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

GEORGIA AQUARIUM, INC., Plaintiff, v. PENNY PRITZKER, in her official capacity as Secretary of Commerce, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, and NATIONAL MARINE FISHERIES SERVICE, Defendants, and ANIMAL WELFARE INSTITUTE, WHALE AND DOLPHIN CONSERVATION, WHALE AND DOLPHIN CONSERVATION, INC. (NORTH AMERICA), EARTH ISLAND INSTITUTE, and CETACEAN SOCIETY INTERNATIONAL, Intervenor-Defendants.	)	**CIVIL ACTION NO. 1:13-CV-03241-AT**

INTERVENOR-DEFENDANTS' REPLY TO PLAINITFF GEORGIA AQUARIUM, INC.'S RESPONSE TO INTERVENOR-DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES*

CASES **PAGE(S)**

* Asterisks indicate authorities upon which Intervenor-Defendants chiefly rely.

STATUTES

REGULATORY MATERIALS

OTHER AUTHORITIES

RULES

In its Response, Georgia Aquarium continues to argue that the National Marine Fisheries Service ("NMFS")—in denying an unprecedented application for a permit under the Marine Mammal Protection Act ("MMPA") to import 18 beluga whales captured from a likely depleted stock in Russia—arbitrarily "invented new . . . legal standards," "ignored [its] own . . . policies," and "cherry-picked facts." Pl.'s Resp. at 1. In fact, NMFS applied a precautionary approach to marine mammal management, under which it gave the benefit of scientific uncertainty to a stock that is likely depleted, data-deficient, and subject to an ongoing and increasing live-capture trade, rather than an applicant for an import permit for public display.

Application of this precautionary approach and NMFS' determinations based on it are lawful and rational under the MMPA, its implementing regulations, the Administrative Procedure Act ("APA"), and the administrative record. Under the MMPA, NMFS ***may*** issue an import permit for public display, but ***only if*** such permit will be consistent with the MMPA's purposes. NMFS rationally determined that permitting the import of beluga whales captured from a stock that is likely depleted, data-deficient, and subject to an ongoing and increasing live-capture trade is "not consistent" with the purposes of the MMPA and its implementing regulations.

Herein, Intervenors respond to misstatements of law and mischaracterizations of Intervenors' arguments, contained in Georgia Aquarium's Response.

I. NMFS ACTED WITHIN THE BOUNDS OF ITS DISCRETION UNDER THE MMPA, ITS IMPLEMENTING REGULATIONS, AND THE APA WHEN IT APPLIED MULTIPLE SCIENTIFIC TOOLS IN A PRECAUTIONARY MANNER AND DETERMINED THAT GEORGIA AQUARIUM FAILED TO DEMONSTRATE THAT THE SEA OF OKHOTSK BELUGA WHALE TRADE IS SUSTAINABLE.

With regard to 50 C.F.R. § 216.34(a)(4), which required ***Georgia Aquarium*** to demonstrate that its proposed import would be ***unlikely***[1] to have a "significant adverse impact" on the Sakhalin Bay-Amur River stock of beluga whales, Georgia Aquarium refuses to accept that NMFS was not required to apply a PBR-based analysis of sustainability of the beluga whale trade in the Sea of Okhotsk. Instead, NMFS acted within the bounds of its discretion under the MMPA, its implementing regulations, and the APA when it applied multiple scientific tools in a precautionary manner to an unprecedented request to import 18 beluga whales captured from a likely depleted and data-poor stock for public display.[2] Georgia Aquarium's

[1] **Unlikely means "improbable, rare, unheard of, [or] inconceivable," a difficult standard to disprove.** The New Roget's Thesaurus in Dictionary Form 515 (Norman Lewis, ed. G. P. Putnam's Sons 1964); *see In re Polar Bear Endangered Species Act Listing and § 4(d) Rule Litig.*, 516 Fed. App'x 5, 6 (D.C. Cir. 2013) (holding that the agency "reasonably concluded that plaintiffs failed to satisfy the requirements for an enhancement permit, namely that the importation be . . . 'likely to contribute significantly to maintaining or increasing distribution or numbers necessary to ensure the survival or recovery of the species or stock.'").

[2] The four tools applied by NMFS include: (1) a PBR-based analysis of sustainability; (2) "mathematical models (or scenarios) to back-calculate [relative] abundance" and analyze population trends; (3) a decision framework for managing stocks in data-deficient situations developed by the International Council for the

Response mischaracterizes Intervenors' arguments in support of NMFS's sustainability findings and Georgia Aquarium's new criticisms of NMFS' sustainability findings are without merit.

A. NMFS Did Not Have to Apply a PBR-Based Analysis of Sustainability, and Instead Acted within the Bounds of Its Discretion Under the MMPA, Its Implementing Regulations, and the APA in Applying Multiple Scientific Tools in a Precautionary Manner to an Unprecedented Request to Import 18 Beluga Whales from a Likely Depleted, Data-Deficient Stock.

Georgia Aquarium does not contend that NMFS' interpretation of 50 C.F.R. § 216.34(a)(4) as requiring Georgia Aquarium to demonstrate that the "beluga whale trade in the Sea of Okhotsk is sustainable," AR Doc. 8998 at 17443, is unlawful. Pl.'s Resp. at 6 ("Section 216.34(a)(4) is satisfied if the level of removals is sustainable"). Instead, Georgia Aquarium continues to press upon this Court, as it pressed upon NMFS, a myopic view of sustainability under which the trade is sustainable if it "established that the removals [live captures] were below PBR." *Id.* Georgia Aquarium also continues to spend pages of briefing, *see id.* at 6–10, arguing that NMFS' statement that a PBR-based analysis of sustainability is inappropriate where "the available information does not support a conclusion that the stock is

---

Exploration of the Sea ("ICES"); and (4) an analysis of localized depletions. *See* AR Doc. 8998 at 17443, 17447, 17450, 17452.

stable or increasing," AR Doc. 8998 at 1744, is incorrect and a sufficient basis to find the entirety of NMFS' sustainability determination arbitrary.

