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VIA REGULATIONS.GOV

December 2, 2019

Permits and Conservation Division
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway, Room 13705
Silver Spring, MD 20910
Attn: Jolie Harrison, Chief

RE: File No. 22629, NOAA-NMFS-2019-0113

Dear Ms. Harrison:

On behalf of the millions of members and constituents of the Animal Welfare Institute (AWI), Animal Justice, Cetacean Society International, Friends of the Sea Otter, the International Marine Mammal Project of Earth Island Institute, Marine Connection, the Oceanic Preservation Society, Ontario Captive Animal Watch, Orca Research Trust, People for the Ethical Treatment of Animals, Whale and Dolphin Conservation, World Animal Protection, and Zoocheck Canada, I am submitting these comments on *84 FR 52072*, notice of receipt by the National Marine Fisheries Service (NMFS) of an application by Mystic Aquarium (Applicant) to import five live beluga whales (*Delphinapterus leucas*) from MarineLand in Canada for the purpose of scientific research. **We strongly oppose this permit application.**

When considering this application, NMFS must apply the conservative bias of the Marine Mammal Protection Act (MMPA) (16 U.S.C. § 1361 et seq. (1972)) (Rally et al., 2018)—which requires that no action be taken regarding these belugas that might prove adverse to their interests or the interests of the depleted population from which they descend—and **deny this permit request.**

Overview

We recognize the need for scientific research on belugas (and all other marine mammals), as climate change affects their habitats and other anthropogenic activities and impacts on the environment threaten their survival and wellbeing. We also recognize the general quality of the research program at Mystic Aquarium. When conducted in the appropriate context, some aspects of the Applicant's research proposals are bona fide[1] (although see below for our concerns with various details).

Regardless, for substantive and compelling conservation and animal welfare reasons, **the laws in both Canada and the United States do not allow for this importation** (see below for

[1] 16 U.S.C. § 1361(3)(22)

discussion). NMFS should never have accepted this permit application in the first instance. The solution to this dilemma—the need to conduct research on belugas without misusing research exemptions in the laws on both sides of the border—is clear: The Applicant's eight research proposals describe work that can realistically and cost-effectively be done at MarineLand, obviating the need for an importation. This, in our opinion, is a permissible outcome for the whales and the law—the Applicant should invest the time, money, and staff effort needed to establish conditions at MarineLand to allow the research to be conducted there, and to otherwise improve the wellbeing of MarineLand's beluga population.

Notwithstanding this solution, a request to import cetaceans or their progeny from a depleted population for scientific research with "incidental" public display and breeding erases the clear and necessary distinction between research, public display, and enhancement under the MMPA; therefore, **this importation must be denied**. To our knowledge, such a request has never been made before under the MMPA, meaning the Applicant seeks to set a (dangerous) precedent. This is not merely a request for a research permit where the marine mammals in question would also incidentally be on public display.[2] This is also not a request for a research permit for a rescued marine mammal from an endangered/depleted population in the United States who cannot be released.[3] This is a request to *import individuals or their progeny from a depleted population for research, where they would intentionally and continuously be on public display*, and may eventually be held solely for the purpose of public display, and would be part of a coordinated breeding program that is *not for enhancement*, as the progeny would never be released (see 16 U.S.C. § 1374(c)(4)(B)(iii); see also p. 57, permit application: "Any progeny that may be born as a result of research activities would be maintained in captivity for the duration of their lives and would not be released to the wild"). **Such an importation is specifically not allowed under 16 U.S.C. § 1372(b)(3).**

[2] This type of situation was generally addressed by NMFS in implementing regulations (50 C.F.R. § 216.41(c)(1)(vi)). In *61 FR 21926* (May 10, 1996), NMFS's final rule on MMPA special exception permits, NMFS stated, with regard to public display of *non-depleted marine mammals* held for research (depleted marine mammals are addressed specifically in various sections of the regulations—see e.g., 50 C.F.R. § 216.41(b)(5)—but not here), "A number of comments expressed concern over restricting the public display of marine mammals held for scientific research. Some comments identified specific instances in which research facilities display their marine mammals as a means of educating the public about the research and receiving donations for financial support of research projects. ¶As scientific research and public display are recognized by statute as two separate activities, *NMFS has retained this restriction as a necessary distinction between these activities*" (p. 21929; emphasis added). It also noted that the regulations provided "adequate flexibility to allow [public display of non-depleted marine mammals], under appropriate conditions, to occur under a scientific research permit" (pp. 21929–21930).

[3] See https://www.fisheries.noaa.gov/species/beluga-whale#spotlight. Tyonek, a beluga calf from the endangered Cook Inlet beluga population, was transferred to SeaWorld San Antonio when NMFS determined he was non-releasable (see https://apps.nmfs.noaa.gov/preview/applicationpreview.cfm?ProjectID=22095&view=0100000000 for details). His public display being incidental to research is not analogous to this situation, as he was a non-releasable wild rescue and the only option for housing him was in a public display facility. The five belugas who are the subject of this permit application are captive-born, already have housing, and it is not critical or essential to import them and house them in a public display facility in the United States, for research or any other purpose.

We maintain that **this permit application should be rejected without further review or be denied outright**, and we offer detailed legal and scientific discussion as to why. However, we also discuss other important aspects of the permit application below.

Major Concerns

We have five major concerns with this permit application.

1. US law does not allow this importation as proposed

The MMPA created a strict moratorium on the taking and importation of all marine mammals, subject to a few narrow exemptions under permit, including importation for purposes of scientific research or public display, photography for educational or commercial purposes, or enhancing the survival or recovery of a species or stock[4] (16 U.S.C. § 1371(a)(1)). The party who seeks to take or import marine mammals bears the burden of proof that the permit criteria are met and must show that the proposed action will not disadvantage the species or stock (§§ 1373(a), 1374(b), and 1374(d)(3); see also *Georgia Aquarium, Inc. v. Pritzker*, 135 F. Supp. 3d 1280 (N.D. Ga 2015)). Thus, the burden of proof for these legal and regulatory requirements rests with the Applicant.

A. The depleted designation under the MMPA applies to the whales proposed for importation

The MMPA, under § 1362(3)(1), allows for stocks or population stocks to be designated as "depleted" if:

> (A) the Secretary, after consultation with the Marine Mammal Commission and the Committee of Scientific Advisors on Marine Mammals established under title II of this Act, determines that a species or population stock is below its optimum sustainable population;[5]
>
> (B) a State, to which authority for the conservation and management of a species or population stock is transferred under section 109, determines that such species or stock is below its optimum sustainable population; or
>
> (C) a species or population stock is listed as an endangered species or a threatened species under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.).

The depleted designation applies to all members of said stock or population stock (and their progeny—see below) even if they are held in captivity. Analogous precedent for a cetacean exists directly under the Endangered Species Act (ESA) (16 U.S.C. §§ 1531 et seq). Lolita, an orca held at Miami Seaquarium, was captured from the southern resident killer whale (SRKW) population

[4] The use of the term "stock" is increasingly out of favor in marine mammal management and policy and we will use "population" throughout the rest of these comments, except where it is quoted directly from the MMPA or its regulations.

[5] "Under the Marine Mammal Protection Act, any population that is below its maximum net productivity level, the lower bound of the optimum sustainable population range, is considered to be depleted. The National Marine Fisheries Service has determined that maximum net productivity in small cetaceans … occurs at about 60 percent of carrying capacity" (Marine Mammal Commission, 1992; p. 102).

in 1970—just prior to the passage of the MMPA in 1972 and the ESA in 1973. She is the only SRKW currently held in captivity. While NMFS listed the SRKWs as endangered in 2005,[6] the agency did not extend the protections to those members of the population held in captivity until People for the Ethical Treatment of Animals successfully petitioned NMFS to have Lolita recognized as endangered and to remove the ESA's captive-member exclusion (*People for the Ethical Treatment of Animals, Inc. v. Miami Seaquarium*, No. 15-22692-CIV, 2017 WL 1533986, at *1 (S.D. Fla. Mar. 2, 2017), report and recommendation adopted, No. 1:15-CV-22692-UU, 2017 WL 7411186 (S.D. Fla. Mar. 17, 2017)). Lolita's case is analogous because, while NMFS listed the SRKWs as endangered decades after her capture, the agency did eventually amend the SRKW endangered listing to include Lolita as the only captive member of the population.[7]

In another example, the US Fish and Wildlife Service (USFWS) issued a split-listing for chimpanzees in 1990,[8] listing wild chimps as endangered and captive chimps as threatened, allowing them to be used for medical research. After consideration of a petition filed by a group of NGOs, the USFWS determined in 2015 that "chimpanzees held in captivity should not have separate legal status under the Act because they have no 'range' that is separate from the range of the species in the wild to which they belong, as that term is used in the Act."[9] Furthermore, the Service recognized:

> Certain provisions in sections 9 and 10 of the Act show that Congress anticipated that *captive animals would have the same legal status as their wild counterparts by providing certain exceptions for animals held in captivity*. Section 9(b)(1) of the Act provides an exemption from certain section 9(a)(1) prohibitions for listed animals held in captivity or in a controlled environment as of the date of the species' listing (or enactment of the Act), provided the holding in captivity and any subsequent use is not in the course of a commercial activity. Section 9(b)(2) of the Act provides an exemption from all section 9(a)(1) prohibitions for raptors held in captivity or in a controlled environment as of 1978 and their progeny. Section 10(a)(1)(A) of the Act allows permits to "enhance the *propagation* or survival" of the species. This demonstrates that Congress recognized the value of captive-holding and propagation of listed specimens held in captivity, but intended that such specimens would be protected under the Act, with these activities generally regulated by permit. If captive specimens could simply be excluded through the listing process, none of these exceptions and permits would be needed (p. 34502; emphases added).

[6] *70 FR 69903* (November 18, 2005)

[7] *80 FR 7380* (February 10, 2015). Of course, any ESA-listed species or population stock is automatically also depleted, meaning this MMPA-designation also applies to captive members.

[8] See *80 FR 34499* (June 16, 2015) for background.

[9] *Id.*; p. 34502

The same can, of course, be said for the MMPA. In its chimpanzee listing, the USFWS recognized that the ESA served to protect and conserve ecosystems *as well as* endangered or threatened species *themselves*. The agency highlighted the fact that nothing in the statutory language/purpose indicates that conservation programs should be limited to specimens located in the wild.[10] The MMPA is similar to the ESA in this regard—it protects marine ecosystems *as well as marine species* (16 U.S.C. §§ 1361(2), (5)(B), (6); §§ 1373(b)(1), (3)).

In addition, all progeny of whales so designated, and thus the animals proposed for importation here, are covered by the depleted designation[11] (see also fn 18). Being a hybrid does not weaken an animal's claim to this status.[12] Progeny can descend from one or both parents, unless

[10] *Id.*

[11] Regarding applicability to progeny, see NMFS's Scoping Document, Modifications to the Regulations Governing the Issuance of Scientific Research, Enhancement, and Public Display Permits Pursuant to the MMPA (March 2010, available at http://www.freemorgan.org/pdfs/NMFS-Scoping-Document-on-Marine-Mammal-Permit-Regulations-March-2010.pdf), which states "Throughout Section 104 of the MMPA, references to reporting requirements related to progeny of captive marine mammals make it clear that the requirements of the MMPA apply to progeny of captive animals as unique individuals" (p. 15).

[12] Both the Convention on Endangered Species of Wild Fauna and Flora (CITES) and the US regulations implementing CITES consider hybrids protected (see 50 CFR 50 CFR § 23.43). The Migratory Bird Treaty Act also protects all progeny, including hybrids (50 CFR § 21.3). FOIA documentation NMFS provided to AWI in November 2019 indicates that the agency has already grappled with this legal concept. See, e.g., NOAA/NMFS internal email stating, "I wanted you to be aware of Mystic Aquarium's permit application to import beluga whales from Marineland [sic] of Canada. At least one parent of each whale was wild caught from the depleted Russian stock and are at least a hybrid or possibly fully depleted" (FOIA document 0.7.2244.27560); see also documents 0.7.2244.27216, 0.7.2244.137, 0.7.2244.143, 0.7.2244.146, 0.7.2244.150, and 0.7.2244.154.).

The FOIA documentation indicated that the Applicant asked—and NMFS responded to—several questions either by email and/or through phone calls or in-person meetings (see e.g., FOIA documents 0.7.2244.27059, 0.7.2244.27192, 0.7.2244.204, 0.7.2244.27215, and 0.7.2244.326). On November 26, 2019, AWI requested to be provided the same information on these questions that NMFS provided to the Applicant (Hancock, 2019). NMFS officials spoke with AWI representatives on the phone on December 2, 2019 and summarized the answers that the agency provided to the Applicant. The Applicant's questions, and the summary response provided by NMFS, are as follows:

In FOIA Doc. 0.7.2244.27212, Mystic Aquarium, through its lobbyist, Mr. Schildwachter, asked questions regarding the effect of the depleted designation:

> "1. Depleted Status. Question: We may need to choose among whales for import that are, or may be, originally taken from the Sakhalin Bay-Nikolaya Bay-Amur River Stock of Beluga Whales. We can make every effort to document which is which, but we are already certain that all those taken from the wild were taken before the designation of that stock as depleted and therefore are themselves from a non-depleted stock. That is, a stock being animals active in 'common spatial arrangement'. Is there a policy either issued or implied that extends depleted status beyond the designated stock and retroactively to any individual that originated from that area at any time?
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> "Question: Related to the above, is there an issued or implied policy that extends depleted status to progeny of individuals taken from a non-depleted stock prior to a later designation of depleted? In choosing an appropriate selection of whales, we are already constrained by combinations of age, sex, and other factors, and so would like further guidance on if and, if so, how designation of a wild stock as depleted is relevant to a captive one."

specifically stated otherwise, and the MMPA does *not* specify that, to be considered depleted, progeny must descend from two depleted parents.[13]

The parents being captured before the depleted designation changes nothing.[14] In 2016, after the parents of the five whales proposed for importation were captured (the parents were captured in the late 1990s through 2005), NMFS designated the Sakhalin Bay-Nikolaya Bay-Amur River (S-N-A) population of belugas as depleted.[15] The MMPA states:

> [I]t is unlawful to import into the United States any marine mammal if such mammal was— … taken from a species or population stock which [NMFS] *has … designated* as a depleted species or stock (16 U.S.C. § 1372(b)(3); emphasis added).

NMFS indicated to AWI that the agency's response to this line of questioning was to direct Mr. Schildwachter to the final rule designating the Sakhalin Bay-Nikolaya Bay-Amur River (S-N-A) belugas as depleted (*81 FR 74711*), the contents of which would address his questions.

In the same email, Mr. Schildwachter had inquired with the agency about research:

> "2. Question: We understand that import of a whale from a depleted stock is permissible under the exception that the import from a depleted stock 'will directly benefit that species or stock, or will fulfill a critically important research need' (50 CFR 216.41(b)(2)(ii)). By what criteria are the qualitative terms in this exception judged? For example, would a research need described in a recovery plan for the species categorically qualify as a 'critically important research need'? Is collaboration within the mainstream of the community of beluga experts relevant?"

