



**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.)

CIVIL ACTION NO.
1:13-CV-03241-AMT

**MEMORANDUM IN SUPPORT OF PROPOSED INTERVENOR-
DEFENDANTS' MOTION TO INTERVENE**



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Olga Shpak & Dmitri Glazov, *Review of the Recent Scientific Data on the Okhotsk Sea White Whale (Delphinapterus leucas) Population Structure and Its Application to Management*, J. CETACEAN RESEARCH & MGMT. (2013), available at <https://events.iwc.int/index.php/scientific/SC65a/paper/viewFile/394/357/SC-65a-SM23>23

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Animal Welfare Institute, Whale and Dolphin Conservation, Whale and Dolphin Conservation, Inc. (North America), Cetacean Society International, and Earth Island Institute (“Movants”) submit this memorandum in support of their Motion to Intervene. In this case, Plaintiff Georgia Aquarium, Inc. seeks a vacatur of a decision by the National Marine Fisheries Service (“NMFS”) denying its application for a Marine Mammal Protection Act (“MMPA”), 16 U.S.C. § 1361 et seq., permit to import eighteen beluga whales captured in the Sea of Okhotsk from a likely depleted stock of beluga whales. Plaintiff also seeks an order mandating issuance of the permit, which would lead to the first direct import of purposefully live-captured cetaceans¹ to the United States for public display in over twenty years. Because this import would impair the collective efforts of Movants over decades to conserve and protect cetaceans in their wild habitats and in captivity, and would impair the conservation, aesthetic, economic, and professional interests of their members in the same, they respectfully request that the Court grant the motion and permit them full participation as defendants.

Movants are entitled to intervene as of right under Federal Rule of Civil Procedure 24(a)(1) because the MMPA grants them a broad right to seek judicial review of MMPA permitting decisions and under Rule 24(a)(2) because the

¹ *Cetacea* is a taxonomic order that comprises the marine mammals commonly known as whales, dolphins, and porpoises.

disposition of this action may practically impair their ability to protect their substantial interests in the import that NMFS does not adequately represent. Alternatively, Movants request to permissively intervene under Rule 24(b).

STATEMENT OF FACTS

Thirty-three beluga whales live in captivity in the United States, thirteen of which were captured from the wild for public display (all from the Canadian Arctic in the 1980s and 1990s). The remaining captive beluga whales were born in captivity. That live-captured beluga whales account for less than half of all beluga whales in captivity in the United States reflects an emerging U.S. public opposition to the live-capture of wild cetaceans. The last live-capture of cetaceans from U.S. waters occurred in 1993 (Pacific white-sided dolphins from California by the John G. Shedd Aquarium in Chicago), and the last import under the MMPA of cetaceans purposefully live-captured in foreign waters was in 1992 (beluga whales from Churchill, Canada)—more than twenty years ago. NMFS, *Overview Handout, 2* (last updated Aug. 6, 2013), http://www.nmfs.noaa.gov/pr/permits/sci_res_pdfs/georgiaaquarium_belugas_onepager.pdf. The United States' twenty-year cessation on sourcing cetaceans from the wild for public display also reflects growing scientific recognition that cetaceans, particularly larger whales, e.g., beluga whales, require more space and social interaction than public display facilities can provide.



Against this backdrop, over a five-year period beginning in 2006, a live-capture operation, run by the Marchenko family and led by agents of Utrish Dolphinarium, Ltd. (“Utrish”), a Russian company, captured eighteen beluga whales from the Sakhalin Bay-Amur River stock of beluga whales in the Sea of Okhotsk. Georgia Aquarium, Inc., *Permit Appl.*, App. C. (June 15, 2012), http://www.nmfs.noaa.gov/pr/permits/sci_res_pdfs/17324_final_application.pdf. This stock of beluga whales was subject to “intense” historical harvest,² and it meets the MMPA’s definition of a “depleted” stock, 16 U.S.C. § 1362(1)(B), as recognized by NMFS, although NMFS has not formally designated it as such. *See* NMFS, *Denial Letter & Decision Mem.*, 12 (Aug. 5, 2013) (“information we have suggests [the stock] would be considered depleted”), http://www.nmfs.noaa.gov/pr/permits/sci_res_pdfs/17324_denial_letter_final.pdf. Utrish transported the animals 4,350 miles to a research station on the Black Sea where they have been held for up to seven years, during which period the Georgia Aquarium prepared its application.

