

LOOKING BEHIND THE CURTAIN:
ACHIEVING DISCLOSURE OF MEDICAL AND
SCIENTIFIC INFORMATION FOR CETACEANS IN
CAPTIVITY THROUGH VOLUNTARY COMPLIANCE
AND FEDERAL ENFORCEMENT

By
Heather D. Rally
Donald C. Baur
Matthew McFeeley*

In recent years, increasing concern has emerged within the general public and scientific communities over the detrimental effects of captive maintenance on the health and welfare of cetaceans. There is widespread agreement that the medical records of cetaceans held in captivity are a source of important information that can shed light on the animal health impacts of certain captive conditions, as well as on diseases and environmental threats to cetaceans in the wild. Despite the value of such records to advancing animal husbandry, animal welfare, and wildlife conservation, the medical and behavioral records of cetaceans held in captivity are routinely withheld from the public and the greater scientific community by the facilities that hold these animals captive. Absent voluntary compliance by the captive display industry, there remain legal avenues to bring about transparency and disclosure of medical and behavioral records through enforcement of permit conditions included in the public display permits issued under the Marine Mammal Protection Act (MMPA) prior to 1994 and under the regulations for marine mammal care and maintenance under the Animal Welfare Act. Amendments to MMPA in 1994 to limit MMPA jurisdiction, in most respects, to animals in the wild did not apply retroactively to permits issued before that date. Therefore, the medical requirements of pre-1994 MMPA permits remain in effect and generally also apply to the

* Heather Rally, D.V.M., is the Supervising Veterinarian for Captive Animal Law Enforcement at the PETA Foundation. Donald Baur is a partner with Perkins Coie LLP. Matthew McFeeley is a US-qualified attorney and Solicitor of England and Wales with Richard Buxton Environmental & Public Law in London. Dr. Rally and Mr. Baur have been involved in the administrative and legal proceedings described in this Article to secure the release of records about cetaceans in captivity, and Mr. Baur is one of the counsel of record in *PETA v. Forest Preserve District of Cook County* discussed in footnote 378. The authors appreciate the assistance of Jared Goodman, Director of Animal Law, PETA Foundation; Naomi Rose, Marine Mammal Scientist, Animal Welfare Institute; Georgia Hancock Snusz, Of Counsel, Animal Welfare Institute; Sheri Pais, Legal Assistant, Perkins Coie; Michelle Bender, Ocean Rights Manager, Earth Law Center; Anna Hazlett, J.D. 2019, Vermont Law School; Aimee Ford, Associate, Perkins Coie; and Betty Price, Legal Practice Assistant, Perkins Coie in the preparation of this Article.

progeny of permitted animals. The National Marine Fisheries Service, however, denies it has authority to seek voluntary industry compliance or undertake permit enforcement. Furthermore, the Animal and Plant Health Inspection Service, which has express authority to collect medical or necropsy records under the Animal Welfare Act regulations, has not obtained these documents for agency review or public access. The failure of both agencies to act denies interested parties the ability to review information that could improve the health and wellbeing of cetaceans in captivity and in the wild, as well as help to inform public opinion about the ethical implications of maintaining cetaceans in captivity.

I. INTRODUCTION	305
II. BACKGROUND	310
A. <i>The Marine Mammal Public Display Legal Requirements</i>	310
1. <i>The MMPA Permit System</i>	310
2. <i>The Animal Welfare Act Marine Mammal Standards</i>	314
B. <i>The 2017 SeaWorld Orca Deaths and 2018 Serious Injury</i>	315
1. <i>Tilikum</i>	316
2. <i>Kyara</i>	318
3. <i>Kasatka</i>	319
4. <i>Katina</i>	319
C. <i>The MMPA Permits for the SeaWorld Whales</i>	321
1. <i>Kasatka's Permit</i>	321
2. <i>Tilikum's and Kyara's Permit</i>	322
3. <i>Katina's Permit</i>	324
D. <i>The Importance of Necropsy and Clinical History Reports</i>	324
E. <i>Consideration of the Pre-1994 Permit Requirements by the Federal Agencies</i>	328
III. THE MEDICAL RECORD RELEASE REQUIREMENTS OF THE MMPA	335
A. <i>Pre-1994 MMPA Permits</i>	336
B. <i>The 1994 Amendments</i>	337
C. <i>The 1994 Amendments Have No Effect on the Necropsy/Clinical History and Inspection Requirements of the SeaWorld Orca Permits</i>	340
1. <i>The Necropsy/Clinical History Requirements of Pre-1994 Permits Fulfill Fundamental MMPA Purposes and Inspection</i>	340
2. <i>The MMPA and Permits No. 240 and No. 774 Must Be Construed Under the Precautionary Principle and to Give the Benefit of Any Doubt to the Marine Mammals</i>	343
3. <i>NMFS Is Not Entitled to Deference</i>	345
4. <i>Permits No. 240 and No. 774 Remain in Effect</i>	347
5. <i>Consistency with the 1994 Amendments</i>	350
6. <i>The 1994 Amendments Legislative History</i>	358
D. <i>Permit No. 774 Applies to the Progeny of the Animals Imported Under Its Authority</i>	362

E. NMFS Should Enforce Permits No. 240 and No. 774 If <i>SeaWorld Does Not Voluntarily Comply</i>	363
IV. RECOMMENDATIONS FOR ACCESS TO AND USE OF INFORMATION ON CAPTIVE CETACEANS.....	365
V. CONCLUSION	370

I. INTRODUCTION

Fifty-five million years of evolution have shaped cetaceans—whales, dolphins, and porpoises—into intelligent, wide-ranging, and highly social creatures.¹ Their habitat is dynamic and presents a diverse array of currents, temperature, surface conditions, wildlife, and other ecological components.² Cetaceans play a critical role within these marine ecosystems, serving a variety of essential functions such as helping to maintain a stable food chain, distributing nutrients throughout the water column and between ecosystems during migration, and having their carcasses serve as habitats for other species.³ They also play an important economic role by promoting tourism and education.⁴

Cetaceans have brains that are complex in structure. The parts of their brains associated with intelligence, emotional and social complexity, and self-awareness are highly developed.⁵ These animals have an exceptional capacity for communication and social awareness, which gives them a high degree of autonomy and a keen understand-

¹ See, e.g., Lori Marino, *The Brain: Evolution, Structure, and Function*, in DOLPHIN COMMUNICATION AND COGNITION: PAST, PRESENT, AND FUTURE 3–18 (Denise L. Herzing & Christine M. Johnson eds., 2015) (exploring the development of cetacean brains through an evolutionary perspective).

² See generally Erich Hoyt, *Marine Protected Areas For Whales, Dolphins and Porpoises: A World Handbook For Cetacean Habitat Conservation and Planning* (2005), at 7; Jason J. Roberts et al., *Habitat-based Cetacean Density Models For The U.S. Atlantic And Gulf of Mexico*, 16 SCI. REP. 22,615 (2016); Nat'l Oceanic and Atmospheric Admin., *Biologically Important Areas, Cetacean & Sound Mapping*, <https://cetsound.noaa.gov/important> [<https://perma.cc/TM9Q-FACT>] (accessed Sept. 23, 2018); Nat'l Marine Fisheries Serv., *Biological Report: Designation of Critical Habitat for Southern Resident Killer Whales* (Oct. 2006), <https://www.westcoast.fisheries.noaa.gov/publications/protected-species/marine-mammals/killer-whales/esa-status/srkw-ch-bio-rpt.pdf> [<https://perma.cc/MUU4-7BJD>] (accessed Sept. 23, 2018).

³ Joe Roman et al., *Whales as Marine Ecosystem Engineers*, 12 FRONTIERS ECOLOGY & ENV'T 377, 379 (2014).

⁴ *Id.* at 383; see *A Whale of an Effect on Ocean Life: The Ecological and Economic Value of Cetaceans*, ANIMAL WELFARE INST., <https://awionline.org/awi-quarterly/fall-2017/whale-effect-ocean-life-ecological-and-economic-value-cetaceans> [<https://perma.cc/WK9E-MJSX>] (accessed July 31, 2018) (“[Whale watching provides] millions of people an opportunity to observe and learn about whales.”).

⁵ See Lori Marino, *Brian Structure and Intelligence in Cetaceans*, in WHALES AND DOLPHINS: COGNITION, CULTURE, CONSERVATION AND HUMANE PERCEPTIONS 125 (Brakes and Simmonds eds., 2011) (providing implications for intelligence in dolphins and whales); Paul Spong, *Communication*, in WHALES AND DOLPHINS: COGNITION, CULTURE, CONSERVATION AND HUMANE PERCEPTIONS 137 (Brakes and Simmonds eds., 2011) (describing anatomical structures of the cetacean brain associated with intelligence, sociality, emotion, and self-awareness).

ing of how their life is unfolding in the wild or in captivity.⁶ The sophisticated mental, emotional, and social capacities of cetaceans are traits once thought reserved exclusively for human beings and afford cetaceans the sense of self-identity and individuality that is so highly valued by human beings. By virtue of these characteristics, a strong argument can be made that cetaceans have both moral standing worthy of ethical consideration and fundamental moral rights that are inherent to their nature and that should not be violated by human actions for human benefit.⁷

These characteristics also make cetaceans poor choices as animals to maintain in captivity. Thus, many countries, such as the United Kingdom and India, effectively prohibit this practice.⁸ Long-term stress associated with confinement of cetaceans can result in physical and behavioral abnormalities and subsequent illness.⁹ Much of the stress of captivity is social in nature. Captivity and confinement inhibit engagement in healthy social interactions, as well as limit exercise, exploration, and choice, contributing to chronic stress leading to hyper-aggression, repetitive, purposeless behaviors, and self-inflicted trauma.¹⁰ In addition to behavioral effects, chronic stress sometimes contributes to immune suppression and susceptibility to physical disease.¹¹ The United States' Marine Mammal Inventory Report lists numerous diseases that are commonly associated with stress-related

⁶ See NAOMI A. ROSE ET AL., *THE CASE AGAINST MARINE MAMMALS IN CAPTIVITY* 37–39 (Naomi A. Rose & Debra Firmani eds., 4th ed. 2009) (describing cetacean communication and its significance); Lori Marino, *The Marine Mammal Captivity Issue: Time for a Paradigm Shift*, in *THE PALGRAVE MACMILLAN ANIMAL ETHICS SERIES 7* (Linzey & Cohn eds., 2018) (describing cetaceans' high degree of autonomy and a keen understanding of how their life is unfolding in the wild or in captivity).

⁷ Thomas I. White, *Whales, Dolphins and Ethics: A Primer*, in *DOLPHIN COMMUNICATION & COGNITION: PAST, PRESENT, FUTURE*, 257–70 (Denise L. Herzog & Christine M. Johnson, eds., 2015), http://indefenseofdolphins.com/wp-content/uploads/2017/06/TWhite_Whales_dolphins_ethics.pdf [<https://perma.cc/K2NE-XUBQ>] (accessed Sept. 23, 2018).

⁸ See *id.* at 45 (stating that the United Kingdom implements strict legislation for keeping cetaceans in captivity); David Kirby, *Here's All the Places Around the World that Ban Orca Captivity*, TAKEPART (Apr. 10, 2014), <http://www.takepart.com/article/2014/04/10/all-states-countries-and-cities-ban-orcas-captivity> [<https://perma.cc/UKA6-WXB7>] (accessed July 31, 2018) (“On May 20, 2013, India’s Ministry of Environment and Forests banned the keeping of captive dolphins for public entertainment. A few countries have standards so strict that it is nearly impossible to keep cetaceans in captivity, including . . . the United Kingdom.”).

⁹ ROSE ET AL., *supra* note 6, at 35–36.

¹⁰ See *id.* at *Overview* para. 5 (“Stress-related conditions . . . including pacing and self-mutilation . . . frequently develop in predators denied the opportunity to hunt.”); Kelly A. Waples & Nicholas J. Gales, *Evaluating and Minimising Social Stress in the Care of Captive Bottlenose Dolphins (*Tursiops aduncus*)*, 21 *ZOO BIOLOGY* 5, 5–6 (2002) (“[C]hronic and/or severe stress can lead to loss of fitness . . . [and] aggression or the threat of aggression”).

¹¹ Waples & Gales, *supra* note 10, at 19 (“Research demonstrates that social subordination can constitute chronic stress, leading to . . . decreased immune resistance, increased corticosteroids, and higher levels of arteriosclerosis.”).

immune suppression as a cause of death in cetaceans.¹² Scientific literature reports that cetaceans often die prematurely in captivity, and an abundance of evidence shows that they fail to thrive in captive environments.¹³ While some individual animals may cope better than others, there is a fundamental incompatibility between what cetaceans need to flourish—if not survive—and what captivity offers.¹⁴

Given the existing history of holding cetaceans in captivity, however, there is a strong need to learn more about the health of these animals, not only to improve the quality of their lives, but also to gain information that could be beneficial to cetaceans in the wild. Cetaceans in their natural environment are hard to access to examine or sample, whereas captive cetaceans are often examined closely and handled as part of their routine care. Captive cetaceans experience unique survival challenges associated with the captive environment, and often need detailed medical attention.¹⁵ Therefore, data on cetacean health and welfare under captive maintenance has value in understanding these animals' physiological and behavioral adaptability and immune fitness, and regular sampling offers baseline data on a suite of health parameters. Given the rapidly changing global environment and unique challenges facing our oceans today, it is critical for scientists to understand the impact that pathogens and environmental stressors have on cetacean populations in order to secure their survival into the future. Thus, dissemination of critical captive cetacean health and welfare information to the greater scientific community and the public through data sharing and publication should be a leading priority for all facilities housing cetaceans.

Despite the pressing need for improved knowledge about whales, dolphins, and porpoises, one of the most obvious sources of information (the clinical history and necropsy reports for animals in captive facilities) has been inaccessible to experts in the field and the general public. Private facilities can be a source of information by way of the clinical history and necropsy reports for animals they maintained in captivity. While there is conclusive evidence that cetaceans should not be kept in captive environments other than for their own well-being,

¹² NAT'L OCEANIC & ATMOSPHERIC ADMIN., NAT'L MARINE FISHERIES SERV., U.S. MARINE MAMMAL INVENTORY REPORT (2015).

¹³ See ROSE ET AL., *supra* note 6, at 42–43 (“Various analytical approaches have demonstrated that the overall mortality rate of captive orcas is at least two and a half times as high as that of wild orcas . . . , and age- and sex-specific annual mortality rates range from two to six times as high. Other dolphins and whales—such as Pacific and Atlantic white-sided dolphins . . . common dolphins . . . and pilot whales . . . have been maintained in captivity with varying levels of success.”).

¹⁴ See *id.* at 22 (“Cetaceans are in all ways severely compromised by captivity. The reduction in their horizon represented by a tank, even a large one, is extreme. Neither their physical nor their social environment can be simulated or re-created.”).

¹⁵ See *id.* at 35 (“Stress in mammals can manifest in many ways, including weight loss, lack of appetite, anti-social behavior, reduced calving success, arteriosclerosis . . . , stomach ulcers, change in blood cell counts, increased susceptibility to diseases . . . , and even death.”).

hundreds of whales and dolphins currently live in zoos and aquariums in the United States, and thousands are in captivity throughout the world.¹⁶ As a result, much vital information about their health and causes of death is kept away from the scrutiny of professionals outside of these facilities.¹⁷

While the inability of interested parties to gain access to information about captive-held cetaceans has been a matter of concern within the environmental and animal welfare communities for some time, the problem has recently come under especially sharpened scrutiny as the result of the deaths of three orcas at SeaWorld facilities (one each in SeaWorld parks in Orlando, San Antonio, and San Diego), all within a seven-month period in 2017.¹⁸ One of the whales, Tilikum, is of particular interest because of his long and difficult history of life in captivity, dating from 1983.¹⁹ Tilikum, the whale featured in the movie *Blackfish*, was involved in the deaths of three people, and he is the most prominent symbol of the problems with maintaining cetaceans in captivity.²⁰ Tilikum's notoriety, and the circumstances of his life in captivity, have resulted in strong interest in obtaining his medical records for independent review.²¹ Despite this interest, SeaWorld refuses to make the records available, not only for Tilikum, but also for the other two deceased whales, Kyara and Kasatka.²² Moreover, a recent serious

¹⁶ See *Captive Whales and Dolphins—Global*, BORN FREE, <http://www.bornfree.org.uk/campaigns/zoo-check/captive-whales-dolphins/global/> [<https://perma.cc/E2BF-LWWV>] (accessed July 31, 2018) (“There are believed to be at least 2000 individual dolphins . . . , 227 beluga whales . . . , 56 orca . . . , 37 porpoises . . . and 17 false killer whales . . . held in 343 captive dolphin facilities across the world.”); see also NAT’L OCEANIC & ATMOSPHERIC ADMIN., *supra* note 12 (listing all whales, dolphins, porpoises, seals, and sea lions held for public display, scientific research, enhancement, and national defense purposes).

¹⁷ See Ameena Schelling, *SeaWorld Just Revealed What Killed Tilikum—Sort of*, DODO (Feb. 2, 2017), <https://www.thedodo.com/seaworld-tilikum-cause-of-death-2243563561.html> [<https://perma.cc/64QU-3Z67>] (accessed July 31, 2018) (interviewing Naomi A. Rose, a marine biologist and orca expert with the Animal Welfare Institute, about SeaWorld’s successful lobby to remove requirements for making necropsy reports of captive cetaceans public).

¹⁸ Lindsey Bever, *A SeaWorld Clan Loses Its Matriarch—The Third Killer Whale to Die at One of the Parks This Year*, WASH. POST (Aug. 17, 2017), https://www.washingtonpost.com/news/animalia/wp/2017/08/17/a-seaworld-clan-loses-its-matriarch-the-parks-third-killer-whale-to-die-this-year/?utm_term=.173167134fd8 [<https://perma.cc/TB9B-R8TT>] (accessed July 31, 2018).

¹⁹ See generally Stephanie Pappas, *How Tilikum the Orca Changed the Conversation About Animals in Captivity*, LIVE SCI. (Jan. 7, 2017, 8:32 AM), <https://www.livescience.com/57421-legacy-of-tilikum-killer-whale.html> [<https://perma.cc/G9ET-LE88>] (accessed July 31, 2018) (detailing the history of Tilikum’s captive life).

²⁰ *Id.*

²¹ See, e.g., Schelling, *supra* note 17 (discussing SeaWorld’s reluctance to provide necropsy reports that could shed light on the details of Tilikum’s death and noting that Tilikum’s store became a rallying point for a public increasingly concerned about captivity).

²² Letter from Chris Oliver, Assistant Adm’r for Fisheries, Nat’l Oceanic & Atmospheric Admin. Fisheries, Office of Protected Resources, Nat’l Oceanic & Atmospheric Admin. & Nat’l Marine Fisheries Serv. to Naomi Rose, Marine Mammal Scientist,

injury to another SeaWorld orca, Katina, and the loss of J-50, a young orca in the wild and member of the endangered Southern Resident Killer Whale population, highlight the importance of obtaining records for animals currently alive and for which permit conditions continue to apply and authorize the National Marine Fisheries Service (NMFS) to inspect public display facilities and obtain records.²³

As discussed in this Article, while SeaWorld has rejected all requests to release these reports, it can be compelled to submit to NMFS the records for all four whales in captivity, under the permits that authorized their importation, pursuant to the requirements in the Marine Mammal Protection Act (MMPA).²⁴ Unfortunately, NMFS has taken no action to enforce the permit requirements, and its failure to do so has compounded the broad and systemic problem of shielding the life histories, clinical records, and scientific data about the marine mammals held captive in private facilities. As a result, a veil of secrecy enshrouds important aspects of the maintenance of cetaceans in captivity.

This Article begins with a Background Section discussing the public display requirements of the MMPA, the SeaWorld whales and their permit requirements, and the importance of captive whale medical histories for the health of cetaceans both in captivity and the wild. The next Section of the Article discusses MMPA permits, the 1994 Amendments, and the reason that the clinical history/necropsy provisions of the permits for these animals remain in effect and apply to many of the progeny of the animals subject to the permits. The final Section makes recommendations on how to improve the transparency and use of the records of cetaceans held in captivity. The recommendations advocate going beyond permit enforcement to reform the system by which zoos and aquariums withhold important medical and scientific information from the public and the greater scientific community, controlling both its use and its resulting conclusions. The central thesis of this Article is the need for the public display industry to reform its own practices and to establish guiding principles for the access to—and use of—information about captive-held cetaceans by independent parties. While legal tools exist to force the release of such information, the most beneficial outcome is voluntary compliance by all facilities.

Animal Welfare Inst. (Oct. 18, 2017) (on file with *Animal Law*) [hereinafter Letter from Chris Oliver (Oct. 18, 2017)].

²³ *Caring for Katina*, SEAWORLD, <https://seaworld.com/orlando/blog/caring-for-katina/> (Mar. 31, 2018) [<https://perma.cc/42WJ-UGRP>] (accessed Aug. 10, 2018).

²⁴ See *infra* Section II.C (explaining how “[t]he permits for the three deceased SeaWorld orcas demonstrate how information about the medical history and cause of death of many cetaceans in captivity can be made accessible in the public realm”).

II. BACKGROUND

A. *The Marine Mammal Public Display Legal Requirements*

1. *The MMPA Permit System*

Recognizing the important roles and unique characteristics of whales, dolphins, and porpoises, as well as other marine mammals, Congress enacted the landmark MMPA in 1972.²⁵ The Congressional findings that serve as the basis for the MMPA's requirements set the stage for federal action to protect cetaceans and other marine mammals in the wild and in captivity.²⁶

The MMPA sets forth the primary purpose of maintaining the "health and stability of the marine ecosystem" and, when consistent with that objective, directs that marine mammals should be "protected and encouraged to develop" to obtain an optimum sustainable population (OSP).²⁷ The MMPA's purposes and policies also recognize the role marine mammals play in interstate commerce²⁸ and declare that "marine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic."²⁹

The MMPA further declares that "there is inadequate knowledge of the ecology and population dynamics of such marine mammals and of the factors which bear upon their ability to reproduce themselves successfully."³⁰ Thus, the MMPA encourages "international arrangements for research on, and conservation of, all marine mammals"³¹ and defines *conservation* to include "the collection and application of biological information."³²

One of the strongest goals of the MMPA, both in 1972 and today, is gaining information about marine mammals and promoting scientific research. Indeed, it was "[i]n the teeth of this lack of knowledge" about marine mammals that Congress built into the MMPA the requirement that "we act conservatively—that no steps should be taken regarding these animals that might prove to be adverse or even irreversible in their effects until more is known."³³

²⁵ 16 U.S.C. §§ 1361–1423h (2018). *See generally* Donald C. Baur et al., *The Law of Marine Mammal Conservation*, in *OCEAN AND COASTAL LAW AND POLICY* (Donald C. Baur et al. eds., 2d ed. 2015) (presenting an overview of the MMPA).

²⁶ 16 U.S.C. § 1361. The MMPA also applies to pinnipeds, sirenians, sea otters, and polar bears. *Id.* § 1362(6).

²⁷ *Id.* § 1361(6). *OSP* is defined to mean "the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element." *Id.* § 1362(9).

²⁸ *Id.* § 1361(5).

²⁹ *Id.* § 1361(6).

³⁰ *Id.* § 1361(3).

³¹ *Id.* § 1361(4).

³² *Id.* § 1362(2).

³³ H.R. REP. NO. 92-707, at 4148 (1971).

The MMPA applies to all marine mammals, defined as “any mammal which (A) is morphologically adapted to the marine environment (including sea otters and members of the orders Sirenia, Pinnipedia, and Cetacea), or (B) primarily inhabits the marine environment (such as the polar bear).”³⁴ Jurisdiction over marine mammals is divided between two federal agencies: NMFS, which has responsibility for cetaceans and all pinnipeds except walruses, and the U.S. Fish and Wildlife Service (FWS), which has authority over all other marine mammals (e.g., sea otters, manatees, dugongs, walruses, and polar bears).³⁵ Title II of the MMPA establishes the independent Marine Mammal Commission (MMC), an oversight agency of three members appointed by the President, with the advice and consent of the Senate.³⁶ In carrying out its duties, the MMC must consult with its nine-member Committee of Scientific Advisors on Marine Mammals.³⁷ Federal agencies must respond to all MMC recommendations, and detailed written explanations shall be issued to the MMC by any agency that declines to follow those recommendations.³⁸

Concerned over the large number of federal and state agencies and conflicting laws applying to marine mammals under the MMPA, Congress consolidated power in the hands of the federal government and preempted state authority to “enforce or attempt to enforce, any state law or regulation relating to the taking” of any marine mammal.³⁹ Federal preemption also applies to the importation of marine mammals.⁴⁰

Take is defined under Section 1362(13) of the MMPA to mean “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.”⁴¹ This definition has been expanded by regulation. FWS defines the term to mean:

[T]o harass, hunt, capture, collect, or kill, or attempt to harass, hunt, capture, collect, or kill any marine mammals, including, without limitation, any of the following: the collection of dead animals or parts thereof; the restraint or detention of a marine mammal, no matter how temporary; tagging a marine mammal; or the negligent or intentional operation of an aircraft or vessel, or the doing of any other negligent or intentional act which results in the disturbing or molesting of a marine mammal.⁴²

³⁴ 16 U.S.C. § 1362(6).

³⁵ *Id.* § 1362(12)(A).

³⁶ *Id.* § 1401(a), (b)(1).

³⁷ *Id.* § 1403(a), (c).

³⁸ *Id.* § 1402(d).

³⁹ *Id.* § 1379(a).

