

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GEORGIA AQUARIUM, INC.,)
)
Plaintiff,)
)
v.)
)
PENNY PRITZKER, *in her Official*)
Capacity as Secretary of Commerce,)
NATIONAL OCEANIC AND)
ATMOSPHERIC ADMINISTRATION,)
and NATIONAL MARINE FISHERIES)
SERVICE,)
)
Defendants.)
)

Civil Action No. _____

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

Plaintiff Georgia Aquarium, Inc. (“Georgia Aquarium” or “Aquarium”)
brings this Complaint and shows the Court as follows:

INTRODUCTION

1. Plaintiff Georgia Aquarium brings this action pursuant to the Marine Mammal Protection Act (“MMPA”), 16 U.S.C. §1361, *et seq.*, and seeks judicial review of Defendants’ decision to deny the Aquarium a permit to import 18 beluga whales (*Delphinapterus leucas*) from Russia to the United States for the purpose of

public display. Defendants' decision violates the MMPA and the Administrative Procedure Act ("APA"), 5 U.S.C. §701, *et seq.*

2. On June 15, 2012, Georgia Aquarium submitted an application pursuant to the MMPA for a permit to import 18 beluga whales from Russia to the United States. Georgia Aquarium submitted the permit application only after sponsoring a multi-year peer reviewed research program that determined the collection of the whales by the Russians did not adversely affect the population in the wild. Defendants stated the application was the most thorough application Defendants had ever received.

3. The whales to be imported had been collected from the Sea of Okhotsk by Russian experts under the supervision of a scientific institute affiliated with the Russian Academy of Science and in accordance with the laws of Russia.

4. The MMPA requires Defendants to issue or deny a permit to import marine mammals within 30 days after a public hearing is held on the application. 16 U.S.C. §1374(d)(5). A public hearing on the Aquarium's permit application was held October 12, 2012. Defendants denied the permit on August 5, 2013, almost ten months after the public hearing.

5. Defendants' decision to deny the permit violates the MMPA and the APA because, among other things, the decision (a) is contrary to the purposes,

policies, and provisions of the MMPA; (b) imposes legal standards found nowhere in law; (c) employs ad hoc and unsupportable methodologies to assess the effect of the collection on the wild population that have not been peer reviewed and have not been applied to any other permit applicant; (d) ignores the best scientific information available; (e) illegally demands that future actions of the Russian Federation comply with Defendants' interpretation of the MMPA, notwithstanding the fact that the MMPA is not binding on other sovereign nations and (f) was based on considerations not found in the law. Defendants' actions are arbitrary, capricious, and not in accordance with law.

6. The MMPA authorizes a permit applicant to seek judicial review of an agency decision to deny a permit within 60 days of the denial. 16 U.S.C. §1374(d)(6).

PARTIES, JURISDICTION, AND VENUE

7. This action arises under the MMPA, 16 U.S.C. §1361, *et seq.*, and the APA, 5 U.S.C. §§701-706.

8. Plaintiff Georgia Aquarium, Inc., located in downtown Atlanta, Georgia, is a not-for-profit entity organized under the laws of the State of Georgia. Georgia Aquarium meets all legal standards to house and care for the beluga whales that are the subject of this action. Georgia Aquarium relies on community

support to fund its marine conservation and education programs. Over 18 million people have visited Georgia Aquarium and participated in its educational programs since the Aquarium opened in 2005.

9. Defendant Penny Pritzker is the Secretary of Commerce and is sued in her official capacity. She is ultimately responsible for overseeing the proper administration and implementation of the MMPA with respect to marine mammals subject to her department's jurisdiction, which includes beluga whales.

10. Defendant National Oceanic and Atmospheric Administration ("NOAA") is an agency of the United States Department of Commerce with supervisory responsibility for the National Marine Fisheries Service. The Secretary of Commerce has delegated her responsibility to ensure compliance with the MMPA to NOAA which, in turn, has sub-delegated that responsibility to the National Marine Fisheries Service.

11. Defendant National Marine Fisheries Service ("NMFS") is an agency of the United States Department of Commerce that has been delegated primary responsibility to ensure compliance with the MMPA within the Department of Commerce.

12. This Court has jurisdiction and venue pursuant to the MMPA which provides:

Any applicant for a permit ... may obtain judicial review of the terms and conditions of any permit issued by the Secretary under this section or of his refusal to issue such permit. Such review, which shall be pursuant to chapter 7 of Title 5, may be initiated by filing a petition for review in the United States district court for the district wherein the applicant for the permit resides, or has his principal place of business ... within sixty days after the date on which such permit is issued or denied.”

16 U.S.C. §1374(d)(6). Georgia Aquarium has its principal place of business within this district and this action is filed within 60 days of the denial of the permit.

13. This Court also has jurisdiction pursuant to the APA which provides that final agency action is subject to judicial review. 5 U.S.C. §§701-706.

Defendants’ denial of Georgia Aquarium’s permit application is an “agency action” subject to judicial review under the APA.

14. This Court also has jurisdiction pursuant to 28 U.S.C. §1331 which grants the district courts “original jurisdiction of all civil actions arising under the ... laws ... of the United States,” and 28 U.S.C. §1361 which grants the district courts “original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.”

15. This Court has the authority to grant declaratory relief pursuant to the Declaratory Judgment Act, 28 U.S.C. §§2201-2202, and may also grant relief pursuant to the MMPA, 16 U.S.C. §1374(d)(6), as well as the APA, 5 U.S.C. §706.

LEGAL BACKGROUND

16. The MMPA is intended to conserve and manage marine mammal populations because “marine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic...” 16 U.S.C. §1361(6).

17. The MMPA places a moratorium on the taking of marine mammals which can be waived if certain findings are made. 16 U.S.C. §§1371(a), 1373. The MMPA states the term “take” means “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.” 16 U.S.C. §1362(13).

18. Certain activities were deemed sufficiently important that a mandated waiver of the taking moratorium was included in the MMPA. 16 U.S.C. §1371(a). Two such exempted activities are the taking and importation of marine mammals for public display. 16 U.S.C. §1371(a)(1).

19. Senator Hollings, the Chairman of the Subcommittee that wrote the Senate version of the MMPA in 1972 explained the special treatment for public

display, stating that without observing marine mammals in oceanaria the “magnificent interest” in these animals will be lost and “none will ever see them and none will care about them....” Ocean Mammal Protection Hearings Before the Subcommittee on Oceans and Atmosphere, Senate Commerce Committee, 92nd Cong., 2d Sess., 266 (1972). During consideration of the 1988 amendments to the MMPA, Congress reaffirmed the public display exemption. The House of Representatives Committee Report stressed that “[E]ducation is an important tool that can be used to teach the public that marine mammals are resources of great aesthetic, recreational and economic significance, as well as an important part of the marine ecosystem. It is important, therefore, that public display permits be issued to entities that help inform the public about marine mammals as well as perform other functions.” H. Rep. No. 970, 100th Cong., 2d Sess., 33-34 (1988). The importance of the public display exemption was again recognized in the 1994 amendments to the MMPA where the Report of the Senate Committee on Commerce, Science, and Transportation stated: “The MMPA recognizes that [public] display provides an important educational opportunity to inform the public about the esthetic, recreational, and economic significance of marine mammals and their role in the ecosystem.” S. Rep. No. 220, 103rd Cong., 2d Sess., 4 (1994).

20. Notwithstanding this exemption, the MMPA makes it unlawful to import into the United States any marine mammal if that mammal was: (a) pregnant at the time of taking; (b) nursing at the time of taking, or less than eight months old, whichever is later; (c) taken from a stock designated as depleted (beluga whales in Russia are not so designated); or (d) taken in an inhumane manner. 16 U.S.C. §1372(b). It is also unlawful to import any marine mammal taken in violation of the MMPA or taken in another country in violation of the laws of that country. 16 U.S.C. §1372(c)(1).

21. Permits for the taking or importation of marine mammals for public display are issued pursuant to 16 U.S.C. §1374. That section of law provides that permits for the taking or importation of marine mammals shall be consistent with any applicable regulations established under 16 U.S.C. §1373 and shall specify: (a) the methods of capture, supervision, care, and transportation which must be observed pursuant to a taking or importation; (b) the number and kind of animals to be taken or imported; (c) the location from which the animals may be taken or imported and the manner in which they may be taken, which manner must be humane; (d) the duration of the permit; and (e) other terms and conditions deemed appropriate. 16 U.S.C. §§1374(b) and 1374(c)(1).

