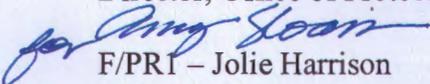




NOV 26 2019

Memorandum For: F/PR – Donna S. Wieting
Director, Office of Protected Resources

From:  F/PR I – Jolie Harrison
Chief, Permits and Conservation Division

Subject: Report on the Application for a Public Display Permit
[File No. 22686]: Recommendation for Issuance

I recommend the National Marine Fisheries Service (NMFS) issue a public display permit for the importation of three bottlenose dolphins (*Tursiops truncatus*), pursuant to the Marine Mammal Protection Act of 1972 as amended (MMPA; 16 U.S.C. 1361 *et seq.*) and the regulations governing the taking and importing of marine mammals (50 CFR Part 216).

The permit was requested by the Chicago Zoological Society, Brookfield Zoo (Bill Zeigler, Responsible Party), 3300 Golf Road, Brookfield, IL 60513.

Summary of Requested Activities

Species: Bottlenose dolphins.

Objectives: The importation of these animals is for public display purposes.

Location: Transport from Dolphin Quest Bermuda to either the Brookfield Zoo in Brookfield, Illinois or Coral World Ocean Park in St. Thomas, U.S. Virgin Islands.

Methods: Air and ground transport subject to the Animal Welfare Act.

Numbers of Animals: Three bottlenose dolphins identified in Appendix 1 of the permit.

Duration: The permit would be valid for five years from the date of issuance or upon completion of the importation of all three dolphins, whichever occurs first.

Chronology of Processing

October 17, 2018	Application submitted
October 23, 2018	Application attachments submitted
November 19, 2018	Request for additional information
December 13, 2018	Application resubmitted with revisions
December 26, 2018	Government shutdown began
January 25, 2019	Government shutdown ended



February 5, 2019	2 nd Request for additional information
February 19, 2019	Response from applicant and application determined complete
March 8, 2019	Application distributed to the Marine Mammal Commission (MMC)
March 19, 2019	Notice of application published in the <i>Federal Register</i> ; Application distributed to the U.S. Department of Agriculture (USDA), Animal and Plant Health Inspection Service (APHIS) and other NMFS reviewers
April 2, 2019	MMC recommendation letter received
April 16, 2019	Applicant provided additional information in response to comments from the MMC and public comments, and the revised application was posted online; Comment period extension published in the <i>Federal Register</i> and revised application distributed to reviewers
April 22, 2019	APHIS comments received
May 19, 2019	Public comment period closed
August 7, 2019	Request for additional information from the Brookfield Zoo based on comments received; Request for additional consultation from APHIS based on comments received
September 3, 2019	Applicant response to request for additional information received
September 19, 2019	APHIS response received

Summary of External Comments and Responses

NMFS published a notice in the *Federal Register* (84 FR 10044) announcing receipt of the application, making it available for public review for 30 days. In response to requests from the public and non-governmental organizations (NGOs), the public comment period was extended for an additional 30 days (84 FR 15595). The application was also provided to the MMC and APHIS.

The Marine Mammal Commission: The MMPA stipulates that NMFS may not issue a public display permit without first seeking review of the application by the MMC and its Committee of Scientific Advisors.

In a letter dated April 2, 2019, the MMC commented that both APHIS and MMC had received “communications from concerned groups alleging water quality problems at Coral World’s new dolphin enclosure” and that APHIS had inspected Coral World and approved the dolphin enclosure for use in February 2019, subsequent to receipt of water quality complaints. The MMC recommended NMFS not issue the permit until it had consulted further with APHIS to verify current compliance of Coral World with all applicable Animal Welfare Act (AWA) standards and regulations. The MMC further indicated the proposed activities are consistent with the purposes and polices of the MMPA.

Response: As per the MMC’s recommendation, in an email dated April 16, 2019, NMFS requested verification from APHIS that Coral World was currently in compliance with all applicable AWA standards and regulations as discussed below.

The U.S. Department of Agriculture’s Animal and Plant Health Inspection Service: Facilities holding marine mammals for public display purposes must be licensed by APHIS, and those marine mammals must be held and transported in compliance with the provisions of the AWA (7 U.S.C. 2131 – 2156). APHIS has jurisdiction under the AWA for enforcing the regulations for the humane handling, care, treatment, and transportation of mammals. On March 19, 2019, the application was forwarded to APHIS for review and comment specific to compliance of the recipient facilities (Brookfield Zoo and Coral World) with the AWA and APHIS’ implementing regulations. On April 16, 2019, NMFS forwarded the MMC recommendations to APHIS and requested verification that Coral World was currently in compliance with all applicable AWA standards and regulations, specifically including water quality.

In an email dated April 22, 2019, APHIS confirmed that the Brookfield Zoo and Coral World are licensed under and in compliance with the AWA and its implementing regulations. In making this determination, APHIS indicated that it had reviewed the alleged water quality problems received from concerned groups regarding Coral World as well as the water quality monitoring plan submitted by Coral World.

In addition, APHIS responded to allegations that the dolphins currently at Coral World were health compromised. APHIS commented that the current population of dolphins at Coral World were reported to be in good health and have effectively been quarantined, and that quarantine timeframes are at the discretion of the attending veterinarian.

APHIS concluded that it had no objections to the transport of the dolphins to Coral World, Brookfield Zoo, or both.

On August 7, 2019, NMFS requested an additional consultation with APHIS regarding two comments received from the public during the comment period regarding APHIS inspections and water quality. On September 19, 2019, APHIS confirmed that the latest inspection of Coral World on February 14, 2019, included inspection of the dolphin enclosure and the water quality test results since the last APHIS inspection. APHIS confirmed that no non-compliances were noted regarding water quality at Coral World. APHIS further clarified that should coliforms level rises above 1,000 MPN/100 milliliters (most probable number method), then the procedures outlined in Section 9 CFR §3.106 must be followed.

