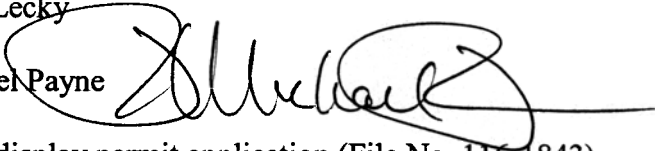




NOV 8 2006

MEMORANDUM FOR: F/PR – James H. Lecky  
FROM: F/PR1 – P. Michael Payne   
SUBJECT: Review of public display permit application (File No. 116-1843)  
submitted by Sea World, Inc. [Brad Andrews, Responsible Party],  
under the authority of the Marine Mammal Protection Act:  
Recommendation for Issuance

### Abstract

Sea World, Inc. [Brad Andrews, Responsible Party] requests a permit to import three male beluga whales (*Delphinapterus leucas*) from the Marineland of Canada, Ontario, Canada to Sea World of Florida, Orlando, Florida. The applicant requests this import for the purpose of public display.

### Chronology

April 20, 2006	Date of application
May 22, 2006	Date of revised application
June 2, 2006	Application published in the <u>Federal Register</u>
June 5, 2006	Application complete (*updated signature page received)
June 13, 2006	Application distributed
July 10, 2006	Close of public comment period
July 19, 2006	Marine Mammal Commission comments received

### Comments

**The Marine Mammal Commission (MMC)** recommended approval of the application provided that:

- the Service confirm that the lineage of the animals to be imported are from a North American beluga whale population, and if such is not the case, require that relevant and thorough status of the stock information be provided (i.e., the stocks from which the animals' parents were collected);
- the Service, in consultation with APHIS, is satisfied that the applicant's plans and facilities for transport and maintenance of the requested animals is adequate to provide for their health and well-being in accordance with the AWA, including correction of previous deficiencies in Sea World's inspection reports; and

- the Service is satisfied that the applicant's education program is acceptable (i.e., that a program is in place for public education; that the basic message of the program is accurate and consistent with the policies of the MMPA; and that the program includes accurate information about the life history and other aspects of the species. The Commission requests that this information be provided to it for review prior to issuance of the permit.

The Commission believes that the activities for which it has recommended approval are consistent with the purposes and policies of the MMPA.

**Response:** The beluga whales being maintained at Marineland of Canada are all from Russian waters or descendants of these animals. Given that the import of these animals will not have a direct impact on the status of the populations of beluga whales in the wild, the Service (NMFS) did not request further information on the status of the species in the wild as it determined that NMFS had available information on that issue.

NMFS has consulted with U.S. Department of Agriculture, APHIS and, based on APHIS' non-objections to this application and overall compliance history under the AWA, is satisfied that the applicant's plans and facilities for transport and maintenance of the requested animals are adequate to provide for their health and well-being. The permit is conditioned such that the animals: (1) must be transported from Canada to the United States in accordance with the U.S. Department of Agriculture's standards entitled "Specifications for the Humane Handling, Care, Treatment, and Transportation of Marine Mammals" (9 CFR Part 3, Subpart E); (2) must have the travel plan documented at their facility, and the animals must be accompanied by health certificates signed within 10 days of the transport; and (3) the importation of marine mammals must be accompanied by the appropriate Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) permits (i.e., 50 CFR part 14).

Sea World, Inc. has submitted information regarding the admission policies and their conservation/education program. This program is based on the professional standards established by the American Zoo and Aquarium Association (AZA) and the Alliance of Marine Mammal Parks and Aquariums (Alliance) and Sea World, Inc. is a member of both organizations. Notice to accept professional standards of the AZA and Alliance was published in the Federal Register on October 6, 1994 (59 FR 50900). As such, NMFS is satisfied that the applicant meets public display criteria as specified in the MMPA.

