

## ANIMAL WELFARE ACT: WELFARE STANDARDS

*Cathy Liss discusses the changes to the standards after the 1985 Improved Standards for Laboratory Animals amendment to the AWA and the emphasis of performance standards that were implemented. Kimberly Ockene discusses the AWA regulations for commercial dog breeders and a petition for rulemaking that seeks to enhance these regulations. Naomi A. Rose and Georgia Hancock Snusz discuss captive marine mammals and their coverage under the AWA. Lastly, Anna Frostic speaks about public handling of exotic animals held at licensed exhibitors, which are regulated under the Act.*

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### I. THE 1985 IMPROVED STANDARDS FOR LABORATORY ANIMALS AMENDMENT TO THE ANIMAL WELFARE ACT: FROM ENGINEERING TO PERFORMANCE-BASED STANDARDS

By  
Cathy Liss\*

I'll be speaking about the shift from engineering to performance-based standards following passage of the 1985 Improved Standards for Laboratory Animals amendment to the Animal Welfare Act (AWA). I'll also touch on the continuing threat from the "regulatory reform" movement.

For those who aren't familiar with the Animal Welfare Institute (AWI), background on our work can be found at [www.awionline.org](http://www.awionline.org). I call particular attention to our efforts on behalf of animals in research. In the 1960s, the Institute sought adoption of the original AWA and worked towards adoption of various broadening and strengthening amendments thereafter. My involvement with the organization began

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\* © Cathy Liss is the President of the Animal Welfare Institute (AWI). She has been with AWI since she started as an undergraduate intern. She has served as Senior Research Associate, Executive Director, and is now the President.

minimum mandated space, there is no exercise requirement at all.<sup>48</sup> So they could literally spend their entire lives in a cage. The two other big-ticket items that we asked for are: A restriction on the frequency of breeding, which the agency has never addressed, and an annual hands-on veterinary exam.

The lack of breeding restrictions is very problematic for breeding dogs who are bred from the time they're very young until they're no longer able to breed. Just litter after litter, with no rest. There are different opinions among veterinarians and experts as to what are the appropriate parameters for breeding restrictions. However, there's widespread consensus that there should be some restrictions on the frequency of breeding.<sup>49</sup> Our petition requests no more than two litters in an eighteen-month period.<sup>50</sup>

For veterinary care, the current regulations require that there be a written veterinary plan that the breeder come up with in conjunction with their veterinarian and do require adequate veterinary care. However, there are no specific requirements as to what that means.<sup>51</sup> We have asked for there to be a requirement for an annual hands-on veterinary exam, which there currently is no requirement for.<sup>52</sup>

We think that there should also be a mandated screening of breeding dogs, on at least an annual basis, to screen them for hereditary defects before they're cleared for breeding, and also just to make sure that their body is in a reasonable condition to breed.<sup>53</sup> We also asked for certain types of preventive care such as vaccinations.<sup>54</sup>

Thank you.

### III. MARINE MAMMAL STANDARDS UNDER THE ANIMAL WELFARE ACT

By

Naomi A. Rose and Georgia Hancock Snusz\*\*\*

**Naomi A. Rose:** Good Morning, my name is Naomi Rose and this is my colleague Georgia Hancock Snusz, and we are going to talk about

<sup>48</sup> *Id.*

<sup>49</sup> *How Often Can You Breed a Female Dog?*, WHELPINGPUPPIES.COM (Feb. 3, 2017), <https://whelpingpuppies.com/how-often-can-you-breed-a-female-dog/> [https://perma.cc/6LWG-379S] (accessed Jan. 25, 2019).

<sup>50</sup> See Rulemaking Petition, *supra* note 25, at 29–34 (showing restrictions proposed to allow female dogs more adequate rest between litters).

<sup>51</sup> 9 C.F.R. § 2.40(b)(2).

<sup>52</sup> See Rulemaking Petition, *supra* note 25, at 43–44 (giving reasons for the proposal of more frequent veterinary care for dogs in these conditions).

<sup>53</sup> *Id.* at 37–38.

<sup>54</sup> *Id.* at 43–44. HSUS also had a few other miscellaneous items that were asked for which were also very important, but the ones already discussed were the key asks.