As discussed in Intervenors' opening brief, in determining whether Georgia Aquarium satisfied its burden under § 216.34(a)(4), neither the MMPA nor its implementing regulations require NMFS to apply a PBR-based analysis of sustainability to an application for a permit to import marine mammals for public display. Intervenors' Br. at 8; *id*. at 33 ("neither the MMPA nor MMPA regulations require the use of a particular framework in demonstrating or determining the consistency of the proposed import with the purposes of the MMPA or 50 C.F.R. § 216.34(a)(4)"). As such, NMFS had discretion to apply multiple scientific tools in a precautionary manner in determining whether the beluga whale trade in the Sea of Okhotsk is sustainable.[3] Georgia Aquarium contends that this argument "is nothing more than saying [NMFS] can do whatever [it] want[s] notwithstanding the law and regulations." Pl.'s Resp. at 5. While Intervenors admit that NMFS' discretion in deciding which scientific tools to apply and how to apply those tools is

[3] In contrast, NMFS has less discretion in regulating the taking of marine mammals incidental to commercial fishing operations, as the MMPA requires use of "take reduction plan[s]" based on a PBR management scheme and formulated by "take reduction teams," 16 U.S.C. § 1387(f), and requires the input of "regional scientific review groups," *id*. at § 1386(d)(1).

not unlimited, in this case, NMFS acted within the bounds of its discretion under the MMPA and the APA, for two primary reasons.

First, the legislative history of the MMPA indicates that Congress has been very purposeful in deciding how permissive to be in allowing exceptions for the take and import of marine mammals and has decided to be less permissive in allowing the take and import of marine mammals for public display than for other purposes. Since enactment in 1972, the MMPA has prohibited the import of marine mammals for public display captured from stocks designated by NMFS as depleted *and* has required applicants for such permits to demonstrate that the import "will be consistent with the purposes of the [MMPA]." Pub. L. 92-522, § 102(b)(3), 86 Stat. 1032 (1972).[4] In contrast, Congress allowed for the issuance of permits to import marine mammals for scientific research captured from stocks designated as depleted. *Id*. While the MMPA has been amended several times to allow the take or import of marine mammals from a stock designated as depleted for certain purposes and with no requirement that an applicant demonstrate consistency with the Act's purposes, Congress has never altered these requirements for permits for public

[4] The purposes of the MMPA include preventing stocks of marine mammals from "diminishing below their optimum sustainable population[s]," and taking measures "immediately . . . to replenish any . . . stock which has already diminished below [OSP]." 16 U.S.C. § 1361(2). *See also* Intervenors' Br. at 2.

display.[5] In fact, only permits for the take and import of marine mammals for public display cannot be issued for animals captured from a stock designated as depleted.

Thus, in considering an application for a permit to import marine mammals for public display, it is consistent with the intent of Congress for NMFS to apply multiple scientific tools in a manner that is more precautionary than when considering applications for permits for other purposes. Similarly, while NMFS may apply a PBR management scheme to declining marine mammal stocks for certain categories of takes or imports, *see* Pl.'s Resp. at 7, 9, NMFS may lawfully decide not to apply the scheme to imports for public display where "available information does not support a conclusion that the stock is stable or increasing," AR Doc. 8998 at 17450.[6] While Georgia Aquarium is correct that from a biological standpoint

[5] Specifically, in 1988, Congress created a permit for enhancing the survival or recovery of a stock that allowed for the take or import of animals captured from a stock designated as depleted. Pub. L. 100-711, § 5, 102 Stat. 4755 (1988); 16 U.S.C. § 1374(c)(4)(A). Likewise, in 1994, Congress created a new regime for regulating incidental take of marine mammals by commercial fishing operations that required use of the PBR management scheme, authorized incidental take from stocks designated as depleted, and did not require a demonstration of consistency with the purposes of the MMPA. Pub. L. No. 103-238, § 118, 108 Stat. 532 (1994); 16 U.S.C. § 1387. Also in 1994, Congress required issuance of permits for the import of polar bear parts taken in sport hunts in Canada if certain requirements are met, which did not require a demonstration of consistency with the purposes of the MMPA. Pub. L. 103-238, § 5; 16 U.S.C. § 1374(c)(5)(A)(i)–(iv).

[6] In addition, Intervenors again emphasize that because NMFS reasonably determined that "the information available lead [it] to believe that removals likely

different types of removals are equal, Pl.'s Resp. at 8, this does ***not*** mean that NMFS must treat each type of removal as equal from a management standpoint. Indeed, the "primary purpose" of Congress in adding the PBR management scheme to the MMPA in 1994 was "to establish criteria for identifying and prioritizing marine mammal stocks most affected by interactions with commercial fishing operations," S. Rep. No. 95-797, at 6 (1994), *reprinted in* 1994 U.S.C.C.A.N. 518, 523, ***not*** **to provide permit applicants with a tool to justify takes after the fact.**[7]

Second, this is an unprecedented proposed import. NMFS has never been faced with an application to import for public display cetaceans captured from a foreign stock that is likely depleted,[8] poorly monitored, unscientifically managed,[9]

---

exceed PBR [level]," the Court need not decide if the scheme can be applied to a declining stock. *See* Intervenors' Br. at 26 n.20, 24–30.

[7] *See also* ECF No. 62-2 at 6 (PBR management scheme was added to the MMPA to "implement several principles . . . particularly that assessment should ***precede*** the use of resources and that managers should recognize the possible consequences of uncertainty and act accordingly") (emphasis added); *id*. at 26 (PBR level is "useful in evaluating the role of various known sources of human-caused mortality," not authorizing take, where "a population is declining for unknown reasons").

[8] The Marine Mammal Commission ("MMC") found that the stock "may well be below 60 percent of its historic carrying capacity," which is "the level that is used for distinguishing healthy from depleted [stocks]." AR Doc. 8730 at 10095.

[9] *See* AR Doc. 9174 at 21256 (comment by Intervenors discussing recommendation of International Whaling Commission's Scientific Committee that "the live-capture quota for the North-Okhotsk subzone be reduced to a level that is consistent with available scientific data and . . . that the total allowable quota [be] broken down into separate quotas for Sakhalin-Amur [and other areas]").

and subject to an ongoing and increasing live-capture trade. In addition, NMFS last permitted the import of cetaceans purposefully captured in foreign waters for public display by the applicants twenty-three years ago. AR Doc. 9141 at 20456. Under these circumstances and bedrock principles of administrative law, it was well within the bounds of NMFS' discretion under the MMPA and APA to apply multiple scientific tools in a precautionary manner to determine whether the beluga whale trade in the Sea of Okhotsk is sustainable. Particularly, it was well within the bounds of NMFS' discretion to apply the ICES decision framework in this context for the first time, "as an additional tool to examine . . . sustainability," AR Doc. 8998 at 17450, because an agency may "announc[e] and apply[] a new standard of conduct" in an informal adjudication. *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947); *accord N.L.R.B. v. Bell Aero. Co.*, 416 U.S. 267, 294–95 (1974) (unanimous).[10] Similarly, it was well within the bounds of NMFS' discretion to determine that, in the context of imports of marine mammals for public display, when there is "only one recent abundance estimate to rely on and no trend data to establish that the stock is increasing, the use of PBR as an [exclusive] index of sustainability . . . is not appropriate." AR Doc. 8998 at 17447; *Chenery*, 332 U.S. at 203 ("[a] problem may

