

July 16, 2001

Ms. Teiko Saito
Director
Office of Management Authority
U.S. Fish & Wildlife Service
4401 N. Fairfax Drive, Room 700
Arlington, VA 22203



**Re: *Comments on Application No. PRT 020575 and
Application No. PRT 043001***

P.O. Box 959
Moss Landing, CA. 95039



P.O. Box 3513
Santa Barbara, CA. 93130-3513

A project of Earth Island Institute

Dear Ms. Saito:

These comments on Permit Applications Nos. 043001 and 020575 are submitted on behalf of the Earth Island Institute, Sea Otter Defense Initiative, Defenders of Wildlife, The Humane Society of the United States, and In Defense of Animals. PRT 043001 seeks a permit under section 104 of the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. § 1374, and the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"), to capture and export five Alaskan, or northern, sea otters (*Enhydra lutris kenyoni*) and export them to the Ibaraki Prefectural Oarai Aquarium in Japan. PRT 020575 seeks a permit under the MMPA and CITES to capture three Alaskan sea otters for export to the Aquamarine Fukushima Aquarium. In both cases the applicants mention that they need to capture and examine approximately 20 sea otters in order to settle on the desired number for export. For the reasons stated herein, these above-referenced organizations oppose both applications and request that they be denied.

Both applications fail to comply with the requirements of the MMPA and the U.S. Fish and Wildlife Service ("FWS") regulations governing the take and export of sea otters. As such, the MMPA and FWS regulations prohibit the issuance of these permits. In addition, FWS has not taken the steps necessary to comply with the National Environmental Policy Act ("NEPA") for these permits. Moreover, FWS' issuance of these permits is discretionary. As demonstrated in this letter, sound reasons and policy considerations dictate that FWS exercise its discretion to deny these applications.

A. Export Permits Cannot be Issued Under the MMPA

By letter of July 12, 2001, many of the organizations represented in this letter wrote to you to explain why FWS lacks authority to issue export permits for these facilities. By way of summary, the MMPA prohibits export unless authorized by permit. 16 U.S.C. § 1372(a)(4). No express authority exists for export permits. See id. §§ 1371(a)(1), 1374. Animals can be exported only pursuant to certain other kinds of permits, in this case public display. Id. § 1374(c)(2)(B)(ii). Public display permits cannot be issued to foreign facilities, however, because they are not registered or licensed under the Animal Welfare Act. Id. § 1374(c)(2)(A)(ii). The comparability provisions of section 104(c)(9) only allow for foreign facilities to receive marine mammals; that section does not authorize the issuance of permits to export the animals. Id. § 1374(c)(9). Apparently, FWS as well as the Marine Mammal Commission and the National Marine Fisheries Service share this view, as they joined last year in proposing an MMPA amendment to authorize such permits. See Attachment 1 (see section 304). This clear lack of authority requires the applications to be denied outright. In fact, they should not have even been accepted by FWS for review.

B. The Oarai and Aquamarine Fukushima Aquariums

1. The Receiving Facilities Do Not Meet U.S. Standards

When a foreign facility seeks to obtain an exported marine mammal for public display purposes, the Secretary must determine that the "receiving facility meets standards that are comparable to the requirements that a person must meet to receive a permit" under the MMPA for public display purposes. Id. § 1374(c)(9). The MMPA imposes the burden of proof on the applicant to establish that it meets standards that are comparable to the requirements in the United States. See id. § 1374(d)(3). In addition, FWS must be satisfied with the applicant's qualifications for proper care and maintenance and the adequacy of its facilities. 50 C.F.R. § 18.31(c). This is a heavy burden that requires the benefit of the doubt to be given to the marine mammals. See, e.g., H.R. Rep. No. 707, 92d Cong, 1st Sess. 15, 18 (1971). Accord Committee for Humane Legislation v. Richardson, 414 F. Supp. 297, 309 (D.D.C. 1976), aff'd, 540 F. 2d 1141 (D.C. Cir. 1976).

Neither permit applicant can meet the required burden of proof. Moreover, the record before FWS demonstrates that neither applicant has a care and maintenance program and record that would pass muster under domestic requirements. Finally, Japan's overall marine mammal program fails to meet comparability standards under United States law.