On June 15, 2012, the Georgia Aquarium submitted an application to NMFS for a MMPA permit to import the up to 3,300-pound beluga whales to the United States on simultaneous flights totaling nearly forty hours in length. Upon arrival, it

² *See, e.g.*, Randall R. Reeves et al., *Sustainability Assessment of Beluga (Delphinapterus leucas) Live-Capture Removals in the Sakhalin-Amur Region, Okhotsk Sea, Russia* 12 (Occasional Paper of the Int’l Union for Conservation of Nature Species Survival Comm’n No. 44, 2011).

plans to transfer three of the beluga whales to its facility and the remaining animals under breeding loans to partner facilities—Shedd Aquarium, SeaWorld parks in Orlando, San Antonio, and San Diego, and, potentially later, Mystic Aquarium in Connecticut. Its objective in importing the eighteen beluga whales is to “enhance the North American beluga whale-breeding cooperative by increasing the population base of captive beluga [whales] to a self-sustaining level.” *Id.* at 1. It has no public plans to introduce captive-bred beluga whales to the wild.

On August 30, 2012, NMFS published a notice of receipt of the application and sixty days of public comment on it and the associated Draft Environmental Assessment (“EA”) prepared under the National Environmental Policy Act. *See* 77 Fed. Reg. 52,694, 52,695 (Aug. 30, 2012). NMFS received over 8,899 public comments—nearly the most of any MMPA permit application since the Act passed in 1972. Most public comments expressed significant environmental and animal welfare concerns over issuance of the permit. In their comments, Movants raised concerns regarding: (1) whether the Georgia Aquarium adequately demonstrated the regulatory criteria for permit issuance; (2) the humaneness of the captures and the proposed transport; (3) whether some animals were nursing when taken; and (4) the inadequacy of the Draft EA. On October 12, 2012, NMFS held a public hearing on the application and Draft EA, at which Movants provided testimony.



On August 5, 2013, NMFS denied the application under the MMPA and its regulations. *See* 78 Fed. Reg. 48,655 (Aug. 9, 2013); 50 C.F.R. pt. 216. NMFS explained that: (1) it was unable to make the determination that the proposed import, by itself or in combination with other activities, would not likely have a significant adverse impact on the Sakhalin-Amur stock of beluga whales given its “steady and significant decline over the past two decades” caused by the “ongoing live-capture trade since 1989”; (2) the requested import will likely result in the taking of marine mammals beyond those authorized by a permit because “issuance of this permit would contribute to the demand to capture belugas from this stock for the purpose of public display worldwide, resulting in the future taking of additional belugas from this stock”; and (3) “five of the beluga whales proposed for import, estimated to be approximately 1.5 years old at the time of capture, were potentially still nursing and not yet independent at the time of capture.” *Denial Letter, supra* p. 3, at 1–2. On September 30, 2013, Plaintiff filed this action.

ARGUMENT

I. MOVANTS ARE ENTITLED TO INTERVENE AS OF RIGHT UNDER FED. R. CIV. P. 24(a)(1) & (a)(2).

Federal Rule of Civil Procedure 24(a) provides that:

On timely motion, the court must permit anyone to intervene who: (1) is given an unconditional right to intervene by a federal statute; or (2)

claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

In considering a motion to intervene, courts “accept as true all well-pleaded nonconclusory allegations in the motion . . . and in declarations supporting the motion, absent sham, frivolity, or other objections.” 6 Moore's Fed. Practice, § 24.03(1)(a) (Matthew Bender 3d ed. 2013). Courts construe Rule 24(a) liberally for the benefit of movants and “any doubt concerning the propriety of allowing intervention should be resolved in [their] favor.” *Fed. Sav. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist.*, 983 F.2d 211, 216 (11th Cir. 1993). If a movant “establishes all prerequisites to intervention, the district court has no discretion to deny the motion.” *United States v. Georgia*, 19 F.3d 1388, 1393 (11th Cir. 1994).

Here, Movants are entitled to intervene as of right under Rule 24(a)(1) because the MMPA grants them a broad right to seek judicial review of MMPA permitting decisions, as well as under Rule 24(a)(2) for reasons stated below.

A. Movants Are Entitled to Intervene as of Right Under Rule 24(a)(1) Because § 1374 of the MMPA Grants Them a Broad Right to Seek Judicial Review of MMPA Permitting Decisions.

Section 1374 of the MMPA, which grants NMFS authority to issue permits for the taking or import of protected marine mammals, provides that:

Any applicant for a permit, or any party opposed to such permit, may obtain judicial review of the terms and conditions of any permit issued by the Secretary under this section or his refusal to issue such a permit. Such review . . . shall be pursuant to [the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701–06].