\*\*\*\* © Naomi A. Rose is Marine Mammal Scientist with the Animal Welfare Institute. Dr. Rose works on issues addressing cetacean capture, trade, and captivity. Georgia Hancock Snusz is now Of Counsel for the Animal Welfare Institute.

captive marine mammals. We're going to change up the pace a little bit here with regard to the Animal Welfare Act (AWA). These are the marine mammal species that are covered under the AWA: Obviously, whales and dolphins, seals, sea lions, and walrus are the ones you might expect, but also polar bears, sea otters, and manatees.<sup>55</sup>

Polar bears, of course, are just bears and sea otters are very closely related to river otters and other otters and weasels, but they are considered marine mammals because ecologically they are tied to the marine environment.<sup>56</sup> They cannot leave the marine environment and survive. Under the Marine Mammal Protection Act (MMPA),<sup>57</sup> they are considered marine mammals and therefore, the AWA also agrees that they are marine mammals. Now, the one good thing we can say about the AWA, when it comes to marine mammals, is that they have their own subpart, their own section of regulations.<sup>58</sup>

There are eighteen sections that are specific to marine mammals, so the AWA does recognize that they have special needs. That's about the extent of what's good in the Act, when it comes to these species. These eighteen sections were first promulgated back in the '70s<sup>59</sup> and there was a cooperative agreement with the National Marine Fisheries Service<sup>60</sup> under the MMPA to co-govern the care and handling of marine mammals in captivity.

Twenty years ago, the Animal and Plant Health Inspection Service (APHIS) actually recognized that those standards were out of date. In fact, they convened a negotiated rulemaking panel,<sup>61</sup> which I

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<sup>55</sup> This presentation was accompanied by a PowerPoint presentation which can be viewed at [https://law.lclark.edu/law\\_reviews/animal\\_law\\_review/](https://law.lclark.edu/law_reviews/animal_law_review/). The first slide showed several photographs of various marine mammals.

<sup>56</sup> See Marine Mammal Protection Act 16 U.S.C. § 1362(6) (2003) (providing a definition of marine mammal).

<sup>57</sup> *Id.*; *Public Display of Marine Mammals*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/national/marine-mammal-protection/public-display-marine-mammals> [<https://perma.cc/CPF7-5SDJ>] (accessed Jan. 25, 2019) (providing an overview of some of the key points from the MMPA); see also *Marine Mammals*, U.S. FISH AND WILDLIFE SERV.: INTERNAL AFF., <https://www.fws.gov/international/animals/marine-mammals.html> [<https://perma.cc/3QRF-MD92>] (accessed Jan. 25, 2019) (providing a list of the animals covered by the MMPA).

<sup>58</sup> 9 C.F.R. § 1.1 (2013); 9 C.F.R. §§ 3.100–3.118 (2012).

<sup>59</sup> *Marine Mammals: Humane Handling, Care, Treatment, and Transportation*, 44 Fed. Reg. 36,868 (June 22, 1979).

<sup>60</sup> This interagency agreement was signed on August 10, 1979, also with the U.S. Fish and Wildlife Service. See DEPARTMENT OF THE INTERIOR, U.S. FISH AND WILDLIFE SERVICE, ADMINISTRATION OF THE MARINE MAMMAL PROTECTION ACT OF 1972 (Apr. 1, 1971 to Mar. 31, 1980) at 14, <https://www.fws.gov/ecological-services/es-library/pdfs/Marine%20Mammal%20AR%201-979-1980.pdf> [<https://perma.cc/6G8R-FCSU>] (accessed Jan. 25, 2019); see also DEPARTMENT OF COMMERCE NATIONAL MARINE FISHERIES SERVICE, MARINE MAMMAL PROTECTION ACT OF 1972 ANNUAL REPORT (Jan. 1, 1997 to Dec. 31, 1997) at 121, [http://www.nmfs.noaa.gov/pr/pdfs/laws/mmpa\\_annual\\_1997.pdf](http://www.nmfs.noaa.gov/pr/pdfs/laws/mmpa_annual_1997.pdf) [<https://perma.cc/47U7-2V7E>] (accessed Jan. 25, 2019).

<sup>61</sup> Marine Mammal Negotiated Rulemaking Advisory Committee; Establishment, 60 Fed. Reg. 27,049 (May 22, 1995); Animal Welfare; Marine Mammals, Notice of Meeting, 61 Fed. Reg. 9371 (Mar. 8, 1996). See USDA AGRICULTURAL MARKETING SERVICE, WHAT

was a member of. This negotiating rulemaking panel was probably one of the first and only times that APHIS tried this method, as far as I am aware. It was an effort to get all of the controversy and all the adversarial positions hashed out, in advance of doing the rulemaking. That, theoretically, would allow the rulemaking to go ahead smoothly with minimal controversy and then be finalized in an expeditious manner.