**The USDA Animal and Plant Health Inspection Service (APHIS)** received a copy of the application and was consulted regarding previous deficiencies in Sea World's inspection reports. APHIS reviewed the application and inspection reports and did not have any issues with the planned import. APHIS reiterated the need for a transport plan prior to import.

**Response:** The permit is conditioned to require the travel plan be documented at their facility and the animals must be accompanied by health certificates signed within 10 days of the transport.

**Public Comments:** Public comments were received from the following groups: the Humane Society of the United States (HSUS) on behalf of HSUS and Earth Island Institute, the Whale and Dolphin Conservation Society (WDCS), Zoocheck Canada, Inc., Cetacean Society International (CSI), and the Animal Welfare Institute (AWI). The issues raised are organized into categories and are summarized below.

Opposition to captivity: AWI does not support captivity of healthy cetaceans for the purpose of public entertainment, even under the guise of education. The only instances in which captivity should be condoned include animals rescued from life threatening situations which are being rehabilitated for release to the wild, or if release is impossible, are being cared for in a safe, adequate, and environmentally enriched conditions without the need to perform.

**Response:** These comments are beyond the scope of issues to consider under the MMPA. The MMPA provides for exceptions to the moratorium on take for the purpose of public display.

Age of the animals: HSUS notes that Sea World has represented the subject animals as adults in their application. Sea World indicates that these animals are between 3 and 4 years of age which would not qualify them as adults. HSUS is concerned that these animals may be still socially dependant on their mothers. WDCS concurs that removal of these animals from their pool mates is not in their best interest given their age.

**Response:** Section 102(b) prohibits the importation of animals that are pregnant or nursing or less than eight months old at time of taking. These are the only “age” prohibitions on public display imports in the MMPA and the permit contains conditions to prohibit the above imports. Concerns regarding animal care and maintenance fall under the AWA and are under the jurisdiction of APHIS. APHIS has reviewed and provided comments on this application (see APHIS comments above).

North American breeding program: WDCS provided the following concerns regarding the mentioned breeding program. The animals to be imported are not sexually mature at this time. Beluga whales have low breeding success in captivity. Incorporation of these animals into the breeding program will result in the mixing of genetically distinct stocks (Canadian and Russian whales). The progeny of this breeding program will never be candidates for release to the wild based on genetic differences nor is this the intent of this program.

**Response:** These comments are beyond the scope of issues to consider under the MMPA and are covered under the AWA. APHIS has reviewed and commented on this application and had no comments regarding the breeding program with respect to AWA concerns (see APHIS comments above).

Transport concerns: WDCS believes that transport of marine mammals should only occur in cases where urgently needed improvements are required in an animal's living conditions and is in the best interests of its health and welfare. This is not the case for this application. Based on previous marine mammal transports, there is a real risk to the health and welfare of the animals as a result of moves between facilities.

**Response:** This comment is beyond the scope of issues to consider under the MMPA and is covered under the AWA. NMFS provided APHIS a copy of the application and requested consultation regarding such concerns that would fall under their jurisdiction (see APHIS comments above).

Marineland of Canada: WDCS noted that there are no approved standards for public display facilities in Canada and reference a 1998 report (Zoocheck Canada) which details general welfare concerns raised about Marineland of Canada. This report explores five recurrent themes: the wellbeing of the animals; Marineland's failure to play a legitimate conservation role; the facility's negative educational value; inadequate public health and safety measures; and the absence of adequate legislation governing the capture, trade and maintenance of captive wildlife. AWI adds that Marineland of Canada is a poorly run facility where the animals are held in substandard accommodations and treated as monetary commodities.

**Response:** These comments are beyond the scope of issues to consider under the MMPA.

Sea World of Florida: WDCS expressed concern regarding non-compliant issues found in the submitted inspection reports for Sea World of Florida. Furthermore, Sea World of Florida's USDA license will expire in January 2007. WDCS questions the issuance of a permit that extends further into the future than the expiration of their USDA license, a requirement for holding marine mammals for public display.

