

**TESTIMONY OF
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U.S. DEPARTMENT OF COMMERCE**

**ON
MARINE MAMMALS IN CAPTIVITY**

**BEFORE THE
SUBCOMMITTEE ON INSULAR AFFAIRS, OCEANS AND WILDLIFE
COMMITTEE ON NATURAL RESOURCES
U.S. HOUSE OF REPRESENTATIVES**

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Thank you for inviting the Department of Commerce's National Oceanic and Atmospheric Administration (NOAA) to provide testimony at this important hearing on Marine Mammals in Captivity. We appreciate the opportunity to provide information on NOAA's implementation of the Marine Mammal Protection Act and our programs under that law.

BACKGROUND

Jurisdiction for marine mammal species is divided between NOAA and the U.S. Fish and Wildlife Service. While NOAA has jurisdiction over whales, seals, sea lions, and dolphins, the Fish and Wildlife Service has jurisdiction over polar bears, walrus, sea otters, manatees and dugongs. The mission of NOAA's National Marine Fisheries Service (NMFS) under the *Marine Mammal Protection Act (MMPA)* is to ensure that marine mammal species and stocks under our jurisdiction can recover to, or be maintained at, levels that ensure they continue to act as significant functioning elements of the ecosystems of which they are a part and to enable the stocks to reach their optimum sustainable population (OSP) levels. The MMPA defines OSP as "the number of animals which will result in the maximum productivity of the population or species, keeping in mind the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element."

To this end, NMFS scientists conduct population assessments and investigations to identify and evaluate factors that affect marine mammal species and stocks in the wild. NMFS uses information from these assessments and investigations to inform conservation and management measures as well as to regulate the "take" of marine mammals in the wild, which the MMPA defines as "to harass, hunt, capture, or kill or attempt to harass, hunt, capture or kill any marine mammal."

NMFS' marine mammal conservation and management responsibilities and activities under the MMPA are widespread and diverse and pertain to protecting these animals and their populations in the wild. For example, NMFS:

- Oversees the Marine Mammal Health and Stranding Response Program, whose members respond to marine mammals that have stranded ashore or become entangled, and assess trends in marine mammal health and correlate these trends with a changing environment;

- Reduces the level of serious injury and mortality of marine mammals incidental to commercial fisheries by developing and implementing take reduction plans with the fishing industry, environmental groups, and other affected stakeholders;
- Develops guidelines and funds research to address critical data gaps in our understanding of effects of noise on marine mammals;
- Works cooperatively with the shipping industry to address impacts of vessel traffic on marine mammals;
- Works under various international treaties and agreements to improve protection and conservation of marine mammal species that cross outside the borders of U.S. waters; and
- Develops and oversees mitigation and monitoring measures to minimize impacts of oil and gas activities, and alternative energy exploration and development, on marine mammals.

Most significant to this hearing, NMFS, along with the U.S. Fish and Wildlife Service, also enforces the *MMPA* moratorium on taking of marine mammals and administers the various exceptions to the moratorium by authorizing take incidental to activities other than commercial fishing¹ and permitting take for research, enhancement, photography, and public display. The majority of permits issued by NMFS under section 104 of the *MMPA* are for scientific research on marine mammals in the wild. Under Section 104, NMFS may also issue permits authorizing the removal of marine mammals from the wild or the import of marine mammals into the United States for public display purposes.

NMFS' responsibility with respect to public display of marine mammals is to ensure that stocks and species of marine mammals in the wild are not adversely affected by removal of animals from wild populations, that takes are conducted humanely, and that those who apply for permits to import or take animals from the wild for public display meet the three statutory issuance criteria in section 104(c)(2)(A) of the *MMPA*. Specifically, NMFS must determine that permit applicants:

- (1) Offer a program for education or conservation purposes that is based on professionally recognized standards of the public display community;
- (2) Are registered or hold a license under the *Animal Welfare Act*; and
- (3) Maintain facilities that are open to the public on a regularly scheduled basis with access that is not limited other than by charging an admission fee.

Once a public display facility meets these criteria and has legally obtained and is maintaining a marine mammal at the facility, NMFS has no authority under the *MMPA* to provide oversight over the holding, breeding and care of the animal.

The 1994 amendments to the *MMPA* significantly reduced NMFS' oversight over marine mammals held for public display purposes. The responsibility for monitoring the care and maintenance of public display marine mammals was consolidated solely within the Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) under the Animal Welfare Act (AWA). In recognition of inter-related jurisdictions under the *MMPA* and AWA, NMFS, APHIS and the Fish and Wildlife Service (FWS) entered into a revised Memorandum of Agreement (MOA) in 1998. The coordination under this MOA continues with monthly meetings among the agencies to facilitate and promote the consistent, effective, and cooperative implementation of all standards

¹ NMFS regulates take incidental to commercial fishing under section 118 of the *MMPA*.

governing the humane care, handling, treatment, and transportation of marine mammals, both pursuant to their take or import, and during their captivity.

Public display permits may be issued for removal of marine mammals from the wild and for the import of marine mammals into the U.S. Information regarding the education and conservation program is required as part of the permit application. This information is a summary document that provides an overview of a facility's education and conservation programs. A notice of receipt for each permit application must be published in the *Federal Register* announcing a 30 day public comment period. During the public comment period, the application is sent to the Marine Mammal Commission for review, as well as to appropriate NMFS regions and centers. Based in part on the comments received, NMFS then makes a final determination as to whether the preparation of an environmental assessment or environmental impact statement is required under the National Environmental Policy Act and makes a decision on the issuance or denial of the application under the MMPA.

The subcommittee has asked for specific comments on the following items:

1) The adequacy of current professionally recognized standards for education or conservation programs at public display facilities.