They got together, and convened stakeholders from the federal agencies, from the zoo and aquarium community, and from the animal Non-Governmental Organizations (NGO), which is where I came in.<sup>62</sup> Also, a neutral arbitrator, Dr. Joseph Geraci,<sup>63</sup> whose job was to try to control the animus at the table and who had the confidence and trust of both sides of this debate. The Committee met several times over the course of these two years<sup>64</sup> and it was a very interesting process, as you might imagine. Believe it or not, we came to a consensus on thirteen of eighteen provisions.<sup>65</sup>

Now, that sounds really good but these sections were the low hanging fruit—the easy ones. Things like record keeping, staffing requirements, and so on. There were five sections we could not come to

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IS NEGOTIATED RULEMAKING? <https://www.ams.usda.gov/sites/default/files/media/Feb82011IntrotoNR.pdf> [<https://perma.cc/6RN4-8P8Y>] (accessed Jan. 25, 2019) (defining the term “negotiated rulemaking”).

<sup>62</sup> The following organizations were included on the Committee as voting members: American Zoo and Aquarium Association, Alliance of Marine Mammal Parks and Aquariums, International Association of Amusement Parks and Attractions, Marine Mammal Coalition, United States Navy, Center for Marine Conservation, The Humane Society of the United States, Animal Welfare Institute (representing a broad coalition of animal concern groups), American Association of Zoo Veterinarians, International Association for Aquatic Animal Medicine, International Marine Animal Trainers Association, and the Animal and Plant Health Inspection Service. The following organizations or individuals were included on the Committee as observers or consultants and did not vote on the final consensus reached by the Committee: Marine Mammal Commission, National Marine Fisheries Service, Fish and Wildlife Service, and Dr. Joseph Geraci, independent consultant to the Committee. Animal Welfare; Marine Mammals, 64 Fed. Reg. 8735 (Feb. 23, 1999) (to be codified at 9 C.F.R. pt. 3).

<sup>63</sup> Jacques Kelly, *Joseph R. Geraci, Expert in Marine Mammal Medicine and National Aquarium Official, Dies*, BALT. SUN (Sept. 15, 2015) <http://www.baltimore.com/news/obituaries/bs-md-ob-jospeh-geraci-20150915-story.html> (accessed Jan. 3, 2019).

<sup>64</sup> Animal Welfare; Marine Mammals, 66 Fed. Reg. 239 (Jan. 3, 2001) (to be codified at 9 C.F.R. pt. 3) (“The Committee conducted three sessions, on September 25 and 26, 1995, in College Park, MD; on April 1, 2, and 3, 1996, in Riverdale, MD; and on July 8, 9, and 10, 1996, in Riverdale, MD.”).

<sup>65</sup> *Id.* at 239–57. APHIS published regulations for those thirteen consensus-based sections (and on one paragraph in a 14th section). § 3.101 on general requirements for facilities housing marine mammals, including construction, water and power supply, drainage, storage, waste disposal, and washroom facilities; § 3.104(a) on general space requirements for primary enclosures; §§ 3.105, 3.107–3.110 on animal health and husbandry; § 3.105 on feeding requirements; § 3.107 on sanitation and pest control; § 3.108 on standards for employees and attendants; § 3.109 on separation of marine mammals; and § 3.110 on veterinary care. §§ 3.112–3.118 concern transportation of marine mammals.

consensus on.<sup>66</sup> Four were the conditions under which these animals are held, the meat of the matter as it were, no offense. This was where the panel could not come to a consensus. Those conditions include space requirements, indoor and outdoor facilities, which include temperatures, salinity, things like that. Then also water quality, what the bacterial levels and chemical levels in the water could be, how clear the water needed to be, etcetera. We could not come to consensus on those. Then there was the fifth section, which I will turn over to Georgia to discuss.

**Georgia Hancock Snusz:** The fifth section, section 3.111 covering swim-with-dolphin programs, was not part of the negotiated rulemaking process. It underwent its own traditional rulemaking, which began in 1994 after APHIS assumed full jurisdiction over swim-with programs.<sup>67</sup> They previously shared that jurisdiction with the National Oceanic and Atmospheric Administration (NOAA),<sup>68</sup> because NOAA administers the MMPA, but when the MMPA was reauthorized in 1994, this removed most of NOAA's jurisdiction over captive marine mammals and turned it over to APHIS.<sup>69</sup>

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<sup>66</sup> *Id.* at 248. No consensus was reached at all on 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. Consensus language was developed for general space requirements under § 3.104, but not on the specific space requirements for particular marine mammal species. *Id.*

<sup>67</sup> Animal Welfare; Marine Mammals, 60 Fed. Reg. 4383, 4383 (Jan. 23, 1995) (to be codified at 9 C.F.R. pt. 1 & 3).

<sup>68</sup> 16 U.S.C. § 1362(12)(A); see also *Laws & Policies*, NOAA FISHERIES, <http://www.nmfs.noaa.gov/pr/laws/mmpa/> [<https://perma.cc/2ZRV-HFVX>] (accessed Jan. 25, 2019) (identifying the three federal entities that share responsibility for implementing the Marine Mammal Protection Act).

