



Animal Welfare Institute

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27 March 2014

Protected Resources Division
National Marine Fisheries Service
Northwest Region
7600 Sand Point Way NE
Attention: Lynne Barre, Branch Chief

Re: 79 FR 4313

Dear Ms. Barre:

I am writing on behalf of the Animal Welfare Institute (AWI) and its members on the proposed rule, published in *79 FR 4313*, to remove the exclusion for captive members of the Southern Resident killer whale distinct population segment (SR DPS). The current regulatory language inappropriately excludes Lolita, the sole member of the SR DPS held in captivity, from the endangered listing finalized for the SR DPS under the Endangered Species Act (ESA) in 2005. We support the proposed rule to remove this exclusion and agree with the discussion by the National Marine Fisheries Service (NMFS) in the proposed rule of why excluding a captive member of the SR DPS was inappropriate in the first instance.

However, AWI does not agree with the conclusion found in the proposed rule that activities such as “1) Continued possession of captives; and 2) continued provision of Animal Welfare Act-compliant care and maintenance of captives” do not result in a violation of ESA section 9 and therefore do not require a section 10 permit. We believe the current Animal Welfare Act (AWA) regulations are likely to result in long-term impacts equivalent to injury; regardless, Lolita’s enclosure is not AWA-compliant.

The Endangered Species Act and its application to captive killer whales

The ESA defines “take” to mean “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in such conduct.”¹ NMFS interprets “harm” as an act that “actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding or sheltering.”²

In *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*,³ the Supreme Court indicated that the broad goals, the structure, and the legislative history of the ESA indicated Congressional intent to protect the habitats of listed species, not just individual animals, from destruction. *Babbitt* specifically

¹ 16 U.S.C. § 1532(19)

² 50 C.F.R. § 222.102

³ 515 U.S. 687 (1995)

contemplated harm and serious injury that does not necessarily result in mortality, such as impairment of reproduction.⁴

NMFS has not adopted a regulatory definition of “harass” under the ESA. In biological opinions, however, NMFS interprets “harass” to mean “an intentional or unintentional human act or omission that creates the probability of injury to an individual animal by disrupting one or more behavioral patterns that are essential to the animal’s life history or its contribution to the population the animal represents.”⁵

In contrast to NMFS, FWS has adopted a regulatory definition of “harass.” Under FWS regulations, “harass” means “an intentional or negligent act or omission that creates a likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns, which include, but are not limited to, breeding, feeding, or sheltering.”⁶

In this proposed rule, NMFS appears to propose a harassment standard for captive orcas similar to the FWS regulatory definition of “harass,” stating that it does not “consider continued provision of Animal Welfare Act-compliant care [as likely to result in a take violation], as long as such practices or procedures *are not likely to result in injury*” (emphasis added).⁷ AWI strongly disagrees with this; captivity, by definition, disrupts one or more behavioral patterns that are essential to the animal’s life history and its contribution to the population, in accordance with NMFS’ traditional interpretation of harassment.

Lolita and the Animal Welfare Act

As explained below, Lolita is not in AWA-compliant care. Therefore, her continued maintenance in the Miami Seaquarium represents take. Although Lolita is one of the longest-surviving captive killer whales in the world, she is the last surviving member of the dozens of SR DPS whales live-captured for public display in the 1960s and 1970s. While her physical health is good, her psychological health is undoubtedly poor and regardless, her current enclosure is not in compliance with the AWA.

In 1998, The Humane Society of the United States (HSUS) submitted a complaint to the Animal and Plant Health Inspection Service (APHIS), arguing that Lolita’s enclosure, which measures 35’ from the center island to the wall directly opposite, was not AWA-compliant. The minimum horizontal dimension (MHD) for a killer whale is 48’.⁸ The HSUS argued that the two gates at either end of the center island were irrelevant to this requirement. When they are opened, they create a larger circumference for the enclosure, but the regulation does not stipulate a minimum circumference for a cetacean enclosure, only a MHD. The MHD of Lolita’s enclosure is from the center of the island to the wall directly opposite.

⁴ 515 U.S. 687 at 710 (1995); similarly, portions of *Marbled Murrelet v. Babbitt*, 83 F.3d 1060, 1067 (9th Cir. 1996), suggest that impaired breeding success is harm, and an injunction was affirmed in a situation where the opinions did not demonstrate that timber harvesting would cause the death of or actual injury to mobile marbled murrelets.

