distributed
February 19, 2013	Marine Mammal Commission comments received
February 25, 2013	Application posted on OPR website to facilitate multiple requests from the public to review
March 06, 2013	Close of public comment period
May 1, 2013	Additional information requested regarding Kamogawa SeaWorld (replacement of the animal and legal possession)



May 8, 2013	Certificate of Possession submitted by Kamogawa SeaWorld (legal possession)
September 6, 2013	Information requested regarding Kamogawa SeaWorld's (replacement of the animal)
November 11, 2013	Statement regarding replacement of the animal received from Kamogawa SeaWorld (via Sea World LLC)

Summary of external comments and response

NMFS published a notice in the *Federal Register* announcing receipt of the application, making it available for public review. The application was also provided to the Marine Mammal Commission and the USDA Animal and Plant Health Inspection Service (APHIS). The following external comments were received regarding the application.

The Marine Mammal Commission (MMC)

The MMPA stipulates that NMFS may not issue a permit without first seeking review of the application by the MMC and its Committee of Scientific Advisors.

In a letter dated February 19, 2013, the MMC recommended approval of the application provided that NMFS, in consultation with the APHIS, is satisfied that the applicant's plans and facilities for transporting and maintaining the dolphin meet the requirements established under the Animal Welfare Act (AWA) and are adequate to provide for its health and well-being.

The MMC believes that the activities for which it has recommended approval are consistent with the purposes and policies of the MMPA.

Response: The application was reviewed by APHIS and their comments are below. In consultation with APHIS, NMFS believes that the applicant is capable of transporting and maintaining this animal in accordance with the AWA.

The USDA Animal and Plant Health Inspection Service (APHIS)

Facilities that hold marine mammals for public display must be licensed by APHIS, and animals must be held and transported in compliance with the provisions of the AWA (7 U.S.C. 2131 – 2156). APHIS has jurisdiction under the AWA for enforcing the standards and certification requirements for the humane handling, care, treatment, and transportation of mammals. The application was forwarded to APHIS for review and comment specific to compliance of the facility with the AWA and APHIS implementing regulations.

In a letter dated February 6, 2013, APHIS had no objection to the import. APHIS confirmed that the facility is licensed under the AWA and the transportation appeared to be compliant with the AWA. In addition, APHIS confirmed that the exhibit (a complex of 4 pools) would be space compliant with the addition of this animal, but noted that the holding pool could not be used for long-term housing of animals.

Public Comments: Approximately three hundred and fifty comments were received from NGOs and private citizens in opposition to this permit application. Many of the comments were form letters or included similar information; therefore the comments are summarized here.

Comments encompassed the following arguments against the importation:

1) Opposition to Public Display: Many of the commenters expressed opposition to the capture and confinement of whales and dolphins for the purposes of public display. They argue that captivity is stressful and the needs of such highly intelligent animals cannot adequately be met. More specifically, one commenter expressed welfare concerns for the animal as a result of being separated from her pod at Kamogawa SeaWorld, acclimation to her new environment and the process of introduction to the resident population at Sea World of Texas.

Response: The MMPA provides for exceptions to the moratorium on take for the purpose of public display, including the issuance of import permits if certain criteria are met. Comments regarding captive maintenance and care are beyond the scope of issues for NMFS to consider under the MMPA and are under the purview of APHIS under the AWA. As described above, APHIS was consulted regarding the ability of the applicant to comply with the AWA in the transport and maintenance of this animal.

2) Insufficient education programs: Commenters described the education programs at marine mammal public display facilities as inadequate, inaccurate, and incomplete. Some commenters debated whether the entertainment value of these animals translated into educational value. One commenter argues that Sea World is failing in its education/conservation by not educating the public about the drive fisheries and that Sea World's past connections with the drive fisheries taint the education/conservation messaging.

Response: Section 104(c) of the MMPA provides for permits to be issued for the purpose of public display (for import and capture from the wild) provided that certain criteria are met. Section 104(c)(2)(A)(i) of the MMPA specifies that facilities must offer "a program for education or conservation purposes that is based on professionally recognized standards of the public display community." We recognize that the public display industry is largely self-regulated under the 1994 Amendments to the MMPA, including that the "professionally recognized standards" for education and conservation programs for public display have been established by the public display industry.

Sea World LLC submitted a summary of their education programs in the application. Their program is based on the professionally recognized standards established by the Association of Zoos and Aquariums (AZA) and Alliance of Marine Mammal Parks and Aquariums (AMMPA) of which Sea World of Texas is a member. A notice was published in the *Federal Register* by NMFS on October 6, 1994 (59 FR 50900) accepting the professional standards of the AZA and AMMPA as meeting the education/conservation component of the MMPA regulations. As such, NMFS is satisfied that the applicant meets public display criteria as specified in the MMPA.

