

**TESTIMONY**  
**OF**  
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**On behalf of the**  
**American Zoo and Aquarium Association**  
and the  
Alliance of Marine Mammal Parks and Aquariums  
before the  
**SUBCOMMITTEE ON FISHERIES CONSERVATION, WILDLIFE**  
**AND OCEANS**  
COMMITTEE ON RESOURCES  
U.S. HOUSE OF REPRESENTATIVES  
On the  
Implementation of the Marine Mammal Protection Act Amendments of 1994  
**October 11, 2001**

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Mr. Chairman and Members of the Subcommittee, I am representing the American Zoo and Aquarium Association (AZA) and the Alliance of Marine Mammal Parks and Aquariums (Alliance). The members of these two organizations include marine life parks, aquariums, and zoos whose expertise is the public display of animals including marine mammals. These zoological institutions are dedicated to the highest standards of care for marine mammals and to their conservation in the wild through public education, scientific study, and wildlife presentations. Collectively, the members of AZA and the Alliance represent the greatest body of experience and knowledge with respect to marine mammal husbandry.

AZA represents over 200 accredited zoo and aquarium institutions that draw over 135 million visitors annually and have more than 5 million zoo and aquarium members. The Alliance has 40 members that host over 36 million visitors each year. Collectively, these institutions teach more than 12 million people each year in living classrooms, dedicate over \$50 million annually to education programs, invest over \$50 million annually to scientific research and support over 1300 field conservation and research projects in 80 countries.

AZA and the Alliance are uniquely qualified to comment on the Marine Mammal Protection Act (MMPA). Both organizations are very knowledgeable about the MMPA as it pertains to the public display of marine mammals and the rescue of stranded animals. And, both were actively involved in the process of amending the MMPA in 1994.

**I. The Role of Public Display Facilities**

The House Resources Committee and its Subcommittee on Fisheries Conservation, Wildlife and Oceans have long understood the important role of public display. Indeed, a Congressional report on the passage of Marine Mammal Protection Act in 1972 observed "*...without observing marine mammals in oceanaria the 'magnificent interest' in marine mammals will be lost and 'none will ever see them and none will care about them and they will be extinct. If it were not for these organizations and the public exposure you have on these animals in the first place, these matters wouldn't be brought to the attention of the public.'*"

## A. Education

The conservation of marine mammals requires public education, the practice of conservation behaviors by every individual, and the development of effective public policy. The public display of marine mammals plays an integral role in this conservation effort, helping to preserve these magnificent animals for present and future generations. With public display comes marine mammal education and conservation programs unique in their ability to establish a personal connection between visitors and the animals. This personal connection fosters learning about how the behaviors of each and every one of us affect marine mammals and the habitats in which they dwell.

Congress has entrusted zoological parks and aquariums with great responsibility and they strive daily to live up to that responsibility. Each and every year, members of the American Zoo and Aquarium Association and the Alliance of Marine Mammal Parks and Aquariums proudly communicate their educational messages to an ever-expanding and diverse audience, reaching more and more children and adults about the importance of conserving marine mammals and their habitats. Members provide an enthusiastic, imaginative, and intellectually stimulating environment to the approximately 140 million people who visit AZA and Alliance member marine life parks, aquariums, and zoos annually. Additionally, each year over 12 million young people participate in programs for school children. With the growth of the Internet, along with more traditional forms of communication, AZA and Alliance members reach nearly one hundred and fifty million children and adults each year.

Recognizing this responsibility, both AZA and the Alliance established standards for education programs offered by public display facilities in the United States. The standards have been acknowledged by the National Marine Fisheries Service (NMFS) as the two "professionally accepted standards" on which a public display facility must base its education and conservation programs. NMFS published these standards in the Federal Register October 6, 1994, (Vol.59, No.193, Pgs. 50900-2).