**Response:** NMFS has consulted with APHIS on the above concerns and they had no objections based on Sea World's overall compliance history under the AWA. According to APHIS, Sea World of Florida has maintained a good compliance history and there is not reason to believe that their exhibitor's license will not be renewed. APHIS licenses are renewed yearly following a facility inspection and exhibitors would be entitled to due process before a license would be revoked, suspended, or terminated. The permit is conditioned such that Sea World, Inc. must continue to meet the three public display criteria required by §104(c)(2)(a) of the MMPA. In addition, Sea World, Inc. must notify the Office Director by certified mail if the APHIS licenses issued to any of its facilities are revoked, suspended, or terminated.

Capture of the parents: Several commenters believe that the capture of the parents was both illegal and inhumane and therefore in violation of the MMPA.

- **Illegal (CITES):** Several of the commenters questioned the validity of the non-detriment finding issued by Russia given the little assessment and unknown impact to the wild population. They state that U.S. (NMFS) is not legally bound to accept another country's

standards for capture, maintenance, record keeping and transport, when those standards threaten, violate, or weaken U.S. law. They further argue that the U.S. has the right to establish conditions under which imports of products will be allowed under CITES and those import conditions may be stricter than the export conditions required by the treaty. There is little data on the current population of Russian beluga stocks and it is impossible to determine if capture operations and hunting are having an impact on the stocks. As such, the sustainability of the beluga captures cannot be determined.

- **Inhumane:** The commenters refer to the footage obtained by the International Fund for Animal Welfare documenting capture techniques used in Russia in 1999. The commenters describe the processes used to capture and house belugas (Vladivostok facility) as brutal and grossly substandard. WDCS further references Mark Simmonds (WDCS's Director of Science) comments on the above video which describe the capture methods used in Russia as inhumane. HSUS further states that this import would be in violation of the MMPA given that the public display industry uses the progeny of animals as products in a commercial business. The MMPA prohibits the sale or purchase of "any marine mammal or marine mammal part that is taken in violation of this chapter" and the progeny are the resultant "products" of breeding inhumanely taken parents.

**Response:** The action under consideration is the importation of three beluga whales that were captive born and legally maintained in Canada. Their import will have no direct effect on the wild population. Concern has been raised regarding the potential for Marineland to replace these belugas with additional imports from Russia; this has been addressed below (see International trade concerns).

International trade: Between 1990 and 2005, WDCS reports that 186 beluga whales have been exported, all captured from the wild. WDCS is concerned about the increasing trade in belugas to other countries where they may be held in conditions that may compromise their health and well-being. In addition, Zoocheck claims issuance of this permit will encourage breeding programs using founder animals in other countries with intent to provide progeny to U.S. facilities, thus encouraging further captures that may also be inhumane and unsustainable. Issuance of this permit will at the least provide a perception of a U.S. market for beluga whales that increase the incentive for future captures. Commenters question Marineland of Canada's commitment to no further imports from Russia given their past acquisition history. The decade long relationship between Marineland of Canada and Russia will continue with additional imports of beluga whales and the prospect of potential sales to facilities in the U.S.

**Response:** Regarding international trade of marine mammals, the MMPA provides NMFS with authority to issue permits for the importation and holding marine mammals in captivity for public display purposes (16 U.S.C. 1374; Section 104 (c)). Issuance of this permit would not establish a precedent for future actions or represent a decision in principle about future proposals. Each permit application received is evaluated upon its own merits relative to the criteria established in the MMPA and NMFS' implementing regulations. Issuance of a permit to a specific individual or organization for a given

activity does not in any way guarantee or imply that NMFS would authorize other individuals or organizations to conduct the same or a similar activity.

As previously discussed, the action under consideration is the importation of three beluga whales that were captive-born and legally maintained in Canada. Their import will have no direct effect on the wild population. The original take of the parents in Russia is not relevant to the action being considered. Furthermore, Marineland of Canada has provided written assurance that they have no plans to import beluga whales from the wild or other facilities to replace those animals being offered to Sea World and NMFS has not reason, at this time, to question this assurance.