[10] Georgia Aquarium admits that NMFS' consideration of the permit application was an informal adjudication under the APA. Pl.'s Resp. at 44 n.29.

be so specialized and varying in nature as to be impossible of capture within the boundaries of a general rule. In those situations, the agency must retain power to deal with the problems on a case-to-case basis if the administrative process is to be effective"); *Bell Aero.*, 416 U.S. at 294–95; *Gonzalez v. Reno*, 212 F.3d 1338, 1350 (11th Cir. 2000) ("agencies have latitude to 'adapt their rules and policies to the demands of changing circumstances'") (quoting *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 42 (1983)).

Moreover, the record evidences that NMFS' Office of Protected Resources, in deciding to apply multiple scientific tools in a precautionary manner, as opposed to "exclusive reliance on a comparison between PBR and live capture removals," AR Doc. 8998 at 17447, acted deliberately, consulting with and incorporating feedback from NMFS' Chief Scientist. AR Doc. 9018 at 17725–28 (July 5, 2013 e-mail from Dr. Richard Merrick, Chief Scientist for NMFS, to P. Michael Payne, Chief, Permits Division, in which Dr. Merrick states "without knowledge of the stock's trend in abundance, it is inappropriate to support further removals from this stock" and attaches a "written description of [his] logic . . . which more fully describes the logic behind this precautionary approach to marine mammal management"); AR Doc. 9019 at 17729 (July 9, 2013 e-mail from M. Payne stating "Richard [Merrick] has it [a "revised sustainability section"] now").

Therefore, the Court should uphold NMFS' application of multiple scientific tools in a precautionary manner in denying Georgia Aquarium's application.

B. Georgia Aquarium Mischaracterizes Intervenors' Arguments In Support of NMFS' Findings on Sustainability and Georgia Aquarium's New Criticisms of These Findings Are Meritless.

In the portions of its Response criticizing NMFS' findings on the sustainability of the beluga whale trade in the Sea of Okhotsk,[11] Georgia Aquarium continues to refuse to accept three basic points. First, under a precautionary approach to marine mammal management and this administrative record, it was rational for NMFS to find that Georgia Aquarium's PBR-based analysis of sustainability failed to allow for a buffer to account for removals other than live captures. Second, NMFS' estimate of historical abundance to which it applied the ICES decision framework is conservative and based on commercial hunting data, not an "apples to oranges comparison." Pl.'s Resp. at 15. Third, NMFS' concern for adverse impacts caused by localized depletions was shared by the International

[11] In this case, the APA only required NMFS to provide "a brief statement of the grounds for denial," 5 U.S.C. § 555(e); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 417 (1971), a requirement which NMFS more than satisfied by preparing a separate attachment to its final decision memorandum on the sustainability of the beluga whale trade in the Sea of Okhotsk, AR Doc. 8998 at 17443. In addition, the "substantial-evidence test" invoked by Georgia Aquarium, Pl.'s Resp. at 3, does not apply to informal adjudications. *Volpe*, 401 U.S. at 414.

Union for the Conservation of Nature ("IUCN") and further supported by follow-up research contained in the administrative record.

With regard to Georgia Aquarium's PBR-based analysis of sustainability, at its core, Georgia Aquarium disagrees with NMFS' "particular concern" that Georgia Aquarium's analysis allowed for "no buffer to account for other sources of human-caused mortality." AR Doc. 8998 at 17445. Georgia Aquarium argues that "a buffer is nothing more than an attempt to distract the Court from the fact that [NMFS'] own evidence shows no removals in addition to public display." Pl.'s Resp. at 10–13. In fact, under the precautionary approach to marine mammal management and this administrative record, it was rational to require such a buffer. **It is undisputed that in four years (2005, 2010, 2011, and 2012), "the entire calculated PBR allowance [of 29 to 30] was taken in live captures."** AR Doc. 8998 at 17445; *accord* Intervenors' Br. at 11; AR Doc. 9211 at 21550.[12] This fact alone was an adequate basis for NMFS' to determine that "the application does not demonstrate the sustainability [of the trade]," AR Doc. 8998 at 17447, as it is a key concept of the PBR management scheme that when human-caused mortality is greater than the

[12] In 2011, the year in which 11 of the 18 beluga whales at issue were captured, AR Doc. 8927 at 14286, the PBR level was exceeded, Intervenors Br. at 11 (33 captures).

PBR level over several years,[13] the stock will likely decline, and in a period of time become or remain depleted with a fair probability, *see* Intervenors' Br. at 6–7.[14]

In addition, the administrative record adequately supports NMFS' finding that there is a "likelihood that some unquantifiable level of additional human-caused mortality is occurring," AR Doc. 8998 at 17447, as there are numerous threats facing beluga whales of the Sakhalin-Amur stock (subsistence harvest,[15] accidental

---

[13] Nowhere do Intervenors state, as Georgia Aquarium contends, *see* Pl.'s Resp. at 31–32, that "a one-year exceedance of PBR causes stock depletion." Intervenors stated that "if estimated human-caused mortality exceeds a stock's PBR level in one year, it is a 'warning' that that the mortality could lead to depletion of the stock," and thus is an unsustainable level of mortality. *See* Intervenors' Br. at 6.

[14] This key concept comes from the Wade paper, ECF No. 62-2 at 29–30 ("if mortality is consistently estimated to be greater than the PBR over many years, then the population will become depleted"), which Intervenors filed to assist the Court in understanding the PBR management scheme as it relates to NMFS' sustainability findings. This concept "not subject to reasonable dispute," by NMFS or Georgia Aquarium, as the Wade paper—written by a NMFS scientist—is the seminal paper on the PBR management scheme. *See* Fed R. Evid. 201(b)(2).