The mission of educational exhibits and programming at AZA and Alliance member facilities is to enhance the appreciation and understanding of marine mammals and their ecosystems. Members of these zoological institutions instill in those who visit an awareness of ecological and conservation issues and a respect and caring for these animals and their environments. Our members believe this respect engenders a strong, active commitment to marine mammal conservation and an understanding that each and every person can make a difference. Generally, the goals of AZA and Alliance member education programs are to:

- § provide opportunities for visitors to expand their knowledge about marine mammal biology and natural history;
- § promote awareness of and sensitivity toward the marine environment;
- § present information on marine conservation issues;
- § be marine science and environmental information resources to interested citizens, local schools, community groups, and educators, and
- § inspire visitors to embrace conservation behavior.

Education programs and courses are diverse and age relevant. Programs for children ages three to five provide an excellent opportunity for preschoolers to see and begin to gain an appreciation and understanding of other living creatures. Interspersed amidst the singing, role-playing, and other activities designed to teach young children about marine mammal characteristics and behavior is a strong conservation message of respect for all life forms. Programs emphasize learning through sight, touch, sound, and movement.

Education courses for school-age children teach the importance of conservation, responsible human behavior, and the principles of ecology. The courses also promote basic competencies in science and other related disciplines. AZA and Alliance members typically use county and state science curriculum standards when developing programs. Many institutions have curriculum advisory committees made up of local educators who review curriculum and programs to assure that they meet the needs of teachers, the community and the state.

Elementary and secondary school teachers who are interested in incorporating new, exciting programs into their teaching plans have the opportunity to learn to teach curriculums developed by AZA and Alliance members. The focus on the environment and conservation includes activities in both field and laboratory settings. Courses reflect state frameworks and nationally recognized standards in science and mathematics. Some of the courses are designed to help teachers receive academic credits toward re-certification.

In its statement on complementary sources of science education, the National Science Teachers Association (NSTA) specifically recognizes the educational role of zoos and aquaria, museums, cultural attractions, and other community resources. According to NSTA, there is a growing body of research that documents the power of learning experiences outside the classroom to spark curiosity and engage interest in the sciences during the school years and throughout a lifetime. NSTA points out that these complementary science institutions have a long history of providing staff development for teachers and enriching experiences for students and the public. NSTA recognizes that science education and resources at zoological parks and aquariums are "often the only means for continuing science learning in the general public beyond the school years."

A 1998 Roper Starch poll provides clear evidence that programs at marine life parks, aquariums, and zoos are educational and provide the public with a heightened appreciation of the importance of conserving and preserving marine mammals. Responses to the Roper Starch poll indicate that seeing live marine mammals enhances the educational experience for the visitors to marine life parks, aquariums, and zoos.

- Almost everyone (97%) who visited Alliance member marine life parks, aquariums, and zoos said their experience with live marine mammals had an impact on their appreciation and knowledge of the animals. The impact was greater for those visiting facilities where they actually had an opportunity to interact with marine mammals.
- Ninety-six percent (96%) of the parks' visitors agreed that "seeing marine mammals engaged in their daily behavior as I did here today is the best way to understand and learn about them."
- Ninety-four percent (94%) of the visitors agreed with the statement, "I learned a great deal about marine mammals today."
- Nine in ten visitors agreed that they "have become more concerned about the importance of preservation/conservation of marine mammals as a result of my visit here today."

## **B. Research**

Knowledge acquired through research with animals in public display facilities, in tandem with field research, is another fundamental contribution to marine mammal conservation. Communicating this knowledge is one of the most effective means of ensuring the health of wild marine mammals in the 21st century. Much of this research simply cannot be accomplished in ocean conditions.

Tens of millions of dollars are being spent on research at and by AZA and Alliance member facilities that is essential in understanding the anatomy and physiology of marine mammals, in treating sick and injured animals from the wild, and in learning to better manage

and assist endangered species. Additionally, many AZA and Alliance facilities collaborate with marine mammal researchers from colleges, universities, and other scientific institutions that conduct studies important to wild species' conservation and health. Over the years, this body of work has contributed significantly to the present knowledge about marine mammal biology, physiology, reproduction, behavior and conservation. These studies have led to improvements in diagnosing and treating diseases; techniques for anesthesia and surgery; tests for toxic substances and their effects on wild marine mammals; and advancements in diet, vitamin supplementation, and neonatal feeding.