⁵ *Strahan v. Roughead*, 910 F. Supp. 2d 358 (D. Mass. 2012) (citing NMFS Programmatic Biological Opinion on U.S. Navy Training Activities on East Coast Training Ranges)

⁶ 50 C.F.R. § 17.3(c)

⁷ 79 FR 4313 and 4318

⁸ 9 C.F.R. Ch. 1, Subchapter A, Part 3, Subpart E §3.104

APHIS responded to The HSUS on 13 October 1998, stating that “the pool in question *meets the intent* of the regulations in providing adequate space for the continuing health and well-being of Lolita” (emphasis added; letter available from AWI). However, no such standard is found in § 3.104(b)(1)(i) of the captive marine mammal regulations. The regulation is straightforward and has no “intention” or “adequate” standard. An enclosure must have a MHD of 48’ for killer whales or it is not AWA-compliant.

APHIS went on to say that “The minimum horizontal dimension (MHD) requirement is 48 feet; the actual MHD is 80 feet in one direction and 60 feet in the direction interrupted by the platform.” This was a nonsensical response in 1998 and still is. MHD is by definition and plain language the shortest right-angled line that can be drawn from one wall to another within the enclosure. APHIS referred to the *maximum* horizontal dimension of Lolita’s enclosure as a *minimum* horizontal dimension, which makes no sense, and admitted that the actual MHD was “interrupted by the platform [center island].” Again, it makes no sense to dismiss the center island as an obstruction, when in fact it goes to the bottom of the enclosure and Lolita cannot circumvent it unless the gates are open. She must swim to one of the gates at either end of the center island to access the back area, which APHIS included in the 60’ measurement. APHIS cannot treat the center island “as the crow flies,” because Lolita cannot fly over it. She also cannot swim through it at its center point.

APHIS has clearly received a significant number of complaints about Lolita’s enclosure, as it now provides a form response to complaints filed by members of the public. A 9 March 2010 letter, also available from AWI, addressed to “Dear Concerned Citizen,” responds thusly: “Finally, the minimum horizontal dimension (MHD) is 48 feet; the actual MHD measurement [of Lolita’s enclosure] is 80 feet in one direction and 60 feet in another.” Once again, this response is nonsensical – there cannot be *two* minimum horizontal dimensions, and certainly not of different lengths!

APHIS goes on to say “We did not include the medical pool area in our MHD measurements of the main pool.” This is plainly false. APHIS *did* include the back area in the 60’ measurement (this area is used as the medical pool when both gates are closed and is the space referenced in APHIS’ letter as “the medical pool area”). Without the back area, there is no horizontal (or vertical) dimension that measures 60’ in Lolita’s enclosure at all. With it, the shortest right-angle distance from one wall to the other is 60’, interrupted by the center island.

On 28 October 1997, APHIS prepared an inspection report (available from AWI) of the Miami Seaquarium whale stadium (Lolita’s enclosure) and determined that the MHD was “60’ disregarding platform.” The whole point of the complaints filed with APHIS is that the center island *cannot* be disregarded – its existence determines the minimum horizontal dimension in this enclosure, by definition. It is simply irrational for APHIS to continue to claim that the center island can be disregarded or ignored. From the animal’s perspective, it is a solid obstacle and cannot be circumvented at all when the gates are closed (which may be for prolonged periods if one of Lolita’s companion animals (usually bottlenose dolphins) is ill and confined to the medical pool).

Lolita should be included in the endangered listing of the SR DPS, and when she is, NMFS must act to improve her welfare and to prevent future takes. Her enclosure is not AWA-compliant and thus continued captivity in such conditions is a take.

Options for Lolita

NMFS has stated that it considers releasing a captive animal into the wild as an activity that may result in take.⁹ AWI notes that, should any attempt to release Lolita back to the wild be considered take, it would be experimental and as such would qualify for a research permit under 16 U.S.C. § 1539(a)(1)(A).

Another option, which would address the AWA compliance issue, is to move Lolita to an AWA-compliant enclosure. The most obvious choice would be to move her to SeaWorld, in Orlando – it is AWA-compliant and close to Miami.

A third option is to move Lolita to an enclosure exceeding AWA requirements within the SR DPS home range. There is a proposal for this option, developed by the Orca Network, and would certainly address the MHD issue. The proposal has identified a site that far exceeds AWA size standards in every way. AWI supports this option.

Lolita is currently held in a solitary state (without conspecifics), which constitutes harm according to NMFS' definition. NMFS' proposal to simply ignore Lolita's enclosure and her solitary state and allow the status quo to continue, as APHIS has inappropriately and arguably illegally done for decades, is unacceptable. Keeping Lolita in captivity also would not qualify for a Section 10 permit because that activity does not fall within scientific purposes, enhancement or propagation, or incidental take.

Captive killer whales are harassed under the NMFS and FWS definitions

Captivity for killer whales represents a take under the ESA, as well as the harassment standard adopted by NMFS in its biological opinions and by the FWS in its regulations. Captivity, by definition, eliminates certain "essential behavioral patterns" and it "significantly disrupts behavioral patterns."