Response: NMFS reviewed Section 9 CFR §3.106(b) of APHIS’ implementing regulations pertaining to water quality testing, retesting, and water treatment. This section states “should a coliform bacterial count exceed 1,000 MPN, two subsequent samples may be taken at 48-hour intervals and averaged with the first sample. If such average count does not fall below 1,000 MPN, then the water in the pool shall be deemed unsatisfactory, and the condition must be corrected immediately.” In addition, APHIS requires that water samples are taken and tested weekly for coliform counts and that records at the facility document the time and results of sampling. These records must be maintained for one year and be available for inspection to APHIS upon request.

NMFS consulted with APHIS on two occasions regarding this application and potential water quality issues at Coral World. Based on APHIS' review and comment, NMFS is satisfied that both facilities are complying with the AWA and, specifically, that Coral World is complying with the AWA standards for water quality.

Public Comments: Public comments were received in the form of individual comments, online campaigns, and online generated form letters. Comments were received from members of the public as well as NGOs. A total of 14,578 comments were received on this proposed action. Comments were both in opposition to and in support of issuance of a permit. The majority of commenters opposed the import of these bottlenose dolphins. In addition, some commenters requested a public hearing on this application. While the request for a public hearing was not granted, the public comment period was extended for an additional 30 days (for a total of 60 days) to allow the public ample opportunity to comment on this application. The substantive, relevant comments were reviewed and summarized into the following topic areas:

1. General

Some commenters stated that the application was vague: that is, it was not clear which dolphins would go to which facility, and when the dolphins would be imported because a five-year permit was requested. Furthermore, some commenters stated that the infrastructure differences between Coral World and Brookfield Zoo are too disparate and should not be reviewed under the same application; rather, that two separate applications should have been submitted for each respective facility. Some commenters noted their difficulty in getting the inspection reports from APHIS for the Brookfield Zoo and Coral World, as well difficulties in obtaining territorial and federal agency records requested under the Freedom of Information Act (FOIA).

Other commenters argued that Coral World is operating as a business entertainment venture and its main purposes is to increase tourism, not to educate the public or conserve animals. Some commenters opposed dolphins in captivity and objected to the animals being used in breeding programs.

In addition, some commenters suggested that the United States should not participate in the international trade of this species and mentioned the Taiji, Japan drive fisheries in their comments.

Response: The application was submitted in accordance with NMFS's implementing regulations (50 CFR Subpart D) and followed the prescribed application instructions for public display (*National Marine Fisheries Service, Marine Mammals, Marine Mammal Public Display Permits*; OMB No. 0648-0084; Expires December 31, 2019). NMFS evaluated this application based on complete information being provided for both destination facilities, including descriptions of transport plans and facility infrastructures, and the option for all three animals to be imported to either Brookfield Zoo or Coral World. NMFS has determined that both facilities meet the criteria under the MMPA for public display¹; and, the applicant has met the issuance criteria in

¹ Section 104(c) states that applicants for public display permits must demonstrate that they meet these criteria to hold marine mammals for this purpose: 1) offering a program of education or conservation based on professionally recognized standards; 2) being licensed as an exhibitor under the Animal Welfare Act (7 U.S.C. 2131 *et seq.*); and 3) maintaining facilities that are open to the public on a regularly scheduled basis.

NMFS' implementing regulations for issuance of an import permit for public display purposes. Under the MMPA, permits may be valid for a maximum duration of five years, and NMFS has previously issued import permits for the purposes of public display for up to five years to account for the logistics of animal transport and facilities' animal management plans. The permit would be specific to the three animals identified for import and would expire upon completion of the importation of all three animals or at the end of five years, whichever comes first. The applicant submitted an application that was deemed complete and NMFS consulted with APHIS regarding the AWA compliance of both facilities. Additional information such as APHIS inspection reports are not required by NMFS.

The Brookfield Zoo is a member of both the Association of Zoos and Aquariums (AZA) and the Alliance of Marine Parks and Aquariums (AMMPA). Coral World is a member of the AMMPA. Therefore, both facilities meet the criteria set forth in the MMPA that facilities must offer "a program for education or conservation purposes that is based on professionally recognized standards of the public display community." Specifically, a *Federal Register* notice (59 FR 50900; October 6, 1994) was published by NMFS accepting the professional standards of the AZA and the AMMPA as meeting the education/conservation component of the MMPA regulations.

The MMPA provides for exceptions to the moratorium on take and import for the purpose of public display, including the issuance of import permits if certain criteria are met (16 U.S.C. 1374; Section 104 (c)). NMFS is making a decision based on this particular permit application for the importation of these three specific bottlenose dolphins that were born in captivity (and not collected from the wild or affiliated with the Taiji drive fishery).

2. Animal Welfare

Comments received regarding the humane handling, care, and treatment of captive marine mammals (including exhibit space, exposure to the sun, health of the animals presently at Coral World, and contingency plans) fall under the jurisdiction of APHIS under the AWA. NMFS consulted with APHIS regarding the AWA compliance of the facilities and these comments are not considered further.

3. Animal Transport

Commenters opposing the application argued that transport of dolphins is stressful, risky, inhumane, and this particular transport would be long and hot for the animals. Commenters noted that these animals have never been transported (causing additional stress) and transported animals are more vulnerable to health issues. They argue that the application lacks a detailed transport plan and references an out of date 2001 edition of the CRC Handbook of Marine Mammal Medicine. Another commenter suggested that Coral World's transport plan is unrealistic when compared to the transport of the Dolphinaris² animals in February 2019. This commenter argued that the transport plan needs to be updated based on real times associated with

² In February 2019, two dolphins were transported from Dolphinaris Arizona to Coral World Ocean Park under Section 104 (c)(8)(B)(i)(II) of the MMPA (15-day notification). Two additional dolphins were transported at the same time (February 2019) under an emergency authorization prior to the 15-day notification in order to allow the dolphin group to be transported together following a series of dolphin deaths at Dolphinaris Arizona since September 2017.

the previous transport and take into account timing, ambient temperatures, mitigation, and impacts to the animals. This commenter also argued that the complexity and risk of transport warrants an environmental impact statement (EIS) under the National Environmental Policy Act (NEPA).

