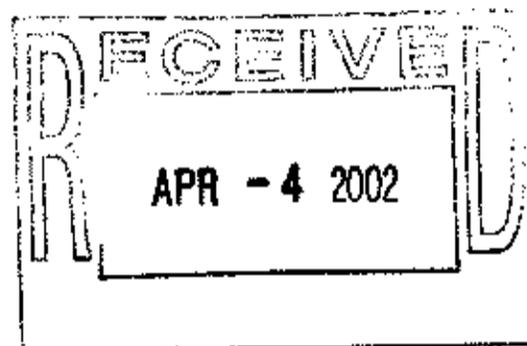


MARINE MAMMAL COMMISSION
4340 EAST-WEST HIGHWAY, ROOM 905
BETHESDA, MD 20814

3 April 2002

Mr. Donald R. Knowles
Director, Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway, Rm. 13821
Silver Spring, Maryland 20910



Dear Mr. Knowles:

Thank you for providing the Commission with the opportunity to comment on the Service's proposed rule concerning public display permits under the Marine Mammal Protection Act. I appreciate your patience and hope that you will find our comments helpful, particularly as they relate to the broader issues of statutory construction. In this regard, the Commission has tried to provide a comprehensive overview directed at helping the Service resolve the various issues related to the export of marine mammals to public display facilities in foreign countries. In addition, we have several comments concerning specific provisions of the proposed regulations.

For the most part, the Commission believes that the proposed regulations are appropriate and, except as indicated below, we support their adoption as final regulations. Nevertheless, the Commission has reservations concerning the discussion of many of the issues in the preamble to the proposed rule. While the preamble does a good job of discussing certain issues, it does not always do so in a way that follows the presentation in the proposed regulations. This sometimes makes it difficult for reviewers to connect the explanatory text with the underlying regulatory provisions being discussed. Further, and more importantly, the preamble fails to address several important issues or addresses them superficially. As a result, reviewers are often left wondering how a regulatory provision would be implemented or not understanding the statutory basis behind the Service's proposals. The Commission has tried to identify all of the areas where additional explanation is needed and encourages the Service to provide an expanded discussion of these points during the course of the rulemaking.

Further, we understand that the Service is considering holding a meeting of interested parties specifically to discuss the issue of exports under section 104(c) of the Act. We believe that this would be a useful endeavor and encourage the Service to do so. Inasmuch as many of the provisions of the proposed rule hinge on the Service's interpretations of the Act's export provisions, a clear understanding of those positions is needed. As discussed in some detail below, we question whether the Service has yet to resolve these issues clearly.

Exports of Marine Mammals

As noted in the preamble to the proposed rule, considerable debate and confusion exist with respect to whether and how the Marine Mammal Protection Act applies to the export of marine mammals for purposes of public display. The discussion of this issue on page 35213-35214 of the proposed rule, however, is too truncated and inexact to provide the necessary background to those submitting comments and serves to add to the existing confusion. The notice probably should have noted the availability of two legal analyses of the export question to serve as additional background. These are the 10 December 1996 memorandum prepared by Martin M. Freeman of the NOAA Office of the General Counsel on letters of comity (NOAA opinion) and the 16 April 1997 response prepared by George J. Mannina, Jr. (Mannina opinion).

The threshold question to be resolved is whether the Service has jurisdiction over a marine mammal once it has been exported from the United States and/or jurisdiction over the facility. The Commission agrees with the position set forth in the Mannina opinion that, if the Act confers no such jurisdiction, the Service cannot regulate any aspect of public display of those animals once they leave the country and cannot require a foreign government to provide assurance of comity to assist the Service in enforcing actions over which it has no authority. In this regard, it is unfortunate that, in describing the need for comity statements, the proposed rule states that "...NMFS has no jurisdiction over the animals once they are exported..." The Commission believes that a more accurate portrayal of the situation is that the Service has continuing jurisdiction over exported marine mammals but, absent the cooperation of the country to which the animals are exported, may not have an effective way of exercising that jurisdiction.

Both the NOAA opinion and the Mannina opinion cite the case of *U.S. v. Mitchell*, 553 F2d 996 (5th Cir. 1977), as being relevant to resolving the issue of extraterritorial jurisdiction with respect to marine mammals exported from the United States for purposes of public display. While the analysis in that case is very useful, the holding itself is not. That case examined the extraterritorial reach of the Act's taking prohibition in a criminal proceeding against a U.S. citizen who collected dolphins within the territorial waters of a foreign country. The court found that neither the statutory language at issue, nor its legislative history, provided a sufficient indication that Congress intended it to have extraterritorial application. It does not stand for the proposition that no other provision of the Act would have an international reach, as suggested in both the NOAA and Mannina opinions.

Employing the analysis of the appellate court in the *Mitchell* case, the Commission believes that section 104(c) of the Marine Mammal Protection Act confers subject matter jurisdiction over marine mammals exported from the United States. In reaching this conclusion, the Commission relies on the statutory language itself, rather than any clear statement of intent in the legislative history of this section. As opposed to the taking prohibition at play in *Mitchell*, which clearly applies within the United States and on the high seas, but which is silent with respect to its applicability in other countries, section 104(c) specifically addresses the issue of exports and the responsibilities that extend to facilities that receive marine mammals from the

United States. Most notably, section 104(c)(2)(C) provides that –

A person to which a marine mammal is sold or exported or to which possession of a marine mammal is otherwise transferred under the authority of subparagraph (B) shall have the rights and responsibilities described in subparagraph (B) with respect to the marine mammal without obtaining any additional permit or authorization under this Act. Such responsibilities shall be limited to –

(i) for purposes of public display, the responsibility to meet the requirements of clauses (i), (ii), and (iii) of subparagraph (A)...¹

Thus, the statute is clear that the provisions at issue apply to exports, as well as to domestic transfers of marine mammals, and place an obligation on all recipients to meet certain requirements.²

The next issue to consider is whether those obligations persist subsequent to the export of a marine mammal from the United States. To resolve this issue, one must look to section 104(c)(2)(D), which sets forth the consequences of failing to meet those responsibilities. Under that provision, a person who holds a public display permit, or who is exercising rights under subparagraph (C), but who no longer meets the applicable requirements and is not likely to meet those requirements in the near future, is subject to permit revocation and/or seizure of the animals. It is clear from this language, at least with respect to domestic facilities, that there is a continuing obligation to satisfy the three requirements for obtaining a public display permit. If one adopts the position that the statutory basis for exports of marine mammals to foreign facilities under the Marine Mammal Protection Act also comes from section 104(c)(2), it follows that they too have a continuing obligation to meet these three requirements. That is, if those facilities avail themselves of section 104(c)(2) as the basis for obtaining marine mammals, then they also take on the responsibilities of a person exercising rights under subparagraph (C). There is no indication in either subparagraph (C) or (D) that those responsibilities lapse once a marine mammal has been exported from the United States or that foreign facilities exercising rights under (C) are to be treated differently than domestic facilities exercising similar rights. This being the case, we believe that the best interpretation of the intent of section 104(c)(2) is that it (1) provides foreign facilities with the authority to obtain marine mammals from U.S. facilities if they meet requirements comparable to those applicable to domestic facilities, (2) specifies that foreign facilities that obtain marine mammals from the United States take on the responsibility to

¹ These requirements are (1) offering a program for education or conservation purposes that is based on professionally recognized standards of the public display community, (2) being registered or licensed to maintain the marine mammals under the Animal Welfare Act, and (3) maintaining facilities that are open to the public on a regularly scheduled basis and with accessibility limited only by the charging of an admission fee.