⁴⁰ *See* *Fouke Co. v. Mandel*, 386 F. Supp. 1341, 1360 (D. Md. 1974) (holding that a state law regulating the importation of sealskins was in conflict with the MMPA and thus unconstitutional pursuant to the Supremacy Clause).

⁴¹ 16 U.S.C. § 1362(13).

⁴² 50 C.F.R. § 18.3 (2018).

NMFS uses the same definition with one addition, added in 1991, expressly prohibiting “feeding or attempting to feed a marine mammal in the wild.”⁴³

The MMPA, through various sections, allows for the taking of marine mammals in specific situations: (1) scientific research; (2) public display; (3) photography for educational or commercial purposes; (4) enhancement of the survival or recovery of a species or stock; (5) incidental take of endangered or threatened marine mammals in commercial fishing operations; (6) by citizens of the United States for small numbers of marine mammals incidental to a specified activity other than commercial fishing that will have a negligible impact on the species or stock and will occur within a specified geographical area over a period of not more than five consecutive years or, if by harassment only, over a one-year period; (7) by any Indian, Aleut, or Eskimo who resides in Alaska and who dwells on the coast of the North Pacific Ocean or the Arctic Ocean if such taking is for subsistence or handi-craft purposes and is not accomplished in a wasteful manner; (8) by nonlethal means to protect personal safety, private property, or fishing gear or catch; (9) for purposes of self-defense or to save the life of a person in immediate danger; (10) to free a marine mammal entangled in fishing gear or debris; and (11) under a catchall waiver provision applicable to a variety of situations, including management actions and commercial exploitation.⁴⁴

Section 1374(b)(2)(B) of the MMPA specifies that any take authorized by permit issued for purposes (1) through (4) in the preceding paragraph must be “humane.”⁴⁵ Under Section 1362(4), “humane” is defined as “that method of taking which involves the least possible degree of pain and suffering practicable to the mammal involved.”⁴⁶ In accordance with Section 1374(d)(3), the activity authorized by permit must also be consistent with the purposes of the MMPA.⁴⁷

Of particular relevance to this Article is the exception to the take and import prohibitions for public display purposes. No marine mammal may be taken from the wild or imported into the United States for public display purposes without an MMPA permit.⁴⁸ The proposed taking or importation must first be reviewed by the MMC, which shall recommend such a permit if it is consistent with the purposes and policies of the MMPA.⁴⁹ Each permit application must be noticed in the Federal Register for public comment within 30 days.⁵⁰ A hearing may

⁴³ 50 C.F.R. § 216.3 (2018).

⁴⁴ 16 U.S.C. § 1371(a)(1), (a)(2), (a)(3), (a)(4)(A), (a)(5)(A)(i), (a)(5)(D)(i), (b)(1)–(3), (c), (d)(1). Takes by U.S. citizens must have a negligible impact on the species or stock. *Id.*

⁴⁵ *Id.* § 1374(b)(2)(B).

⁴⁶ *Id.* § 1362(4).

⁴⁷ *Id.* § 1374(d)(3).

⁴⁸ *Id.* § 1371(a)(1).

⁴⁹ *Id.*

⁵⁰ *Id.* § 1374(d)(2).

be requested within 30 days following the publication of notice,⁵¹ and a final decision must be made within 60 days at the end of the comment period or after the close of the hearing.⁵² A public display permit can be issued only to an applicant that (1) offers a program for education or conservation based on professionally recognized standards of the public display community; (2) is registered or holds a license under the Animal Welfare Act (AWA); and (3) maintains facilities for public display that are open to the public on a regularly scheduled basis and to which access is not limited or restricted other than by charging an admission fee.⁵³

Public display permits cannot be issued for depleted marine mammals (i.e., listed under the Endangered Species Act or below their OSP level under the MMPA).⁵⁴ A public display importation permit also cannot be issued for any marine mammal pregnant or nursing at the time of taking, or less than eight months old, whichever occurs later,⁵⁵ or taken in an inhumane manner, unless necessary for the protection or welfare of the animal.⁵⁶

Permits must be consistent with applicable regulations promulgated under Section 1373 of the MMPA and specify the number and kind of marine mammals involved, the location and manner of taking (which must be humane), the period during which the permit is valid, and any other terms and conditions deemed appropriate.⁵⁷

Under Section 1373, the permit regulations must “insure” that any taking “will not be to the disadvantage of those species and population stocks and will be consistent with the purposes and policies” of the MMPA.⁵⁸ Courts have defined the disadvantage test to mean a population must be above its OSP level,⁵⁹ and to apply to public display permits.⁶⁰

⁵¹ *Id.* § 1374(d)(4).

⁵² *Id.*

⁵³ *Id.* § 1374(2)(a).

⁵⁴ *Id.* §§ 1362(1)(B)–(C), 1372(b)(3).

⁵⁵ *Id.* § 1372(b)(1)–(2).

⁵⁶ *Id.* § 1372(b)(4).

⁵⁷ *Id.* § 1374(b)(2). The MMPA permit regulations are set forth in 50 C.F.R. § 216, Part 216, Subpart D. The issuance criteria include a finding that the proposed activity will be humane and will not present any unnecessary risks to the health and welfare of the marine mammals, and that the facilities and resources used for captive marine mammals are adequate for the proper care and maintenance of the marine mammal. 50 C.F.R. § 216.34(a)(1), (6).

⁵⁸ *Id.* § 1373(a).

⁵⁹ *See* Comm. for Humane Legislation, Inc. v. Richardson, 414 F. Supp. 297, 309 (D.C. Cir. 1976) (“Before the agency can prescribe regulations to provide for the taking of marine mammals, it must find, inter alia, that the expected impact of such regulations on the optimum sustainable population of the species involved is not to the disadvantage of the animals.”).

⁶⁰ *See* Ga. Aquarium v. Pritzker, 135 F. Supp. 3d 1280, 1292–93 (D. Ga. 2015) (“Essential to this requirement of § 1374(d)(3) that a permit applicant demonstrate a proposed import ‘will be consistent with the purposes of [the MMPA],’ is the mandate that

2. *The Animal Welfare Act Marine Mammal Standards*

The purpose of the AWA is to ensure the humane care and treatment of various animals used in research or for exhibition or kept as pets.⁶¹ To meet this goal, the Secretary of Agriculture must “promulgate standards to govern the humane handling, care, treatment, and transportation of animals by dealers, research facilities, and exhibitors.”⁶² On behalf of the Secretary, the Animal Plant and Health Inspection Service (APHIS) published the first of such standards for marine mammals in 1979, setting forth a series of requirements on a species-specific basis for different marine mammals, as well as some general standards.⁶³ For each species, the standards follow a mostly quantitative or engineering-based approach by prescribing requirements such as pool size, water temperature, water quality, lighting, and similar dimensions and criteria.⁶⁴

The APHIS standards have been consistently criticized as being too lax and insufficient to provide for the needs of marine mammals, especially cetaceans.⁶⁵ In 1995, APHIS provided notice of a negotiated rulemaking advisory committee intended to address the need for updating and improving its marine mammal standards.⁶⁶ While that effort did not result in the desired updates and improvements, it ultimately contributed to proposed revisions to the marine mammal standards in February 2016.⁶⁷ The proposed standards also received strong criticism for not making necessary improvements, and for their increased use of difficult to enforce performance-based standards in-

stocks ‘should not be permitted to diminish below their optimum sustainable population[s] [OSP].’”)

⁶¹ Animal Welfare Act of 1970, 7 U.S.C. § 2131(1) (1976).

⁶² *Id.* § 2143(a)(1).

⁶³ Marine Mammals; Human Handling, Care, Treatment, and Transp., 44 Fed. Reg. 36868 (June 22, 1979) (codified at 9 C.F.R. pts. 1, 3).

⁶⁴ 9 C.F.R. §§ 3.100–3.118 (2014).

⁶⁵ See, e.g., Naomi A. Rose et al., *Improving Captive Marine Mammal Welfare in the United States: Science-Based Recommendations for Improved Regulatory Requirements for Captive Marine Mammal Care*, 20 J. INT’L WILDLIFE L. & POL’Y 38, 38–72 (2017) (detailing how the Animal Plant and Health Inspection Service (APHIS) standards for space requirements are inadequate and not based on current industry best practices) [hereinafter *Improving Captive Marine Mammal Welfare*]. For more information on the poor track record with AWA enforcement, see Delcianna J. Winders, *Administrative Law Enforcement, Warnings, and Transparency*, 79 OHIO L.J. 451 (2018).

⁶⁶ Marine Mammal Negotiated Rulemaking Advisory Committee Establishment, 60 Fed. Reg. 27049 (proposed May 22, 1995) (to be codified at 9 C.F.R. pt. 3) (“The Department of Agriculture announces its intent to establish an advisory committee to develop a recommended rulemaking proposal to revise the regulations governing the handling, care, treatment, and transportation of marine mammals in captivity.”).

⁶⁷ Animal Welfare; Marine Animals, 81 Fed. Reg. 5629, 5630 (proposed Feb. 3, 2016) (to be codified at 9 C.F.R. pts. 1, 3) (“No consensus language was developed [by the Rulemaking Committee] for four sections of the standards: §3.100 on variances and implementation dates; §3.102 on indoor facilities; §3.103 on outdoor facilities; and §3.106 on water quality.”).

stead of engineering-based requirements.⁶⁸ The proposed cetacean standards have been criticized for providing insufficient space, among other deficiencies.⁶⁹

Dating from 1979, the APHIS standards have included a necropsy requirement. Pursuant to 9 C.F.R. § 3.110(g)(1), facilities must perform a “complete necropsy” on all marine mammals that die in captivity.⁷⁰ The reports must be maintained for three years at both the animal’s home facility and at the facility where it died.⁷¹ Significantly, the reports do not have to be submitted to APHIS; rather, they need only be “presented to APHIS inspectors when requested.”⁷² APHIS appears to have never requested that such reports be submitted.⁷³ The standards also require that individual animal medical records be kept and made available to APHIS inspectors upon request.⁷⁴

The problem with these APHIS standards is that they allow facilities to continue to shield necropsy and clinical history reports from review by independent and third-party reviewers and the public. The MMPA permit conditions are consistent with the statute’s emphasis on transparency and broad protection for marine mammals by requiring that the reports be submitted to NMFS, at which point they become publicly available under the Freedom of Information Act.⁷⁵ The APHIS standards, only require the reports to be maintained at the facilities that maintained the animals in captivity for three years.⁷⁶ APHIS could however, solve the lack of transparency problem by routinely using its authority to request the reports for cetaceans and then retaining copies in agency records, but this has not been done.

B. *The 2017 SeaWorld Orca Deaths and 2018 Serious Injury*

The deficiencies of the current record keeping system for the use of records at public display facilities are made apparent by the 2017 deaths of three orcas held at SeaWorld and a serious injury in 2018.

⁶⁸ Rose et al., *supra* note 65, at 41.

⁶⁹ *Id.* at 46–56 (discussing the inadequacy of current space requirements).

⁷⁰ 9 C.F.R. § 3.110(g)(1).

⁷¹ 9 C.F.R. § 3.110(g)(2).

⁷² *Id.*

⁷³ See Letter from Tonya G. Woods, Dir. of Freedom of Info. & Privacy Act, to Georgia Hancock, Animal Welfare Inst. (Dec. 8, 2017) (on file with *Animal Law*) (stating that APHIS had not received any necropsy reports at least since January 1, 1994). In response to the FOIA request, APHIS conceded that it does not maintain copies of necropsy reports; it only reviews them onsite at facilities. *Id.*

⁷⁴ CONG. RESEARCH SERV., RL30120, THE MARINE MAMMAL PROTECTION ACT: REAUTHORIZATION ISSUES 19 (2007) [hereinafter CRS RL 30120].

⁷⁵ *Id.*

⁷⁶ 9 C.F.R. § 3.110(g)(2).

1. *Tilikum*

Tilikum,⁷⁷ a 36-year-old male orca held in captivity at SeaWorld Orlando, died on January 6, 2017.⁷⁸ Captured in 1983 at the age of two off the coast of Iceland, Tilikum lived in a tank in Reykjavík for close to one year before his transfer to Sealand of the Pacific in British Columbia.⁷⁹ In 1992, SeaWorld imported Tilikum under Permit No. 774, issued by NMFS pursuant to the MMPA.⁸⁰

Largely as a result of SeaWorld's breeding program, he sired at least twenty calves.⁸¹ Nine of Tilikum's progeny are alive and also held in captivity at SeaWorld facilities.⁸² Tilikum is the subject of the 2013 documentary *Blackfish*.⁸³ He was involved in the deaths of three people: in 1991 (Keltie Byrne, a part-time trainer killed at Sealand), 1999 (Daniel Dukes, a member of the public killed at SeaWorld), and 2010 (Dawn Brancheau, an experienced trainer killed at SeaWorld).⁸⁴ Evidence suggests that these acts of aggression, among other abnormal behaviors by captive cetaceans such as Tilikum, are likely to be related to psychological trauma or frustration associated with a life of confinement in small spaces and the stress of captivity.⁸⁵

⁷⁷ Different sources adopt different spellings of Tilikum's name, some using two *l*'s (i.e., "Tillikum") while others use one (i.e., "Tilikum"). This Article adopts the latter spelling.

⁷⁸ *The Life and Care of Tilikum At SeaWorld*, SEAWORLD CARES, (Jan. 6, 2017), <https://seaworldcares.com/tilikum> [<https://perma.cc/8J3Q-MR64>] (accessed July 31, 2018).

⁷⁹ David Hughes, *Who was Tilikum? SeaWorld Orca from Blackfish Documentary Who Killed His Trainer: Here's What We Know*, SUN (Jan. 6, 2017, 11:15 PM), <https://www.the-sun.co.uk/news/2555068/tilikum-death-seaworld-orca-blackfish/> [<https://perma.cc/MJ37-9CLC>] (accessed July 31, 2018).

⁸⁰ NAT'L MARINE FISHERIES SERV., U.S. DEP'T OF COMMERCE, PUB. DISPLAY PERMIT NO. 774 (Oct. 7, 1992) [hereinafter PERMIT NO. 774]. This Article focuses primarily on Tilikum and Permit No. 774. It does so because of Tilikum's recent death and the fact that Permit No. 774 presents the relevant issues of a pre-1994 permit that includes necropsy and clinical history requirements that remain in effect and extend to progeny. In general, pre-1994 permits have been difficult to obtain, but the analysis in this Article applies to similar MMPA permits.

⁸¹ See *Captive Orca Genealogy Map*, WHALE & DOLPHIN CONSERVATION, <http://us.whales.org/sites/default/files/tilikum-captive-orca-sea-world-genealogy-map.pdf> [<https://perma.cc/7ELR-7TZ7>] (accessed July 31, 2018) (mapping the lineage of Tilikum's captive-born calves).

⁸² See *List of Captive Orcas*, WIKIPEDIA, https://en.wikipedia.org/wiki/List_of_captive_orcas [<https://perma.cc/RS7V-7EN6>] (accessed July 31, 2018) (detailing the identities and location of captivity of all living and deceased captive orcas).

⁸³ *SeaWorld Killer Whale Tilikum Dies*, STRAITS TIMES (Jan. 8, 2017, 5:00 AM), <http://www.straitstimes.com/world/seaworld-killer-whale-tilikum-dies> [<https://perma.cc/JKZ6-ACBN>] (accessed July 31, 2018).

⁸⁴ *Id.*

⁸⁵ See Robert Anderson et al., *Orca Behavior and Subsequent Aggression Associated with Oceanarium Confinement*, 6 ANIMALS 1, 11 (2016) ("[In *Blackfish*,] the history of orca captivity and Tilikum's earlier life . . . is presented against the backdrop of other aggressive human-orca and orca-on-orca incidents at SeaWorld."); Ros Clubb & Georgia J. Mason, *Animal Welfare: Captivity Effects on Wide-Ranging Carnivores*, 425 NATURE

Following the negative media exposure resulting from *Blackfish* and pressure from animal welfare organizations—and the corresponding decline in profits and drop in stock value—SeaWorld announced on November 9, 2015, that it would end orca performances by 2017.⁸⁶

SeaWorld sought a permit from the California Coastal Commission (CCC) to expand its San Diego facility through the construction of a large tank.⁸⁷ The CCC's initial approval of the SeaWorld application on October 8, 2015, included a prohibition on using the animals for breeding.⁸⁸ SeaWorld sued the CCC on December 23, 2015, challenging the no-breeding prohibition and other restrictions related to captive care and maintenance.⁸⁹ On March 17, 2016, SeaWorld stated that it would end its orca breeding program immediately.⁹⁰ On April 18, 2016, SeaWorld withdrew its permit application to the CCC and its lawsuit.⁹¹ On September 12, 2016, Governor Brown signed legislation prohibiting orca breeding programs and theatrical shows in California.⁹²

On March 8, 2016, SeaWorld released a video on its website describing Tilikum's declining health due to a bacterial infection in his

473, 473 (2003) ("Among the carnivores, naturally wide-ranging species show the most evidence of stress and/or psychological dysfunction in captivity . . . Husbandry of these species in captivity is therefore in need of improvement, such as provision of extra space.").

⁸⁶ Rupert Neate, *SeaWorld to End Killer Whale Shows in Wake of Mounting Protests*, GUARDIAN (Nov. 9, 2015, 4:19 PM), <https://www.theguardian.com/us-news/2015/nov/09/seaworld-end-orca-whale-shows-san-diego> [<https://perma.cc/AE6F-RKUK>] (accessed July 31, 2018). See also *Educational Encounters and Experiences that Matter*, SEAWORLD CARES, <https://seaworldcares.com/en/Future/Educational-Encounters/> [<https://perma.cc/37FL-H6QE>] (accessed July 31, 2018) (announcing new orca educational experiences at SeaWorld).

⁸⁷ *SeaWorld Announces First-of-its-Kind Killer Whale Environment and More Than \$10 Million in New Funding for Research and Conservation Projects*, SEAWORLD PARKS & ENT. (Aug. 15, 2014), <https://seaworldentertainment.com/en/media/company-news/blue-world-project> [<https://perma.cc/PP8P-Z3ZY>] (accessed July 31, 2018).

⁸⁸ CAL. COASTAL COMM'N, TRANSCRIPT OF PROCEEDINGS 325–28 (Oct. 8, 2015); CAL. COASTAL COMM'N, PERMIT APPLICATION NO. 6-15-0424, NOTICE OF INTENT TO ISSUE PERMIT, at 3 (Dec. 3, 2015).

⁸⁹ Verified Petition for Writ of Mandate & Complaint for Declaratory Relief at 3, *SeaWorld v. Cal. Coastal Comm'n*, No. 37-2015-00043163-CU-WM-CTL (Cal. Super. Ct. San Diego 2015).

⁹⁰ *SeaWorld Announces Last Generation of Orcas in its Care*, SEAWORLD ENTERTAINMENT (Mar. 17, 2016), <http://www.seaworldinvestors.com/news-releases/news-release-details/2016/SeaWorld-Announces-Last-Generation-Of-Orcas-In-Its-Care/default.aspx> [<https://perma.cc/CQ22-H826>] (accessed July 31, 2018).

⁹¹ *Blue World Coastal Development Permit Withdrawn in California*, SEAWORLD CARES, <https://seaworldcares.com/2016/04/California-Coastal-Commission-Letter-for-Blue-World-Project/> [<https://perma.cc/9CNQ-NWTV>] (accessed July 31, 2018).

⁹² Sophia Bollag, *California Bans Orca Captivity and Breeding Following SeaWorld's Decision to End Its Program*, L.A. TIMES (Sept. 13, 2016, 2:02 PM), <http://www.latimes.com/politics/essential/la-pol-sac-essential-politics-updates-california-bans-orca-captivity-and-1473800196-htmstory.html> [<https://perma.cc/59AY-BH>] (accessed July 31, 2018).

lungs.⁹³ The infection was resistant to antibiotics, a problem commonly seen in animals exposed to long-term antibiotic use, such as captive orcas.⁹⁴ According to the March 8 video, Tilikum was not expected to survive his illness.⁹⁵ In another video released on June 29, 2016, SeaWorld indicated that Tilikum's health had improved but that his condition was still "guarded."⁹⁶ SeaWorld did not release any additional reports about Tilikum's health before his death about six months later.

In its announcement of Tilikum's death, SeaWorld stated that "[w]hile the official cause of death will not be determined until the necropsy is completed, the SeaWorld veterinarians were treating a persistent and complicated bacterial lung infection. The suspected bacteria is part of a group of bacteria that is found in water and soil both in wild habitats and zoological settings."⁹⁷

2. *Kyara*

On July 24, 2017, *Kyara*, one of Tilikum's progeny (his granddaughter), died at SeaWorld's San Antonio facility.⁹⁸ *Kyara* died from lung disease after a serious case of pneumonia, according to SeaWorld.⁹⁹ In a statement, SeaWorld stated that she succumbed to "serious and progressive health issues that the animal care and veterinary teams had been aggressively treating."¹⁰⁰ SeaWorld also linked *Kyara*'s death to health issues afflicting orcas in the wild by stating "[p]neumonia has been identified as one of the most common causes of morbidity or illness in whales and dolphins, both in the wild and aquariums."¹⁰¹ SeaWorld cited scientific literature supporting the common affliction of pneumonia in the wild and captivity.¹⁰²

⁹³ SeaWorld Parks & Entm't, *Caring for Tilikum the Killer Whale* at 1:30, YOUTUBE (Mar. 8, 2016), <https://www.youtube.com/watch?v=hXvsx0KS0Zk> [<https://perma.cc/V9EP-RW7K>] (accessed July 31, 2018) [hereinafter *Caring for Tilikum the Killer Whale*].

⁹⁴ *As Tilikum Ails, Questions for SeaWorld*, KIMMELA CTR. FOR ANIMAL ADVOC., INC. (Mar. 9, 2016), <http://www.kimmela.org/2016/03/09/as-tilikum-ails-questions-for-seaworld/> [<https://perma.cc/82ZN-ZSUW>] (accessed July 31, 2018).

⁹⁵ *Caring for Tilikum the Killer Whale*, *supra* note 93, at 2:30.

⁹⁶ SeaWorld Parks & Entm't, *Checking in on Tilikum's Progress* at 0:23, YOUTUBE (Jun. 29, 2016), <https://www.youtube.com/watch?v=y7vyB4lbA8g> [<https://perma.cc/LRD4-4SXX>] (accessed July 31, 2018).

⁹⁷ *The Life and Care of Tilikum at Sea World*, *supra* note 78.

⁹⁸ *Kyara, Last Killer Whale Born in Captivity at a SeaWorld Park, Dies at 3-Months-Old*, NBC NEWS (Jul. 25, 2017, 7:08 AM), <https://www.nbcnews.com/news/us-news/kyara-last-killer-whale-born-captivity-seaworld-park-dies-3-n786206> [<https://perma.cc/WFF5-NYT2>] (accessed July 31, 2018, 7:08 AM). *Kyara*'s mother was Takara and *Kyara*'s father was Kyuquot. *Id.*

⁹⁹ *SeaWorld is Saddened to Announce the Passing of Kyara*, SEAWORLD CARES (updated Sept. 28, 2017), <https://seaworldcares.com/kyara-update> [<https://perma.cc/6G5A-VLHS>] (accessed July 31, 2018).

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

3. *Kasatka*

Kasatka was born in 1977 and captured off the coast of Iceland on October 26, 1978.¹⁰³ Considered to be the matriarch of the San Diego SeaWorld orca family, she had two daughters, two sons, six grandchildren, and two great-grandchildren.¹⁰⁴ However, like Tilikum, Kasatka had violent interactions with a trainer: she pulled trainer Ken Peters to the bottom of the tank during a show in 2006, as depicted in *Blackfish*.¹⁰⁵ Then, in 2008, she was diagnosed with a “bacterial respiratory infection.”¹⁰⁶ SeaWorld treated her for the illness for nine years, but she declined to a point where she had to be euthanized.¹⁰⁷ Towards the end of her life, Kasatka also developed severe, locally extensive skin lesions around her mandible.¹⁰⁸ SeaWorld said it would “conduct a full post-mortem examination known as a necropsy to examine the extent of her illness and how it impacted her organ function.”¹⁰⁹ As with Tilikum, SeaWorld claims that Kasatka’s illness is the most common cause of orca mortality in the wild and captivity.¹¹⁰

4. *Katina*

On March 17, 2018, the matriarch of the SeaWorld orcas in Orlando, Katina, sustained serious injury to her dorsal fin.¹¹¹

¹⁰³ *The Deadly History of Captive Killer Whales*, ORCA HOME (updated Dec. 6, 2017), <http://www.orcahome.de/orcadead.htm> [<https://perma.cc/B935-63QM>] (accessed July 31, 2018).

¹⁰⁴ *Kasatka*, SEAWORLD SAN DIEGO BLOG (Aug. 15, 2017), <https://seaworld.com/san-diego/blog/kasatka> [<https://perma.cc/XBL9-FEGX>] (accessed July 31, 2018).

¹⁰⁵ David Kirby, *Near Death at SeaWorld: World Wide Exclusive Video*, HUFFINGTON POST (updated Dec. 6, 2017), https://www.huffingtonpost.com/david-kirby/near-death-at-seaworld-wo_b_1697243.html [<https://perma.cc/UQ28-YRNB>] (accessed July 31, 2018).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ See Ameena Schelling, *SeaWorld Orca Dies After Photos of ‘Terrible’ Skin Lesions Emerge*, DODO (Aug. 16, 2017), <https://www.thedodo.com/in-the-wild/seaworld-kasatka-chin-lesions> [<https://perma.cc/2YZG-XVEW>] (accessed July 31, 2018) (“SeaWorld made no mention of the lesions in the statement announcing [Kasatka’s] death.”).