3) Request contrary to purposes of the MMPA: One commenter argued that the requested permit was not consistent with the overall goal of the MMPA and that the evaluation of any application for a permit must be reviewed consistent with the intent to “protect” marine mammals and “restrict” any activity that is potentially inconsistent with the purpose of the MMPA.

Response: The MMPA specifically provides for an exception to the prohibitions for the purpose of public display, including issuing permits for the take and import of marine mammals if certain criteria are met. By providing for the exception, import for public display of marine mammals is consistent with the purposes of the MMPA, as long as the issuance criteria are met, which is the case for this permit.

4) Humaneness and Risk of Transport: Commenters noted that transport in general is stressful and suggested that transport in and of itself is inhumane. Specifically, concerns were raised regarding the lack of details provided about the transport and the potential effects to the animal.

Response: “Humane” is defined by the MMPA as “that method of taking which involves the least possible degree of pain and suffering practicable to the mammal involved.” See MMPA Section 3(4). The transport of marine mammals is under the purview of APHIS and is covered under the AWA. APHIS was consulted on this application and provided comments (see APHIS comments above). Based on previous comments received from APHIS, Special Condition B.2.c. of the permit requires that the travel plan be documented and the animal be accompanied by a health certificate signed within 10 days of the transport.

5) Regulatory Process: A comment was received indicating that the public did not have adequate time to review the permit application and submit comments. This was based on when the commenter became aware of the application on February 24, 2103.

Response: The application was received on August 28, 2012, the application was not considered complete until January 11, 2013, after receipt of additional information. The application was published in the *Federal Register* on February 4, 2013, and the application was available for public comment for 30 days in accordance with NMFS implementing regulations (50 CFR 216.33(d)(1)(iii)).

6) Origin of the animal, drive fisheries and international trade: The commenters reference the MMPA issuance criteria that “the proposed activity by itself or in combination with other activities, will not likely have a significant adverse impact on the species or stock (216.34(a)(4))” with respect to the drive fisheries and international trade. Commenters expressed concerns that the animal is of a species that is taken in the Japanese drive fisheries - a recognized mechanism for capturing animals for public display. Commenters note that only recently have Pacific white-sided dolphins been a target of the drive fisheries in response to the demand by marine mammal parks to acquire this species. Commenters argue that it is possible that this animal’s parents

were captured in the drive fisheries or that this animal was captured in the drive fisheries, and not born in captivity, as documented in the application. Commenters further express concern that upon importation of this animal, Kamogawa Sea World will simply replace the animal with another animal potentially from the drive fisheries. In addition, commenters believe that inadequate documentation was provided that prove the dolphin was captive born and that the parents of this dolphin were incidentally by-caught in fishing operations in 1994 cannot be verified, and therefore, NMFS should deny the permit application.

Response: The applicant included a statement from the General Manager and Director of Zoological Operations at Kamogawa Sea World that the animal proposed to be imported was captive born on May 3, 2006 at Kamogawa Sea World. The statement also indicated that the sire and dam of the animal proposed to be imported were incidentally captured in set nets on February 8 and February 5, 1994, respectively and transported to Kamogawa Sea World on November 8, 1994. The statement confirmed that neither the sire nor dam were captured in the drive fishery. In addition, the applicant provided specimen reports from the International Species Information System for the animal proposed to be imported and its sire and dam.

In response to public comments, Kamogawa Sea World provided certificates of possession for both of the parents as documentation that the parents were obtained incidentally and were being held in accordance with Japanese law. In addition, Kazutoshi Arai, General Manager of Kamogawa Sea World, provided a signed affidavit stating that Kamogawa Sea World had no plans to replace the animal to be imported.

The commenters did not provide any evidence to support their assertions that any of these animals were captured in the drive fisheries or that Kamogawa Sea World had recently obtained animals from the drive fisheries. Although NMFS has issued permits for the importation of marine mammals taken in drive fisheries in the past (1983 – 1992), since then, NMFS has taken another look at drive fisheries specifically and has determined that drive fisheries cannot be considered to be a humane take under the MMPA and has not issued import permits for animals from that source.

7) Departure from Long-Standing Policy: One commenter stated that no import permits had been granted in over 20 years and that such a departure from policy and practice must be fully explained prior to reversing current practices.

Response: This commenter is misinformed. The commenter was referring to information that was provided as part of a public meeting regarding an application for a permit to import recently collected marine mammals. The commenter quoted a handout regarding authorizations for capture of wild cetaceans for public display purposes. The information was that NMFS has not received an application to capture wild cetaceans from U.S. waters, or to import cetaceans that had been recently captured in foreign waters, in more than 20 years. In fact, many cetaceans that have been captive born or were long-time captive animals have been imported into the U.S. within the last 20 years.