16 U.S.C. § 1374(d)(6). The plain language of § 1374(d)(6) grants parties opposed to the issuance of MMPA permits a broad right to seek judicial review of MMPA permitting decisions. *See Animal Welfare Inst. v. Kreps*, 561 F.2d 1002, 1006 (D.C. Cir. 1977) (holding that § 1374(d)(6) permitted organizations to challenge both the issuance of an import permit and the waiver regulations under which the permit was issued). In fact, two circuits have held that § 1374(d)(6) confers Article III standing on organizations to challenge the terms and conditions of any MMPA import permit to which they are opposed. *See id.* at 1005 (“It is clear that [organizations] would have standing under the statute to challenge each and every successive permit issued pursuant to the waiver which they oppose.”); *Cetacean Cmty. v. Bush*, 386 F.2d 1169, 1178 (9th Cir. 2004) (“The MMPA explicitly grants standing to seek judicial review . . . to a ‘party’ opposed to such permit.”); *see also Strahan v. Coxe*, 127 F.3d 155, 160 (1st Cir. 1997) (noting that § 1374(d)(6) allows “a citizen [to] seek review of the Secretary’s actions under the MMPA”). Given that Movants could, under § 1374(d)(6), seek review of the terms of an import

permit ultimately issued, this section should allow them to intervene as of right so that the Court can efficiently consider all issues with this import in one proceeding.

While § 1374(d)(6) does not specifically use the term “intervention,” because it gives Movants a broad right to seek judicial review of MMPA permitting decisions, the Court should interpret it as providing Movants the right to intervene in this action by a permit applicant over NMFS’s refusal to issue a permit to which the Movants are opposed. Federal courts have interpreted legislation providing parties with similarly broad rights to judicial review, yet failing to specifically mention “intervention,” liberally to include intervention rights. For example, § 16(b) of the Securities Exchange Act provides that:

Suit[s] to recover [insider] profit[s] may be instituted . . . in any court of competent jurisdiction by the issuer, or by the owner of any security of the issuer in the name and in behalf of the issuer if the issuer shall fail or refuse to bring such suit within sixty days after request or shall fail diligently to prosecute the same thereafter.

15 U.S.C. § 78p(b). Although § 16(b) does not mention intervention, courts have interpreted it liberally to permit shareholder intervention under Rule 24(b)(1) in an action to recover insider profits. *See Pellegrino v. Nesbit*, 203 F.2d 463, 468 (9th Cir. 1953); *see also, e.g., Term Loan Holder Comm. v. Ozer Groups, L.L.C.*, 303 F.3d 161, 168–69 (2d. Cir. 2002) (interpreting 11 U.S.C. § 1109(b), which provides that “[a] party in interest . . . may raise

and may appear and be heard on any issue in a [chapter 11 bankruptcy] case,” as granting an unconditional right to intervene). Thus, § 1374(d)(6) of the MMPA entitles Movants to intervene as of right under Rule 24(a)(1).

B. Movants Are Entitled to Intervene As of Right Under Rule 24(a)(2) Because They Satisfy All Necessary Factors and Offer Special Expertise in Cetacean Science and Conservation.

Under Fed. R. Civ. P. 24(a)(2), a movant is entitled to intervene as of right if it: (1) files a timely application; (2) asserts an interest relating to the property or transaction which is the subject matter of the action; (3) is so situated that disposition of the action may, as a practical matter, impair or impede its ability to protect the interest; and (4) has an interest that is not adequately represented by the existing parties to the suit. *Stone v. First Union Corp.*, 371 F.3d 1305, 1309 (11th Cir. 2004). Movants here satisfy all factors and are entitled to intervene as of right.

1. The motion is timely because the Complaint was filed just three months ago and no dispositive motions are pending.

The timeliness of a motion to intervene depends on a number of factors:

(1) the length of time during which the proposed intervenor knew or reasonably should have known of the interest in the case before moving to intervene; (2) the extent of prejudice to the existing parties as a result of the [movant's] failure to move for intervention as soon as it knew or reasonably should have known of its interest; (3) the extent of prejudice to the proposed intervenor if the motion is denied; and (4) the existence of unusual circumstances.

Georgia v. U.S. Army Corps of Eng'rs, 302 F.3d 1242, 1259 (11th Cir. 2002).