¹⁰⁹ *Kasatka*, *supra* note 104.

¹¹⁰ Lori Weisberg, *One of SeaWorld’s Oldest Killer Whales Dies*, SAN DIEGO UNION-TRIB. (Aug. 16, 2017, 4:25 PM), <http://www.sandiegouniontribune.com/business/tourism/sd-fi-orca-death-20170816-story.html> [<https://perma.cc/D824-RJGN>] (accessed July 31, 2018).

¹¹¹ *Caring for Katina*, *supra* note 23.



Sea World did not announce the injury until March 31, and when it did so it provided very little information, stating only that the injury was “the result of interaction with other members of the orca pod.”¹¹² SeaWorld claimed that “aggressive and antagonistic” interaction with members of an orca pod “is a common occurrence among wild killer whale pods, as well as those at SeaWorld” and that such behavior “is a natural behavior we’d expect to see.”¹¹³

In response to SeaWorld’s explanation, five animal welfare groups wrote to NMFS on April 19, 2018, to raise concerns over Katina’s injury.¹¹⁴ They noted that the wound is very serious and may never heal because it is so deep and the gravitational pull on the edges as a result of captivity in a small concrete tank is an impediment to the closing of the torn fin.¹¹⁵ They also noted that such a large wound is susceptible to infection from environmental pathogens, a leading cause of death among whales in captivity, and that captive whales have a predisposition to secondary infection as a result of immune compromise from the

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ Letter from Naomi A. Rose, Marine Mammal Scientist, Animal Welfare Inst., et. al, to Chris Oliver, Assistant Admin. for Fisheries, Office of Protected Res., Nat’l Oceanic & Atmospheric Admin. & Nat’l Marine Fisheries Serv. 1 (Apr. 19, 2018) (on file with *Animal Law*).

¹¹⁵ *Id.*

stress of being maintained in concrete tanks and unnatural social settings with other animals.¹¹⁶

The groups further noted that SeaWorld's assertions about an orca "pod" at its facility and aggression within pods in the wild are misleading. The artificial social structure at SeaWorld does not constitute a "pod," they stated, because it does not consist of a family unit of several generations, as in the wild. Instead, it consists of only five whales, two of whom are not related to Katina, one of whom is the result of inbreeding Katina with her son, and her grandson.¹¹⁷ As the groups explained, aggression of the nature alleged by SeaWorld among whales in the same pod in the wild has never been observed. In fact, in the wild, Katina would be the matriarch, overseeing a cohesive family unit of several generations where such violent interactions would be rare, if not nonexistent.¹¹⁸

The animal welfare groups expressed their view that it was more likely that Katina's injury was caused by SeaWorld's facility itself, such as her dorsal fin being caught between the bars or hinges of the automated gates, tearing the tissue.¹¹⁹ Given the serious nature of the injury, the groups asked NMFS to use its MMPA permit authority to inspect the SeaWorld records about the injury.¹²⁰ In addition, the People for the Ethical Treatment of Animals (PETA) filed a complaint with APHIS, asking it to investigate.¹²¹

C. *The MMPA Permits for the SeaWorld Whales*

The permits for the three deceased SeaWorld orcas demonstrate how information about the medical history and cause of death of many cetaceans in captivity can be made accessible in the public realm.

1. *Kasatka's Permit*

NMFS issued a permit to SeaWorld on June 30, 1978, to take and import four killer whales from North Atlantic waters, Iceland, or Scandinavia.¹²²

Under General Condition C.4., the permit requires SeaWorld to maintain a variety of records and reports.¹²³ General Condition C.4.d. requires SeaWorld to submit an autopsy and clinical history within

¹¹⁶ *Id.* at 1–2.

¹¹⁷ *Id.* at 2.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 2–3.

¹²¹ Email from Jared Goodman, Director of Animal Law, People for the Ethical Treatment of Animals Found., to Animal and Plant Health Inspection Serv., U.S. Dep't of Agric. (Apr. 2, 2018) (on file with *Animal Law*).

¹²² NAT'L MARINE FISHERIES SERV., U.S. DEP'T OF COMMERCE, MARINE MAMMAL PROT. ACT, PUBLIC DISPLAY PERMIT NO. 240 (Jun. 30, 1978) [hereinafter PERMIT NO. 240].

¹²³ *See id.* at 3–4 ("The Permit Holder shall maintain sufficient written records regarding the marine mammals taken or imported as authorized herein, and regarding each marine mammal of the species authorized herein to be taken or imported in its

thirty days of the death of each animal.¹²⁴ General Condition C.5.b. requires SeaWorld to “make every reasonable attempt to notify the scientific community of the availability of specimen materials.”¹²⁵ The permit, as issued, also included five pages of standard conditions for care and maintenance of the animals in captivity, in General Condition D.¹²⁶ NMFS rescinded these care and maintenance requirements for all previously issued permits when APHIS promulgated its AWA marine mammal regulations on June 22, 1979.¹²⁷ NMFS did not rescind the necropsy/clinical history requirement in General Condition C.4.d.¹²⁸

2. *Tilikum’s and Kyara’s Permit*

SeaWorld applied for a permit to import Tilikum from Sealand of the Pacific on November 6, 1991, nine months after the death of Keltie Byrne, the Sealand trainer.¹²⁹ This application also covered two adult female killer whales (Haida and Nootka), both of whom were pregnant at the time of the application.¹³⁰ As grounds for the import permit, SeaWorld stated that “[d]ue to the disruptive and potentially harmful impact this male may have on the success of mother/calf nursing and bonding, authorization is requested for the relocation of this animal to SeaWorld of Florida as soon as possible.”¹³¹

While this application was pending, Haida gave birth to a calf on December 24, 1991.¹³² Nootka gave birth a few months later, but the calf did not survive.¹³³ Tilikum subsequently became the target of aggression from Haida and Nootka.¹³⁴ Sealand placed Tilikum in a small medical pool—maintaining the 20-foot whale in a 23-foot wide, 12-foot deep space for weeks.¹³⁵ On January 3, 1992, SeaWorld asked NMFS

possession or otherwise acquired, to allow for adequate identification of each such mammal.”).

¹²⁴ *Id.* at 4.

¹²⁵ *Id.* at 5.

¹²⁶ *Id.* § D.

¹²⁷ Amendment to Conditions Imposed in Scientific Research and Public Display Permits for Live Captive Marine Mammals, 44 Fed. Reg. 42204–05 (Jul. 19, 1979) (codified at 50 C.F.R. pts. 215–16).

¹²⁸ *Id.* at 42205.

¹²⁹ NAT’L MARINE FISHERIES SERV., U.S. DEP’T OF COMMERCE, APPLICATION FOR PERMIT FOR PUBLIC DISPLAY § IV(B), (C) (Nov. 6, 1991).

¹³⁰ *Id.* § IV(A), (B).

¹³¹ *Id.* § IV(C).

¹³² Letter from Brad F. Andrews, Vice President of Zoological Operations, SeaWorld, Inc., to Anne D. Terbush, Chief of Permits Div., Office of Protected Res., Nat’l Oceanic & Atmospheric Admin. & Nat’l Marine Fisheries Serv. (Dec. 30, 1991) (on file with *Animal Law*).

¹³³ *The Deadly History of Captive Killer Whales*, *supra* note 103.

¹³⁴ Tim Zimmermann, *TiliLeaks: Exclusive Documents Reveal That Tilikum Was Trapped in A 31-Foot Pool For 17 Consecutive Days*, DODO (Jul. 24, 2014), <https://www.thedodo.com/tileaks-exclusive-documents—639864949.html> [<https://perma.cc/4QNG-SMPL>] (accessed July 31, 2018).

¹³⁵ *Id.*

for permission to import Tilikum on an emergency basis for his own interest.¹³⁶ NMFS criticized the manner in which Sealand and SeaWorld handled the situation, because they failed to take protective and proactive measures despite knowing months in advance that Haida and Nootka would give birth.¹³⁷ NMFS nonetheless issued the emergency authorization in the form of a cooperative agreement between itself and SeaWorld, pending final action on the permit application.¹³⁸

NMFS granted Permit No. 774 to SeaWorld on October 7, 1992.¹³⁹ The permit contained a variety of provisions related to importation, care and maintenance while in captivity, progeny, and the deaths of the animals.¹⁴⁰ For purposes of reporting and providing information about the death of the three whales, Permit No. 774 includes the following provisions, which are identical to the corresponding provisions in Kasatka's permit: SeaWorld must notify NMFS by telephone so that, if practicable, a qualified observer may be present at the necropsy;¹⁴¹ SeaWorld "shall provide a report of the death" of an animal subject to the permit within thirty days, including necropsy and clinical history;¹⁴² and SeaWorld "shall make every reasonable attempt to notify the scientific community of the availability of specimen materials."¹⁴³ The permit has no termination date.¹⁴⁴ The permit also applies to Tilikum's progeny, including Kyara, under Special Conditions (B)(1)(c).¹⁴⁵ Kasatka's permit does not have a progeny provision.¹⁴⁶

¹³⁶ Letter from Brad Andrews, Vice President of Zoological Operations, SeaWorld, Inc., to Anne Terbush, Chief of Permit Div., Office of Protected Res., Nat'l Oceanic & Atmospheric Admin. & Nat'l Marine Fisheries Serv. (Jan. 7, 1992) (on file with *Animal Law*).

¹³⁷ See Letter from Nancy Foster, Ph.D., Dir. of Office of Protected Res., Nat'l Marine Fisheries Serv., to Brad Andrews, Vice President of Zoological Operations, SeaWorld, Inc. (Jan. 8, 1992) (on file with *Animal Law*) ("[B]oth Sealand and Sea World had at least two months advance knowledge of the imminent birth of at least one, and possibly two, killer whale[] calves. Sealand is responsible for these animals and should have taken steps to ensure that arrangements were made to hold the adult male killer whale, 'Tilikum,' at or nearby the Sealand facility or at another facility in Canada following such births.").

¹³⁸ *Id.* at 2.

¹³⁹ PERMIT NO. 774, *supra* note 80.

¹⁴⁰ *Id.* This Article addresses only the permit terms and conditions that apply upon the death of the whales and their progeny. Other terms and conditions of Permit No. 774 may also remain in effect after the 1994 amendments.

¹⁴¹ *Id.* at para. (B)(2)(b).

¹⁴² *Id.* at para. (C)(4)(d).

¹⁴³ *Id.* at para. (C)(5)(b).

¹⁴⁴ See *id.* at para. (B)(1)(e) ("The terms and conditions of this Permit shall remain in effect as long as the marine mammals . . . imported hereunder are maintained in captivity under the authority and responsibility of the Permit Holder.").

¹⁴⁵ See *id.* at para. (B)(1)(e) (applying the terms and conditions of the Permit to the progeny of the marine mammal).

¹⁴⁶ See PERMIT NO. 240, *supra* note 122 (omitting a progeny provision).

3. *Katina's Permit*

Katina was imported pursuant to the same permit for Kasatka, issued on June 30, 1978. In addition to the necropsy provision, Permit No. 240 for Kasatka and Katina includes General Condition C.8., under which the Director of NMFS may request to inspect SeaWorld's "records and facilities" so far as such records and facilities "pertain to activities authorized by this Permit, relate to the species covered by the Permit, or pertain to the Director's responsibilities under the Act." All of these prerequisites are met by Katina's injury at SeaWorld as part of its public display program. The injury relates to orcas, as covered by the permit, and the public display activities involving Katina are authorized by the Permit. In addition, Katina's injuries have been caused, according to SeaWorld, by other whales held at its Orlando facility, or, as is more likely, by the facility itself, which pertains to the Permit activities.

Finally, because SeaWorld alleges that the injury is typical of the kind of aggression that occurs in the wild, even under the claim the NMFS does not have any role for captive marine mammals, the injury and its purported cause fall under "the Director's responsibilities under the Act." Thus, General Condition C.8 is clearly applicable to Katina's injury and puts NMFS in the position to inspect SeaWorld's records and facilities.

D. *The Importance of Necropsy and Clinical History Reports*

Well-conducted and well-documented necropsies and clinical histories are important because they make it possible to evaluate the cause of death and the health and behavioral history of the animals involved. Necropsies are conducted and clinical histories recorded not only to determine the cause of death of an individual animal, but also to elicit information about the disease origin, its processes within the body, predisposing factors, and the success or failure of treatments provided.¹⁴⁷ The information gleaned from post-mortem pathology reports can be used to inform captive management practices and tailor medical intervention to improve and save the lives of animals.¹⁴⁸ Of

¹⁴⁷ See Patrick N. Nation, *The Necropsy in Veterinary Medicine: Part 1 Reasons and Principles* at 5 (unpublished paper, Department of Laboratory Medicine and Pathology, University of Alberta-Edmonton), <http://oahn.ca/wp-content/uploads/2015/06/The-Necropsy-in-Veterinary-Medicine-Part-1.pdf> [https://perma.cc/TU79-STSV] (accessed July 31, 2018) ("There are many reasons to conduct a necropsy in veterinary medicine[, including]: to determine the cause of death of an animal . . . and to establish an etiology of disease. . . . [To clarify] clinical signs, . . . to search for and assess concurrent disease and management problems in order to establish causes of production loss. . . . [And] to assess the effectiveness of medical or surgical therapy . . .").

¹⁴⁸ See B. Bais et al, *Study of Preventative Health Measures for Wildlife in Captivity: A Review of Management Approaches*, 2 INT'L J. OF AVIAN & WILDLIFE BIOLOGY 73, 74 ("A thorough pathology examination allows evaluation of medical, management, and nutritional programs. It is also valuable in identifying problems requiring immediate action to safeguard the health of the collection.").

course, health records are also of considerable value for these same reasons when obtained for animals that are still alive, such as Katina.

Every case of illness and/or death of a wild animal in captivity has the potential to yield important information not only to help advance animal management, but also to contribute to the conservation of wild populations.¹⁴⁹ As wild populations become stressed by exposure to noise and pollutants, they can be immune-suppressed and succumb to infections from environmental organisms.¹⁵⁰ Thus, clinical history and pathology data for captive orcas may also shed light on the health status of wild whales who occasionally succumb to similar diseases as those commonly seen in captive individuals. For example, in the case of Tilikum, SeaWorld claims the “suspected bacteria [causing Tilikum’s death] is part of a group of bacteria that is found in water and soil both in wild habitats and zoological settings.”¹⁵¹

In its March 8, 2017, video announcing Tilikum’s health problems, SeaWorld confirmed the broad relevance of information about Tilikum’s condition and treatment by saying, “[i]f Tilikum had shown up with this disease in the wild, he would’ve been gone a long time ago.”¹⁵² SeaWorld admits that the clinical treatment implemented during Tilikum’s disease contains significant information, by stating, “Tilikum’s veterinarians and caretakers delivered various treatment regimens over the course of his illness, which consisted of, among other things, combinations of anti-inflammatories, anti-bacterials, anti-nausea medications, hydration therapy and aerosolized antimicrobial therapy.”¹⁵³

SeaWorld made similar statements in its press release about the death of Kyara, noting the prevalence of pneumonia in captivity and the wild, stating “[w]e are conducting a full examination to completely understand what ultimately caused her death.”¹⁵⁴ It is clear from these statements that SeaWorld understands the potential significance of these clinical cases to wild orca health, and yet it routinely refuses to release or publish pathology data for reference by the greater scientific community, which flies in the face of its own purported mission.¹⁵⁵

¹⁴⁹ Michael Hutchins, *Serving Science and Conservation: The Biological Materials Request Protocol of the New York Zoological Society*, 9 ZOO BIOLOGY 447, 447 (1990) (“Biological materials obtained during routine veterinary treatment and necropsies on zoo and aquarium animals provide opportunities to study a wide variety of phenomena, many of which have important implications for wildlife conservation and captive animal management.”).

¹⁵⁰ See Gregory D. Bossart, *Marine Mammals as Sentinel Species for Oceans and Human Health*, 19 OCEANOGRAPHY 134, 135 (2006) (finding emerging and resurging diseases in dolphins and manatees as a result of environmental distress).

¹⁵¹ *The Life and Care of Tilikum at Sea World*, *supra* note 78.

¹⁵² *Caring for Tilikum the Killer Whale*, *supra* note 93, at 2:12.

¹⁵³ *The Life and Care of Tilikum at Sea World*, *supra* note 78.

¹⁵⁴ *SeaWorld is Saddened to Announce the Passing of Kyara*, *supra* note 99.

¹⁵⁵ On March 13, eight experts on marine mammal stranding and veterinarians wrote to NMFS under Section 402(c) of the MMPA, 16 U.S.C. § 1421a(c), to request

SeaWorld further reinforced this point in its public statements about the health problems confronting J-50, a four year-old orca in the wild who was part of the endangered Southern Resident Killer Whale population. J-50, also known as Scarlett, was the subject of careful monitoring since 2017 due to her small size and rapid loss of weight.¹⁵⁶ Her health condition deteriorated and became critical during the summer of 2018, and NOAA conducted an effort to determine and address the cause of her poor health, aided by outside experts from organizations like The Whale Sanctuary Project and SeaWorld.¹⁵⁷ Unfortunately, these efforts did not succeed, and J-50 was declared presumed dead on September 13, 2018.¹⁵⁸

During the rescue effort, SeaWorld lauded its own role in the rescue program saying “a lot of the reasons they have been able to make some progress in this case, is because of SeaWorld’s extensive medical history with the whales that are here [at SeaWorld] in captivity and then using that as a baseline to compare [sic] the killer whales in this population.”¹⁵⁹ Thus, SeaWorld again conceded that its medical records for captive whales are relevant to the health of whales in the wild and NOAA’s conservation, management, rescue, and rehabilitation programs.

In response to the SeaWorld statement on the relevance of its medical records to the J-50 rescue effort, four animal welfare groups wrote to NMFS, again requesting that the necropsy and clinical history requirements of SeaWorld’s orca permits be enforced.¹⁶⁰ The organizations noted that SeaWorld’s statement about its role with J-50 and

information on health factors relevant to the rescue, rehabilitation and possible release of stranded animals. Letter from Dr. Heather Rally, et al., to Chris Oliver, Assistant Admin. for Fisheries, Office of Protected Res., Nat’l Oceanic & Atmospheric Admin. & Nat’l Marine Fisheries Serv. (Mar. 13, 2018) [hereinafter Letter from Dr. Heather Rally (Mar. 13, 2018)]. Under Section 402(b), NMFS has a duty to collect, and periodically update appropriate scientific literature on marine mammal health disease and rehabilitation, causes of illnesses and deaths of stranded marine mammals, and other life history and reference level data. The experts also cited to the MMPA permit requirements. NMFS responded on March 28, 2018, again stating “NMFS believes the necropsy provisions of those permits were effectively extinguished by the 1994 Amendments to the MMPA.” NMFS also stated “Section 402 does not or compel any entity to provide their data on marine mammal health or disease.” Letter from Chris Oliver, Assistant Admin. for Fisheries, Office of Protected Res., Nat’l Oceanic & Atmospheric Admin. & Nat’l Marine Fisheries Serv., to Dr. Heather Rally (Mar. 28, 2018) [hereinafter Letter from Chris Oliver (Mar. 28, 2018)].

¹⁵⁶ Lynda Mapes, *Orca J50 presumed dead but NOAA continues search*, SEATTLE TIMES, (Sept. 13, 2018), <https://www.seattletimes.com/seattle-news/environment/orca-j50-declared-dead-after-search-southern-residents-down-to-74-whales/> [<https://perma.cc/P3ES-9A5Y>] (accessed Sept. 23, 2018).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ Chris Gros, *Saving J50: SeaWorld Researcher Helping Starving Whale* (Aug. 20, 2018), <http://www.cbs8.com/story/38924199/saving-j50-seaworld-researcher-helping-starving-killer-whale> [<https://perma.cc/F4X9-PS7B>] (accessed Sept. 23, 2018).

¹⁶⁰ Letter from Naomi Rose, Marine Mammal Scientist, Animal Welfare Inst., et al., to Chris Oliver, Assistant Admin. for Fisheries, Office of Protected Res., Nat’l Oceanic &

the value of its database on captive whales is inconsistent with its refusal to release the orca necropsies and other medical records, as required by the MMPA permits. NMFS denied that request in a September 7, 2018 letter, again asserting it lacked jurisdiction to do so.¹⁶¹

The MMC recognized the importance of necropsy and clinical history reports to captive as well as wild cetaceans in its March 28, 2017, communication to NMFS, in response to the issue of whether the conditions of Tilikum's permit remained relevant to NMFS jurisdiction over wild cetaceans.¹⁶² The MMC noted four reasons to support the importance of these medical documents: (1) information on organisms cultured from captive animals with known clinical signs and history could help interpret the significance of organisms cultured from wild animals of the same species; (2) understanding the types of lesions observed in postmortem captive animals helps interpret results from wild animals and guide investigations into current conservation issues; (3) samples collected at necropsy for contaminant analyses, combined with reproductive history, could help determine the role of contaminants in reproductive failure; and (4) medical histories could help regulatory agencies structure permits to select for those wild-caught animals most likely to adjust to captivity.¹⁶³

In addition to providing important information pertinent to the health of captive-held and wild animals, necropsy and clinical history reports are important for regulatory purposes. They can shed light on the question of whether animals should ever be removed from the wild for their conservation.¹⁶⁴ The health information contained in these documents can also inform the development and implementation of species-specific regulations and protocols to improve the lives of animals housed in captivity.

Without transparency and tangible data, proposals and protocols for future research would be compromised. In addition, agency or third-party oversight, stranding¹⁶⁵ responses, and efforts to correct

Atmosphere Admin. & Nat'l Marine Fisheries Serv. (Aug. 28, 2018) (on file with *Animal Law*).

¹⁶¹ Letter from Chris Oliver, Assistant Admin. for Fisheries, Office of Protected Resources, Nat'l Oceanic & Atmosphere Admin. & Nat'l Marine Fisheries Serv. to Naomi Rose, Marine Mammal Scientist, Animal Welfare Inst. (Sept. 7, 2018) (on file with *Animal Law*).

¹⁶² E-mail from Michael L. Gosliner, Gen. Counsel, Marine Mammal Comm'n, to Mary O'Brien, Office of Gen. Counsel, Nat'l Oceanic & Atmospheric Admin. (Mar. 28, 2017) (on file with *Animal Law*).

¹⁶³ *Id.*

¹⁶⁴ Corrine Henn, *Common Illnesses Seen in Captive Whales Prove It's Time to Empty the Tanks!*, ONE GREEN PLANET (Feb. 2016), <http://www.onegreenplanet.org/animal-sandnature/common-illnesses-seen-in-captive-whales/> [<https://perma.cc/9A23-A7PL>] (accessed July 31, 2018).

¹⁶⁵ The term "stranding" in this context refers to an event in the wild in which a marine mammal is found dead on a beach, shore, or near shore waters, or when found alive onshore or in nearshore waters such that the animal is unable to return to open water or is unlikely to survive without physical assistance or medical intervention.

outdated and ineffective industry-standard husbandry practices for the betterment of animal welfare would be frustrated.

For these reasons, the medical and scientific value of obtaining these reports for critical and independent analysis becomes clear when the applicability of such permit requirements to the full class of the subject animals is taken into account. Looking only at cetaceans, approximately 260 whales and dolphins have been maintained in captivity in the United States since before 1994, which, as discussed in the next Section, is when NMFS stopped including necropsy and clinical history report requirements in its MMPA public display permits.¹⁶⁶ Many of these animals are likely to be subject to MMPA permits that contain the same standard necropsy and clinical history requirements. Some of those permits, in turn, will include progeny provisions similar to Tilikum's, which would extend the same requirements to the offspring of these animals. In fact, NMFS states that "we have [hundreds] more pre-1994 [public display] permits that have the same provisions."¹⁶⁷ Taken together, the information that should be in NMFS files and accessible to experts and the public would include a very significant body of data and information that is of great value for marine mammal science, husbandry, and the evaluation of the ethical considerations governing the maintenance of whales and dolphins in captivity. Unfortunately, whatever information those reports contain is accessible only to the institutions that hold the animals under their control.

*E. Consideration of the Pre-1994 Permit Requirements
by the Federal Agencies*

With knowledge of the important reasons for public disclosure of necropsy reports and clinical histories, and the declining health of Tilikum, in 2016 and 2017 PETA conducted research and analysis of the grounds upon which information could be obtained if SeaWorld would not release it on a voluntary basis. For months beginning in the fall of 2016, PETA, joined by the Animal Welfare Institute (AWI), engaged in meetings and conversations with NMFS, FWS, and APHIS (including FWS and NMFS agency legal counsel) regarding Tilikum's declining health and the need for full transparency of his health records.¹⁶⁸ The purpose of these meetings was to seek agency comments on the legal theory for continued applicability of the pre-1994 permits, and to establish a cooperative approach for obtaining and

¹⁶⁶ See NAT'L OCEANIC & ATMOSPHERIC ADMIN., *supra* note 12 (listing cetacean species held captive in the United States).

¹⁶⁷ Email from Amy Sloan, Nat'l Oceanic & Atmospheric Admin., to Tiffini Brookens, Marine Mammal Comm'n (Jan. 26, 2017) (on file with *Animal Law*).