<sup>69</sup> In 1993, NMFS published proposed MMPA regulations detailing the care and maintenance of marine mammals that were the subject of public display permits. Marine Mammals; Protected Species Special Exception Permits 58 Fed. Reg. 53,320 (Oct. 14, 1993). The regulations would have required, among other things, a certain level of content for the public display facilities' education and conservation programs. *Id.* at 53,361. The regulations also would have prohibited transfer of marine mammals without prior approval by NMFS, *id.* at 53,348, and would have required public and agency review and renewal of public display permits at least every six years, allowing amendments to take account of "changing circumstances." *Id.* at 53,344; see also *id.* at 53,328–29 (explaining the provisions limiting the period of permits). The public display industry objected to the proposed regulations, countering 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 conflicted with many of the standards established under the AWA. See Heather D. Rally et al., *Looking Behind the SeaWorld Curtain: Achieving Disclosure of Medical and Scientific Information for Cetaceans in Captivity Through Voluntary Compliance and Federal Enforcement*, 24 ANIMAL L. 303 (2018) (discussing how the 1994 amendments to the MMPA did not relieve NMFS from enforcement of permits issued prior to the amendments, including the progeny of those animals). The MMPA was written to be reauthorized approximately every four years or so, which led to periodic battles over various amendments to the law. A bill to reauthorize the MMPA, focused primarily on amendments to the provisions dealing with fisheries interactions, had been negotiated with various stakeholders starting in late 1992 and moved forward toward a vote through 1993, the same year as

In September 1998, APHIS published the final rule for the swim-with-dolphin programs.<sup>70</sup> While the NGO community would have preferred that swim-with programs be banned altogether, if swim-with was to be allowed, then the regulations agreed to weren't actually that bad. They were quite strict in that they required refuges or freely accessible places where the animals could go if they didn't feel like interacting with people.

They were also strict with regard to medical treatment required for the animals because they were exposed to additional risks from being in close contact with the public all the time. However, this swim-with rule was short-lived. Within six months, APHIS suspended enforcement when a few facilities that had only wading programs—meaning that participants were only in the water up to about their thighs—complained that it was unfair that they were included in the rule.<sup>71</sup> Instead of suspending the rule just for the wading programs, APHIS suspended it for everyone.

That was in April 1999. There still are no specific swim-with-dolphin regulations. The number of swim-with programs has probably increased three to five-fold since then,<sup>72</sup> and yet, except for that brief six-month window in 1999, these programs have only been covered by the general regulations. Please keep in mind that these animals are exposed to a constant stream of strange people and they're under increased stress because of that. Yet, they receive no special regulatory treatment.

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the NMFS proposed rule. In order to circumvent the proposed NMFS regulations, industry lobbyists worked behind the scenes to draft pro-captivity amendments to the MMPA, basically removing NMFS jurisdiction over captive marine mammals, and snuck them in (to a bill painstakingly negotiated by fisheries interests for well over a year) for approval just weeks before the final vote in April 1994. See David Kirby, *Death at SeaWorld: Shamu and the Dark Side of Killer Whales in Captivity*, 210–16 (2013) (detailing the timeline of events between industry lobbyists and animal activists in trying to convince Congress of their preferences). NMFS, the MMC, and environmental and animal welfare organizations fought back, vigorously opposing the public display industry amendments. See, e.g., *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) (urging Congress to impose stronger restrictions on capturing marine mammals) (statement of John Grandy, HSUS). After the 1994 MMPA amendments, APHIS realized it had to consider whether its standards were sufficient to stand alone without any additional permit conditions from NMFS, which is why it undertook the process to “update” the regulations vis-à-vis the neg-reg panel, commencing one year later.

<sup>70</sup> Animal Welfare; Marine Mammals, Swim-With-Dolphin Programs, 63 Fed. Reg. 47,128 (Sept. 4, 1998) (to be codified at 9 C.F.R. pt. 1 & 3).

<sup>71</sup> Animal Welfare; Marine Mammals; Swim-With-Dolphins Programs, 64 Fed. Reg. 15,918, 15,918 (Apr. 2, 1999) (to be codified at 9 C.F.R. pt. 1 & 3).

<sup>72</sup> The actual number of swim-with programs in the United States is difficult to determine, as there is currently no requirement under the APHIS regulations or the MMPA for facilities to report that this activity is occurring. Some public display facilities allow the public to swim with their dolphins in addition to presenting standard performances, while others are swim-with programs only.