² Or, as we conclude below, in the case of foreign facilities, comparable requirements.

continue to meet those requirements, and (3) provides for the seizure of the animals or the assessment of penalties if the facility fails to meet those obligations. This is only possible if the Service retains jurisdiction over compliance once marine mammals have been exported.

As noted above, the Commission believes that this is the *best* interpretation of the applicable statutory provisions. We recognize, however, that it is not the *only* possible interpretation. In this regard, we note that one of the assumptions underlying our position is that section 104(c)(2) provides the authority for foreign display facilities to obtain marine mammals from the United States. Only if this is the case, are they subject to the rights and responsibilities set forth in subparagraph (C) or to the consequences spelled out in subparagraph (D) for failure to meet those responsibilities.

A contrary argument can be made that section 104(c)(2) does not apply to transfers of marine mammals to foreign facilities for purposes of public display. The Commission has taken the position that section 104(c)(2)(A) does not provide authority for the issuance of export permits to foreign public display facilities.³ In reaching this conclusion, the Commission relied on a literal reading of the subparagraph. By its own terms, the provision only applies to the issuance of permits to take or import marine mammals. There is no mention of any authority for issuing export permits. Also, one of the required determinations for permit issuance is that the facility be registered or hold a license under the Animal Welfare Act (7 U.S.C. § 2131 *et seq.*). The Animal and Plant Health Inspection Service, charged with implementing the Animal Welfare Act, has taken the position that the Act does not apply extraterritorially, and the Service does not license or register foreign facilities. As such, a foreign facility cannot satisfy one of the requirements for obtaining a public display permit.

A literal reading of subparagraphs (B) and (C) leads to a similar conclusion that no exports to foreign facilities for purposes of public display are authorized under these provisions. In this regard, a foreign facility receiving a marine mammal from a U.S. facility cannot meet the requirement of subparagraph (A) that it be licensed or registered under the Animal Welfare Act and, thus, no export or other transfer to such a facility is authorized. Likewise, a foreign facility would be unable to satisfy its responsibility under subparagraph (C) to meet the requirements of subparagraph (A).

If no exports to foreign facilities can be authorized under section 104(c)(2), what authority remains under which such exports may be allowed? We are left with section 104(c)(9), which states that—

No marine mammal may be exported for the purpose of public display, scientific research, or enhancing the survival or recovery of a species or stock unless the receiving

³ See enclosed letter of 31 July 2001 to Charlie R. Chandler commenting on the permit applications from Aquamarine Fukushima and Ibaraki Prefectural Oarai Aquarium.

facility meets standards that are comparable to the requirements that a person must meet to receive a permit under this subsection for that purpose.

One might argue that this is a free-standing provision under which exports are allowed to facilities that, at the time of export, satisfy the comparability requirements. If this were the case, the other provisions of section 104(c) that are tied to permits being issued under paragraph (2)(A) or rights being exercised under paragraph (2)(C) would not be applicable. This would include the seizure authority of paragraph (2)(D), the notification requirements of paragraph (2)(E), the requirements of paragraph (8)(B) pertaining to captive-born progeny, and the inventory requirements of paragraph (10).

While not quite making this argument, this appears to be one embraced in the Mannina opinion. In this regard, Mr. Mannina, on page 9 of his analysis, concludes that foreign public display facilities are neither persons to whom a permit has been issued under section 104(c)(2)(A), nor persons exercising rights under section 104(c)(2)(C). Rather than basing this conclusion on a claim that section 104(c)(9) is a free-standing provision governing exports, however, that opinion rests on an overly broad construction of the holding in *Mitchell* that the Marine Mammal Protection Act confers no jurisdiction to regulate any activities in foreign nations. For the reasons discussed above, we disagree with such an interpretation.

Faced with these two possible interpretations of the statutory provisions, we must consider which one better reflects Congressional intent behind their enactment. There are two primary reasons that the Commission believes that the first alternative discussed above is more appropriate.

First, we look to the language of section 104(c)(9) itself. When examined closely, the language, as enacted, does not authorize anything. Rather, it provides that “[n]o marine mammal may be exported...unless...” certain standards are met. This wording strongly suggests that it was intended as a limitation on some other export authority under the Act. In the case of exports for purposes of public display, section 104(c)(2) provides the only alternative authority. Thus, we need to explore ways to reconcile these provisions, notwithstanding the fact that a literal reading of section 104(c)(2) leads to the conclusion that no exports to foreign display facilities can be authorized.

Second, a literal interpretation of the language of section 104(c)(2) leads to internal inconsistencies that render certain portions nonsensical. For example, it makes no sense to authorize transfers from a domestic facility to a foreign facility, and to specify the responsibilities that are placed on the recipient facility, but at the same time, establish criteria that are impossible for the foreign facility to meet.

The best meshing of these various provisions is to interpret section 104(c)(9) as embellishing the authority of section 104(c)(2), rather than providing independent authority for exports. Recognizing that foreign facilities are ineligible to be licensed or registered under the

Animal Welfare Act, it makes sense for Congress to have provided the alternative of meeting comparable standards. By making this simple link between the two export provisions, albeit not explicit in the statute, everything falls into place. In this way, exports can be made to foreign facilities that meet standards comparable to those applicable to domestic facilities. If this is what Congress intended, it follows that Congress also intended certain rights to accrue to, and certain responsibilities to be placed on, those facilities. In essence, the foreign facility, at least implicitly, becomes a facility exercising rights under section 104(c)(2)(C). As such, it follows that it should be expected to live up to the responsibilities of a facility exercising those rights.

If one believes, as the Commission does, that the Marine Mammal Protection Act places continuing obligations on foreign facilities and that the Service is authorized to take remedial action if a facility fails to meet those obligations, the next question to be addressed is how best to exercise U.S. jurisdiction over marine mammals being maintained in foreign countries. The way the Service ostensibly has chosen to do this is by requiring the government of the country in which the recipient facility is located to provide a comity statement.