¹⁶⁸ Meeting with Nat'l Marine Fisheries Serv. (Oct. 3, 2016); Meeting with Marine Mammal Comm'n (Oct. 4, 2016); Meeting with Marine Mammal Comm'n (Dec. 14, 2016); Meeting with U.S. Fish & Wildlife Serv. (Dec. 16, 2016); Meeting with Solicitor's Office, U.S. Fish & Wildlife Serv. (Apr. 27, 2017).

sharing necropsy and clinical health records.¹⁶⁹ PETA/AWI also emphasized that the goal was to achieve the voluntary release of information by SeaWorld and similarly situated facilities;¹⁷⁰ enforcement and litigation were regarded as the last resort.

After SeaWorld reported on January 6, 2017, that Tilikum had died, counsel to PETA/AWI immediately informed NMFS by email that the permit requirements relating to notice of death and necropsy requirements in Permit No. 774 were now activated and subject to NMFS enforcement.¹⁷¹ PETA, AWI, and other organizations sent letters to NMFS on January 9 and 10, confirming the applicability of the permit requirements and asking for a meeting to discuss enforcement.¹⁷² NMFS responded on January 19, indicating that it was consulting with FWS and MMC, was aware of the time-sensitive nature of the issues, and would respond soon about the meeting.¹⁷³ AWI also wrote to APHIS on February 10, requesting that it use its authority under the AWA regulations to request Tilikum's necropsy.¹⁷⁴ APHIS never responded. AWI, PETA, and other groups wrote to NMFS again on February 14, repeating the request for a meeting and asking that enforcement procedures be initiated as a result of SeaWorld's failure to submit the necropsy report within the required thirty-day period, which had expired.¹⁷⁵

On March 8, NMFS offered to set up a meeting to discuss the necropsy report.¹⁷⁶ AWI responded by asking what position NMFS would

¹⁶⁹ See E-mail from Naomi Rose, Marine Mammal Scientist, Animal Welfare Inst., to Joel Manby, Chief Exec. Officer, SeaWorld (Mar. 25, 2017) (on file with *Animal Law*) (“As I explained in my initial outreach to you in January, several NGOs, including AWI, have been addressing the necropsy provisions in Tilikum’s import permit. To date, we have an ongoing dialog with the relevant agencies about having these provisions enforced.”).

¹⁷⁰ See *id.* (“I would like to request again that SeaWorld comply voluntarily with these required permit provisions.”).

¹⁷¹ E-mail from Donald Baur, Partner, Perkins Coie LLP, to Donna Wieting, Dir. of Protected Res., NOAA, et al., (Jan. 6, 2017) (on file with *Animal Law*).

¹⁷² Letter from Jared Goodman, Dir. of Animal Law, People for the Ethical Treatment of Animals, to Eileen Sobek, Assistant Adm’r for Fisheries, Nat’l Marine Fisheries Serv. (Jan. 9, 2017) (on file with *Animal Law*); Letter from Naomi Rose, Marine Mammal Scientist, Animal Welfare Inst., et al., to Eileen Sobek, Assistant Adm’r, Nat’l Marine Fisheries Serv. (Jan. 10, 2017) (on file with *Animal Law*).

¹⁷³ Letter from Donna Wieting, Dir. of Protected Res., Nat’l Marine Fisheries Serv., to Naomi Rose, Marine Mammal Scientist, Animal Welfare Inst. (Jan. 19, 2017) (on file with *Animal Law*).

¹⁷⁴ Letter from Georgia Hancock, General Counsel, Animal Welfare Inst., to Barbara Kohn, Senior Staff Veterinarian, Animal and Plant Health Inspection Serv. (Feb. 10, 2017) (on file with *Animal Law*).

¹⁷⁵ Letter from Naomi Rose, Marine Mammal Scientist, Animal Welfare Inst., et al., to Sam Rauch, Acting Assistant Adm’r, Nat’l Marine Fisheries Serv. (Feb. 14, 2017) (on file with *Animal Law*).

¹⁷⁶ E-mail from Amy Sloan, Research Permit Program Lead, Nat’l Marine Fisheries Serv., to Naomi Rose, Marine Mammal Scientist, Animal Welfare Inst. (Mar. 8, 2017) (on file with *Animal Law*).

set forth in the meeting.¹⁷⁷ NMFS responded by email on March 10, stating:

We had intended to provide our position in person at the meeting. Since you asked we send you an overview of how the agency intends to proceed and “a summary of any NOAA legal analysis,” in advance of the meeting, I’ll provide our position here.

NMFS believes the necropsy provisions of the 1992 permit were effectively extinguished by the 1994 amendments to the MMPA and that jurisdiction over necropsies and associated reports is the province of APHIS under the AWA and its regulations. Thus, we will not be enforcing the necropsy-related provisions of the permit. The legal analysis supporting this determination is exempt from disclosure under the attorney-client privilege, and we will not be discussing it in any detail at the meeting.¹⁷⁸

Based on the NMFS response that it had reached a conclusion that the 1992 permit requirements no longer applied and it would not be discussing the basis for that conclusion, PETA and AWI determined there was no reason to meet with NMFS. Instead, on March 13, AWI and other animal welfare organizations asked the MMC to convene a meeting with all federal agencies, SeaWorld, and other stakeholders to discuss the issue.¹⁷⁹ Communications with the MMC confirmed that NMFS failed to complete its consultation on the applicability of the necropsy/clinical history requirement before it issued its March 10 final determination.¹⁸⁰ In fact, NMFS did not even share its legal analy-

¹⁷⁷ E-mail from Naomi Rose, Marine Mammal Scientist, Animal Welfare Inst., to Amy Sloan, Research Permit Program Lead, Nat’l Marine Fisheries Serv. (Mar. 9, 2017) (on file with *Animal Law*).

¹⁷⁸ E-mail from Amy Sloan, Research Permit Program Lead, NOAA, to Naomi Rose, Marine Mammal Scientist, Animal Welfare Inst. (Mar. 10, 2017) (on file with *Animal Law*).

¹⁷⁹ Letter from Naomi Rose, Marine Mammal Scientist, Animal Welfare Inst., et al., to Rebecca Lent, Exec. Dir., Marine Mammal Comm’n (Mar. 13, 2017) (on file with *Animal Law*).

¹⁸⁰ The timeline of communications between the National Marine Fisheries Service (NMFS), Marine Mammal Commission (MMC), and the Fish and Wildlife Services (FWS) is as follows:

- Mar. 7, 2017: MMC met with NMFS, and NMFS for the first time shared with MMC its draft legal analysis;
- Mar. 10, 2017: NMFS advised the People for the Ethical Treatment of Animals (PETA)/AWI that it had concluded that the 1994 Amendments “effectively extinguished” Tilikum’s permit and that the legal basis for its conclusion would be withheld from disclosure;
- Mar. 15, 2017: NMFS emailed its draft legal analysis to MMC;
- Mar. 28, 2017: MMC provided comments on the draft legal analysis to the NOAA Office of General Counsel;
- Apr. 7, 2017: The Department of the Interior Solicitor’s Office sent comments on the draft legal analysis to NMFS and MMC; and
- Apr. 7, 9, and 13, 2017: The NOAA general counsel sent follow-up emails (on file with *Animal Law*).

See E-mail from Mike Gosliner, General Counsel, Marine Mammal Comm’n, to Donald Baur, Partner, Perkins Coie LLP (Aug. 18, 2017) (on file with *Animal Law*) (outlining the timeline of communications listed above).

sis with the MMC until March 15, and the MMC provided comments on March 28.¹⁸¹ Legal counsel for FWS provided comments on April 7.¹⁸² Thus, NMFS rendered its conclusion on the applicability of Tilikum's permit well in advance of receiving comments from its sister agencies or completing consultation with the MMC. The content of those interagency comments and analyses have not been made available.

On March 25, AWI reached out to SeaWorld to seek voluntary compliance.¹⁸³ AWI indicated that an "open letter" made available to the media would be sent to SeaWorld if necessary,¹⁸⁴ but the goal was to avoid taking such action. AWI asked for a response within two weeks (by April 7).¹⁸⁵ Joel Manby, SeaWorld CEO at that time responded on April 13, saying that SeaWorld would not release the information and that it had a strong record of promoting scientific research.¹⁸⁶

On April 24, MMC issued an invitation to the requested meeting to AWI, PETA, NMFS, FWS, APHIS, SeaWorld, and the Association of Zoos and Aquariums.¹⁸⁷ The meeting took place on May 1, at the MMC office in Bethesda.¹⁸⁸ The meeting covered several topics related to record-keeping, research, and publication of information about marine mammals in captivity.¹⁸⁹ At the meeting, SeaWorld representatives stated that Tilikum's necropsy report and related clinical history information would not be released.¹⁹⁰ SeaWorld also discussed the practice it followed for controlling access to data and records about the animals held at its facilities.¹⁹¹ Scientists not working for SeaWorld could submit research proposals.¹⁹² SeaWorld employees would review the pro-

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ Rose, *supra* note 169.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ See E-mail from Joel Manby, Chief Exec. Officer, SeaWorld Parks & Ent., to Naomi Rose, Marine Mammal Specialist, Animal Welfare Inst. (Apr. 13, 2017) (on file with *Animal Law*) ("We are sharing, and intend to continue sharing Tilikum's information through the standard, and professionally accepted methods of science . . . [and] we also remain committed to advancing legitimate scientific research."). Manby resigned from his position as CEO on February 27, 2018. *SeaWorld Entertainment, Inc. Announces Leadership Transition Plan*, SEAWORLD ENT. (Feb. 27, 2018), <http://www.seaworldinvestors.com/news-releases/news-release-details/2018/SeaWorld-Entertainment-Inc-Announces-Leadership-Transition-Plan/default.aspx> [https://perma.cc/LE85-CFY2] (accessed Sept. 23, 2018).

¹⁸⁷ E-mail from Rebecca Lent, Exec. Dir., Marine Mammal Comm., to Animal & Plant Health Inspection Serv., Nat'l Marine Fisheries Serv., SeaWorld, Dept. of Interior, U.S. Fish & Wildlife Serv., & Ass'n of Zoos & Aquariums (Apr. 24, 2017) (on file with *Animal Law*).

¹⁸⁸ Memorandum from Donald C. Baur to File 1 (May 4, 2017) (on file with *Animal Law*).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 3.

¹⁹¹ *Id.* at 2.

¹⁹² *Id.*

posals and, if in furtherance of SeaWorld objectives, approve access to the records by the researcher.¹⁹³ Any resulting publication would have to include SeaWorld employees as co-authors.¹⁹⁴ SeaWorld does not include outside experts in the review of proposals, and does not typically provide an explanation of the reason for rejecting research proposals and requests for access to information.¹⁹⁵

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *See id.* (recalling a statement from SeaWorld's veterinarian Dr. Dold that outside parties do not have a role in the review of internal records). SeaWorld proclaims that it has made effective use of the information it holds on its captive animals. For example, in response to a FOIA lawsuit by AWI seeking information about the NMFS legal position or the requirements of Tilikum's permit, *infra* note 204, SeaWorld issued the following statement for inclusion in an article by the *Times of San Diego*: "As required, SeaWorld submits mortality information to appropriate regulatory agencies. Additionally, we share this information with the public, and the zoological community. Necropsy reports contain complex medical information and analysis, which are best interpreted and used by researchers and trained specialists. SeaWorld does release specific necropsy findings via peer-reviewed scientific papers where the information is useful to the health and management of both free-ranging animals and those in human care. Our teams work with a variety of scientists to assure that the data and biomaterials from the animals are available for specific and verified scientific studies that will benefit those species today and in the future. Those interested in reading more about SeaWorld's scientific contributions can review the more than 350 peer-reviewed articles, book chapters and books our team members have authored at SeaWorldCares.com." Ken Stone, *SeaWorld Hiding Orca Necropsies, Including San Diego's Kasatka, Federal Suit Claims*, *TIMES SAN DIEGO* (Jan. 11, 2018), <https://timesofsandiego.com/business/2018/01/11/seaworld-hiding-orca-necropsies-including-san-diegos-kasatka-federal-suit-claims/> [<https://perma.cc/2N56-R9JY>] (accessed July 31, 2017). SeaWorld's statement can be readily deconstructed. First, SeaWorld carefully chooses its words to say it "submits mortality information to appropriate regulatory agencies." *Id.* (emphasis added). This "information" does not include the full reports and underlying data, but only summaries or general statements as drafted by SeaWorld representatives. Second, to the extent this "information" is shared with the public and the zoological community, again it is not the full reports and data, but only the information SeaWorld chooses to release. Third, SeaWorld maintains that necropsy reports and clinical histories are not required to be submitted for marine mammals. In fact, SeaWorld has expressly refused to release Tilikum's necropsy and clinical history reports to the public, zoological community, or any government agency. Fourth, numerous experts in the field are available to review the reports and interpret them for the public; the significance of the data will not be lost to the public. Fifth, SeaWorld has considerable control over the "scientists" it works with and the "verified . . . studies" that will be prepared. If SeaWorld does not approve of a subject for study or the resulting analysis, then it can be expected that the studies will not be released. Sixth, out of the "more than 350 peer-reviewed articles" that SeaWorld touts, only around fifty-five have been about orcas. Among those, only two of them mention an orca necropsy finding. *See* Charles Buck et al., *Isolation of St. Louis Encephalitis Virus from a Killer Whale*, 1 *CLINICAL & DIAGNOSTIC VIROLOGY* 109, 109 (1993) (stating that the killer whale's "necropsy was unremarkable"); Judy St. Leger et al., *West Nile Virus Infection in Killer Whale, Texas, USA, 2007*, 17 *EMERGING INFECTIOUS DISEASES* 1531, 1531 (2011) (discussing the examination of a 14-year old male killer whale at a marine park in San Antonio that died suddenly). Finally, in response to the information set forth in SeaWorldCares.com, a website has been established called "SeaWorld Fact Check." This website contains a series of rebuttal points to SeaWorld media releases and other statements. For example, on the subject of SeaWorld scientific contributions on orcas, SeaWorld Fact Check states: "Notably,

On July 31, 2017, a coalition of animal welfare organizations wrote to NMFS asking for enforcement of the necropsy and clinical history requirements of Tilikum's permit to his most recently deceased progeny, Kyara.¹⁹⁶ As noted in its March 25 email, AWI sent another email to Mr. Manby on August 4, 2017, communicating the imminent release of an open letter.¹⁹⁷

In an additional effort to get SeaWorld to submit the information about Tilikum and Kyara voluntarily, a coalition of five animal welfare organizations sent the open letter to Mr. Manby on August 8, 2017.¹⁹⁸ SeaWorld did not reply. As in the case of Tilikum, SeaWorld kept Kyara's records secret and did not submit necropsy or clinical history reports to NMFS.

With the death of Kasatka on August 15, the coalition of animal welfare organizations sent yet another letter to NMFS, this time seeking enforcement of the necropsy provisions of her Permit No. 240.¹⁹⁹

SeaWorld has not made its orca publications readily available for the public to download (with the exception of articles published in "open access" journals). When a zoology student asked SeaWorld for details about its research publications, the company replied, "Our research, in general, is not available for people outside the zoological society to read and review. Although we do an extensive amount of research there is little we can directly point you to [sic]." The company directs people to Google Scholar or a college library for its publications, when in fact very few of them are available through these sources. SeaWorld claims that easy access to its 'collection' of animals has resulted in research that helps wild counterparts. SeaWorld's website lists its orca-specific publications; until July 2014, the list included duplicate listings of the same papers, a book review and erroneously-cited publications. SeaWorld claims this bibliography represented research essential to protecting free-ranging orca populations. Following criticism of this bibliography (Schiffman 2014), SeaWorld removed it and posted a revised version soon after. The revised list now shows that SeaWorld began publishing peer-reviewed papers on orcas in 1977 and since then its employees have produced only fifty-one publications (i.e., 1.3 publications per year over the 38-year period and with more than half of those published before 2000). Of these fifty-one, seven were not peer-reviewed (a critical aspect for classification as a scientific publication). Three deal directly with the capture of free-ranging orcas (a practice SeaWorld has pledged to discontinue). Eight are only relevant to the keeping of captive orcas (such as artificial insemination or the demographics of captive whales). Another paper uses data collected from captive orcas, but is purely a statistical model and of no relevance to orcas (free-ranging or captive). Thus there are thirty-two published, peer-reviewed scientific papers related to free-ranging orcas (i.e., less than one per year). *Research*, SEAWORLD FACT CHECK, <http://www.seaworldfactcheck.com/research.htm> [<https://perma.cc/S3XQ-5UFZ>] (accessed July 31, 2018). As this discussion shows, SeaWorld's claims of an open and thorough scientific research and information-sharing program should be viewed skeptically.

¹⁹⁶ Letter from Naomi Rose, Marine Mammal Scientist, Animal Welfare Inst., et al., to Chris Oliver, Assistant Adm'r for Fisheries, Office of Protected Resources, Nat'l Oceanic & Atmosphere Admin. & Nat'l Marine Fisheries Serv. (July 31, 2017) (on file with *Animal Law*).

¹⁹⁷ Email from Naomi Rose, Marine Mammal Scientist, Animal Welfare Inst., et al., to Joel Manby, CEO, SeaWorld (Aug. 4, 2017) (on file with *Animal Law*).

¹⁹⁸ Letter from Naomi Rose, Marine Mammal Scientist, Animal Welfare Inst., et al., to Joel Manby, CEO, SeaWorld (Aug. 8, 2017) (on file with *Animal Law*).

¹⁹⁹ Letter from Naomi Rose, Marine Mammal Scientist, Animal Welfare Inst., et al., to Chris Oliver, Assistant Adm'r for Fisheries, Office of Protected Resources, Nat'l

Counsel to PETA/AWI submitted a detailed Legal Issue Paper confirming the legal basis for continuing applicability of the permit conditions to the Assistant Administrator for Fisheries on August 29, 2017.²⁰⁰

NMFS provided perfunctory responses to the requests for enforcement of the Kyara and Kasatka permit requirements in letters dated September 7 and October 18, 2017.²⁰¹ Each letter made the same statement, repeating the language of the March 10 email that the 1994 amendments “effectively extinguished” the necropsy and clinical history permit requirements.²⁰² Again, NMFS did not provide any explanation or legal rationale for its conclusion.

The MMC noted the untenable nature of the NMFS refusal to reveal its legal analysis in a Freedom of Information Act (FOIA) response letter to AWI on December 18, 2017, where General Counsel Michael Gosliner stated that he was:

[S]ympathetic to the position that [AWI] finds itself in – the responsible agency (NMFS) has given you its legal conclusion that the 1994 amendments to the MMPA extinguished the permit terms and conditions related to necropsies and clinical histories, but has declined to provide you with its rationale for this conclusion. I can see where that agency would not want to share its draft legal analysis outside of the government, but once that conclusion has been reached, its final position no longer is pre-decisional.²⁰³

Because NMFS refused to respond in any way to the document request, AWI filed a lawsuit to compel compliance with FOIA on January 9, 2018.²⁰⁴ As a result, while SeaWorld refuses to release its medical

Oceanic & Atmosphere Admin. & Nat'l Marine Fisheries Serv. (Aug. 25, 2017) (on file with *Animal Law*).

²⁰⁰ Letter from Donald Baur, Partner, Perkins Coie, to Chris Oliver, Assistant Adm'r for Fisheries, Office of Protected Resources, Nat'l Oceanic & Atmosphere Admin. & Nat'l Marine Fisheries Serv. (Aug. 29, 2017) (on file with *Animal Law*).

²⁰¹ See Letter from Chris Oliver, Assistant Adm'r for Fisheries, Office of Protected Resources, Nat'l Oceanic & Atmosphere Admin. & Nat'l Marine Fisheries Serv. (Sept. 7, 2017) (“As we have stated to you previously, NOAA’s NMFS believes the necropsy provisions of Permit No. 774, issued in 1992 were effectively extinguished by the 1994 amendments to the Marine Mammal Protection Act.”); Letter from Chris Oliver (Oct. 18, 2017), *supra* note 22 (“NOAA’s National Marine Fisheries Service (NMFS) believes the necropsy provisions of permits issued prior to 1994, including permit numbers 774 and 240, were effectively extinguished by the 1994 amendments to the Marine Mammal Protection Act.”).

²⁰² See *supra* note 201 and accompanying text (providing citations to the letters).

²⁰³ Letter from Michael Gosliner, Gen. Counsel, Marine Mammal Comm’n, to Georgia Hancock, Gen. Counsel, Animal Welfare Inst. (Dec. 18, 2017) (on file with *Animal Law*).

²⁰⁴ Complaint for Declaratory and Injunctive Relief at 1, *Animal Welfare Inst. v. Nat'l Oceanic & Atmospheric Admin.*, No. 1:18-cv-00047-CKK (D.D.C. Jan. 9, 2018); see Ken Stone, *supra* note 195 (“Alleging violations of the Freedom of Information Act, or FOIA, the nonprofit animal protection group is asking the court to force the National Marine Fisheries Service . . . to explain why SeaWorld can withhold the necropsy of Kasatka as well as the cause-of-death reports of Tilikum and his granddaughter Kyara, who also died in 2017. Moreover, AWI wants to know the legal basis for a reputed change in a public-display permit that once mandated the disclosure of killer whale necropsies.”). As of the date of this Article, NMFS continued to withhold its legal memorandum from release and the case is now at the briefing stage. The files produced in the

records for these animals, the federal regulatory agencies responsible for marine mammals sit on their hands and allow an important scientific and medical research opportunity to slip away, while shielding the legal rationale for such failure to act from public review.

NMFS has continued to reject requests by the animal welfare organizations to enforce the MMPA permits and obtain necropsy and clinical history records from SeaWorld and other facilities. As noted previously, on March 15, 2018, eight marine mammal experts wrote to NMFS under section 402(c) of the MMPA to request necropsy and clinical history reports that should have been collected under the permits to be used for marine mammal health, disease and rehabilitation purposes.²⁰⁵ NMFS responded on March 28, 2018, stating that section 402 does not obligate it to compel release of the reports and that the MMPA permit provisions “were effectively extinguished by the 1994 amendments.”²⁰⁶ In addition, following Katina’s injury, animal welfare groups wrote to NMFS on April 19, 2018, to request a federal inspection of SeaWorld’s Orlando facility and records, under pre-1994 permit conditions comparable to the necropsy requirement.²⁰⁷ NMFS responded on May 2, stating that the regulation of marine mammal facilities and record keeping is under the jurisdiction of APHIS.²⁰⁸

Most recently, on August 27, 2018, the animal welfare groups asked NMFS to enforce the permit provisions in response to SeaWorld’s proclamations of the value of its medical records for captive whales in the effort to rescue whales in the wild, such as J-50.²⁰⁹ Once again, NMFS provided a simplistic “wipe-its-hands” response writing back on September 7, 2018, and saying “the regulation of recordkeeping for marine mammals at public display facilities, including necropsy reports, is under the jurisdiction” of APHIS.²¹⁰

III. THE MEDICAL RECORD RELEASE REQUIREMENTS OF THE MMPA

The necropsy and clinical history requirements of MMPA permits are found only in permits issued prior to 1994, when Congress amended the MMPA to limit the role of the NMFS in the regulation of

lawsuit contained versions of the legal memorandum, all of which were completely redacted.

²⁰⁵ Letter from Dr. Heather Rally (Mar. 13, 2018); see Bossart, *supra* note 150 (finding emerging and resurging diseases in dolphins and manatees as a result of environmental distress).

²⁰⁶ Letter from Chris Oliver (Mar. 28, 2018).

²⁰⁷ See *supra* notes 111–121 and accompanying text (discussing the response from SeaWorld regarding the injury to the captive orca, Katina).

²⁰⁸ Letter from Chris Oliver, Assistant Admin. for Fisheries, Office of Protected Res., Nat’l Oceanic and Atmospheric Admin & Nat’l Marine Fisheries Serv. (May 2, 2018) (on file with *Animal Law*).

²⁰⁹ See *supra* notes 156–61 and accompanying text (discussing the response from SeaWorld regarding the death of the wild orca, J-50).

²¹⁰ Letter from Chris Oliver (Sept. 7, 2017), *supra* note 201.

marine mammals in captivity.²¹¹ This Section discusses the history of the necropsy and clinical history provisions of pre-1994 permits and the effect of the MMPA amendments.

A. Pre-1994 MMPA Permits

Public display permits issued under the MMPA prior to the promulgation of the APHIS AWA Marine Mammal Standards in 1979 routinely included detailed care and maintenance standards, such as those found in Section D of Kasatka's 1978 permit.²¹² Upon publication of the AWA rules, however, NMFS determined that it no longer needed to include such detailed care and maintenance requirements in MMPA public display permits.²¹³ As a result, it published a "notice of amendment of conditions" in the Federal Register on July 19, 1979.²¹⁴ NMFS stated, "[b]ecause of the implementation . . . of the [APHIS rules] which cover these same activities, the similar conditions imposed by existing permits are considered to be superseded and hereby replaced by the [AWA] standards."²¹⁵ NMFS rescinded the General Conditions under Sections D (on care and maintenance), C.2.h. (common carrier requirements), C.2.i. (transportation plans), and C.6.b. (display programs must not fatigue animals).²¹⁶ It left in place the necropsy requirements of Section C.4.d.²¹⁷

After this 1979 adjustment to permit conditions, NMFS routinely included provisions in its permits that applied to certain aspects of maintaining marine mammals in captivity, after the animals had been removed from the wild or imported.²¹⁸ These provisions applied to

²¹¹ See Ken Stone, *supra* note 195 ("In March 2017—two months after 'Blackfish' subject Tilikum died in Orlando—NOAA/NMFS said it had concluded that the necropsy and clinical history provisions of Tilikum's permit had been 'extinguished' by 1994 amendments to the Marine Mammal Protection Act.")