In response to this line of questioning, NMFS stated that any critically important research need may be identified in a species recovery plan; however, any final determination regarding "critical need" would not be made until after the permit application had been made available to the public and underwent review by the Marine Mammal Commission.

Additionally, with regard to "Taking ... beyond [that] authorized by the permit" (50 CFR 216.34(a)(7))," Mr. Schildwachter asked:

> "Question: To the extent that satisfaction of this rule depends on others not subject to U.S. law, NOAA has in the past taken written assurances from such parties. Other, more enforceable assurances are conceivable. What standard of decision-making must any such assurance meet?"

In response to this line of questioning, NMFS stated that the burden is on the applicant to demonstrate how the criteria would be met and that each application is reviewed on a case by case basis.

[13] For example, 16 U.S.C. § 1374(c)(4)(B)(iii) states that the MMPA allows the captive maintenance of depleted marine mammals held under enhancement permits only if the Secretary "requires that *the marine mammal or its progeny* be returned to the natural habitat of the species or stock as soon as feasible, consistent with the objectives of any applicable conservation plan or recovery plan" (emphasis added). The use of the singular here means only one parent need be of the depleted population for *its* progeny to be covered by the designation.

[14] See e.g. 16 U.S.C. § 1374(c)(8)(C), "Any progeny of a marine mammal born in captivity before the date of the enactment of the Marine Mammal Protection Act Amendments of 1994 [April 30, 1994] and held in captivity for the purpose of public display shall be treated as though born after that date of enactment." If captive-born progeny of pre-Amendment marine mammals are covered by the MMPA, then captive-born progeny of pre-depleted designation marine mammals are certainly covered by a later depleted designation.

[15] *81 FR 74711* (October 27, 2016)

The statute's use of the present perfect tense ("has designated") instead of the past perfect tense ("had designated") or the past tense ("was designated at the time of taking") indicates that the prohibition does apply to animals taken from a population that is designated depleted after their initial take (see also next paragraph).

In re Polar Bear Endangered Species Act Listing and Section 4(d) Rule Litigation (MDL No. 1993, 720 F.3d 354, 357-358 (D.C. Cir. 2013)) fully agreed with this reading of the statute and helps to dispel any notion that the MMPA's prohibition against the importation of depleted animals would not apply here because of when the depleted designation occurred. In that case, Safari Club International had sued the USFWS after the agency barred the importation of polar bear trophies due to the polar bear's depleted status under the MMPA. The DC Circuit noted:

> In support of its argument that the import prohibitions apply only to polar bears taken after the species became depleted, the Safari Club first points to section 102(b)(3), which prohibits importation of any marine mammal "taken from a species or population stock which the Secretary has, by regulation published in the Federal Register, designated as a depleted species or stock." 16 U.S.C. § 1372(b)(3). According to the Safari Club, this provision applies only to mammals taken from species that had already been designated as depleted at the time they were taken.[16]

Both the US District Court and the US Court of Appeals for the DC Circuit disagreed, with the circuit court stating:

> The provision refers not to mammals taken from species the Secretary *had designated* as depleted but instead mammals taken from species the Secretary *has so designated*. If Congress intended section 102(b)(3) to apply only to mammals taken after the species became depleted, it would have replaced the verb "has" with "had." Reinforcing this conclusion, other provisions of section 102(b) are expressly limited by the phrase "at the time of taking." Specifically, sections 102(b)(1) and 102(b)(2), respectively, prohibit importation of mammals "pregnant at the time of taking" and "nursing at the time of taking." 16 U.S.C. § 1372(b)(1)–(b)(2). By contrast, section 102(b)(3) contains no language limiting its operation to species designated as depleted "at the time of taking" (emphases added).

It is therefore clear that a depleted designation both applies retroactively to any individual that originated from that area at any time and extends to all future captive progeny of individuals taken from a stock that was later designated as depleted. Under no circumstances should NMFS even consider a scenario where the five whales covered by this permit application are not included in the S-N-A depleted designation.

[16] *In re Polar Bear Endangered Species Act Listing and Section 4(d) Rule Litigation* - MDL No. 1993, 720 F.3d 354, 357-358 (D.C. Cir. 2013)

B. The MMPA prohibits public display of marine mammals of a depleted population incidental to a scientific research permit

In enacting the MMPA, Congress purposely placed a prohibition on importing marine mammals from depleted populations for the purpose of public display. As noted in the previous subsection, the MMPA states:

> Except pursuant to a permit for scientific research, or for enhancing the survival or recovery of a species or stock, issued under section 1374(c) of this title, it is unlawful to import into the United States any marine mammal if such mammal was— … taken from a species or population stock which [NMFS] has … designated as a depleted species or stock (16 U.S.C. § 1372(b)(3)).[17]

Other provisions of the statute indicate that this prohibition applies to progeny of members of a depleted population.[18] This interpretation is also consistent with the precautionary purpose of the MMPA. Accordingly, when NMFS issued its final rule designating the S-N-A belugas as depleted under the MMPA, it lawfully and appropriately declared that "[a]s a result of this determination, importation of beluga whales from this population (or their progeny) into the United States for the purpose of public display will now be prohibited."[19]

It is similarly clear that Congress did not authorize the Secretary to allow public display incidental to a scientific research permit issued for depleted marine mammals. Section 1374(c)(4) relates to permits issued for enhancing the survival or recovery of a species or stock. The section provides that *under an enhancement permit*, "[t]he Secretary may allow the public display of such a marine mammal [from a depleted species or stock] only if the Secretary determines that such display is incidental to the authorized maintenance and will not interfere with the attainment of the survival or recovery objectives" (§ 1374(c)(4)(B)). Section 1374(c)(3), on the other hand, relates to permits issued for *scientific research* on marine mammals (and, therefore, relates to the application at issue here). This section, directly preceding Congress' explicit allowance of incidental public display for *depleted* marine mammals held for enhancement purposes, does *not* similarly allow for incidental public display of a marine mammal from a depleted species or stock for *research* purposes.

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[17] See also § 1371(a)(3)(B), which prohibits the taking or importation "of any marine mammal which has been designated by the Secretary as depleted" except pursuant to a permit issued for "scientific research purposes, photography for educational or commercial purposes, or enhancing the survival or recovery of a species or stock."

[18] See fn 11. NMFS also applies requirements of the Endangered Species Act (ESA) to progeny of captive marine mammals (50 C.F.R. §§ 224.101(b) and 223.102(b)): "Unless otherwise indicated in the 'Description of listed entity' column, all individual members of the listed entity and their progeny retain their listing status wherever found, including individuals in captivity." NMFS's website also states that "progeny, that…are designated as depleted under the MMPA, may not be exported to foreign countries for public display" (see https://www.fisheries.noaa.gov/national/marine-mammal-protection/public-display-marine-mammals).

[19] *81 FR 74711* (October 27, 2016); p. 74718

The Supreme Court has "often noted that when 'Congress includes particular language in one section of a statute but omits it in another'—let alone in the very next provision—this Court 'presume[s]' that Congress intended a difference in meaning" (*Loughrin v. United States*, 573 U.S. 351, 358 (2014) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983))). Congress's decision to explicitly authorize the Secretary to permit public display incidental to an enhancement permit, but not to explicitly provide the same authority in the immediately preceding section describing scientific research permits, must be given its natural meaning: **NMFS *cannot* allow for public display of a depleted marine mammal incidental to a scientific research permit**. Interpreting this to the contrary would render Congress's express authorization of incidental public display in § 1374(c)(4)(B) for enhancement permits superfluous, undermine the purpose of the enhancement permit program, and "run[] afoul of the 'cardinal principle' of interpretation that courts 'must give effect, if possible, to every clause and word of a statute'" (*Id.* (quoting *Williams v. Taylor,* 529 U.S. 362, 404 (2000))).

NMFS's regulations are consistent with the Secretary's inability to authorize public display of a depleted marine mammal incidental to a scientific research permit.[20] The agency *generally allows* for public display of marine mammals incidental to research if certain conditions are met (50 C.F.R. § 216.41(c)(1)(vi)), but does not purport to allow such display of *depleted* marine mammals, which are subject to additional statutory protections. **Any finding that § 216.41(c)(1)(vi)(B) authorizes incidental display *of a depleted marine mammal* imported pursuant to a research permit is plainly contrary to the MMPA and vulnerable to an as-applied challenge**. This should be the end of the matter.

C. Georgia Aquarium should be a co-applicant for this importation request

Given the partnership between Mystic Aquarium and Georgia Aquarium (see Appendix 1 of the permit application);[21] Georgia Aquarium's essential financial investment in this effort (p. 17, permit application: "Mystic Aquarium does not have the resources to fund this initiative alone and, in compliance with our lending institution, *must engage* in a lease in lieu of a loan agreement [with Georgia Aquarium]"; emphasis added); the claim that three of the whales would be "owned" by Georgia Aquarium;[22] and the involvement of Georgia Aquarium representatives in efforts

[20] We note that the Alliance of Marine Mammal Parks and Aquariums holds a permit to import marine mammal parts for breeding purposes, which NMFS amended on January 6, 2017 to clarify depleted species prohibitions re: reproductive research. Notably, following the S-N-A depleted designation, the Alliance cannot import parts from depleted stocks for breeding purposes. Amendment #5, which is a research permit, states "this permit does not authorize the propagation of marine mammal species or stocks designated as depleted, such as the recently designated Sakhalin Bay-Nikolaya Bay-Amur River stock of beluga whales, *for public display purposes*" (NOAA Fisheries File No. 17305, application available at https://apps.nmfs.noaa.gov/search/search.cfm; emphasis added).

[21] We note that the Memorandum of Understanding found in Appendix 1 does not address "ownership" of these whales as the Applicant and Georgia Aquarium see it (p. 17, permit application). In other words, other than the statement on p. 17 in the permit application, the Applicant has provided no documentation of the lease agreement between the two facilities wherein three of the whales would be "owned" by Georgia Aquarium. Therefore, the permit application is deficient in this sense; it must include the lease agreement between these two facilities regarding three of the whales.

[22] We believe firmly that marine mammals cannot be *owned* by anyone—given their status as protected species under the MMPA, when in captivity, we consider these species held in the public trust. The public display industry itself

undertaken by Mystic Aquarium related to this importation request,[23] it is clear that Georgia Aquarium is not just a "silent" partner in this endeavor, but a major actor. Therefore, the facility should explicitly and openly be a co-applicant for this importation permit request.

Georgia Aquarium's omission as an applicant renders this application legally deficient (see 50 C.F.R § 216.14(a)(2)). The application should be withdrawn and resubmitted with Georgia Aquarium as a co-applicant. We consider the likelihood that at least the three whales Georgia Aquarium would "own" would indeed be transferred (sooner than later) to Georgia Aquarium to be far higher than implied by the application. The application also potentially runs afoul of 50 C.F.R. § 216.41(a)(2), which requires that "For any scientific research involving captive maintenance, the application must include supporting documentation from the person responsible for the facility or other temporary enclosure." While the application presents a fair amount of documentation about Georgia Aquarium in general, including a facility description and transport plan in addition to the memorandum of understanding between the two aquariums, it appears to lack documentation from the person who would be responsible for the belugas at Georgia Aquarium (also see fn 21). The Applicant and Georgia Aquarium must address this overarching deficiency by being upfront and submitting a joint application.

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seldom uses the terms "own" and "ownership" when referring to these animals—for example, marine mammals are often transferred under "breeding loans" (which may last the animal's lifetime), not *sold.*

As public trust animals and given their special status as progeny of animals wild-caught from a depleted population, should this importation permit be granted, these five whales *and all their descendants*, while they would be in the custody of whichever facility was holding them, must be under the direct, legal jurisdiction of NMFS, which is the closest thing to "ownership" in these cases.

There is precedent for this. The USFWS retained legal jurisdiction over Yupik, a female polar bear exported to the Morelia Zoo in Mexico after being rescued as an orphaned cub in Alaska, even though ultimately she was in the custody of the Morelia Zoo for 25 years under a USFWS Letter of Authorization (LOA) (see USFWS Letter of Authorization: Transfer and Placement of a Female Alaska Polar Bear Cub, May 7, 1992). While Yupik was on "permanent loan" to Morelia Zoo, the LOA stated that any violation of the LOA's conditions and stipulations constituted grounds for revocation of the LOA and repossession of the polar bear by the USFWS. The USFWS was in fact attempting to repatriate Yupik from an uncooperative Morelia Zoo at the time of her death in November 2018. In the unfortunate event NMFS issues a permit in response to this application, **NMFS should be the sole arbiter on decisions related to these five belugas and their descendants.**

[23] For example, in a move that is most likely unprecedented for any MMPA research permit, both Stephen Coan of Mystic Aquarium *and* Michael Leven of Georgia Aquarium met with *the Secretary of Commerce*, Wilbur Ross, in October 2017 to discuss this permit application (FOIA documents 0.7.2244.27045, 0.7.2244.27108). It is difficult to see why an executive with Georgia Aquarium would join an executive with Mystic Aquarium to lobby a Cabinet-level official if sending whales to Georgia Aquarium was not merely a possibility, but rather a near certainty. NMFS released documentation of this meeting to AWI on November 19, 2019, the day after the public hearing on this permit application (see Sebastian, 2019 and NMFS Second Interim FOIA Response DOC-NOAA-2019-001230, November 2019).

D. The Applicant cannot meet the disadvantage test of the MMPA

The Applicant cannot show that the proposed importation would not disadvantage the population of belugas from the White Sea (erroneously referred to as the Barents Sea in the application[24]) (16 U.S.C. § 1373(a)).[25] All the mothers of the whales to be imported were captured from the depleted S-N-A population in the Okhotsk Sea in the Russian Federation,[26] which means the relevant statutory and regulatory provisions for depleted populations apply (see above). The father of one whale was also captured from this population, while the father of three was captured in the White Sea. This population is of unknown conservation status, but is considered by international beluga experts to be of moderate concern (NAMMCO, 2018). The father of the final whale has not been determined with certainty, but is likely one of these two males (see p. 45, permit application and Appendix 4).

The Applicant blithely states that the conservation status of the belugas in the White Sea is "non-depleted" (p. 45, permit application), but there is no basis for this conclusion and the Applicant provides no evidence for it. On the contrary, the most recent global assessment of beluga whales (NAMMCO, 2018) does not support the Applicant's conclusion (for the White Sea *or* the Barents-Kara-Laptev Seas—the latter is considered to be of *high* concern by beluga experts). The burden is on the Applicant to determine the conservation status of the White Sea population and show the proposed importation would not disadvantage this stock. It must provide data to support a conservation determination, which is highly likely to be impossible at this time, given the current state of knowledge of belugas in this region. A significant investment in time and resources would be necessary to conduct the required research, especially given said research would be in Russian waters. In similar situations in the past, MMPA permits have been denied when the status of the affected population was not known and could not serve as a basis for meeting the disadvantage test (e.g., *Kokechik Fishermen's Ass'n. v. Secretary of Commerce*, 839 F.2d 795 (D.C. Cir. 1989)).