Chain of trade: The issue for several commenters is whether the chain of trade of Russian belugas, beginning with the capture of belugas in the Sea of Okhotsk and ending with the import into the U.S. of captive-bred progeny of those animals, is consistent with the letter and intent of the MMPA. They further stated that the Secretary would violate the requirements of the MMPA if animals were imported for public display by failing to determine that the method by which the whales were or will be captured is consistent with the MMPA provisions, and also by failing to ascertain the optimum sustainable population (OSP) of the species of whale involved, before issuing permits. The commenters argued that these omissions render the issuance of the permits invalid under the Administrative Procedure Act (APA) as not being in accordance with law or, alternatively, arbitrary and capricious, and thus an abuse of discretion.

**Response:** Again, the action under consideration is the importation of three beluga whales that were captive-born and legally maintained in Canada. The only whales to be imported under the permit will be beluga whales that were born in captivity and are currently in captivity, and as such, their removal will have no direct effect on the wild population. The determination of OSP would only be relevant if this action involved the direct take of marine mammals from the wild. The original take of the parents in Russia has already occurred and is not relevant to the action being considered.

Beluga whale status: Prior to any take permit being issued, Congress mandated in the MMPA that the impact of the take must be determined including the impact of the taking to achieve OSP for each species. Several commenters stated that there is insufficient information on the status of beluga whales to make a determination that the import, in combination with the capture of the parent stock [and future captures] will not likely have a significant adverse impact on the Russian stocks. There are no historical or current population assessments for Russian beluga whales. AWI reports that the Russian quota for beluga whales is currently over one thousand animals annually without information on the population size and status. The status of the entire species is of concern given that in 1999, the Scientific Committee of the International Whaling Committee (IWC) concluded that only 4 of 29 beluga whale populations were stable. They are threatened across their range by oil and gas development, over-hunting, over-fishing, vessel traffic, industrial development and pollution. IWC's Scientific Committee describe the White Sea population of belugas as "depleted" and numbering a "few hundred" animals. WDCCS believes that any removal of any animals would be severely detrimental to the population. WDCCS provided an online reference which indicated that the Red Book of the Russian

Federation lists beluga whales as category 3, Rare. In 2001 the IWC passed a resolution regarding small cetaceans which notes the “depleted or unknown status of many beluga stock” and “supports the recommendations of the Scientific Committee in 1999 that beluga range states continue studies to resolve the structure of beluga stocks, conduct contaminate analysis and health assessments and provide relevant scientific data to the Scientific Committee.”

**Response:** This argument is not relevant given that the action under consideration concerns the importation of three beluga whales born in captivity. The animals in question were not, and there are no plans for these animals to be, part of a wild population. The determination of OSP is based on scientific data. The original take of the parents has already occurred and was a legal take in Russia in accordance with their established quotas. Furthermore, no OSP (or Potential Biological Removal (PBR)) has been established for this population. PBR is defined as the maximum number of animals that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population. Marineland of Canada has also indicated that they will not be replacing the animals that will be exported through additional imports from the wild or other facilities. Therefore, there will be no impacts to the wild from this import.

Upon consultation with the Red Book as referenced, NMFS could not find a ranking for beluga whales. Beluga whales are not listed as "endangered" or "threatened" under the Endangered Species Act, nor have the Russian stocks of belugas been designated as “depleted” under the MMPA (see status of the stocks in the corresponding EA analysis).

Burden of proof: CSI claims it is Sea World as the applicant who must prove the sale of these animals will not stimulate further captures and international sales of wild Russian belugas, that those captures will be from stocks that can sustain approved take quotas, and that the capture, maintenance and transport of those animals would be acceptable under U.S. law. This is consistent with the spirit of the law and the intent of Congress.