As noted in the discussion on page 35213 of the proposed rule, “[c]omity’ is generally understood to be a rule of courtesy by which one government honors decisions made by another government.” More precisely, as defined in Black’s Law Dictionary, comity of nations is “[t]he recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws.”⁴ The comity statement, depending on how it is worded, is expected to provide reasonable assurance that the country to which marine mammals are being exported will recognize the actions of the Service and/or U.S. courts concerning the seizure of those animals or other actions taken to enforce the provisions of the Marine Mammal Protection Act.

Although the Service, in the preamble to the proposed rule, correctly explains that comity is a recognition of the actions of one government by another, it inexplicably deviates from this view elsewhere in the discussion and in the proposed regulatory language itself. In this regard, the Service apparently does not intend to ask the foreign government for assurances that it will give comity to actions taken to enforce U.S. law with respect to the exported marine mammals. Rather, the Service intends to ask the government to indicate that it will use its own laws to ensure (1) continued compliance with care and maintenance standards comparable to those established under the Animal Welfare Act, (2) that the animals will continue to be held for the intended purposes, and (3) that inventory information is provided to the United States.

The Commission has several problems with the proposed approach. Despite the Service’s characterization of this as a comity statement, it is not based on the recipient country providing comity to actions taken by the Service or U.S. courts. Instead, the Service is proposing to rely on foreign law and the independent actions of the foreign government in administering its

⁴ Black’s Law Dictionary, sixth edition (1991), at page 267.

laws as the basis for ensuring compliance with the comparability provisions of the Marine Mammal Protection Act. This being the case, the statement would not provide the Service with the necessary assurance that its actions to enforce the Act with respect to the foreign facility will be recognized by the foreign government. In fact, such a statement serves to make it less likely that the foreign government will afford comity to U.S. enforcement actions because there would be at least a tacit understanding that enforcement would be carried out under the aegis of the foreign law rather than the Marine Mammal Protection Act. Under such a system, it is not clear that the facility would be held accountable if it failed to meet its responsibilities under the Act or that the Service would be able to meet its responsibility to ensure compliance with the statutory provisions as they apply to foreign facilities.

This is not to say that the Commission would be adverse to a system that relies more heavily, or even entirely, on the foreign government for monitoring its facilities and ensuring comparability with U.S. standards. We do not believe, however, that such a system comports with the existing provisions of the Marine Mammal Protection Act, which places the responsibility on the Service to ascertain compliance and, when necessary, to take remedial steps to address non-compliance. As we have recommended in Congressional testimony, we think that other statutory schemes may be more workable. We therefore encourage the Service to work with the interested parties to design a system that achieves the goal of providing reasonable assurance that marine mammals exported from the United States will be well cared for throughout the duration of their maintenance in captivity, that more realistically reflects the ability of the Service and other U.S. agencies to identify and correct problems at foreign facilities, and that does not establish unnecessary barriers to the exchange of marine mammals among qualified facilities.

Specific Comments

Page 35210, col. 2, par. 3 – This paragraph describes the scope of the proposed rule as being inapplicable to marine mammals and marine mammal parts taken or born in captivity prior to 21 December 1972. While we agree with the Service's assessment with respect to those marine mammals taken before the effective date of the Act, the situation concerning captive-born marine mammals is less clear. In this regard, section 104(c)(8)(C) of the Act specifies that "[a]ny progeny of a marine mammal born in captivity before [30 April 1994] and held in captivity for the purpose of public display shall be treated as though born after that date...." A literal reading of this provision would mean that any marine mammal born in captivity before the end of April 1994 and held in captivity for purposes of public display, including those born prior to 21 December 1972, would be treated as though born after 30 April 1994. This being the case, these animals would be subject to the jurisdiction of the Act, and presumably should be covered by the implementing regulations. The Commission therefore recommends that the Service either conform the regulations to reflect this interpretation of section 104(c)(8)(C) or provide additional explanation to support the view that pre-Act progeny are properly beyond the scope of the regulations.

Page 35210, col. 3, par. 1 – This paragraph discusses authorizations to maintain unreleasable rehabilitated marine mammals. It does not, but should, explain that there are two separate statutory provisions under which the maintenance of such animals may be authorized – section 104 and section 109(h) – and that the authorization process differs between the two. The Service has broad discretion as to which facilities it designates under section 109(h) (pursuant to a section 112(c) agreement) to rescue, rehabilitate, and maintain stranded and rehabilitated marine mammals. Thus, the Service clearly can require public notice and a 30-day comment period before authorizing a new facility to hold marine mammals under this provision, if it so chooses. However, there may be situations in which it is in the best interest of the animal to be placed at the facility pending public review. The Commission therefore suggests that greater flexibility be incorporated into the regulations to allow action prior to the close of the comment period in certain instances.

Page 35210, col. 3, par. 2 – This paragraph discusses the problems associated with releasing captive marine mammals to the wild and indicates that such releases are not permissible. In contrast to these statements, the proposed regulations in fact allow such releases if authorized by a special exemption permit or under the regulations implementing section 109(h) of the Act. Further discussion is needed in the preamble to explain that the release of captive marine mammals can be authorized in some instances. Also, as recommended in our comments on section 216.13(d) of the proposed rule, the Service should discuss the statutory basis for the prohibition (i.e., that release of captive marine mammals constitutes a taking).

Page 35211, col. 1, par. 2 – We note that the Service is proposing to allow the temporary release of captive marine mammals for the purpose of recall training, provided that advance authorization is obtained from the Director of the Office of Protected Resources. The Commission believes that any such authorizations should (1) be granted only for purposes of husbandry training (i.e., to enable facilities to recapture animals if they escape or are released pursuant to a contingency plan); (2) be carried out only by facility staff; and (3) not involve the participation of the public. The discussion in this paragraph indicates that pinger-recall training is “primarily under the purview of APHIS....” It is not clear from this discussion, however, whether the Animal and Plant Health Inspection Service (APHIS) agrees with this assessment and, if so, whether APHIS believes that it can impose limitations on such training aimed at protecting wild marine mammals. Because of these and related questions, a more detailed presentation would be useful.

Page 35211, col. 2, par. 2 – The discussion of exports in this paragraph is confusing. Contrary to the impression created in the first sentence, the Marine Mammal Protection Act contained no explicit prohibition on exporting marine mammals until enactment of the 1994 amendments. The second sentence does not follow from the first, despite the use of the conjunctive adverb “however.” Moreover, it is not clear from the discussion why it would be difficult to provide clear guidance in the regulations as to when exports and imports for purposes of scientific research would be permitted. Likewise, it is not clear from the discussion why the existing regulations prohibit exports only of those species listed under the Endangered Species Act. As

noted above, the answer is a simple one – prior to 1994 the Marine Mammal Protection Act did not contain an export prohibition (although transport, purchase, and sale associated with an export was generally prohibited, absent an authorization). The final sentence also needs reworking. In this regard, section 102(a)(4) of the Act clearly permits exports for purposes of scientific research and species enhancement, in addition to exports for purposes of public display. Also, these exceptions do not appear to be limited to living marine mammals, provided the requirements of section 104(c) are satisfied.