22. Persons eligible to receive a permit to take or import a marine mammal for public display must (a) offer a program for education or conservation purposes that is based on professional recognized standards of the public display community; (b) be registered or hold a license issued under 7 U.S.C. §2131, *et seq.*; and (c) maintain facilities that are open to the public on a regularly scheduled basis such that access is not limited except by the charging of an admission fee. 16 U.S.C. §1374(c)(2)(A).

23. The MMPA vests authority over certain marine mammals with the Secretary of Commerce and for other marine mammals with the Secretary of the Interior. Authority over the order Cetacea is given to the Secretary of Commerce. 16 U.S.C. §1362(12)(A). Beluga whales belong to the order Cetacea.

24. The Secretary of Commerce (“Secretary”) has promulgated regulations implementing the MMPA provisions regarding the taking or import of marine mammals for public display and certain other purposes. Those regulations provide that before issuing a permit “the applicant must demonstrate” that (a) the proposed activity “is humane and does not present any unnecessary risks to the health and welfare” of the animals; (b) the proposed activity is consistent with restrictions imposed by the Secretary which are set forth in 50 C.F.R. §216.35; (c) if the proposed activity involves species protected under the Endangered

Species Act (beluga whales in Russia are not so protected), the activity is consistent with that Act; (d) the proposed activity “by itself or in combination with other activities, will not likely have a significant adverse impact on the species or stock;” (e) the applicant has adequate expertise, facilities, and resources to successfully accomplish the objectives and activities stated in the application; (f) the applicant has adequate qualifications, facilities, and resources for the proper care and maintenance of the marine mammal if a live animal will be held captive or transported; and (g) the requested import will not likely result in the taking of marine mammals beyond those authorized by the permit. 50 C.F.R. §216.34(a).

25. Regulations promulgated by the Secretary set forth at 50 C.F.R. §216.35 provide that other restrictions shall apply to all permits for taking or import for public display and certain other purposes. Those restrictions are that: (i) the taking or import complies with applicable regulations; (ii) the maximum period for a permit shall not exceed five years; (iii) marine mammals to be imported must be taken and imported in a humane manner and in compliance with any applicable law; (iv) the permit holder shall not import any marine mammal that is pregnant or lactating at the time of taking or import, or is unweaned or less than eight months old unless such import is specifically authorized; (v) captive marine mammals shall not be released to the wild unless such release is authorized; (vi)

the permit holder is responsible for all activities occurring under the permit; (vii) persons operating under the permit must possess qualifications commensurate with the activities undertaken; (viii) persons who require federal or state licenses to conduct activities under the permit have such licenses; (ix) the permit is not transferable; and (x) the permit holder shall possess a copy of the permit.

26. The MMPA directs the Secretary of Commerce or the Secretary of the Interior, depending on the species that is subject to the application, to publish notice in the Federal Register of each permit application submitted pursuant to 16 U.S.C. §1374 and to invite public comments for 30 days. 16 U.S.C. §1374(d)(2). Within 30 days of the close of the public comment period, or within 30 days after the date of any public hearing held on the permit application, the applicable Secretary is directed to issue a decision granting or denying the permit. 16 U.S.C. §1374(d)(5).

FACTUAL BACKGROUND

A. The Georgia Aquarium

27. Georgia Aquarium features a collection of 19,539 animals representing 737 species, including beluga whales. The Guinness Book of World Records named the Aquarium as the world's largest in its 2011 edition. Georgia Aquarium has the requisite license from the U.S. Department of Agriculture

Animal and Plant Health Inspection Service to own and maintain the species in its care. The Aquarium also meets the requirements in the MMPA regarding public display facilities.

28. The Aquarium contains nearly ten million gallons of water across six galleries and 70 exhibits. The Aquarium receives more than 2.1 million guests annually, educating them on the living wonders of the aquatic world and encouraging them to care about the challenges faced by free ranging aquatic animals and their ecosystems. Since its 2005 opening, more than 18 million guests have visited Georgia Aquarium.

29. The Aquarium's commitment to marine mammals – and beluga whales in particular – is manifested by the Cold Water Quest gallery, currently home to four beluga whales, as well as harbor seals, penguins, and southern sea otters. Within the Cold Water Quest gallery, guests have the opportunity to view beluga whales in a naturalistic habitat complemented by multimedia educational tools and live narrators sharing information about the species.

B. The Aquarium's Educational Mission

30. Public education is a core mission of the Aquarium and a principal reason for its creation. The Aquarium's mission statement states the Aquarium is to be an “educational and scientific institution featuring exhibitions and programs

of the highest standards, offering engaging visitor experiences, and promoting the conservation of aquatic diversity throughout the world.” The mission statement calls for establishing “formal and informal programs” with Georgia school districts, universities, and educational institutions worldwide “that utilize the facilities, exhibits, laboratories, marine support equipment, and scientific staff” of Georgia Aquarium to further the educational mission of these school districts, universities, and other educational institutions.

31. Beluga whales are a principal species of focus in Georgia Aquarium’s educational programs. Beluga whales are the centerpiece of the Cold Water Quest Gallery. Education at Georgia Aquarium is facilitated through close observation of the animals, education stations, behind-the-scenes tours, interactive computer kiosks, hands-on touch pools, graphics, engaging videos, and live Q&A with staff who have special training with respect to beluga whales and other arctic species. Reflective of the Aquarium’s special focus on beluga whales is the fact that a number of the self-guided and instructor-led programs include content and lessons specific to beluga whales. The programs focus primarily on helping guests better understand the natural history of beluga whales, as well as current research, conservation, rehabilitation, and rescue efforts for these animals, with an emphasis on creating awareness of the unique arctic ecosystem where beluga whales are

found and the many obstacles they face to survive in their natural environment. In addition, there are regularly scheduled beluga-specific presentations by trained Aquarium staff members who discuss beluga whales and their natural environment. Presentation topics include the status of beluga whales in the wild and information about organizations that are playing an active role conserving belugas. Research efforts into beluga whale migration and other forms of animal behavior are included in the presentation topics.

32. Among the educational programs focused exclusively on beluga whales are Sea Life Safari and Discovery Labs. In Sea Life Safari, students are taught the four basic needs of belugas, focusing on the species' ability to survive in cold-water habitats. In Discovery Labs, students are taught about the status of beluga populations around the world, and examine hypothetical wildlife management decisions involving beluga populations by identifying factors that can affect population size.

33. Since its opening in 2005, Georgia Aquarium has had a special focus on students, with hundreds of thousands of students visiting the Aquarium on organized school field trips focused on classroom exercises and learning experiences. More than 200,000 of these participants have been enrolled in instructor-led programs. On average, the Aquarium hosts approximately 85,000

students per year for the instructor-led and self-guided programs. Education about beluga whales figures prominently in those programs. In the school years 2011-2012 and 2012-2013, 236,640 students, teachers, and chaperones visited the Aquarium. In addition, since the Aquarium's opening, more than 160,000 school children have benefited from the Aquarium's Sponsored Education Admissions Program that provides free or greatly-reduced admission to underprivileged students, giving them a special opportunity to experience the Aquarium and to develop an interest in the conservation of aquatic animals. Overall, Georgia Aquarium has reached more than 780,000 students through outreach programs and Aquarium visits.

34. The educational impact on guests at Georgia Aquarium and other U.S. zoological institutions is immense. 175 million guests visit U.S. aquariums and zoos annually. Within the last decade alone, accredited U.S. facilities have trained more than 400,000 teachers and provided effective teaching materials and hands-on interaction for scientific curriculum around the country. Studies show that seeing and learning about marine mammals, including belugas, in person increases understanding of the species, as well as the potential impact of environmental changes occurring in our oceans.

35. Educational programming at Georgia Aquarium is based on the professional standards established by the Association of Zoos and Aquariums and the Alliance of Marine Mammal Parks and Aquariums and the objectives of the State of Georgia Department of Education that are reflected in the Georgia Performance Standards (“GPS”) for each grade level. Aquarium programs also meet the applicable national curriculum standards and feature an evaluation component that meets the GPS.