There is still a tremendous amount scientists do not yet know about the marine mammals in our oceans and rivers. And we desperately need greater knowledge and understanding if we are going to make informed, intelligent decisions regarding the increasingly complex pressures on these wild animals. The long-term studies of in-shore, wild marine mammal populations, which provide scientists opportunities to measure contaminant exposure, monitor health and immune responses of individual animals, and to study population-level trends, are extremely important. Alliance and AZA members play a strong role in these efforts as evidenced by the following examples of both *in situ* and *ex situ* research projects:

- § the Sarasota Dolphin Research Program, begun in 1970 and supported by the Brookfield Zoo - Chicago Zoological Society since 1989. Efforts over these 30 years have resulted in the development of a natural laboratory for detailed, long-term studies of the behavior, population biology, health, and ecological relationships of resident communities of bottlenose dolphins along the central west coast of Florida;

- § research by Six Flags Marine World on killer whales in northern Washington State, British Columbia, and southern Alaska, which has led to numerous publications since it started in 1981;

- § cooperative work by Shedd Aquarium and the University of Quebec on cancer in beluga whales in the St. Lawrence River, animals that have high levels of PCBs, pesticides, mercury, and other mutagenic compounds in their systems, which will help scientists understand the influence of environmental contaminants on the health of these animals;

- § a collaborative study of endangered manatees and their exposure to bacterial and viral pathogens conducted by the National Aquarium in Baltimore and supported by Florida Department of Natural Resources and SeaWorld, which will help scientists better understand the diseases these animals are exposed to in the wild;

- § a wide range of studies on the natural history of marine mammals stranded in Florida by SeaWorld, focusing on food habits, parasites, growth, development, and mortality patterns;

- § an assessment of the immune function of seals, sea lions, whales, and dolphins that will greatly add to the current body of knowledge also by SeaWorld; and

- § the first ecology and biology study of rough-toothed dolphins by Dolphin Quest at their French Polynesian facility, with support from SeaWorld;

- § dolphins' communication systems researching by The Walt Disney Company's Living Seas;

- § microsatellite DNA markers to look at genetic diversity of dolphins in public display facilities by the Indianapolis Zoo, along with Texas A&M University; and

- § radiation therapy techniques for treating corneal opacities in beluga whales by the New York Aquarium.

### **C. Stranded Marine Mammals**

For centuries, experts have long been frustrated in their attempt to restore to health the millions of stranded marine mammals found

sick and dying on beaches throughout the world. Today, members of AZA and the Alliance have the expertise and ability to offer much needed, practical assistance to these animals. The accumulated knowledge, collective experience, and resources of these facilities are the primary factors in these successful rehabilitation efforts. Indeed, AZA and Alliance members provide millions of dollars in direct expenditures and in-kind contributions annually to support stranding programs.

Though there are hundreds of unspoken heroes who strive to save stranded marine mammals, one recent event was highlighted in a documentary by National Public Television. It featured Mystic Aquarium's successful rehabilitation of a pair of young pilot whales. The show was titled *Whale Rescue: Stranded Friends*. The pair of whales were rescued from a Cape Cod beach and, after being nursed back to health for nearly four months, were released off the coast of Rhode Island. It was the first release of pilot whales by any U.S. aquarium in nearly 14 years. The whales were fitted with satellite-linked transmitters that operated for approximately three months and provided aquarium scientists with important information about the animals' range and diving patterns.

Also, Animal Planet's *Wild Rescues* last year featured a segment on Dually, an injured manatee rescued in the Florida Keys. The show contains dramatic footage of Dually's initial rescue by the Dolphin Research Center and her surgery at Miami Seaquarium to remove fishing line embedded in her flippers.

The U.S. Coast Guard flew a melon-headed whale calf to Sea Life Park Hawaii after it was found floundering in the ocean two years ago. These whales are not found in public display facilities and scientists from the University of Hawaii are using this unique opportunity to learn more about the species and its acoustic behavior.

