

THE MARINE MAMMAL PROTECTION ACT PROTECTS THE
RIGHT TO PUBLIC DISPLAY OF WILD MARINE MAMMALS, NOT
RELEASE BACK INTO THE WILD

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American zoos and aquariums pride themselves on their rescue and rehabilitation programs, yet many stranded and injured marine mammals never return to the wild, regardless of being fully rehabilitated. Many releasable mammals are kept in captivity due to the availability of permits to keep releasable rehabilitated marine mammals. This article will argue that the Marine Mammal Protection Act—which was created to protect marine mammals—is harming rehabilitated animals by allowing zoos and aquariums to keep them for public display, rather than return them to the wild. Beginning with a discussion of marine mammal rehabilitation and the legal framework of the Marine Mammal Protection Act, this article will illustrate how captive facilities fail to meet their legal obligations and are unsuitable for marine mammals. Accordingly, the current laws should be changed to prohibit granting permits to keep rehabilitated marine mammals that are deemed releasable for public display purposes. Lastly, this article will identify the social, judicial, and legislative trends which indicate that this prohibition would be a welcomed change, despite the potential obstacles to implementation.

INTRODUCTION

Marine mammals have unique physical characteristics that enable them to thrive in the extreme temperatures, depths, pressure, and darkness of the marine environment.¹ Four taxonomic groups are used to categorize marine mammals: cetaceans (whales, dolphins, and porpoises), pinnipeds (seals, sea lions, and walruses), sirenians (manatees and dugongs), and marine fissipeds (polar bears and sea otters).² Most marine mammals spend

¹ *Marine Mammals*, NATIONAL OCEANIC AND ATMOSPHERIC ADMIN., <https://www.noaa.gov/education/resource-collections/marine-life/marine-mammals> (last visited Nov. 10, 2022) [<https://perma.cc/9PRL-BBJZ>].

² *Id.* For the purpose of this article, “marine mammals” hereinafter refers only to cetaceans and pinnipeds that are subject to NOAA Fisheries’ jurisdiction. Sirenians and marine fissipeds protection is under the jurisdiction of the U.S. Fish and Wildlife Service. *Understanding Marine Mammal Protections*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/insight/understanding-marine-mammal-protections#:~:text=protect%20marine%20mammals%3F-,Which%20marine%20mammals%20does%20NOA>

their lives swimming freely in the ocean; however, some marine mammals may become injured and require rehabilitation at some point during their lives.

While some injuries are caused by natural threats, most are the result of anthropogenic activity. Natural causes of injury include unusual weather events, viral and bacterial infections, parasitism, disease, and starvation.³ Alternatively, because of humans, wild marine mammals are harmed by ingesting foreign objects, entanglement in debris, vessel strikes, habitat destruction, noise pollution, oil spills, and exposure to artificial toxins.⁴ Moreover, natural harms can be exacerbated by human activity. For example, the frequency and severity of algal blooms has increased due to climate change.⁵

Each year, thousands of marine mammals “strand” and require rehabilitation because of these natural and anthropogenic threats. A marine mammal is considered “stranded” when it is found dead on land or in the water, or when it needs medical attention.⁶ Unfortunately, not all stranded animals are found alive, nor are capable of rehabilitation due to the severity of their injuries. In 2017, 5,764 pinnipeds and cetaceans were stranded across the United States.⁷ In 2018, 7,320 marine mammals were stranded in the United States—a 27 percent increase from the previous year.⁸ Notably,

A%20Fisheries%20protect%3Fbears%20under%20the%20same%20act (last visited Apr. 3, 2023) [<https://perma.cc/X9S4-BJVZ>].

³ *Understanding Marine Wildlife Stranding and Response*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/insight/understanding-marine-wildlife-stranding-and-responses#why-do-animals-strand?> (last visited Nov. 20, 2022) [<https://perma.cc/P275-KNJD>].

⁴ *Marine Mammal Threats*, WOODS HOLE SEA GRANT, <https://seagrant.whoi.edu/k-12/coast/marine-mammal-threats/> (last visited Nov. 9, 2022) [<https://perma.cc/244M-4CA9>]; *Marine Life in Distress*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/topic/marine-life-distress> (last visited Nov. 9, 2022) [<https://perma.cc/5PYQ-6RC7>]; *Various Reasons for Stranding*, SEAWORLD PARKS & ENT., <https://seaworld.org/animals/all-about/rescue-and-rehab/reasons-for-stranding/> (last visited Nov. 9, 2022) [<https://perma.cc/C4BT-DUJ4>].