[15] With regard to actual subsistence harvest, Georgia Aquarium ignores the statement in Shpak (2013), discussed in Intervenors' opening brief, *see* Intervenors' Br. at 35 n.31, that in "Priamurye (Sakhalinsky to Udskaya bay) **around 20–30 whales can be taken annually** by locals," AR Doc. 9221 at 21548; *see also id*. at 21547 ("Priamurye, the area from the Amur to the Uda river"). In addition, with regard to potential subsistence harvest, the quota includes a large portion of the Sea of Okhotsk because "in the Russian Far East, including Shantar-Sakhalin region of the Okhotsk Sea, the beluga harvest by local residents has a long history." ECF No. 83-1 at 3. Georgia Aquarium's belief, *see* Pl.'s Resp. at 12 n.9, that only one region (Shantar) continues to have subsistence harvest, while other regions such as the Sakhalin-Amur that historically had subsistence harvest no longer have such harvest is plausibly inaccurate. Thus, it was precautionary for NMFS to "assume[] that some level of subsistence hunting in the region is occurring." AR Doc. 8998 at 17446.

drowning,[16] incidental take in fishing operations and vessel strikes,[17] climate change, and pollution), Intervenors' Br. at 27–28; AR Doc. 8915 at 13784–87 (IUCN analysis of threats). NMFS adequately explained that it chose to be precautionary and credit evidence indicating that there is likely additional human-caused mortality rather than conflicting evidence given that "monitoring of other types of take in this region is low, if existent at all," AR Doc. 8998 at 17445—**all that was required of NMFS under the APA**, *see* Richard J. Pierce, Jr. & Kristine E. Hickman, Fed. Admin. Law 343 (2010); *Stone & Webster Const., Inc. v. U.S Dep't of Labor*, 684 F.3d 1127, 1133 (11th Cir. 2012) (under APA's substantial evidence test: (1) "substantial evidence exists even when two inconsistent conclusions can be drawn from the same evidence," and the reviewing court is prevented from "deciding the facts anew . . . or re-weighing the evidence"). Given the likelihood of some level of additional human-caused mortality, and that if the five-year average of live captures from 2007–2011 is used (22.4) the annual removal of just six to seven additional

[16] With regard to accidental drowning, Georgia Aquarium ignores the statement in Shpak (2013) that "all whales accidentally killed during the captures must be considered as removed, i.e. included in the quota." AR Doc. 9221 at 21553.

[17] With regard to incidental take and vessel strikes, Georgia Aquarium ignores Shpak (2013), which states that "bycatch in salmon traps or gillnets and poachers' sturgeon nets as well as ship strikes—is nearly impossible to be estimated . . . due to rejection to report by the persons implicated in such cases, the vast scarcely populated area and impossibility to arrange regular coastal patrols." AR Doc. 9221 at 21551.

animals would exceed the PBR level of 29, it was rational for NMFS to determine that it is ***not unlikely, i.e., that it is possible or plausible***, that removals of beluga whales from the Sakhalin-Amur stock exceeded the PBR level in several years. AR Doc. 8998 at 17449 ("based on an integration of all the available data, we believe that total removals . . . have exceeded PBR . . . on a regular basis").[18]

Given the lack of a buffer to account for this level of additional human-caused mortality, and the upward trend in live captures, *see* Intervenors' Br. at 11, 43, NMFS rationally determined that Georgia Aquarium's comparison between PBR and live capture removals "does not demonstrate the sustainability of the [trade]," AR Doc. 8998 at 17447.[19] In making this determination, NMFS specifically "recognize[d] the limitations on data about sources of human-caused mortality," AR Doc. 8998 at 17447, but, in the face of such scientific uncertainty, lawfully decided to apply a precautionary approach to marine mammal management, under which "absence of evidence is not evidence of absence," a principle stressed by Intervenors

[18] If the four-year average of annual removals from 2008–2011 is used (28), which is appropriate under NMFS' Guidelines for Assessing Marine Mammal Stocks, *see* Intervenors' Br. at 28 n.22, the annual removal of ***just one to two*** additional animals would exceed the PBR level, *see id*.

[19] Likewise, the IUCN Panel stated that "any animals taken by humans, including those killed or injured in fishing gear, struck by vessels, or accidentally drowned during live-capture operations, should be considered when evaluating the sustainability of any level of intentional removals." AR Doc. 8915 at 13786.

in their comments, *see* AR Doc. 8750 at 9329, and recognized by federal courts in several contexts.[20] **Moreover, NMFS' determination that it "cannot discount the likelihood" that there are additional sources of human-caused mortality that would exceed any buffer is entitled to considerable deference because NMFS made predictions within its expertise about a data-deficient stock, *see* AR Doc. 8998 at 17445, and sources of human-caused mortality such as climate chance and pollution that are currently difficult to quantify.** AR Doc. 8998 at 17446 (noting that "increased human activity" due to climate change has "the potential to impact habitat for beluga whales . . . but predicting the type and magnitude of the impacts if any, is difficult at this time"); AR Doc. 8998 at 17447 (noting the IUCN Panel's concern with mortality from pollution but stating that "there is no basis for integrating pollution into an assessment of biological removal"). *Baltimore Gas and Elec. Co. v. Natural Resources Def. Council, Inc.*, 462 U.S. 87, 103 (1983) (when an agency "is making predictions, within its area of special expertise, at the frontiers of science . . . a reviewing court must generally be at its most deferential").

With regard to NMFS' application of the ICES decision framework as "an additional tool" to examine sustainability, AR Doc. 8998 at 17450, Georgia

[20] *E.g.*, *United States v. Acosta-Gallardo*, 656 F.3d 1109, 1117 (10th Cir. 2011) (no *Brady* violation because "absence of evidence is not evidence of absence").

Aquarium continues to argue that NMFS' use of 13,000 to 15,000 animals as a "highly conservative historical maximum" abundance estimate for the stock in applying the ICES decision framework is "flawed." Pl.'s Resp. at 18. Specifically, Georgia Aquarium argues that this abundance estimate is flawed because NMFS' statement that "the population had to be at least 13,000–15,000 during th[e] period [of commercial hunting from 1916–1937]" is based on an erroneous statistic that the total removal during this time period was "over 20,000 whales (average 1,000 whales per year for 20 years)." AR Doc. 8998 at 17452.