In 1996, the parties participated in negotiated rulemaking and came to consensus on many sections, and yet the agency didn't publish the regulations for those consensus sections until 2001.<sup>73</sup> Even the industry was getting anxious for the agency to publish the regulations because they wanted to know where they stood. If they were going to construct new facilities, for example, they wanted to know how big they needed to be. They were just as annoyed as the NGO community by the agency's five-year delay.<sup>74</sup>

For the remaining five sections on which the parties did not reach consensus, APHIS pursued a traditional rulemaking. It published an Advanced Notice of Proposed Rulemaking (ANPR) in 2002, one year after the consensus regulations were finalized.<sup>75</sup> Fourteen years after the ANPR, APHIS finally issued a proposed rule on the five sections for which consensus was not reached; that was in February of 2016.<sup>76</sup> In essence, we waited for virtually nothing, because one of the most important sections, on space requirements, remained unchanged. Dr. Rose will explain further.

**Naomi A. Rose:** In the past thirty-two years, since 1984, when the space requirements were last updated,<sup>77</sup> there's been an enormous amount of field science on these species. I know this because that's when I started my career as a marine mammal scientist. There were a lot of things we still didn't know about these animals in the wild then. Tags at that time for these animals were the size of toasters. It was really very difficult to put them on a lot of these animals.

In the last fifteen years alone, there has been an enormous amount of progress on learning how these animals actually live their lives in the wild.<sup>78</sup> Tags are now the size of half-dollars. They can go to great depths with the animals. We know how deep they dive. We know

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<sup>73</sup> Animal Welfare; Marine Mammals, 66 Fed. Reg. at 239.

<sup>74</sup> Advocates, including Dr. Rose, were aware, from contemporaneous personal observation made during interactions with public display representatives, that they were also waiting to see the final regulations.

<sup>75</sup> Animal Welfare; Marine Mammals, 67 Fed. Reg. 37,731 (May 20, 2002) (to be codified at 9 C.F.R. pt. 1 & 3). An Advance Notice of Proposed Rulemaking is a preliminary notice an agency publishes in the Federal Register to announce when it is considering regulatory action. Agencies typically use ANPRs to gather more information prior to making a decision on whether to conduct a formal rulemaking. The Federal Register notice would describe the area under regulatory consideration and seek public comments on the issues and options discussed. OFFICE OF THE FED. REGISTER, *A Guide to the Rulemaking Process*, [https://www.federalregister.gov/uploads/-2011/01/the\\_rulemaking\\_process.pdf](https://www.federalregister.gov/uploads/-2011/01/the_rulemaking_process.pdf) [<https://perma.cc/CJ5Q-V9TE>] (accessed Jan. 25, 2018).

<sup>76</sup> Animal Welfare; Marine Mammals, 81 Fed. Reg. 5629 (Feb. 3, 2016) (to be codified at 9 C.F.R. pt. 1 & 3).

<sup>77</sup> See *id.* at 5630 (referencing the space requirement as one of the sections of regulation that has not been amended since 1984).

<sup>78</sup> See 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 1, 38–72 (2017), <https://doi-org.library.lproxy.org/10.1080/13880292.2017.1309858> (“[M]arine field biologists have been prolific in the past 15–20 years.”).

how far they travel in a twenty-four-hour period. We know what their home range sizes are. These are things we didn't know thirty-two years ago. These are things we didn't know fifteen years ago.

For APHIS to say in their proposed rule that they are unaware of any science that justifies changing the current standards for space<sup>79</sup>—which are minimum standards from thirty-two years ago—is simply inexplicable. These are large animals in small enclosures, but even more important than that, these are wide-ranging animals in small enclosures. A lot of metadata were analyzed by Clubb and Mason,<sup>80</sup> for example. In this paper, they looked at polar bears, big cats, other animals that are wide-ranging in nature. Marine mammals are wide-ranging animals.

This is a typical dive of an orca:

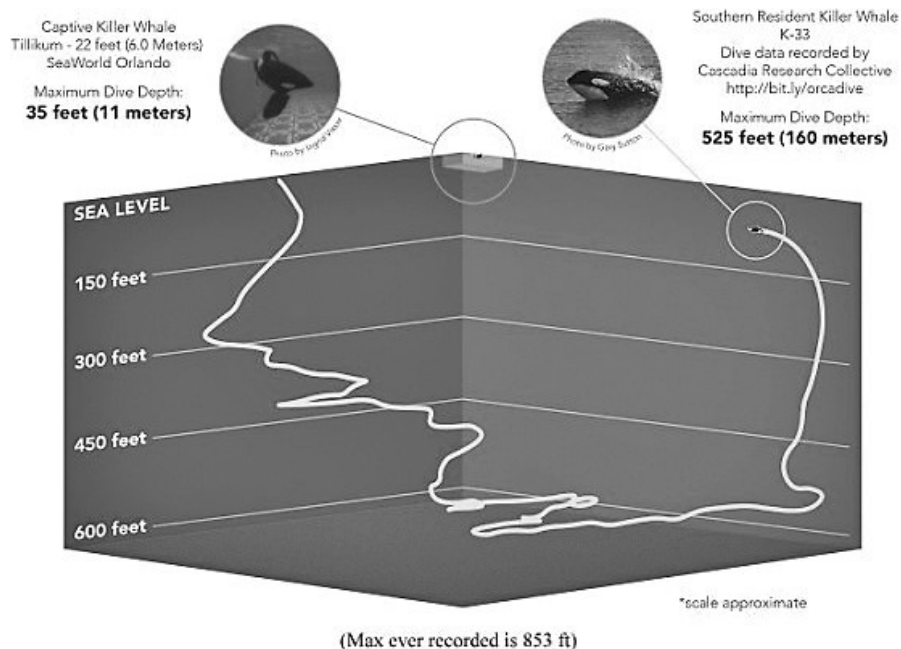


Figure 1. A graphic of a typical dive by a male orca in the Pacific Northwest. Based on data and tagging tracks from Cascadia Research Collective, Oregon. Graphic by Wild Orca.

He'll make that dive multiple times in a day. From left to right is about five minutes, meaning this is a five minute dive. He'll make this dive several times a day, which is not unusual. He goes down to 525 feet. He does something down there. He's not just sitting down there. He's foraging. He's doing something. He comes back up. The little box, in the middle of the graph up at the top, is Shamu Stadium at

<sup>79</sup> Animal Welfare; Marine Mammals, 81 Fed. Reg. at 5635.

<sup>80</sup> Ros Clubb & Georgia Mason, *Captivity Effects on Wide-Ranging Carnivores*, NATURE 425, 473–74 (Oct. 2, 2003), [https://www.researchgate.net/publication/9069205\\_Animal\\_Welfare\\_Captivity\\_effects\\_on\\_wide-ranging\\_carnivores](https://www.researchgate.net/publication/9069205_Animal_Welfare_Captivity_effects_on_wide-ranging_carnivores) [<https://perma.cc/7GRH-JGUK>] (accessed Jan. 3, 2019).



SeaWorld. In San Diego, ten animals live in that space. In San Antonio, five. In Orlando, six. That's as big as it is. That box is the largest enclosure in the United States, and it is far in excess of the minimum standards that APHIS establishes. Far in excess of what the minimum standards are. Yet this [Fig. 1] is a typical dive for an orca. There has to be an agreement that there's something wrong with this. Common sense says when a typical tank is only one ten thousandths of 1% the size of natural home range, the animal is not being adequately provided for. The graph of that dive comes from this new tagging technology mentioned earlier.<sup>81</sup>

Here's some more new technology. This is from drones.<sup>82</sup>



Figure 2. A drone's view of a family of orcas in the Pacific Northwest. NOAA Fisheries.

We now get a bird's eye view of the way these animals live in the wild. So, this is a group of belugas [indicating photo showing group of several dozen beluga whales from an aerial view]; thousands of animals can congregate in the same space. This is a group of bottlenose dolphins [indicating another photo of a large group of dolphins from aerial view]; they live in fission-fusion societies, get together, break apart, get together, break apart, with up to 100 to 120 animals. You can think of it as a village. This is a family of orcas [Fig. 2]. This is a mother and all of her children and all of her children's children. They are extremely strongly bonded with family. This is a group of Pacific

<sup>81</sup> Eve Jourdain, *Norwegian Orca Survey, Using New Technology for Studying Orca*, BBC ONE BLUE PLANET II, <http://www.bbc.co.uk/programmes/articles/1YsRmhsRSfPbL5m5rhgRb4T/using-new-technology-for-studying-orca> [<https://perma.cc/4XPU-HTH9>] (accessed Jan. 25, 2019).

<sup>82</sup> The slide accompanying this comment showed four drone photographs of belugas, bottlenose dolphins, Pacific white-sided dolphins, and orcas.

white-sided dolphins [indicating photo of a large group of these dolphins]. Again, hundreds of them can congregate out in the open ocean.<sup>83</sup>

When they are put into captivity, they do not even need to be held with conspecifics; that is, the same species. It is legal under the regulations for these animals to be held with “compatible” species.<sup>84</sup> So they do not even have to be held with the same species, and yet these are animals that live in large groups and complex societies. Again, common sense says there has to be something wrong with that. Now I’m going to turn it back over to Georgia to talk about enforcement.

**Georgia Hancock Snusz:** We can, in various inspection reports, see that the enforcement APHIS provides over marine mammal facilities tends to be limited to cosmetic citations rather than major substantive violations. For example, in 2015, an inspection report cited the Mirage Hotel and Casino in Las Vegas, which displays dolphins, for an unsanitary food prep kitchen.<sup>85</sup> These citations are essentially fix-it tickets, typically with thirty days to correct.<sup>86</sup> However, according to the group, Mojave Dolphins, despite the order for the Mirage to address the sanitation violation by mid-July of 2015, there had been no follow-up from USDA as of late September of that year.