²¹² See Email from Amy Sloan, *supra* note 167 (stating that NMFS has "[hundreds] more pre-1994 [public display] permits that have the same provisions").

²¹³ MMC, Annual Report to Congress for 1979, at 54 [hereinafter MMC Annual Report to Congress 1979].

²¹⁴ *Id.*; Amendment to Conditions Imposed in Scientific Research and Public Display Permits Issued for Live Captive Mammals, 44 Fed. Reg. 42204 (July 19, 1979).

²¹⁵ *Id.* at 42205. Rescinding these provisions without providing for public comment violated Section 101(a)(1) of the MMPA, which requires public comment on permit applications, which would include terms and conditions. See 16 U.S.C. § 1371(a)(i) ("Consistent with the provisions of section 1374 of this title, permits may be issued by the Secretary for . . . public display."); 16 U.S.C. § 1374(d)(2) (requiring the Secretary to publish notice in the Federal Register and invite public comment from interested parties for public display permits). As a result, permits cannot be modified without providing for public comment, which NMFS did not do.

²¹⁶ Amendment to Conditions Imposed in Scientific Research and Public Display Permits Issued for Live Captive Mammals, 44 Fed. Reg. at 42205.

²¹⁷ See *id.* ("All other General and Special Conditions remain in effect.")

²¹⁸ *The Marine Mammal Protection Act Part III: Hearing Before the H. Subcomm. on Env't & Nat. Res. of the Comm. on Merch. Marine & Fisheries*, 103d Cong. 100–03 (1994) (Statement of The Am. Zoo & Aquarium Ass'n & The All. of Marine Mammal Parks & Aquariums) [hereinafter *MMPA Hearing*]; *The Marine Mammal Protection Act Part III: Hearing Before the H. Subcomm. on Env't & Nat. Res. of the Comm. on Merch.*

marine mammals in captivity in conjunction with AWA standards administered by APHIS, and were not considered to be inconsistent or in conflict with those rules.²¹⁹ Of particular importance were MMPA permit requirements that: (1) applied the “humane” treatment requirement of Section 104(b)(2)(B); (2) established that take by harassment continued after removal from the wild; (3) imposed limitations on the transfer of permitted animals to new facilities; and (4) required foreign facilities to meet U.S. standards before transfer could occur. As noted above, NMFS also continued to include necropsy requirements in the permit’s General Conditions, which were not considered to be in conflict with the APHIS standards.²²⁰

B. *The 1994 Amendments*

In 1993, NMFS published proposed MMPA regulations to govern facilities that hold marine mammals subject to public display permits.²²¹ Among other things, the regulations would have instituted detailed requirements relating to the content of public display facilities’ education and conservation programs,²²² prohibited transfer of marine mammals without prior approval by NMFS,²²³ and required public and agency review and renewal of public display permits at least every

Marine & Fisheries, 103d Cong. 131–39 (1994) (statement of John A. Hodges, Partner, Wiley, Rein & Fielding) [hereinafter *Hodges Hearing*].

²¹⁹ *The Marine Mammal Protection Act Part III: Hearing Before the H. Subcomm. on Env’t & Nat. Res. of the Comm. on Merch. Marine & Fisheries*, 103d Cong. 13, 40–54 (1994) (Statement of Nancy Foster, Nat’l Marine Fisheries Serv.); *The Marine Mammal Protection Act Part III: Hearing Before the H. Subcomm. on Env’t & Nat. Res. of the Comm. on Merch. Marine & Fisheries*, 103d Cong. 20–22 (1994) (Statement of John Grandy, Humane Soc’y of the U.S.); *The Marine Mammal Protection Act Part III: Hearing Before the H. Subcomm. on Env’t & Nat. Res. of the Comm. on Merch. Marine & Fisheries*, 103d Cong. 100–03 (1994) (Statement of John Reynolds, Marine Mammal Comm’n).

²²⁰ As stated by the MMC in its Annual Report to Congress for 1979, “[a]ny inconsistent conditions relating to the humane handling, care, treatment, and transportation of captive marine mammals that were imposed by permit issued prior to 20 September 1979 are superseded and replaced by new standards” MMC, Annual Report to Congress 1979, *supra* note 213.

²²¹ See Protected Species Exception Permits, 58 Fed. Reg. at 53320 (Oct. 14, 1993) (“NMFS is proposing to amend the regulations for permits to: . . . public display . . . under the Marine Mammal Protection Act of 1972 (MMPA).”).

²²² *Id.* at 53343 (requiring NMFS to evaluate “whether the basic messages and purposes of the program are consistent with the policies and objectives of the MMPA, whether they include accurate information about the life history, behavior, sensory capabilities, conservation or other aspects of marine mammals, such as their role in the marine ecosystem, and whether they are being, or are likely to be, conveyed to the participating public in an effective manner”); see *id.* at 53361 (“Describe current and proposed education or conservation programs, including the program’s purpose; objectives; basic information, concepts, and values to be conveyed; methods and techniques for implementation and evaluation; and identifying which aspects of the program are intended to be conveyed to which segments of the public.”).

²²³ *Id.* at 53348.

six years²²⁴—allowing amendments to take account of changing circumstances.²²⁵

The public display industry vigorously opposed some of the proposed regulations, arguing that the MMPA did not confer jurisdiction over marine mammals after they had been removed from the wild and that the NMFS permit requirements and proposed rules were in conflict with many of the standards established under the AWA and administered by APHIS.²²⁶ To address their concerns, the industry proposed to amend the MMPA to be consistent with this position.²²⁷ NMFS, MMC, and environmental and animal welfare organizations vigorously opposed the public display industry amendments.²²⁸

When it amended the MMPA in 1994, Congress made a number of changes requested by the public display industry, but stopped short of divesting NMFS of jurisdiction, reflecting an effort to balance concerns expressed by both sides in the debate.²²⁹ The Amendments changed the law as it relates to public display permits in six key ways:

- (1) Congress amended the definition of “harassment,” limiting it to events occurring in the wild; there could be no take by harassment of marine mammals held in captivity.²³⁰
- (2) The Amendments altered the criteria for issuance of a public display permit. Prior to the Amendments, the statute required that a permit be issued only if: (a) an “applicant’s facilities were open to the public on a regularly scheduled basis”, restricted only by an admissions fee, and (b) the applicant “offer[ed] a program for education or conservation purposes that, based on professionally recognized standards of the public display community, is acceptable to the Secretary”²³¹ The Amendments removed the phrase “is acceptable to the Secretary,” limiting the Secretary’s ability to deny a permit if “professionally recognized standards” of the industry itself were met.²³² The Amendments also added a requirement that applicants be “registered or hold a license issued under [the Animal Welfare Act].”²³³
- (3) The Amendments removed a mandatory provision requiring all public display permits to contain conditions related to supervision and care after

²²⁴ *Id.* at 53344.

²²⁵ *Id.* at 53328–29 (explaining the provisions limiting the period of permits).

²²⁶ *MMPA Hearing, supra* note 218, at 100–01. In making this argument, the industry, represented principally by the Alliance of Marine Mammal Parks and Aquariums (AMMPA) and the American Association of Zoological Parks and Aquariums (AAZPA), relied on a single district court decision holding that the MMPA take prohibition applied only to actions occurring in the wild and ceased to apply after the animals were removed from its natural environment. *Hodges Hearing, supra* note 218, at 137.

²²⁷ *MMPA Hearing, supra* note 218, at 102.

²²⁸ *Id.* at 35 (statement of Dr. John Grandy, Humane Soc’y of the U.S.), 4, (Statement of Douglas Hall, Nat’l Oceanic & Atmospheric Admin.), 11, (Statement of Dr. Robert Hofman, Marine Mammal Comm’n).

²²⁹ See generally Marine Mammal Protection Act Amendments of 1994, Pub. L. No. 103-238, 108 Stat. 532 (1994) (amending the MMPA).

²³⁰ *Id.* § 12(18)(A)(i)–(ii).

²³¹ 16 U.S.C. § 1374(c)(2).

²³² Marine Mammal Protection Act Amendments of 1994 § 5(b)(2)(A)(i).

²³³ *Id.* § 5(b)(2)(A)(ii).

the initial importation.²³⁴ Before the 1994 Amendments, Section 104(a)(2) stated that “[a]ny [public display] permit issued by the Secretary . . . shall specify, in addition to the conditions required by subsection (b) of this Section, the methods of capture, supervision, care, and transportation which must be observed pursuant to and after such taking or importation.”²³⁵ The 1994 Amendments removed the phrase “and after,” eliminating the requirement that all public display permits must include such terms.²³⁶ In enacting the 1994 amendments, Congress did not alter the language of subsection (b), which gives the Secretary authority to include in permits “any other terms or conditions which the Secretary deems appropriate.”²³⁷

(4) Permit holders were granted certain rights, including the right to take, import, purchase, sell, export, transport, or transfer possession of the animal without obtaining any additional permit or authorization.²³⁸ The 1994 Amendments further specified that the party receiving the transferred marine mammal did not need to obtain any additional permit or authorization.²³⁹

(5) The Amendments to Section 104 specified certain additional notice and reporting requirements that govern marine mammals in captivity.²⁴⁰ These requirements included notice of the sale, purchase, or transport of animals subject to a permit within fifteen days, and notice of the birth of any progeny within thirty days,²⁴¹ and the establishment of an inventory of all public display permit animals that shall contain “only the following information,” including the “date of death of the marine mammal and the cause of death when determined.”²⁴²

(6) Finally, Congress dealt with pre-1994 Amendment permits through a provision stating that any pre-existing public display permit “is hereby modified to be consistent with that Section 104(c)(2) [public display] as amended by this Act.”²⁴³

Following these amendments, NMFS took the general position that it had been divested of any role over regulating marine mammals in captivity, and took no action to revisit pre-1994 permits.²⁴⁴

²³⁴ *Id.* § 5(b)(2)(A).

²³⁵ 16 U.S.C. § 1374(c)(1) (emphasis added).

²³⁶ Marine Mammal Protection Act Amendments of 1994 § 5(b)(2)(A).

²³⁷ 16 U.S.C. § 1374(b)(2)(D).

²³⁸ Marine Mammal Protection Act Amendments of 1994 § 5(b)(2)(B). With respect to export to foreign facilities, the amendments also required that the foreign facility meet requirements comparable to those to which domestic facilities are subject. *Id.* § 5(b)(2)(D).

²³⁹ *Id.* § 5(b)(2)(C).

²⁴⁰ *Id.* § 5(b)(2)(E).

²⁴¹ 16 U.S.C. § 1374(c)(8)(B).

²⁴² *Id.* § 1374(c)(10)(H).

²⁴³ Marine Mammal Protection Act Amendments of 1994 § 5(c).

²⁴⁴ *H.R. 2693, A Bill to Reauthorize the Marine Mammal Protection Act of 1972: Legislative Hearing Before the Subcomm. On Fisheries Conservation, Wildlife, and Oceans of the H. Comm. on Resources*, 108th Cong. 127 (2003).

C. *The 1994 Amendments Have No Effect on the Necropsy/Clinical History and Inspection Requirements of the SeaWorld Orca Permits*

While the common perception has been that the 1994 Amendments removed NMFS and FWS from any role for marine mammals in captivity, a close reading of those Amendments confirms that limited, but important, functions still reside with these agencies.

1. *The Necropsy/Clinical History Requirements of Pre-1994 Permits Fulfill Fundamental MMPA Purposes and Inspection*²⁴⁵

Permits No. 240 and No. 774, and the provisions of Section 104 of the MMPA relevant to its continued applicability, must be interpreted in accordance with the purposes and policies of the MMPA.

Section 2 of the MMPA sets forth the Congressional findings and declarations of policy that govern the interpretation and administration of its requirements and the actions of NMFS and regulated entities such as SeaWorld.²⁴⁶ Several MMPA findings and declarations of policy inform the continued applicability of Permits No. 240 and No. 774.

Section (5) finds that marine mammals and marine mammal products may “move in interstate commerce” and states the policy that “the protection and conservation of marine mammals and their habitats is therefore necessary to insure the continued availability of these products which move in interstate commerce.”²⁴⁷ This Congressional finding and policy directly covers marine mammals in captivity because of their place in interstate commerce. The “protection and conservation” of marine mammals clearly includes the reporting and review of information about why marine mammals have died and the health conditions they experienced and treatment applied while they were alive. This information is relevant to marine mammals in the wild, as well as in captivity.

Many MMPA findings and policies strongly support the need to gather information about diseases, which may help marine mammals in captivity, and the wild by improving stranding responses. Section (1) finds that marine mammals may be “in danger of extinction as a result of man’s activities.”²⁴⁸ Section (2) provides that marine mammal species and population stocks “should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part.”²⁴⁹ Section (3) concedes that “there is inadequate knowledge of the ecology and popu-

²⁴⁵ The same legal analysis discussed in this section for necropsy and clinical history reports in General Condition C.4 also applies to Condition C.8, for record and site inspection such as in Katina’s case.

²⁴⁶ 16 U.S.C. § 1361.

²⁴⁷ *Id.* § 1361(5).

²⁴⁸ *Id.* § 1361(1).

²⁴⁹ *Id.* § 1361(2).

lation dynamics of such marine mammals and of the factors which bear upon their ability to reproduce themselves successfully.”²⁵⁰ Section (6) acknowledges that “marine mammals”—without limitation to species or stocks and applying to individual animals²⁵¹—“have proven themselves to be resources of great international significance, esthetic and recreational as well as economic.”²⁵² In recognition of that importance, Congress issued the finding that marine mammals “should be protected and encouraged to develop to the greatest extent feasible.”²⁵³ Section (6) also recognizes that the primary purpose of the MMPA is “to maintain the health and stability of the marine ecosystem.”²⁵⁴

All of these provisions from Section 2 readily bring the necropsy report and clinical history requirements of Permits No. 240 and No. 774 within the scope of the MMPA. The protection of the whales subject to this permit, including Tilikum’s progeny, who bear a close relationship to interstate commerce, unquestionably justifies obtaining information about his death and clinical history, especially in light of SeaWorld’s assertion that he most likely died as a result of a persistent bacterial infection found in the wild, as well as in captive maintenance facilities.²⁵⁵ SeaWorld’s claim about the prevalence of this disease in the wild also justifies obtaining Tilikum’s, Kyara’s, and Kasatka’s health information for the MMPA purposes of gaining knowledge about factors affecting the ecology of whales, their ability to reproduce, their place in the marine ecosystem, and the health and stability of the marine environment they inhabit. Stranding responses, plainly under the purview of the MMPA,²⁵⁶ can also benefit from this information. Learning information about how these bacteria could be affecting wild populations of cetaceans, and possibly seeking to control or treat the disease, is readily within the scope of the MMPA and the responsibilities of NMFS to administer that law.

The requirement of Permits No. 240 and No. 774 that the necropsy report and clinical history must be provided to NMFS is especially important because there is no indication that SeaWorld has used this information from other animals to study and address the stocks and health of wild populations. Instead, SeaWorld’s purported research on its captive orcas appears largely to be limited to breeding and other

²⁵⁰ *Id.* § 1361(3).

²⁵¹ The term *marine mammal* means “any mammal which (A) is morphologically adopted to the marine environment (including sea otters and members of the orders Sirenia, Pinnipedia and Cetacea” 16 U.S.C. § 1362(6) (emphasis added). Thus, the definition is not limited to species or population stocks, but also applies to individual animals.

²⁵² 16 U.S.C. § 1361(6).

²⁵³ *Id.*

²⁵⁴ *Id.*

²⁵⁵ See *The Life and Care Of Tilikum At SeaWorld*, *supra* note 78 (“SeaWorld veterinarians were treating a persistent and complicated bacterial lung infection.”).

²⁵⁶ See 16 U.S.C. § 1421(h) (2018) (defining *stranding* under the MMPA).

public display and captivity-related considerations.²⁵⁷ It is, therefore, essential that NMFS obtain the necropsy and clinical history information and make sure that it is available to other parties who can use it to address the effects of captivity, the adequacy of care and maintenance of captive specimens, stranding responses, the health of orcas (and other toothed cetaceans) in the wild, and the health of their environment. SeaWorld's practice of limited access to this information, and controlling its use for only approved topics and with SeaWorld co-authors, highlights the importance of making these reports generally available from agency files.

NMFS's own practice prior to 1994 confirms that it has considered necropsies important not only as applied to husbandry issues and the health of animals in captivity, but also for wild cetaceans. For example, NMFS wrote to the MMC on December 26, 1991 asking to review the necropsies of four dolphins that died at the Dolphin Research Center.²⁵⁸ NMFS indicated that the necropsy information was relevant not only to swim-with-the-dolphin programs, but also to "identify any problems that could possibly relate to . . . *strandings of wild dolphins in Florida waters*."²⁵⁹ The MMC confirmed the independent relevance of necropsy reports on captive dolphins to animals in the wild in its response letter of February 25, 1992, noting that "it does not appear that screens were done for antibodies to viruses . . . that appear to be showing up *in both captive and wild populations in many parts of the world*."²⁶⁰ As this exchange demonstrates, NMFS and the MMC have historically considered necropsy information from captive animals to be relevant to their MMPA duties to both wild and captive-held animals (a point that SeaWorld also concedes in its media statements

²⁵⁷ See *Killer Whale Studies*, SEAWORLD, <https://seaworldcares.com/research/killer-whales/> [<https://perma.cc/H4AA-4564>] (accessed July 31, 2018) (listing SeaWorld's contributions to scientific literature).

²⁵⁸ Letter from Ann Terbush, Chief of Permit Div., Office of Protected Res., Nat'l Marine Fisheries Serv., to John R. Twiss, Jr., Exec. Dir., Marine Mammal Comm'n (Dec. 26, 1991) (on file with *Animal Law*).

²⁵⁹ *Id.* (emphasis added).

²⁶⁰ Letter from John R. Twiss, Jr., Exec. Dir., Marine Mammal Comm'n, to Ann Terbush, Chief of Permit Div., Office of Protected Res., Nat'l Marine Fisheries Serv. (Feb. 25, 1992) (on file with *Animal Law*) (emphasis added). The Commission also noted the importance of requiring clinical histories to accompany necropsy reports, a requirement of the Tilikum permit: "On a more general matter, the Commission notes that the Dolphin Research Center has provided, with each necropsy report, a brief history of each animal. Although these histories are useful, they would be more useful if they also included medical histories of the animals. Inasmuch as detailed medical records should be maintained as an integral part of a facility's veterinary care program as is required by Animal and Plant Health Inspection Service standards and National Marine Fisheries Service permit conditions, medical histories, or at least summaries of those histories, should be provided routinely with necropsy reports. It would also be useful in this case to have the personal vitae for the Medical Director who submitted the information." *Id.*

after the deaths of Tilikum and Kyara).²⁶¹ It therefore cannot be argued that the purpose of necropsy reports required prior to 1994 was limited to captive maintenance issues and no longer applies as a result of the 1994 amendments.

2. *The MMPA and Permits No. 240 and No. 774 Must Be Construed Under the Precautionary Principle and to Give the Benefit of Any Doubt to the Marine Mammals*

As discussed in this Article, the provisions of the MMPA, as amended in 1994, and Permits No. 240 and No. 774 are clear on their face, and there is no question that the necropsy/clinical history requirements of Tilikum's permit (and any other similar permit) remain in effect. Failure of NMFS to adopt this position would be arbitrary and capricious under the Administrative Procedure Act (APA).²⁶² If, however, there is any uncertainty or ambiguity, the MMPA and case law establish clear principles of interpretation that such questions must be resolved in favor of marine mammals.

When it passed the MMPA in 1972, Congress outlined two important features: (1) a precautionary principle in favor of the species; and (2) assigning the burden of proof to any party seeking to exploit marine mammals.²⁶³ The MMPA follows a risk-averse approach—in cases of doubt or ambiguity, decisions should be precautionary and favor marine mammals. The House Merchant Marine and Fisheries Committee makes clear its intent that marine mammals should benefit from cautious and conservative protective actions:

In the teeth of this lack of knowledge of specific causes, and of the certain knowledge that these animals are almost all threatened in some way, it seems elementary common sense to the Committee that legislation should be adopted to require that we act conservatively—that no steps should be taken regarding these animals that might prove to be adverse or even irreversible in their effects until more is known. As far as could be done, we have endeavored to build such a conservative bias into the legislation here presented.²⁶⁴

As stated by Senator Packwood: “Scientists generally will state that our level of knowledge of marine mammals is very low Barring better and more information, it would therefore appear to be wise to

²⁶¹ In 2017, the MMC confirmed its longstanding position on the importance of necropsies in its email correspondence with NMFS regarding the continued applicability of Tilikum's permit conditions. E-mail from Michael Gosliner, *supra* note 162.

²⁶² *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am. v. Brock*, 783 F.2d 237, 239, 244–45 (D.C. Cir. 1986) (remanding a case where a Union brought a claim that a decision by the Department of Labor was arbitrary, capricious, and contrary to law under the APA).

²⁶³ See H.R. REP. NO. 92-707, at 6 (1971) (“[T]he burden is placed upon those seeking permits to show that the taking should be allowed . . . [and t]he effect of this set of requirements is to insist that the management of the animal populations be carried out with the interests of the animals as the prime consideration.”).

²⁶⁴ *Id.*

adopt a cautious attitude toward the exploitation of marine mammals.”²⁶⁵

In keeping with this congressional intent, courts adopt a precautionary principle. *Committee for Humane Legislation, Inc. v. Richardson*, one of the first MMPA decisions, acknowledges that the MMPA should be interpreted “for [the benefit of the protected species] and not for the benefit of commercial exploitation.”²⁶⁶ The Court declared: “Congress enacted the MMPA for one basic purpose: to provide marine mammals . . . with necessary and extensive protection against man’s activities.”²⁶⁷ Similarly, in *Kokechik Fishermen’s Association v. Secretary of Commerce*, the D.C. Circuit stated that, when weighing commercial and conservation interests, “[t]he interest in maintaining healthy populations of marine mammals comes first.”²⁶⁸

The MMPA legislative history confirms that any party wishing to take marine mammals, such as SeaWorld, must meet a heavy burden of proof:

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. If that burden is not carried—and it is by no means a light burden—the permit may not be issued. The effect of this set of requirements is to insist that the management of the animal populations be carried out with the interests of the animals as the prime consideration.²⁶⁹

NMFS itself has adopted these principles when construing the meaning of Section 104 of the MMPA on public display permits. In its briefs in the recent lawsuit by Georgia Aquarium challenging the denial of its permit application to import beluga whales from Russia, NMFS noted that the permit applicant (and, by extension in this case, the permit holder) has the burden of proof,²⁷⁰ and that Congress intended marine mammals to be given the benefit of the doubt.²⁷¹

²⁶⁵ 117 CONG. REC. 34599 (Oct. 4, 1971).

²⁶⁶ *Comm. for Humane Legislation, Inc. v. Richardson*, 414 F. Supp. 297, 307 n.24 (D.D.C. 1976) (citing H.R. Rep. No. 92-707, at 22).

²⁶⁷ *Id.* at 306.

²⁶⁸ *Kokechik Fishermen’s Ass’n v. Sec’y of Commerce*, 839 F.2d 795, 802 (D.C. Cir. 1988); see also *Brower v. Daley*, 93 F. Supp. 2d 1071, 1073 (N.D. Cal. 2000) (citing to the holding in *Comm. for Humane Legislation, Inc. v. Richardson* that the MMPA is for the benefit of the protected species) (citation omitted); *Animal Prot. Inst. Of Am. v. Mosbacher*, 799 F. Supp. 173, 179 (D.D.C. 1992) (“What emerges somewhat more clearly from all of the above is Congress’ general concern about protecting marine mammals from human depredations . . .”).

²⁶⁹ H.R. REP. NO. 92-707, at 6 (1972).

²⁷⁰ Memorandum of Law in Support of Intervenor-Defendants’ Cross-Motion for Summary Judgement & Response to Plaintiff Ga. Aquarium’s Motion for Summary Judgement at 3, *Ga. Aquarium, Inc. v. Pritzker*, 135 F. Supp. 3d 1280 (N.D. Ga. 2015) (No. 1:13-CV-03241-AT); Intervenor-Defendants’ Reply to Plaintiff Ga. Aquarium, Inc.’s Response to Intervenor-Defendants’ Cross-Motion for Summary Judgment at 18, *Ga. Aquarium, Inc.*, 135 F. Supp. 3d (No. 1:13-CV-03241-AT).

²⁷¹ See Intervenor-Defendants’ Reply to Plaintiff Ga. Aquarium, Inc.’s Response to Intervenor-Defendants’ Cross-Motion for Summary Judgment, *supra* (explaining that

The court adopted those principles in its decision in *Georgia Aquarium*, upholding the NMFS permit denial.²⁷² The court cited the above-referenced quote from H.R. Rep. No. 92-707, as relied on in *Committee for Humane Legislation*, that NMFS must act “conservatively” in the “teeth of this lack of knowledge” about marine mammals.²⁷³ The court also confirmed that the burden of proof is on the party seeking to exploit marine mammals²⁷⁴ and observed that the MMPA is not a “balancing act” between the interests of industry and the animals.²⁷⁵ Instead, the court explained, citing *Kokechik*, “[t]he interests of the marine mammals come first under the statutory scheme, and the interests of the industry as important as they are, must be served only after the protection of the animals is assured.”²⁷⁶ In upholding the NMFS decision, the court emphasized the important role of the agency in gathering information about marine mammals: “[t]he MMPA further ‘creates a strong regulatory responsibility on the agencies involved, coupled with a Congressional directive that far more adequate knowledge must be developed on what is actually happening to these animals.’”²⁷⁷ Applying these principles to the question of the continued applicability of the necropsy/clinical history conditions of Permits No. 240 and No. 774 confirms that SeaWorld must honor these provisions, and NMFS must enforce them.