36. At the public hearing on Georgia Aquarium’s permit application conducted by NMFS on October 12, 2012, educators testified regarding the important role Georgia Aquarium and other zoological facilities play in educating the public. Dr. Brian Davis, Ph.D., of Georgia Aquarium, for example, quoted the book *Building a Future for Wildlife* which states: “Zoos and aquariums enable people to develop appreciation, wonder, respect, understanding, care and concern about nature Zoos and aquariums appeal to a very broad audience and have huge visitor numbers throughout the world. They therefore have the potential to be a very important source of environmental awareness, training and action for a sustainable future.” Dr. Davis then noted that “[a]t Georgia Aquarium we see this each day as our guests of all ages utilize our facility to learn, make connections, and take action. We are proud that Georgia Aquarium can serve as a mechanism

of change that can educate and hopefully influence the policy makers of tomorrow to ensure healthy and sustainable beluga populations.”

37. Other testimony by educators at the October 12, 2012 NMFS public hearing included the following: “The National Science Teachers Association (NSTA) recognizes and encourages the development of sustained links between the informal institutions and schools. NSTA strongly supports and advocates informal science education because we share a common mission and vision articulated by the National Science Education Standards. Informal science education complements, supplements, deepens, and enhances classroom science studies. It increases the amount of time participants can be engaged in a project or topic. It can be the proving ground for curriculum materials. The impact of informal experiences extends to the affective, cognitive, and social realms by presenting the opportunity for mentors, professionals, and citizens to share time, friendship, effort, creativity, and expertise with youngsters and adult learners. Informal science education allows for different learning styles and multiple intelligences and offers supplementary alternatives to science study for non-traditional and second language learners. It offers unique opportunities through field trips, field studies, overnight experiences, and special programs. Informal science learning experiences offer teachers a powerful means to enhance both

professional and personal development in science content knowledge and accessibility to unique resources. Informal science education institutions, through their exhibits and programs, provide an effective means for parents and other care providers to share moments of intellectual curiosity and time with their children. Informal science institutions give teachers and students direct access to scientists and other career role models in the sciences, as well as to opportunities for authentic science. Informal science educators bring an emphasis on creativity and enrichment strategies to their teaching through the need to attract their noncompulsory audiences. NSTA advocates that local corporations, foundations, and institutions fund and support informal science education in their communities. Informal science education is often the only means for continuing science learning in the general public beyond the school years.”

38. The report of the U.S. Commission on Ocean Policy, *An Ocean Blueprint for the 21st Century*, recommends that formal and informal ocean education be strengthened to better engage the general public, cultivate a broad stewardship ethic, and prepare a new generation of leaders to meet future ocean policy challenges. The report states that aquariums and zoos play an important role in achieving their recommendation.

39. The education programs developed and presented at Georgia Aquarium have received letters of commendation from the University of Georgia, Georgia State University, Georgia Department of Education, Cobb County School District, Clayton County Public Schools, The Lovett School, Marietta City Schools, Board of Cooperative Educational Services, Fulton County Board of Education, and numerous teachers who have brought their students to Georgia Aquarium. At the October 12, 2012 hearing on the permit application conducted by NMFS, additional testimony commending the Aquarium's educational programs was received from a middle school science teacher, university professor, and elementary school principal.

40. Through conservation and education programs presented at the Georgia Aquarium, visitors interact and experience marine mammals and belugas in a way that teaches them about the ocean environment and motivates them toward conservation actions. The import of 18 beluga whales will further the Aquarium's educational mission by promoting educational opportunities that teach people about beluga whales, as well as other marine animals.

41. The import of the 18 beluga whales will also allow for the existence of a self-sustaining beluga whale population in human care and, therefore, the continuation and appropriate expansion of beluga whale education programs.

Having a self-sustaining beluga whale population in human care will allow Georgia Aquarium and other U.S. public display facilities to continue and expand beluga whale education programs.

C. The Aquarium's Commitment to Animal Health

42. Georgia Aquarium is also home to the Correll Center for Aquatic Animal Health, a state-of-the-art animal health facility with more than 10,500 square feet designed by 12 world-renowned veterinary and conservation professionals for the purpose of caring for the animals at Georgia Aquarium, conducting research, and teaching aquatic medicine. The Correll Center for Aquatic Animal Health is a fully equipped hospital and diagnostic laboratory staffed by five clinical veterinarians, two veterinary pathologists, a parasitologist, a nutritionist, and four veterinary technicians. It is one of the largest and most modern aquarium veterinary hospitals in the world.

43. Georgia Aquarium is the only facility in the United States with a program that integrates an aquarium and a veterinary teaching hospital in the specialty fields of wildlife medicine and veterinary pathology. To accomplish this, Georgia Aquarium established a partnership with the University of Georgia College of Veterinary Medicine. The University's veterinary teaching hospital enhances Georgia Aquarium's ability to provide a complete aquatic animal

pathology and clinical medicine program while also providing joint training for veterinary residents, interns, and students.

44. The Aquarium's partnership with the University of Georgia's College of Veterinary Medicine creates a combined clinical and pathology academic program that contributes significantly to the scientific community's understanding of the underwater world and helps marine mammal experts apply new discoveries to the husbandry, health care, and conservation of aquatic life. Georgia Aquarium's discoveries are published in peer-reviewed scientific publications and shared with other aquariums and academic organizations throughout the world. In 2012 alone, 26 peer-reviewed papers were published by Georgia Aquarium.

45. The addition of 18 whales to the North American breeding population will also allow participating facilities such as Georgia Aquarium to enhance existing breeding programs. More than half of the 33 beluga whales currently in accredited facilities in North America were born in captivity. However, given current population age and dynamics, the current North American breeding population is unsustainable. Thus, Georgia Aquarium and its zoological partners have created a strategic plan that maximizes the appropriate social groupings for courtship, breeding, delivery, and post-delivery care. While the 18 whales will be owned by Georgia Aquarium, some will be distributed to other U.S. facilities

pursuant to breeding loan agreements. If the import occurs, this careful population management process has the potential to extend the current beluga whale population in human care an estimated 60+ years without additional acquisitions.

D. The Aquarium's Commitment to Research

46. Research relating to species in the care of Georgia Aquarium is also a core mission of Georgia Aquarium. The Aquarium's mission statement states the Aquarium is to be an institution "[s]upporting, conducting, and disseminating basic and applied research on environmental issues and stimulating our community's and our visitors' thoughtful consideration of them...."

47. Much can be learned about animals in human care, including beluga whales, that cannot be learned from studying the animals in the wild. As Dr. Grey Stafford, Director of Conservation at World Wildlife Zoo and Aquarium, testified at the October 12, 2012 public hearing on the permit application, "vital physiological and behavioral data" can only be gathered in captivity because "for many physiological parameters, the mere act of collecting information [in the wild] interferes with or dramatically skews the very natural processes one is attempting to measure." For example, Dr. Stafford pointed to the importance of understanding the energy needs of beluga whales related to available food supplies, research that can only be done with animals in human care. Dr. Stafford concluded: "Given the

changes now affecting arctic regions, a better understanding of beluga energetics represents some of the physiological and behavioral insights necessary for the conservation of the wild population. [Such information] is increasingly important to policy makers and scientists making decisions in areas such as balancing the needs of ecosystem management and setting sustainable fishing levels to ensure adequate food supplies.”

48. Dr. Ann Pabst at the University of North Carolina at Wilmington submitted similar comments to NMFS on the Georgia Aquarium permit application stating: “The study of marine mammals in human care has added significantly to our understanding of their biology, and, thus, to our efforts to conserve them in the wild. The controlled conditions provided by research [at] public display facilities have permitted careful study of such fields as energetics (*i.e.*, metabolism, locomotion, thermoregulation), and reproductive and sensory biology of a number of marine mammal species. These data have provided critical baselines that have been used to determine how human activities may impact marine mammals in the wild.”

49. Dr. Brandon Southall, who is affiliated with the University of California, Santa Cruz and Duke University, submitted a comment to NMFS on the Georgia Aquarium permit application stating: “There is no viable debate about the

incredible importance of having animals in controlled conditions under which routine monitoring and scientific assessment have resulted in tremendous advances in veterinary medicine, basic biological functions including reproduction, sensory systems, and many other areas. For instance, most of our basic understanding about ... physiological processes such as metabolic function and basic sensory processes, including hearing, have been accomplished only through having the opportunity to work with animals in human care.” Dr. Southall continued: “[T]he understanding of these essential life history parameters ... has direct application to the understanding of the biological significance of disturbance of wild beluga and other marine mammal stocks by providing a scientific basis for calculating the physiological and survival implications of disturbance.... As beluga live in increasingly altered environments from climate change and resulting industrialization of native habitats ... such information is increasingly needed to scientifically assess human impacts on wild stocks....” Dr. Southall then noted that the scientific information gathered at public display facilities is also “applied directly in rehabilitating stranded animals.”