Response: The applicant referenced their many collective years (among Brookfield, Coral World, and Dolphin Quest) of transporting marine mammals safely over many decades without incident and noted that it is widely accepted that marine mammal transport can be done safely. The applicant updated its references to include the CRC Handbook of Marine Mammal Medicine 3rd edition (Gulland et al., 2018) and indicated that their methods were consistent with those described in Chapter 33 (Marine Mammal Transport; Yip and Dold, 2018), which notes “specialized requirements for transport have been developed over years of experience.” These specialized requirements include both regulations (*e.g.*, APHIS) and standards (*e.g.*, International Air Transport Association (IATA)) established to safely, humanely and successfully transport marine mammals.

The Brookfield Zoo provided a description of the proposed transport protocols in the application including mitigation measures that would be employed to minimize stress, pain, and suffering. As examples, the applicant noted that the dolphins will be acclimated to transport stretchers and containers and will have health assessments prior to transport. They further confirmed that the transport would be conducted in accordance with federal regulations and IATA guidelines. NMFS disagrees with the commenter that transport conducted in accordance with professionally recognized standards conducted by staff with experience in marine mammal transport would trigger the need for an EIS under NEPA (see NEPA discussion below).

The applicant addressed the questions regarding the February 2019 transport to Coral World and disputed the claims made by the commenter specifically that the ground time unloading in St. Thomas took more than 12 hours. The applicant noted that the unloading in St. Thomas and the transport to Coral World took less than 3 hours. Based on the best available information, the applicant indicated that transport times in the application were best estimates.

While transport of marine mammals is under the purview of APHIS under the AWA, NMFS must also determine that the import is conducted in a humane manner, and the applicant has demonstrated such. APHIS did not indicate any concerns regarding the transport as described in the application and NMFS is satisfied with the proposed transport plan. The permit will require that the travel plan be documented at the receiving facility, and the animals must be accompanied by a health certificate signed by the attending veterinarian stating that the animal was examined within the prior 10 days and found to be in acceptable health for transport.

4. Effects on NMFS Protected Species

Commenters argued that Coral World’s construction of the dolphin enclosure destroyed many coral species within and adjacent to the underwater structures and, now that the exhibit is operational; the potential threat to nearby endangered species persists. In addition, commenters argued that wild dolphins could be exposed to pathogens from the dolphins currently at Coral World (the Dolphinaris animals), eat fish transiting between the dolphin enclosure and the

surrounding waters that may be contaminated by the captive animals, and that lack of quarantine might impact the wild dolphins should the imported animals harbor pathogens.

Response: Coral World obtained the appropriate permit under the Clean Water Act (CWA) from the U.S. Army Corps of Engineers (Corp) for the construction of the dolphin enclosure. During the CWA permitting process, the Corps consulted with the NMFS Southeast Regional Office under Section 7 of the ESA. The resulting Biological Opinion (BiOp, NMFS, 2016) considered the effects of the construction and operation of the proposed dolphin enclosure at Coral World on listed corals and critical habitat for corals³. NMFS concluded in the BiOp that the proposed action was likely to adversely affect but not likely to jeopardize the continued existence of these listed corals or result in destruction or adverse modification of designated critical habitat. The BiOp also included reasonable and prudent measures necessary to minimize the impact of incidental take associated with the action, including the requirement for an Environmental and Water Quality Monitoring Plan (Coral World, 2016) and associated reporting to the Corps and the NMFS Southeast Regional Office.

Following construction authorized under the Corps permit, the U.S. Virgin Islands (USVI) Department of Planning and Natural Resources (DPNR), agreed to amend Coral World's Territorial Pollution Discharge Elimination Systems (TPDES) permit to cover the continued operation of the new dolphin enclosure. This amended TPDES permit would incorporate the requirements of the NMFS BiOp (2016) including environmental and water quality monitoring into the future (Keularts, 2019).

As for effects on wild dolphins, the attending veterinarian for the Chicago Zoological Society/Brookfield Zoo provided a statement regarding the health of the dolphins that originated from Dolphinaris Arizona indicating that they do not perceive any risks of infectious disease from the animals. In addition, the veterinary staff reviewed all records available pertaining to the four dolphins that died at Dolphinaris Arizona and there was no indication of a common cause of death among the animals.

The applicant noted the perimeter fencing at Coral World meets or exceeds all USDA regulations and is adequate to prevent access by other animals. The exhibit space was inspected and approved by APHIS through the AWA exhibitor licensing process. In addition, the applicant explained that wild dolphins are infrequent visitors to Water Bay (the location of the Coral World facility) and given the construction of the enclosure it is unlikely for wild dolphins to come into direct contact with Coral World's public display dolphins. The applicant noted that when wild dolphins have been observed in Water Bay, they are seldom seen in the area of the Coral World dolphin enclosure and have not attempted to approach the enclosure.

In addition, the Environmental Assessment Report submitted by Coral World to the Office of Coastal Zone Management (CZM) includes a contingency plan for any dolphin that is diagnosed with a communicable disease. This includes moving the affected animal(s) to a closed

³ Elkhorn (*Acropora palmata*), pillar (*Dendrogyra cylindrus*), lobed star (*Orbicella annularis*), boulder star (*Orbicella franksi*), and mountainous star (*Orbicella faveolata*) corals; and elkhorn and staghorn (*Acropora cervicornis*) coral critical habitat

containment system or into the exiting on-shore sea lion pools. NMFS is satisfied with the applicant's response regarding assessment of the potential impacts on wild dolphins from the dolphins proposed to be imported to Coral World.