Mass strandings are becoming more common. Over 100 dolphins died in bays along the Florida panhandle in late 1999 and early 2000. Another 100 dolphins stranded and 28 died last year in the Florida Keys. AZA and Alliance members located throughout Florida cooperated with government officials in efforts to save the animals involved in the mass strandings in their state waters. The U.S. government also is concerned about a die-off of gray whales along the Pacific coast.

## **II. The 2001 Regulations Proposed by NMFS**

The 1994 Amendments (1994 Amendments) to the Marine Mammal Protection Act were a reaction to, and rejection of, regulations proposed by NMFS. In 1993, NMFS proposed replacing 5 pages of public display regulations with a 234-page "simplification." The 1994 Amendments rejected that "simplification."

On July 3, 2001, more than seven years after passage of the 1994 Amendments, NMFS published proposed regulations ("Proposed Regulations") to implement the 1994 Amendments. 66 Fed. Reg. 35209 (July 3, 2001). The Proposed Regulations are inconsistent with, and contradict, the 1994 Amendments, resurrecting many of the same sweeping and costly proposals Congress rejected in 1994. The following are the principal issues.

### **A. Care and Maintenance Standards for Marine Mammals**

Before the 1994 Amendments, NMFS claimed it had equal authority with the Animal and Plant Health Inspection Service (APHIS) to establish and enforce care and maintenance standards for marine mammals at public display facilities. The 1993 proposed regulations made clear that NMFS intended to exercise its claimed authority in significant ways. However, in the 1994 Amendments, Congress decided it was wasteful for two agencies to have identical responsibilities and that the public display community should not be subjected to double jeopardy by having two different agencies enforcing care and maintenance standards. Therefore, Congress determined that APHIS would have sole authority over the care and maintenance of animals at public display facilities. Nevertheless, the Proposed Regulations resurrect the rejected 1993 approach by giving NMFS joint responsibility to enforce APHIS' care and maintenance standards.

Reflecting Congressional intent to have only one agency issuing and enforcing care and maintenance standards, the 1994 Amendments provided that when NMFS issues a public display permit, NMFS' responsibility is restricted to determining whether the public display facility "is registered or holds a license" issued by APHIS pursuant to the Animal Welfare Act ("AWA"). 16 U.S.C. § 1374(c)(2)(A)(ii). Indeed, the preamble to the Proposed Regulations admits that the "Captive care and maintenance of marine mammals held for public display are now under the sole jurisdiction" of APHIS. 66 Fed. Reg. at 35211. The preamble also admits that

the 1994 Amendments had the specific effect of "removing the jurisdiction of NMFS over public display captive animal care . . . ." Id. Thus, Congress clearly provided that the establishment and enforcement of marine mammal care and maintenance standards is APHIS' responsibility.

Nevertheless, the Proposed Regulations attempt to overturn the 1994 Amendments by stating that NMFS' authority is not limited to determining if a public display facility has an APHIS registration or license. Instead, the Proposed Regulations state NMFS must also independently determine that the facility complies with all of APHIS' care and maintenance standards. Proposed § 216.43(b)(3)(ii), 66 Fed. Reg. at 35216. As in 1993, NMFS is claiming it has joint responsibility with APHIS to enforce APHIS' care and maintenance standards.

This intent becomes very clear in § 216.43(a)(4) of the Proposed Regulations which states that public display facilities must allow any National Oceanic and Atmospheric Administration employee to examine any marine mammal, to inspect all public display facilities and operations, and to review and copy all records concerning any marine mammal. 66 Fed. Reg. at 35216. Compounding the problem of having two agencies enforcing the same regulations, the Proposed Regulations state that "any person" designated by NMFS will also have the right to examine any marine mammal held for public display, to inspect any public display facility, and to review and copy all records. [Emphasis added.] Proposed § 216.43(a)(4), 66 Fed. Reg. at 35216.

Simply put, the Proposed Regulations could create the situation in which APHIS finds a facility in compliance with APHIS' standards, but NMFS, or some private person designated by NMFS, says that APHIS is wrong about APHIS' own regulations --- and NMFS can then either deny the facility the right to display animals or seize the animals.