50. As a result of this type of research, public display facilities, including Georgia Aquarium, have published more than 1,500 scientific research papers through 2012.

51. Beluga whales are a primary research focus of Georgia Aquarium. The import of the 18 beluga whales under the permit will directly increase the opportunities for research that will benefit species in the wild and the care of stranded animals. In addition, Georgia Aquarium continues to provide funding to understand and assess the population size, genetic relationships and spatial usage of the Sea of Okhotsk beluga whales. At the request of NMFS, Georgia Aquarium has also provided staff, equipment, and funding to assess the status of beluga whale populations in Alaska.

52. As the next significant phase of its ongoing commitment to beluga whales and other marine species, Georgia Aquarium intends to create a comprehensive, non-intrusive research program to address several research needs, including beluga whale physiology, diving adaptations, bioacoustics, and nutritional requirements.

53. These non-intrusive studies will help scientists better understand, among other things, the effects of climate change on belugas, how noise in the marine environment from shipping, resource extraction, etc. affects belugas, and how allowable fishing levels may affect the prey needs of belugas. Without the import of the 18 beluga whales, it will not be possible to conduct this research on a larger population and on a more statistically valid basis.

E. The Collection of the Beluga Whales

54. The beluga whales to be imported under the proposed permit were not collected for Georgia Aquarium. When Georgia Aquarium submitted its permit application, these animals had already been removed from the wild under permits issued by the Russian Federation and were part of a pre-existing Russian collection. The collection was done under the supervision of the A. N. Severtsov Institute of Ecology and Evolution, part of the Russian Academy of Science.

55. The animals that were collected are owned by Russians, not by Georgia Aquarium. The Russian Federation issues annual permits for the collection of beluga whales from the Sea of Okhotsk and collecting entities can sell or otherwise dispose of the animals as they wish. Georgia Aquarium has no control over the provisions, terms, or conditions of any collection permit issued by the Russian Federation. Georgia Aquarium has no control over the number of animals a permit authorizes to be collected. Georgia Aquarium does not control the disposition of collected animals.

56. Recognizing the need to increase the number, age and genetic diversity of beluga whales in accredited North American public display facilities, Georgia Aquarium placed a non-refundable deposit with a Russian entity permitted by the Russian Federation to collect beluga whales so that the permitted entity

would not sell 18 of its collected whales to another party until after NMFS made a determination as to whether these animals could be imported into the United States. Thus, the whales in question were not collected for, nor are they owned by, Georgia Aquarium. If this case is unsuccessful, the decision as to the fate of the whales will be made by their owner, the Russian collector.

57. Of the 18 belugas whales included in the permit application, two were collected in 2006, eleven were collected in 2010, and five were collected in 2011 from the Sakhalin-Amur region of the Sea of Okhotsk. All whales were collected in accordance with Russian law and under properly issued collection permits. A special scientific panel of the International Union for the Conservation of Nature and Natural Resources noted in an official report published in 2011 that an independent beluga whale expert and his staff participated in fieldwork in the Sea of Okhotsk in 2007, 2008, and 2010 and “were favorably impressed by the way the experienced capture team caught and handled the whales.”

58. During the short summer collection season, the collection team based its operations at Chkalova Island in the Sakhalin-Amur region of the Sea of Okhotsk. This site is approximately eight kilometers (five miles) northwest of the primary collection site near Baydukova Island. Collection attempts were only initiated during low tide when water depth was shallow (two to four meters [6.6 to

13.1 feet] deep). The collection team sailed with equipment from Chkalova Island, a location near the mid-point of Baydukova Island where belugas are known to forage for salmon in shallow water near shore. As the team sat at anchor, it searched for beluga groups swimming in shallow waters (approximately two to four meters deep) using binoculars. The collection team did not chase or drive whales into shallow waters. Instead, the team only engaged whales that were already located in shallow nearshore waters or those that were moving voluntarily in the direction of such shallow waters. For groups fitting the latter description, the collection team would track the location of the group from a distance and would act only after the whales swam into sufficiently shallow water.

59. When a group of belugas was detected, the collection team conducted an initial visual assessment using binoculars to estimate the number and age of the animals present and to identify the presence of any newborn calves, mother-calf pairs, or juveniles less than one year old. No action was taken by the collection team until the initial assessment was completed and the team was certain of the composition of the group. This is the same protocol utilized in studies approved by NMFS. Because the collection team could safely engage only a limited number of whales in one attempt, the team would not engage if there were more than five animals present. Furthermore, the collection team would not engage any group if

mother-calf pairs, calves, large adults, or juveniles less than one-year old were identified during the initial assessment. Groups including mother-calf pairs and calves were not engaged because calves are not collected, nor does the collection team separate calves from their mothers. Additionally, groups with large, mature adults were not engaged because mature adults are too heavy to collect safely without specialized equipment.

60. The equipment used by the collection team included three baidars (traditional motor/sail boats approximately 14 meters (46 feet) in length with low freeboards, a flat deck, and a central outboard motor) and up to 12 other boats approximately three meters (9.8 feet) in length with 40 horsepower outboard motors. Two of the baidars were loaded with half of a seine net measuring approximately 1.5 kilometers (0.9 mile) in length and eight meters (26.2 feet) in depth with a stretched mesh approximately 30 centimeters (one foot) in cell size. The seine net was constructed of a soft nylon rope and had buoys along the length of the top rope and sewn-in, heavy leaded thread along the bottom rope. This design allows the net to take a vertical orientation once deployed into the water. One-half of the net was placed on each baidar and the two baidars traveled closely side by side with other boats tied to the stern of each until the net was deployed. A

third baidar was used only if the initial collection attempt conducted by the other two baidars failed.

61. When a suitable group of belugas was located in sufficiently shallow water, the collection team would begin engaging the whales. The baidars would separate and encircle the whales by deploying the seine net behind them in a curving trajectory to create a “compass” around the whales. After the compass was formed, the two ends of the net were tied together to eliminate areas of net overlap where whales might become trapped. Once the seine net was closed around the whale group, the team conducted a second visual assessment of the animals swimming inside the seine net. The examination team included a veterinarian or equally trained animal care specialist. If there were any newborn calves, mother-calf pairs, large adults, or juveniles less than one-year old present, the net was opened and all of the animals allowed to exit. If the net did not include newborn calves, mother-calf pairs, large adults, or juveniles less than one-year old, one baidar would sail for the nearby beach of Baydukova Island. There, the baidar would land onshore and the collection team would begin slowly pulling the net into shore by hand. This would simultaneously decrease the diameter of the compass while moving the whales into still shallower waters where they could be more easily handled.

62. As each whale was moved into shallow waters near the onshore baidar, it was removed from the seine net, transferred to a soft net stretcher, and loosely secured along the sides of the nearby baidar in the water parallel to and facing the bow of the boat. Each beluga was supervised by one or two team members who ensured its safe, unimpeded breathing. With the belugas secured and monitored in this position, the baidars sailed slowly (less than five miles per hour – well within the normal swimming speed for beluga whales) to the Chkalova Island camp. The trip to Chkalova Island was undertaken cautiously, with the whales secured to the baidar in a manner that was both safe and in a position that ensured the unimpeded breathing of the whales.

63. Once the baidars had slowly motored to the Chkalova Island camp and were in approximately one meter of water, the animals were moved from alongside the baidar in their net stretchers to shallow water where measurements were taken and their condition and status was inspected by the on-site veterinarian. They were also often kept partially covered under a section of the small net that surrounded them to secure their flippers and avoid injury while being examined. The veterinary examination included a full health assessment of each whale to determine fitness, condition and status.

64. Once in the large shore side pens at the Chkalova Island site, the belugas were monitored and cared for by husbandry and veterinary staff from the Utrish Dolphinarium. While in the shore side pens, the whales were fed locally-caught herring and salmon. Every whale began taking food no later than the second day after collection. The beluga whales remained in the shore side pens under constant supervision and with fulltime medical care for approximately two months before they were transported to the Utrish Marine Mammal Research Station (“UMMRS”) on the Russian coast of the Black Sea. UMMRS is part of the Severtsov Institute of Ecology and Evolution, created by the Russian Academy of Science approximately 27 years ago. Its staff of approximately 200 includes trainers, veterinarians, water engineers, scientists, and other support personnel.