On this basis alone—the inability of the Applicant (or anyone, for that matter) to provide sound scientific evidence of the conservation status of one of the populations from which three or four of

[24] The Applicant states the father of three of the whales covered by this permit application was captured in the Barents Sea, but in fact there have been no reported live captures in the Barents-Kara-Laptev Seas region (NAMMCO, 2018). This is further addressed in fn 90 and elsewhere in these comments.

[25] 16 U.S.C. § 1373(a) states in its entirety: "The Secretary, on the basis of the best scientific evidence available and in consultation with the Marine Mammal Commission, shall prescribe such regulations with respect to the taking and importing of animals from each species of marine mammal (including regulations on the taking and importing of individuals within population stocks) as he deems necessary and appropriate *to insure that such taking will not be to the disadvantage of those species and population stocks* and will be consistent with the purposes and policies set forth in section 2 of this Act" (emphasis added). Permits must comply with § 1373 regulations (*Id.* § 1374(b); H.R. Rep. No 92-707, at 18 (1971): "In every case, the burden is placed upon those seeking permits to show that the taking should be allowed and will not work to the disadvantage of the species or stock of animals involved").

[26] https://www.fisheries.noaa.gov/action/designation-sakhalin-bay-nikolaya-bay-amur-river-stock-beluga-whales-depleted-under-mmpa; see also *81 FR 74711* (October 27, 2016) and 50 C.F.R. § 216.15(j).

the whales covered by this permit application descend, and thus the inability to meet the "disadvantage" test under the MMPA—**the permit must be denied**.

E. Discussion of general issuance criteria at 50 C.F.R. § 216.34

Even assuming that NMFS could authorize public display incidental to a scientific research permit for these animals, notwithstanding the text of the MMPA, for NMFS to issue any permit under this subpart, the Applicant must meet several issuance criteria (50 C.F.R. § 216.34(a)), including that:

> (1) The proposed activity is humane and does not present any unnecessary risks to the health and welfare of marine mammals;
>
> (2) The proposed activity is consistent with all restrictions set forth in § 216.35 and any purpose-specific restrictions as appropriate set forth in §§ 216.41–216.43;
>
> (3) The proposed activity, if it involves endangered or threatened marine mammals, will be conducted consistent with the purposes and policies set forth in section 2 of the Endangered Species Act (ESA);
>
> (4) The proposed activity by itself or in combination with other activities, will not likely have a significant adverse impact on the species or stock;
>
> (5) Whether the Applicant's expertise, facilities, and resources are adequate to accomplish successfully the objectives and activities stated in the application;
>
> (6) If a live animal will be held captive or transported, the Applicant's qualifications, facilities, and resources are adequate for the proper care and maintenance of the marine mammal; and
>
> (7) Any requested importation or exportation will not likely result in the taking of marine mammals or marine mammal parts beyond those authorized by the permit.

NMFS interprets issuance criterion (7) as requiring a permit applicant to demonstrate that the permit would not likely result in replacement takes or otherwise *increase demand* for the protected species resulting in takes to meet such anticipated demand. In the court case involving Georgia Aquarium, the court upheld this interpretation of issuance criterion (7) as consistent with the language of the regulations and the precautionary purpose of the MMPA (*Georgia Aquarium*, 135 F. Supp. 3d at 1229).

The application falls short with respect to issuance criteria (1), (4), and (7) in particular. With respect to criterion (1), while transferring cetaceans is occasionally required for veterinary or welfare reasons, both the transport and integration into new surroundings with unfamiliar conspecifics is inherently stressful (Spoon and Romano, 2012) and poses risks to the animals' health and welfare (see, e.g., Small and DeMaster, 1995). Therefore, carrying out such a transfer for scientific research is *not humane* when other options are available (see below). In addition, given that this importation is not *necessary* to conduct the proposed research (discussed at length, above and elsewhere in these comments), **the importation would fail to meet both prongs of this regulatory standard**. As noted above, the research could be conducted at MarineLand, obviating the need for a transfer.

As for criteria (4) and (7), any live trade in cetaceans, whether of wild-caught or captive-born animals, increases the demand for, and encourages the capture of, these species from the wild. Several of the NGOs submitting this comment letter have been addressing the situation in the Russian Far East, where belugas from the S-N-A population have been live-captured for decades for the global marine theme park trade (e.g., Shpak and Glazov, 2013), and where all of the mothers and one of two fathers of these captive-born whales were captured.

Capture operators in this region have explicitly argued to Russian authorities who are considering ending the issuance of live capture permits[27] that western activists are seeking to stop beluga captures in the Okhotsk Sea so that westerners can "corner the market" on live beluga sales, thus "cutting out" the Russian operators (C. Vinick, personal communication). This accusation is obviously untrue, as the NGOs seeking to end the captures in Russia are not the same people as those seeking to trade in live belugas, but clearly our concern that *any* trade in live cetaceans encourages captures from the wild is supported by these accusations. In short, **allowing this importation would likely "increase demand for the protected species resulting in takes to meet such anticipated demand,"** despite the whales covered by this permit application being captive-born.

NGOs have previously outlined the links between live trade in marine mammals (even of captive-born animals) and captures from the wild (see, e.g., Humane Society of the United States and Earth Island Institute, 2006; Vail and Risch, 2006). In 2006, SeaWorld sought to import three first-generation descendants of wild-caught belugas from MarineLand.[28] NGOs considered this a "testing of the waters," and predicted that, should the permit be issued, in the near future some US public display facility would attempt to import belugas caught directly from the wild. The permit was issued and this prediction proved accurate—Georgia Aquarium attempted to import 18 wild-caught Russian belugas in 2012.[29] This current request to import belugas descended from a depleted population for research (when in fact they would be on full-time public display) is likely another "testing of the waters." We predict, if it is successful, that once again, in the near future, another facility with less impressive research bona fides than Mystic Aquarium will request to bring in yet more captive-born belugas from MarineLand for "incidental" public display and breeding for public display.

In addition, as noted above, these trades would be seen by Russian capture operators as either opportunities for sales (as they would perceive the United States as a market for Russian wild-caught whales *or their descendants*) or an argument to perpetuate captures in the Russian Far East in order to maintain the Russian Federation's leadership in supplying live belugas to the global public display industry. The court that upheld the denial of the importation permit to Georgia Aquarium in 2015 recognized the validity of this concern. The court found that there was a "high likelihood that if the 18 beluga whales [were] imported to the U.S., the ongoing Russian capture

[27] Russian authorities have suspended issuing quotas for 2020, but for now this suspension is temporary and quotas may be reinstated in the future (see link in fn 31).

[28] *71 FR 33281* (June 8, 2006)

[29] *77 FR 52694* (August 30, 2012)

operation—the sole supplier of beluga whales [to the global market]—will replenish its inventory with additional captures. Russia has exported at least 237 beluga whales between 1990 and 2010 and the existing quotas for live-capture exceed[ed] the 18 whales subject to [the proposed importation]" (135 F. Supp. 3d at 1334). NAMMCO (2018) reported that annual live capture removals from the S-N-A population rose from 40 to over 100 (noting exact numbers were not available) between 2012 and 2015 and exports continued until at least 2017.[30]

Global market demand resulted in the confirmed capture of 90 belugas in the 2018 Okhotsk Sea capture season.[31] Like the Georgia Aquarium case, there is a high likelihood that the importation of belugas from MarineLand to the United States will increase and encourage demand for this protected species around the world, resulting in takes to meet this anticipated demand. The Applicant must provide evidence or assurances that the requested importation will not have *these* impacts to avoid violating 50 C.F.R. § 216.34(a)(7).

We note that the Applicant states it has been working "closely with new management at Marineland [sic] to assure compliance" (p. 75, permit application) with 50 C.F.R. § 216.34(a)(7). However, the risk of takes occurring beyond those authorized by this permit is not limited to MarineLand seeking replacement belugas from the wild. In fact, given the new laws in Canada (see below), this is no longer a threat. The risk lies in the Russian Far East and China, not in Canada or the United States. The failure of the Applicant, the US public display industry, and NMFS to broaden their perspectives, examine the trade links, and think globally has been an ongoing obstacle in the effort by scientists and NGOs to end the international trade in wild belugas. These trade links must be considered when determining the potential adverse impact of the permit "in combination with other activities" and through "taking[s]…beyond those authorized by the permit."

F. Discussion of issuance criteria specific to research permits under 50 C.F.R. § 216.41

In addition to the requirements under 50 C.F.R. §§ 216.33–216.38 of the regulations, permits for scientific research are governed by specific issuance criteria listed under § 216.41(b). Notably, the Applicant must demonstrate that:

> (4) The proposed research will not likely have significant adverse effects on any other component of the marine ecosystem of which the affected species or stock is a part.

[30] See, e.g., CITES Trade database: https://tinyurl.com/umpbbh2

[31] This number was approximately triple the Potential Biological Removal level calculated for the S-N-A belugas during the effort by Georgia Aquarium to import S-N-A belugas (see Reeves et al., 2011). This capture in the 2018 summer season led to a massive international public outcry; three belugas were reported during the winter as missing from the holding pens (and were presumed to have died) and 87 were released back to the wild by November 2019 (the fate of these whales is for the most part unknown to date)—see https://www.facebook.com/freerussianwhales/ for more information about this situation. None of the 90 belugas captured entered international trade, but the capture of free-ranging belugas might still continue for this purpose in Russia despite the outcome of the 2018 captures—see fn 27 and main text.

(5) For species or stocks designated or proposed to be designated as depleted, or listed or proposed to be listed as endangered or threatened:

(i) The proposed research cannot be accomplished using a species or stock that is not designated or proposed to be designated as depleted, or listed or proposed to be listed as threatened or endangered;

(ii) The proposed research, by itself or in combination with other activities will not likely have a long-term direct or indirect adverse impact on the species or stock;

(iii) The proposed research will either:

(A) Contribute to fulfilling a research need or objective identified in a species recovery or conservation plan, or if there is no conservation or recovery plan in place, a research need or objective identified by the Office Director in stock assessments established under section 117 of the MMPA;

(B) Contribute significantly to understanding the basic biology or ecology of the species or stock, or to identifying, evaluating, or resolving conservation problems for the species or stock; or

(C) Contribute significantly to fulfilling a critically important research need.

Again, as noted above, these issuance criteria also apply to the progeny of animals taken from a depleted population.

The application fails to meet the issuance criterion found in § 216.41(b)(5)(i), as the research can be accomplished using non-depleted animals.[32] Therefore, **the application fails to meet a threshold condition for a research permit**. The Applicant's attempt to meet its burden to establish otherwise is entirely speculative and an obvious post-hoc effort to justify why *these* individuals must be imported (p. 20, permit application). Indeed, the Applicant can accomplish the objectives of the proposed research with existing belugas in the United States. There are

[32] The Applicant notes that samples from other facilities have been received in the past (see, e.g., p. 16, permit application) and given the small sample size they are proposing (six animals), acquiring such samples seems a feasible alternative to importing whales from MarineLand. The Applicant claims that relying on other facilities is *not* feasible because some samples require training the animals to facilitate the sampling and this training would conflict with other priorities, but this seems an eminently surmountable obstacle (and is not an obstacle at MarineLand at all, as most of the belugas there are not subject to the "priority" of training for typical show-style performances).

The Applicant also argues that shipping samples from MarineLand could threaten the integrity of the samples or compromise their quality (p. 59, permit application), but this would also be true of samples sent from Georgia Aquarium or, for that matter, from animals in the field to any laboratory. Concern about shipping samples is therefore specious (as *all* samples from free-ranging whales, which are the ultimate intended beneficiary of this research, would require shipping, in some cases great distances), and frankly the Applicant could use the necessity of shipping samples from MarineLand or other US facilities to Mystic Aquarium's laboratory to develop state-of-the-art shipping protocols, which would be of great benefit to field researchers needing to ship samples collected from free-ranging cetaceans.

approximately 30 belugas currently held in US facilities.[33] "Mystic Aquarium collaborates with [each of these] other AZA accredited aquaria that maintain belugas under professional care" (p. 21, permit application).

In the application's descriptions of the eight proposed studies—including their hypotheses, objectives, and justifications—the Applicant never identifies a clear reason why it *must* conduct these studies using progeny of a depleted population. Rather, the Applicant repeats boilerplate language that the studies would contribute to conservation of endangered belugas in Cook Inlet and depleted belugas in the Okhotsk Sea, as well as other beluga populations globally (see, e.g., pp. 4, 6, 8, permit application). However, it is clear from the application's description of the studies' research objectives and justifications that Mystic Aquarium need not conduct the research using the protected progeny of a depleted population.

Where specifically tasked with identifying why the research "must involve ESA-listed or MMPA-depleted species," the Applicant makes broad assertions that amount to nothing more than its claim that the research would provide data that could potentially be relevant to endangered and depleted populations (p. 20, permit application). For example, the Applicant points to "the case of Tyonek, an orphaned beluga calf from the critically endangered Cook Inlet beluga population," who "offered the unique opportunity to study the immune system, endocrine system, gene expression, hearing, and body condition and growth from a Cook Inlet beluga calf" (p. 20, permit application).

The case of Tyonek, however, highlights the fatal flaw in the application's justifications for why progeny of a depleted population must be used—the belugas covered by this permit application were all born and raised in captivity and all but one (or two) is a hybrid of two geographically and genetically separated populations. This minimizes the value of any research results related to the genetics *or* environment of the depleted population as it naturally occurs in the wild (see also below, in "Comments on Recurring Themes").

The Applicant fails to address these significant and inherent confounding variables. In fact, the Applicant makes clear that it deems these belugas "the only ideal cohort available for the research purposes of this application," not because they are progeny of a depleted population, but because "all are captive born and have been captive since birth [and] [a]ll are trained or trainable…" (p. 21, permit application). **This rationale falls far short of the standard required** and these same qualities also apply to most if not all of the belugas already in the US captive population, meaning belugas already captive in the United States are equally "ideal."

Nevertheless, in an attempt to satisfy the burden of establishing that the research must be accomplished using imported animals from a depleted population, the Applicant asserts that "research studies that take ample training time and a more in-depth effort for sampling are not feasible at other locations including Marineland [sic] of Canada and most U.S. facilities" (p. 21, permit application). According to the application, "[i]t has not proven feasible" to work with other

[33] www.cetabase.org

facilities "to shift their institutional priorities to train whales for hearing or diving physiology studies, for example" (p. 21, permit application). However, the Applicant then touts its

> *formal* [sic] institutional collaboration with Georgia Aquarium…in which Georgia Aquarium has committed to support sampling on any of the belugas identified on this permit that would need to be moved to their facility if deemed in the best interest of an individual beluga or the US beluga population (for social, health, or welfare reasons), allowing for a contingency should these whales need to be moved without disruption to or compromise of the research. The research that would continue at Georgia Aquarium is identical to the research at Mystic Aquarium, without exception. The animals would continue to participate in all eight proposed research studies. The PI will train Georgia Aquarium personnel for sample and data collection to support all of the studies included in this permit (p. 19, permit application; see also below in "Detailed Comments").