5. Water Quality at Coral World

Comments received regarding water quality concerns at Coral World generally fell into two categories: the first pertains to AWA water quality requirements under APHIS purview, and the second pertains to CWA water quality requirements for the TPDES permit under the purview of the USVI DPNR.

Commenters suggested that NMFS confirm that APHIS inspected and tested the water of the dolphin enclosure during the APHIS inspection in February 2019 (i.e., this was not just a spot check inspection by APHIS that did not consider routine water quality over time for the safety of the bottlenose dolphins). Commenters noted that the current APHIS standards for marine mammals require testing only for coliform bacteria and tolerate very high levels, which indicates a disconnect between USVI testing for human safety and APHIS standards for dolphin welfare. In addition, commenters claim Coral World is in violation of its TPDES permit and has been cited for violations of the CWA by the Environmental Protection Agency (EPA). Commenters urged NMFS to not issue a MMPA Section 104 permit for the import until Coral World is removed from the Significant/Category 1 Noncompliant category; the existing TPDES permit is modified to incorporate the dolphin enclosure; and, the TPDES permit includes water quality and environmental monitoring.

Response: NMFS contacted and confirmed with APHIS that the February 2019 inspection did include an inspection of the dolphin enclosure and the results of the water quality testing, and that it found no instances of non-compliance. APHIS further noted that water quality records are reviewed from the date of the last inspection and the inspections do consider water quality over time. APHIS also confirmed that "AWA bacterial standards set a cap of 1000 MPN/100 milliliters (most probable number method) for coliforms. If the coliform level rises above this, the procedures outlined in 9 CFR §3.106 must be followed." NMFS is satisfied based on APHIS' review that Coral World is complying with AWA standards of water quality.

NMFS also contacted DPNR, who issues and monitors the TPDES permits for the area, including Coral World, to confirm the status of the TPDES permit. DPNR explained Coral World is complying with their TPDES permit, including criteria for turbidity, clarity, and bacterial limits. DPNR also explained they are following all the necessary requirements to process an amendment to the existing TPDES permit, including incorporating conditions per the agreement between the Corps and NMFS Southeast Regional Office. DPNR also confirmed the amended permit would include environmental and water quality monitoring for the operation of the dolphin enclosure, which includes consideration for additional dolphins in the future. (Keularts, 2019). Refer to additional explanations about this status in subsection 6 below.

6. National Environmental Policy Act Review

Commenters argued that this NMFS action did not qualify for a categorical exclusion (CE) under NEPA: first, because the status of the TPDES permit and water quality issues indicated in subsection 5 above presents extraordinary circumstances that need to be considered in an

environmental assessment (EA) or EIS, and second, that NMFS cannot review the permit application independent of the construction and operation of the Coral World dolphin enclosure.

Response: NMFS' determination to apply a CE is appropriate and in compliance with NEPA, 40 CFR 1508.4 and NOAA policies and procedures for implementing NEPA. The decision NMFS needs to make under the MMPA is based on the authorities described in Section 104 of the MMPA, as applied to the information described in the application, and the potential environmental effects of the NMFS action, which is limited to those that would occur due to the authorization to import the captive-born bottlenose dolphins.

As for the argument that the status of the TPDES permit and water quality issues are extraordinary circumstances requiring consideration in an EA or EIS, NMFS disagrees. The mere presence of one or more extraordinary circumstances does not preclude the use of a CE. The presence of an extraordinary circumstance indicates only a potential for impacts. A CE still applies if further review and documentation reasonably supports the conclusion a potential impact is not "significant" for the purposes of NEPA. NOAA's extraordinary circumstances criteria are established to consider whether proposed action's potential effects are *significant* in terms of context (e.g., consideration of the affected region, interests, resources, etc.) and intensity (e.g., severity of impacts). As explained in the memorandum documenting the determination that a CE applies to NMFS's action (see Attachment 1), certain conditions must be present to be considered significant in terms of NOAA's extraordinary circumstances. For example, to be considered significant, Coral World's effects on water quality would have to fall within one or more of the following scenarios. At this time, none of these scenarios are present:

- Cause a substantial adverse effect on the affected species or stock or cause unnecessary risks to the health and welfare of marine mammals,
- Substantially degrade the quality of the area's water resources,
- Substantially contaminate a public water supply, or
- The TPDES permit would have to be revoked by USVI DPNR.

Under the CWA, water quality standards (WQS) are provisions of a state, territory, or authorized tribe approved by EPA⁴ that describe the desired condition of a water body, the means by which that condition will be protected or achieved, and used as the basis for actions under the CWA, such as establishing water quality-based effluent limitations. Water bodies are used for purposes such as recreation, scenic enjoyment or drinking water. To protect human health and aquatic life, states, territories and authorized tribes establish WQS, which form a legal basis for controlling pollutants entering the waters of the United States. WQS consist of three main components: designated uses of a water body, criteria⁵ to protect designated uses, and anti-degradation requirements to protect designated (USEPA, 2019). The USVI is under EPA Region 2; however, the USVI is the permitting authority for Coral World, not the EPA (USEPA, 2019).

⁴ States, territories and authorized tribes adopt WQS based on federal standards. If EPA determines states, territories and authorized tribes WQS meet CWA requirements; then their standards are applicable.

⁵ Water quality criteria can be numeric (e.g., the maximum pollutant concentration levels permitted in a water body) or narrative (e.g., a criterion that describes the desired conditions of a water body being "free from" certain negative conditions). States, territories and authorized tribes typically adopt both numeric and narrative criteria.