This was the specific result Congress rejected in 1994. Not only do the Proposed Regulations create budgetary questions regarding why Congress would want two agencies enforcing the same statute, particularly when the AWA vests sole enforcement authority with APHIS, but they also raise public policy and significant privacy issues regarding why any member of the public designated by NMFS should have the right to inspect facilities for compliance with APHIS standards and to require public display facilities to turn over all of their records.

## **B. Export of Marine Mammals**

Although Congress and the courts have rejected NMFS' effort to apply the MMPA in foreign nations, the Proposed Regulations specifically attempt to make foreign citizens subject to NMFS' regulations. Not surprisingly, foreign nations are not enthusiastic about subordinating their sovereign authority to NMFS' regulations.

Prior to the 1994 Amendments, NMFS required that marine mammals could be exported for public display only if the foreign nation agreed it would afford comity to any decision by NMFS to modify, suspend or revoke that permit. 66 Fed. Reg. at 35213. The 1994 Amendments rejected the NMFS requirement. The 1994 Amendments provided that any person properly holding marine mammals for public display in the United States could export the animals "without obtaining any additional permit or authorization." 16 U.S.C. § 1374(c)(2)(B). However, the 1994 Amendments did effectively address the export issue by stating that a marine mammal could be exported for public display only if the receiving facility met "standards that are comparable to the requirements that a person must meet to receive a permit" under the MMPA for public display. 16 U.S.C. § 1374(c)(9). There are three such standards: the facility must (1) offer a program for education or conservation based on professionally recognized standards of the public display community; (2) have an APHIS registration or license <sup>(1)</sup>; and (3) be open to the public on a regularly scheduled basis with access not limited except by an admission fee. 16 U.S.C. § 1374(c)(2)(A). Significantly, Congress applied this comparability test only to the facility which receives the animals from the United States and not to subsequent transfers between foreign facilities.

In the 1994 Amendments, Congress clearly recognized the continuing validity of the decision in United States v. Mitchell, 553 F.2d 996, 1003, 1005 (5th Cir. 1977), where the Court held the MMPA does not apply within the territory of a foreign sovereign. Indeed, a December 10, 1996, opinion from the Office of General Counsel, NOAA, stated the MMPA "does not confer U.S. jurisdiction over marine mammals in the territory of other sovereign states."

The Proposed Regulations offer a different interpretation of the 1994 Amendments. The Proposed Regulations amend the statute by replacing the comparability test with the requirement that the foreign facility "must meet the public display criteria at Sec. 216.43(b)(3)(i) through (iii). . . ." [Emphasis added.] Proposed § 215.43(f)(2), 66 Fed. Reg. 35219. However, the requirements of section 216.43(b)(3)(i)-(iii) include not only the three statutory requirements that a facility offer an education or conservation program based on professionally recognized standards, be registered or hold on APHIS license, and be open to the public, but section 216.43(b)(3)(ii) adds NMFS' newly minted requirement that NMFS independently determine that the facility complies with APHIS' care and maintenance standards. <sup>(2)</sup>

But the Proposed Regulations do not stop here. NMFS interprets the MMPA provision requiring NMFS to maintain an inventory of marine mammals held under MMPA permits, 16 U.S.C. § 1374(c)(10), to mean that NMFS must maintain an inventory of those animals and their progeny even if the animals are no longer in the U.S. 66 Fed. Reg. 35213. Since everyone agrees the MMPA does not apply outside the U.S., it is hard to see how NMFS reaches the conclusion that NMFS is to apply the inventory reporting requirements to foreign citizens. Nevertheless, NMFS combines that interpretation with its new version of the comparability standard to conclude that NMFS can prohibit the export of a marine mammal until the government of the country in which the receiving facility is located signs a letter of comity agreeing "to enforce requirements equivalent to the U.S. Marine Mammal Protection Act. . . ." Proposed § 216.43(f)(4), 66 Fed. Reg. 35219, see 66 Fed. Reg. 35213. The regulatory preamble makes it quite clear that equivalency means all of NMFS' regulatory requirements. 66 Fed. Reg. at 35213. Thus, the preamble states that NMFS' regulatory requirements apply "to all holders of animals exported from the United States . . . ." Id.