These assertions are irreconcilable. The Applicant cannot argue, on the one hand, that it *must* import depleted belugas because it is *infeasible* to conduct the proposed research at other US facilities (including Georgia Aquarium), and on the other, that if the belugas need to be moved to Georgia Aquarium for social, health, or welfare reasons, the *identical* research would continue *without exception*.

In addition, **in violation of § 216.41(b)(5)(ii), this importation would likely have a negative impact on the population or result in taking of additional marine mammals by increasing the demand for captive belugas**, as discussed above. As long as Russian belugas are moving around the globe, the capture operators in Russia have strong motivation to pressure the Russian government to allow live beluga captures from the depleted S-N-A population, and possibly from other populations of unknown conservation status, for international trade.

G. Full-time public display is not incidental

The Applicant seeks to import belugas for scientific research purposes and, once the whales are imported, put those whales on public display, as Mystic Aquarium has no dedicated research facilities. However, the Applicant states that "[w]hile the goal of the permit is research, public display will be *incidental*" (p. 64, permit application; emphasis added). **This proposed use of the whales violates the MMPA and NMFS' regulations**, because the public display aspects of the lives of these whales and the relationship of those public display aspects to the proposed scientific research would not be "incidental."

Under the NMFS regulations, non-depleted marine mammals held under scientific research permits cannot be placed on public display unless certain requirements are met, including that the public display is "conducted *incidental* to and do[es] not in any way interfere with the permitted scientific research" (50 C.F.R. § 216.41(c)(1)(vi)(B)). Notwithstanding this provision does not apply to depleted marine mammals (see above), it cannot be relied upon by the Applicant because the public display would not be *incidental* but would instead be an *intentional*, ongoing, permitted aspect of the maintenance of the belugas at Mystic Aquarium, and most likely Georgia Aquarium.

This conclusion is supported by NMFS's regulatory definition of "incidental," as well as case law and dictionary definitions of the term.

"Incidental" is not defined in the MMPA, but the term is defined under NMFS's implementing regulations as "a *non-intentional* or *accidental* act that results from, but is not the purpose of, carrying out an otherwise lawful action" (50 C.F.R. § 229.2; emphasis added).[34] This definition precludes intentional or knowing acts. Although this definition arises under the regulations for commercial fisheries authorizations, NMFS expressly provides that "unless otherwise defined in this chapter," the definition applies chapter-wide (50 C.F.R. § 229.2). Thus, the definition of "incidental" extends to other sections within the same chapter, including the section for scientific research permits, unless NMFS has promulgated a separate definition. Because NMFS has not done so, the definition of "incidental" in § 229.2 also applies to § 216.41, the section for scientific research permits.

The definition used in NMFS's regulations also aligns with numerous dictionary definitions of the term, which generally define an "incidental" act as one that is unpredictable and minor or subordinate when compared to the primary act. For example, the *Webster's II New Riverside University Dictionary* defines "incidental" as an act "occurring or apt to occur as an *unpredictable or minor* concomitant" (emphasis added).[35] Similarly, *Black's Law Dictionary* defines "incidental" as "*subordinate* to something of greater importance; having a *minor role*" (emphasis added).[36] The *Oxford English Dictionary* defines "incidental" as "[o]ccurring or liable to occur in *fortuitous* or *subordinate* conjunction with something else of which it forms *no essential part*" (emphasis added).[37] *Webster's Collegiate Dictionary* defines the term to mean "likely to ensue as a *chance or minor consequence*" (emphasis added).[38] Finally, *Merriam-Webster* defines "incidental" as "being likely to ensue as a *chance* or *minor consequence*" or "*without intention or calculation*" (emphasis added).[39] The plain meaning of the word, therefore, excludes major, intentional acts.

Courts have clarified the meaning of "incidental" in several regulatory contexts. For example, the Second Circuit addressed the meaning of "necessary or incidental" as that phrase is applied to

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[34] Although only defined once, "incidental" is used in several NMFS regulations. See, e.g., 50 C.F.R. § 216.3 ((1), excluding from the definition of "bona fide scientific research" "[r]esearch that is not on marine mammals, but that may *incidentally* take marine mammals"; and (2) defining "*incidental* catch") (emphasis added); see also 50 C.F.R. § 216.35 (requiring a holder of a special marine mammal permit to possess a copy of the permit "when the marine mammal is in transit *incidental* to" a permitted activity) (emphasis added); 50 C.F.R. § 216.103 (defining "*[i]ncidental* harassment, *incidental* taking and *incidental*, but not intentional, taking" to mean "an accidental taking . . . includ[ing] those takings that are infrequent, unavoidable or accidental") (emphasis added).

[35] See "incidental," *Webster's Ii New Riverside University Dictionary* (1984).

[36] See "incidental," *Black's Law Dictionary* (11th ed. 2019).

[37] See "incidental," *Oxford English Dictionary*, available at https://www.oed.com/view/Entry/93467?redirectedFrom=incidental#eid.

[38] See "incidental," *Webster's Collegiate Dictionary 609* (9th ed. 1990).

[39] See "incidental," *Merriam-Webster*, https://www.merriam-webster.com/dictionary/incidental

activities that are part of the mining process (446 F.2d 981 (2d Cir. 1971)). The court held that the common meaning of "incidental" is that "the process must occur in *subordinate* conjunction with a mining process, and that it is the *coincidental* and *secondary* result of the mining process" (emphasis added).[40] In two cases involving NMFS's definition of "incidental" here at issue, the DC District Court upheld the agency's interpretation of the term "incidental" in the MMPA as permitting only non-intentional or accidental take of marine mammals by commercial fishers (*Black v. Pritzker,* 121 F. Supp. 3d 63 (D.D.C. 2015); *Pacific Ranger, LLC v. Pritzker*, 211 F. Supp. 3d 196 (D.D.C. 2016)). In *Black v. Pritzker*, the court noted that NMFS's regulatory definition of "incidental" "as limited to *non-intentional* or *accidental* acts conformed with the common meaning of the term" (emphasis added).[41]

Likewise, in *Pacific Ranger, LLC v. Pritzker*, the court noted that "the incidental-take exception to the broad take prohibition must be read narrowly, to give effect to Congress's intent that '[t]he interest in maintaining healthy populations of marine mammals comes first,'" and determined that "incidental" take only excuses acts that are "accidental" and "non-intentional" (*Pac. Ranger,* 211 F. Supp. 3d at 217-18). The court's reasoning is particularly instructive. Recognizing that, with the MMPA, Congress intended to broadly prohibit the taking of marine mammals with a few "carefully crafted exceptions," the court squarely rejected the contention that "a legal provision that immunizes 'nonintentional or accidental [takings] that result[] from, but [are] not the purpose of, carrying out an otherwise lawful action[,]'"[42] can "excuse any taking so long as it [wa]s not the purpose of' the activity and instead [wa]s a mere consequence of steps that are incidental to lawful" activities.[43] Looking to the plain text of the regulation, the court noted that "an interpretation that would deem all takes 'incidental' except those that are purposeful effectively renders the first part of the 'incidental' definition a nullity, because all that matters is what the second half of the definition speaks to—whether the take 'result[ed] from, but [was] not the purpose of, carrying out an otherwise lawful action."[44] The court also noted that "the phrase 'non-intentional or accidental' does important work within the 'incidental' take definition, as it effectuates Congressional intent to prioritize the wellbeing of marine mammals over other interests" (see *Simmons v. ICC*, 829 F.2d 150, 156 (D.C. Cir. 1987) (explaining that, when interpreting a regulation, the court must consider "the context of the regulation as a whole").

None of these definitions qualifies the proposed public display in this application as "incidental." The public display of the whales would not be a mere coincidence, nor unpredictable, minor, subordinate, fortuitous or a non-essential part of the research. Simply put, the research has been

[40] 446 F.2d 981 (2d Cir. 1971) at 991.

[41] *Black*, 121 F. Supp. 3d at 88.

[42] *Id.*; p. 215 (quoting 50 C.F.R. § 229.2).

[43] *Id.* (internal quotations omitted) (alterations in original).

[44] *Id.* (quoting 50 C.F.R. § 229.2). As the court noted, "[i]t is well established that regulatory interpretations that produce surplusage are disfavored" (see *id.* (citing *Oceana, Inc. v. Pritzker*, 75 F. Supp. 3d 469, 484 (D.D.C. 2014) (citing *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 668–69 (2007))).

purposefully designed to be conducted within the context of, and at the existing facilities used by, Mystic Aquarium's (and possibly Georgia Aquarium's) public display program. Public display cannot be said to be incidental to the proposed research program simply by stating it would be so (the application makes reference to this "incidental" public display only once, on p. 64). To the contrary, the subjective intent of the actor is immaterial to whether a taking is properly deemed to be incidental.[45] Rather, the relevant question is whether the "act to be excused"—here, public display—"is 'non-intentional' or 'accidental.'"[46] Here, public display cannot fairly be categorized as a "non-intentional" or "accidental" consequence of the research.

Nor can the Applicant "render[] the first part of the 'incidental' definition a nullity" by relying solely on the latter part of the definition, i.e., whether the take "result[ed] from, but [was] not the purpose of, carrying out an otherwise lawful action."[47] Despite the Applicant's statement that the public display would be a mere consequence of otherwise lawful scientific research, to fall within the definition of "incidental," and for public display to be properly deemed "incidental," the display of the belugas would *also* need to be a "non-intentional" or "accidental" consequence of the lawful scientific research.[48] The application fails to establish that necessary element, with its single mention of "incidental public display." Thus, public display is neither a "non-intentional" nor "accidental" activity. Rather, placing the belugas on display is the deliberate and intended consequence of this permit application.[49] Indeed, other than using the term "incidental," the Applicant offers no explanation why the public display of these whales would be an unintentional, secondary, and minor component of the scientific research.

Reviewing other situations in which NMFS has characterized an activity as resulting in incidental take, it is clear that NMFS has interpreted "incidental" actions as those that are unintentional, temporary, discrete, and secondary to another action. There are, of course, many examples of NMFS issuing MMPA incidental take authorizations for noncommercial fishing activities under 16 U.S.C. § 1371(a)(5). The types of activities NMFS considers to qualify as "incidental" under this section are relevant, however, to interpreting that term for public display "incidental" to scientific research. For example, in January 2015, NMFS issued an incidental harassment authorization (IHA) to the National Ocean Service's Office of National Marine Sanctuaries Gulf of the Farallones National Marine Sanctuary (GFNMS) to take marine mammals, by harassment,

[45] *Pac. Ranger*, 211 F. Supp. 3d at 214 (noting that the MMPA's prohibition on take "is in the nature of a strict-liability provision").

[46] *Id.*; p. 218.

[47] *Id.*; p. 215 (quoting 50 C.F.R. § 229.2).

[48] See *id.*; see also *id.*; p. 214 ("[T]his Court has no doubt that the safe harbor for "incidental" takes exempts only a narrow slice of the takes that are otherwise proscribed, and that, by using the words "accidental" and "non-intentional," the Secretary meant to place deliberate takes outside the exception."); *cf. Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515, U.S. 687, 700-01 (1995) ("No one could seriously request an "incidental" take 701*701 permit to avert § 9 liability for direct, deliberate action against a member of an endangered or threatened species").

[49] See *id.*; p. 214 (excluding deliberate takes from the "safe harbor" of incidental takes).

incidental to rocky intertidal monitoring work and searching for black abalone.[50] Although the research was part of a long-term study, the incidental take was expected to occur for only seven days, with all work being done during daylight, minus low tides, and the incidental take was likely to result only when survey personnel were near haul-out sites and hauled-out pinnipeds. Further, during the long-term study, GFNMS sought similar IHAs that would allow the work to be conducted for a period of four to eight days per sampling period, with no more than three sampling periods per year.

As another example, NMFS issued an IHA to Deepwater Wind Block Island Transmission, LLC to take marine mammals by harassment, incidental to construction of the Block Island Transmission System.[51] Construction was scheduled to take place within less than one year, with activities that could result in take by harassment lasting for only a portion of that time, up to six weeks, and during that brief period, only on an episodic basis. In yet another of many possible examples, NMFS issued a Letter of Authorization (LOA) to the Alaska Aerospace Corporation (AAC), for the take of marine mammals incidental to space vehicle and missile launch operations at the Pacific Spaceport Complex Alaska on Kodiak Island, Alaska.[52] Although the incidental take by Level B harassment would occur over a five-year period, the take would not be continuous—there would be a maximum of only nine vehicle launches per year, or a mere 0.025 percent of the time of the overlap program period.

In each of the cases above, the incidental take was intended to occur temporarily, and for minor periods of time during the primary activity. Further, the takes clearly would be the unintentional, subsidiary consequence of a primary action. Those examples are clearly distinguishable from this case, in which the Applicant intends to import the belugas knowing that they would be maintained on public display on a full-time, continuous and, indeed, indefinite basis, even extending beyond the five-year term requested for this research permit. As we note below, the application does not specify what would happen with the whales after the five-year research term, but since they would not be released, the only possible conclusion is that they would remain in public display facilities for the remainder of their lives. The application also explains that any offspring of the five whales to be imported would be subject to certain scientific research but would "not be handled for the sole purpose of research" (p. 15, permit application). Again, without more information, the only possible conclusion is that such offspring would also be maintained on public display on a permanent basis. There is no scenario in which life in captivity for the benefit of public viewing can be regarded as "incidental" to anything.

The application also states that the belugas may go to Georgia Aquarium. Like Mystic Aquarium, Georgia Aquarium does not have dedicated research facilities and, as a result, any whales sent there would be on full-time public display as well (Appendix 13, permit application).

[50] *80 FR 3560* (January 23, 2015)

[51] *79 FR 51314* (November 1, 2014)

[52] *82 FR 27472* (June 15, 2017)

For all of these reasons, the application's plan to put the whales, and their anticipated offspring, on full-time, regular public display is antithetical to NMFS's interpretation of "incidental," which aligns with the common meaning of the term. In fact, it is more accurate to consider the scientific research as incidental to the public display of these whales. As a result, **the application fails to meet the requirement that the public display of belugas only be "incidental" to the purported research purposes of the permit, and it must be denied on this ground alone.**

Even assuming that the belugas' public display would be genuinely incidental, public display is not "necessary to address scientific research objectives" that are outlined in the application, as also required by regulation (50 C.F.R. § 216.41(c)(1)(vi)(A)). The Applicant's own description of the eight proposed studies does not reference public display as an aspect of those studies. Where NMFS has generally prohibited the public display of marine mammals held for scientific research (50 C.F.R. § 216.41(c)(1)(vi)(A)), the agency clearly did not intend to authorize regular public display of marine mammals simply because there are no research facilities for the study animals. This interpretation would effectively eliminate this prong to the exception for any applicant that maintains only one enclosure complex suitable for the species it seeks to use for research.