⁵ OFF. OF WATER, U.S. ENV’T PROTECTION AGENCY, EPA 820-S-13-001, IMPACTS OF CLIMATE CHANGE ON THE OCCURRENCE OF HARMFUL ALGAL BLOOMS (May 2013); *Climate Change Indicators: Weather and Climate*, U.S. ENV’T PROTECTION AGENCY (Aug. 1, 2022), <https://www.epa.gov/climate-indicators/weather-climate#:~:text=Rising%20global%20average%20temperature%20is,with%20human%2Dinduced%20climate%20change> [<https://perma.cc/329G-FNWA>].

⁶ *Understanding Marine Wildlife Stranding and Response*, *supra* note 3.

⁷ OFF. OF PROTECTED RES., NOAA FISHERIES, 2017 NATIONAL REPORT OF MARINE MAMMAL STRANDINGS IN THE UNITED STATES 3 (2021).

⁸ OFF. OF PROTECTED RES., NOAA FISHERIES, 2018 REPORT OF MARINE MAMMAL STRANDINGS IN THE UNITED STATES 1 (2022).

between 1994 and 2004, an average of only 1,413 pinnipeds and 23 cetaceans were stranded and admitted for rehabilitation across the continental United States and Hawaii.⁹

The goal of rehabilitation is to nurse the marine mammal back to health so it can be released back into its natural habitat.¹⁰ Unfortunately, even when rehabilitation is successful, not all marine mammals return to the ocean. Data from 1995 to 2004 indicates that only 52 percent of rescued pinnipeds deemed releasable were actually released.¹¹ An even lower proportion of cetaceans, 17 percent, were released after successful rehabilitation.¹² This disparity exists because the Marine Mammal Protection Act (MMPA) provides for “take” permits to retain marine mammals for public display. Consequently, zoos and aquariums, or similar facilities, can apply to keep rehabilitated marine mammals that could have been released.

I. CURRENT LEGAL FRAMEWORK: THE MARINE MAMMAL PROTECTION ACT

The MMPA was created in part as a response to increasing anthropogenic threats to marine mammals.¹³ Scientists and the public were concerned that humans would drive marine mammal species to extinction.¹⁴ To prevent this fate, the MMPA was enacted in 1972, establishing a national policy to protect marine mammal species by preventing population stocks from decreasing below a functioning level and restoring diminished stocks to their optimum sustainable populations.¹⁵

⁹ Michael Moore et al., *Rehabilitation and Release of Marine Mammals in the United States: Risks and Benefits*, 23 *MARINE MAMMAL SCI.* 731, 737 (Oct. 2007).

¹⁰ LAURIE GAGE, NAT’L OCEANIC AND ATMOSPHERIC ADMIN., *POLICIES AND BEST PRACTICES FOR MARINE MAMMAL STRANDING RESPONSE, REHABILITATION, AND RELEASE: STANDARDS FOR REHABILITATION FACILITIES* iv (Janet E. Whaley ed., Feb. 2009).

¹¹ Moore et al., *supra* note 9, at 735.

¹² *Id.*

¹³ *Marine Mammal Protection Act*, MARINE MAMMAL COMM’N, <https://www.mmc.gov/about-the-commission/our-mission/marine-mammal-protection-act/> (last visited Nov. 20, 2022) [<https://perma.cc/Z2JC-TW29>].

¹⁴ *Id.*

¹⁵ See Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1423 (2018); *Marine Mammal Protection Act Policies, Guidance, and Regulations*, NOAA FISHERIES (May 26, 2022), [https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-protection-act-policies-guidance-and-regulations#:~:text=The%20Marine%20Mammal%20Protection%20Act%20\(MMPA\)%20was%20enacted%20on%20October,which%20they%20are%20a%20part](https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-protection-act-policies-guidance-and-regulations#:~:text=The%20Marine%20Mammal%20Protection%20Act%20(MMPA)%20was%20enacted%20on%20October,which%20they%20are%20a%20part) [<https://perma.cc/B94V-89ZF>].

This section will discuss various provisions of the MMPA that are relevant to this topic. First, part (a) explains the history of wild capture and marine mammal captivity, and how these practices changed due to the MMPA's enactment. Part (b) discusses Title IV of the MMPA, the Marine Mammal Health and Stranding Response Act, which created specific stranding response procedures. Next, part (c) explains how the MMPA's "take" permit provisions function. Finally, part (d) states the legal standards that marine mammal display facilities must meet under Section 104 of the MMPA.