3. *NMFS Is Not Entitled to Deference*

As noted above, on March 10, NMFS announced its position that “the necropsy provisions of the 1992 permit were effectively extinguished by the 1994 amendments to the MMPA.”²⁷⁸ Despite the months of outreach by PETA and the AWI, including providing several copies of the evolving legal analysis for discussion to the three federal agencies, NMFS stated that it “will not be discussing [the NMFS legal memorandum] in any detail at the meeting.”²⁷⁹ As a result, after a nearly one-year dialogue carried forward by PETA/AWI, no explanation is available from NMFS for its conclusion that the provisions of Permits No. 240 and No. 774 do not apply. This decision by NMFS on

in the absence of scientific certainty, Congress intended that the stock receive the benefit of uncertainty, rather than the public display permit applicant).

²⁷² See *Ga. Aquarium, Inc.*, 135 F. Supp. 3d at 1338 (“In light of the plain language of the statute and the clear intent of the MMPA’s prohibition to protecting nursing animals in the wild, the Court find that NMFS’s determination was not arbitrary and capricious.”).

²⁷³ *Id.*

²⁷⁴ See *id.* at 1293 (“As NMFS stated in its Decision Document denying Georgia Aquarium’s permit application, ‘it is the [permit] applicant’s responsibility, not that of NMFS to demonstrate that the MMPA criteria has been met.’”).

²⁷⁵ *Id.* at 1292.

²⁷⁶ *Id.*

²⁷⁷ *Id.* at 1339.

²⁷⁸ E-mail from Amy Sloan, *supra* note 178.

²⁷⁹ *Id.*

Tilikum's public display permit was made before completing its required consultation with the MMC.²⁸⁰

Whatever the legal basis for the NMFS conclusion, presumably the agency will argue that the statutory language is ambiguous and therefore its interpretation is entitled to deference. To the contrary, NMFS would not be entitled to deference, and, even if its interpretation were accorded some degree of deference, the conservative bias of the MMPA would prevail.

NMFS's position regarding the effect of the 1994 amendments leads to clear tension between two principles: *Chevron* deference, which provides NMFS with significant decision-making power and protection from judicial review, and the precautionary purpose of the MMPA, which constrains NMFS's actions with respect to their negative effects on marine mammals. Where the two principles align—and NMFS rightfully argues for deference to act in favor of marine mammal protection despite scientific uncertainty—the Northern District Court of Georgia deferred to NMFS without hesitation.²⁸¹ Where the principles collide, leaving NMFS's action at odds with the MMPA's conservative bias in favor of marine mammals, courts have denied agency deference.²⁸² Here, NMFS has taken a position that leads to less transparency and access to necropsy reports and clinical history documentation, which is contrary to the best interests of marine mammals in the wild and captivity. Since NMFS cannot assure that its interpretation of the 1994 amendments will not negatively impact the “research on, and conservation of, all marine mammals,”²⁸³ NMFS's interpretation directly contradicts the conservative bias of the MMPA.

²⁸⁰ See *supra* note 180 and accompanying text (providing a timeline of events related to Tilikum's public display permit and demonstrating the NMFS provided its legal opinion to the MMC on March 15, 2017, five days after it announced its decision to AWI in its March 10 e-mail).

²⁸¹ The Northern District Court of Georgia held that, given the purpose of the MMPA, NMFS's decision to deny the Georgia Aquarium's request for a permit to import 18 beluga whales from Russia was neither arbitrary nor capricious. *Ga. Aquarium, Inc.*, 135 F. Supp. 3d at 1338. With evidentiary uncertainty as to the potential negative impacts of the removal of beluga whales from the wild, “[NMFS] reasonably adopted a precautionary approach” that deserved deference. *Id.* at 1311.

²⁸² The Ninth Circuit denied deference to NMFS's interpretation of the MMPA—under which NMFS approved the whale hunting quota for the Makah Indian Tribe—because the agency's decision was contrary to the MMPA's precautionary purpose. In particular, the court determined that since NMFS could not *assure* that the Tribe's hunting of gray whales would not threaten the role of gray whales as “functioning elements of the marine ecosystem,” there was also no assurance that the purpose of the MMPA would be effectuated. *Anderson v. Evans*, 371 F.3d 475, 498 (9th Cir. 2004). The Ninth Circuit also did not accord deference to NMFS where the agency's action conflicted with the conclusions of its own experts. The court determined that in the face of a lack of scientific evidence, NMFS made an “underprotective” policy choice. *Nat. Res. Def. Council, Inc. v. Pritzker*, 828 F.3d 1125, 1139 (9th Cir. 2016).

²⁸³ 16 U.S.C. § 1361(4).

4. *Permits No. 240 and No. 774 Remain in Effect*

Permits No. 240 and No. 774 contain no expiration date and state that “[t]he terms and conditions of the Permit shall remain in effect as long as the marine mammals . . . imported hereunder are maintained in captivity under the authority and responsibility of the Permit Holder.”²⁸⁴

The continuing effect of the permit is consistent with the MMPA, as amended. Congress specifically addressed the issue of the continuing effect of pre-1994 permits by enacting a provision which modified such permits to be consistent with the newly-amended language in Section 104(c)(2).²⁸⁵ It is therefore clear that Congress intended pre-1994 permits to remain in effect, subject only to the requirement that their terms be modified if inconsistent with the amended Section 104(c)(2).

Further, there are clear indications that Congress understood MMPA permits to continue to apply beyond the act of take or importation. Section 104(f), left untouched by the 1994 Amendments, mandates that a permit “must be in the possession of the person to whom it is issued (or an agent of such person) . . . any . . . time while any marine mammal taken or imported under such permit is in the possession of such person or agent” and also requires that a duplicate copy of the permit is “physically attached to the container, package, enclosure, or other means of containment, in which the marine mammal is placed for purposes of . . . supervision or care.”²⁸⁶ Thus, Congress envisioned that the permit would have continued applicability. Moreover, in enacting the 1994 Amendments, Congress did not alter language which required that the Secretary should specify in all permits “the period during which the permit is valid.”²⁸⁷ In the case of Permit No. 774, the permit has no expiration date.²⁸⁸

The definition of *harassment* included in the 1994 Amendments does not alter this conclusion. By defining harassment as occurring only in the wild, the 1994 Amendments eliminated any possibility that civil and criminal liability could be imposed upon members of the public display industry for actions they believed to be lawful, and which did not explicitly violate any provision of their permit, but which NMFS otherwise determined to constitute “harassment.” Such a definitional change cannot be read to imply that Congress intended to divest NMFS of authority to include conditions applicable to the cir-

²⁸⁴ PERMIT NO. 774, *supra* note 80, at para. (B)(1)(e).

²⁸⁵ See 16 U.S.C. § 1374(e)(1)(A) (permitting the Secretary to update previously issued permits to conform to the amendments of the Section).

²⁸⁶ 16 U.S.C. § 1374(f).

²⁸⁷ *Id.* § 1374(b)(2)(C).

²⁸⁸ See PERMIT NO. 774, *supra* note 80 (“The terms and conditions of the Permit shall remain in effect as long as the marine mammals, and/or the progeny of such marine mammals, imported hereunder are maintained in captivity under the authority and responsibility of the Permit Holder.”).

cumstances in which marine mammals were kept subsequent to take or importation; the amendments to the definition of harassment simply mean that prohibited harassment does not occur in captivity. In any case, Tilikum's permit is for importation, not take, so the definition of harassment has no limiting effects on the permit itself.

In fact, the 1994 Amendments left in place a provision providing the Secretary with the authority to include in public display permits "any other terms or conditions which the Secretary deems appropriate."²⁸⁹ Read in conjunction with the other changes discussed above, it is clear that Congress preserved NMFS's authority to institute and enforce permit conditions, so long as those conditions were not inconsistent with the amended provisions of the MMPA.²⁹⁰ Thus, no provision in the 1994 amendments canceled Kasatka's and Tilikum's permits.

Permits No. 240 and No. 774 are also not terminated or altered by NMFS regulations, which were published in 1996 and limit the time during which the permitted act (importation, in this case) can occur, but do not terminate the effectiveness of other permit conditions.²⁹¹

²⁸⁹ 16 U.S.C. § 1374(b)(2)(D). This provision arguably provides the basis to include necropsy report requirements in post-1994 permits as well. Because the animals are already dead, and due to the important scientific information that can be derived from necropsies that is relevant to wild populations as well as captive maintenance, including such a provision would not be limited to the kind of care and maintenance issues that are under the jurisdiction of APHIS for other permits issued after the amendments.

²⁹⁰ This conclusion is also consistent with the principle that congressional enactments will only be construed to have retroactive effect if the language of the act requires it. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("Retroactivity is not favored in the law. Thus, congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."). In applying this principle in analogous situations, courts have held that existing permits and other rights should not be considered to be affected by subsequent legislation except where statutory language clearly requires such a result. For instance, in *Appalachian Power Co. v. Train*, the Fourth Circuit held that a provision in the 1977 amendments to the Clean Water Act requiring certain limitations on the discharge of toxic pollutants did not operate to retract variances that had been granted to the electric power industry that allowed discharges beyond the limits. *Appalachian Power Co. v. Train*, 620 F.2d 1040, 1047 (4th Cir. 1980). In another case, in considering a section of the 1992 Cable Act, the Sixth Circuit held that an existing exclusive franchise agreement stood, regardless of the law's prohibition on such agreements, stating that "[i]f Congress had decided that some policy consideration justified the invalidation of existing contracts and the disruption of the parties' settled expectations, it would have stated its intent more clearly." *James Cable Partners, L.P. v. City of Jamestown*, 43 F.3d 277, 280 (6th Cir. 1995). *See also* *Forest Guardians v. Thomas*, 967 F. Supp. 1536, 1560 (D. Ariz. 1997), *aff'd sub nom.* *Forest Guardians v. Dombeck*, 131 F.3d 1309 (9th Cir. 1997) ("Agencies generally do not have the authority to issue rules having retroactive effect in the absence of an express Congressional grant of such authority.").

²⁹¹ *See* 50 C.F.R. § 216.35(b) (2018) ("The maximum period of any special exception permit issued, or any major amendment granted, is five years from the effective date of the permit or major amendment. In accordance with the provisions of § 216.39, the period of a permit may be extended by a minor amendment up to 12 months beyond that established in the original permit."). Other regulatory language supports this interpretation, and NMFS practice confirms that the agency also has adopted this interpretation. We reviewed ten post-1996 public display permits, and each of them contains a

Moreover, this regulation does not apply retroactively to permits that had been issued before promulgation of the rules in 1996.²⁹²

In its March 10 unexplained, yet final, legal position that Tilikum's permit provisions no longer apply, NMFS states that those requirements were "effectively extinguished by the 1994 amendments."²⁹³ In making this statement, NMFS undermines its own conclusion because case law is clear that repeals by implication (i.e., "effectively extinguished") are not favored.²⁹⁴ Generally, repeal by implication may occur only where there is either an "irreconcilable conflict" between the two acts or a complete substitution, in which the later act covers the whole subject of the earlier one.²⁹⁵ Here, there is neither. In fact, the 1994 amendments can be read to avoid any conflict at all. Congress did not address the need, or lack thereof, for necropsy reports, which leads to the logical conclusion that Congress had no intention of changing the status quo for medical reporting in permits issued prior to 1994.

limited period of less than five years during which the importation was authorized to occur, but also a provision providing that the permit itself remains in effect as long as the marine mammal is maintained by the permit holder. The permits reviewed were Public Display Permit Nos.: 116-1380 (July 9, 1997); 116-1591 (Mar. 8, 2001); 116-1662 (June 6, 2002); 226-1752 (May 21, 2004); 116-1729 (July 23, 2004); 116-1843 (Nov. 14, 2006); 10084 (Mar. 27, 2008); 13614 (Apr. 16, 2009); 15014 (Sept. 1, 2010); 15206 (Nov. 12, 2010).

²⁹² Provisions appearing in the proposed rules in 1993 that would have modified existing permits were eliminated in the final rules promulgated in 1996. Instead, the rules were applied prospectively. *Compare* Protected Species Special Exception Permits, 58 Fed. Reg. 53320, 53330 (Oct. 14, 1993) (codified at 50 C.F.R. pts. 215, 216, and 222) ("Section 104(e) of the MMPA allows NMFS to modify, suspend, or revoke permits for violations of their terms or conditions."), *with* Marine Mammals Special Exception Permits to Take, Import and Export Marine Mammals, 61 Fed. Reg. 21926 (May 10, 1996) (codified at 50 C.F.R. pts. 216 and 222) (failing to mention provisions for modifying existing permits). Moreover, reading the 1996 rules to alter existing permits runs afoul of the rule that regulations do not generally have retroactive effect. *See supra* note 290 (discussing various court holdings finding that administrative rules do not have retroactive effect absent express language).

²⁹³ E-mail from Amy Sloan, *supra* note 178.

²⁹⁴ *Posadas v. Nat'l City Bank of N.Y.*, 296 U.S. 497, 503; *see* *Morton v. Mancari*, 417 U.S. 535, 549–50 (1974) (finding that the lower court erred in finding that the statute was impliedly repealed because repeals by implication were not favored and there was no affirmative showing of a congressional intent to repeal the statute).

²⁹⁵ *Posadas*, 296 U.S. at 503; *see also* *Branch v. Smith*, 538 U.S. 254, 273 (2003) ("An implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict' or where the latter act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'"); *Traynor v. Turnage*, 485 U.S. 535, 547–48 (1988) explaining that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum unless the later statute expressly contradicts the original act' or unless such a construction is absolutely necessary in order that the words of the later statute shall have any meaning at all); *Radzawer v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976) ("It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum.").

Finally, a Department of Commerce administrative law judge has determined that the MMPA amendments have not terminated pre-1994 permits. In that proceeding, the judge ruled that the 1994 MMPA amendments did not “alter the responsibility of the Secretary of Commerce in issuing public display permits” and “did not render existing public display permits issued before the enactment of the 1994 Amendments null and void.”²⁹⁶ The judge therefore found that violations of the permit in question subjected the permit holder to liability.²⁹⁷

5. Consistency with the 1994 Amendments

Having established the continuing validity of Permits No. 240 and No. 774, the specific provisions of the permit must be considered to determine which, if any, were affected by the 1994 amendments.

Even though the permit itself remains in effect, Section 5(c) of the 1994 Amendments provides, in a note appended to Section 104, that “[a]ny permit issued under Section 104(c)(2) of the Marine Mammal Protection Act of 1972 (16 U.S.C. § 1374(c)(2)) before the date of the enactment of this Act [April 30, 1994] is hereby modified to be consistent with *that section* as amended by this Act.”²⁹⁸ The language Congress used was clear: the Amendments modified existing permits to be made consistent with the amended *Section 104(c)(2)*, rather than stating that all existing permits and all conditions were to be modified to be made consistent with each and every amendment to Section 104. Had Congress intended for pre-existing permits to be made consistent with all of Section 104, as amended, it would have used “this Section,” or “Section 104,” rather than “that Section,” which clearly refers back to the earlier use of “Section 104(c)(2).”²⁹⁹

²⁹⁶ *In re Richard O'Barry*, No. SE960112FM/V, 1999 WL 1417459, at *17 (Nat'l Oceanic & Atmospheric Admin. June 8, 1999).

²⁹⁷ *Id.* at *15. These violations involved breaching a permit condition which required the permit holders to obtain a separate scientific research permit before any of the marine mammals covered by the public display permit were released into the wild. *Id.*

²⁹⁸ Marine Mammal Protection Act Amendments of 1994 § 5(c) (emphasis added).

²⁹⁹ There are many other instances in the MMPA where the term *section* is used with clear reference to a *subsection* or other subdivision of an overall section, such as the following (indicated by italics):

- § 101(a)(2)(E): shall, six months after importation of yellowfin tuna or tuna products has been banned under this section, certify such fact to the President, which certification shall be deemed to be a certification for the *purposes of section 8(a)* of the Fisherman's Protection Act of 1967 (22 U.S.C. 1978(a)) for as long as such ban is in effect; and
- § (a)(5)(A)(ii) For a military readiness activity (as defined in *section 315(f)* of Public Law 107-314; 16 U.S.C. 703 note), a determination of “least practicable adverse impact on such species or stock” under clause (i)(II)(aa) shall include consideration of personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.
- § (a)(5)(A)(iii) Notwithstanding clause (i), for any authorization affecting a military readiness activity (as defined in *section 315(f)* of Public Law 107-314; 16 U.S.C. 703 note) the Secretary shall publish the notice required by such clause only in the Federal Register.

The use of the term *Section* rather than *Paragraph* does not change the analysis. Guidance documents on legislative drafting for both the House and Senate direct that the term *Section* should be used in situations such as this one where a single subdivision is referenced.³⁰⁰ For example, the Style Manual published by the House Legislative Counsel states that “[i]f the reference is to more than 1 unit,

-
- § 102(b) [IMPORTATION OF PREGNANT OR NURSING ANIMALS; DEPLETED SPECIES OR STOCK; INHUMANE TAKING.] — Except pursuant to a permit for scientific research, or for enhancing the survival or recovery of a species or stock, issued under *section 104(c)* of this Act
 - § 103(d) [PROCEDURE.] — Regulations prescribed to carry out this section with respect to any species or stock of marine mammals must be made on the record after opportunity for an agency hearing on both the Secretary’s determination to waive the moratorium pursuant to *section 101(a)(3)(A)* and on such regulations, except that, in addition to any other requirements imposed by law with respect to agency rulemaking, the Secretary shall publish and make available to the public either before or concurrent with the publication of notice in the Federal Register of his intention to prescribe regulations under this section[.]
 - § 104(c)(2)(D) the Secretary may revoke the permit in accordance with *section 104(e)*, seize the marine mammal, or cooperate with other persons authorized to hold marine mammals under this Act for disposition of the marine mammal.
 - § 104(c)(4)(A)(I) consistent with any conservation plan adopted by the Secretary under *section 115(b)* or any recovery plan developed under *section 4(f)* of the *Endangered Species Act of 1973* for the species or stock
 - § (c)(5)(B) The Secretary shall establish and charge a reasonable fee for permits issued under this paragraph. All fees collected under this paragraph shall be available to the Secretary until expended for use in developing and implementing cooperative research and management programs for the conservation of polar bears in Alaska and Russia pursuant to *section 113(d)*.
 - § (c)(7) Upon request by a person for a permit under paragraph (2), (3), or (4) for a marine mammal which is in the possession of any person authorized to possess it under this Act and which is determined under guidance under *section 402(a)* not to be releasable to the wild, the Secretary shall issue the permit to the person requesting the permit if that person
 - § (h)(3)(C) For each year after 1984, the Secretary shall include in his annual report to the public and the Congress under *section 103(f)* a discussion of the proposed activities to be conducted each year as part of the monitoring program required by subparagraph (A).
 - § 107(a)(e)(7) [DISPOSITION OF SEIZED CARGO.] — (1) Whenever any cargo or marine mammal or marine mammal product is seized pursuant to this section, the Secretary shall expedite any proceedings commenced under *section 105(a)* or (b). (Consistently called sections throughout 107(e)).
 - § 109(b)(3)(A) such determination shall be treated, for purposes of applying this title beyond the territory of the State, as a determination made in accordance with *section 103* and as an applicable waiver under *section 101(a)(3)*[.]
 - § 109(b)(3)(B)(i) incidentally in the course of commercial fishing operations (whether provided for under *section 101(a)(2)* or (4)), or in the course of other specified activities provided for under *section 101(a)(5)*, in the zone described in *section 3(14)(B)*[.]

³⁰⁰ Courts rely on the House and Senate legislative drafting manuals as interpretive aids when considering federal legislation. *See, e.g.,* *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004). (“Congress ordinarily adheres to a hierarchical scheme in subdividing statutory sections This hierarchy is set forth in drafting manuals prepared by the legislative counsel’s offices in the House and the Senate.”).

the reference is to the senior unit. Thus, refer to Section 5(a)(1) and not paragraph (5)(a)(1).³⁰¹

The convention of referencing the senior unit is consistently used throughout the 1994 MMPA Amendments.³⁰² Another component of the 1994 Amendments demonstrates the term *that section* refers back to a previously referenced subdivision, not the section as a whole. Section 24 of the 1994 Amendments, titled “Further Technical and Conforming Amendments,” provided:

(1) EXECUTION OF PRIOR AMENDMENTS.—The amendments set forth in section 3004(b) of the Marine Mammal Health and Stranding Response Act (106 Stat. 5067)—

- (A) are deemed to have been made by that section to section 3(12) of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1362(12)); and
- (B) shall not be considered to have been made by that section to section 3(11) of that Act (16 U.S.C. 1362(11)).³⁰³

Here, it is indisputable that “that section” refers only to subsection (b) of Section 3004 of the Marine Mammal Health and Stranding Response Act (MMHSRA). Subsection (b) of Section 3004 of the MMHSRA had purported to amend the definition of “Secretary” in MMPA section 3(11) (16 U.S.C. § 1362(11)),³⁰⁴ when in fact the definition appeared in Section 3(12) (16 U.S.C. § 1362(12)).³⁰⁵ However, the Amendments in the other parts of Section 3004 are clearly inapplicable to MMPA section 3(12) and it would be both illogical and impossible to amend Section 3(12) according to their terms.³⁰⁶ It is clear in this context that “that section” must mean Section 3004(b) and cannot

³⁰¹ U.S. H.R. OFFICE OF THE LEG. COUNSEL, HOUSE LEGISLATIVE COUNSEL’S MANUAL ON DRAFTING STYLE at Sec. 341(f)(2) (Nov. 1995), https://legcounsel.house.gov/HOLC/Drafting_Legislation/draftstyle.pdf [<https://perma.cc/CRJ7-MWSW>] (accessed July 31, 2018).

³⁰² Of course, this is not to imply that the terms for more junior subdivisions such as “subsection” and “paragraph” are not used in the Amendments. They are used in specific situations in which the drafting conventions dictate their use. As just one example, section 4 of the 1994 Amendments provides that “[s]ection 101(a) (16 U.S.C. § 1371(a)) is amended—(1) by amending *paragraph* (1) to read as follows . . .” Marine Mammal Protection Act Amendments of 1994 § 4(a)(1). This clearly refers to Section 101(a)(1). For another example, Section 117 requires that the Secretary “shall, in consultation with the appropriate regional scientific review group established under *subsection* (d) of this section, prepare a draft stock assessment . . .” 16 U.S.C. § 1386(a) (2018). This is referencing Subsection (d) of the same Section (117).

³⁰³ Marine Mammal Protection Act Amendments of 1994 § 24(a)(1)(A)–(B) (emphasis added).

³⁰⁴ Marine Mammal Health and Stranding Response Act, Pub. L. No. 102-587, § 3004(b), 106 Stat. 5039, 5067 (1992).

³⁰⁵ See 16 U.S.C. § 1362(12) (defining *secretary*). See also High Seas Driftnet Fisheries Enforcement Act, Pub. L. No. 102-582, § 401, 106 Stat. 4900, 4909 (1992) (adding a definition to the MMPA and redesignating paragraphs (5) through (14) as paragraphs (6) through (15), which was enacted on November 2, 1992, two days before the passage of the MMHSRA). See Marine Mammal Health and Stranding Response Act Title 3 (enacting MMHSRA on November 4, 1992).

³⁰⁶ Subsection (a) of Section 3004 made changes to MMPA sections 102(a), 109(h)(1), and 112(c), and Subsection (c) made changes to Section 2 (16 U.S.C. § 1361). Marine

mean all of Section 3004. Similarly, “that section” in Section 5(c) of the Amendments clearly refers back to Section 104(c)(2), not to the entirety of Section 104.³⁰⁷

The limitation of Section 5(c) to Section 104(c)(2) is important because it means the elements of the 1994 Amendments outside of Section 104(c)(2)—even if they would arguably conflict with Permits No. 240 and No. 774—do not apply to pre-1994 permits. For instance, such provisions include the requirement to maintain an inventory, including “only” specified information which, in the case of mortality, would be limited to “the date of death” and “cause of death when determined.” Pre-1994 permits would not be modified to be consistent with this provision because it is found in Section 104(c)(10), not Section 104(c)(2).

Even if Section 5(c) were interpreted to require consistency with the whole of section 104, however, the necropsy requirements of the two permits would still apply because they are consistent with the entirety of the Section.³⁰⁸ The inventory is a separate reporting requirement established under the 1994 Amendments.³⁰⁹ Congress intended the inventory to be concise and short, without detailed narrative discussion.³¹⁰ Nowhere in the Amendments, however, did Congress declare that other information could not be required for other purposes. In fact, Congress did not repeal the preexisting authorization to include in permits “any other terms or conditions which the Secretary

Mammal Health and Stranding Response Act § 3004(a), (c). Only the Amendments in subsection (b) are applicable to Section 3(12) of the MMPA.

³⁰⁷ Marine Mammal Protection Act Amendments of 1994 § 5(c). This point is established and supported in reference to other environmental laws, including but not limited to, the: Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA); Endangered Species Act (ESA); and Clean Air Act (CAA). There are numerous examples that could be cited to confirm the use of this legislative drafting convention, including, for example, § 9604(e)(7)(A) of CERCLA states a person is “a bona fide prospective purchaser under § 9601(40) of this title if the person is otherwise described in that section.” “That section” must refer to § 9601(40) because it is the section that describes the criteria for a person to be a bona fide prospective purchaser. Additionally, § 1533(a)(3)(B)(ii) of the ESA states the “requirement to consult under § 1536(a)(2) of this title with respect to an agency action (as that term is defined in that section).” The legislators took an extra step to unambiguously specify that the term “agency action” is defined in § 1536(a)(2) by referring back to “that section.” Furthermore, there are numerous examples within the CAA supporting the use of “this section” refers to the section as a whole such as § 7403(b)(3), § 7403(b)(8), § 7403(h)(4)(i)(2), and § 7405(a)(1)(B). For instance, § 7403(b)(3) states “in subsection (a)(1) of this section . . . ,” clearly referring to a specific subsection of the entire section.)

