

September 13, 2001

Ms. I. Teiko Saito
Chief, Office of Management Authority
U.S. Fish and Wildlife Service
4401 North Fairfax Drive
Mail Stop 700
Arlington, VA 22203



**Re: Comments on Applications No. PRT 020575 and
No. PRT 043001/Renewed FOIA Request**

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



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

A project of Earth Island Institute

Dear Ms. Saito:

These supplemental comments on Permit Application No. 020575 (Aquamarine Fukuskima) and No. 043001 (Ibaraki Prefectural Oarai Aquarium) are submitted on behalf of: Earth Island Institute; Sea Otter Defense Initiative; Defenders of Wildlife; The Humane Society of the United States; and In Defense of Animals. Our previous comments, submitted by letter of July 16, 2001, are hereby incorporated by reference and are set forth in Attachment 1. In those comments, we explained in detail the reasons why both permit applications must be denied. All of the reasons continue to apply, and by this letter we restate our strong opposition to these applications.

On August 14, 2001, the U.S. Fish and Wildlife Service ("FWS") published a notice in the Federal Register reopening the comment period on these applications. 66 Fed. Reg. 42677.¹ Subsequent to the closing of the initial comment period, the applicants submitted additional information, which has now been made available to us for review. Nothing in that new information cures the deficiencies noted in our initial comment letter, and all of those objections remain valid.

¹ In that notice, FWS asserts that the comment period on the initial notice closed on July 15, 2001. This is incorrect. July 15 was a Sunday; therefore, the comment period closed on July 16, the date our initial comments were filed.

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Renewed Request for Public Hearing. Our organizations repeat their request for a public hearing. No valid basis has been articulated by FWS for not holding a public hearing on these applications. As explained in our letters of July 2, 2001 and July 12, 2001, a public hearing is necessary to allow for a fully developed record and fair opportunity to comment. By not granting a hearing, FWS has failed to provide a forum that allows us to present critical evidence that requires a visual presentation and narration, including photographs, videos, and reports from individuals who have direct experience with these facilities. In addition, the only vehicle for allowing the overwhelming opposition to these applications to be presented fully and effectively is through an in-person hearing where the many members of the public who are affected by, and opposed to, these applications can present their views.

FWS has not responded to these reasons for a hearing. Instead, the Service merely asserts that because a NEPA categorical exclusion purportedly applies, "the Service does not anticipate holding a public hearing" Id.

This reasoning is flawed in two respects. First, as explained in our initial comment letter, FWS cannot invoke a categorical exclusion. Thus, the only basis for not holding a hearing set forth by FWS is inapplicable. Second, a hearing is called for independently under section 104(d)(4) of the Marine Mammal Protection Act ("MMPA"). 16 U.S.C. § 1374(d)(4). Under this provision, FWS has until October 15, 2001, to hold such a hearing. Failure to hold a hearing will deny our organizations and the general public the opportunity, recognized by Congress in creating this authority under MMPA, their full procedural right and opportunity to comment upon these extremely controversial applications. We request an independent response from FWS on our requests for a hearing.

Prohibition on Export Permits. In our initial comment letter, we stated that FWS lacks authority under the MMPA to issue export permits. Nothing in the new information addresses this legal deficiency. In addition, the two other federal agencies with jurisdiction under the MMPA have stated their view that our position is correct.

By letter of July 31, 2001, commenting on these applications, the Marine Mammal Commission ("MMC") stated that it "does not believe that the Marine Mammal Protection Act authorizes the issuance of export permits. . . ." Attachment 2. In addition, in its notice of proposed rulemaking published on July 3, 2001, to

promulgate MMPA permit regulations, the National Marine Fisheries Service states, "[w]hen Congress amended the MMPA in 1994, it prohibited the export of marine mammals." 66 Fed. Reg. 35213. Presumably, FWS is in agreement with these positions adopted by its sister agencies, who are entitled deference by the courts in construing the MMPA. In addition, FWS has a statutory duty to accord special deference to recommendations from the MMC. 16 U.S.C. § 1402(d). For these reasons, FWS should reject these applications out-of-hand due to the absence of legal authority to issue an export permit or a public display permit to an unlicensed, unregistered foreign entity.

Failure to Comply with NEPA. The grounds stated in our initial comment letter regarding NEPA and the need for an EA or EIS continue to apply. FWS is incorrect, for the reasons previously stated, in invoking a categorical exclusion for these applications.

Failure to Comply With FOIA. By letter of June 19, 2001, all documents relevant to these applications were requested on our behalf under FOIA. Attachment 3. As stated in a July 19, 2001, letter to Dr. Kohn of APHIS from the applicant, Attachment 4, that agency apparently requested more information from these aquaria by letter of June 15, which presumably is in the possession of FWS. Although we had FOIA requests pending before both FWS and APHIS subsequent to that date, see Attachments 3 and 5, we have not been provided a copy of that important letter from APHIS, which apparently identifies deficiencies with the application. We therefore renew our FOIA request for all documents in the possession of FWS as of the date of this letter, regarding these permit applications. This request is submitted pursuant to 5 U.S.C. § 552 et seq.