65. The Georgia Aquarium permit application clearly states no mother-calf pairs were targeted or collected. The animals were collected using a humane method that is accepted by scientific methodology worldwide and is consistent with methods used by NMFS during cetacean health assessments and interventions. This includes not collecting and retaining mother-calf pairs, animals that are less than one year of age, or those that are nursing calves. The collection and handling of the beluga whales by the Russians was done in accordance with

the Animal Welfare Act, other U.S. and international law, and the bylaws of the zoological associations to which Georgia Aquarium belongs.

F. The Sea of Okhotsk Beluga Whale Population and the Permit Application

66. The 18 beluga whales at issue were collected from the Sea of Okhotsk in Russia. Prior to deciding to seek a permit to import the whales, Georgia Aquarium needed to be certain the collections did not adversely affect any beluga whale population. Accordingly, Georgia Aquarium sponsored a multi-year research program that was conducted by the A. N. Severtsov Institute of Ecology and Evolution of the Russian Academy of Science to evaluate the genetic relationships, migratory patterns, and status of the Sea of Okhotsk beluga whale populations. Before Georgia Aquarium and others sponsored this research, little was known about the genetic relationships, migratory patterns, and status of Sea of Okhotsk beluga whale populations. Gathering such information was consistent with Georgia Aquarium's core mission of research, particularly with respect to beluga whales, which are one of the Aquarium's species of principal focus. Georgia Aquarium and its partners provided funds to independent scientists who developed and implemented the research program. Georgia Aquarium alone spent \$1 million to fund the research program.

67. According to the analysis conducted by scientists of the Severtsov Institute, the average annual removal of 20 beluga whales from the Sea of Okhotsk from 2000-2010 is less than one percent of the population group from which the whales were collected (the whales in the Sakhalin-Amur area) and is below the allowed potential biological removal (“PBR”) for that group.

68. The data on population levels and dynamics gathered from the study by the Severtsov Institute were peer reviewed by a panel of beluga whale experts selected by the International Union for the Conservation of Nature and Natural Resources (“IUCN”). The resulting report, titled “Report of an Independent Scientific Review Panel,” was published in 2011. The IUCN Independent Scientific Review Panel was comprised of six noted beluga whale experts: Dr. R. R. Reeves, Dr. R. L. Brownell, Jr., Dr. V. Burkanov, Dr. M. C. S. Kingsley, Dr. L. F. Lowry, and Dr. B. L. Taylor. Four of these six scientists are current or former senior scientists at NMFS. One of the current NMFS scientists is the leader of the NMFS Marine Mammal Genetics Group. One of the former senior NMFS scientists is now the Chairman of the Committee of Scientific Advisers of the U.S. Marine Mammal Commission created under the MMPA.

69. As defined by the MMPA, the PBR for a population is the number of animals that may be removed from a stock each year without adversely affecting

the population. PBR is calculated based on a formula that has three elements – population size, reproductive rate, and the need, if any, for species recovery. Population size is calculated by taking the number of animals observed on the surface and multiplying that by a correction factor to account for unobserved animals swimming below the surface. The IUCN used this formula to estimate PBR. The IUCN panel concluded beluga removal at the levels occurring during the years preceding the Georgia Aquarium’s permit application would not have an adverse effect on that population.

70. The IUCN panel calculated the PBR for the Sakhalin-Amur population of beluga whales in the Sea of Okhotsk from which the 18 whales were collected as 29 animals per year. That number was later raised to 30 per year based on the IUCN panel recommendation. This is a highly conservative number. The IUCN used assumptions/data regarding population size in the basic PBR formula that are far more conservative than those used by NMFS to calculate PBR when NMFS applies the MMPA. The IUCN process for calculating population size differed from the NMFS process because (1) the average, not the peak, population count was used, (2) the IUCN panel employed the lowest commonly used correction factor for animals not seen and counted because they were below the surface, and (3) no correction factor was applied for difficult to detect young

animals. In addition, (1) a 20th-percentile minimum population estimate was used, (2) the estimated net productivity (*i.e.*, reproduction) factor was halved, and (3) a recovery factor was applied that again halved the estimated PBR.

71. To calculate the PBR, the IUCN expert panel used a minimum population estimate of 2,891, then multiplied that number by one-half the accepted net productivity rate of 4% for belugas, and then multiplied that number by a 0.5 recovery factor. This resulted in an annual PBR of 29 animals, later corrected to 30 per year based on data analysis that used an additional pooling of data recommended by the IUCN panel. This annual PBR is one percent of the IUCN minimum population estimate and well above the 2007-2011 five-year average removal of 22 animals. However, if the IUCN had used the population size estimation methods, including the population correction factors, NMFS applies pursuant to the MMPA for calculating the PBR for beluga whale stocks in the eastern Chukchi Sea, eastern Bering Sea, and Bristol Bay in the U.S., then the IUCN PBR calculation would increase to 46 per year. The collection of the 18 whales proposed for import occurred over a three-year period.

72. The IUCN PBR calculations were based on the assumption that the whales found in the Sakhalin-Amur area are a distinct and separate population group. However, the data indicate this is not the case. The Sea of Okhotsk

features three beluga whale summer aggregations, one in the Sakhalin-Amur region, one in the adjacent Shantar region (comprised of four bays), and one in the Shelikov region. The Shelikov population is distinct from the other two and, based on existing data and geographic considerations, should not be considered part of the Shantar and Sakhalin-Amur aggregations. However, data on migration patterns, data regarding the mixing during the breeding season of whales from the groups that summer in the Shantar and Sakhalin-Amur areas, and genetic analyses all show that the Shantar and Sakhalin-Amur populations are related and should be considered as one group for calculating PBR.

73. As to genetic analysis, data for 19 microsatellite loci (*i.e.*, nuclear DNA inherited from both parents) indicate the beluga whales in the Shantar region and the whales in the Sakhalin-Amur region are not genetically differentiated but instead belong to one genetically homogeneous population. The mitochondrial DNA (“mtDNA”) (*i.e.*, a small part of the cellular DNA usually inherited only from the mother) data indicate female belugas have a degree of fidelity to specific summering areas, but it is not absolute and mtDNA is shared by belugas in the different summering areas. The genetic data, particularly for microsatellite loci, indicate there is considerable interbreeding of the animals in all areas in the Shantar and Sakhalin-Amur regions over time. The combined microsatellite and

mtDNA data indicate the beluga whales in individual bays in the Shantar and Sakhalin-Amur areas are not genetically distinct groups and that beluga whales in the Shantar and Sakhalin-Amur regions comprise one genetic stock. This means that calculation of a PBR should use the number of whales in the entire population of the Shantar and Sakhalin-Amur region.

74. The genetic data are confirmed by satellite tagging data which show that beluga whales that summer in the Sakhalin-Amur region spend the winter in the central Sea of Okhotsk. Many experts believe beluga whales that summer in the Shantar region also spend their winter in the central Sea of Okhotsk. The breeding season occurs while the whales are in the winter and spring grounds. The satellite tagging data also revealed that two of the 12 whales (17%) that had been tagged during the summer in the Sakhalin-Amur region were resighted the next summer in the Shantar region. This is direct evidence that beluga whales move among the Shantar and Sakhalin-Amur regions and that both areas should be considered as one group for the calculation of PBR. In addition, all of the whales tagged during the summer in the Sakhalin-Amur region spent the fall in the Shantar region before moving north to the wintering grounds.

75. The combined population estimate of the beluga whales summering in the various bays in the Sakhalin-Amur and Shantar regions is 9,240 with a minimum population estimate of 8,632. If one uses the PBR calculation methods employed by the IUCN, the resulting PBR is 86. If, however, one used the PBR calculation methodology employed by NMFS under the MMPA for managing the Chukchi Sea and the Bering Sea beluga whale populations in the U.S., the PBR would increase even more.

76. The IUCN expert panel that calculated the PBR for the Sakhalin-Amur summer beluga population also addressed the question of whether the beluga whale collection program permitted by the Russian Federation is the only source of removals of beluga whales in the Sea of Okhotsk. As to the existence of any additional anthropogenic take, the IUCN panel found there was no evidence to suggest any such take was anything more than minimal and, when combined with the five-year average annual permitted collection, certainly not high enough to exceed PBR.

G. The Permit Decision

77. Defendants denied the Georgia Aquarium permit application on August 5, 2013.

78. Defendants determined the permit application met most but not all the criteria set forth in 50 C.F.R. §216.34 and the MMPA for issuance of the permit.