Here, Movants knew of their interests in the case when the Georgia Aquarium filed its Complaint. They seek to intervene at the earliest stages of this litigation, just three months after the filing of the Complaint, before the issuance of any briefing schedules, and before the filing of any dispositive motions. *See Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989) (holding that motion to intervene was timely when filed seven months after the complaint and three months after motion to dismiss). Under such circumstances, intervention will not result in prejudice or delay the proceedings. *Compare Meek v. Metro. Dade Cnty.*, 985 F.2d 1471, 1479 (11th Cir. 1993).

- 2. Movants have substantial interests in the proposed import because they have programs dedicated to, expend resources on, and their members have conservation, aesthetic, economic, and professional interests in, the conservation and welfare of wild and captive beluga whales and they participated extensively in the administrative proceedings.**

A movant is entitled to intervene as of right if the movant's interest in the subject matter of the litigation is "direct, substantial, and legally protectable." *Georgia*, 302 F.3d at 1249. This inquiry is a "flexible one." *See Chiles*, 865 F.2d at 1215; *Security Ins. Co. v. Schipporeit, Inc.*, 69 F.3d 1377, 1381 (7th Cir. 1995) ("[w]hether an applicant has an interest sufficient to warrant intervention as a matter of right is a highly fact-specific determination, making comparison to other cases of limited value"). Indeed, "[t]he 'interest' test is primarily a practical guide

to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process.” *Worlds v. Dep’t of Health & Rehab. Servs.*, 929 F.2d 591, 594 (11th Cir. 1991).³

Environmental nonprofits have satisfied the interest test where they and their members alleged programmatic, conservation, aesthetic, economic, or professional interests in the subject matter of the suit. *See Nat’l Parks Conservation Ass’n v. U.S. Dep’t of the Interior*, No. 11-578, 2012 U.S. Dist. LEXIS 43419, at *8–10 (M.D. Fla. Mar. 28, 2012) (organization of members who enjoyed a nature preserve in the past or had plans to do so in the future had “requisite interests in issues in [the] litigation” where the disposition could affect their ability to access the lands); *South Dade Land Corp. v. Sullivan*, 155 F.R.D. 694, 696 (S.D. Fla. 1994) (finding that organization’s “members’ “interest[s] in wildlife conservation and enjoyment of [a] park’s natural resources” were legally protectable); *see also Ctr. for Biological Diversity v. Kempthorne*, No. 08-1339, 2008 U.S. Dist. LEXIS 84972, at *7 (N.D. Cal. Oct. 2, 2008) (where organization’s “members have an interest in the continued existence of [a threatened species] in its natural habitat” it had sufficient interest in an action concerning a regulation allegedly jeopardizing

³ Movants “need not demonstrate that [they] have standing in addition to meeting the requirements of Rule 24” if “there exists a justiciable . . . controversy between” the existing parties. *Chiles*, 865 F.2d at 1213.

the species' continued existence). Notably, the D.C. Circuit has recognized a person's "interest in . . . seeing . . . particular animals living under humane treatment" where a person visits them with some regularity as legally cognizable. *See Animal Legal Def. Fund v. Glickman*, 154 F.3d 426, 431 (D.C. Cir. 1998).

In addition, courts have considered participation in the process leading to the adoption of the legislation or agency action at issue in the litigation as a factor to consider in applying the interest test. *See Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1398 (9th Cir. 1995) (holding that "public interest group is entitled as a matter of right to intervene in an action challenging the legality of a measure it has supported"); *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 526 (9th Cir. 1983) (National Audubon Society granted intervention as of right where it "participated actively in the administrative process surrounding" decision to establish conservation area for birds of prey); *In re Sierra Club*, 945 F.2d 776, 779 (4th Cir. 1991) (organization that was party to an administrative permit proceeding entitled to intervene as of right in challenge to constitutionality of governing regulation).

Here, Movants have substantial interests in the import of these eighteen beluga whales because they have extensive programs dedicated to, and expend substantial resources on, the conservation and welfare of wild and captive beluga whales and other cetaceans. For example, Animal Welfare Institute ("AWI")

manages numerous projects focusing on cetacean conservation and welfare, including its Captive Marine Mammal Program, which monitors and responds to worldwide activities that result in the suffering of marine mammals for public display. *See, e.g.*, Rose Decl. Ex. B ¶ 6. Earth Island Institute’s (“EII”) Baikal Watch is a conservation program in Russia that has worked to protect gray whales and other cetaceans in the Sea of Okhotsk, and its International Marine Mammal Project is a leading global effort to stop the commercial exploitation of cetaceans. Phillips Decl. Ex. J ¶¶ 4–5. Movants currently expend hundreds of thousands of dollars annually on these programs, all of which include the publication and wide dissemination of literature on cetacean conservation and welfare issues. *Id.* ¶¶ 6, 11; Millward Decl. Ex. A ¶¶ 3, 11; Stroud Decl. Ex. F ¶ 5; Rossiter Decl. Ex. I ¶ 5.