The *MMPA* stipulates that education and conservation programs offered by marine mammal public display facilities be based on professionally recognized standards of the public display community. NMFS acknowledges that those standards are set by the industry that is being regulated. The committee report interpreting the 1994 amendments to the *MMPA* explicitly states that the Secretary should not regulate the content of education and conservation programs. The committee report further recognized the diversity in and among public display facilities, as well as the methods available for providing education and conservation opportunities, and requested the regulating agencies acknowledge and foster this diversity. The American Association of Zoological Parks and Aquariums, now the Association of Zoos and Aquariums, (AZA) was singled out as a professional association made up of accredited public display institutions that had acceptable standards in place. The committee language states that standards which approximate those of the AZA meet the requirements of the education and conservation criteria required under section 104(c) of the *MMPA*.

At the time of the 1994 *MMPA* amendments, members of the AZA and of the Alliance of Marine Mammal Parks and Aquariums (Alliance) represented approximately 60 percent of the facilities that were holding marine mammals for public display. Following the amendments, NMFS asked the AZA and the Alliance to prepare a list of their standards for education and conservation programs. The AZA and Alliance submitted their separate standards, which NMFS then published in the *Federal Register* (59 FR 50900, October 6, 1994) as examples of standards on which education or conservation programs could be based to meet the public display permit requirements of the *MMPA*.

NMFS acknowledges that there are many different ways to educate the public about marine mammal conservation. Approximately 100 facilities hold marine mammals for public display purposes and each facility has tailored its education and conservation programs to serve particular audiences within the constraints of available resources. To create a "one size fits all" approach to educating the public fails to embrace the need to craft current and meaningful messages utilizing the many different educational resources available.

NMFS routinely works with public display facilities at a national and regional level on projects of mutual interest to foster conservation of marine mammals in the wild through promoting responsible wildlife viewing, raising awareness of marine debris and pollution concerns, and responding to beached and stranded marine mammals.

2) The need for regulations to be developed pursuant to Section 104(c)(2)(A)(i) of the Marine Mammal Protection Act to ensure sound standards for education or conservation programs.

The *MMPA* criteria for issuance of permits to take or import of marine mammals for public display states that the applicant must meet the “professionally recognized standards of the public display community.” Thus, it is those *industry* standards for education and conservation programs, not federal standards, that are applicable. This statutory requirement is clear, and therefore there is no need for further clarification through NMFS implementing regulations. Congress and NMFS have acknowledged that standards used by AZA and the Alliance represent an acceptable industry “standard” for education and conservation programs for marine mammals in public display facilities.

Currently, approximately 80 percent of U.S. facilities holding marine mammals are members of the AZA or the Alliance, both of which have standards for conservation and education programs. These organizations also have an accreditation process that requires facilities to meet association standards for education and conservation programs. Additionally, most marine mammal public display facilities are established entities within their communities, with a history of providing education and conservation information to their guests. The establishment of new marine mammal facilities is not a common occurrence — the most recent U.S. facility opened in 2006 on St. Thomas, U.S. Virgin Islands.

As part of the current permit regulation revision and associated *NEPA* scoping processes underway, NMFS has not proposed specific regulations for education and conservation programs other than requiring a facility to demonstrate that it meets the *MMPA* criteria by having a program based on professionally recognized standards. NMFS is not seeking to change the implementing regulations to revise its role with regard to marine mammals in public display, but to update permit regulations to reflect current agency policies that are consistent with the *MMPA*, and in consideration of court decisions about cumulative impacts and other *NEPA* compliance matters. With respect to public display, NMFS is seeking to codify or consolidate existing procedures for implementing inventory reporting based on Section 104 of the *MMPA*, as well as issuing permits for import or collection of marine mammals from the wild for public display purposes.

3) The processes for evaluating education and/or conservation programs at public display facilities during the permitting process and whether those programs are periodically reevaluated after permits are granted to ensure standards continue to be met.

Consistent with its responsibilities to protect marine mammal populations in the wild, NMFS’ primary consideration when reviewing applications for permits to import or remove marine mammals from the wild for purposes of public display is whether the removal of marine mammals from the wild is “sustainable” and does not compromise the stocks’ maintenance at optimum sustainable population levels. Before such a permit can be issued, NMFS must determine that the manner of taking is consistent with the *MMPA*’s humane standard. For imports, NMFS evaluates

whether the original taking was legal in the country of origin and assesses whether the take was consistent with the sustainability, humaneness, and other standards of the *MMPA*.

Applicants requesting a permit to import or take marine mammals from the wild for public display must demonstrate that they meet the three aforementioned *MMPA* criteria set forth in section 104(c)(2)(A). Regardless of whether applicants are members of or subscribe to the professionally recognized standards of the AZA or Alliance, permit applications must include a written summary of the organization's education or conservation program to be considered complete. These summaries are not intended to be an exhaustive compilation of every program, script, or brochure available to the public, but rather, each summary must contain enough information to demonstrate that a facility has an education or conservation program that is comparable to or based on the standards set forth by the AZA or Alliance.

NMFS does not routinely re-evaluate the education and conservation programs of facilities holding marine mammals after permit issuance. However, upon receipt of a new public display permit application, NMFS reviews the education and conservation program of the facility regardless of when it last issued a permit to that facility. Facilities that hold a permit to import or take marine mammals from the wild for public display are required to continue to meet the three criteria under the *MMPA* for as long as they have marine mammals.

Conclusion

Again, NOAA appreciates this opportunity to provide testimony on current practices and policies with regard to marine mammals in public display facilities. We look forward to continuing our work with the Subcommittee on strategies to ensure the recovery and protection of marine mammal populations.