8) Whale Meat Trade in Japan: One commenter alleged that the sale of whale jerky at Kamogawa Sea World presents a risk to the health and welfare of marine mammals in violation of the MMPA (50 CFR 216.34(a)(1)) and that the partnership of Sea World and Kamogawa Sea World legitimizes, benefits and supports an organization involved in the international sales of whale meat products from a Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) protected species. In addition, the commenter contends that the whale meat contains levels of mercury that make it unsafe for human consumption.

Response: 50 CFR 216.34(a)(1) requires that the proposed activity (i.e. the import of the dolphin) is humane and does not present any unnecessary risks to the health and welfare of marine mammals. This comment is not applicable to this issuance criterion because it has nothing to do with the proposed activity, which is the import of the dolphin.

9) CITES: Pacific white-sided dolphins are listed as Appendix II under CITES and transport of this animal will require an export permit from Japan. Commenters requested that the CITES permit be provided prior to a decision on the application.

Response: As an Appendix II listed species, the export permit must be issued by the Government of Japan and it is the Japanese government's responsibility to evaluate and issue the CITES export permit for this dolphin. CITES requires that a country's Management Authority determine that an export "...will not be detrimental to the survival of that species" (Article IV. 2. a.). Furthermore, CITES requires that a country's Management Authority is satisfied that "...any living specimen will be so prepared and shipped as to minimize the risk of injury, damage to health or cruel treatment" (Article IV. 2. c.). NMFS does not require that applicants submit their CITES permits along with their MMPA applications. The permit requires the proper CITES export permits be obtained prior to importation of this animal into the U.S. (Special Condition B.2.d.).

10) U.S. Responsibility: The U.S. was one of the first countries to display captive cetaceans and now has one of the largest public display industries in the world. The U.S. must assume responsibility for shaping the nature of this industry and its role in live cetacean trade in relation to this application, and its role in maintaining the highest standards in procuring animals for U.S. facilities.

Response: The MMPA provides NMFS with authority to issue permits for the importation of marine mammals for public display purposes (16 U.S.C. 1374; Section 104 (c)) provided that certain criteria are met. NMFS is making a decision based on this particular permit application for the importation of a single marine mammal.

11) Request for a Public Hearing: Multiple commenters requested NMFS hold a public hearing because of the public interest, primarily opposition, in this application and in order to allow for the full measure of public input on the proposed action.

Response: NMFS responds to this comment by reiterating that the MMPA provides for exceptions to the moratorium on take and import for the purpose of public display. A public hearing was not found to be warranted because documentation necessary to inform the decision could be provided in writing during the public comment period.

Applicable federal permits and consultations

Marine Mammal Protection Act (MMPA) permit: Public display permits are issued under section 104 of the MMPA and NMFS's implementing regulations at 50 CFR Part 216. These permits exempt public display of marine mammals from the MMPA's take and import prohibitions. An MMPA section 104 permit is required for the proposed activity because it will result in importation of a marine mammal.

Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES): The requested species is listed on Appendix II of CITES. Special Condition B.2.d. requires a CITES export permit prior to import. Prior to providing an export permit for an Appendix II species, a country must make findings regarding: 1) the impact of the export on the survival of that species; 2) the collection of an animal was consistent with domestic laws; and 3) the shipment of an animal is done in a way that minimizes the risk of injury, damage to health, or cruel treatment.

National Environmental Policy Act (NEPA): Public display permits are, in general, categorically excluded from the requirement to prepare an Environmental Assessment (EA) or Environmental Impact Statement (EIS) (NOAA Administrative Order Series 216-6, May 20, 1999). NMFS concluded that permit issuance is consistent with the limitations of a categorical exclusion identified in Section 6.03f.2(a) of NAO 216-6. The factors listed in Section 5.05b of NAO 216-6 were considered in evaluating the intensity of the action, including the potential cumulative impact on the protected species from the total amount of permits issued with CEs. The memorandum documenting this NEPA analysis is part of the administrative record for this permit.

Findings and Recommendation

As required by the MMPA and NMFS regulations, the information provided by the applicant demonstrates that the import will be consistent with the purposes of the MMPA and applicable regulations. The Permits Division's review of the application and other relevant information, including MMC and public comments, indicates that the transport is consistent with the MMPA's definition of "humane."

As required by the MMPA, the permit specifies: (1) the effective date of the permit; (2) the number and kinds (species) of marine mammals to be imported; (3) the location and manner in which they may be imported; and (4) other terms and conditions deemed appropriate.

For these reasons, I recommend you sign the permit, with the terms and conditions as drafted by the Permits Division.