Page 35211, col. 2, par. 4 – As explained in this paragraph, imports of certain specimen material from marine mammals legally exported from the United States could be authorized by the Service without issuing a permit. While the Commission agrees that having the ability to use streamlined procedures to issue such authorizations might be convenient in some instances, we question whether the Act provides such latitude. The Commission therefore requests that the Service provide additional information setting forth the legal underpinning for its proposed interpretation of the Act. Specifically, the Service needs to explain the statutory authority under which such imports would be authorized and how the applicable provisions allow the Service to treat specimen materials for medical examinations and cause-of-death determinations differently than other marine mammal parts or products.

Page 35211, col. 3, par. 2 – The first sentence in this paragraph suggests that the reason all public display facilities no longer need to obtain permits before acquiring marine mammals is because the National Marine Fisheries Service no longer has jurisdiction over the care of captive marine mammals maintained for public display. While it is true that the Service no longer has jurisdiction over care and maintenance issues for display animals, this is not the reason that permits are not required in all instances. Rather, it is because section 104(c)(2) provides alternative mechanisms for providing such authorizations. This should be made clear in the final rule.

Page 35211, col. 3, par. 3 – By using the parenthetical phrase “or entity” in the first sentence of this paragraph, the Service suggests that the term “person,” as used in the Marine Mammal Protection Act, is limited in scope. In fact, the term “person” is defined quite broadly in section 3 of the Act to include “any private person or entity.” While we do not object to the Service clarifying that such entities are covered by the regulations, we do not believe that it should do so in a way that suggests that these entities are outside of the definition of the word “person.”

Page 35212, col. 1, par. 1 – The first sentence of this paragraph explains that the second issuance criterion concerning licensing or registration under the Animal Welfare Act means that the facilities “comply with all applicable APHIS standards (9 CFR 3.104 through 3.118).” The referenced sections, however, do not include all of the Animal Welfare Act provisions that are applicable or that should be covered under the proposed regulatory provision. In this regard, the facilities must also comply with the additional, albeit more general, requirements of part 2 of the APHIS regulations, 9 C.F.R. § 2.1 *et seq.* In addition, it is unclear why the citation in the preamble excluded sections 3.100 through 3.103, which are also included under subpart E and

are specifically applicable to the care and maintenance of marine mammals.

Page 35212, col. 1, par. 4 – This paragraph notes that approximately 60 percent of the facilities that maintain marine mammals for public display are members of either the Alliance of Marine Mammal Parks and Aquariums or the American Zoo and Aquarium Association. Presumably this figure includes U.S. facilities only. The Service should clarify whether or not foreign facilities are represented in this estimate, keeping in mind that they are required to meet comparable standards in order to obtain marine mammals from the United States.

Page 35212, col. 2, par. 3 – This paragraph discusses the proposed regulation requiring applicants to demonstrate that the proposed capture or importation of a marine mammal is from a source that will have the least possible effect on wild populations. Additional guidance concerning this requirement as it pertains to importations is needed. In this regard, marine mammals to be imported into the United States often come from display facilities in other countries, where the animals are already on public display. Would the Service consider that such a transfer would have little or no effect on wild marine mammal populations, inasmuch as the animals are already in captivity, or would it look to the program in place in the country of origin to ensure that it met the least possible effect criterion? If the Service does not intend to look beyond the present circumstances of foreign-maintained animals, this would allow marine mammals taken under programs that do not meet the criterion (e.g., Japan's drive fishery) to be laundered through foreign facilities. If the Service intends to look at the circumstances surrounding the underlying capture, how would it treat the captive-born offspring of a marine mammal that, itself, would not meet the import criterion?

Page 35212, cols. 2-3, carryover par. – This paragraph indicates that, when a marine mammal is imported into the United States, the permit, as a matter of routine, will include an authorization to export that animal to the original holder, subject to a 15-day notification requirement. However, under section 104(c)(9) of the Marine Mammal Protection Act, that facility must still meet the comparability requirements of the Act in order to obtain the animal, even though it would be returning to the original foreign facility. Thus, if the Service is to issue a re-export authorization at the time it issues an import permit, it will need to determine that the foreign facility meets standards that are comparable to the requirements that a domestic facility must meet in order to obtain a public display permit. Even then, the Service needs to re-examine the determination prior to export to ascertain that the facility still meets comparable standards. Presumably, this could be done within the 15-day period prior to export. However, the discussion in the final rule should explain that additional information may be required from the facility in order for the Service to make the required determinations.

Page 35313, col. 3, par. 1 – This paragraph discusses the issue of comity. Consistent with the discussion of exports provided above, the Commission believes that this paragraph, and the following paragraphs, need to be revised to clarify not only what comity is, but that what the Service is asking foreign governments to provide is in fact a statement that that government will provide comity to U.S. actions taken under the Marine Mammal Protection Act.

Page 35313, col. 3, par. 3 – The second sentence of this paragraph needs to be thoroughly revised. As discussed above, if the Service has no jurisdiction over marine mammals once they are exported, then it has no authority to require continued compliance with reporting and other provisions of section 104(c) by the recipient foreign facility. What we believe the Service meant was that it in fact possesses continuing subject matter jurisdiction over the marine mammals under the Marine Mammal Protection Act, but may not have personal jurisdiction over a foreign facility that would enable it to exercise that jurisdiction effectively, absent assistance from the government of the country in which the facility is located. It is because of potential problems in exercising its jurisdiction over marine mammals once they have been exported to a foreign country that the Service requires a comity statement. It is not because the Service lacks jurisdiction over the animals under the Act.

Page 35214, col. 1, par. 1 – This paragraph indicates that the loss of an APHIS exhibitor's license would constitute grounds for permit revocation or seizure of a facility's marine mammals. The discussion further indicates that a letter from APHIS expressing its intention to revoke an exhibitor's license may also provide a sufficient basis for revocation or seizure by the National Marine Fisheries Service. We agree. However, the Service does not discuss the ramifications of the suspension of an exhibitor's license. Presumably, this too could provide a sufficient basis for permit revocation or the seizure of a facility's marine mammals, if it were determined that the facility was not likely to come into compliance with the Animal Welfare Act standards in the near future. This possibility is reflected in section 216.43(g) of the proposed rule and should be noted in the discussion.