A. *History of Marine Mammal Capture and Captivity*

Human capture was one major cause of the concerning decline of wild marine mammal populations. Before the MMPA's enactment, wild marine mammal capture was unregulated.¹⁶ For centuries, zoos and aquariums could capture animals as often as was necessary to maintain inventory for display and profit.¹⁷ The first marine mammals were kept in captivity as early as 1060,¹⁸ however, records of these early instances are scarce. Most sources assert that walrus were first held captive as early as 1608, followed by pinnipeds and cetaceans in the late 1800s.¹⁹

Today, at least 2,360 cetaceans live in captivity across the globe,²⁰ and the number of pinnipeds in captivity is unknown.²¹ As a result of the MMPA's prohibition on marine mammal capture in 1972, most captive marine mammals in the United States today were not wild caught, but rather were born in captivity through breeding programs or were kept in captivity after they were rescued.

¹⁶ See *Frontline Online: A Whale of a Business: Historical Chronology*, PBS, <https://www.pbs.org/wgbh/pages/frontline/shows/whales/man/mancron.html> (last visited Nov. 22, 2022) [<https://perma.cc/4MSB-ATHA>].

¹⁷ *Id.*

¹⁸ Todd R. Robeck et al., *Captive Breeding in* THE ENCYCLOPEDIA OF MARINE MAMMALS 178 (William J. Perrin et al. eds., 2nd ed. 2009 (noting that the first polar bear may have been held in captivity in 1060, followed by harbor porpoises in the 1400s).

¹⁹ *Id.*; *Pinnipeds in Captivity*, SEAL CONSERVATION SOC'Y, <https://www.pinnipeds.org/seal-information/rehabilitation-and-captivity/pinnipeds-in-captivity> (last visited Oct. 6, 2022) [<https://perma.cc/DQB5-PHBX>]; Frontline, *supra* note 16.

²⁰ *CFAF's Work for Whales and Dolphins in Captivity*, CHANGE FOR ANIMALS FOUND., <https://www.changeformanimals.org/whales-and-dolphins-in-captivity#:~:text=There%20are%20currently%20at%20least,in%20captivity%20since%20the%201950s> (last visited Oct. 6, 2022) [<https://perma.cc/2U3H-BLBW>].

²¹ *Id.*

B. Marine Mammal Health and Stranding Response Act

Another threat to marine mammal survival was, and continues to be, injuries caused by human activity. In 1992, Title IV, the Marine Mammal Health and Stranding Response Act, amended the MMPA to address this problem.²² Title IV mandates emergency responses to sick, injured, distressed, or dead pinnipeds and cetaceans.²³ The 1992 amendments also established the Marine Mammal Health and Stranding Response Program (MMHSRP) to coordinate emergency responses.²⁴ More than 100 volunteer organizations and local, tribal, state, and federal government agencies work with the MMHSRP to ensure all rescues are performed with human responder and animal safety in mind.²⁵

Under Title IV, there are three goals for stranding responses: (1) welfare of individual animals, (2) protection of human health and welfare, and (3) collection of scientific information.²⁶ Section 109(h) of the MMPA mandates that, whenever feasible,²⁷ steps shall be taken to return a stranded marine mammal to its natural habitat.²⁸ Despite this legal obligation, many releasable rehabilitated marine mammals never return to their natural habitats because of “take” permits.

²² *Laws & Policies: Marine Mammal Protection Act*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/topic/laws-policies/marine-mammal-protection-act> (last visited Nov. 28, 2022) [<https://perma.cc/4QNQ-D6XF>].

²³ *Marine Mammal Health and Stranding Response Program*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/national/marine-life-distress/marine-mammal-health-and-stranding-response-program> (last visited Nov. 9, 2022) [<https://perma.cc/4HQX-ZE9T>].

²⁴ *Id.*

²⁵ *Id.*; OFF. OF PROTECTED RES., NOAA FISHERIES, *supra* note 7, at 5.

²⁶ There is no established prioritization of these goals, this is just how they are ordered in the statute. 16 U.S.C. § 1421; Moore et al., *supra* note 9, at 733.

²⁷ According to NMFS guidance, feasibility is determined by the animal’s capability for successful life in the wild, as determined by the attending veterinarian. If the veterinarian determines that (1) release of the rehabilitated animal could adversely affect the wild populations, and/or (2) release will likely not be successful because of the animal’s physical condition and behavior, the animal will be deemed non-releasable. Subsequently, it will be placed in a permanent facility by NMFS Office of Protected Resources. Off. of Protected Res., National Marine Fisheries Service Procedure 02-308-02, at 1 (Mar. 14, 2012), https://media.fisheries.noaa.gov/2021-11/02-308-02%20renewal_signed.pdf [<https://perma.cc/Q8PU-S3MR>].

²⁸ Marine Mammal Protection Act § 109(h), 16 U.S.C. § 1379.