As noted in subsection 5, above, NMFS contacted the USVI DPNR to confirm the status of Coral World's TPDES permit. In these communications with USVI DPNR personnel, they confirmed Coral World is complying with the existing TPDES permit. In addition, USVI DPNR explained they are obligated to follow certain procedures necessary to amend the TPDES permit. Thus, USVI DPNR is reviewing all the post-construction reports associated with the water quality of the dolphin enclosure that were required by the CZM permit (i.e., the CZM permit required 12 months of post-placement monitoring) to form the basis for modified criteria (e.g., pollutant limits) and the associated water quality sampling and monitoring requirements. In addition, USVI DPNR confirmed, based on the sampling and monitoring reports provided to date, that water quality criteria for turbidity, clarity and bacterial limits are being met and the values are relatively low. However, to provide a fair assessment for making appropriate TPDES permit criteria, including pollutant limits, it is necessary for USVI DPNR personnel to review all reports, which are still in progress. In most cases, when a project like Coral World's dolphin enclosure is constructed, an aggressive sampling schedule can be reduced if provided results show low or zero concentrations of the pollutants being monitored. Thus, USVI DPNR indicated that when their review of Coral World's 12-month sampling period ends, they would determine a sampling schedule that is appropriate for that TPDES permit (Keularts, 2019).

As for the argument that NMFS cannot review the permit application independent of the construction and operation of the Coral World dolphin enclosure, NMFS disagrees. During the NEPA review, NMFS considers whether its proposed action is "connected" to one or more other actions, and if so, whether extraordinary circumstances preclude use of a CE. In addition, if a proposed action is related to but not part of a larger action (i.e., not connected), a CE may be appropriate. Given that construction is completed, the enclosure is operational, and dolphins currently reside at Coral World, NMFS determined the Chicago Zoological Society's request for a permit to import the captive-born bottlenose dolphins, while related, is not a connected action under 40 CFR 1508.25 (a)(1) ⁶ and therefore, is appropriately reviewed independent of the construction and operation of the facility.

Applicable Federal Permits and Consultations

MMPA Permit: Permits to import marine mammals for public display are issued under Section 104 of the MMPA and NMFS's implementing regulations at 50 CFR Part 216. These permits exempt take or import of marine mammals from the MMPA's take prohibition. An MMPA Section 104 permit is required for the activity described because it will result in importation of marine mammals for public display purposes.

Animal Welfare Act: Marine mammals held for public display purposes must be maintained in facilities licensed by the USDA APHIS, and held and transported in compliance with the provisions of the AWA 7 U.S.C. 2131 – 2156. APHIS has jurisdiction under the AWA for enforcing the standards and certification requirements for the humane handling, care, treatment, and transportation of mammals. As discussed above, APHIS reviewed the permit application,

⁶ Per 40 CFR 1508.25 (a)(1), connected actions mean they are closely related and therefore, should be discussed in the same NEPA document. Actions are connected if one or more of these three scenarios exists: 1-one action triggers the other 2-one action will not be taken unless others are taken previously or simultaneously 3-one action is an interdependent part of a larger action and depends on the larger action for its justification.

confirmed the recipient facilities meet AWA requirements, and stated there were no objections to issuance of the proposed permit.

Convention on International Trade in Endangered Species of Wild Fauna and Flora: Bottlenose dolphins are listed on Appendix II of CITES. The country of export must make findings prior to issuing the CITES export permit regarding: 1) the impact of the export on the survival of that species; 2) whether the collection of an animal was consistent with domestic laws; and 3) whether the shipment of an animal is done in a way that minimizes the risk of injury, damage to health, or cruel treatment. The permit includes a condition stating that the importation of marine mammals is subject to the provisions of CITES and that no marine mammal may be imported without the required CITES permits. In addition, the permit cover letter states that a CITES export permit is required from the Management Authority of the Government of the Bahamas for the importation of these bottlenose dolphins.

Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA) Consultation: Section 305(b)(2) of the MSFCMA requires NMFS to complete an Essential Fish Habitat (EFH) consultation for any action authorized, funded, or undertaken, or proposed to be authorized, funded, or undertaken by the agency that may adversely affect EFH. Consultation is required for renewals, reviews or substantial revisions of actions.

The Permits and Conservation Division determined that the permitted activity will not occur in areas with designated EFH and did not initiate consultation with the NMFS Office of Habitat Conservation. The proposed activity includes the transport of bottlenose dolphins from Bermuda to the United States. This activity will not affect EFH.

National Environmental Policy Act Documentation

The memorandum documenting the determination that NMFS issuance of Permit No. 22686 to the Chicago Zoological Society qualifies to be categorically excluded from further NEPA review is part of the administrative record for this permit (see Attachment 1).

Findings and Recommendation

As required by the MMPA and NMFS regulations, and as informed by other relevant information, including coordination with the MMC, APHIS and DPNR, and public comments, the information provided by the applicant demonstrates that:

- the import is humane and does not present any unnecessary risks to the health and welfare of marine mammals;
- the import will be consistent with the purposes of the MMPA and 50 CFR Part 216;
- the applicant's expertise, facilities, and resources are adequate to accomplish the objectives and activities stated in the application, including continued care and transport;
- the proposed activity by itself or in combination with other activities, will not likely have a significant adverse impact on the species or stock; and
- the requested import will not likely result in the taking of marine mammals beyond those authorized by this permit.

In accordance with Section 102(b) of the MMPA and as codified in 50 CFR § 216.12, the Permits and Conservation Division has determined that the marine mammals proposed for importation were not 1) pregnant at the time of taking; 2) nursing at the time of taking or less than eight months old, whichever occurs later; 3) taken from a species or stock designated as depleted; or 4) taken in a manner deemed inhumane by the Secretary of Commerce.