As an initial matter, while Georgia Aquarium contends that NMFS, in making this statement, relied on an appendix to a version of Shpak (2011) that is not in the record, Pl.'s Resp. at 18; ECF No. 83-1, it appears that NMFS in fact relied on Shpak (2013) (which is AR Doc. 9221 and cites to the appendix), given the similarity between the language in the decision memorandum and Shpak (2013),[21] and thus that NMFS inadvertently cited to Shpak (2011) in its decision memorandum. Nevertheless, while the statistic in Shpak (2013) that "the average annual take was

[21] NMFS decision memorandum states: **"[t]he average annual take** in this harvest **was approximately 1,000 beluga** whales **ranging from 607**–2,817 over a 20 year period (Shpak et al. 2011)." AR Doc. 8998 at 17452 (emphasis added). Similarly, Shpak (2013) states: **"[t]he average annual take was approximately 1000 belugas ranging from 607** (in 1917) to **2817** (in 1933) whales (Shpak *et al.*, 2011, Appendix 4)." AR Doc. 9221 at 21548 (emphasis added).

approximately 1000 belugas" may only apply to a 13-year period, rather than a 20-year period, an average annual removal of 1,000 animals over a 13-year period (more than 13,500 animals based on the data discussed in this extra-record appendix, ECF No. 83-1 at 3–4) supports NMFS' statement that "a highly conservative historical maximum" abundance estimate is 13,000–15,000 animals. In addition, the appendix states that "there [are] no data for [annual removals] for 1931–1932, but in 1933 the harvest reached a peak of 2817 whales," *id*. at 4, and that the removals in 1930 were 1481, which suggests that there may have been substantial removals in 1931 and 1932. If the removals were also 1,000 per year in 1931 and 1932, the total removals from 1916 to 1937 would be more than 15,500 animals. Thus, again, this new criticism of NMFS' sustainability findings is meritless.

Finally, with regard to NMFS' concern for adverse impacts caused by localized depletions, Georgia Aquarium again seeks the benefit of scientific uncertainty and falsely accuses Intervenors of misrepresenting the record. Pl.'s Resp. at 28–30. Specifically, Georgia Aquarium argues that Intervenors' opening brief overstates the IUCN Panel's statements regarding this issue. Intervenors, however, accurately stated that the IUCN Panel had a "concern," *compare* Intervenors' Br. at 30, *with* AR Doc. 8915 at 13789, about "possible 'local depletions,'" AR Doc. 8915 at 13792, given the "fidelity of belugas to summering

sites, which elsewhere is known to be high at the level of the bay or estuary," *id*. at 13789, and that "the same live-capture sites are used repeatedly, year after year," *id*. at 13792. Likewise, while Georgia Aquarium is correct that the IUCN Panel recommended additional research on possible localized depletions, *id*. at 13792, under the MMPA, its implementing regulations, and the APA, NMFS may rationally give the benefit of such scientific uncertainty to the stock, rather than a public display permit applicant, as Georgia Aquarium bore the burden of proving that the beluga whale trade in the Sea of Okhotsk is sustainable.[22] Moreover, Georgia Aquarium ignores that Shpak followed the IUCN Panel recommendation and in Shpak (2013) confirmed that localized depletions are a serious concern:

> Based on our observations and multiple recaptures of well-recognized belugas . . . **we may conclude that the beluga groups in Sakhalinsky [B]ay may have fixed feeding 'slots' along the coast and demonstrate a 'fine-scale' site-fidelity.** Several catching teams working simultaneously during a prolonged period of time in the southwestern part of Sakhalinsy Bay, with high probability, will cause a chronic stress in resident groups.

[22] For this reason, the Court should also reject Georgia Aquarium's dismissal of NMFS' and the IUCN Panel's concern, AR Doc. 8998 at 17452; AR Doc. 8915 at 13789, about impacts to matrilines caused by a "slight preponderance of females in the catches," AR Doc. 8915 at 13789. In addition, while Georgia Aquarium asserts that "matriarchal adult females that are 'socially important' in the transmission of cultural information were not collected," Pl.'s Resp. at 30, 10 of the 18 beluga whales are female (one 9.5 years old when captured; four 5.5 years old when captured), AR Doc. 8927 at 14286, and Georgia Aquarium has no way of knowing whether these females were socially important.

AR Doc. 9221 at 21551 (emphasis added); *see* Intervenors' Br. at 35.

II. GEORGIA AQUARIUM OFFERS NO NEW ARGUMENT FOR WHY NMFS' INTERPRETATION OF 50 C.F.R. § 216.34(a)(7) IS NOT ENTITLED TO *AUER* DEFERENCE, AND IGNORES EVIDENCE AND ITS OWN ADMISSION THAT A DIRECT OUTCOME OF THE PROPOSED IMPORT COULD BE REPLACEMENT TAKES.

With respect to 50 C.F.R. § 216.34(a)(7), which required ***Georgia Aquarium*** to demonstrate that the proposed import is ***unlikely*** to result in the taking of beluga whales beyond the 18 proposed for import, Georgia Aquarium offers no new argument for why NMFS' interpretation of this criterion is "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997). On the merits of this criterion, Georgia Aquarium continues to ignore evidence in the administrative record, and its own admission, that a "direct outcome" of the proposed import will likely be replacement takes by the Marchenko live-capture operation for Utrish Dolphinarium, Ltd.

A. Congress Intended NMFS to Regulate U.S. Facilities When Sourcing Marine Mammals, and NMFS May Rely on a Regulatory History of 50 C.F.R. § 216.34(a)(7) in Interpreting this Criterion.

NMFS interpreted 50 C.F.R. § 216.34(a)(7) as requiring Georgia Aquarium to demonstrate that "the foreign shipping facility will not replace the [18 beluga whales] with additional animals of the same species." AR Doc. 8998 at 17424. In its Response, Georgia Aquarium offers no new argument for why NMFS'

interpretation is inconsistent with a regulation that states that a permit applicant must demonstrate that a proposed import "will not likely result in the taking of marine mammals or marine mammal parts beyond those authorized by the permit." 50 C.F.R. § 216.34(a)(7). Instead, Georgia Aquarium continues to pursue an illogical argument that NMFS' interpretation is an extraterritorial application of the MMPA and continues to argue, incorrectly, that NMFS and this Court may not rely on the regulatory history of 50 C.F.R. § 216.34(a)(7) in interpreting this criterion.