Movants’ programs fund and conduct research and conservation projects on, and for, wild and captive cetaceans, including beluga whales and other cetaceans in the Sea of Okhotsk. Over the past thirteen years, Whale and Dolphin Conservation (“WDC”) has supported 185 conservation field projects on cetaceans in over forty countries, including Russia. Stroud Decl. Ex. F ¶ 5. WDC has funded the construction of trails and viewing towers in the White Sea region of Russia for shore-based beluga whale watching and funded a decade of field research on, and spearheaded a campaign to prevent the capture of, orcas in Far East Russia. *Id.*

¶ 6. Likewise, Cetacean Society International (“CSI”) has awarded 1,200 grants for cetacean conservation projects, including a White Sea beluga whale survey and related cultural festival, and research on gray whales in the Sea of Okhotsk.

Rossiter Decl. Ex. I ¶ 5. Further, AWI and CSI contribute to the International Whaling Commission’s (“IWC”) Small Cetacean Conservation Research Fund, which funds scientific research on small cetacean populations, including research on the Sea of Okhotsk beluga whale stocks. *Id.*; Millward Decl. Ex. A ¶ 4.

Movants’ members have substantial interests in this import, as they specifically contribute to and volunteer with Movants for, and have varied conservation, aesthetic, economic, and professional interests in, the conservation and welfare of wild and captive beluga whales. For example, AWI member Rodney Russ is the Owner and Senior Expeditions Leader of Heritage Expeditions Ltd., the only expedition travel corporation in the world that conducts annual ecotourism expeditions to the Sea of Okhotsk. Russ Decl. Ex. C ¶¶ 2, 10. During these expeditions, Mr. Russ observes beluga whales of the Sakhalin-Amur stock, and, through his activities leading these annual expeditions, he has concrete plans in the near future to observe the beluga whales from this stock and others in this region. *Id.* ¶¶ 10–13. Likewise, Robert Lott, a staff member of WDC, has observed beluga whales in, and explored the potential reintroduction of captive



beluga whales to, the White Sea. Lott Decl. Ex. G ¶¶ 4, 10–12. Thus, Movants have substantial “interest[s] in the continued existence of [the beluga whale] in its natural habitat” that are directly related to, and legally protectable, in this action concerning an import of beluga whales that they believe will have negative effects on the Sakhalin-Amur beluga whale stock and other cetacean stocks in the region that they work to protect. *See Kempthorne*, 2008 U.S. Dist. LEXIS 84972, at *7.

Movants also have members that live by the facilities that would receive the imported beluga whales who are opposed to the placement of additional cetaceans in captivity in their communities. Millward Decl. Ex. A ¶¶ 6, 12; Rossiter Decl. Ex. I ¶¶ 6, 10. For example, David Drolet, AWI member and Atlanta resident, alleges that he observed negative effects of captivity on the beluga whales at the Georgia Aquarium. Drolet Decl. Ex. E ¶ 12–13. He recently visited and has plans to visit the facility to observe the fish exhibits and continue monitoring the welfare of its cetaceans to which he has developed a “strong personal attachment,” *id.* ¶¶ 10–14, which is legally protectable. *See Am. Soc’y for the Prevention of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus*, 317 F.3d 334, 337 (D.C. Cir. 2003). As such, members have “interest[s] in . . . seeing [these] particular [beluga whales] living under humane treatment.” *Glickman*, 154 F.3d at 431.



Finally, Movants actively participated in the administrative and other processes that led to the denial of this permit application. *See, e.g.*, Millward Decl. Ex. A ¶ 8. All Movants submitted comments and testified at the public hearing. *See, e.g., id.* Dr. Rose attended the IWC Scientific Committee’s annual meeting in June 2013, where she participated in considering new scientific information that led the Committee to conclude that the Russian management regime for beluga whales in the Sea of Okhotsk is “very likely to lead to unsustainable removals.” *See* Rose Decl. Ex. B ¶¶ 13–15. In addition, Movants have actively participated in the administrative process for prior MMPA permit applications on beluga whales. *See, e.g., id.* ¶ 7. More broadly, they have participated in international forums for decades to conserve and protect wild and captive cetaceans. *See id.* ¶¶ 5, 12, 21; Millward Decl. Ex. A ¶ 4, 11; Stroud Decl. Ex. F ¶¶ 5–7; Asmutis-Silvia Decl. Ex. H ¶¶ 4–7; Phillips Decl. Ex. J ¶¶ 3–5; Rossiter Decl. Ex. I ¶¶ 3–4.