**Response:** The action in question is the importation of three captive-born beluga whales that are being legally maintained at Marineland of Canada. These animals have never been part of the wild population, nor is it likely that they ever will be, and therefore the impact of their import will not affect the species in the wild. Furthermore, Marineland of Canada has indicated in writing that they have no plans to replace these animals with additional imports to their facility.

Compliance with the National Environmental Policy Act (NEPA): The commenters regard this application as highly controversial and precedent setting for future actions with significant effects. Therefore, they request preparation of an Environmental Impact Statement under NEPA. NMFS indicated in its receipt of application published in the Federal Register that this action would qualify under a categorical exclusion. The commenters feel that this level of analysis would be insufficient given the degree of significance and controversy. They further state that issuance of this permit is a major federal action with significant consequences via the chain of trade that was established by the capture and importation of the parents. They assert that areas of

impact include 1) unique geographic area (habitat modifications from removal and disturbance of resident belugas); 2) uncertain activities (unknown impacts from beluga takes); 3) involves unknown risks (abetting unsustainable takes); 4) represents a decision in principle about a future consideration (precedent setting); 5) may adversely affect historical resources and must include a review of cumulatively significant impacts. The commenters concluded that an EIS is necessary to determine if imports of wild caught Russian belugas and their progeny are legal under U.S. law.

**Response:** During the public comment period for this application, some commenters considered this action to be significant and controversial in nature. As a result, NMFS determined that preparation of this EA was warranted to analyze the environmental effects that would result from the issuance of this permit. The action under consideration is the issuance of a permit for the importation of three captive-born beluga whales from Canada to the United States. While the issue of the origin of the parents was considered significant and controversial by the commenters, the proposed action is the importation of captive-bred progeny of those animals into the U.S. The capture and import of the parents has already occurred and these animals are being legally maintained in Canada. The EA demonstrates that the proposed transport and maintenance of these progeny will not result in significant environmental effects. Although the appropriateness of the proposed action is under question as a public policy, the action is allowed under the MMPA and its environmental impacts are not considered to be either significant or controversial for NEPA compliance purposes.

### **Other Applicable Regulations**

#### **Convention on International Trade in Endangered Species of Wild Fauna and Flora**

**(CITES):** The requested species is listed on Appendix II of CITES. Special Condition B.1.e. requires a CITES export permit from Canada prior to import. Prior to providing an export permit for an Appendix II species, a country must make findings regarding: 1) the impact of the export on the survival of that species; 2) the collection of an animal was consistent with domestic laws; and 3) the shipment of an animal is done in a way that minimizes the risk of injury, damage to health or cruel treatment.

**National Environmental Policy Act (NEPA):** Public display permits are, in general, categorically excluded from the requirement to prepare an Environmental Assessment (EA) or Environmental Impact Statement (EIS) (NOAA Administrative Order Series 216-6, May 20, 1999).

In reviewing the permit request, NMFS determined that public health and safety are not affected; no unique geographic area is affected; and the effects of this activity are not highly uncertain, nor do they involve unique or unknown risks. Issuance of this permit will not set a precedent for future actions with significant effects, nor does it represent a decision in principle about a future consideration. There are no individually insignificant but cumulatively significant impacts associated with the proposed action, and there is no adverse effect on historic resources.



However, several comments were received from the public suggesting that this action may be considered controversial by some members of the public. Therefore, for this permit NMFS prepared the attached Environmental Assessment (EA).

### **RECOMMENDATION**

The proposed importation for public display is consistent with the purposes and policies of the MMPA. NMFS has determined that Sea World, Inc at Sea World of Florida 1) offers a program for education or conservation purposes that is based on professionally recognized standards of the public display community, 2) holds a license issued under 7 U.S.C. 2131 *et seq.*, and 3) maintains facilities for the public display of marine mammals that are open to the public on a regularly scheduled basis with access not limited or restricted other than by charging an admission fee. No adverse impact to the populations or to the ecosystem as a result of the authorized activity is anticipated. For these reasons, I recommend that you sign the permit.