³⁰⁸ Permit terms requiring the reporting of certain other information to NMFS are not inconsistent with limits on the contents of the inventory. The requirement that only certain information be included in the inventory limits the information that NMFS may require in certain specified situations in which rights were afforded to permit holders, including the transfer of animals and the birth of progeny, but does not preclude the agency from requiring that other information be reported in other situations. Nor does it preclude the agency from requiring that certain information be made public.

³⁰⁹ Marine Mammal Protection Act Amendments of 1994 § 5(b)(10).

³¹⁰ *See id.* (requiring minimal information with no narrative requirement).

deems appropriate,”³¹¹ nor the requirement that “[a]ny person authorized to take or import a marine mammal for purposes of . . . public display . . . shall furnish to the Secretary a report on all activities carried out by him pursuant to that authority.”³¹² Necropsy and clinical history reports provide important information about the cause of death and other health conditions of the animal. They supplement, rather than conflict with, the information contained in the inventory.³¹³ As a result, it is not inconsistent with any aspect of the 1994 Amendments or any provision of Section 104 for a permit condition to require a necropsy report and clinical history. Since the deaths of Tilikum and Kasatka trigger both requirements, SeaWorld must now file the inventory information required in Section 104(c)(10)(H) *and* comply with the necropsy requirements of Permits No. 240 (Kasatka) and No. 774 (Tilikum, Kyara).

The provisions of Section 104(c)(2), which Permits No. 240 and No. 774 were modified to be consistent with, are limited to: (1) the criteria a facility must meet to hold a public display permit;³¹⁴ (2) the right to transfer, import, export, possess, etc. by right, without any additional permit;³¹⁵ (3) the rights of the party acquiring the marine mammal to do so without obtaining a new permit;³¹⁶ and (4) the 15-day notice requirement for sale, transfer, export, or purchase.³¹⁷ These requirements of Section 104(c)(2), as amended, have no effect on the necropsy provisions of Permit No. 774.

³¹¹ 16 U.S.C. § 1374(b)(2)(D).

³¹² *Id.* § 1374(c)(1).

³¹³ Of course, NMFS confirmed as much in its 1979 notice where it specifically left the necropsy provisions in place. *See supra* 190 and accompanying text (describing that SeaWorld would not release information about Tilikum’s necropsy report and related clinical history information).

³¹⁴ *See* 16 U.S.C. § 1374(c)(2)(A)(i)–(iii) (“A permit may be issued . . . for the purpose of public display only to a person which the Secretary determines—(i) offers a program for education or conservation purposes that is based on professionally recognized standards of the public display community; (ii) is registered or holds a license issued under 7 U.S.C. 2131 et seq.; and (iii) maintains facilities for the public display of marine mammals that are open to the public on a regularly scheduled basis and that access to such facilities is not limited or restricted other than by charging of an admission fee.”).

³¹⁵ *See id.* § 1374(c)(2)(B)(i)–(ii) (“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 chapter, to—(i) take, import, purchase, offer to purchase, possess, or transport the marine mammal that is the subject of the permit; and (ii) sell, export, or otherwise transfer possession of the marine mammal, or offer to sell, export, or otherwise transfer possession of the marine mammal . . .”).

³¹⁶ *See id.* § 1374(c)(2)(C) (“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 chapter.”).

³¹⁷ *See id.* § 1374(c)(2)(E) (“No marine mammal held pursuant to a permit issued under subparagraph (A), or by a person exercising rights under subparagraph (C), may be sold, purchased, exported, or transported unless the Secretary is notified of such action no later than 15 days before such action.”).

The third and fourth provisions noted above are irrelevant here, as there has not been a transfer of the animal to another party and statutorily required notice by SeaWorld of certain activities is not at issue.

Regarding the first provision noted above, the only criterion for holding a public display permit that is arguably relevant here is the 1994 Amendments' requirement that those in possession of such a permit also be "registered or hold a license issued under [the AWA]."³¹⁸ This provision does not, however, provide that the APHIS standards for care and maintenance preempt provisions imposed in pre-1994 MMPA permits. Section 104(c)(2) simply requires that the facility have an AWA license, not that the standards associated with such a license over-ride any other standards. In any case, no inconsistency exists between the terms of Permits No. 240 and No. 774 and the AWA standards. The APHIS regulations simply specify minimum requirements that must be met related to handling, care, treatment, and transportation of marine mammals in captivity, and nothing in the permit conditions conflicts with these baseline standards. Also, as noted above, in 1979, NMFS and APHIS determined that the necropsy provisions of previously issued permits would remain in effect after promulgation of the AWA marine mammal standards.³¹⁹

With regard to the second provision above, Section 104(c)(2)(B) provides that "[a] permit . . . shall grant to the person to which it is issued the right, without obtaining any additional permit or authorization under this Act, to [] take, import, purchase, . . . possess, [] transport . . . sell, export, or otherwise transfer possession of the marine mammal" that is the subject of the permit.³²⁰ First, it is noteworthy that permit conditions that relate to post-mortem activities such as necropsy do not relate to any of the listed activities for which no further authorization or permit may be required. However, even if such activities were deemed to relate to possession of the animal, for instance, the provision is inapposite. The provision prevents NMFS from (1) requiring regular public review, renewal, and potential amendment of public display permits in order to continue to possess marine mammals, or (2) requiring additional approval for a transfer of the animals, both of which had been features of the 1993 proposed rules.³²¹ However, the prohibition on requiring *additional* permits or authorizations for marine mammals that have already been taken or imported subject to a valid permit does not alter NMFS authority to include appropriate permit conditions in the *original* permit. This authority was explicitly

³¹⁸ Marine Mammal Protection Act Amendments of 1994 § 5(b)(2)(A)(ii) (amending 16 U.S.C. § 1374(c)(2)(A)(ii)).

³¹⁹ See *supra* Section III.A (discussing the pre-1994 permits).

³²⁰ 16 U.S.C. § 1374(c)(2)(B)(i). Note that the provision also provides the same rights related to offers to purchase, sell, export, or otherwise transfer the animal. *Id.* §1374(c)(2)(B)(ii).

³²¹ See *supra* Section III.B (discussing the 1994 permit amendments).

preserved in the statute.³²² Nor can the consistency provision eliminate such conditions in pre-1994 permits. If the authority to include these provisions remains after the 1994 Amendments, prior permits containing such provisions are clearly consistent.

The fact that NMFS may not require a further permit or authorization to take the animal subject to the permit does not alter this conclusion. The regulatory definition of taking includes actions which “harass, hunt, capture, collect, or kill” or attempts to do so, and includes “the collection of dead animals or parts thereof.”³²³ However, none of the activities associated with necropsy procedures meet this definition. The animal—and all its constituent parts—is already in the possession of SeaWorld. No “collection” is occurring. More importantly, however, the provision only prevents NMFS from requiring *additional* authorizations to engage in activities that result in a taking.³²⁴ The provision does not alter the authority to include valid conditions in the original permit. Nothing in the 1994 Amendments indicates that permit conditions related to necropsy are excluded from the scope of the congressional authorization to include “any other terms or conditions which the Secretary deems appropriate.”³²⁵

Modifying Permit Nos. 240 and 774 to be consistent with the requirements of Section 104(c)(2) therefore has no effect on the necropsy requirements. There are, however, sections of both permits that are affected by the 1994 Amendments. For example, one permit term requires that “[t]he Holder shall not sell or otherwise dispose of (1) any mammal, the taking or importation of which is authorized by this Permit . . . except with the approval of the Assistant Administrator and subject to such terms and conditions as the Assistant Administrator may prescribe.”³²⁶ This condition is clearly inconsistent with the 1994 Amendments’ provision granting permit holders the right to sell, export, or otherwise transfer possessions of the animals without obtaining any additional permit or authorization.

In addition, NMFS has consistently viewed necropsy reports as relevant to its responsibilities over marine mammals in the wild, not just in captivity. The importance of necropsy reports for non-captive marine mammals, before the 1994 Amendments and contemporaneous to the issuance of the Tilikum permit, is confirmed by the Dolphin Research Center correspondence between NMFS and the MMC in 1992, cited previously in this Article.³²⁷ As a result, it cannot be argued now that the necropsy provisions contained in Tilikum’s permit were relevant only to captive maintenance and husbandry issues, such that their applicability would have been terminated in 1994 when the

³²² See 16 U.S.C. § 1374(b)(2)(D) (authorizing the Secretary to require specification of any other terms or conditions the Secretary deems appropriate).

³²³ 50 C.F.R. § 216.3 (2018).

³²⁴ 16 U.S.C. § 1374(c)(2)(B)(i).

³²⁵ *Id.* § 1374(b)(2)(D).

³²⁶ PERMIT No. 774, *supra* note 80, at para. C.5.a.

³²⁷ Letter from John R. Twiss, *supra* note 260.

MMPA Amendments limited the NMFS's role to animals in the wild. NMFS's own actions confirm that, at the time it issued Tilikum's permit, it considered necropsy information important to its current role for conserving wild populations and addressing the health issues confronted by orcas in the natural environment.

Finally, the fact that NMFS may lack jurisdiction to regulate care and maintenance of captive marine mammals does not mean that it cannot gather information about the status of these animals to share for the benefit of science and the interest of the public. The MMPA policies set forth in Section 2, as discussed previously, provide a goal for NMFS to further the scientific knowledge, understanding and protection of marine mammals, including those such captive-held animals involved in interstate commerce.³²⁸ Obtaining necropsy and clinical history information clearly advances those policy objectives. SeaWorld itself has bolstered the need for necropsy information relative to wild populations by stating that the cause of death for all three whales was a disease that also affects orcas in the wild.³²⁹

Even if care and maintenance for these whales is limited to the standards under the APHIS AWA regulations, the necropsy requirements would still apply, as NMFS chose to leave the necropsy/clinical history provisions of the permits in place even after publication of the AWA marine mammal standards.³³⁰ The APHIS "minimum" standards do not prevent additional notification or reporting, such as the permit terms under consideration. The APHIS regulations contain a provision specifically related to marine mammal deaths which requires that "[a] complete necropsy, including histopathology samples, microbiological cultures, and other testing as appropriate, must be conducted by or under the supervision of the attending veterinarian."³³¹ The AWA regulations further require a licensee to prepare a preliminary necropsy report "listing all pathologic lesions observed" and a final report including "all gross and histopathological findings, the results of all laboratory tests performed, and a pathological diagnosis."³³² Necropsy records must be maintained for a period of three years and made avail-

³²⁸ See 16 U.S.C. §§ 1361(3)–(5) ("The Congress finds that—there is inadequate knowledge of the ecology and population dynamics of such marine mammals and of the factors which bear upon their ability to reproduce themselves successfully; negotiations should be undertaken immediately to encourage the development of international arrangements for research on, and conservation of, all marine mammals; marine mammals and marine mammal products . . . move in interstate commerce . . .").

³²⁹ *Kasatka*, *supra* note 104 (stating *Kasatka* succumbed to a bacterial respiratory infection); see *Life and Care of Tilikum at SeaWorld*, *supra* note 78 (stating *Tilikum* died of bacterial pneumonia); *SeaWorld is Saddened to Announce the Passing of Kyara*, *supra* note 99 (stating *Kyara* was treated for pneumonia and died of lung disease).

³³⁰ 44 Fed. Reg. 36868. Clearly, the AWA on its face is not intended to occupy the field (for example, the AWA does not prohibit the Secretary from promulgating their own standards). 7 U.S.C. § 2146(a) (2018).

³³¹ 9 C.F.R. § 3.110(g)(1) (2018).

³³² *Id.*

able to APHIS inspectors when requested,³³³ but there is no requirement for the reports to be made public or submitted to APHIS, unless requested to do so.³³⁴ APHIS generally does not require the necropsy reports to be submitted.³³⁵ As a result, there is no way for interested parties to obtain them unless the facility involved makes them available.

Permit Nos. 240 and No. 774 also require a necropsy report, but the report must be provided to NMFS.³³⁶ When the reports are in the possession of NMFS, they become public records subject to release under FOIA.³³⁷ Such a requirement is not inconsistent with the APHIS standards; it simply imposes an additional obligation to submit the reports to NMFS. The same is true of the permit requirements for an independent observer and making specimens available to the scientific community. Thus, it is possible to comply with both the conditions of Permit Nos. 240 and No. 774 and the APHIS regulations without creating an inconsistency—SeaWorld simply must conduct the necropsy, prepare the report required by the AWA, *and* notify NMFS to assign an observer and submit the resulting report to the Service.³³⁸

For all of these reasons, Permit Nos. 240 and No. 774 must be read in accordance with Section 5(c) of the 1994 Amendments so that some provisions are modified to be consistent with Section 104(c)(2), while other provisions remain intact as originally drafted. The necropsy/clinical history requirements of the permit are among the initial permit conditions that remain in effect without change.

6. *The 1994 Amendments Legislative History*

The legislative history of the 1994 Amendments generally supports the interpretation that pre-1994 permits remain in effect. There is some discussion in floor statements that would go further to prohibit enforcement of MMPA permit terms and conditions with respect to captive marine mammals, but these statements can be disregarded as inconsistent with the language of the amendments and of minimal value for statutory construction purposes because they are unilateral statements by individual members of Congress.

³³³ *Id.* § 3.110(g)(2).

³³⁴ *See id.* (requiring only that necropsy reports be “maintained at the marine mammal’s home facility and at the facility at which it died” and “presented to APHIS inspectors when requested.”).

³³⁵ *See* Memorandum from Donald C. Baur to File, *supra* note 188 (recalling that SeaWorld explained that no outside parties have a role in the process of granting requests for SeaWorld records).

³³⁶ *See* PERMIT NO. 240, *supra* note 122, at para. C.4.d; PERMIT NO. 774, *supra* note 80, at para. C.4.d.

³³⁷ CRS RL 30120, *supra* note 74.

³³⁸ In the event the necropsy has already been conducted, SeaWorld would be in violation of this permit requirement if it failed to provide notice to NMFS and discuss the use of an observer.

The House Report states that “[t]he requirement that a person be registered or licensed under the Animal Welfare Act should not be construed as granting the Secretary authority to prescribe regulations governing the care, handling, treatment, or transport of marine mammals. Such regulations are under the authority of the Secretary of Agriculture, as specified in the Animal Welfare Act.”³³⁹ This comment addresses NMFS authority to promulgate certain regulations, but does not implicate its ability to include conditions in previously issued permits.³⁴⁰ The legislation clearly maintained this authority, allowing the Secretary to include in permits “any other terms or conditions which the Secretary deems appropriate.”³⁴¹ Nor does it apply to pre-1994 permits; it concerns only future regulations to implement the 1994 amendments.

Several statements in the record indicate that members of Congress believed the 1994 Amendments would balance concerns related to the treatment of marine mammals in captivity.³⁴² And, in fact, to secure support for the bill’s final passage, a last minute addition to the bill was made during legislative negotiations between the House and Senate, adding a provision specifying that “[e]xcept as otherwise expressly provided, nothing in this Act is intended to amend, repeal, or otherwise affect any other provision of law.”³⁴³ These statements support the conclusion that the pre-1994 permit provisions remain in effect, except where expressly rescinded.

³³⁹ H. R. REP. NO. 103-439, at 40 (1994).

³⁴⁰ In 2003, a letter from the NOAA General Counsel addressing whether a South Carolina state law was preempted by the MMPA cited this part of the House Report, and stated that the 1994 Amendments “clarified that . . . a permit under the MMPA is not to include provisions for methods of supervision, care, or transportation of a marine mammal after the marine mammal has already been taken from the wild and placed in captivity for public display purposes.” Letter from James R. Walpole, Gen. Counsel, Natl. Oceanic & Atmospheric Admin., to James A. Quinn, Assistant Chief Counsel, S.C. Dep’t. of Nat. Res. (Oct. 10, 2003) (on file with *Animal Law*). However, this statement ignores the continued authority contained in the statute to include permit conditions. See 16 U.S.C. § 1374(b)(2)(D) (allowing the Secretary to exercise discretion in providing terms or conditions to permits). The General Counsel’s letter is correct that “the *central* federal authority to regulate the care, handling, treatment, or transport of marine mammals after the animals have been taken from the wild and placed in captivity for public display resides with the Secretary of Agriculture.” Letter from James R. Walpole, *supra* (emphasis added). However, this statement does not mean that NMFS authority to enforce the terms and conditions of pre-1994 permits has been eliminated, as discussed in Section III.C.5.

³⁴¹ 16 U.S.C. § 1374(b)(2)(D).

³⁴² See, e.g., 140 CONG. REC. S4933 (daily ed. Apr. 26, 1994) (statement of Sen. Kerry) (observing that the final package was a “strong environmental package” that “balances the concern for marine mammals in both the wild and captivity with the needs of the commercial fishing industry and others who interact with marine mammals”).

³⁴³ Marine Mammal Protection Act Amendments of 1994 § 2(b); see also 140 CONG. REC. S4923 (daily ed. Apr. 26, 1994) (statement of Sen. Stevens) (“We have also clarified in section 2 that nothing in S. 1636 is meant to amend, repeal, or otherwise affect other provisions of law, unless it has been expressly provided.”).

A floor statement associated with the 1994 Amendments makes broad claims about the effect of Section 5(c) that are inconsistent with the text of the statute. Representative Cunningham stated that the bill would invalidate some terms and conditions in pre-amendment public display permits. Representative Cunningham³⁴⁴ stated:

Finally, the committee intends to establish that existing permits, issued prior to the enactment of these amendments, are automatically modified to be consistent with these amendments. Thus, for example, any terms or conditions that the Secretary has incorporated into existing permits that relate to actual public display of the marine mammals; in the inspection of public display facilities and related records; or the captive maintenance of the standards for the humane handling, care, treatment, and transportation of marine mammals after they are taken or imported pursuant to a permit to take or import for purposes of public display; are null and void.³⁴⁵

This statement is broader than, and unsupported by, the text of Section 5(c) of the 1994 Amendments. As discussed previously, the Amendments only modified preexisting permits to be consistent with Section 104(c)(2). There is nothing in Section 104(c)(2) that applies as broadly as Cunningham's statements that preexisting permits are "null and void" as applied to "actual public display," the inspection of facilities and related records, or captive maintenance. And, as noted above, a NOAA ALJ has determined that pre-1994 Permits were not extinguished by the Amendments.³⁴⁶ Indeed, Section 5(c) did not render inconsistent provisions "null and void;" to the contrary, it modified them to be consistent with the 1994 Amendments.³⁴⁷ Even if Cunningham's interpretation is correct, however, necropsy reports are not covered by Section 5(c) because they involve dead animals and are not involved in what Cunningham describes as the "actual public display of the marine mammals" or "humane handling, care, treatment, and transportation," nor do they involve "the inspection of [] facilities."³⁴⁸

³⁴⁴ Congressman Cunningham resigned from Congress in 2005 after pleading guilty to accepting at least \$2.4 million in bribes from a defense contractor. Ed Henry & Mark Preston, *Congressman Resigns After Bribery Plea*, CNN (Nov. 28, 2005, 10:09 PM), <http://www.cnn.com/2005/POLITICS/11/28/cunningham/> [<https://perma.cc/6JHD-VGNP>] (accessed July 31, 2018). Cunningham represented the San Diego area where SeaWorld maintains a facility. *See id.* ("He represented the 50th district, which includes parts of San Diego and its northern suburbs.")

³⁴⁵ 140 CONG. REC. H2727 (daily ed. Apr. 26, 1994) (statement of Rep. Cunningham). *See also* 140 CONG. REC. H1604 (Mar. 21, 1994) (statement by Rep. Cunningham) (providing an identical statement over a month earlier).

³⁴⁶ *See In re Richard O'Barry*, 1999 WL 1417459 at *16-17 (NOAA June 8, 1999) ("Under the statute, this did not render existing public display permits issued before the enactment of the 1994 Amendments [to the MMPA] null and void . . .").

³⁴⁷ Marine Mammal Protection Act Amendments of 1994 § 5(c).

³⁴⁸ Cunningham statement, *supra* note 344. Cunningham's floor statement also has limited, if any, probative value in discerning the intent of Congress. Courts have ruled that "[s]tray remarks from individual legislators . . . are most often not probative of much of anything" and that "selective invocation of fragments of the floor debate is an object lesson in the perils of appealing to . . . legislative history as a guide to statutory

Necropsy reports are used to determine the cause of death, and do not conflict with any of the enumerated terms and conditions that Representative Cunningham declared “null and void.”

In fact, continued applicability of the necropsy and clinical history permit requirements make sense under the 1994 Amendments. Like Tilikum, Kyara, and Kasatka, the animals subject to MMPA permits were already removed from the wild or imported at the time of the Amendments. The permits containing those provisions were the result of NMFS decision making, after public comment and MMC consultation, and permit holders accepted the permits, and the animals, subject to those conditions and with the understanding that NMFS would obtain the information. Moreover, the resulting reports play a legitimate role in revealing important information about the animals whose removal or importation were approved with the understanding that their medical histories would be submitted to NMFS and be available for public disclosure. By leaving the necropsy/clinical history provisions in place, Congress was merely honoring the terms of decisions already made and ensuring that a final report would be made upon the death of the animals that had been approved for capture or importation. The purported burdens claimed by the public display industry caused by NMFS jurisdiction over the husbandry and maintenance standards of animals living in captivity would not be imposed by simply requiring the medical records of the deceased animals to be submitted to the agency.

Finally, as NMFS confirmed with its 1979 modification of Kasatka’s permit for consistency with the then new APHIS marine mammal standards, the necropsy provisions of MMPA permitting are not in conflict with the care and maintenance standards of the AWA. NMFS, with the agreement of APHIS and FWS, retained the necropsy provisions after very precisely deciding which permit provisions to rescind, including General Conditions that appear in context close to the necropsy requirement.³⁴⁹ The agency entered into a cooperative agreement to implement the new rules and the MMPA permits.³⁵⁰ NMFS rescinded General Conditions C.2.h., C.2.i., and C.6.b., but left in place

meaning The law is what Congress enacts, not what its members say on the floor.” *Szehinskyj v. Att’y Gen. of U.S.*, 432 F.3d 253, 256, 256 n.2 (3d Cir. 2005); *see also* *Crosby v. Nat’l Foreign Trade Council*, 530 U.S. 363, 390–91 (2000) (Scalia, J., concurring) (“[T]he statements of individual Members of Congress (ordinarily addressed to a virtually empty floor) [are not] . . . a reliable indication of what a majority of both Houses of Congress intended when they voted for the statute before us. The *only* reliable indication of *that* intent—the only thing we know for sure can be attributed to *all* of them—is the words of the bill that they voted to make law.”); *Gen. Steel Domestic Sales, L.L.C. v. Chumley*, 840 F.3d 1178, 1182 (10th Cir. 2016) (“[T]he best indicator of [legislative] intent is the statutory language.”); *U.S. v. Geiser*, 527 F.3d 288, 294 (3rd Cir. 2008) (noting that at *Chevron* step one, the question is whether Congress spoke directly to the issue and “legislative history should not be considered”).

³⁴⁹ 44 Fed. Reg. at 42204–05.

³⁵⁰ *Id.*

the necropsy requirement of C.4.d.³⁵¹ Had the agencies considered the necropsy provisions to be inconsistent with the APHIS standards, which also included a necropsy provision (9 C.F.R. § 3.110(g)), NMFS would have rescinded that General Condition.

D. Permit No. 774 Applies to the Progeny of the Animals Imported Under Its Authority

The permit, by its own terms, covers the progeny of the animals it authorized for importation.³⁵² The permit states that its terms and conditions “remain in effect as long as the marine mammals, *and/or the progeny of such marine mammals*, imported hereunder are maintained in captivity under the authority and responsibility of the Permit Holder.”³⁵³

The continuing applicability of Permit No. 774 to the progeny of the animals imported under its auspices is consistent with the MMPA, as amended. The rights granted to permit holders by the 1994 Amendments were also granted by Congress to those holding the progeny of the animals imported under the permits.³⁵⁴ However, the statutory language does not preclude the application of pre-1994 permits to the progeny of animals where the permit expressly provides for that result, as is the case for Permit No. 774. To the contrary, the 1994 Amendments recognize the continuing effect of the original permit, stating “[n]o *additional* permit or authorization shall be required to possess, sell, purchase, transport, export, or offer to sell or purchase the progeny of marine mammals taken or imported under this subsection.”³⁵⁵

A further provision of the 1994 amendments that requires notification of NMFS upon the birth of progeny of marine mammals subject to a public display permit, but prevents NMFS from requiring additional information beyond that necessary for the inventory, does not affect the applicability of pre-1994 permits to marine mammal progeny. These provisions evince a Congressional intent to prevent NMFS from requiring further authorizations upon the birth, transfer, transport, or export of marine mammal progeny or imposing additional conditions because of one of these triggering events. However, nothing in the language of the 1994 Amendments prevents NMFS from, or is inconsistent with, applying the conditions of permits to the descendants of the animals originally imported under a permit.³⁵⁶ In fact, reading

³⁵¹ *Id.* at 42205.