MMPA Section 101(a)(3)(B) prohibits importation of depleted marine mammals under a public display permit. The prohibition states that no permit may be issued for the importation of any marine mammal which has been designated as depleted. Currently, there are five stocks of common bottlenose dolphins designated as depleted under the MMPA (which were split out from the coastal-migratory stock of bottlenose dolphins in the U.S. Mid-Atlantic). NMFS stated in the proposed depletion designation (56 FR 40594; August 15, 1991) that this particular (i.e., coastal-migratory) stock of bottlenose dolphins had not been a source of bottlenose dolphins for the public display industry. In other words, dolphins from the depleted stocks were presumed not to be among the dolphins held for public display. In addition, no wild captures of bottlenose dolphins for public display have occurred since 1989. Thus, in this case, NMFS has concluded that the captive born dolphins proposed for importation are not from lineages associated with this depleted stock.

As required by the MMPA, the permit specifies: 1) the effective date of the permit, 2) the number and kinds (species) of marine mammals that may be imported, 3) the location and manner in which they may be imported, and 4) other terms and conditions deemed appropriate. Other terms and conditions deemed appropriate relate to compliance with the AWA, animal health records, transport plans, CITES permits, and inventory reporting to ensure permit compliance. These terms and conditions are consistent with those in previous permits that NMFS has issued for importation for public display.

For the reasons explained herein and the CE memorandum (Attachment 1), I recommend you sign the permit with the terms and conditions as prepared by the Permits and Conservation Division.

References

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Keularts, Benjamin. Personal Communications. 2019. Department of Planning and Natural Resources, Division of Environmental Protection. Government of the Virgin Islands of the United States

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File No. 22686 Recommendation Memo Attachment 1: Categorical Exclusion for the Issuance of
Public Display Permit No. 22686



NOV 26 2019

MEMORANDUM FOR: The Record
FROM: *for Amy Sloan* F/PR1 – Jolie Harrison
Chief, Permits and Conservation Division
SUBJECT: Categorical Exclusion for the Issuance of Public Display Permit
No. 22686

NOAA Administrative Order (NAO) 216-6A requires all proposals be reviewed with respect to environmental consequences on the human environment. This memorandum addresses the determination that the issuance of a permit (No. 22686) for public display purposes qualifies to be categorically excluded from further National Environmental Policy Act (NEPA) review.

Proposed Federal Action

The National Marine Fisheries Service (NMFS) proposes to issue a permit for public display purposes under Section 104 of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*).

Description of the Applicants Proposed Activities

1. The permit applicant is the Chicago Zoological Society, Brookfield Zoo (Bill Zeigler, Responsible Party), 3300 Golf Road, Brookfield, IL 60513.
2. The permit would be valid for five years from the date of issuance or upon completion of the importation of all three dolphins, whichever occurs first.
3. Target species: Captive-born bottlenose dolphins (*Tursiops truncatus*).
4. Location: Import/transport from Dolphin Quest Bermuda to either the Brookfield Zoo in Brookfield, Illinois, or Coral World Ocean Park in St. Thomas, U.S. Virgin Islands.
5. Duration: The import of each animal would occur once during the five-year period.
6. Objectives: To import three captive-born bottlenose dolphins for public display purposes.
7. Methods: Air and ground transport subject to the Animal Welfare Act (AWA) and its implementing regulations governing the humane handling, care, and transport of marine mammals.

Applicable Categorical Exclusion

The issuance of a MMPA Section 104 permit for the import of bottlenose dolphins for public display purposes is consistent with activities identified in categorical exclusion (CE) B2 and there are no extraordinary circumstances with the potential for significant environmental effects that would preclude the issuance of this MMPA Section 104 permit from being categorically excluded. The following sections summarize the relevant factors supporting a CE determination for this action.

Determination Summary

In determining whether a CE is appropriate for a given MMPA Section 104 permit, NMFS considers the applicant's specified activity (applicant's action) and the potential extent and magnitude of impacts from the activity along with the extraordinary circumstances listed in the Companion Manual for the NAO 216-6A. The evaluation of whether extraordinary circumstances (if present) have the potential for significant environmental effects is limited to the decision NMFS is responsible for, which is issuance of a MMPA Section 104 permit for public display purposes (NMFS' action). While there may be environmental effects associated with the underlying action, potential effects of NMFS' action is limited to and associated with the issuance of an MMPA Section 104 permit and impacts for the import of marine mammals for public display purposes.

Since 2001, NMFS has issued 28 MMPA Section 104 permits for import of marine mammals for public display purposes. Of those, 25 were determined to qualify for a categorical exclusion. For the other three, NMFS prepared Environmental Assessments (EAs), which analyzed the environmental impacts of the import of marine mammals for public display purposes and resulted in Findings of No Significant Impacts. In addition, numerous EAs were prepared for the issuance of MMPA Section 104 permits for scientific research on marine mammals included under CE B2. These EAs addressed factors in 40 CFR 1508.27 regarding the potential for significant impacts and demonstrate the issuance of MMPA Section 104 permits for the categories of activities encompassed by CE B2 do not individually or cumulatively have a significant effect on the human environment.

For these reasons, only circumstances that are present and relevant to the consideration whether to issue a MMPA Section 104 permit to the Chicago Zoological Society is evaluated in the following subsections.

1. Extent and Magnitude of Proposed Import

The issuance of this MMPA Section 104 permit to import marine mammals for public display purposes would authorize the import (via air and ground transport) of three captive-born bottlenose dolphins from Dolphin Quest Bermuda to either the Brookfield Zoo in Brookfield, Illinois or Coral World Ocean Park in St. Thomas, U.S. Virgin Islands for public display purposes.