To understand the problem, a case example may be helpful. The Proposed Regulations, including the letter of comity, have the effect of providing that if an animal is exported from the United States to a French facility in 2001, and the French facility decides in 2011 to transfer the animal to a public display facility in Spain, then the French government and the French facility must determine that the Spanish facility meets the MMPA standards as interpreted by NMFS, including the requirement that the facility meets APHIS requirements and has an acceptable education or conservation program --- and NMFS must receive a transport notification and inventory report from both the Spanish and French facilities. If the animal at the Spanish facility gives birth 5 years later, the Spanish facility must file an inventory report with NMFS reporting the birth. If that progeny is transferred to a public display facility in Germany 10 years later, the Spanish government and the Spanish facility are to ensure that the German facility meets the requirements of the U.S. MMPA as interpreted by NMFS, including the requirement that the facility meets APHIS standards and has an acceptable education or conservation program --- and NMFS is to receive a transport notification and inventory report from both the Spanish and the German facilities. If 15 years later, now 40 years after the original 2001 export from the U.S., the marine mammal originally transferred, now in a Spanish facility, dies, NMFS is to receive an inventory notice of that event together with an explanation of the cause of death. And if the progeny, now in Germany, dies in 2061, 60 years after the parent left the United States, NMFS is to receive an inventory notification including the cause of death.

These "comity" requirements are nothing more than an effort by NMFS to apply the MMPA internationally, something neither Congress nor the courts allow. The Proposed Regulations not only raise very serious international relations issues, but they also raise serious questions about whether NMFS should be using its limited resources to transform itself into an international regulatory agency.

### C. The Removal of Animals from the Wild

Although no public display facility has taken marine mammals from the wild since 1992, and there are no plans to do so, it may some day be necessary to do so to maintain genetic diversity. The Proposed Regulations make that impossible.

With respect to non-depleted species, the Proposed Regulations provide that unless NMFS has established a removal quota, the applicant for a take permit must demonstrate that the taking "will not have, by itself or in combination with all other known takes and sources of mortality, a significant direct or indirect adverse effect" on the species. Proposed § 216.43(b)(3)(v)(B), 66 Fed. Reg. at 35216. However, existing regulations already require a permit applicant to demonstrate that any taking "by itself or in combination with other activities, will not likely have a significant adverse impact on the species or stock . . . ." 50 C.F.R. 216.34(a)(4).



The public display community does not object to the existing regulations. But the Proposed Regulations significantly change the existing standard and create an impossible burden to meet. Unlike the existing regulations which require a showing that the taking is not "likely" to have a significant adverse effect on the species, the Proposed Regulations require that the public display community prove a negative i.e., that the taking "will not have" a significant adverse effect. Moreover, the Proposed Regulations now require that you prove a negative not only with respect to "direct" effects but also with respect to what NMFS calls "indirect" effects.

Not only do the Proposed Regulations establish standards which are virtually impossible to meet, but if a person tries to meet the standard, NMFS creates still more obstacles because the Proposed Regulations allow NMFS to require public display facilities to undertake extensive, expensive and time consuming research to gather and analyze population level information and to evaluate every other direct or indirect take or source of mortality. The Proposed Regulations are quite specific that NMFS' decision on whether to allow the taking is to be based on the best available information "including information gathered by the applicant." This last clause allows NMFS to require an unending gathering of new information in order to satisfy whatever information thresholds NMFS may establish.

The public display community does not object to the existing requirement that it demonstrate that any removal from the wild is not likely to adversely affect the population at issue. The community does object to the wording in the Proposed Regulations moving the goalposts and permitting NMFS to insist on information gathering which allows NMFS to move the goalposts again by requiring new studies before NMFS can make a decision.