On the extraterritoriality argument, NMFS does not "want Russia and/or its nationals to agree not to collect and export beluga whales to other countries before . . . grant[ing] a permit application," as Georgia Aquarium contends, Pl.'s Resp. at 34, but rather does not want ***Georgia Aquarium*** through this proposed import to participate in and contribute to an ongoing and increasing live capture trade targeting the likely depleted Sakhalin-Amur stock. **Georgia Aquarium continues to ignore that multiple provisions of the MMPA authorize NMFS to deny privileges and exemptions when inconsistent with the purposes and conservation goals of the MMPA.** *See, e.g.*, 16 U.S.C. § 1371(a)(3)(A) (prohibiting the granting of a waiver of the moratorium on importation by U.S. facilities "unless [NMFS] certifies that the program for taking marine mammals in the country of origin is consistent with the provisions and policies of th[e] [MMPA]."); *id*. at § 1371(a)(2)(A) (Secretary of the

Treasury "shall insist on reasonable proof from the government of any nation from which fish or fish product will be exported to the United States of the effects on ocean mammals of the commercial fishing technology in use for such fish or fish products exported from such nation to the United States"). In fact, the MMPA mandates that NMFS, prior to issuing a permit to import marine mammals for public display, determine whether the manner in which the foreign government allowed foreign citizens to capture the marine mammal at issue was humane. *Id*. at §§ 1372(b)(4), 1374(b)(2)(B). It is clear that Congress intended NMFS to consider the relationship between import permit requests by U.S. facilities and "actions by and between foreign governments and foreign citizens." Pl.'s Resp. at 34.

In continuing to argue that NMFS applied the MMPA extraterritorially, Georgia Aquarium grossly misinterprets key cases. In *United States v. Mitchell*, 553 F.2d 996, 997 (5th Cir. 1977), the court simply held that the MMPA's "criminal prohibitions of the Act do not reach conduct in the territorial waters of a foreign sovereignty." In addition, the court noted that Congress, in passing the MMPA, intended to regulate where U.S. facilities source marine mammals for import. *Id*. at 1004. Likewise, Georgia Aquarium refuses to accept that the court in *Animal Welfare Inst. v. Kreps*, 561 F.2d 1002, 1010 (D.C. Cir. 1977), stated that Congress, in passing the MMPA, "deci[ded] that denial of import privileges is an effective

method of protecting marine mammals in other parts of the world." In addition, Georgia Aquarium fails to distinguish *Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237 (11th Cir. 2000) and *Environmental Defense Fund, Inc. v. Massey*, 986 F.2d 528 (D.C. Cir. 1993). NMFS' concern about the likelihood of replacement takes and increased demand caused by an import ***into the United States*** is "akin to the myriad laws directing federal decisionmakers to consider particular factors before extending aid or engaging in certain types of trade." *Massey*, 986 F.2d at 533. There is "no support" for Georgia Aquarium's proposition that requiring it to consider the direct outcome of its proposed import is extraterritorial application of the MMPA "merely because the effects of its compliance [c]ould be felt in [Russia]." *Id*. at 536.[23]

Offering no new arguments for why NMFS' interpretation of 50 C.F.R. § 216.34(a)(7) is not entitled to *Auer* deference, Georgia Aquarium continues to argue that NMFS and this Court may not rely on the regulatory history of 50 C.F.R. § 216.34(a)(7) in interpreting this criterion. *See* Pl.'s Resp. at 38 ("Defendant' reliance on this never-finalized proposed rule is continuously misplaced"). The case law is clear that NMFS may rely on the regulatory history in interpreting its

[23] Georgia Aquarium misinterprets several other cases. For example, contrary to Georgia Aquarium, *see* Pl.'s Resp. at 26 n.19, in *Animal Protection Inst. v. Mosbacher*, 799 F. Supp. 173 (D.D.C. 1992), the court declined to address whether NMFS must ascertain the OSP of a stock prior to issuing an import permit for public display, presumable because the stock at issue was well within OSP. *Id*. at 180.

regulation and the Court may rely on the regulatory history in deciding whether NMFS' interpretation is entitled to deference. *See* Intervenors Br. at 22 (discussing cases); *see also, e.g.*, *Howmet Corp. v. EPA*, 614 F.3d 544, 550 (D.C. Cir. 2010) ("we look to the [agency's] overall regulatory framework . . . as well as the regulatory history of the agency's [regulation]" in deciding whether an interpretation of an ambiguous regulation is entitled to deference).

In addition, Georgia Aquarium argues that "the only possible interpretation [of the regulatory history] is that the reference to requested replacement takes [in the transcript of the hearing on the proposed regulations] is a reference to replacement takes by U.S. citizens." Pl.'s Resp. at 38. The transcript is clear, however, that NMFS was also concerned with replacement takes by foreign capture operations and/or foreign shipping facilities. *See* ECF No. 60-2 at 43 (explaining that the intent of the criterion is to address situations where "it can be reasonably seen that there is some type of direct outcome of the issuance of the permit and the take **or import** allowed by the permit, or, in this case, it's [sic] **import or export,** that would likely result in the replacement takes or otherwise increase demand"; "while permits . . . will be issued for certain purposes . . . we're not interested in an outcome of those permits to involve increased take") (emphasis added). Nowhere in the transcript do

the NMFS officials limit "replacement takes" or "increased take" to mean "increased applications to NMFS to take," as Georgia Aquarium argues. Pl.'s Resp. at 38.

B. Georgia Aquarium Ignores Evidence in the Administrative Record and Its Own Admission that a Direct Outcome of the Proposed Import Could Be Replacement Takes.

On NMFS' application of its interpretation to the administrative record, Georgia Aquarium again fails to recognize that it bore the burden of providing "assurance that an additional 18 whales would not be captured in the future in place of the 18 whales requested for import." AR Doc. 8998 at 17424; *see* Pl.'s Resp. at 41 ("Defendants do not offer any evidence"; "neither Defendants nor Intervenors offer a shred of evidence"). Nevertheless, Georgia Aquarium ignores evidence in the administrative record from which NMFS rationally determined that a direct outcome of its proposed import "could be" the capture of an additional 18 beluga whales. AR Doc. 8998 at 17424. First, Utrish Dolphinarium, Ltd., has captured and sold Sakhalin-Amur beluga whales to supply oceanaria since 1989. AR Doc. 8915 at 13784. Second, as the MMC stated, the strong international demand to capture animals from this stock "almost certainly will continue through the foreseeable future." AR Doc. 8730 at 10098.