A 2012 inspection called out SeaWorld of Florida for various infractions.<sup>87</sup> APHIS told SeaWorld to put a protocol in place to prevent these sorts of things from recurring. But how alarming is it that in this facility’s thirty-year history, such protocols were not already in place?

Lolita is a killer whale who is famous for her tiny tank [Fig. 3], which is not in compliance with the AWA.<sup>88</sup> Lolita, who has been in this small tank since 1970, is the prime example of why the AWA is not

<sup>83</sup> See, e.g., entries for these species in William F. Perrin et al., *ENCYCLOPEDIA OF MARINE MAMMALS* (Elsevier 2d ed. 2009) (providing the behavior, distribution, ecology, and physiology of these cetaceans in different parts of the world).

<sup>84</sup> 9 C.F.R. § 3.109.

<sup>85</sup> *Mirage Resorts Inc., Citation: Violation Found at Mirage, Needs Reinspection, #MOJAVEDOLPHINS* (Sept. 22, 2015) <http://mojavedolphins.com/violation62015> [<https://perma.cc/DR8C-QU5N>] (accessed Jan. 25, 2019).

<sup>86</sup> *Id.*

<sup>87</sup> See USDA, APHIS, Inspection Report, SeaWorld of Florida (Dec. 3, 2012).

<sup>88</sup> See, e.g., USDA OFFICE OF THE INSPECTOR GENERAL, Audit Report 33601-0001-31, APHIS: ANIMAL WELFARE ACT – MARINE MAMMALS (CETACEANS) (May 2017), <https://www.usda.gov/oig/webdocs/33601-0001-31.pdf> [<https://perma.cc/KR4W-H8SU>] (accessed Jan. 25, 2019) (finding that an inspected Orca exhibit may not meet regulations under the AWA due to the configuration of the pool); see also Jonathan Kendall, *Lolita’s Tank Is Substandard, Marine Mammal Commission Rules*, BROWARD PALM BEACH NEW TIMES (Aug. 22, 2016), <http://www.browardpalmbeach.com/news/lolitas-tank-is-substandard-marine-mammal-commission-rules-8019582> [<https://perma.cc/AT7J-RBD8>] (accessed Jan. 25, 2019) (showing the Marine Mammal Commission’s assessment that tank distances are to be unobstructed measurements); see generally Comment Letter from Rebecca J. Lent, Ph.D., Executive Director of the Marine Mammal Commission, to APHIS (May 4, 2016), <https://www.mmc.gov/wp-content/uploads/16-05-04-Regulatory-Analysis-and-Development-APHIS-proposed-rule.pdf> [<https://perma.cc/7L7M-Q68G>] (accessed Jan. 25, 2019) (providing commentary on standard size regulations).

working for captive marine mammals. In any given tank, the existing APHIS regulations require a minimum horizontal dimension of only 48 feet for orcas, which is just over twice Lolita's length. The work island, which goes all the way to the floor of the tank, creates an obstruction. APHIS claims this is a partial obstruction and, therefore, it's okay. The agency claims the minimum horizontal dimension requirement is met by virtue of the fact that when the gates are open, [to either side of the work island], Lolita can swim the circumference of the tank. However, based purely on geometry, a circumference is not a minimum horizontal dimension. It's only 35 feet from the work island to the top end of the pool, which is clearly less than 48 feet.