H. This action does not qualify for a Categorical Exclusion under NEPA

"The National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 et seq., as implemented by the Council on Environmental Quality (CEQ) Regulations (40 CFR [sic] Parts 1500 through 1508), requires that Federal agencies include in their decision-making processes appropriate and careful consideration of all environmental effects of proposed actions, analyze potential environmental effects of proposed actions and their alternatives, avoid or minimize adverse effects of proposed actions, and restore and enhance environmental quality to the extent practicable."[53] Categorical exclusions (CE) are:

> a category of actions that an agency has determined does not individually or cumulatively have a significant effect on the quality of the human environment. A CE is a form of NEPA compliance, without the detailed analysis that occurs in an EA [environmental assessment] or EIS [environmental impact statement].[54] A CE may only be applied to a proposed action when… c) there are no extraordinary circumstances that may require further analysis in an EA or EIS.

"A categorical exclusion is appropriately applied for categories of actions that NOAA has determined via these NEPA procedures do not have significant effects on the quality of the human environment, so long as there are no extraordinary circumstances present that would indicate that the effects of the action may be significant."[55] For this permit application, NMFS should invoke

[53] See NOAA-NAO-216-6A-Companion-Manual-03012018 (Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities—Companion Manual for NOAA Administrative Order 216-6A (January 13, 2017), available at https://www.nepa.noaa.gov/docs/NOAA-NAO-216-6A-Companion-Manual-03012018.pdf; p. 1).

[54] *Id.*; p. 4.

[55] *Id.*; p. 3.

exception (c) as noted above. NAO 216-6 provides a two-part test for determining if an action qualifies for a CE.[56] If the action does not pass *both* parts of the test, an EA or an EIS must be prepared. If the action passes both parts of the test, it *may* qualify for a CE, if there are no significant impacts.

> Test Part 1: … NAO 216-6 § 5.05c states that the following types of actions do not qualify for a CE (even if they would have passed Test Part 2 below):
>
> 1. Actions that involve a geographic area with unique characteristics such as historic or cultural resources, park lands, prime farmlands, wetlands, wild and scenic rivers, or ecologically critical areas;
>
> 2. Actions that are the subject of controversy based on potential environmental consequences;
>
> 3. Actions that have uncertain environmental impacts or unique or unknown risks;
>
> 4. Actions that establish a precedent or decision in principle about future proposals;
>
> 5. Actions that may result in cumulatively significant impacts;
>
> 6. Actions that may have any adverse effects upon endangered or threatened species or their habitats.[57]

Mystic's application fails to meet several of the criteria. With regard to 2) ("Actions that are the subject of controversy based on potential environmental consequences"); 5) ("Actions that may result in cumulatively significant impacts"); and 6) ("Actions that may have any adverse effects upon endangered or threatened species or their habitats"), the whales proposed for importation are the progeny of individuals from a depleted population, or the progeny of animals from a population whose conservation status is unknown. Importation of the whales under an MMPA permit, even if for research purposes, would incentivize international trade in these animals. On these grounds alone, **a CE would be inadequate to satisfy NEPA**. With regard to 4) ("Actions that establish a precedent or decision in principle about future proposals"), this permit, if granted, would be the first of its kind and would thus set a precedent. For this reason alone, **a CE would be inadequate to satisfy NEPA and an EIS is warranted**.

The NAO 216-6 Test Part 2 delineates several categories of actions that typically qualify for a CE, and permits under 16 U.S.C. § 1374 are amongst those categories of actions.[58] However, because

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[56] NOAA NEPA Handbook (The National Oceanic and Atmospheric Administration National Environmental Policy Act Handbook, Version 2.3, May 2009, available at https://www.nepa.noaa.gov/NEPA_HANDBOOK.pdf; pp. 22-23).

[57] *Id.*

[58] *Id.*; p. 23. See also NOAA-NAO-216-6A-Companion-Manual-03012018 (fn 53), "Issuance of permits or permit amendments under section 104 of the MMPA for take or import of marine mammals for scientific research, enhancement, commercial or educational photography or public display purposes…" (p. E-3) with various examples of scientific research listed.

the permit application fails multiple criteria under Part 1 of the test, the agency need not even consider Part 2, and **must complete NEPA analysis by preparing an EIS.**

The perpetuation of the international trade in live belugas underscores the fact that "significant social or economic impacts are interrelated with significant natural or physical environmental effects"—under such circumstances, an EIS is required to "discuss all of the effects on the human environment."[59] The CEQ's NEPA regulations state that the "human environment shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment" (40 C.F.R. § 1508.14). The guidance's discussion of this interrelatedness supports the fact that any trade in these animals, even when they are captive-born, encourages additional trade and captures from the wild. **Additional NEPA review is needed in the form of an EA, or better yet, an EIS, to fully consider the environmental impacts of this precedent-setting application.**

2. The Applicant would allow the whales to mate and produce offspring

With the June 2019 passage of Bill S-203, the Ending the Captivity of Whales and Dolphins Act, Canada has banned the display and breeding of cetaceans in captivity. Bill S-203 amended the Criminal Code, RSC 1985 c C-46 (Criminal Code), making it a criminal offense, punishable by a fine of up to CN$200,000, to own or keep a cetacean in captivity, breed or impregnate a cetacean, or possess reproductive materials of cetaceans, including sperm, eggs, or embryos.[60] It is also an offense to arrange, receive money for, or take part in events at which cetaceans are made to perform for human entertainment.[61] Bill S-203 also amended the Fisheries Act, RSC 1985 c F-14 (Fisheries Act), making it illegal to capture wild cetaceans and take them into captivity unless the cetacean is injured or in distress and in need of assistance.[62]

All but one of the cetaceans currently held in captivity in Canada are housed at MarineLand in Ontario, from which the five belugas covered by this permit application would be transferred. MarineLand and the Vancouver Aquarium are permitted to keep whales and dolphins who were born or conceived before the new legislation was passed. In addition, persons who keep a cetacean in captivity in order to provide it with care or assistance following an injury are exempted from the Criminal Code prohibition.[63] It is still possible for a provincial government to issue a license to allow a person conducting scientific research to keep a cetacean in captivity, or breed or impregnate a cetacean, though no such licenses have been issued to date.[64]

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[59] See NOAA NEPA Handbook (fn 56), at Attachment A: Administrative Order 216-6, at 6.02h; p. 108.

[60] Criminal Code s445.2(2), (5)

[61] Criminal Code ss445.2(4). The Criminal Code creates an exception to this prohibition where the performance is authorized by a license issued by a province, but no such provincial licenses have been issued to date.

[62] Fisheries Act s28.1

[63] Criminal Code ss445.2(3)

[64] Criminal Code ss445.2(3.1)

Bill S-203 was also intended to restrict the international trade in cetaceans by making it illegal to import or export live cetaceans without a permit from the Minister of Fisheries and Oceans.[65] The amended section 23.2(2) of the Fisheries Act states:

> The Minister may issue a permit authorizing the importation or exportation of a living cetacean or sperm, an egg or an embryo of a cetacean and impose any conditions that the Minister considers appropriate in the permit, if the importation or exportation is for the purpose of
>
> (a) conducting scientific research; or
>
> (b) keeping the cetacean in captivity if it is in the best interests of the cetacean's welfare to do so.

This provision grants the Minister significant discretion when it comes to deciding whether or not to issue an exportation permit. After recently approving the transfer of two belugas from MarineLand to Spain, then-Fisheries Minister Jonathan Wilkinson noted that the Spanish facility's commitment to not allow the belugas to breed was an important factor in his decision to allow the exportation on the basis that it was in the best interests of the whales' welfare (Casey, 2019), in a reference primarily to overcrowding at MarineLand. MarineLand has not yet applied for a permit under the Fisheries Act for the five whales proposed for exportation to Mystic Aquarium (Wilkinson, 2019a ,b), but Canadian officials have stated that "Our government has been clear that whales should not be kept in captivity for entertainment purposes, nor should they be bred in captivity, and any possibility of captive breeding after exporting a whale or dolphin from Canada *would not be viewed favourably* in the assessment of any application for an export permit" (Wilkinson, 2019a, b; emphasis added).

The Applicant clarifies that any calves produced during the period covered by the research permit would be used in the research under certain protocols, but it is clear that mating, pregnancy, birth, and calf rearing are not critically important to the proposed research (p. 12, permit application—"beluga whale reproduction is not the purpose of the proposed research"). The Applicant goes to great lengths to clarify that these actions and events would be allowed to occur only incidentally and "naturally," with no use of methods such as artificial insemination (p. 12, permit application) and may not occur at all. As we noted above, any progeny produced by these five whales would have no value to conservation, as they would never be released to the wild (p. 57, permit application). Therefore, given the breeding prohibition in Canada, in the unfortunate event this permit is issued, we believe **it is incumbent upon NMFS to demonstrate comity toward, and comparable standards to, Canadian law (see, e.g., 16 U.S.C. § 1374(c)(9) and below) and include in the permit conditions a prohibition on allowing these whales to reproduce.**

We note that the Applicant attempts to justify production of (an estimated maximum of) two calves during the five-year duration of the permit by stating that beluga calf development has been "rarely studied" (p. 15, permit application). However, we question why this is the case and do not find it

[65] Fisheries Act s 23.2(1)

compelling as a justification for allowing these whales to breed. Over the past decade or so, a number of beluga calves have been born in captivity in North America (including a fairly large number at MarineLand[66])—one would have supposed that monitoring the development of these calves would have been intense. These data (undoubtedly maintained in each animal's veterinary records) and any archived information should be made freely available to those equipped to analyze them. *New* births should not be necessary to study such basic biology well into the sixth decade of holding belugas in captivity.

Frankly, given the effort by Georgia Aquarium to import 18 wild-caught belugas from the Russian Federation seven years ago (an effort that ended in 2015 in a court ruling[67] upholding NMFS's decision to deny the permit application), we find this proposed importation for scientific research entirely suspect—a thinly veiled effort to import belugas for the primary purposes of public display and breeding (see next section). Three of the whales would be "owned" by Georgia Aquarium (see elsewhere for our views on who should "own" these animals) and the application states that they may be transferred to Georgia Aquarium under vaguely described circumstances (see above and below). It is difficult not to see this importation request as a "backdoor" to acquiring additional belugas for the North American beluga breeding cooperative (see Georgia Aquarium, 2012, for more information on the cooperative). Georgia Aquarium apparently did discuss acquiring MarineLand belugas with the then-owner before submitting a permit application to NMFS for wild-caught whales in 2012, but determined this option was "not a viable alternative" (Georgia Aquarium, 2012; p. E-14). That owner is now deceased and, at least by attempting to use the exemption for scientific research (even if breeding and public display are the true purpose), the 50+ belugas held by MarineLand are now potentially accessible to the cooperative (which includes Mystic Aquarium).

We strongly urge NMFS not to set a disastrous precedent that would weaken the MMPA, wherein facilities are allowed to (mis)use the scientific research exemptions in Canadian and US law, allowing exportation of captive cetaceans and importation of depleted populations of marine mammals respectively, to acquire captive cetaceans for public display, and to allow breeding for public display. The North American beluga breeding cooperative has been, by and large, a failure (Willis, 2012). Belugas require relatively specialized social and physical conditions to allow conception, unlike delphinids (Steinman et al., 2012)—they simply do not breed well in captivity. Belugas have been displayed since the 1950s (Cetabase, 2010) and the beluga breeding cooperative has been operating since the 1980s (Georgia Aquarium, 2012), yet the current captive population held by the cooperative is at best stable at low numbers and at worst in decline. There are serious ethical concerns raised by the cooperative's continued efforts to acquire additional belugas for breeding. If breeding belugas in captivity has largely failed after 30+ years of focused effort, it is time to end the attempt and spare the remaining captive belugas the stress, energy expenditure, and grief of conceiving and losing calves.

[66] www.cetabase.org.

[67] https://awionline.org/sites/default/files/uploads/documents/ML-AWI-Belugas-FinalCourtOpinion-09282015.pdf

3. Georgia Aquarium, with which the Applicant is a partner, has a troubling history regarding beluga imports

Seven years ago, Georgia Aquarium applied for a permit to import 18 wild-caught beluga whales from the Okhotsk Sea, Russian Federation (Georgia Aquarium, 2012). To its credit, the facility invested in research in the Sakhalin Bay-Nikolaya Bay-Amur River region, to determine if removal of these animals would be sustainable (see, e.g., Shpak and Glazov, 2013). Unfortunately, at Georgia Aquarium's request, the majority of captures took place before the research was completed, and then, when the research results supported a likely depleted status for this beluga population under the MMPA,[68] Georgia Aquarium refused to accept these results or NMFS's decision to deny the permit application.

In 2014, Georgia Aquarium filed a lawsuit in federal court to overturn NMFS's denial and lost. The entire process had significant (and wasteful) economic costs for the facility, NGOs, and the government and it certainly cast doubt on Georgia Aquarium's insistence that the importation was intended to promote beluga conservation (just as the Applicant claims for this importation). Indeed, four of the 18 belugas, who were maintained in a holding facility on the Black Sea for years because Georgia Aquarium commissioned their capture before it actually had a permit in hand,[69] died during the regulatory process and subsequent litigation. Georgia Aquarium did not reveal these deaths, for which it is entirely responsible, until after the court ruled.[70]

We question Mystic Aquarium's partnership with a facility with such a troubling history of attempting to weaken the MMPA, misinterpret sound science, and overturn precautionary management decisions, a facility that showed tremendous disregard for the welfare of the belugas it was seeking to import. For some time now, most cetacean scientists, including the IUCN SSC Cetacean Specialist Group, and zoo and aquarium professional associations have discouraged captures from the wild to supply public display exhibits.[71] Georgia Aquarium's effort to import 18 wild-caught belugas from Russia flew in the face of that growing consensus.

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[68] See 16 U.S.C. § 3(1) and above for a definition of "depleted." Indeed, only one year later, the population was so designated: https://www.fisheries.noaa.gov/action/designation-sakhalin-bay-nikolaya-bay-amur-river-stock-beluga-whales-depleted-under-mmpa.

[69] We note that the Applicant has begun the pursuit of an importation permit—which again is costing all stakeholders and the government time and money to address—before MarineLand has even applied for an exportation permit from the Canadian government under new statutory requirements (Wilkinson, 2019a, b). Given the strong possibility that Canada will not grant an exportation permit, applying for an importation permit under the MMPA seems premature.

[70] See http://www.belugaimportproject.org/ and http://www.belugaimportproject.org/difficult-decisions/, especially the timeline that describes these deaths at http://news.georgiaaquarium.org/internal_redirect/cms.ipressroom.com.s3.amazonaws.com/216/files/20166/Beluga%20Import%20Project%20Timeline%207.12.pdf. This timeline was not published until 2016, a year after Georgia Aquarium lost its court case. At no time during the court case did the aquarium notify the public of these deaths.