Therefore, Movants meet the interest test of Rule 24(a)(2).

- 3. The outcome may impair the interests of Movants and their members because the import may result in the taking and import of additional cetaceans for public display from this stock or region and placement of more cetaceans in captivity in members’ communities.**

Rule 24(a)(2) requires that an applicant be “so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect its

interest.” Impairment is a “diminution, however small, in strength, value, quality, or quantity.” 6 Moore’s Fed. Practice, § 24.03(3)(a). Rule 24(a) does not require legal impairment of a movant’s interests. It is enough that a movant’s ability to protect its interests *may* be impaired as a practical matter. In addition, the rule’s emphasis on “practical disadvantage” was “designed to liberalize the right to intervene in federal actions.” *Nuesse v. Camp*, 385 F.2d 694, 701 (D.C. Cir. 1967).

Here, Plaintiff’s requested relief—a vacatur and an order requiring NMFS to issue the permit—would lead to the first direct import of live-captured cetaceans into the United States for public display in over twenty years. This import would provide U.S. endorsement of, and support for, the expanding global trade in live-captured beluga whales from the likely depleted Sakhalin-Amur stock of beluga whales, thereby contributing to future removals. *See Denial Letter, supra* p. 3, at 2 (“[W]e believe that issuance of this permit would contribute to demand to capture belugas from this stock for the purpose of public display worldwide, resulting in the future taking of additional belugas from this stock.”); *see also* Fisher Decl. Ex. D ¶¶ 9–15. This import would create an incentive for Russian entities to capture more beluga whales by increasing demand by foreign countries for beluga whales for public display. If NMFS’s decision stands, the United States will not serve as an example to these foreign countries to increase their demand for beluga whales.



Consequently, the import would impair Movants' cetacean conservation and welfare programs and force them to continue diverting additional resources to cetacean conservation and welfare. For example, AWI projects that if international trade in live-captured cetaceans increases in the near future, it will spend up to an additional \$70,000 annually on its cetacean conservation and welfare programs, and it will spend further resources opposing MMPA permit applications, resources it would otherwise spend on other projects. Millward Decl. Ex. A ¶ 11; *see also* Asmutis-Silvia Decl. Ex. H ¶ 12; Phillips Decl. Ex. J ¶ 11. Movants also believe that this import would lead to the take and import of other cetacean species, including orcas, Fisher Decl. Ex. D ¶ 9–12, which would further impair Movants' programs and drain their programmatic resources. *See* Stroud Decl. Ex. F ¶ 10, 12–15 (describing how entities capturing the very orcas studied by FEROP have been “fueled” by beluga whale sales). As such, the import would “perceptibly impair” Movants' programs. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *see Fla. State Conf. of the NAACP v. Browning*, 522 F.3d 1153, 1166 (11th Cir. 2008) (organizational standing where organizations “reasonably anticipate[d] that they [would] have to divert personnel and time to educating volunteers and [affected individuals] on compliance with [a statute's requirements] that would otherwise be spent on [other activities]”).



Likewise, the import would impair the aforementioned conservation, aesthetic, economic, and professional interests of Movants' members in beluga whales. The import would make it more likely that the Marchenko live-capture operation, Utrish, or other entities will capture beluga whales in the Sea of Okhotsk that Mr. Russ has concrete plans to visit with customers in the near future. *See* Russ Decl. Ex. C ¶¶ 19–25; *see Animal Prot. Inst. v. Mosbacher*, 799 F. Supp. 173, 177 n.7 (D.D.C. 1992) (finding standing to challenge MMPA import permit despite fact that countries “might theoretically export their whales elsewhere” because “diminution in demand [for the whales] would correlate directly to the diminution in harm to plaintiffs”).⁴ Similarly, Movants believe that the import would lead to the capture of other cetacean species in the Sea of Okhotsk for public display that their members study and work to protect. Stroud Decl. Ex. F ¶ 10, 12; Fisher Decl. Ex. D ¶¶ 9–15; Rose Decl. Ex. B ¶ 16; *see Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs.*, 528 U.S. 167, 184 (2000) (“reasonable concerns about effects of . . .