Mark Berman, Assistant Director, International Marine Mammal Project of Earth Island Institute, observed in June 1999 that Oarai Aquarium had tanks for its dolphins that were overcrowded and had a strong chlorine smell. Further observations documented at least five bottlenose dolphins and one false killer whale in the main tank. A small perimeter tank had a Pacific white-sided dolphin and three other dolphins. The sea lion enclosure was inadequate with very little space to haul out on. One California sea lion and its pup were in a kennel inside a warehouse without a pool and they were on concrete. The staff told Mr. Berman that this was to keep them from the other sea lions. These situations and substandard conditions observed by Mr. Berman would not be allowed in the United States. Mr. Berman also observed, inside the warehouse, three newly caught dolphins from the Futo drive fishery that were being trained. The dolphins ignored the trainers and swam in a continuous circle appearing agitated. In addition, it is noted that the current application does not mention the presence of the false killer whale and Pacific white-sided dolphin. The Oarai Aquarium has stated that between October 2001 and March 2002, during the next drive fishery in Taiji and Futo, they will purchase additional cetaceans. This is in direct conflict with the spirit of the MMPA as, through this purchase, Oarai Aquarium is condoning the continuation of this brutal slaughter.

In addition, Japan itself cannot meet the comparability requirements of section 104(c)(9). Japan does not maintain care, maintenance and humane treatment standards that compare to those of the United States. Some Japanese aquaria, including Oarai Aquarium, participate in the drive fishery to acquire cetaceans. This is in contradiction with the MMPA. In 1993, Earth Island Institute (EII) legally challenged the imports from Japan drive fishery catches. EII proved that this was an inhumane take under the MMPA, therefore, it is reasonable to conclude that Oarai Aquarium's actions are inconsistent under the MMPA. Thus, even if these facilities satisfy Japanese standards, the permits must still be denied because those standards are not comparable to U.S. law.

2. Japan Cannot Provide Comity with United States Standards

It is standard practice under the MMPA to require foreign countries to afford comity to U.S. laws prior to authorizing export. In this case, Japan cannot do so because its marine mammal practices and laws are so fundamentally at odds with U.S. law that any gesture of comity is meaningless. For example, the drive fishery allowed under Japanese law, and used by the Oarai Aquarium to collect bottlenose dolphins, is flatly prohibited under U.S. law. No country that engages in such a gruesome fishery can legitimately accord comity to U.S. laws. In addition, Japan has repeatedly flaunted the

principles and policies adopted under the International Convention for the Regulation of Whaling, further distancing that country from any possible comity relationship with the United States. For these reasons, comity cannot be provided, and the permits must be denied.

3. Oarai Fails to Meet Professionally Recognized Conservation Standards

In evaluating an application for a permit to take marine mammals for public display, the MMPA requires the Secretary to determine that the applicant "offers a program for education or conservation purposes that is based on professionally recognized standards of the public display community." *Id.* § 1374(c)(2)(A)(i). This requirement governs the subject facility's entire education and conservation program. Thus, in evaluating the Oarai facility, FWS cannot look to the program for sea otters alone, but must also determine whether the facility's overall education/conservation program is based upon professionally recognized standards of the public display community. A review of Oarai's entire program demonstrates that this theme park does not conduct its education and conservation programs in a manner that meets professionally recognized standards in the United States.

It appears that recently Oarai participated in a brutal and inhumane program for capturing marine mammals for public display. This was the dolphin "drive" capture in Futo, Japan. This brutal capture method resulted in over 100 dolphins being herded into shallow water, where many were butchered. See Attachment 2, dated June 27, 2001, from Sakae Hemmi, Institute for Environmental Science and Culture, Inc. to FWS. Ms. Hemmi wrote about the brutal Oarai capture in 1996 in her report "A Report on the Dolphin Catch Quota Violation." See Attachment 3. Videotape of this activity is enclosed. See Attachment 4.

The last time a facility in the United States considered such activities, the National Marine Fisheries Service ("NMFS") requested additional information on this capture method. Serious questions were raised whether that technique would qualify as humane, and a strong public outcry resulted. In that instance, in 1993, Marine World Africa-USA sought permission to import false killer whales from a facility that had acquired the marine mammals using the drive capture method. NMFS requested additional information on the drive method of capture and expressed concern that such a practice would not be humane, as required under section 104(b)(2)(B) of the MMPA. The applicant failed to produce the requested information, and the application lapsed. Since that time, there have been no requests by a U.S. facility to acquire marine mammals captured by such a technique.