[71] See, e.g., https://assets.speakcdn.com/assets/2332/aza_policy_on_responsible_population_management_final.pdf, the Association of Zoos and Aquariums' policy statement on responsible population management: "Before acquiring

Mystic Aquarium was originally part of the effort to import wild-caught whales (Georgia Aquarium, 2012), but withdrew at some point before the *Federal Register* notice of the permit application was published.[72] It seems a huge backward step for Mystic Aquarium to partner now with Georgia Aquarium, even though the whales involved are captive-born. It certainly makes it difficult not to suspect that revisiting the acquisition of some of MarineLand's belugas, despite subsequent passage of the Ending the Captivity of Whales and Dolphins Act in Canada and the designation of the S-N-A population of belugas as depleted in the United States, was always "Plan B" for Georgia Aquarium, after failing in its attempt to acquire belugas directly from the wild.[73]

4. The research can be done at MarineLand

As we noted earlier, the study descriptions in the application suggest that the research—albeit at greater cost of time, effort, and money (although there would be a cost savings by not transporting five whales by truck and air between MarineLand and Mystic Aquarium)—could be done at MarineLand, which would allow a larger sample size and no abuse of the exemptions in the laws on either side of the border (as well as sparing these five whales from the stress of transport and a disruption of their current social groupings; see below). The Applicant could and should leave the whales where they are, work with MarineLand to make the animals' conditions better, and conduct all the studies there.

Almost all of the Applicant's arguments against doing the research at MarineLand do not hold up to scrutiny, as none are insurmountable or would harm the quality of the research. There would be a small delay due to the need to train staff and establish the infrastructure for taking samples (which would also be the case for any work conducted at Georgia Aquarium, as transferring whales there would also require training staff to collect samples), but arguably the welfare of the whales at MarineLand would be appreciably improved if the work were conducted there. Most of them are not trained for typical show-style performance and have minimal engagement with their caretakers; more stimulation through interaction with trainers and training for sample collection would make life more interesting for all the whales at MarineLand. Indeed, the fact that they are not trained for typical show-style performance means there would be no "institutional priorities" to shift (see above) or to conflict with, meaning the majority of belugas at MarineLand are available for training for sample collection.

We also note that much of the research requires only tissue and cell samples for analysis, not the living whale. This generally weakens any argument that importing these five whales is essential or *critical* for the research. Much of the research that does require a living whale (such as

animals from the wild, institutions are encouraged to examine alternative sources including other AZA institutions and other regional zoological associations or other non-AZA entities" (p. 4).

[72] *77 FR 52694* (August 30, 2012)

[73] We note again that in 2011-2012 Georgia Aquarium did unsuccessfully approach MarineLand. It is difficult to see this re-approach to MarineLand, now that the previous owner is deceased, as unrelated to the 2012 importation attempt. See also fn 23.

photogrammetry and tag placement testing) could be conducted anywhere and indeed, the three whales currently at Mystic Aquarium would be sufficient for, e.g., tag placement testing. In short, while we recognize the *convenience* of having six whales at Mystic Aquarium, **the research *can* be done without their presence there, meaning the application fails to meet the regulatory standard**.

5. Moving five whales would do little to reduce overcrowding at MarineLand

The primary infrastructure problem at MarineLand is overcrowding (and lack of shade, which is easily corrected). Reducing overcrowding at MarineLand is a stated objective of the importation. In an apparent reference to standards under new Canadian law, the importation is being requested partially to serve the best interests of the belugas at MarineLand, who are currently held in conditions where the Applicant argues removing the five whales covered by the permit application would improve "wellbeing" of the whales remaining behind and "create space" there (p. 21, permit application).[74] However, there are over 50 belugas held at MarineLand, in several separate enclosures. We do not find the prospect of removing five of them—especially when several births are imminently expected (p. 21, permit application)—to be likely to improve the overcrowded conditions at MarineLand appreciably. This is therefore not at all a compelling argument to justify this proposed transfer.

The beluga exhibit at Mystic Aquarium already holds three belugas. It is actually several feet shallower than at least one of MarineLand's enclosures. Eight belugas there would be less crowded than at MarineLand, but would still be a "full house," and that is before any calves are born. We note as well that Georgia Aquarium already has five belugas, which is by Georgia Aquarium's own reckoning maximum capacity (Ruggieri, 2019). Adding any from the proposed importation or through breeding would suggest that overcrowding may become an issue there too.

The belugas at MarineLand have been in these overcrowded conditions for many years. We firmly hold that it would be in *their* best interests for the Applicant to invest the time, money, and effort to conduct the research at MarineLand and work with the staff at MarineLand to enrich the whales' lives and improve husbandry practices, rather than subject five of the whales to the stress of transport and all of them to the stress resulting from a disruption of their current social groupings (Spoon and Romano, 2012). Now that captive cetacean breeding and importation are prohibited in Canada, the overcrowding at MarineLand will of course resolve itself in time, through attrition.

<u>Documents Received from AWI's Freedom of Information Act Request</u>

We have already referred to several of the documents we received in response to an AWI request under the Freedom of Information Act (FOIA) (5 U.S.C. § 552).[75] In May 2019, following media reports indicating the possibility of proposed exports of belugas from MarineLand to the United States and Spain, AWI submitted a FOIA request to NMFS seeking further information. On August

[74] We note, however, that Section 23.2(2)(b) of the Fisheries Act in Canada is meant to apply to the whales to be transferred, not to the whales who remain behind in the facility of origin.

[75] See AWI FOIA Request to NMFS re: MarineLand Belugas (May 13, 2019).

14, 2019, NMFS provided the first interim response,[76] in which the agency released documentation showing that:

- in November 2018, Mystic submitted a draft application for NMFS's review;[77]
- NMFS returned comments on the draft in December;[78]
- Mystic submitted a "final" application on March 4, 2019;[79]
- NMFS sent back comments April 15;[80] and
- Mystic re-submitted a revised final application on May 9, 2019.[81]

In the FOIA response, all versions of the application itself were redacted.[82] As noted above, on November 19, 2019, just a day after the public hearing on the permit application, NMFS released to AWI its second interim FOIA response,[83] which included documentation demonstrating that Mystic Aquarium, its lobbyists, and in some cases Georgia Aquarium, have been lobbying the federal government with respect to this planned importation for several years.[84] Public records indicate that in 2019 to date, Mystic Aquarium has paid at least $90,000 to Watershed Results, a lobbying firm in Washington, DC.[85]

Comments on Recurring Themes Found in the Permit Application

We identified four substantive themes that recur throughout the permit application.

[76] See NMFS First Interim FOIA Response to AWI DOC-NOAA-2019-001230

[77] See FOIA Documents 0.7.2244.27283, 0.7.2244.27295

[78] See FOIA Document 0.7.2244.27297.

[79] See FOIA Document 0.7.2244.27559.

[80] See FOIA Document 0.7.2244.27571.

[81] See FOIA documents 0.7.2244.27609.

[82] While we have not submitted the redacted draft applications with this comment letter, we note that they are FOIA DOC-response NOAA-2019-001230 documents 0.7.2244.27283-000001 through -000021, 0.7.2244.27295-0001 through -000021, 0.7.2244.27297.000001 through -.000004, 0.7.2244.27559.000001 through -000026, 0.7.2244.27571.000001 through -000004, 0.7.2244.27609.000001 through -000028. We believe NMFS improperly withheld these drafts, which were submitted to NMFS by a nongovernmental entity. If there was a small amount of confidential information, then that could have been redacted, but wholesale redaction of the entire draft application was inappropriate under FOIA.

[83] See NMFS Second Interim FOIA Response DOC-NOAA-2019-001230 and FOIA DOC-NOAA-2019-001230 email transmittal.

[84] See e.g. FOIA Documents 0.7.2244.10115, 0.7.2244.15985, 0.7.2244.15985-000001, 0.7.2244.27018, 0.7.2244.27031, 0.7.2244.27041, 0.7.2244.27041-000001, 0.7.2244.27212, 0.7.2244.27215, 0.7.2244.27216, 0.7.2244.27219, 0.7.2244.27242, 0.7.2244.27269.

[85] See Lobbying Disclosure Act filings for Mystic Aquarium-Watershed Results LLC, 2019.

1. Breeding

As we noted above, the Applicant makes clear throughout the application that the facility would not prevent natural mating and production of offspring (see, e.g., p. 6, which references "offspring…of whales listed in this permit" or p. 8, which states "if animals naturally breed"). Breeding is now prohibited in Canada (see above). If the whales exported from MarineLand to Mystic Aquarium, all of whom are young and some of whom have not yet reached the age of sexual maturity, mate and produce offspring, this would be inconsistent with Canadian law.

In the United States, the MMPA has a comparability clause with regard to captive maintenance (16 U.S.C. § 1374(c)(9)), which is satisfied by the governments of receiving facilities providing a letter of comity to NMFS. It seems highly inconsistent with the spirit of US law for NMFS to require comity *from* governments to which US marine mammals are exported but not provide similar comity *to* governments from which foreign marine mammals are imported. In short, **NMFS should insert conditions in any permit issued as a result of this application that prohibit, for the five MarineLand belugas, breeding (including transfer of gametes or embryos), public display, and any subsequent transfer for purposes other than scientific research or in the best interests of the animals' welfare, consistent with Canadian law**. It should also include the condition that any subsequent transfer(s) would require commitment to the same criteria and prohibitions, preventing laundering of whales through a facility with restrictions to another without restrictions.

We understand the arguments the Applicant makes for why natural mating and production of offspring would be allowed. Regardless, the law in Canada was meant to support the goal of phasing out the public display of cetaceans, because the government of Canada found that such display is not in the best interests of these species. US law and US public display facilities may disagree with this finding, but they should respect it. If the Applicant considers the prevention of mating and production of offspring an impediment to its research objectives, then it should not seek to source animals from Canada—and NMFS should not issue an importation permit for research to the Applicant, or any other facility intending to allow breeding, for animals from Canada.

In addition, throughout the application, while it is clarified breeding is not essential for the research objectives, the Applicant notes that calves, where possible, would be sampled with specific protocols to account for their special vulnerabilities. However, we find these protocols to require considerable handling of the calves, even though they are part of what are described as routine veterinary procedures. Such routine veterinary procedures have been shown to impact adult belugas where "Each animal was extensively conditioned over a decade to many learned husbandry behaviors" (p. 637) yet "[a]ll stress-related hormones were significantly elevated during physical examination" (p. 636; Schmitt et al., 2010). Survivorship of beluga calves in the North American beluga breeding cooperative has clearly not been impressive (Willis, 2012). We cannot help but wonder if excessive veterinary- and husbandry-related handling of dependent cetacean calves may be a factor in beluga calf mortality (that is, perhaps delphinid calves cope with handling better than monodontid calves). We strongly urge Mystic Aquarium and other beluga-holding facilities to conduct an assessment of mortality factors in the beluga breeding programs in North

America and Europe. MarineLand has had not only a large number of calves born, but apparently a fairly large proportion surviving past the age of three, despite its overcrowded conditions.[86] It would be of great welfare value to see how much veterinary- and husbandry-related handling the beluga calves at MarineLand receive compared to those in the United States or Europe.

2. Best interests and Georgia Aquarium

In several places in the permit application (first stated on p. 1), the Applicant notes that as many as three of the belugas would be sent to Georgia Aquarium if "deemed in the best interest of an individual beluga or the US beluga population for social, health, or welfare reasons." We note two points here. One, this "best interest" standard is extremely vague (see above) and not found in the MMPA. We recognize it is a standard found in relevant Canadian law (see § 23.2(2)(b) of the Fisheries Act), but it is vague in that context as well. This statement affords whoever makes a decision about moving a beluga or belugas to Georgia Aquarium a considerable degree of discretion.

Two, it is never clarified anywhere in the permit application *who* would make this decision (that is, who would deem it in the best interest of an animal or animals to be moved). Given the Applicant is seeking to import these whales under a very narrow exemption for take of depleted populations for scientific research, it is imperative that where these animals end up and how they are ultimately used by a facility be strictly controlled. In the unfortunate event NMFS issues a permit, it is essential that these elements of the permit are clear and precise in its conditions. The Applicant notes that Georgia Aquarium would "own" three of the whales, giving the Applicant and that facility significant conflicts of interest in being part of any decision-making process about the ultimate disposition of these whales. We contend that ***NMFS* should clearly be designated as the "owner" of these animals, solely responsible for any decisions made regarding the animals' disposition** (see next subsection).

3. Five-year term of permit

It is not clear in the permit application what would happen to these five whales at the end of the proposed five-year term of the permit (see p. 2, permit application). We have reason to believe the Applicant intends to apply for an extension to the permit, but this is not stated in the application, nor is it clear what would happen at the end of that extended period.

We are concerned that extending the permit *ad infinitum* becomes cover for the public display of these animals (however, see above, under "Major Concerns: US law does not allow this importation as proposed" and fn 22, for additional discussion of necessary permit conditions regarding "ownership"). As noted above, we already oppose the idea of these animals coming into the country even for incidental public display, consistent with Congress' restrictions in the MMPA. Issuing what may ultimately become an open-ended research permit merely heightens our concern that the research is cover for acquiring animals from a depleted population for what are in reality public display and breeding purposes.

[86] See, e.g., https://www.cetabase.org/captive/cetacean/marineland-canada/

Despite our belief that the Applicant intends to apply for an extension at the end of the five-year period for the permit under question, the application actually states on p. 69 that, at the "termination of research projects (i.e., at the end of the five-year permit), belugas participating in the project [which presumably include any offspring of the five whales proposed for importation] would continue to reside at Mystic Aquarium or Georgia Aquarium [one presumes *not* for research, but at that point solely for public display]. However, if deemed in the best interest of an individual beluga or the US [captive] beluga population…they may be moved to *another professionally-accredited facility in the United States*…" (emphasis added). This is profoundly disturbing and frankly firmly **disqualifies this permit application for approval under MMPA regulations**.

The Applicant is admitting in so many words that these whales might end up in the general public display population of captive belugas in the United States. This is absolutely *not* what was intended when the MMPA exempted the importation of depleted populations for scientific research. This inconsistency further underscores why incidental public display of depleted marine mammals is allowed for enhancement but not for scientific research—such incidental public display only makes sense if it is temporary and later results in the direct improvement of a wild population's conservation status.

Our ideal solution would be to place whales from MarineLand into a seaside sanctuary in Canada or elsewhere. We note that efforts to establish sanctuaries for cold-water species such as belugas are ongoing. The SEA LIFE Trust sanctuary for two belugas is close to being operational[87]—Mystic did visit this sanctuary and apparently intends to continue monitoring its progress. The Whale Sanctuary Project is finalizing plans for site procurement and permitting in Nova Scotia.[88] While we recognize waiting for a sanctuary that could take on MarineLand belugas would result in a delay of the Applicant's research, we believe this alternative to the proposed importation should be considered more seriously by all concerned. It avoids breaking laws and would result in living conditions for the whales that more closely resemble those of free-ranging belugas than does a concrete tank.

This concern about the ultimate disposition of these animals is further exacerbated by the intent of the Applicant to do nothing to prevent mating or the production of offspring. At some point as these whales or their potential offspring age, they might become superfluous to research that is either completed, is no longer being conducted at Mystic Aquarium, or is otherwise no longer subject to this or another research permit—p. 69 of the application confirms this possibility, so this is not merely speculative on our part. Thus, the North American beluga breeding cooperative could acquire some of these whales or their descendants who would be used *solely for public display and/or breeding*, at several removes from the original importation.