79. 50 C.F.R. §216.34(a)(1) requires that the proposed activity be humane and not present any unnecessary risks to the health and welfare of marine mammals. Defendants found the proposed transport of beluga whales met this standard.

80. 50 C.F.R. §216.34(a)(2) requires that the proposed activity be consistent with the restrictions in 50 C.F.R. §216.35, which includes restrictions related to humaneness, a prohibition on importing marine mammals that were “unweaned” or less than eight months of age when taken, and requirements that the permit applicant possess the necessary qualifications to undertake the proposed activity. Defendants stated these requirements duplicated other regulations and would be addressed in the context of those other regulations.

81. 50 C.F.R. §216.34(a)(3) requires that activities involving species listed under the Endangered Species Act be consistent with that Act. Since beluga whales are not so listed, Defendants found this criterion inapplicable.

82. 50 C.F.R. §216.34(a)(4) requires that the proposed activity by itself or in combination with other activities will not likely have a significant adverse impact on the species or stock. Defendants found this criterion was not met

because Defendants “cannot discount the possibility” that there could be an “undetected” decline in the population of the beluga whales in the Sea of Okhotsk and that the live capture of beluga whales for public display “may have contributed” to the undetected possible decline. Defendants deemed the permit application inadequate because it contained no information about the population trend of beluga whales found in the Sea of Okhotsk.

83. 50 C.F.R. §216.34(a)(5) requires that the permit applicant have the expertise, facilities, and resources to accomplish the proposed activity. Defendants found Georgia Aquarium has the requisite expertise, facilities, and resources.

84. 50 C.F.R. §216.34(a)(6) requires that if a live animal is to be transported the permit applicant have qualifications, facilities, and resources adequate for the proper care and maintenance of the marine mammal. Defendants found Georgia Aquarium meets this standard.

85. 50 C.F.R. §216.34(a)(7) requires that the import will not likely result in the taking of additional marine mammals. Based on language in a 1993 Proposed Rule that was never adopted, Defendants found this standard was not met because the Russian Federation will not agree to stop issuing permits for the live capture of beluga whales for public display.

86. 50 C.F.R. §216.34(b) requires Defendants to consider the opinions or views of scientists or other knowledgeable persons. Defendants stated this was done.

87. 16 U.S.C. §1372(b) and 50 C.F.R. §216.12(c) prohibit the importation of animals that were pregnant at the time of taking. Defendants found no pregnant animals were collected.

88. 16 U.S.C. §1372(b) and 50 C.F.R. §216.12(c) prohibit the importation of animals that were nursing or less than eight months old, whichever is later, at the time of taking. Defendants found this standard was not met as to five of the belugas proposed for import because it was theoretically possible the five were not fully independent of their mothers at the time of collection.

89. 16 U.S.C. §1372(b) and 50 C.F.R. §216.12(c) prohibit the importation of a marine mammal from a “depleted” stock. Defendants found the Sea of Okhotsk stock of beluga whales is not depleted.

90. 16 U.S.C. §1372(b) and 50 C.F.R. §216.12(c) make it unlawful to import any marine mammal not taken in a humane manner. Defendants determined the collection of the 18 beluga whales was performed in a humane manner.

91. 16 U.S.C. §1372(b) and 50 C.F.R. §216.12(c) prohibit the importation of marine mammals taken in another country in violation of the laws of that country. Defendants found the 18 beluga whales were collected in compliance with the laws of Russia.

H. Defendants' Decision Making Process

92. Before submitting the permit application, Georgia Aquarium met with representatives of Defendants on multiple occasions to discuss the possible permit application and to ask what information Defendants needed to have included in the application in order to comply with the MMPA. At no time did Defendants state that population trend data for Sea of Okhotsk beluga whales was a required component of a permit application. However, as discussed above, Defendants found the permit application did not comply with the MMPA because of the absence of population trend data.

93. Before submitting the permit application, Georgia Aquarium submitted a draft of the application to Defendants with a request that Defendants identify any additional information required by the MMPA or Defendants so that Defendants could make a decision regarding the application. The draft permit application did not contain population trend data for Sea of Okhotsk beluga whales. The draft application computed the PBR for the Sakhalin-Amur

population group and used PBR as the measure of the sustainability of removals. Defendants did not ask Georgia Aquarium to provide population trend data for Sea of Okhotsk beluga whales. Defendants did not assert that PBR analysis could not be used to determine the sustainability of removals from a population. Nevertheless, Defendants' permit denial rejected Georgia Aquarium's reliance on a PBR analysis, stating PBR analysis could not be used because of the absence of population trend analysis showing an increasing population.

94. When Defendants published a Federal Register notice of receipt of the permit application, Defendants stated the application was complete, notwithstanding the absence of population trend data which Defendants stated was required in its denial of the permit.

95. After reviewing the permit application, Defendants prepared a Draft Environmental Assessment on the Georgia Aquarium permit application. That document stated Defendants proposed to issue the requested permit to Georgia Aquarium.

96. Early in 2013, representatives of Defendants told representatives of Georgia Aquarium that the permit had been written and the decision document had also been written. A permit is not written unless the agency's decision is to issue a permit.

97. Subsequently, representatives of Defendants told representatives of Georgia Aquarium that the delay in announcing the final agency decision on the permit application was caused by a disagreement among Defendants' lawyers regarding whether an environmental assessment or an environmental impact statement should be prepared pursuant to the National Environmental Policy Act. Defendants would not have been considering the preparation of an environmental impact statement regarding the permit decision with its attendant costs and delays if the agency's decision was to deny the permit application.

98. Subsequent to these events, representatives of Defendants told representatives of Georgia Aquarium on June 20, 2013 that Defendants were concerned that granting the permit to Georgia Aquarium would "open the floodgates" to more permit applications to collect and/or import animals for public display. Despite Defendants' concerns about considering future collection or import permits for public display, the MMPA specifically authorizes public display facilities to submit permit applications for the collection and import of marine mammals for public display.

99. The MMPA specifies that Defendants may not issue a permit for the import or public display of marine mammals without first consulting with the U.S. Marine Mammal Commission and its Committee of Scientific Advisors. The

Commission and its Committee of Scientific Advisors were created, among other things, to provide scientific advice to Defendants. 16 U.S.C. §1401, *et seq.* After considering the scientific evidence and all of the applicable statutory and regulatory standards, the Commission recommended issuance of the permit. In addition, the Agriculture Department's Animal and Plant Health Inspection Service, which has responsibility for overseeing the care and maintenance of marine mammals in human care, recommended approval of the permit application.

FIRST CLAIM FOR RELIEF
(Violation of the MMPA and the APA
Regarding the Impact of the Import on Wild Populations)

100. Plaintiff realleges, as if fully set forth herein, each and every allegation contained in paragraphs 1 through 99.

101. The regulations implementing the MMPA provide that the proposed action (here the import of 18 previously collected beluga whales) by itself or in combination with other activities will not likely have a significant adverse impact on the species or stock. 50 C.F.R. §216.34(a)(4). Defendants claim the permit, if issued, would violate this regulation. In applying this regulation, the permit denial states “the relevant question under the MMPA becomes ‘Is the beluga whale trade in the Sea of Okhotsk sustainable?’”

102. Defendants claim this standard is violated because Defendants “cannot discount the possibility” that there could be an “undetected” decline in the population of beluga whales in the Sea of Okhotsk and that the live capture of beluga whales for public display “may have contributed” to this undetected, possible decline.

103. Prior to submitting the permit application, Georgia Aquarium supported research by the A. N. Severtsov Institute of Ecology and Evolution, part of the Russian Academy of Science, to design and implement a multi-year study of beluga whales in the Sea of Okhotsk (the “Severtsov Study”) as described above.

104. The Severtsov Study verified that the collections of beluga whales from the Sea of Okhotsk as permitted by the Russian Federation were sustainable and were at a level that would not adversely affect the wild population.

105. The data and analysis of the Severtsov Study were peer reviewed by a panel of beluga whale experts selected by the IUCN. As described above, the resulting report, titled “Report of an Independent Scientific Review Panel,” was published in 2011.

106. As described above, the IUCN panel concluded the level of removals under permits issued by the Russian Federation is sustainable.