Import/Transport: The proposed activities that would be authorized by the permit (i.e., import/transport) are expected to result in minor, short-term (recoverable) behavioral effects on the individual captive marine mammals that are the subject of the permit. Marine mammals are regularly transported safely and successfully between zoological parks and aquariums due, in part, to utilizing specialized transport techniques and equipment and carefully monitoring the health and welfare of individuals (Yip and Dold, 2018). Transport, including moving animals via ground and air transportation, may result in stress to the affected animals, as evidenced by stress hormone studies (Schmitt et al., 2010, St. Aubin and Geraci, 1988). The stress likely increases as the amount of time spent in transport, as well as the amount of handling required, increases. The transport plan proposed by the applicant is intended to yield the least amount of stress practical given the logistical requirements. The applicant has demonstrated that the permit personnel (transport leads) are capable of supervising the care, transport, and maintenance of the animals and are properly trained in husbandry protocols and safety procedures. Air transport of the three animals would be conducted in compliance with the guidelines of the International Air Transport Association (IATA), Live Animals Regulations (LAR), the CRC Handbook for Marine Mammal Medicine (Gulland et al., 2018), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) Guidelines for Transport and Preparation for Shipment of Live Wild Animals, and all other applicable regulations, standards, and conditions set forth under the AWA and MMPA.

Prior to the transport, the subject dolphins would be acclimated to transport stretchers and containers to ensure their comfort and minimize stress, and, will be examined by a veterinarian and cleared for travel. The dolphins would be fasted for 18 hours prior to transport. The dolphins would be placed in specially designed transport containers suspended by a sling in water. The containers would be positioned onto trucks for transports to the airport, where the containers would be loaded onto a plane for flights to either Brookfield Zoo or Coral World. Once at the destination airport, the containers would be shifted to trucks for transport to the facility. Transport to Brookfield Zoo has been estimated to take 8 hours (direct to Chicago). Transport to Coral World has been estimated to take either 7 ½ hours (direct to St. Thomas) or 12 ½ hours (stopover in Miami, Florida). Coral World would request a designated port exemption to transport the dolphins directly to St. Thomas. During the transport, veterinary and husbandry staff experienced in marine mammal transports would accompany and monitor the animals. Water temperatures and animal temperatures would be monitored throughout the flight, and lighting and noise would be minimized for the comfort of the animals. In addition, ice and water would be available during the flight for the animals as needed for hydration. Attendants would have access to the dolphins at all times.

The dolphins would be expected to fully recover from effects of transport within days of arrival at their final destination(s). Based on data obtained from previous transports of cetaceans, the types of mitigation measures proposed as part of the application are expected to be effective at minimizing stress associated with import. St. Aubin and Geraci (1989) noted that most physiological stress response indices were reported to normalize within the first week of captivity, indicating that these are short-term stress responses. Therefore, authorizing the import of these dolphins is not expected to have significant adverse impacts to the individual animals that are the subject of this permit.

Destination Public Display Facilities: The subject bottlenose dolphins will be maintained at either Brookfield Zoo or Coral World Ocean Park. The applicant has indicated that two of the dolphins would be imported to Coral World and the other dolphin would be imported to either Coral World or the Brookfield Zoo. As public display facilities, these facilities are required to be licensed under the AWA and meet AWA standards for the humane handling, care, treatment, and transportation of marine mammals outlined in Section 9 CFR § 3.100 to 3.118 of the USDA's regulations implementing the AWA. This includes standards for such things as veterinary care, feeding, enclosures, and water quality. The Brookfield Zoo dolphin enclosure is an indoor space consisting of four interconnecting habitats circulating 1.1 million gallons of salt water. The main habitat is 110 feet long, 40 feet wide and 23 feet deep. Two circular holding areas are 35 feet in diameter and 14 feet deep. The medical area is 25 feet in diameter and 3 ½ feet deep. The man-made salt water is filtered through a series of sand-gravel filters, protein skimmers, and an ozone tower. As an indoor facility without access to natural bodies of water, the maintenance of these dolphins is not expected to have adverse impacts to non-target protected species, their populations, or habitats.

The Coral World facility is an open water habitat that includes an approximately 70,000 square foot fenced off area in Water Bay, St. Thomas, U.S. Virgin Islands. This habitat is open to ocean currents and has a natural bottom that ranges from 20 feet to zero feet depth. Coral World's dolphin enclosure and the surrounding area do not include State and National Parks or wilderness areas, wildlife refuges, National Marine Sanctuaries or National Monuments. In addition, Coral World's facility does not occur on properties listed or eligible for listing on the National Register Historic Places or National Historic Landmarks.

Impacts to listed¹ species including listed corals and sea turtles in the area in or adjacent to the Coral World dolphin enclosure, are not expected from public display/continued care and maintenance of the captive dolphins. Mitigation measures will be implemented to avoid or minimize effects to listed species that may occur in the area from operation of the facility (NMFS, 2016).

Regarding the potential effects of water quality at Coral World, NMFS determined that there would be no significant effects to bottlenose dolphins. To be considered significant, Coral World's effects on water quality would have to:

- Cause a substantial adverse effect on the affected species or stock or cause unnecessary risks to the health and welfare of marine mammals,
- Substantially degrade the quality of the area's water resources,
- Substantially contaminate a public water supply, or
- The TPDES permit would have to be revoked by the United States Virgin Islands (USVI) Department of Planning and Natural Resources (DPNR)

At this time, none of these scenarios exists. NMFS is satisfied the appropriate authority (USVI DPNR) is monitoring and tracking the status of Coral World's compliance with their TPDES permit and follows up with Coral World when a condition arises where corrective action is necessary to return to and maintain the limits established by their permit. In addition, the

¹ Species listed as threatened or endangered under the Endangered Species Act.

MMPA Section 104 permit, if issued, would be conditioned such that the Permit Holder is responsible to obtain any other permits, and to comply with any other Federal, State, territory, local or international laws and regulations.