As we noted above, NMFS has never before issued a permit to import a depleted but non-ESA listed marine mammal for scientific research or enhancement purposes. In the unfortunate event NMFS does grant this permit, **it would seem prudent for the agency to utilize §§ 112(c) and (d)**

[87] https://belugasanctuary.sealifetrust.org/en/

[88] https://whalesanctuaryproject.org/

of the MMPA, whereby NMFS "may periodically review agreements … for performance adequacy and effectiveness."[89] This would allow NMFS to engage in an agreement with the Applicant for the lives of these five whales and, if breeding were to occur, for the lives of all future progeny down the line. A lifetime permit option that applies to all progeny would ensure no whales are ever held only for public display, but must always be used for bona fide research. To remain consistent with the way NMFS processes permits under the MMPA, NMFS could include a condition requiring review of the permit activities at least every five years to ensure the research remains bona fide.

We do not see a way to prevent these five whales or their descendants from eventually being absorbed into the general public display population of belugas in the United States other than by including a lifetime permit condition, given the longevity of belugas (even in captivity) and the ability of US facilities to transfer marine mammals among themselves without additional permits (16 U.S.C. § 1374(c)(2)(B)). Indeed, the Applicant admits this may well happen. This is precisely the situation the prohibition on importing depleted marine mammals or their progeny for public display was meant to prevent. Therefore, in the unfortunate event a permit is issued, **NMFS must make it for the lifetime of the imported whales and all of their descendants.**

4. Value of results to conservation of endangered and depleted populations

As we note above, the Applicant repeatedly states that the results of this research would be applied to conservation efforts for the endangered CI and depleted S-N-A belugas. The first instance of this claim is on p. 3, where the Applicant specifically states that "the continued development of reagents and assays…to detect disease and pathogens will enable" monitoring of the health of different free-ranging beluga populations, including endangered CI and depleted S-N-A belugas, to which other free-ranging beluga populations could then be compared. The former claim is made because the Applicant argues that the results of the research would respond to specific needs identified in the CI beluga recovery plan (identifying such needs is a regulatory requirement; 50 C.F.R. § 216.41(b)(5)(A)); the latter claim is made because the five whales proposed for importation are descendants of wild-caught whales from the S-N-A population.

While some of the research results are independent of genetics (e.g., developing reagents, photogrammetry, developing non-invasive tags), others would be of greatest conservation value if there were a genetic tie between the study animals and a specific population. Given that there is no genetic relationship between the whales to be imported and CI whales, the applicability of certain research results to that endangered population would require caveats. Even the Applicant states the following:

[89] See, e.g., the USFWS's Special Rule for the Polar Bear Under Section 4(d) of the Endangered Species Act (*78 FR 11766*, February 20, 2013), which states, "While a determination of negligible impact is made at the time the regulations are issued based on the best information available, each request for an LOA is also evaluated to ensure it is consistent with the negligible impact determination. The evaluation consists of the type and scope of the individual project and an analysis of all current species information, including the required monitoring reports from previously issued LOAs, and considers the effects of the individual project when added to all current LOAs in the geographic area. Through these means, the type and level of take of polar bears is *continuously evaluated throughout the life of the regulations* to ensure that any take remains at the level of negligible impact" (p. 11771; emphasis added).

> Conducting research on belugas with genetics in common with a later-designated Depleted [sic] stock lineage may offer more direct insight into basic biology helpful in restoring the wild stock. Studies on the immune system, reproductive biology and behavior, and endocrine and auditory systems would be directly applicable. These studies would also serve as "reference" should the feasibility of studying these whales in the wild occur through future studies (p. 20, permit application).

As for the S-N-A population, only one of the whales to be imported is confirmed as a pure-bred animal from that population (p. 45, permit application). Three are confirmed hybrids, with the father coming from the Barents Sea (actually the White Sea;[90] see also fn 24), and the paternity of one could not be confirmed. Research results related to genetic makeup from hybrids would not be "directly applicable." Regardless, given that beluga research in the Okhotsk Sea is conducted exclusively (to our knowledge) by Russians, we consider the statement that research results *would be* shared for conservation purposes to be unsupported by the application as written for the S-N-A belugas. The claim requires confirmation that the Applicant's researchers, e.g., Dr. Tracy Romano, have made contact with Russian researchers, e.g., Drs. Olga Shpak or Dmitri Glazov, and Russian authorities in the Far East, and have developed a communications channel with them for this purpose. Without such confirmation, this justification for the research is rhetorical and even specious, and cannot be part of NMFS's calculus when deciding whether to issue the permit.

Related to this, Study #3's proposal notes that sounds similar to those CI belugas hear would be played to the whales at Mystic Aquarium (p. 7, permit application) as part of the study protocol, and results from this study could be applied to the S-N-A whales. However, Parsons et al. (2008) and Wright et al. (2009) outlined ways in which controlled exposure studies conducted in captivity (and this was for studies in sea pens—for studies in tanks, the applicability limitations are greater) have limitations when applying their results to free-ranging populations. We are concerned about the proposal's failure to note these caveats. In addition, we imagine the soundscape in the Okhotsk Sea is actually dissimilar to Cook Inlet, for a number of reasons, not the least of which is Cook Inlet is relatively industrialized and the Okhotsk Sea is not. Therefore, the characterization of the value of this particular aspect of Study #3 for the parent population of the whales proposed for importation once again seems specious and unsupported.

In general we find Study #3 to be somewhat duplicative with previous studies[91] and any aspect of it that relates to the whales' reactions to sound of limited (or even dubious) value to free-ranging animals. Sound in a concrete tank will behave differently to sound in nature; even the Applicant

[90] All known live takes in the White-Barents Seas regions were taken from the mouth of the Varzuga River in the White Sea (NAMMCO, 2018); apparently none actually came from what is now considered the Barents-Kara-Laptev Seas population.

[91] Duplicative aspects of Study #3 should be minimized, to reduce stress to the whales subjected to these controlled exposure experiments (see, e.g., Houser et al., 2013, where dolphins eventually refused to participate in controlled exposure experiments, sometimes at levels below those known to cause temporary threshold shift), a concern even the Applicant acknowledges ("Signal duration and duty cycle will depend on the tolerance level of the trained whale to remain on station"; p. 34, permit application).

acknowledges this: "…the spectra data collected in Cook Inlet will be different than the spectra of the recording projected through a transducer into an enclosed facility" (p. 36, permit application).

Detailed Comments

p. 4—Study #2 would arguably be one of the most valuable in terms of field studies and applicability to free-ranging populations. However, we note that there is no description, here or later in the methodology section, of collecting fecal matter directly from the water column after a whale has a normal bowel movement. The fecal samples would all be taken with anal swabs. We do not understand the failure to include collection of floating fecal material. This is how it would be done in the field and testing methodologies for collecting these samples in captivity would be of value to field studies. We do realize that samples that come in direct contact with treated tank water may be affected in ways that skew the results, but identifying how the samples are affected could assist with field research when dealing with pollutants and other water contaminants. At the least, collection methodologies could be tested for application to field studies.

p. 9—Study #5 would examine diving physiology. We note that the *in vitro* methods described do not need live whales; this work is done entirely on cells in the lab. The *in vivo* studies, the methods of which are described later in the application (p. 40), would, in our opinion, have little if any applicability to free-ranging populations. The tank at Mystic Aquarium is, at its deepest, 16.5 ft (5 m) deep, according to the Applicant (one of the tanks at MarineLand is deeper, but still apparently only 7 m deep—the deepest point in Georgia Aquarium's main enclosure is 7.6 m deep, per Appendix 13). Regardless, the targets would be placed at a depth of only 6 ft, 10 in (2 m; p. 53, permit application). For a whale whose body is about as long as the tank is deep, with a maximum recorded dive of 900 m, who may dive to 600 m once a day, and who routinely dives to depths of 10 to 50 m (see review of beluga diving research in Rose et al., 2017), diving to 2 m is highly unlikely to result in any physiological *diving* responses that are relevant to free-ranging belugas. Even a 10-min breath hold (the maximum duration in any of the proposed studies; p. 40) under captive circumstances would lead to physiological responses of undoubtedly limited applicability to free-ranging animals.

p. 10—Study #6 would examine beluga microbiomes. We once again question the applicability of any of this study's results to free-ranging populations. The microbiome of captive whales held in an inland concrete enclosure supplied by treated, fresh city water (as described on p. 65 of the application) and fed frozen fish that has been thawed is likely to differ in key ways from the microbiome of free-ranging whales. While we see some value in studying captive beluga microbiomes when the goal is to address welfare and health issues relevant to *captive* whales, we see virtually none in studying them if the purpose is to understand their role in *free-ranging* beluga health. We do recognize the value of developing methodologies to study microbiomes that can be used on samples taken in field studies.

p. 12—Study #7 is the only one that is entirely reliant on having the whales go through normal seasonal reproductive cycles, mate, and produce offspring. However, we note that the hypothesis is not really a hypothesis at all, but rather a commonsense statement of fact ("Changes in behavior and physiology will occur in belugas before, during and after the breeding season, throughout

pregnancy and after birth"; p. 12, permit application). This study does not seem to be essential for testing novel or progressive hypotheses (at least none outlined in the application) nor to have much value to free-ranging populations. It merely builds on data that have already been collected over the years on captive beluga reproduction, as facilities have attempted (and failed) to establish self-sustaining beluga breeding programs.

In addition, we feel compelled to comment on the statement in this study description that "breeding is a natural behavior and will be allowed to occur" (see also p. 68). There are many natural beluga behaviors—including most obviously foraging for and feeding on live prey, but also diving to depths greater than 5–8 m, migrating annually to different habitats, or choosing from a population of hundreds (if not thousands) of individuals as social partners—that captivity does not allow. Preventing this one natural behavior, which is seasonal and intermittent (Steinman et al., 2012), seems a minor additional stressor, compared to the stress that already results from the prevention of these other, *daily* natural behaviors.

We also reiterate that the Ending the Captivity of Whales and Dolphins Act in Canada was intended to phase out captivity of cetaceans. Although the legislation allows for those cetaceans held at the time Bill S-203 passed to remain on display, the ban on breeding was specifically added to ensure this would be the last generation of belugas at MarineLand. This study would severely undermine that provision, whether it occurred at MarineLand or Mystic Aquarium.

p. 13—While we see significant value in Study #8 for field studies, we see no justification for importing five whales to conduct it. This work can be conducted adequately either on the three whales already at Mystic Aquarium or with whales at MarineLand.

In addition, while we agree offspring should be kept with their respective mothers, we are concerned by the statement "if deemed in the best interest of the individual beluga or the US beluga population for social, health, or welfare reasons, [progeny] may be cared for at Georgia Aquarium. Examples of scenarios that could necessitate moving animals include meeting the social needs of the animals, medical reasons, or *to ensure optimal animal management*" (emphasis added). These potential caveats, the last in particular, strike us as overly broad and subjective and could be used to justify actions that benefit the facilities or the breeding cooperative more than the whales themselves.

In the wild, for example, beluga calves may nurse for up to two years, but juveniles are likely to remain in the maternal pod after weaning (see, e.g., Colbeck et al., 2013). Transfer of young captive cetaceans is not uncommon (one of the five whales proposed for importation is only four years of age), yet it is difficult to imagine a situation where moving a calf or juvenile to a different facility (e.g., from Mystic Aquarium to Georgia Aquarium) would not negatively affect both the calf/ juvenile and the mother. It is also unclear how the impacts of stress on research results arising from such a transfer would or could be measured throughout the studies generally. **If a permit is issued, we urge NMFS to direct the Applicant to only separate calves from their mothers as a means to address any *obvious animal welfare concerns*, e.g., social incompatibility leading to aggression**, and not simply for the convenience of one facility or another.

p. 16—The Applicant argues that increasing the available sample size at Mystic Aquarium from one to six (or three to eight, depending on how one considers the two whales who are on loan) is essential to achieve the research objectives, as six is a "more robust sample size." However, we point out that maintaining the whales at MarineLand and pursuing a plan where all of the studies are conducted there increases the proposed sample size nearly ten-fold. In addition, samples can, with some effort, be collected at all the facilities currently in the North American beluga breeding cooperative. Consequently, arguing a need to increase the sample size is a completely non-compelling justification for this research, especially as this argument is not accompanied by any kind of analysis that shows six whales would be sufficient to increase the power of any statistical tests applied to the data.[92]

The Applicant notes that other beluga-holding facilities have "limited time available given *other priorities* in other animal care and training programs" (p. 16; emphasis added). While we agree that most facilities displaying cetaceans could (and should) devote far more time and effort to research (see e.g., Hill and Lackups, 2010; Hill et al., 2016), this is a fairly damning statement coming from a public display facility. The "other priorities" are performances and training for performances. It suggests strongly that there is truly little commitment within the public display industry for research, despite its rhetoric, weakening any argument that attempts to justify incidental public display when an importation of individuals or their progeny from a depleted population for scientific research is requested. While the public display at Mystic Aquarium might genuinely be intended as incidental (although in fact it would not be—it would be deliberate and continuous; see above), it would almost certainly be the primary purpose at Georgia Aquarium and any other facility that may, in the future, obtain these belugas or their progeny or seek to import belugas for research from MarineLand if and when NMFS sets a bad precedent by issuing the requested permit.

p. 17—The Applicant describes its partnership with Georgia Aquarium as a financial necessity, as it does not have the resources to fund the research initiative on its own. This requires clarification (and also see above, regarding the need for the Applicant to supply an actual copy of the lease agreement between the two facilities)—for example, the Applicant should provide a detailed, line item budget, wherein the Applicant describes precisely which costs it does not have the resources

[92] In fact, on p. 15 of the permit application, the Applicant states that six whales would allow "*opportunity* for statistical conclusions" (emphasis added). On p. 19, it states that six whales would "greatly enhance the strength of the data allowing for research *to approach* statistical significance" (emphasis added). On p. 21, it states that a sample size of six would "allow for a *greater likelihood* of data achieving statistical significance" and "the *possibility* for statistical conclusions" (emphases added). On p. 60, it states that six whales would enable "the *potential* for more statistically significant conclusions" (emphasis added). Finally, on p. 76, it states six whales "*may allow* for statistical significance and stronger data more applicable to wild belugas" (emphasis added).

All of these statements argue powerfully that no power analysis has in fact been conducted (or if it has, it found six or eight whales little better than three or even one). **Arguing that importing these five whales is *critical* (see p. 21, permit application; "Importing these whales is critical") is undermined entirely by these statements**—if in fact six or eight whales are statistically no better than three or even one, conducting the research at MarineLand or with the belugas in the US captive population, where the sample sizes would be 50+ or ~30 respectively, clearly becomes the best option and **the only legal one.**

to cover (as well as a rationale for why these costs cannot be covered by applying to foundations, grant agencies, or any other funding sources that do not have, as Georgia Aquarium would, conflicts of interest). For example, one presumes, since the Applicant already has an established laboratory, that it can fund the analyses of samples, whether five or 50. What part, then, of the "initiative" can the Applicant *not* fund? We cannot help but wonder if the transport expenses themselves are beyond the budget of the Applicant, in which case leaving the whales at MarineLand and conducting the research there would address that budgetary shortfall.