107. The IUCN panel commended the sponsors of the Sea of Okhotsk research program for funding “the research and monitoring needed to ensure long-term sustainability” of the Sea of Okhotsk beluga collection program approved by the Russian Federation. The panel also stated it wished “to commend [the research sponsors] for making the methods and results available for critical, independent scientific evaluation.” Georgia Aquarium was a principal sponsor of the research.

108. The IUCN Independent Scientific Review Panel evaluated the sustainability of the collections that had occurred in the Sea of Okhotsk by computing the safe potential biological removal (“PBR”) level and comparing that to the total number of removals. The IUCN Panel stated: “The PBR approach was developed to estimate levels of annual removals that are compatible with the goals of the U.S. Marine Mammal Protection Act...” The panel stated the PBR approach it used “meets the ... definition of sustainable.”

109. The IUCN panel concluded that the “PBR (sustainable annual removal) ... = 29 belugas.” This number was later increased to 30 based on additional data analysis recommended and approved by the Panel.

110. The IUCN panel “concluded that the sustainability of recent removals could reasonably be determined by comparing the 2006-2010 mean removals with

a PBR of 29 [later increased to 30]....” The mean live capture for 2006-2010 was 20.

111. In claiming that issuance of an import permit to Georgia Aquarium would violate 50 C.F.R. §216.34(a)(4), Defendants stated: “In particular, we relied on the [IUCN] Committee’s recent report....” Despite stating this, Defendants ignored the conclusions of that report which found the collections from the Sea of Okhotsk are sustainable. Defendants justified disregarding the report of the Independent Scientific Review Panel of the IUCN because, in Defendants’ view, using PBR as a measure of sustainable removal levels “is only appropriate where the stock is increasing...” and there is no population trend data in Georgia Aquarium’s permit application showing such an increase. Requiring that PBR can only be used if there is population trend data showing the population is increasing is an unprecedented legal standard found nowhere in law or regulation. Application of an unsupportable, and heretofore unknown, legal standard is arbitrary, capricious, and not in accordance with law.

112. Defendants routinely approve permits and actions using PBR as a measure of sustainability and do not require data showing that the relevant population stock is increasing. As noted above, when Georgia Aquarium submitted a draft of the permit application to NMFS asking what additional data or

information NMFS might need in the final application, NMFS made no request for population trend data. Application of a standard not applied to other permits is arbitrary, capricious, and not in accordance with law.

113. Even assuming Defendants have not arbitrarily and capriciously created a new standard allowing them to deny the Georgia Aquarium permit application, the relevant beluga whale population in the Sea of Okhotsk is not declining. To assert that the population of beluga whales in the Sakhalin-Amur area has been declining, Defendants manipulated the data. For example, Defendants compared population surveys that multiplied by 12 the number of whales sighted on the surface in order to account for submerged whales with population surveys that multiplied the number of whales sighted on the surface by two. Such results compare apples to oranges. Defendants committed numerous other errors, including using population counts deemed incorrect by the IUCN scientific review panel and comparing actual population levels in one area with minimum population levels in another area.

114. Defendants assert, in the alternative, that even if PBR is the proper measure of sustainable removals, the total number of removals from the beluga whale population in the Sakhalin-Amur area exceeds the PBR level.

115. However, Defendants' permit denial admits: "The removals for live-capture of the beluga whales from the Sea of Okhotsk at the levels reported from 2000-2011 should not impede the stock's growth or recovery." Defendants' permit denial further states: "If the removal of beluga whales for public display were the only source of mortality from this stock, then it would be increasing at a slow rate."

116. After these admissions, Defendants' assert there are six sources of removal of beluga whales in the Sakhalin-Amur area in addition to public display removals that "cannot be fully discounted or assumed to be zero." However, Defendants admit there is a "lack of substantiated data" regarding any sources of removal in addition to public display removals. Nevertheless, Defendants concluded these unsubstantiated sources of removal should be assumed to be at a level that when added to live captures result in the total annual number of takes being above the sustainable PBR.

117. The first possible source of additional mortality cited by Defendants is subsistence harvests. The permit denial cites a Russian scientist's report that the annual subsistence take was possibly one-three animals per village. However, the estimate in that report is anecdotal only and is not supported by any scientific investigation or analysis. In fact, the alleged subsistence takes referenced in that

report occur only in the Shantar region of the Sea of Okhotsk and not in the Sakhalin-Amur area where the 18 beluga whales were collected. There were no reported subsistence takes in that report as to beluga whales found in the Sakhalin-Amur area, which Defendants assert is the relevant population group.

118. The second possible source of additional mortality cited by Defendants is deaths associated with live capture. However, the permit denial reports only one such death between 2007 and 2010.

119. The third possible source of additional mortality cited by Defendants is entanglement in fishing nets. However, the permit denial states that since 1915, nearly 100 years ago, only a “few cases have been reported” and that beluga whales are “unusual among cetaceans in their ability to avoid entanglement.”

120. The fourth possible source of additional mortality cited by Defendants is vessel strikes. However, the permit denial states: “There have been no reports of vessel strikes or evidence of strikes ... reported for this population.”

121. The fifth possible source of additional mortality cited by Defendants is climate change. However, the permit denial states “there are insufficient data to make reliable predictions on the effects of Arctic climate change on beluga whales....”

122. The sixth possible source of additional mortality cited by Defendants is pollution. However, the permit denial states: “The effects of pollution on beluga whales are difficult to determine and there is no basis for integrating pollution into an assessment of biological removal.”

123. It is arbitrary, capricious, and not in accordance with law for Defendants to assert, in the absence of any evidence and in the presence of evidence to the contrary, that additional sources of mortality cause the total removals from the number of beluga whales found in the Sakhalin-Amur area to exceed PBR. There is a marked lack of data supporting Defendants’ conclusion. In fact, the IUCN panel found there was no evidence to suggest that any takes beyond those for public display are anything but minimal, and certainly not high enough to exceed PBR when combined with collections for public display.

124. It is also arbitrary, capricious, and not in accordance with law for Defendants to calculate PBR using a methodology not applied to any other permit applicant. Defendants compared the alleged number of removals to the IUCN panel’s PBR number. However, as described above, the IUCN panel used a method to calculate the population level number used in the PBR equation that is more conservative than the method used by Defendants in calculating PBR under the MMPA. If Defendants calculated PBR using the same method for determining

the population level number that Defendants use under the MMPA for harvested beluga populations in the Chukchi Sea and the Bearing Sea, then the IUCN calculated PBR would increase to 46. None of the “unsubstantiated” removals of beluga whales in the Sakhalin-Amur area about which Defendants are concerned come close to approaching this PBR number when added to the removals for public display.

125. Defendants further assert a factor impacting the permit denial was that the collection of the 18 whales may impact the matrilineal transmission of information among beluga whales in the Sea of Okhotsk that result in belugas returning to summer in specific bays.

126. With respect to matrilines, the belugas to be imported were collected over three years (2005, 2010, and 2011) from groups of five or fewer animals. Therefore, any potential disruption of family units that return to specific bays during the summer because of matrilineal cultural transmission was greatly minimized. The average annual collection of 20 beluga whales from the Sakhalin-Amur summering group from 2000-2010 represents less than 0.6% of the conservative IUCN population estimate of 3,547 animals. If the method used by Defendants to estimate population size under the MMPA is employed, the annual removal rate would be 0.3% of the Sakhalin-Amur population. Further, of the 18

whales to be imported, only 10 (56%) are female and these are all young females. Older matriarchal adult females that are important in transmitting cultural information were not collected. Further, matrilineal systems are hierarchal, meaning only a portion of the adult females, none of which were collected, are responsible for the bulk of the cultural transmission. Removal of a few young females long before they can reach any level of hierarchal dominance is unlikely to disrupt existing or future matrilineal complexes. Given the relatively long life span of these animals, their lifetime fecundity, the number of beluga whales in the Sakhalin-Amur summer group, the associated number of matrilines (which could number in the hundreds), and the small number of animals collected annually (of which approximately half are males), the contention that the Russian collection program consistently removes animals from a single matriline to the point of depletion is not mathematically supportable.

127. Finally, Defendants assert in the permit denial that the collection of the 18 beluga whales may cause localized depletion and that this was considered in the permit denial. Contrary to Defendants' assertion, the collection of beluga whales in the Sea of Okhotsk will not cause localized depletion or have adverse cumulative effects. To conclude otherwise implies that the collections come from the same groups or that the same whales are repeatedly captured and released. The

results of satellite tagging studies conducted on beluga whales found in the Sakhalin-Amur area during summer indicate the whales collected at the collection site (Chkalov and Baydukov Islands) move across the entire 70-mile breadth of the Sakhalin-Amur area. Thus, all animals in the area are available for collection, not just a few local individuals. Since the collection methodology targets groups of five or less whales, mathematically, there could be hundreds of eligible small groups to choose from during a collection season. A group of five is approximately 1/700th of the most conservative Sakhalin-Amur summer population estimate. The likelihood of the same whales being repeatedly captured is exceedingly remote.