Moreover, Georgia Aquarium admits that it could not provide the required assurance from Utrish Dolphinarium, Ltd., and a direct outcome of the proposed

import could be replacement takes by one of the now three capture operations, AR Doc. 9221 at 21550, for Utrish Dolphinarium, Ltd. Specifically, Georgia Aquarium filed with this Court a declaration from the Director of Utrish Dolphinarium, Ltd., Dr. Lev Mukhametov, AR Doc. 8927 at 14292, in which Dr. Mukhametov swears that "if the . . . United States does not give permission for the export . . . . Most likely, these beluga whales will be sold to the Oceanariums of China," ECF No. 20-2.[24]

III. NMFS WAS NOT BOUND TO FOLLOW ITS PRIOR DEFINITION OF NURSING BECAUSE IT WAS A NONBINDING POLICY STATEMENT, AND GEORGIA AQUARIUM OFFERS NO NEW ARGUMENT FOR WHY NMFS' INTERPRETATION OF 16 U.S.C. § 1372(b)(2) IS NOT ENTITLED TO *CHEVRON* DEFERENCE.

Finally, with respect to 16 U.S.C. § 1372(b)(2), which required Georgia Aquarium to demonstrate that no beluga whale was "nursing" when taken, Georgia Aquarium continues to argue incorrectly, Pl.'s Resp. at 42–43, that NMFS was bound to follow a prior definition of "nursing" in which it stated that "for purposes of this policy, 'nursing' means nursing which is obligatory for the physical health and survival of the nursing animal," 40 Fed. Reg. 17,845, 17,846 (Apr. 23, 1975).

[24] While Georgia Aquarium argues that "no future U.S. beluga imports are likely if the Aquarium's permit is granted," Pl.'s Resp. at 41, NMFS made no such finding, *see* AR Doc. 8999 at 17479 ("***If*** a self-sustaining population results from the import, ***presumably*** there would be no further need for import of beluga whales into the U.S. in the foreseeable future.") (emphasis added). *See also* Intervenors' Br. at 42 n.35 (arguing that future applications to import beluga whales are in fact likely).

In addition, Georgia Aquarium offers no new argument for why NMFS' interpretation of § 1372(b)(2) as restricting the import of marine mammals to animals taken after the age at which a member of the species is likely fully independent from its mother is not entitled to *Chevron* deference.

Under the APA, a policy statement is "merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications [and] announces the course which the agency intends to follow in future adjudications." *Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 37 (D.C. Cir. 1974). A policy statement, however, "does not establish a 'binding norm.' It is not finally determinative of the issues or rights to which it is addressed." *Id*. at 38; *see also* Pierce, *supra* p. 13 at 469 ("policy statements are not legally binding on members of the public or on the courts"). Accordingly, an agency may apply a different policy in a future adjudication "if the agency adequately explains the reasons for a reversal of policy." *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005). An agency statement is a policy statement where it: (1) does "not have a present effect," and (2) "leaves the agency and its decision-makers free to exercise discretion." *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 946 (D.C. Cir. 1987). In conducting this analysis, the Court "give[s] some . . . deference to an agency's characterization of its statement." *Id*.

In this case, NMFS' prior definition of "nursing" under § 1372(b)(2) was a nonbinding policy statement. First, NMFS characterized the statement as a nonbinding policy statement: "this policy would be utilized by the NMFS in considering, ***where appropriate***, permit applications." 40 Fed. Reg. at 17,845 (emphasis added). Second, the statement applied to future permit applications. *Id.* Third, the statement left NFMS free to exercise discretion, as NMFS stated "[NMFS] will ***where appropriate***, issue a permit . . . for the intentional taking of marine mammals which are . . . nursing at the time of taking." *Id.* at 17,846 (emphasis added). Thus, in considering Georgia Aquarium's permit application, NMFS was free to reexamine its prior definition of nursing under § 1372(b)(2), particularly in light of the D.C. Circuit's holding in *Animal Welfare Institute v. Kreps*, 561 F.2d 1002, 1011 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1013, that the prior definition is contrary to the "categorical [and] unqualified" nursing prohibition, *id.*, a case which Georgia Aquarium fails to address in its Response, Pl.'s Resp. at 42–45.[25]

NMFS adequately explained the reasons that it "believe[s] that it is the intent of the MMPA to restrict importation of marine mammals to those individuals that

[25] When proposed, the MMC criticized this prior definition of nursing. 40 Fed. Reg. at 17,846 ("we [the MMC] are aware of no rational basis for concluding that nursing in fact is not obligatory for the health and development of the nursing animal in a sense that such behavior is essential for maturing and reproducing successfully").

were taken after such time that they were considered to be independent of their mothers." AR Doc. 8998 at 17426. NMFS explained that this interpretation is consistent with and a practical interpretation of the unqualified nursing prohibition because "it is difficult to visually determine when an animal is fully independent if it is still nursing to some extent." *Id*. Georgia Aquarium offers no new argument for why this interpretation is not entitled to deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Rather, Georgia Aquarium continues to argue that visual examinations before and after the collections prove that none of the beluga whales were nursing when captured, which are not relevant under NMFS' interpretation, as it relies on a comparison of a marine mammal's estimated age at collection with the age at which a member of the species is likely fully independent from its mother. *See* Pl.'s Resp. at 43.[26]

Georgia Aquarium argues that NMFS' application of its interpretation is arbitrary because "there is no magical date on which nursing ends. In fact,

[26] Even if visual examinations were relevant, only an examination of the contents of a beluga whale's stomach with a lavage is definitive of the "individual circumstances of each animal," Pl.'s Resp. at 43, with respect to nursing, *see* AR Doc. 9219 at 21509 (discussing stomach content analyses); AR Doc. 8934 at 16130–32 (same), which was not conducted by Georgia Aquarium. In addition, while the MMC stated that "it does not appear that any of the animals that would be imported was [sic] nursing . . . at the time of taking," AR Doc. 8730 at 10096, the MMC does not explain its reasoning. It is possible that the MMC simply accepted Georgia Aquarium's statements regarding visual examinations.