Report of Investigation of Aquamarine Fukushima. Set forth in Attachment 6 is an investigative report prepared by the Elsa Nature Conservancy in Japan. The report details numerous deficiencies with Aquamarine Fukushima. These deficiencies confirm that the facility does not meet U.S. standards for public education/conservation, care and maintenance, and that issuance of this permit will not be consistent with the purposes of the MMPA, as required to be demonstrated by the applicant under section 104(d)(3). 16 U.S.C. § 1374(d)(3). Indeed, issuing either permit will violate section 104(d)(3) because such take authorization will conflict with

the MMPA purpose set forth in section 2(5) of providing "protection" to all marine mammals, including individual animals² that move in interstate commerce. Id. § 1361(5). Obviously, any animal maintained in substandard facilities such as these will not be protected as required by the MMPA.

The Oarai Aquarium's Participation in Drive Fisheries. As explained in our initial comment letter, the Oarai Aquarium cannot meet U.S. conservation standards because of its participation in the brutal and inhumane drive fishery. Further information on this practice is contained in Attachment 7. In addition, as noted therein, the Oarai Aquarium intends to participate in another such capture next March. No MMPA permit can be issued to a facility that engages in such a barbaric practice completely at odds with MMPA purposes, requirements, and U.S. standards. Additional information on the deficiencies with the Oarai Aquarium is set forth in Attachment 8.

Concern About Validity of Responses. We are concerned with the accuracy and validity of the responses provided by the applicants to APHIS' request for more information.

The responses to APHIS' questions are identical for both facilities. It seems fairly clear that one person wrote one set of responses and gave it to both facilities to use as a reply to APHIS' questions. The likelihood, therefore, that these responses are accurate and true for both facilities seems rather slim. If FWS and APHIS accept these responses at face value, serious questions will be presented regarding the thoroughness of the permit review. Either APHIS and FWS need to visit the facilities and verify this information by an on-site inspection or the agencies need to stand firm and question the veracity of these responses. The applications should be denied until reliable, verified information submitted.

Violations of U.S. Standards at Oarai. The Oarai facility is not in compliance with APHIS standards regarding the sea lion enclosure, even taking into account their questionable reporting on the numbers. The minimum horizontal dimension for the

² The term "marine mammal" as used in section 2(5) and as defined in section 3(6) means "any mammal," thereby extending the coverage of the MMPA to individual animals and not just species or population stocks.

enclosure must be 2.88m, even allowing for the 20% rule (that is, since the length of the pool is well over 9m, the MHD – in this case, the width – which would otherwise need to be 1.5 times the average length of a South American sea lion (which is in fact 2.4m, not 2.9m) or 3.6m, can be 20% less than this or 2.88m). But it is only 1.7m. Thus, because the Aquarium does not maintain facilities that meet U.S. standards, a comparability finding cannot be made and no permit can be issued.

Inhumane Transportation Practices. Finally, we are deeply concerned over the 22.5 hour transport time. Sea otters are very sensitive to transport, particularly males. Both facilities only want one male each, and the odds of these males not surviving the transport are relatively high. The last time FWS allowed this kind of capture and transport to Japan, an otter in fact died soon after arriving. No sea otters should be captured for export to Japan for this reason.

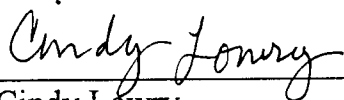
Declining Status of Alaska Sea Otter Populations. As noted in our previous comments, sea otter populations throughout Alaska are in a serious decline. The cause is unknown, as is the extent of the decline. In light of this serious population crash, no sea otter removals from the wild should be authorized. The applicants appear to be trying to skirt this problem by purportedly shifting their collection site to a location in southeast Alaska, but the severity of the population decline and the fact that it has spread further east than originally thought, based on recent information about populations at Kodiak, calls for a cessation of all collections from the wild. Failure to do so will violate the protective purposes of the MMPA that place emphasis on erring on the side of the species. The applicant has not met its burden of proof in this regard.

Conclusion. For all of these reasons, FWS must deny both permit applications. There is no basis upon which either application can be granted without causing numerous violations of U.S. law and standards and placing the animals involved at great risk.

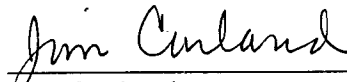
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Thank you for considering these comments.

Sincerely,



Cindy Lowry
Director, Sea Otter Defense
Initiative



Jim Curland
Marine Program Associate,
Defenders of Wildlife

cc: Barbara Kohn, D.V.M.
Robert H. Maltin, Ph.D
Ann Terbush