Page 35214, col. 3, par. 2 – This paragraph provides the Service's estimates of the time required to complete the paperwork for submitting a public display permit application and for seeking a major amendment to such a permit. It seems odd that the Service expects it to take almost 50 percent longer to prepare an amendment request than to prepare an original permit application. The basis for this difference in estimated preparation time should be more fully discussed.

Page 35215, § 216.13(d) – Under this provision, it would be prohibited to release a captive marine mammal into the wild unless authorized under a permit or, for beached or stranded animals, under § 216.27. While we agree with the Service's conclusions, we note that both the proposed regulatory provision and the preamble are silent as to the statutory basis for such a prohibition. Presumably, the Service believes that the release of marine mammals into the wild constitutes a taking and, unless authorized, that such taking is unlawful. This should be explained. In this regard, the Service should discuss, among other things, the ruling in the 1999 administrative proceeding against the Sugarloaf Dolphin Sanctuary and its officers.

Page 35215, § 216.27(c)(4) – See comment above (re: page 35210, col. 3, par. 1) with respect to the possible need for greater flexibility concerning the mandatory 30-day waiting period.

Page 35215, § 216.32(a) – See comment above (re: page 35210, col. 2, par. 3) concerning the need to clarify the scope of the rule as it pertains the progeny of captive marine mammals.

Depending on the Service's response to that comment, changes to section 216.32(a) may be warranted.

Page 35215, § 216.37(e) – See comment above (re: page 35211, col. 2, par. 4) concerning the statutory basis for authorizing such imports without issuing a permit. Unless the Service can provide an adequate explanation of the statutory underpinning, this provision should be deleted.

Page 35215, § 216.43(a)(iv) – This provision defines a “transfer” as meaning “to convey any custodial interest in a marine mammal...” Such a conveyance is described in the next sentence as the transfer of a “whole interest.” As we understand this, conveyances involving partial interests, such as leasing marine mammals, would not constitute a transfer, even though the lessor may be fully responsible for the care and maintenance of the animals for the term of the lease. Was this the Service's intent? If not, revisions may be needed. Also, this is an issue where additional explanation in the preamble would be useful to clarify which situations would and would not constitute a transfer.

Page 35215, § 216.43(a)(v)(3) – This provision prohibits “intrusive research” on any marine mammal maintained in captivity for purposes of public display unless authorized under a separate scientific research or enhancement permit. Some reviewers may be unaware that the Service has defined the term “intrusive research” in section 216.3 of its regulations. To avoid possible confusion, this should be noted in the discussion of this provision in the preamble to the rule.

Page 35216, §216.43(a)(v)(4) – This provision sets forth the Service's right to inspect facilities to ascertain compliance with the requirements of section 216.43. The bounds on these rights, however, are not clearly established. For example, could the Service independently inspect a facility to determine whether the facility is meeting its responsibilities under the Animal Welfare Act or is coordination with APHIS anticipated in all instances? Also, are there limitations on who the Service could designate under clause (i) to conduct an inspection or on what records may be reviewed and copied under clause (iii)? If records are copied and retained by the Service, would they be subject to public access under the Freedom of Information Act? Would they be made available to the Commission if requested under section 205 of the Marine Mammal Protection Act? While we do not disagree with the proposed regulatory provision *per se*, this is one area where additional explanation as to how the Service expects to use its authority could help to allay possible fears of the regulated community as to who would be given access to their facilities and records, and for what purposes. The Commission recommends that such a discussion be provided in the preamble to the final rule.

Page 35216, §216.43(a)(v)(5) – This provision indicates that the Office Director may issue temporary release authorizations for purposes of open-water training of marine mammals. Although this provision is discussed somewhat in the preamble, additional guidance is needed as to the circumstances under which temporary releases would be authorized and the conditions that would apply to such releases.

Page 35216, §216.43(b)(i) – It is not immediately clear why the date of incorporation or the identity of the State in which a corporation or partnership was formed is relevant to the Service’s review of a permit application. This should be explained. Also, the last sentence in this provision suggests that, in all instances, the applicant must be a “U.S. entity” that will assume responsibility for the animals while they are in the United States. While this may make sense for most display facilities in the United States, there may be situations (e.g., traveling exhibits) in which custody remains with the foreign entity, albeit one licensed by APHIS. Clarification is needed as to who may apply for a permit in such instances. For example, does a foreign facility, by virtue of being licensed by APHIS, become a U.S. entity for purposes of this provision?

Page 35216, §216.43(b)(3)(ii) – Although this language tracks the statutory provision concerning facility registration or licensure, it is unclear whether there are any instances when a public display facility could be registered rather than licensed. Clarification of this point might avoid possible confusion in the future.

Page 35216, §216.43(b)(3)(iii)(C) – Inasmuch as one of the requirements for obtaining a public display permit is being registered or licensed under the Animal Welfare Act, it is unclear how the Service can make a decision to issue or deny a permit prior to the facility being completed and meeting that requirement. In the event that temporary placement of the animal at another facility may be required, it is not clear why that facility would not be the applicant. This situation seems parallel to that envisioned under subsection (b)(1), where the Service requires the entity that will assume temporary custody to be the applicant. The Service needs to explain the reasons for the apparently different treatment under these two provisions and the basis for believing that it can issue a permit to an applicant that does not yet meet the statutory requirement of being registered or licensed under the Animal Welfare Act.

Page 35216, §216.43(b)(3)(iv) – See comment above (re: page 35212, col. 2, par. 3) concerning the need for further explanation as to how the Service will determine whether the proposed capture or importation will present the least practicable effect on wild populations.

Page 35216, §216.43(b)(3)(v)(A) – The wording of this provision raises two issues. First, by including the word “permanent” before the phrase “removal from the wild,” the Service suggests that there may be instances in which temporary removal for purposes of public display may be allowed. If the Service is using the word “permanent” to distinguish between animals that may be captured temporarily in the course of obtaining those to be retained, and those that will be placed in the facility under the permit, this should be explained. Second, permanent removals would have to be consistent with any applicable quota established by the Service. It would be useful if the accompanying discussion in the preamble provided further description of such quotas – e.g., the principles that would be used to establish such quotas, the procedures that would be followed in setting them, whether any quotas are currently in place, etc.

Page 35216, §216.43(b)(3)(v)(B) – As with the previous provision, further explanation of the basis for, and the intent behind, this provision would be helpful. For example, it is not clear on

what basis the Service would determine if proposed removals would have a significant direct or indirect adverse effect on a species or stock. Would significance be measured in relation to a stock's optimum sustainable population level, or would some higher threshold be used (e.g., something akin to the negligible impact standard set forth in section 101(a)(5) of the Act)?

Page 35216, §216.43(b)(4) – The wording of this provision suggests that public display permits could be issued under a provision other than subpart D. If this is not the case, it probably would be better to use the phrase “this section” in place of “subpart D.”