During the public comment period for the submitted application, commenters informed NMFS that Coral World exceeded limits set forth in their TPDES permit. However, this should not be perceived as indication of a continuous condition resulting in significant impacts to affected species. Nor is this a condition causing unnecessary risks to the health and welfare of marine mammals or the surrounding environment of the dolphin enclosure. The quality of the water in any given area throughout any given year is dependent on multiple factors, such as the time of year, the amount of rainfall, temperature, and surrounding land uses. Thus, water quality can fluctuate, and while there is potential for fluctuations in water quality for the dolphin enclosure, maintaining water quality is likewise a continuous effort. In other words, achieving and maintaining compliance is ongoing and TPDES permits, including Coral World's, will always require some level of water quality monitoring, sampling, and corrective actions to maintain water quality/permit limits on a routine basis. This is an express purpose and goal of USVI DPNR water quality standards established for the area, which forms the basis to establish limits and other requirements in TPDES permits. In addition, based on communication with USVI DPNR personnel, they explained Coral World is complying with their TPDES permit, including criteria for turbidity, clarity, and bacterial limits. They also confirmed an amended TPDES permit will set forth appropriate limitations, monitoring, and sampling requirements, including conditions based on the agreement between the Corps and NMFS Southeast Regional Office for the operation of the dolphin enclosure. (Keularts, 2019).

Regarding the potential effects of water quality at Coral World in context of AWA standards, NMFS consulted with APHIS on two occasions regarding this application and potential water quality issues at Coral World. APHIS confirmed its inspection of the dolphin enclosure and the results of the water quality testing in February of 2019, and noted no issues of non-compliance. APHIS also confirmed that "AWA bacterial standards set a cap of 1000 MPN/100 milliliters (most probable number method) for coliforms. If the coliform level rises above this, the procedures outlined in 9 CFR §3.106 must be followed." 9 CFR §3.106(b) states "should a coliform bacterial count exceed 1,000 MPN, two subsequent samples may be taken at 48-hour intervals and averaged with the first sample. If such average count does not fall below 1,000 MPN, then the water in the pool shall be deemed unsatisfactory, and the condition must be corrected immediately." In addition, APHIS requires that water samples are taken and tested weekly for coliform counts and that records at the facility document the time and results of sampling. These records must be maintained for one year and be available for inspection to APHIS upon request. Based on APHIS' review and comment, NMFS is satisfied that Coral World is complying with the AWA standards for water quality.

Regarding potential effects from the proposed import of the captive-born dolphins to Coral World to non-target species including wild dolphins, the applicant indicated the perimeter fencing meets or exceeds all USDA regulations and is adequate to prevent release of the captive dolphins or access by unwanted animals. In addition, the applicant explained that wild dolphins are infrequent visitors to Water Bay (the area surrounding the Coral World dolphin enclosure) and due to the construction of the enclosure it is highly unlikely that wild dolphins could come

into direct contact with Coral World's resident captive dolphins. The applicant indicated that when dolphins have been spotted in the general area, they are seldom seen in close proximity of the dolphin enclosure and have not been observed attempting to approach the enclosure. Finally, the Environmental Assessment Report submitted by Coral World to the Office of Coastal Zone Management (Coral World 2012) includes a contingency plan for any dolphin that is diagnosed with a communicable disease. If such a case occurred, Coral World would move the affected animal(s) to a closed containment system or into the existing on-shore sea lion pools.

Based on these factors explained above issuance of the MMPA Section 104 permit for the import of these subject captive dolphins is not expected to have significant adverse impacts to non-target protected species or their populations in the areas the captive dolphins will reside or the adjacent areas of Coral World. Likewise, no effects to animals or habitats protected by the Magnuson-Stevens Conservation and Fisheries Management Act or the Migratory Bird Treaty Act are expected because the permitted activity is focused on the captive-born dolphins that are the subject of the MMPA Section 104 permit.

2. Other Relevant Factors

The issuance of this MMPA Section 104 permit will not result in highly controversial environmental effects or result in environmental effects that are uncertain, unique, or unknown. MMPA Section 104 permits to import marine mammals for public display have been issued for the same species in similar locations using methods and procedures that employ generally accepted standards and best management practices that have been tested, verified and approved. The proposed transport methods are well understood and documented (Yip and Dold, 2018) and prior analyses demonstrate that importation of captive-born marine mammals only affects the animals that are the subject of the permit.

The issuance of this MMPA Section 104 permit will not establish a precedent for future actions or represent a decision in principle about future actions with potentially significant environmental effects because NMFS' actions under MMPA Section 104 are considered individually and are based on the best available scientific information, which is continuously evolving. Therefore, issuance of a MMPA Section 104 permit to a specific individual or organization for a given activity does not guarantee or imply NMFS will authorize others to conduct similar activities. Subsequent requests for permits are evaluated upon their own merits relative to the criteria established in the MMPA and its implementing regulations (50 CFR Part 216) on a case-by-case basis.

NMFS compliance with environmental laws and regulations and Executive Orders (EOs) is based on NMFS' proposed action and the nature of the applicant's request. There are no other environmental laws, regulations, EOs, consultations, federal permits or licenses applicable to NMFS for issuance of this MMPA Section 104 permit to the Chicago Zoological Society for the import of marine mammals for public display purposes. However, it is the applicant's responsibility to secure the necessary Convention on International Trade in Endangered Species of Wild Fauna and Flora permits for import, AWA license, amended TPDES permit, and any other applicable permits or licenses. In addition, upon import, the continued care and captive maintenance of the imported dolphins falls under the jurisdiction of the U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) per the AWA. For example,

the holding of the imported dolphins at the destination facilities (e.g., licensing and maintenance of the facility and husbandry and veterinary care or compliance with other applicable environmental protection laws and regulations) is the responsibility of APHIS.

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