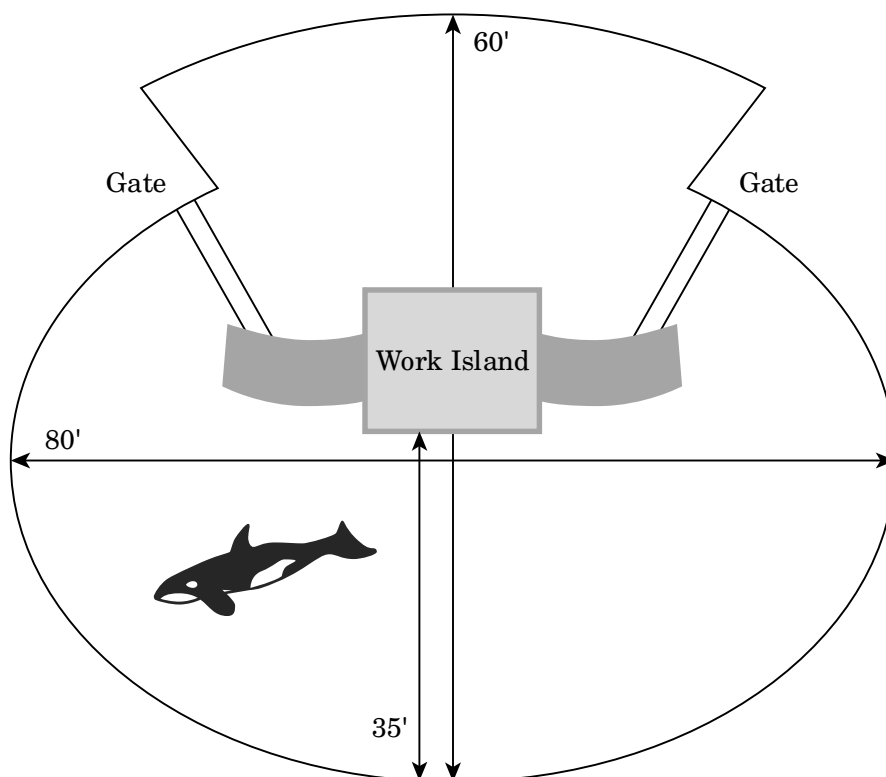


Figure 3. Illustration of Lolita's Tank based on FOIA records. Graphic by Gale Silverman-Feld.

A letter excerpt<sup>89</sup> from APHIS shows that it claims that there are two minimum horizontal dimensions, but by definition, you can't have two minimums, because a minimum is a minimum. Lolita's situation has been litigated by groups such as People for the Ethical Treatment

<sup>89</sup> See *It's Time To Go Above & Beyond for Lolita*, WITHOUT ME THERE IS NO YOU (June 8, 2011), <https://withoutmethereisnou.wordpress.com/2011/06/08/its-time-to-go-above-beyond-for-lolita/> [<https://perma.cc/7L7M-Q68G>] (accessed Jan. 25, 2019) (discussing how APHIS adds the two distances on either side of the island to get to the required minimum distance, even though Lolita cannot freely swim under the island).

of Animals (PETA) and the Animal Legal Defense Fund (ALDF),<sup>90</sup> unfortunately without much success to date.

In closing, Lolita is the poster child for everything that is wrong with the AWA's treatment of captive marine mammals. A law that is supposed to ensure the humane care and treatment of marine mammals in captivity has singularly failed to do so. As Dr. Rose has attested, marine mammal science has progressed tremendously in recent years but the science was ignored by the agency in its proposed rule.<sup>91</sup>

#### IV. HANDLING INFANT EXOTIC ANIMALS UNDER THE ANIMAL WELFARE ACT

By  
Anna Frostic\*\*\*\*

Good morning everyone. My name is Anna Frostic and I am the senior attorney for wildlife and animal research issues for The Humane Society United States (HSUS). It is a pleasure to be here with so many esteemed colleagues and wonderful to see the breadth of interest in these issues that affect countless animals including critically endangered species.

I am going to talk today about the commercial use of exotic animals, and infant exotic animals in particular. These are animals maintained at licensed exhibition facilities that have to comply with the Animal Welfare Act (AWA) and I am going to talk specifically about the AWA animal handling regulations.<sup>92</sup> This issue implicates animal welfare, public safety, and conservation concerns.

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<sup>90</sup> *Proie v. Nat'l Marine Fisheries Serv.*, No. C11-5955BHS, 2012 WL 1536756 at 1 (W.D. Wash. May 1, 2012); *PETA v. Miami Seaquarium*, 189 F. Supp. 3d 1327, 1332 (S.D. Fla. 2016); *PETA v. Miami Seaquarium*, 879 F.3d 1142, 1144 (11th Cir. 2018); *Animal Legal Def. Fund v. USDA*, No. 13-20076-CIV, 2014 WL 11444100 at 1 (S.D. Fla. Mar. 25, 2014); *Animal Legal Def. Fund v. USDA*, 789 F.3d 1206, 1210 (11th Cir. 2015).

<sup>91</sup> Comment Letter from Naomi A. Rose, Ph.D., Marine Mammal Scientist, Animal Welfare Institute, to APHIS, re: 81 FR 5629, Docket No. APHIS-2006-0085 (May 3, 2016), <https://awionline.org/sites/default/files/uploads/documents/AWI-APHIS-proposed-rule-comments-FINAL-03May16.pdf> [<https://perma.cc/L55T-P3JW>] (accessed Jan. 25, 2019).

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<sup>92</sup> The AWA requires facilities that exhibit animals to the public or breed animals for sale in interstate commerce to obtain a license from USDA/APHIS, and requires the agency to adopt regulations "to govern the humane handling, care, treatment, and transportation" of animals possessed by licensees, including minimum requirements "for handling, housing, feeding, water, sanitation, ventilation, shelter from extremes of weather and temperatures, adequate veterinary care, and separation by species where the Secretary finds necessary for humane handling, care, or treatment of animals. . . ." 7 U.S.C. §§ 2143(a)(1), 2143(a)(2).