A clear example of NMFS' moving the goalposts is found with respect to depleted species. The MMPA prohibits the taking of any depleted species. 16 U.S.C. § 1372(b)(3). The Proposed Regulations, include the statutory prohibition but then go on to amend the MMPA by also prohibiting the taking of animals from a species which is "proposed by NMFS to be designated as depleted. . . ." Proposed § 216.43(b)(4)(iii)(A), 66 Fed. Reg. at 35216. Even the Endangered Species Act does not have a provision like that which NMFS is trying to insert into the MMPA. Significantly, NMFS does not impose upon itself any time limit for reaching a final decision on its proposal to designate a species as depleted.

#### **D. Transfer, Reporting and Other Requirements**

The 1994 Amendments provide that a person issued a permit to take or import marine mammals for public display shall have the right "without obtaining any additional permit or authorization" to sell, transport, transfer, etc. the marine mammal to persons who meet the MMPA requirements. 16 U.S.C. § 1374(c)(2)(B). The MMPA also provides that a person exercising these permit rights must notify the Secretary of Commerce no later than 15 days before any sale, transport, etc. 16 U.S.C. § 1374(c)(2)(E). However, the Proposed Regulations ignore the simple and direct process contained in the statute and resurrect elements of the 1993 proposed "simplification" that Congress rejected.

Not only do the Proposed Regulations require that the shipping facility provide the statutorily required 15-day transport notice, but the shipping facility must also submit a complete Marine Mammal Data Sheet ("MMDS") for each mammal to be transferred. Proposed § 216.43(e)(1)(i), 66 Fed. Reg. 35217. The MMDS gives the animal's official NMFS identification number, name, sex, age, origin, etc. -- information already held in the NMFS inventory. The Proposed Regulations go on to state that in addition to receiving a transport notification and MMDS from the shipping facility, NMFS must also receive a transport notification and another MMDS for the marine mammal from the receiving facility. Id. After the transfer occurs, the receiving facility must confirm the transport and submit yet another MMDS. Proposed § 216.43(e)(2), 66 Fed. Reg. at 35218. Thus, a single 15-day notification required by the statute has been transformed into the submission of three transport notifications for the same transaction and three MMDS forms restating the information already in the inventory. <sup>(3)</sup>

Moreover, the Proposed Regulations require that before a transport can occur, both the holder and the receiver must provide NMFS with a certification that the receiver meets the requirements of § 216.43(b)(3)(i)-(iii) of the Proposed Regulations. Proposed § 216.43(e)(1)(i), 66 Fed. Reg. at 35217-18. As noted above, these provisions include requirements that a facility have a conservation or education program, have an APHIS license or registration, be open to the public and be in compliance with all APHIS requirements. However, the Proposed Regulations make persons subject to civil or criminal penalties for submitting false information. Proposed §



216.13(g), 66 Fed. Reg. at 35215.

Read together, these provisions mean that a shipping facility is now subject to penalties if NMFS finds, for example, that the receiving facility is not in full compliance with APHIS standards. It is not clear why an APHIS determination of compliance with APHIS requirements is not adequate and why the shipper and receiver must provide an independent certification, particularly when the MMPA says the transfer may occur without further permit or authorization.

Finally, after erecting the regulatory regime described above, the Proposed Regulations state that any public display permit issued by NMFS shall "contain other conditions deemed appropriate" by NMFS, a catchall provision apparently authorizing NMFS to issue any additional requirements it might think appropriate. Proposed § 216.43(b)(5), 66 Fed. Reg. 35216. Although such a provision might seem a reasonable contingency for most agencies, given NMFS' history, it is a provision about which significant questions must be raised because, in the past, NMFS has not exercised its authority judiciously.

In summary, NMFS has taken the simple process provided for in the statute and converted it into a needlessly cumbersome process.

### **E. Other Issues**

Although the preceding are the major issues, there are a number of other issues in the Proposed Regulations which are of concern. For example, Congress intended that the marine mammal inventory be a record of animals actually held at public display facilities. As noted above, there are serious questions about whether the inventory serves any regulatory purpose. That said, if the inventory is to be a record of marine mammals held at public display facilities, its only valid purpose can be with respect to living marine mammals. It is neither appropriate nor necessary that the Proposed Regulations require facilities to report stillbirths since such animals will not become part of the inventory of animals at public display facilities. See Proposed § 216.43(e)(4)(vii), 66 Fed. Reg. at 35218. The issue regarding stillbirths is with respect to genetics and public display facilities already report stillbirths to these persons who maintain these genetic records.