Defendants admit juveniles ***can be*** completely independent by age one and one half." Pl.'s Resp. at 43 (emphasis added). Georgia Aquarium fails to recognize that the converse of its argument, which is that at "1.5 years of age, beluga whale calves are likely not independent from their mothers," is exactly why NMFS' interpretation is consistent with and a practical interpretation of the MMPA's unqualified nursing prohibition. As Intervenors argued in their opening brief, Intervenors' Br. at 47, under the MMPA and the APA, NMFS has discretion "as a practical matter to fix a date," which allows the import of a few marine mammals that may or may not be nursing, *see Kreps*, 561 F.2d at 1011 n.60. Georgia Aquarium argues that NMFS' date of 1.5 years of age is arbitrary based on a statement in one reference document that lactation in beluga whales lasts "from 6 to 8 months," but, again, NMFS adequately explained that it chose to credit the stronger evidence that "supports a conclusion that beluga calves are nursed for two years and may continue to associate with their mothers for a considerable time thereafter," AR Doc. 8998 at 17426; *see* Intervenors' Br. at 48 n.38 (quoting three publications cited in decision memorandum), all that was required of NMFS under the APA. Pierce, *supra* p 13, at 343; *Stone & Webster Const., Inc. v. U.S Dep't of Labor*, 684 F.3d 1127, 1133

(11th Cir. 2012).[27] Thus, NMFS rationally determined that Georgia Aquarium failed to demonstrate that five of the beluga whales captured in 2010, at the estimated age of 1.5 years old, were not nursing when captured. [28]

CONCLUSION

For the foregoing reasons, and those in their opening brief, the Court should find that NMFS rationally and lawfully denied the application as a matter of law.

---

[27] Intervenors again note that Georgia Aquarium's ***own application*** stated that "disassociation of calves and mothers [is] at about two years old"); *see also* AR Doc. 8934 at 16131 (a NMFS study submitted by Georgia Aquarium that states that "[c]alves depend on their mother's milk as their sole source of nutrition and lactation lasts up to 23 months (Braham 1984), though young whales begin to consume prey as early as 12 months of age (Burns and Seaman 1986)").

[28] If the Court finds for Georgia Aquarium, remand is appropriate for two reasons. First, if the Court holds that NMFS' statutory and regulatory interpretations are not entitled to *Chevron* or *Auer* deference, the Court should give NMFS an opportunity to formulate and seek public comment on new interpretations. Second, if the Court holds that NMFS' determinations under 50 C.F.R. § 216.34(a)(4) & (7) are arbitrary based on the administrative record, the Court should remand the permitting decision to NMFS so that the agency may receive and examine the significant new evidence on the sustainability of the beluga whale trade in the Sea of Okhotsk that has accrued since denial of the permit application. *See, e.g.*, Br. of Amici Curiae Defenders of Wildlife and the Humane Society of the United States at 20–21, ECF No. 63-1 at 25–26 (discussing Shpak (2014), which reports further increases in live captures in 2013 and confirms accidental drownings during live capture operations); *accord* Br. of Amici Curiae of Dr. Sylvia Earle, et al. at 5, 24-25, ECF No. 66-1 at 10, 29–30 (discussing significance of Shpak (2014)); *Zhou Hua Zhu v. U.S. Attorney Gen.*, 703 F.3d 1303, 1315 (11th Cir. 2013) (citing *N.L.R.B. v. Enter. Ass'n, Local 638*, 429 U.S. 507, 522 n.9 (1977) ("When an administrative agency has made an error of law, the duty of the Court is to correct the error of law committed . . . and after doing so to remand the case to the (agency) so as to afford it the opportunity of examining the evidence and finding the facts as required by law")).

Respectfully submitted,

Date: **June 30, 2015**

s/ Tyler J. Sniff, Esq.

Tyler J. Sniff
Admitted pro hac vice
Georgia Bar No. 403125
Donald D. J. Stack
Georgia Bar No. 673735
STACK & ASSOCIATES, P.C.
260 Peachtree Street, NE, Suite 1200
Atlanta, GA 30303
Telephone: (404) 525-9205
Facsimile: (404) 522-0275
E-mail: tsniff@stackenv.com
dstack@stackenv.com

Attorneys for Intervenor-Defendants

CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1(D) of the U.S. District Court for the Northern District of Georgia, I hereby certify that the foregoing **INTERVENOR-DEFENDANTS' REPLY TO PLAINITFF GEORGIA AQUARIUM, INC.'S RESPONSE TO INTERVENOR-DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT** has been prepared with Times New Roman font (14 point) in accordance with Local Rule 5.1(C).

Date: **June 30, 2015**

s/ Tyler J. Sniff, Esq.

Admitted pro hac vice
Georgia Bar No. 403125
STACK & ASSOCIATES, P.C.
260 Peachtree Street, NE, Suite 1200
Atlanta, GA 30303
Telephone: (404) 525-9205
Facsimile: (404) 522-0275
E-mail: tsniff@stackenv.com

Attorney for Intervenor-Defendants

CERTIFICATE OF SERVICE

I, Tyler J. Sniff, hereby certify that on the date indicated below I electronically filed the foregoing with the Clerk of the Court for filing and uploading to the CM/ECF system, which will automatically send e-mail notification of such filing to the following attorneys of record:

Daniel F. Diffley
Georgia Bar No. 221702
Meaghan Goodwin Boyd
Georgia Bar No. 142521
ALSTON & BIRD LLP
1201 West Peachtree Street
Atlanta, GA 30309
Telephone: (404) 881-4703
Facsimile: (404) 253-8572
E-mail: dan.diffley@alston.com
meahan.boyd@alston.com

George J. Mannina, Jr.
NOSSAMAN LLP
1666 K Street, N.W., Suite 500
Washington, DC 20006
Telephone: (202) 887-1491
Facsimile: (202) 466-3215
E-mail: gmannina@nossaman.com

Ashley J. Remillard
NOSSAMAN LLP
18101 Von Karman Avenue
Suite 1800
Irvine, CA 92612
Telephone: (949) 477-7635
Facsimile: (949) 833-7878
E-mail: aremillard@nossman.com

Attorneys for Plaintiff Georgia

Clifford E. Stevens, Jr.
U.S. DEPARTMENT OF JUSTICE
P.O. Box 7611
Washington, DC 20044
Telephone: (202) 353-7548
E-mail: clifford.stevens@usdoj.gov

Lisa D. Cooper
U.S. ATTORNEY'S OFFICE FOR THE NORTHERN DISTRICT OF GEORGIA
600 U.S. Courthouse
75 Spring Street, S.W.
Atlanta, GA 30303
Telephone: (404) 581-6249
E-mail: lisa.cooper@usdoj.gov

Attorneys for Federal Defendants

Aquarium, Inc.

Date: **June 30, 2015**

s/ Tyler J. Sniff, Esq.
Admitted pro hac vice
Georgia Bar No. 403125
STACK & ASSOCIATES, P.C.
260 Peachtree Street, NE, Suite 1200
Atlanta, GA 30303
Telephone: (404) 525-9205
Facsimile: (404) 522-0275
E-mail: tsniff@stackenv.com

Attorney for Intervenor-Defendants