This drive capture method is, without question, an unacceptable way to take marine mammals. Obviously, it does not satisfy the "humane" requirements of section 104(b)(2)(B) of the MMPA. Under no stretch of the imagination can it be said to meet professionally recognized standards of "conservation" in this country. Nor could it be concluded that a facility involved in such an unacceptable practice can maintain an "education program" that would be sanctioned under the MMPA. In this country, no public display facilities currently engage in drive capture methods. For FWS to issue a permit to Oarai would be to say that involvement in such activities, as recently as last fall, is an acceptable practice under the MMPA and merits the issuance of a permit to collect marine mammals in U.S. waters. Such a precedent would make a mockery of section 104(b)(2)(B).

Based upon Oarai's use of the drive method for the capture of marine mammals for public display purposes, the record does not support a determination by the Secretary that this facility has an education or conservation program based on professionally recognized standards. Thus, FWS must deny Oarai's application.

There is not much history on Aquamarine Fukushima. This facility is very new and has a marine mammal corner, which is small by comparison. It has 2 Steller sea lions, 2 harbor seals, two California sea lions and one captive born sea otter from another aquarium. There is insufficient evidence in the record to support a finding that this facility meets U.S. standards. In addition, because Japan cannot afford comity.

4. The Applicants Fail to Meet Their Burden of Proof Showing the Need to Collect Wild Sea Otters

The MMPA requires that the applicant prove that issuance of the permit is consistent with the purposes of the MMPA. 16 U.S.C. § 1374(d)(3). See also 16 U.S.C. § 1371(a)(1); 50 C.F.R. § 18.31(c). In adopting the MMPA, Congress found that marine mammals move in interstate commerce and affect the balance of ecosystems in a manner that is important to animals and animal products that move in interstate commerce. Id. § 1361(5). Congress further found that the protection of marine mammals is important to insure the continuing availability of those products that move in interstate commerce. Id. This policy necessarily requires that if animals are available from captive sources, they must be used before the capture and removal of wild animals. FWS' recognizes this requirement through its permit application form, which directs the applicant to describe the efforts made to utilize captive animals in lieu of taking animals from the wild. See also NMFS Permit Regulations, 50 C.F.R. § 216.27(b)(4) (animals not to be taken from the wild if available from stranding sources).

In this instance, the applicants and their collector fail to meet their burden of proof establishing that there are no captive animals available. In fact, the applicant failed to contact such obvious facilities that hold northern sea otters as: New York Aquarium, Colorado's Ocean Journey Aquarium, Sea World of California, Oregon Zoo, Aquarium of the Americas, New England Aquarium, and Long Beach Aquarium of the Pacific.

C. The Applications Fail to Comply with FWS Regulations for the Taking and Transportation of Live Marine Mammals

The applications fail to comply with FWS' regulations governing the issuance of permits for the taking of marine mammals. See 50 C.F.R. § 18.31. If a marine mammal is to be taken and transported alive, then the application **must** contain "a written certification of a licensed veterinarian knowledgeable in the field of marine mammals that *he has personally reviewed the arrangements for transporting* and maintaining the animals and that in his opinion they are adequate to provide for the well being of the animal." Id. § 18.31(a)(3) (emphasis added). Neither application meets this requirement. The veterinarian statements we have been provided do not address all aspects of the transportation process.

This failure to certify the arrangements for transporting the otters constitutes a fatal flaw for each application. Certification of the arrangements for the transportation of the captured otters is of critical importance in light of FWS' acknowledgement of the high mortality rates associated with the capture and relocation of sea otters. See Draft Biological Opinion for the Formal Consultation on the Containment Program for the Southern Sea Otter ("Draft Biological Opinion") at p. 7, 11; Final Biological Opinion for the Formal Consultation on the Containment Program for the Southern Sea Otter ("Final Biological Opinion") at p. 9, 13 and Draft Evaluation of the Southern Sea Otter Translocation Program, March 1999 ("Draft Evaluation") at pp. 11-12, 15. Therefore, the applicant fails to meet its required burden of proof and, as such, the applications must be denied on the grounds that they fail to comply with the FWS regulations. See 16 U.S.C. § 1374(d)(3).