Page 35216, §216.43(b)(4)(i) – This provision suggests that the Service believes that public display permits may only be issued to facilities in the United States, inasmuch as they are the only ones that can satisfy the requirement of subsection (b)(3)(ii) that the facility be registered or licensed. If this is the case, the Service should state this explicitly, either in the regulations or the preamble discussion.

Page 35216, §216.43(b)(4)(i)(A) – This provision indicates that a depleted marine mammal may be imported for purposes of public display if it is captive-born and the provisions applicable to enhancement permits under section 216.41(b)(6)(iv)(A) are met. This is contrary to section 102(b) of the Act, which prohibits any importation of a depleted marine mammal except under a scientific research or enhancement permit. The more appropriate characterization of the situation the Service seems to be addressing is that the import would be for enhancement purposes and, provided the provisions of section 216.41(b)(6) were met, the animal could be placed on display incidental to the enhancement activities. This is already authorized under section 216.41 and need not be addressed in the public display regulations.

Page 35216, §216.43(b)(4)(i)(B) – This provision implements section 102(b) of the Act, which establishes the sole exception as to when marine mammals that were pregnant or nursing at the time of taking, or less than eight months old, may be imported for purposes of public display. Such imports are permissible if the Service determines that the importation is necessary for the protection or welfare of the animal. It would be helpful if the Service provided additional guidance as to when such a determination is appropriate. In this regard, the Service should, at a minimum, call attention to the discussion in the legislative reports concerning this amendment (i.e., Senate Report 100-592 at page 28 and House Report 100-970 at page 33). Preferably, the Service should incorporate those discussions into the preamble to the final rule and, as appropriate, provide additional guidance concerning how it intends to implement the exception.

Page 35216, §216.43(b)(4)(iii)(A) – This provision would prohibit a public display permit holder from transferring a captive marine mammal to a facility that does not meet the public display criteria set forth in subsection (b)(3)(i)-(iii). As discussed above, however, foreign facilities cannot meet the second criterion. Accordingly, under the proposed regulatory provision, no transfer to a foreign facility would be allowed. This is clearly inconsistent with the underlying statutory provisions and, presumably, not what the Service intended. A further cross-reference to section 216.43(f) and to the comparability findings to be made under that provision is needed.

Page 35216, §216.43(b)(5)(ii) – This provision appropriately references the requirements and applicability of 50 C.F.R. part 14. Inasmuch as that part of the regulations also contains provisions that apply to exports, a similar reference would probably be appropriate in section 216.43(f) as well.

Page 35217, §216.43(b)(5)(vii) – The Commission has several questions concerning this provision, which would allow marine mammals collected from the wild to be maintained for up to six months in a temporary facility. Although it appears that this provision is applicable only to newly captured animals, this is not explicitly stated. This should be clarified. In addition, it is not clear what kind of temporary facilities the Service has in mind. In this regard, we note that, although licensing by APHIS would not be required, the facilities would be expected to meet all applicable Animal Welfare Act standards. Does this mean that the Service intends to require temporary facilities to meet the same requirements that a licensed facility would have to meet? If not, what would be different? If they are the same standards, why not require licensing, or at least inspection and confirmation by APHIS that the facility meets the Animal Welfare Act standards? If there are substantial differences between the requirements for temporary and permanent facilities and/or the level of care provided, a six-month acclimation period would be too long. Why was six months chosen rather than 30, 60, or 90 days? Our last concern with respect to this provision is that it would be a standard condition in public display permits. It would be more appropriate for the Service to design a condition pertaining to acclimation facilities and the length of time a marine mammal may be held in such facilities into individual permits on a case-by-case basis, taking into consideration the species involved, the applicant's demonstrated need for using a temporary facility, and the available alternatives.

Page 35217, §216.43(b)(6) – The discussion of this provision does not, but probably should, indicate that such reports are required to be submitted under section 104(c)(1) of the Act.

Page 35217, §216.43(c)(1) – As discussed above (re: page 35212, cols. 2-3, carryover par.), it is not apparent to the Commission that the Service has the statutory authority to authorize any export, including a re-export, without first determining that the recipient facility, even if it is the original facility, meets requirements comparable to those applicable to domestic facilities. Moreover, under the Commission's interpretation of the Act as it applies to exports for purposes of public display, the recipient facility would become a facility exercising rights under section 104(c)(2)(C) and therefore would have a continuing obligation to satisfy the comparability requirements. If the Service disagrees with these positions, as suggested by the proposed language of this paragraph, it needs to provide a clear explanation of the authority under which re-exports would be allowed.

Page 35217, §216.43(c)(2) – As noted in the previous comment, the Commission believes that the best interpretation of the applicable provisions of the Marine Mammal Protection Act is that a re-export is no different than any other export. This being the case, it is not apparent why the foreign facility would not be subject to the notification and reporting requirements of the Act.

Page 35217, §216.43(c)(3) – By singling out the U.S.-born progeny of marine mammals being re-exported to the original facility as being subject to CITES export requirements, the Service is suggesting that other marine mammals being re-exported under this provision are not subject to these requirements. Is that the position of the Service? If so, what is the basis on which such exports would be exempted? Does the Fish and Wildlife Service, which has primary responsibility for implementing CITES in the United States, agree with the Service’s position?

Page 35218, § 216.43(e)(1)(iii) – The Service proposes under this provision to exempt certain transports of marine mammals from the otherwise applicable notice requirements if the duration is less than 12 hours. While we do not take issue with the policy underlying this proposal, we have concerns about the Service’s execution of it and about the details of the proposed exclusion. Under the statutory scheme, facilities holding marine mammals for purposes of public display are required to provide 15 days advance notice of *any* transport. There are no exceptions. Thus, it would seem that a better way to fashion an exclusion would be to define the term “transport” in a way that excludes certain activities, thereby making the notice requirement inapplicable. Inasmuch as the term “transport” is not statutorily defined, the Service has some leeway in this regard. In this case, however, the Service’s proposed definition of transport (§ 216.43(a)(1)(v)), compounds the identified problem, by including *all* physical movements of marine mammals between facilities or between distinct geographic locations. As for the details of the Service’s proposal, there is no indication, either in the regulatory provision or the preamble discussion, why the Service is proposing to set the limit under the exclusion at 12 hours. Further, the Service should explain what is different about transports for public outreach purposes as compared to transports for other purposes that makes the proposed exclusion warranted. Also, at least with respect to the marine mammals subject to the National Marine Fisheries Service’s jurisdiction, it should be recognized that the transport of pinnipeds is quite different than that of cetaceans. Any exclusion for transports of short duration should recognize those differences by establishing a shorter period, or no exception at all, for cetaceans.