128. The MMPA authorizes the Secretary to issue permits for the importation of marine mammals for public display if issuing the permit complies with all applicable statutory and regulatory provisions. 16 U.S.C. §§1371(a)(1), 1374. The proposed Georgia Aquarium permit complies with all applicable statutory and regulatory provisions. Defendants' decision to deny the permit application when the applicable statutory and regulatory requirements are met violates the MMPA. Defendants' claim that granting the import permit will likely have a significant adverse impact on the beluga whales found in the Sakhalin-Amur area violates the MMPA and the APA because it is arbitrary, capricious, and

not in accordance with law. Defendants' action is based on standards nowhere found in law or regulation, is based on the application of methods and standards that have not been applied to any other permit applicant, is not based on the best scientific evidence, and has no foundation in law or fact.

SECOND CLAIM FOR RELIEF
(Violation of the MMPA and the APA Regarding Whether the Permit Will Result in Additional Removals from the Sea of Okhotsk)

129. Plaintiff realleges, as if fully set forth herein, each and every allegation contained in paragraphs 1 through 128.

130. The regulations implementing the MMPA provide that the proposed action (here the import of 18 previously collected beluga whales) cannot be permitted if it is likely to result in the taking of additional beluga whales. 50 C.F.R. §216.34(a)(7). Defendants claim the permit, if issued, would violate this regulation. Thus, Defendants' permit decision states: "There are ongoing, legal marine mammal capture operations in Russia that are expected to continue...."

131. Defendants' legal position is that "we cannot obtain assurances that an additional 18 whales would not be captured in the future...." In other words, unless a foreign sovereign agrees to never collect another animal, no import permit for public display can ever be granted after the first such permit is approved. The provisions of the MMPA, however, do not support this interpretation. In fact, the

MMPA specifically authorizes the collection and import of marine mammals for public display. 16 U.S.C. §§1371(a)(1) and 1374. Defendants' permit decision violates the MMPA and nullifies these provisions of law by prohibiting any United States entity from importing a marine mammal if the exporting country, which is not subject to the MMPA, may allow future collections for public display.

132. The factual basis for Defendants' legal position is Defendants' belief that "issuance of this permit would contribute to the demand to capture belugas from this stock for the purpose of public display worldwide, resulting in future taking of additional belugas from this stock." To the contrary, one purpose of the proposed import is to increase the breeding population of beluga whales held at accredited North American public display facilities such that no further permits for importation or collection will be sought by such facilities in the foreseeable future.

133. Defendants' Draft Environmental Assessment regarding the permit application recognizes it is highly unlikely that there will be future import or collection applications from facilities subject to the MMPA. That document states: "There are no active permits which authorize the importation of beluga whales in the U.S., or other permits authorizing the direct collection of marine mammals from U.S. waters for public display. In addition, this application has been submitted with the understanding that all facilities holding beluga whales in the

U.S. will be participating in the collective management of these imported animals. Therefore, it is extremely unlikely, but not impossible, for other marine mammal facilities to request a similar permit in the future.”

134. Furthermore, even if an application for import or collection was submitted by a facility subject to the MMPA, Defendants’ Final Environmental Assessment regarding the permit application states that any decision on the Georgia Aquarium permit application is not a precedent for a decision on any other permit application and each permit application will be judged on its own merits.

135. Given Defendants’ admission that it is “extremely unlikely” that any facility subject to the MMPA will submit an application to import or collect beluga whales in the future, Defendants’ sole factual basis for permit denial under 50 C.F.R. §216.34(a)(7) is that non-U.S. entities not subject to the MMPA may seek to import into their sovereign countries animals collected in Russia because the importation of beluga whales by Georgia Aquarium will cause such non-U.S. entities to seek to import beluga whales for public display.

136. Defendants offer no evidence that the import of beluga whales into the United States will “contribute to the demand” for beluga whales in other countries, particularly when the purpose of the import is to reduce the need for future collection.

137. The MMPA authorizes the Secretary to issue permits for the importation of marine mammals for public display if issuing the permit complies with all applicable statutory and regulatory provisions. 16 U.S.C. §§1371(a)(1), 1374. The proposed Georgia Aquarium permit complies with all applicable statutory and regulatory provisions. Defendants' decision to deny the permit when the applicable statutory and regulatory provisions are met violates the MMPA. Defendants' claim that granting the import permit for already collected whales will likely result in the collection of additional beluga whales in violation of 50 C.F.R. §216.34(a)(7) violates the MMPA and the APA because is contrary to the provisions of the MMPA allowing the collection and/or importation of marine mammals for public display, illegally applies the MMPA to sovereign nations, and has no foundation in fact or law. Defendants' action is arbitrary, capricious, and not in accordance with law.

THIRD CLAIM FOR RELIEF
(Violation of the MMPA and APA
Regarding Importation of Five Beluga Whales)

138. Plaintiff realleges, as if fully set forth herein, each and every allegation contained in paragraphs 1 through 137.

139. The MMPA and its implementing regulations prohibit the import of marine mammals that are less than eight months old or nursing at the time of taking, whichever occurs later. 16 U.S.C. §1372(b)(2), 50 C.F.R. §216.12(c).

140. Defendants' permit decision asserts five of the 18 whales proposed for import were estimated to be a minimum of 1.5 years of age at the time of collection. The permit decision further asserts that beluga whales may nurse for two years or longer and, therefore, "[a]t 1.5 years of age, beluga whale calves are likely not independent from their mothers." Therefore, Defendants concluded that granting the permit application would violate 16 U.S.C. §1372(b)(2) and 50 C.F.R. §216.12(c).

141. The stated ages of the whales at the time of capture are estimates. 1.5 years is the low end of the estimate. An accurate determination of age requires the intrusive act of pulling a tooth to examine growth layers, much as a tree is aged by examining growth rings.

142. For nursing to occur, there must be a mother-calf pair and a lactating female. No mother-calf pairs were collected. No lactating female was collected.

143. At the time of collection and again after collection, a veterinarian or equally trained animal care specialist examined the animals and confirmed the presence of no lactating female and no nursing calf.

144. Almost immediately after collection, all the belugas were eating solid food (fish, etc.) for 100% of their dietary needs. This demonstrates the five belugas at issue were independent of their mothers. Had any of the younger animals been nursing and dependent on their mothers, additional handling and acclimation, followed by formula feeding and weaning to solid food would have been required for the animals to survive. For the younger animals to have acclimated and been eating solid food almost immediately after collection is incompatible with the assertion that the animals were nursing in any dependent way, if at all.

145. Defendants offer no evidence contradicting the fact that the five belugas were not nursing. Instead, Defendants assert it was theoretically possible the animals were nursing.

146. The MMPA authorizes the Secretary to issue permits for the importation of marine mammals for public display if issuing the permit complies with all applicable statutory and regulatory provisions. 16 U.S.C. §§1371(a)(1), 1374. The proposed Georgia Aquarium permit complies with all applicable statutory and regulatory provisions. Defendants' decision to deny the permit application when the applicable statutory and regulatory requirements are met violates the MMPA. Defendants' denial of the permit application based on the

claim that five of the beluga whales proposed for import were nursing at the time of collection violates the MMPA and the APA because it has no foundation in law or fact and is arbitrary, capricious and not in accordance with law.

PRAYER FOR RELIEF

Plaintiff respectfully requests that this Court:

- A. Maintain jurisdiction over this action until Defendants are in compliance with the MMPA, APA, and every order of this Court in this action;
- B. Find that Defendants have violated the MMPA and the APA as set forth above;
- C. Vacate the denial of the permit to Georgia Aquarium for the importation into the United States of 18 beluga whales from Russia and order Defendants to issue the permit and enjoin Defendants from taking any action to prevent the import of the whales;
- D. Award Plaintiff its costs of litigation, including reasonable attorneys' fees and expert witness fees; and
- E. Grant Plaintiff such further and additional relief as the Court may deem just and proper under the circumstances.

Dated: September 30, 2013

/s/ Daniel F. Diffley

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