³⁵² PERMIT No. 774, *supra* note 80, at para. B.1.e.

³⁵³ *Id.* (emphasis added).

³⁵⁴ 16 U.S.C. § 1374(c)(8)(A).

³⁵⁵ Marine Mammal Protection Act Amendments of 1994 § 5(b)(8)(a) (emphasis added).

³⁵⁶ *See id.* (providing no prohibitions against NMFS applying the conditions of permits to the permit-animal's offspring). This provision directly precedes the provision requiring notification of the birth of marine mammal progeny to NMFS for purposes of the marine mammal inventory. *Id.* §5(b)(8)(B). The provision merely ensures that the

the 1994 amendments to prevent application of existing permits to progeny would effectively excise the term “additional” from the statute, rendering it “mere surplusage,” inconsistent with rules of statutory construction.³⁵⁷ Accordingly, the necropsy requirements of Permit No. 774 apply to Tilikum’s descendants, including the eleven offspring that have died. The death of Kyara therefore presents a current issue calling for enforcement of the progeny provision of Tilikum’s permit.

E. NMFS Should Enforce Permits No. 240 and No. 774 If SeaWorld Does Not Voluntarily Comply

As discussed in this Article, the information to be derived from necropsies and clinical histories on deceased marine mammals is of considerable interest to the public, and is potentially beneficial to science, stranding responses, husbandry, and the health and welfare of other animals, in captivity and in the wild.

Many marine mammals are in captivity as a result of permits that were issued under the public policy criteria defined by the MMPA and following a decision-making process that involves public comment³⁵⁸ and that recognize the public interest value of science and legitimate education associated with marine mammals.³⁵⁹ Facilities like SeaWorld that hold marine mammals are therefore not entitled to claim sole control over the information about the fate of these animals and withhold it from the public or review by the agency responsible for the authorizations that placed the animals in captivity. The necropsy provisions of Permits No. 240 and No. 774 do nothing more than memorialize the common sense and reasonable policy principle that infor-

required notification is made for all animals that had previously been born before the notification requirement came into effect, to ensure that the inventory was complete and contained all marine mammals involved in public display. *See* 16 U.S.C. § 1374(c)(10) (“The Secretary shall establish and maintain an inventory of all marine mammals possessed pursuant to permits issued under paragraph (2)(A), by persons exercising rights under paragraph (2)(C), and all progeny of such marine mammals.”). A final provision related to marine mammal progeny provides that “[a]ny progeny of a marine mammal born in captivity before the date of the enactment of the Marine Mammal Protection Act Amendments of 1994 and held in captivity for the purpose of public display shall be treated as though born after that date of enactment.” Marine Mammal Protection Act Amendments of 1994 § 5(b)(8)(C).

³⁵⁷ *See* *Williams v. Taylor*, 529 U.S. 362, 364 (2000) (observing that the Supreme Court has noted it is a “cardinal principle of statutory construction that courts must give effect, if possible, to every clause and word of a statute.”); LARRY M. EIG, CONG. RESEARCH SERV., STATUTORY INTERPRETATION: GENERAL PRINCIPALS AND RECENT TRENDS 13 (2011) (stating that statutory language is not to be construed as mere surplusage). It is clear that Congress anticipated that permits would continue to apply to the progeny of marine mammals imported or taken under public display permits and the statute cannot be read to divest NMFS of jurisdiction to apply the terms and conditions of those permits.

³⁵⁸ *See generally* 16 U.S.C. § 1371(a) (providing exceptions to the issuance of permits for the taking and importation of marine mammals).

³⁵⁹ *See generally id.* § 1361 (setting out the findings and policies of the MMPA, including the encouragement of research and conservation).

mation about the death of captive marine mammals held under an MMPA permit should be filed with the federal government and accessible to the public.

Considering the significant attention paid to the death of these animals and the strong public response of sadness and sympathy, as well as demands for a full accounting of the cause of their deaths and clinical histories, it is apparent that release of the clinical history and necropsy reports for the three whales are valuable for public information and scientific and medical research. While other marine mammals subject to the pre-1994 permits may have also been subject to necropsy provisions, the deaths of Tilikum, Kyara, and Kasatka put NMFS in a position where enforcement of these provisions becomes the subject of strong attention and demands for disclosure.³⁶⁰

If SeaWorld continues to refuse to comply with Permits No. 240 and No. 774, then NMFS will need to decide the appropriate course of action under the MMPA. While NMFS has a degree of enforcement discretion for MMPA permits, there is no reasonable basis upon which SeaWorld can be allowed to violate Permits No. 240 and No. 774 without penalties.³⁶¹ The factors that typically weigh in favor of prosecution are consistent with taking action in this case: a clear violation of the law; advance notice to the violating party; strong public interest for enforcement; clear factual evidence of a violation; and refusal of the violating party to accept remedial actions.³⁶² NMFS should enforce the permit requirements to the fullest extent and impose the maximum penalties.

If NMFS declines to enforce Permits No. 240 and No. 774, NMFS has taken a definitive position construing the meaning of Section 5(c) of the 1994 Amendments. As a result, the NMFS legal interpretation is subject to an APA legal challenge as arbitrary and capricious. For the reasons discussed in this Article, NMFS has no valid basis for its position, and is vulnerable to an APA challenge.

When a claim is brought pursuant to the APA, there must be “final agency action for which there is no other adequate remedy in a court.”³⁶³

Agency action “includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.”³⁶⁴ The Supreme Court has provided that administrative action is “final agency action” under the APA if: (1) the agency’s action is the “consummation of the agency’s decision making process—it must not be of a merely tentative or interlocutory nature”; and (2) “the ac-

³⁶⁰ See *supra* Section II.E. (discussing the necropsy report issue).

³⁶¹ See 16 U.S.C. § 1375 (2018) (imposing penalties of \$10,000 for each MMPA violation, with \$20,000 for knowing violations, imprisonment of up to one year, or both).

³⁶² See, e.g., U.S. Attorneys’ Manual, Tit. 9: Principles of Federal Prosecution (U.S. Dept. of Justice) at 9-27.220, 9-27.230, 9-27.250 (setting out factors for commencing or declining prosecutions).

³⁶³ 5 U.S.C. § 704 (2018).

³⁶⁴ 5 U.S.C. § 551(13) (2018).

tion [is] one by which ‘rights or obligations have been determined’, or from which ‘legal consequences will flow.’³⁶⁵

In this case, the affirmative action taken by NMFS in its March 10, 2017 email³⁶⁶ and subsequent letters by Director Oliver on the deaths of Kyara and Kasatka³⁶⁷ constitute final agency action reviewable under the APA. Specifically, NMFS has taken a definitive position interpreting the meaning of Section 5(c) of the 1994 Amendments that significantly changes the legal obligations of pre-1994 permit holders, has significant consequences for the development and implementation of species-specific regulations and protocols to improve the lives of animals, as well as compromises future research. In addition, due to the absence of a private cause of action under the MMPA, there is no other adequate legal remedy. Thus, an APA lawsuit is clearly in order. For the reasons discussed in this Article, NMFS has no valid basis for its position, and judicial review should lead to a decision that the agency incorrectly constructed the 1994 Amendments in concluding that the necropsy and clinical history requirements of Permits No. 240 and No. 774 no longer apply.

After the unfortunate deaths of Tilikum, Kyara, and Kasatka, public and media attention is intensely and vocally focused on SeaWorld’s accountability and cooperation, as well as the manner in which NMFS discharges its duties under the MMPA.³⁶⁸ NMFS should acknowledge that the necropsy and clinical history provisions of Permits No. 240 and No. 774 remain in full force and effect, and that SeaWorld must commit to full compliance and public disclosure. Hopefully, either SeaWorld or NMFS will take the steps necessary to achieve a positive end result where the health records of these whales will be made available to help answer some of the unresolved questions about their lives in captivity and disease threats to wild whales.

IV. RECOMMENDATIONS FOR ACCESS TO AND USE OF INFORMATION ON CAPTIVE CETACEANS

The permits for Tilikum, Kyara and Kasatka are the best examples of how elements of pre-1994 MMPA permits continue to apply. The permit provisions are an important source of information not only about orcas, but for all other marine mammals with similar permit requirements. NMFS routinely included clinical history, necropsy re-

³⁶⁵ *Bennet v. Spear*, 520 U.S. 154, 177–78 (1997) (citations omitted).

³⁶⁶ E-mail from Amy Sloan, *supra* note 178.

³⁶⁷ Letter from Chris Oliver, *supra* note 201.

³⁶⁸ See Fiona Keating, *SeaWorld: Former Trainer Says Deaths of Three Killer Whales a ‘Disgrace to Humanity’*, INDEPENDENT (Aug. 20, 2017, 11:46 AM), <http://www.independent.co.uk/news/world/americas/seaworld-killer-whale-orca-theme-park-john-hargrove-blackfish-kasatka-tilikum-dawn-brancheau-animal-a7903051.html> [https://perma.cc/34YJ-8CLQ] (accessed July 31, 2018) (reporting a quote from SeaWorld Trainer John Hargrove, that “SeaWorld will never release the autopsy but the internal wounds will be far worse”).

port, and site/record inspection requirements in pre-1994 permits.³⁶⁹ Progeny provisions were not included uniformly, but did find a place in most permits issued during the late 1980s and early 1990s. Many of the animals subject to these permits are still alive, or their medical records are in the possession of the facilities where they were, or are maintained.³⁷⁰ In the case of cetaceans, approximately 260 whales and dolphins that were acquired before 1994 are in captivity in the United States now, and most of these animals are subject to the permit requirements.³⁷¹ If NMFS were to adopt the position set forth in this Article, or if APHIS were to request the release of the information under its AWA Marine Mammal Standards, then a significant amount of new and important information would become available.

SeaWorld's failure to release information about the deaths of Tilikum, Kyara, and Kasatka and the injury to Katina points to the need for reformed procedures and legal requirements pertaining to the release of records of captive held cetaceans, if not all, marine mammals. These procedures fall into two categories: (1) reforming facilities' practices regarding access to and use of information about these animals; and (2) development of new legal criteria to compel release of this information in the absence of voluntary actions by facilities.

Unfortunately, the practice of keeping records of captive-held animals private, and resisting open access, is not limited to SeaWorld's position on the necropsy and clinical history records of its whales. Indeed, as noted previously, it appears that the federal agencies responsible for cetaceans (NMFS) and all captive animals subject to the AWA including cetaceans (APHIS), have taken no action to obtain necropsy reports since at least 1994.³⁷²

In addition, it appears that at least one segment of the public display industry continues to adhere to the philosophy of closed access and resistance to sharing information and records. In its April 25, 2018 testimony before the Senate, the Alliance of Marine Mammal Parks & Aquariums signaled its retrenchment in the stance of nondisclosure of records except the most basic information about captive marine mammals. While touting the 1994 Amendments as purportedly giving APHIS "the sole authority to regulate marine mammals in human care," the Alliance complained about the requirements to fill out the simplistic Marine Mammal Inventory Report, which is nothing more than a form requiring information on acquisition, disposition, and transfer/transport of marine mammals. The Inventory consists of one- or two-page forms for each category of information.³⁷³ The Alliance

³⁶⁹ See E-mail from Amy Sloan, *supra* note 167 (stating that NMFS has "[hundreds] more pre-1994 [public display] permits that have the same provisions").

³⁷⁰ NAT'L OCEANIC & ATMOSPHERIC ADMIN., *supra* note 12.

³⁷¹ *Id.*

³⁷² See *supra* note 73 and accompanying text (discussing that APHIS has never appeared to have requested such reports be submitted).

³⁷³ NAT'L OCEANIC & ATMOSPHERIC ADMIN., [www.fisheries.noaa.gov \[https://perma.cc/D3V7-J9FC\]](https://perma.cc/D3V7-J9FC) (accessed Aug. 2, 2018).

characterized the Inventory as “an anachronism,” containing “significant errors,” serving as a “holdover from days prior to the 1994 MMPA Amendments,” and a document that “duplicates information reviewed by APHIS.”³⁷⁴ Even though the 1994 amendments established the Inventory requirement as a duty of the Secretary of Commerce and NMFS,³⁷⁵ the Alliance testified to its position that “animal care is solely under the review of APHIS under the Animal Welfare Act and thus outside of NMFS’s jurisdiction with respect to maintaining the Inventory”³⁷⁶ and complained about FOIA requests for the information in the inventory.³⁷⁷

While the Alliance’s specific complaints about the Inventory could be the subject of a separate discussion, the essential point to be drawn from the testimony for the purposes of this Article is that, apparently on behalf of its sixty-four public display facility members, the Alliance remains wedded to keeping the medical records of cetaceans in captivity out of the public domain and away from disclosure at any level other than as part of APHIS procedures, which are seldom if ever invoked to obtain the relevant documents. The Alliance testimony therefore suggests a step in the wrong direction and away from greater transparency and voluntary disclosure.³⁷⁸

³⁷⁴ Prepared Statement of Rae Stone, on behalf of the Alliance of Marine Mammals Parks and Aquariums on Enhancing the Marine Mammal Protection Act 1, 5–6 (Apr. 25, 2018) [hereinafter Alliance Testimony].

³⁷⁵ 16 U.S.C. § 1374(c)(10).

³⁷⁶ Alliance Testimony, *supra* note 374, at 7.

³⁷⁷ *Id.* at 8. The purpose of the Alliance’s testimony appears to be to enlist Senate support to cause NMFS to revise the Inventory and its use to include less information and to amend the MMPA to “clarify” that the Inventory should not require the reporting of “still births.” The Alliance argues that still births do not fit within the “statutory scheme” of the MMPA because an animal that is “born dead will never become part of the inventory of animals at a public display facility” and that “still births of animals in human care have no scientific correlation with still births in wild populations.” *Id.* at 7–8.

³⁷⁸ Another recent example of the apparent nondisclosure of information regarding the death of captive animals (again from a program involving SeaWorld) concerns the sudden and unexplained death of every one of fifty-four stingrays on public display at the Chicago-area Brookfield Zoo on July 10, 2015. Complaint at 4–5, *PETA v. Forest Preserve District of Cook County*, No. 2018 e08520, Cir. Ct. of Cook County, Ill., Chancery Div. (July 9, 2019), at 4–5. The reported cause of the deaths was the malfunction of the exhibit’s life support system. The exhibit involved a partnership between the Zoo and SeaWorld, with some or all of the stingrays provided by SeaWorld. *Id.* In an effort to discover the cause of the malfunction and relationship to stingray health and captive maintenance, PETA filed a FOIA request on October 24, 2016. *Id.* The PETA request covered records of the Cook County Forest District, which contracted with the Chicago Zoological Society to operate and manage the Zoo. *Id.* at 2. In response, the District refused to disclose any records concerning SeaWorld or the Zoo’s stingray exhibit, arguing the operation of this exhibit and of marine mammal exhibits, was not a governmental function under the purview of the District that would make the documents subject to disclosure. *Id.* at 6. PETA then obtained an opinion from the Illinois Attorney General’s Office concluding that the District’s response violated the Illinois FOIA. *Id.* at 7. When the District failed to release the documents, PETA filed a lawsuit under State law,

As these examples demonstrate, the most important step is for captive display facilities to develop more transparent, impartial, and robust protocols for making important scientific data available to independent researchers on marine mammals in captivity, and marine mammal health generally. Facilities like SeaWorld have both a legal and ethical obligation for transparency with respect to the health and well-being of animals in their care. Legally, as this Article has discussed, that obligation is reflected in the very fabric of the MMPA and the existence, and ongoing applicability of necropsy provisions found in MMPA permits. Ethically, transparency is essential to demonstrating the industry's fulfillment of oft-touted promises to patrons that animals housed on captive display are in good health, experience positive welfare, and contribute to the survival of their counterparts in the wild.

If the captive display industry wishes to achieve transparency and promote science that truly advances the health and welfare of cetaceans, facilities must begin to publish the data that matters and allow independent researchers to do the same. Despite frequent claims by SeaWorld that they “release specific necropsy findings via peer-reviewed scientific papers where the information is useful to the health and management of both free-ranging animals and those in human care,”³⁷⁹ the scientific literature paints a different picture. Indeed, after over forty years of orca captivity and at least sixty-six orca deaths at SeaWorld alone,³⁸⁰ the theme park has apparently published only two peer-reviewed articles that mention an orca necropsy result.³⁸¹

Ultimately, rectifying the lack of transparency requires captive facilities to start publishing more articles on data that has real implications for animal health and well-being—data that matters to both the scientific community and the public at large. In addition, it requires

which is pending at the time of publication of this Article. *Id.* See Ese Olumhense, Elvia Malago, *PETA Seeks Brookfield Zoo Records*, Chi. Trib., July 19, 2018, at 4.

³⁷⁹ Stone, *supra* note 195.

³⁸⁰ See Jacob Krushel, *62 Orcas Have Died at SeaWorld—Not a Single One From Old Age*, Dodo (June 6, 2014), <https://www.thedodo.com/62-orcas-have-died-at-seaworld-580775893.html> [<https://perma.cc/328A-PHS8>] (accessed July 31, 2018) (“62 orcas have died at Seaworld, and not one has died of old age.”); *SeaWorld Euthanizes Sick Orca, Making Her Third Whale to Die at Park in 2017*, Fox News (Aug. 16, 2017), <http://www.foxnews.com/travel/2017/08/16/seaworld-euthanizes-sick-orca-making-her-third-whale-to-die-at-park-in-2017.html> [<https://perma.cc/5XSA-8FPW>] (accessed July 31, 2018) (“Kasatka’s death follows Kyara, who died three weeks ago at the age of three months at the SeaWorld in San Antonio, according to The Independent. Tilikum, who was featured in the 2013 documentary ‘Blackfish,’ also died in January at the age of 35.”); Nicole Hensley, *Unna is the Third Whale at Texas SeaWorld to Die in 2015*, N.Y. DAILY MAIL (Dec. 22, 2015), <http://www.nydailynews.com/news/national/unna-whale-san-antonio-seaworld-die-2015-article-1.2474493> [<https://perma.cc/6A7N-ATBU>] (accessed July 31, 2018) (“The female Orca, Unna, is the third whale in the past six months to die at the San Antonio park . . .”).

³⁸¹ See Charles Buck et al., *supra* note 195 (stating that the killer whale’s “necropsy was unremarkable”); Judy St. Leger et al., *supra* note 195 (discussing the examination of a 14-year old male killer whale at a marine park in San Antonio that died suddenly).

captive facilities to establish a transparent and objective protocol for the review of independent research proposals by scientists soliciting data on captive cetacean health, behavior, and welfare. For example: by formation of a review panel for independent research proposals containing at least one independent reviewer and the use of fixed criteria to guide an objective evaluation of the proposal's merits. Any rejections of data requests for valid research proposals should be accompanied by a full report on the reasoning for such conclusions, as well as an opportunity for ongoing negotiation around data accessibility. Furthermore, while captive display facilities should welcome independent researchers to consider collaboration and contribution from facility staff as appropriate, mandatory oversight and control over third-party research by a facility's staff should not be considered a mandatory pre-requisite to publication.

On the legal side, the best course of action is readily apparent: APHIS should take action under its existing AWA regulations for making necropsy reports available for all cetacean deaths. There is no reason that the APHIS should not routinely obtain these records wherever a whale or dolphin dies. The burden on facilities and APHIS is minimal. The facilities maintain the records anyway; they simply need to turn them over to APHIS. This information could then be published on a publicly accessible APHIS website, providing necessary transparency and avoiding the need for FOIA processing. After consulting with experts in the field, as well as NMFS, FWS and the MMC, APHIS should also issue guidance for SeaWorld and other facilities on how clinical history and necropsy reports should be prepared and submitted. Alternatively, APHIS could revise its regulations for the submission of such reports.

The course of action for NMFS is also simple: it should enforce the pre-1994 Permit conditions if public display facilities do not take voluntary action and APHIS fails to obtain the records. The fact that NMFS has refused to reveal the legal basis for its conclusion that the necropsy and clinical history requirements of pre-1994 permits have been "effectively extinguished" by Congress suggests a lack of confidence in its answer, especially considering the open and collaborative basis upon which the animal welfare groups shared their draft analyses and sought agency input. In any case, as discussed in this Article, there is a strong and compelling legal justification for NMFS to enforce the permits. It is very possible that, if NMFS adopts this position, SeaWorld and other facilities that currently refuse to share this information will voluntarily comply and the public interest will be advanced by open access to important information reports.

The federal agencies responsible for marine mammals could also address the problem, and encourage voluntary compliance, by developing guidelines and best practices on preparing and maintaining health records and making information available to third parties. NMFS, for example, has issued guidelines to the whale-watching industry on how to avoid take and protect whales when engaged in commercial opera-

tions.³⁸² Working together with APHIS, FWS, and MMC, NMFS could develop proposed guidelines reflecting the principles discussed previously in this Section. After receiving public comment, these final guidelines could serve as the standards to which facilities holding marine mammals would conform, thereby avoiding potential enforcement actions and advancing the causes of husbandry, medical care, and scientific research.

Therefore, in the interest of advancing sound science and in light of the demonstrable public interest and recognized international significance of marine mammals to society and to ocean ecosystems, we recommend that facilities like SeaWorld not only endeavor to comply with existing laws that require transparency, but to enhance their own protocols so that they may contribute more meaningfully to the protection and preservation of these incredible animals.

V. CONCLUSION

All cetaceans now in captivity in the United States come, in some way, from wild populations—either because they were captured before the MMPA, taken or imported under MMPA permits, are the offspring of such animals as a result of captive breeding, or are animals that stranded or required rescue and were determined to be non-releasable. As a result, the whales in the current stock of captive cetaceans trace themselves to having previously been part of, or derived from, the marine environment, which is a public trust resource protected for all citizens by the federal government. Where MMPA permits were involved, public review and transparent federal decision-making had to be conducted to make the necessary findings. While in captivity, the condition, possession, and transfer of these animals are subject to regulation under either the AWA or the MMPA. Thus, throughout their lifespan, these animals have been subject to extensive federal management and supervision to fulfill the public policies of the AWA and the MMPA; they are not subject to the sole control of the facilities that hold them.

The public interest in the care and maintenance of cetaceans in captivity continues, and in some cases increases, after they die. The information derived from their health records and necropsy reports is of considerable importance for scientific, husbandry, and public education purposes for cetaceans in captivity and in the wild. Unfortunately, the full reports and underlying data containing this information are often kept under the exclusive control of the facilities that hold the animals. Furthermore, although APHIS has the legal power to obtain this information for all of these animals and NMFS has such authority for certain pre-1994 permitted animals, no action has been taken to demand the release of this information.

³⁸² See *Whale Watch Guidelines*, 64 Fed. Reg. 29270 (June 1, 1999) (giving notice of revised guidelines for whale watching vessels in the northeastern U.S.).

At a conference in Orlando on January 8, 2018, former SeaWorld CEO Joel Manby criticized animal welfare advocates who oppose his company's maintenance of orcas in captivity as being "small-minded" and lacking in "critical thinking."³⁸³ Blaming *Blackfish* for SeaWorld's poor financial performance, Manby declared that "[w]e will still have whales for 50 years" and that "we get to keep the whales."³⁸⁴

Manby's criticism of animal welfare advocates as "small-minded" is a characterization better-suited for SeaWorld's own management of the scientific and medical information for its captive cetaceans and other marine mammals. Indeed, the term readily characterizes SeaWorld's refusal to share complete reports and data about the health, medical history, and cause of death of the whales and other marine mammals that it holds in captivity and uses for paid public entertainment.

If SeaWorld or the Alliance members have something to hide about their practices and the medical condition of these animals, then the failure to release such information has an explanation, but is still lacking in justification. Making medical information available to outside review can only improve the overall understanding of the status of whales and other cetaceans in captivity, as well as in the wild. Such information will be all the more important if one accepts Manby's own claims, unsubstantiated as they are, that the orcas will remain in captivity for another 50 years and that zoos and aquariums will be increasingly important to fend off species extinction 100 years from now, and the Alliance's position that "[k]nowledge acquired through research using husbandry data from animals in public display facilities, in tandem with field research, is essential to marine mammal conservation and one of the most effective ways to ensure the health and sustainability of wild marine mammal population in the 21st century and beyond."³⁸⁵

The best course of action for SeaWorld and other institutions is to provide a mechanism for full transparency and general availability of the information to qualified third parties. Such a practice should follow industry-wide standards which could be developed in consultation with government agencies, animal welfare organizations, scientific experts, and interested parties. SeaWorld and other facilities could, in short, follow a course of action consistent with the antonyms of Manby's characterization of animal welfare advocates as "small-minded" and become, instead, "broad-minded," "open," "receptive," and "tolerant."³⁸⁶ In the absence of such an enlightened and beneficial practice by SeaWorld and similarly situated facilities, the federal

³⁸³ Jessica Chasmar, *SeaWorld CEO Hits 'Small-Minded' Animal Activists Who Don't Know What They are Talking About*, WASH. TIMES (Jan. 8, 2018) <https://www.washingtontimes.com/news/2018/jan/8/seaworld-ceo-hits-small-minded-animal-activists-wh/> [https://perma.cc/6ZTH-FZT6] (accessed July 31, 2018).

³⁸⁴ *Id.*

³⁸⁵ Alliance Testimony, *supra* note 374, at 3.

³⁸⁶ Chasmar, *supra* note 383.

agencies should use their legal authority to obtain this information through enforcement action and make it available to the public under FOIA. Under either approach, the health and well-being of cetaceans would be advanced, and science would benefit, if industry practice and federal oversight follow a path of openness and collaboration rather than secrecy, dereliction of duty and, indeed, "small-mindedness."