Page 35218, § 216.43(e)(4) – It is unclear whether a facility, under this provision, must provide an updated Marine Mammal Data Sheet (MMDS) only when there are changes to its inventory resulting from activities under these regulations or when there are any changes in its marine mammal inventory. Specifically, it is unclear whether facilities are expected to report changes to their inventories that result from activities related to the rescue and rehabilitation of beached or stranded marine mammals. This should be clarified.

This provision also specifies the information that is to be provided in the Marine Mammal Data Sheet. Presumably, holders are also expected to provide information with respect to the species involved. In this regard, the Service should consider how hybrid animals maintained in captivity are to be reported and categorized. On a related point, questions have recently arisen concerning the appropriateness of interbreeding captive marine mammals from different species, subspecies, and stocks. Although it may not be possible to consider these issues as part of this rulemaking, the Commission believes that a review of these matters is warranted. We therefore encourage the Service, in cooperation with the Commission and other agencies, to conduct such a review to

consider if limitations on breeding programs are needed and, if so, how best to implement them.

Page 35219, § 216.43(f) – As discussed elsewhere, a facility located in a foreign country is not eligible for licensing or registration under the Animal Welfare Act. Thus, it makes no sense to require compliance with the public display requirements of section 216.43(b)(3)(i)-(iii) under this provision. Rather, the regulations should discuss compliance with the comparability provisions of section 104(c)(9) of the Act (or the regulatory equivalent). On a separate matter, it appears that the numbering of this subsection is incorrect. In this regard, there is no paragraph (3), although such a provision is referenced in paragraph (1). Is something missing, or should paragraphs (4) through (7) be renumbered as paragraphs (3) through (6)? Whichever is the case, the Service should check to see that the reference to those provisions in paragraph (1) is correct.

Page 35219, § 216.43(f)(1) – By using the phrase “holder or facility” in this provision, the Service suggests that they are different things. As we read the definition of the term “holder” in proposed section 216.43(a)(ii), it would include public display facilities. Thus, to avoid confusion and possible unintended interpretations of this provision, we suggest that a single term be used. Also, while we agree that a copy of the applicable CITES export permit needs to be submitted to the Service prior to export, it is unclear why the Service needs it at least 15 days prior to the proposed export, provided that the other required documentation is submitted then. Unless there is a compelling reason for this requirement, the Service should consider providing greater flexibility concerning the submission of CITES documentation.

Page 35219, § 216.43(f)(2) – As discussed elsewhere, it is not possible for a foreign facility to comply with the requirements of section 216.43(b)(3)(ii). This is recognized by the Service in subparagraph (ii)(A) of this provision, which requires certification by APHIS that the receiving facility meets comparable standards. Nevertheless, the Service needs to recognize that compliance with section 104(c)(2)(A)(ii) of the Act (or section 216.43(b)(3)(ii) of the regulations) is not the same as meeting the comparability requirements. The regulations need to recognize this distinction.

Page 35219, § 216.43(f)(2)(ii)(A) – Although probably not an issue that needs to be addressed in this rulemaking, the Commission notes that it has concerns about the procedures followed in determining that a foreign facility meets standards comparable to those applicable to U.S. facilities under the Animal Welfare Act. In contrast to determinations of compliance by U.S. facilities, which are based on periodic inspections of the facility, determinations of comparability for foreign facilities are based wholly on the review of paper submissions. Although the Service requires that the responsible foreign government certify the accuracy of the information submitted, it is not clear that such certifications are based on a physical inspection of the facility.

Page 35219, § 216.43(f)(2)(iv) – This provision anticipates that marine mammals exported from the United States could be transported among multiple facilities. It is not clear, however, whether the Service is requiring or expects those facilities to provide notice each time a marine mammal is transported. In this regard, the regulations should clearly indicate which, if any, of

the reporting and notification requirements apply to foreign facilities, and the preamble should explain the rationale for including or excluding these facilities. On a related point, it is unclear under the proposed rule whether notice and Service review are expected if the foreign recipient transfers marine mammals obtained from the United States to another foreign facility. If so, the regulations need to set forth the process more clearly. If not, the Service needs to explain its rationale for excluding subsequent transfers from the scope of its regulations.

Page 35219, § 216.43(f)(2)(v) – This provision addresses leases of marine mammals exported from the United States. The requirement concerning the certification from the head of the facility included in the provision, however, is confusing. Would this be in addition to the certification provided by APHIS under paragraph (2)(ii) (which is referenced in this provision) or in lieu of that certification? If it would be an additional certification, is it needed? Perhaps what the Service is really seeking is a commitment from the facility that it intends to remain in compliance with comparable standards for the term of the lease. If the certification of the facility head is intended to be in lieu of an APHIS certification, it would not be an adequate substitute.

This provision also underscores a key omission in the proposed rule. While the Service apparently believes that a separate provision is needed to govern leases of marine mammals exported from the United States for purposes of public display, no similar provision is included to govern sales or other, more permanent transfers. The Commission finds this omission curious and believes that further explanation is needed.

Page 35219, § 216.43(f)(4)(ii) – As discussed above, what the Service is seeking under this provision is not a statement of comity and does not address the Service's ability to enforce the requirements of the Marine Mammal Protection Act with respect to foreign facilities. The Commission recommends that the Service re-examine the basis for seeking such a statement in light of the discussion of exports provided above and make appropriate adjustments.

The punctuation of this provision suggests that the Service intended to include a subparagraph (iii) under section 216.43(f)(4). This is confirmed by the discussion in paragraph (5), which references a paragraph (4)(iii). Without seeing this provision, however, we are unable to comment.

Page 35219, § 216.43(f)(7) – Although this provision might comport with the language of section 104(c)(2) of the Act, without additional explanation, this is unclear. The Commission therefore recommends that the Service review the underlying statutory authority for authorizing such imports without requiring a permit and provide further justification for its proposal in the final rule.

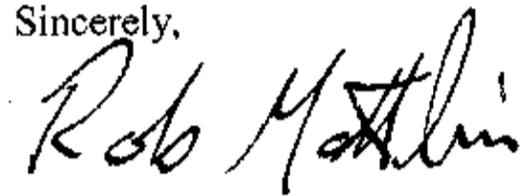
Page 35219, § 216.43(g) – This provision addresses the seizure of captive marine mammals in certain circumstances. Missing from the proposed regulations and the discussion of this provision in the preamble, however, is any indication of its applicability to foreign facilities. This needs to be clarified. If the Service believes that it has authority to seize animals

maintained at foreign facilities that no longer meet the Act's comparability requirements, this should be clearly stated in the regulations. Also, paragraph (g) needs to be revised to reference the comparability requirements. If the Service does not believe that it has subject matter jurisdiction to seize marine mammals maintained at non-compliant foreign facilities, the basis for that position needs to be provided. Further, the Service should discuss the ramifications of its inability to enforce the requirements of the Act against these facilities that arguably have continuing obligations under its provisions.