Arguably, if the Applicant cannot afford to import these whales on its own, then it should not import them at all. Given the lack of compelling rationale for the *necessity* of importing these whales in the first instance in order to conduct the research, the Applicant admitting it cannot afford to import these whales on its own is an argument against issuing the permit. In addition, if Georgia Aquarium's financial assistance is essential for this importation to occur, then it should be a co-applicant for an importation permit and the application should be withdrawn and resubmitted accordingly (see above).

The Applicant argues that having a "critical mass" of belugas at Mystic Aquarium would facilitate the research while minimizing "confounding factors" by having them all in one location. This is the Applicant's argument against maximizing the studies' sample sizes by collecting samples from whales at US facilities. While this argument may have some merit, it is hardly a compelling argument to break the law on both sides of the border, to subject five belugas to a stressful transport, or to spend considerable time, money, and resources on said transport. Clearly these confounding factors are not at issue when it comes to Georgia Aquarium (see above). Regardless, leaving the whales at MarineLand (where they would all be in one location) and conducting the research there would address the confounding factors argument. In addition, 50+ whales are more of a critical mass than six whales.

p. 18—We note, from the Applicant's description of pioneering research done on samples collected from Alaskan subsistence hunts, as well as the description of methodologies elsewhere in the application, that much of the work being proposed does not require living whales, but rather only various tissues. The importation of any animals at all therefore seems less than *critically important*.

p. 19—The application states, "Many of the threats defined in the ESA recovery plan for Cook Inlet are also likely factors in the productivity problems that lead to a Depleted finding under MMPA." This sentence is a bit confusing. If the Applicant means to say that many of the threats in Cook Inlet are likely to be threats in the Okhotsk Sea, where the S-N-A population was designated as depleted, we noted above that this is actually *unlikely*. Cook Inlet is a fairly industrialized area, given Anchorage's presence at the inlet's head, whereas the Sakhalin Bay-Nikolaya Bay-Amur River region is remote, not well-developed, in a country with very different oversight of the environmental impacts of human activity, and therefore is in fact likely affected by different threats.

If the Applicant meant this sentence generally, then it makes even less sense. Each area with an endangered, threatened, or depleted population of marine mammals differs in some or many

aspects from every other such area. The factors that lead to a depleted designation in one area (such as the Okhotsk Sea) may or may not be factors that lead to an endangered listing in another area (such as Cook Inlet) and for many reasons, the factors may be highly divergent. The persistent attempt throughout the application to justify the proposed research by claiming its results would be equally applicable to belugas in Cook Inlet *and* the Sakhalin Bay-Nikolaya Bay-Amur River region is weak on its face, but unless the Applicant can provide any empirical support for this claim (none is currently found in the application), NMFS should disregard this entirely as empty rhetoric. Clearly *some* factors affecting the conservation status of beluga populations in the wild will be consistent across populations, but many will be specific to a population and habitat and claiming loftily that *all* research results will be applicable *everywhere* is at best imprecise and at worst specious.

The application describes here what would happen regarding the research should any whales move to Georgia Aquarium. We note again that the statement that research would continue identically, "without exception," at Georgia Aquarium undermines the Applicant's concern that sampling whales at different facilities introduces confounding factors (see above). We agree it *does*, meaning collecting data at Georgia Aquarium does too. However, if the Applicant feels these confounding factors can be mitigated or are not prohibitive for Georgia Aquarium, then frankly they could be mitigated at any other accredited facility where belugas could be sampled. (We note that Georgia Aquarium's beluga enclosure differs substantially from Mystic Aquarium's in key ways—as one obvious example, the former is an indoor complex, while the latter is outdoor—making the "confounding factors" argument even weaker, as it apparently applies only when it is convenient.)

In addition, the Applicant notes that the principal investigator would train Georgia Aquarium personnel for sample and data collection should any of the whales be moved there. If this can be done with Georgia Aquarium personnel, it could be done with MarineLand personnel and indeed with the personnel from any beluga facility in the United States. Once again, we emphasize that this research can be conducted entirely at MarineLand—this saves transportation costs, increases sample size, and would improve the welfare of the whales at MarineLand, as well as reduce the risks and stressors for the belugas proposed to be imported. The delay this option would incur is minor (on the order of months, not years) and the resulting logistical difficulties would overall be no greater than if the research were partially conducted at Georgia Aquarium. Certainly there would be no "confounding factors" arising from using animals at different facilities.

p. 21—The argument that conducting the research at MarineLand is "not feasible" is not compelling. Simply because doing so would require "ample training time and a more in-depth effort for sampling" is not prohibitive. As noted above, the vast majority of the belugas at MarineLand are not performing in typical shows or being trained for such performances. Therefore, there would be no conflicting priorities for their time and they would no doubt benefit from the stimulation of a training regime related to this research.

p. 26—We note once again that a fair number of the research proposals require only tissue/blood samples, not the presence of living whales.

p. 30—The proposal to use a small boat within the beluga enclosure to sample breaths makes sense when the purpose is to transition this methodology to free-ranging populations. We consider this the first methodology described that may be difficult or impossible to conduct at MarineLand, due to the number of belugas in each enclosure there. However, given this is just a methodology test, sample size is largely immaterial. The Applicant could conduct this part of the study with the three whales already at Mystic Aquarium (and with less crowding once the boat is introduced, if five more whales are not added to that enclosure).

p. 32—We questioned earlier (see our comments related to p. 4, above) using an anal swab to collect fecal material, rather than collecting feces from the water after a normal bowel movement. We accepted that perhaps the sample would be affected by contact with treated water, but at least methodologies for collecting free-floating samples could be tested. However, here the Applicant suggests collecting fecal matter from the water column would be acceptable, since this is how calf feces would be opportunistically collected (so as to avoid the stress of restraining calves for an anal swab, as they cannot be trained to accept the swab voluntarily). If fecal material collected from the water column is in fact acceptable for analysis, then it should be collected this way for older animals as well. Anal swabs as a collection methodology simply have no applicability to free-ranging belugas, at least without direct handling by field researchers, which would add a considerable element of stress to the sampling process.

p. 57—The application states that no mortalities have occurred due to Mystic Aquarium's research program, which has been ongoing since 1999. Four belugas have died at Mystic Aquarium since 1999.[93] It is incumbent upon the Applicant to provide necropsy results for these animals in order to substantiate this claim.[94] The agency at least should review the data upon which this firm claim is based (and the public should also have a chance to review this information).

p. 57—The Applicant makes a number of statements at the top of this page, under the header "Discuss the anticipated effects on the species or stock, especially if mortalities or reproductive effects are possible." These statements are of particular concern to us. First, the Applicant states, "There will be no effect on wild stock [sic] since the animals participating are aquarium-born and

[93] http://www.cetabase.org/captive/cetacean/mystic-aquarium/

[94] Some, if not all, of the seven belugas at Mystic Aquarium who died between 1975 and 2014 and were brought into captivity from the wild between 1975 and 1985 (https://www.cetabase.org/captive/cetacean/mystic-aquarium/) were likely covered by MMPA permits that included necropsy and clinical history requirements. As discussed in Rally (2018) and AWI's previous correspondence with NMFS regarding the captive orca Tilikum and other recent orca deaths at SeaWorld (i.e., Tilikum, DOD January 6, 2017; Kyara [Tilikum's granddaughter], DOD July 24, 2017; Kasatka [wild-caught], DOD August 15, 2017—related AWI correspondence with NMFS dated January 10, 2017; February 14, 2017; July 31, 2017; August 25, 2017;), those permit requirements remain in effect, and Mystic Aquarium, as well as Georgia Aquarium, as a partner institution, must submit *all* necropsy reports of all belugas covered under such permit provisions (one presumes the necropsy reports of belugas who died before 1994—there were three at Mystic Aquarium—were already submitted). If they decline to do so, NMFS should take immediate action to enforce the necropsy permit requirements of all Mystic and Georgia Aquarium MMPA beluga permits and evaluate those reports as part of its review of this application.

not of wild stock." See above under "Main Concerns"—we firmly believe this is incorrect and there *would indeed be* an impact on the S-N-A belugas if this trade occurs.

Second, the Applicant states that "MarineLand is at capacity." This is true and has been true for some time. Now that breeding is prohibited in Canada, this situation will begin to resolve itself, through attrition. There is not and never has been an *urgent* need to remove any whales to "create space" at MarineLand—the conditions have been crowded there for two decades at least and removing five whales from a population of over 50 is not going to change the situation much for the whales remaining behind at MarineLand. See above for our comments on the overcrowding issue.

Finally, the Applicant states "Canadian Bill S-203 [the Ending the Captivity of Whales and Dolphins Act] has been enacted to prohibit the import of additional belugas into Canada." We note with interest that the Applicant characterizes this legislation as promoting conservation (emphasizing that no "replacement" whales can be imported), ensuring that MarineLand's belugas and other cetaceans will now be in captivity solely and clearly for conservation purposes (p. 76, permit application). This is disingenuous and misleading. Public display facilities, including Mystic Aquarium, claim that the purpose of public display *is* conservation.[95] They do not distinguish holding marine mammals for human recreation and entertainment from holding them for conservation and research (in, for example, a dedicated research or enhancement/breeding facility). The Applicant avoids naming the bill, perhaps to avoid highlighting that its primary purpose was and is to promote captive cetacean *welfare*, not conservation. Research is an exemption to some of the bill's prohibitions, not its central purpose. The legislation's central purpose was to end the captivity of cetaceans, for any reason, because Canada has decided keeping cetaceans in captivity is not in their best interests.

In short, the Applicant avoids showing any awareness that the proposed importation, for research but with incidental public display and breeding, undermines the spirit and letter of the Ending the Captivity of Whales and Dolphins Act (Act). Instead, the Applicant implies that this proposed importation is entirely consistent with the legislation's goals. This implication is almost certainly deliberate but is entirely misleading. The fact that the Applicant explicitly would allow mating and production of offspring demonstrates that this proposed importation is *not* consistent with the purposes of the Act—which the Applicant should have noted and made some attempt to rationalize. Instead, the Applicant made no mention of the Act's breeding prohibition at all and indeed made no mention of the fact that MarineLand had not, as of the submission of the permit application or to date, applied for an exportation permit under Canada's new statutory provisions (Wilkinson, 2019a, b).

p. 59—The Applicant makes several arguments here to justify not pursuing the option of conducting the research at MarineLand. The only one that seems remotely valid is the lack of certain infrastructure (such as a specific type of freezer for maintaining samples) at MarineLand.

[95] Mystic Aquarium's mission statement is "The mission of Mystic Aquarium is to inspire people to care for and protect our ocean planet through conservation, education and research." Note it does not say "through animal display." Clearly Mystic Aquarium considers animal display *de facto* "conservation, education and research."

This is, however, something that can be easily rectified, with investment of funds.[96] Some of the arguments are based on the way the facility was managed by the previous owner, who is now deceased. The argument that the facility is privately owned and ownership could be transferred is weak—should sufficient investment be made to conduct the research at MarineLand, a subsequent owner is likely to see this research infrastructure as an asset, not a liability. The concern about shipping samples in a timely way to the laboratory in Connecticut is speculative (see also fn 32)—given that MarineLand has never provided samples under the previous owner means the logistics of shipping samples between the two facilities have never been tested. It seems likely that, if samples began regular movement from MarineLand to Mystic Aquarium's laboratory, the process would be expedited due to its routine nature.

p. 63—The Applicant notes that no animals would be taken from the wild for this proposed research program or importation. This is true, but ignores the link between *any* international trade in live cetaceans (such as this proposed transfer) and captures from the wild (see above).

p. 65—The Applicant describes pool depth varying "from just a few inches to 16.5 feet *to mimic a wild environment*" (emphasis added). This statement is demonstrably false. The tanks at Mystic Aquarium at their deepest are only as deep as an adult beluga is long. This in no way "mimics a wild environment" for beluga whale populations anywhere in their circumpolar distribution.

p. 66—The application presents a table with the water temperatures for the beluga complex at Mystic Aquarium throughout the year. The water is maintained at its coldest in the winter months, which is appropriate, but is never colder than 50° F (10° C), which is in fact more similar to summer water temperatures in many parts of the Arctic where beluga populations are found. Belugas in the winter are often found in water at 0° C, so again the facilities provided to captive belugas do not (and frankly cannot) mimic natural conditions. We emphasize that the inability to truly mimic natural conditions for belugas in captivity is one reason why captive research results, particularly physiological and microbiome results, are of restricted value to free-ranging populations and must be judiciously applied, with suitable caveats.

p. 71—We note with interest that the application form requests the *name* of the transportation company to be used for the importation, yet the Applicant does not provide it. The application simply provides the type of aircraft and indicates "a trucking company" will be used. The names for these transport companies must be provided.

Conclusion

As noted at the outset of these comments, NMFS should never have accepted this permit application or published it in the *Federal Register* in the first instance. This importation, as proposed, would be in violation of both Canadian and US law. The facility of origin, MarineLand in Canada, has not yet applied for an exportation permit, which is in fact unlikely to be granted.

[96] Indeed, based on a statement in a letter from Senators Richard Blumenthal and Chris Murphy of Connecticut to NMFS, dated June 14, 2019, Mystic Aquarium intends to invest US$2million in MarineLand to "improve the welfare and research potential" of the belugas at MarineLand. If this amount of funding is available for these purposes, then the Applicant can surely afford to conduct the research at MarineLand.

Therefore, NMFS has invested time, money, and staff effort in processing an application that is likely moot. **We strongly urge the agency to cease any further review of this permit or deny it expeditiously**, to avoid any more waste of resources.

We emphasize again that we are not arguing against this research. Overall, taking into account expressed concerns and caveats, the results of several of the proposed studies may have value to beluga field studies and conservation efforts. Rather we are arguing that the research can and should be done at MarineLand, with belugas at other US facilities, or with belugas at a sanctuary when one becomes fully operational, so as not to violate the clear letter and spirit of the MMPA (or Canadian law), and to ensure the United States does not become a market for, or encourage trade in, belugas from a depleted population.[97]

Thank you for your consideration of our comments.

Sincerely,

Susan Millward
Marine Program Director
Animal Welfare Institute

On behalf of:

Animal Justice
Cetacean Society International
Friends of the Sea Otter
International Marine Mammal Project of Earth Island Institute
Marine Connection
Oceanic Preservation Society
Ontario Captive Animal Watch
Orca Research Trust
People for the Ethical Treatment of Animals
Whale and Dolphin Conservation
World Animal Protection
Zoocheck Canada

[97] As a demonstration of our commitment to an outcome that is consistent with the law and addresses our concerns, while still allowing the research to move forward, several representatives of the organizations signing this letter met with representatives of Mystic Aquarium on October 17, 2019, to constructively discuss these points.

Cc: Peter Thomas, Ph.D., executive director, Marine Mammal Commission
Senators Richard Blumenthal and Chris Murphy, Connecticut
Senator Cory Booker, New Jersey
Senator Ed Markey, Massachusetts
Representatives Joe Courtney, Rosa DeLauro, Jahana Hayes, Jim Himes, John Larson, Connecticut
Representative Adam Schiff, California

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(Download all cited documents and materials here from the AWI website)

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