### **F. Congressional Assistance May Be Needed**

A review of the Proposed Regulations shows NMFS is attempting to resurrect regulatory proposals already rejected by Congress. NMFS is also attempting to amend the MMPA by inserting provisions nowhere found in the statute. Further, NMFS is adopting new legal interpretations which are not even in the Proposed Regulations but which reverse longstanding understandings of the MMPA. An example of the latter is a July 31, 2001, Marine Mammal Commission (Commission) letter stating that NMFS and the Commission have now determined that the MMPA prohibits NMFS from allowing foreign nationals to take marine mammals in U.S. waters and to export them to a foreign facility, although NMFS could permit U.S. nationals to do so. Since 1972, NMFS and the Commission have read the MMPA to allow for the issuance of such permits to foreign nationals and the letter admits that since the 1994 Amendments six such permits have been issued. Nevertheless, NMFS and the Commission have now decided that the legal authority they found in the MMPA somehow is no longer there. To reach that conclusion, they have discovered words and concepts nowhere found in the MMPA.

We hope that we will be successful working with the agency through the normal administrative process to have this proposed rule drastically modified in a way that reflects Congressional intent. And we may need to look to Congress for support in that endeavor. Should our efforts be unsuccessful, we may have to request further legislative changes that will clearly and precisely limit NMFS' ability to continue to "interpret" the MMPA to insert provisions nowhere found in the law and to impose regulatory interpretations and reinterpretations that are duplicative, unnecessarily burdensome and contrary to Congressional intent.

## **III. Prescott Stranding Grant Program**

AZA and the Alliance are very grateful for the help this Subcommittee has provided with the John H. Prescott Marine Mammal Rescue Assistance Grant Program. Vice Chair Saxton was the principal author of the Prescott bill when he was chair of the Subcommittee. The grant program was initially conceived as a means of providing financial support for the largely volunteer efforts

of stranding network participants. This was reflected in the three priorities listed in the law for which grants should be approved - treatment of stranded marine mammals, data collection for scientific research, and facility operating costs. However, when NMFS published its criteria for the program's implementation plan, these priorities were ignored.

Instead, the agency's listed priorities would impose additional work on long-time volunteer stranding network participants rather than help them with their struggle to fund current activities related to their already significant responsibilities. To meet many agency priorities, network participants would have to formulate proposals for new research in order to obtain grant funds. Additionally, it appears that the agency's priorities are geared more towards incidents of live marine mammal strandings. While these situations are very important and warrant great concern, the majority of stranding activities relate to dead marine mammal strandings. Also, the agency's priorities include a number of outstanding and much needed endeavors, such as a national stranding workshop and meeting, but these are items more appropriately undertaken by the agency.

AZA and the Alliance were also very concerned that NMFS had capped grants at \$75,000 rather than the \$100,000 limit Congress had intended. These issues reportedly have been resolved through discussions between the Congress and the agency. But our two organizations may have to again request help if NMFS continues to use the grant program to fund agency priorities rather than the needs of stranding participants.

#### **IV. Conclusion**

Both AZA and the Alliance very much appreciate the opportunity to testify before the Subcommittee today and hope our comments have been helpful. We look forward to working with the Subcommittee on the upcoming reauthorization of the Marine Mammal Protection Act.

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1. This standard is met through a comparability review by APHIS.
  2. After requiring absolute compliance, the Proposed Regulations state that the receiving facility must also submit to NMFS a letter from APHIS certifying that the receiving facility meets standards comparable to those of APHIS. Proposed § 216.43(f)(2), 66 Fed. Reg. at 35219.
  3. Many observers have questioned the need for the inventory since there is no apparent use of the inventory by NMFS. Given that, the question becomes whether the inventory requirements should be deleted from the Act