D. Failure to Satisfy NEPA

As discussed in the July 12 letter to FWS, the issuance of these permits is a federal action that triggers the National Environmental Policy Act ("NEPA"). Neither the Federal Register notice, nor the application materials provided to us, indicate how FWS intends to comply with NEPA. Clearly, at least an environmental assessment is required. This is an action that will have potentially significant effects on marine mammals and the ecosystem of which they are part. If such a document exists, it must be made available

for public review and comment. See 40 C.F.R. § 1506.6. Because FWS has not considered the environmental consequences of this action under NEPA, the permits cannot be issued.

E. The Fish and Wildlife Service Lacks Sufficient Information on the Status of the South Central Stock of Alaska Sea Otters

Recent studies have documented a dramatic decline in sea otters in Alaska. The data that we are aware of indicate that the Aleutian Island stock has declined 70% since 1992 and up to 95% throughout most of the Archipelago since the 1980's. During the 1980's, the population was estimated at 55,100-73,700 and in 1992, the population estimate was 19,157. Today, it is estimated that 6,000 sea otters currently remain in the Aleutian Islands. The identified collection site at Kodiak is affected by this decline. The applications do nothing to address this serious population decline. In fact, the only evidence they submit to meet their burden of proof is an article from the *Seattle Times* that suggests sea otter populations are healthy. There are many inaccuracies in this article on the status of the northern sea otter populations in Alaska and Washington State. To the contrary, the situation in Alaska is severe, and sea otters are in serious trouble. The status of the Washington state population documented that the highest count for the survey in 2000 was 504 sea otters, a decrease of 17% from 1999. The average finite rate of increase for this population since 1989, up until this most recent survey, has been 9.6%. There is no obvious explanation for the lower count in 2000. However, the results are reason for concern.

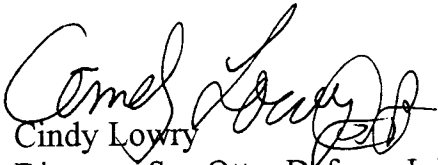
There is considerable scientific evidence on this issue that is well-known to FWS, and the applicant has the burden to evaluate and address. The applicants and their collector have not specified where these animals would come from. In fact, they appear to be seeking animals from the population involved in the decline. In the absence of reliable information on population status, FWS cannot make the findings required by section 101(a)(1), that takes shall be consistent with MMPA purposes and policies, or by section 18.31(c) of its regulations, on the effect of the takes on the affected population stock and the marine ecosystem. See, e.g., 16 U.S.C. § 1361(2)(6) (need to ensure population stocks remain healthy and above OSP). Therefore, the applications must be denied.

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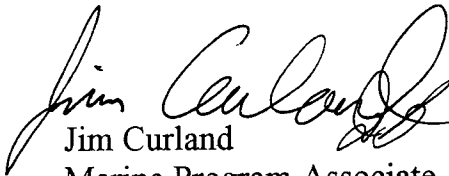
F. FWS Should Exercise Its Discretion To Deny The Applications.

FWS is not required to issue MMPA permits. Issuance of permits is a discretionary action. For all of the reasons stated above, issuance of these permits would present a severe risk to the animals involved. The facilities involved have husbandry records that fail to meet U.S. standards. At least one of the facilities has engaged in inhumane marine mammal capture practices that are vehemently opposed in the U.S. And the applicant has failed, in numerous respects, to provide the information required to obtain a permit. When all of these factors are considered, FWS has sound and compelling policy reasons to deny the applications. Indeed, it would be arbitrary and capricious for FWS to issue the permits in consideration of these factors. We respectfully request that both applications be denied. Should the applicant appeal such a decision, we request notice and opportunity to participate. Thank you for considering these comments.

Sincerely,



Cindy Lowry
Director, Sea Otter Defense Initiative



Jim Curland
Marine Program Associate, Defenders of Wildlife

cc: Barbara Kohn, DVM
Robert H. Mattlin, Ph.D
Ann D. Terbush