⁴ *See also Massachusetts v. EPA*, 549 U.S. 497, 524 (2007) (finding standing where “risk of catastrophic harm, though remote . . . would be reduced to some extent” by relief sought); *United States v. Students Challenging Reg. Agency Procedures*, 412 U.S. 669, 688 (1973) (environmental organization alleged sufficient injury to survive motion to dismiss where it alleged an agency's order allowing for collection of freight increase would cause increased use of non-recyclable commodities, thereby resulting in the use of more natural resources to produce such goods, some of which could be taken from national parks members visited, and resulting in more trash discarded in national parks members visited).

discharges [on] recreational, aesthetic, and economic interests” sufficient injury for standing). In considering such impairment, it is significant that “Congress, in enacting the MMPA, established as a matter of law the requisite causal relationship between American importing practices and [the taking of marine mammals by foreign countries].” *Kreps*, 561 F.2d at 1010.⁵

Further, the import would impair the aesthetic interests of Movants’ members through placement of additional cetaceans in captivity in their communities. For example, David Drolet would suffer aesthetic harm when he visits the Georgia Aquarium to view the fish exhibits, or monitor the welfare of the cetaceans, and he observes beluga whales that he has personal connections to living in what he believes would be more crowded, poorer welfare conditions. Drolet Decl. Ex. E ¶¶ 14–17; *see Glickman*, 154 F.3d at 431.

4. NMFS may not adequately represent Movants’ interests because Movants possess distinct conservation and animal welfare interests and they may make important arguments that NMFS may not.

Movants need only show that the existing parties *may* inadequately represent their interests in this action. The “burden of making th[is] showing should be

⁵ The D.C. Circuit in *Kreps* observed that “the MMPA addresses not only the killing of marine mammals but also the importation of them. This reflects a congressional decision that denial of import privileges is an effective method of protecting marine mammals in other parts of the world.” 561 F.2d at 1010.



treated as minimal.” *Trbovic v. United Mine Workers of Am.*, 404 U.S. 528, 538 n.10 (1972). While there is a presumption of adequate representation “when an existing party seeks the same objectives as the would-be interveners,” this “presumption is weak [and] merely imposes upon the proposed interveners the burden of coming forward with some evidence to the contrary.” *Clark v. Putnam Cnty.*, 168 F.3d 458, 461 (11th Cir. 1999). A movant may rebut the presumption by showing: (1) adversity of interest with existing parties; (2) collusion between existing parties; (3) or nonfeasance by the existing party that should be representing the movant’s interests. *Id.* That the interests of an existing party and a proposed intervenor may be similar does not mean that their litigation approaches will be the same. *See Chiles*, 865 F.2d at 1214. Further, where the government has “the duty to serve two distinct interests, which are related, but not identical,” a movant’s possession of only one of the interests provides sufficient differentiation to support intervention. *Trbovich*, 404 U.S. at 538; *see Sierra Club v. Espy*, 18 F.3d 1202, 1207–08 (5th Cir. 1994) (allowing timber industry to intervene in action against U.S. Forest Service given that “government must represent broad public interest, not just the economic concerns of the timber industry”).

Here, Movants seek the same objective as NMFS of defending its decision. However, Movants, all conservation or animal welfare organizations, do not share



NMFS's dual and at times conflicting responsibilities under the MMPA's public display provisions, to consider conservation and protection of marine mammals and requests by the public display industry to use these animals. Instead, Movants' ultimate objective in this action is the protection of beluga whales from captivity in the United States, the conservation of the likely depleted Sakhalin-Amur stock of beluga whales, and the protection of this stock and other cetaceans from capture for public display. Unlike NMFS, Movants' missions include opposing all live-capture of cetaceans for public display. Indeed, Movants do not agree with NMFS that the Georgia Aquarium adequately demonstrated that the manner of take and the transport methods are humane. Moreover, Movants are committed to ensuring that the United States' cessation on sourcing cetaceans from the wild for public display continues indefinitely. In contrast, NMFS stated that the denial of the application would not prejudice consideration of future import permit applications by the Georgia Aquarium. *Denial Letter, supra* p. 3, at 2. Possession of these distinct conservation and animal welfare interests provides sufficient differentiation from NMFS to support intervention. *Trbovich*, 404 U.S. at 538–39.