Killer whales are inhibited from swimming normally in captivity. Lolita in particular cannot swim for more than 80' in a straight line and is only approximately 15' shorter than her enclosure is wide. She also cannot breach or porpoise normally, as the maximum depth of her tank is only 20', which is her body length. (AWI acknowledges that 20' exceeds the required minimum depth for a killer whale enclosure under the AWA, but notes that this standard has been under review by APHIS for the past 18 years – APHIS acknowledges that this standard is due for updating – and does not allow Lolita to dive sufficiently deep to propel her entire body out of the water, as killer whales do in the wild.) In the wild, killer whales swim up to 100km a day.¹⁰ No killer whales can express this natural ranging behavior in captivity, but Lolita is especially constrained by her non-compliant tank.

Lolita is clearly harassed under the FWS definition of harassment, as she is subjected to persistent noise (e.g., pumps, audience sounds, construction noises) and light (e.g., floodlights for night shows – it is unlikely she ever knows complete darkness). Noise and light exposure of this kind qualifies as harassment not only under the NMFS and FWS definitions noted here, but under the Marine Mammal Protection Act (MMPA).¹¹ As hearing-dependent species who are often at a depth in the ocean where light does not penetrate, this perpetual exposure to noise and light constitutes a condition for cetaceans

⁹ 79 FR 4318

¹⁰ Tyack, P.L. 2009. Behavior – overview. In: *Encyclopedia of Marine Mammals 2nd Edition*. W.F. Perrin, B. Würsig, and J.G.M. Thewissen, eds. Elsevier, New York, pp. 101-107.

¹¹ 16 U.S.C. 1362(18)(A)

that is the epitome of harassment and Lolita has been subjected to it for 44 years. As a non-ESA listed animal, this harassment was legal (under the MMPA public display exemption). Under the ESA, it would qualify as harassment.

Killer whales are also prevented from living in natural social groups. Lolita's social group in particular is severely restricted. She was last held with a conspecific in 1980, when Hugo, a male killer whale, died. Her companions since then have been various species of dolphins – she has not associated with conspecifics in over 30 years. Killer whales are perhaps the most social mammals on the planet, possibly more so than humans are.¹² It is fundamentally harmful to hold them as solitaries and doing so is not AWA-compliant. It *is* AWA-compliant to hold killer whales with non-conspecific cetaceans, but it is biologically and ecologically unsound and may have already resulted in permanent psychological damage to Lolita. This situation must not be allowed to continue under an ESA-listing.

Since 1980, Lolita has been unable to breed. She no longer has estrous cycles, so she can no longer contribute genetically to the SR DPS, but several members of her family are still alive, including the whale believed to be her mother (identified as L25). Returning her to her home range could contribute to the population in social and cultural ways that we cannot measure at this time.

NMFS suggests that releasing Lolita into the wild would be a “take;” however, such a take could be permitted under section 10, as such an effort would be experimental and for the (social and cultural) enhancement of the DPS. It would also result, should the release be successful, in removing any source of take associated with Lolita being held in captivity – a condition for killer whales that clearly results in take, as it negatively affects their welfare (see above). However, AWI does not believe releasing Lolita to the wild is necessary to improve her welfare; retiring her to a sea pen in her home waters, on the other hand, would almost certainly improve her well-being.

Conclusion

The AWI strongly supports the proposed rule to include Lolita in the endangered listing of the Southern Resident killer whale population. However, we urge NMFS to reconsider its proposal to accept Lolita's living conditions as “likely not resulting in a violation of ESA section 9.”

While NMFS may claim that it has determined that these activities are not “likely” to cause take, at this stage it is beyond the authority of NMFS to determine if an action represents take without further investigation. Whether an action is a take or not can only be decided during a prosecution by either NMFS or a citizen suit, pursuant to Section 11 of the ESA by a federal court. Any pronouncement by an agency as to what definitively may or may not be take at this stage is speculation and not entitled to deference or policy weight.

Keeping killer whales in captivity meets the standards established under the NMFS and FWS harassment definitions. However, Lolita's conditions in particular meet these definitions and are most certainly “circumstances” that should meet the bar. Ideally, Lolita should be transferred to an AWA-compliant enclosure in the SR DPS home range that will allow her to exhibit natural behaviors and end without question any continued take as defined by the ESA.

¹² Ford, J.K.B. 2009. Killer whale. In: *Encyclopedia of Marine Mammals 2nd Edition*. W.F. Perrin, B. Würsig, and J.G.M. Thewissen, eds. Elsevier, New York, pp. 650-656.

Thank you for the opportunity to comment on this important matter.

Sincerely,

A handwritten signature in dark ink, appearing to read "Naomi Rose", written in a cursive style.

Naomi A. Rose, Ph.D.
Marine mammal scientist

Cc: Rebecca Lent, Ph.D., executive director, Marine Mammal Commission