* * * * *

Please let me know if you have any questions concerning these comments and recommendations.

Sincerely,



Robert H. Mattlin
Executive Director

cc: Mr. Charlie R. Chandler, Chief, Branch of Permits, Division
of Management Authority, U.S. Fish and Wildlife Service

Chester A. Gipson, D.V.M., Acting Deputy Administrator,
Animal and Plant Health Inspection Service

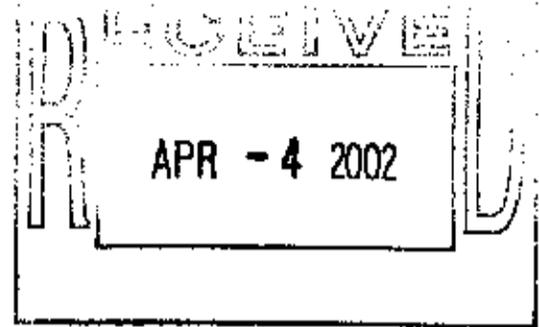
Mr. Kenneth Stansell, Assistant Director for International Affairs,
U.S. Fish and Wildlife Service

Ms. Ann D. Terbush, Chief, Permits Division, Office of Protected
Resources, National Marine Fisheries Service

MARINE MAMMAL COMMISSION
4340 EAST-WEST HIGHWAY, ROOM 905
BETHESDA, MD 20814

31 July 2001

Mr. Charlie R. Chandler
Chief, Branch of Permits
Division of Management Authority
U.S. Fish and Wildlife Service
4401 N. Fairfax Drive
Arlington, VA 22203



Re: Permit Application Nos. PRT-020575
(Aquamarine Fukushima) and
PRT-043001 (Ibaraki Prefectural Oarai Aquarium)

Dear Mr. Chandler:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the above-referenced permit applications with regard to the goals, policies, and requirements of the Marine Mammal Protection Act.

Both applicants are requesting authorization to capture northern sea otters from Alaska waters and export them to facilities in Japan for purposes of public display. In each instance, the applicant is requesting authority to capture, handle, temporarily maintain in captivity, and release up to 20 otters in order to select the animals that will be retained for permanent maintenance in captivity.

The Commission, after carefully reviewing the applicable statutory provisions, does not believe that the Marine Mammal Protection Act authorizes the issuance of export permits and that the applicants do not meet the requirements for a permit to take the requested animals for purposes of public display. The Commission therefore recommends that the Service refrain from issuing the requested permits, or any other export permits, until such time as the Act is amended to accommodate these activities.

In making this recommendation, the Commission recognizes that, since the Act was amended in 1994 to add a prohibition on exporting marine mammals, eight applications seeking similar authorizations have been submitted and six such permits have been issued. In each of those six instances, the Commission recommended approval of the requested authorization subject to certain conditions. Nevertheless, a detailed review of the Act's export provisions conducted by the Commission, the Fish and Wildlife Service, and the National Marine Fisheries Service last year, in anticipation of reauthorization, revealed that no such authority exists.

In this regard, section 101(a) of the Act, which sets forth the exceptions to the Act's moratorium, specifies that permits may be issued to authorize taking and importation of marine mammals, but does not mention export permits. Similarly, section 104, the Act's permitting provision, authorizes the Service to issue permits that allow the taking and importation of marine mammals, but does not include a similar authority for issuing an export permit.

Two provisions added to section 104 in 1994 specifically address exports of marine mammals. Section 104(c)(2)(B) states that "[a] permit under this paragraph shall grant to the person to which it is issued, the right, without obtaining any additional permit or authorization under this Act, to...sell, export, or otherwise transfer possession of the marine mammal..." Section 104(c)(9) specifies that "[n]o marine mammal may be exported for the purpose of public display, scientific research, or enhancing the survival or recovery of a species or stock unless the receiving facility meets standards that are comparable to the requirements that a person must meet to receive a permit under this subsection for that purpose."

One might argue that the applicants could obtain a permit to remove the requested animals from the wild and then export them to their facilities without further authorization pursuant to section 104(c)(2)(B). While this is a plausible construction of that provision, only a facility that is registered or holds a license under the applicable provisions of the Animal Welfare Act (7 U.S.C. § 2131 *et seq.*) can obtain a permit under section 104(c)(2)(A) to take marine mammals for purposes of public display in the first instance. Inasmuch as the Animal Welfare Act applies only to domestic facilities and the licensing and registration provisions of that Act pertain exclusively to such facilities, it follows that a foreign facility cannot meet the requirements for obtaining a permit to take marine mammals for purposes of public display. Conceivably, one could argue that the licensing or registration requirement applies only to domestic facilities and that a foreign facility qualifies for a taking permit if it demonstrated comparability with the Animal Welfare Act standards. Such an interpretation, however, is at odds with the clear language of the pertinent statutory provision and without any support in the legislative history of the 1994 amendments.

As for section 104(c)(9), it merely sets forth the comparability requirements that must be met before a marine mammal may be exported from a domestic facility to a foreign facility. It does not contain any independent authority under which the requested permits to take and export sea otters from Alaska waters may be issued.

While it is not clear that Congress intended to preclude the issuance of a permit to take marine mammals from areas subject to U.S. jurisdiction and export them directly to a foreign facility, that is in fact what the 1994 amendments did. As the Commission has recommended, we encourage the Service to work with the appropriate Congressional committees to identify and correct any unintended consequences of the 1994 amendments that resulted from the addition of the prohibition on exporting marine mammals. In the meantime, however, the Service has little choice but to implement the statutory provisions as enacted.

Should the Service disagree with the Commission's reading of the applicable statutory provisions, we would appreciate a response detailing the rationale for the Service's position. In addition, if the Service decides to consider issuance of these permits notwithstanding the Commission's recommendation, we request that the Commission be given the opportunity to comment specifically on these two applications. In this regard, we share the concerns expressed by the Service's Office of Marine Mammals Management about collecting sea otters in or proximate to areas where this species has been experiencing population declines. While we agree that other collection sites would be preferable, we would like to review any proposed changes to the collection location and transportation plan before the Service makes a determination on the application. Also, inasmuch as the Animal and Plant Health Inspection Service has identified certain deficiencies in the information submitted to demonstrate comparability with the requirements of the Animal Welfare Act, the Commission would like the opportunity to review any supplemental information submitted in that regard as well.

Please contact me if you have any questions concerning this recommendation.

Sincerely,



Robert H. Mattlin, Ph.D.
Executive Director

cc: W. Ron DeHaven, D.V.M.
Barbara A. Kohn, D.V.M.