In addition, the fact that this is the first permit application concerning public display (take or import) NMFS has denied, *see* Rose Decl. Ex. B ¶ 8, suggests it may not make important arguments that Movants may make. For example,

Movants are likely to highlight the results of the scientific review of the Sea of Okhotsk beluga whale stocks conducted at the June 2013 IWC Scientific Committee meeting, which demonstrate that the adverse impacts of live captures on the Sakhalin-Amur stock of beluga whales are even graver than acknowledged by NMFS.⁶ NMFS scientists participated in the review, *see* Rose Decl. Ex. B ¶ 12, and Movants sent NMFS letters requesting it to incorporate this latest scientific evidence in its decision, but NMFS did not mention it in its decision documents. Thus, Movants fear that NMFS will fail to vigorously defend its decision using the best available science put before it by Movants. *See Clark*, 168 F.3d at 461.

Finally, courts have considered the special expertise of a movant in deciding whether to grant intervention as of right. *See Deltona Corp. v. Hoffman*, No. 76-473, 1997 WL 3965, at *1–2 (M.D. Fla. Jan. 20, 1977) (allowing organizations that participated in administrative process to intervene in suit over permit issuance because, “considering the complexity of the scientific matters in question, those who presented the evidence below may be in the best position to present the

⁶ *See* INT’L WHALING COMM’N, *Rep. of the Subcomm. on Small Cetaceans*, in REP. OF THE SCIENTIFIC COMM. ANNUAL MTG. Annex L, 8–9 (2013), available at <http://iwc.int/cache/downloads/4r6wjwdcu3uogs4ssgso8soc4/AnnexL.pdf>; *see also* Olga Shpak & Dmitri Glazov, *Review of the Recent Scientific Data on the Okhotsk Sea White Whale (Delphinapterus leucas) Population Structure and Its Application to Management*, J. CETACEAN RESEARCH & MGMT. (2013), available at <https://events.iwc.int/index.php/scientific/SC65a/paper/viewFile/394/357/SC-65a-SM23>.

evidence before the court”). Movants have decades of experience in cetacean conservation and trade issues, including the complex scientific and international trade issues surrounding this import. For example, AWI’s Dr. Rose is an internationally recognized expert in marine mammal conservation issues that assisted the IWC Scientific Committee in conducting its June 2013 scientific review of the Sea of Okhotsk beluga whale stocks. Rose Decl. Ex. B ¶ 4, 13–15.

In sum, Movants satisfy all factors and are entitled to intervene as of right.

II. ALTERNATIVELY, THE COURT SHOULD PERMIT MOVANTS TO INTERVENE UNDER FED. R. CIV. P. 24(b).

Alternatively, Movants request that the Court permit them to intervene under Rule 24(b)(1)(B), which provides that “[o]n timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact.” Courts liberally grant permissive intervention. *See* 7C Wright & Miller, *Fed. Practice and Procedure* § 1904. The “words ‘claim’ or ‘defense’ are not to be read in a technical sense, but only require some interest on the part of the applicant.” *Sackman v. Liggett Group*, 167 F.R.D. 6, 23 (E.D.N.Y. 1996). In exercising its broad discretion to grant permissive intervention, a court “must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.” Fed. R. Civ. P. 24(b)(3).

Here, Movants seek to defend NMFS's action on the bases that none of its reasons for denying the permit application violate the MMPA or the APA. They seek to argue that the denial is supported by the evidence in the administrative record, which they contend includes evidence in the IWC Scientific Committee's scientific review of the Sea of Okhotsk beluga whale stocks that they submitted to NMFS during its decision-making process. Movants also seek to defend NMFS's recognition of the link between international trade in cetaceans and impacts to wild stocks. These defenses overlap with the Georgia Aquarium's contrary claims.

Intervention by Movants will not unduly delay or prejudice the adjudication of the existing parties' rights. Movants filed this motion during the earliest stages of this litigation before the filing of any dispositive motions, they are not asserting any new legal claims, and they are willing to abide by whatever briefing and other schedules the Court establishes. Further, as discussed above, Movants' special expertise in cetacean science and trade would add significant value to this action. Accordingly, in the alternative, the Court should allow permissive intervention.

CONCLUSION

Movants respectfully request that the Court grant their Motion to Intervene and permit them to fully participate as defendants. Attached is Movants' proposed answer.



Dated: January 7, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.1D of the U.S. District Court for the Northern District of Georgia, I hereby certify that the foregoing brief has been prepared with Times New Roman font (14 point) in accordance with Local Rule 5.1B.

Dated: January 2, 2014

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CERTIFICATE OF SERVICE

I, Donald D. J. Stack, 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:

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