C. “Take” Permits

Sections 101 and 104 of the MMPA authorize the Secretary²⁹ to issue permits for the “taking” or importation of marine mammals for the purpose of public display, among other purposes.³⁰ Under the MMPA, “take” means to “harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.”³¹ The Secretary delegated the permitting authority to the National Marine Fisheries Service (NMFS), a body within the National Oceanic and Atmospheric Administration (NOAA). Accordingly, NMFS created “issuance criteria” for granting take permits.³² Under the issuance criteria, applicants must show that the proposed activity is humane, does not present unnecessary risks to the health and welfare of marine mammals, and is unlikely to have an adverse impact on the species or stock.³³

Prior to 2018, NMFS distinguished applications for wild capture permits from applications for permits to keep releasable rehabilitated marine mammals.³⁴ However, in 2018, NMFS altered its internal procedures; and now, applicants seeking to keep a releasable animal just file a standard take application.³⁵ If the permit is granted, the NMFS Office of Protected Resources Office Director may authorize the retention of a releasable specimen in lieu of a wild capture.³⁶

D. Legal Standards for Marine Mammal Display Facilities

In addition to meeting NMFS’s take permit issuance criteria, the applicant facility itself must also meet certain criteria. Section 104(c)(2)(A)(i) of the MMPA stipulates that permits for public display will only be granted to facilities that provide education and conservation

²⁹ Refers to the Secretary of the department in which the National Oceanic and Atmospheric Administration is operating. Marine Mammal Protection Act § 3(12)(A)(i), 16 U.S.C. § 1362. Refers to the Secretary of the department in which the National Oceanic and Atmospheric Administration is operating. *Id.* § 1362(12)(A)(i).

³⁰ Marine Mammal Protection Act § 104, 16 U.S.C. § 1374.

³¹ Marine Mammal Protection Act § 3, 16 U.S.C. § 1362(13).

³² See 50 C.F.R. § 216.34(a)(1), (4) (2017).

³³ *Id.*

³⁴ Off. of Protected Res., National Marine Fisheries Service Procedure 02-308-03, at 1 (May 1, 2018), <https://media.fisheries.noaa.gov/dam-migration/02-308-03.pdf> [<https://perma.cc/FY3G-UVWH>].

³⁵ *Id.*

³⁶ *Id.*

programs for visitors³⁷ that meet professionally recognized standards.³⁸ Generally, the Association of Zoos and Aquariums (AZA) standards are upheld as the national standard and are used by federal agencies to evaluate institutions.³⁹

II. PROBLEMS WITH MARINE MAMMAL CAPTIVITY

Arguably, there is a moral dilemma in subjecting wild animals that are harmed by humans to a life as human entertainment in captivity. Notwithstanding morality, whether zoos and aquariums that retain releasable marine mammals meet their legal education and conservation obligations is questionable. Furthermore, research has shown that marine mammals may not be suited for captivity.⁴⁰ Especially in cases when rehabilitated marine mammals could be released back to the wild, a zoo or aquarium is not a commensurate alternative.

A. *Public Display Facilities Fail to Meet Education and Conservation Requirements*

Many facilities tout the educational value of publicly displaying wild animals; however, numerous surveys of zoo and aquarium visitors illustrate that the educational value of captivity may be negligible.⁴¹ A study conducted near a captive dolphin exhibit found that visitors tended to remember “tricks” rather than educational information about the species.⁴²

³⁷ Marine Mammal Protection Act § 104(C)(2)(A)(i), 16 U.S.C. § 1374.

³⁸ *Id.*; Stephanie Dodson Dougherty, *The Marine Mammal Protection Act: Fostering Unjust Captivity Practices Since 1972*, 28 J. OF LAND USE 337, 338 (2013).

³⁹ *About AZA Accreditation*, ASS’N OF ZOOS AND AQUARIUMS, <https://www.aza.org/what-is-accreditation?locale=en> (last visited Nov. 10, 2022) [<https://perma.cc/V8AA-XN8D>].

⁴⁰ See generally Lori Marino et al., *The Harmful Effects of Captivity and Chronic Stress on the Well-being of Orcas (*Orcinus orca*)*, 35 J. VETERINARY BEHAV. 69 (2020) (discussing why captive orcas suffer from greater stress than wild orcas and how chronic stress leads to negative health consequences); Laurie J. Gage, *Captive Pinniped Eye Problems, We Can do Better!*, 4 J. MARINE ANIMALS AND THEIR ECOLOGY 25 (2011) (identifying ocular diseases in pinnipeds caused by captivity and proffering solutions to mitigate the diseases); Karli R. Chudeau et al., *Enrichment Reduces Stereotypical Behaviors and Improves Foraging Development in Rehabilitating Eastern Pacific Harbor Seals (*Phoca vitulina richardii*)*, 219 APPLIED ANIMAL BEHAV. SCI. (2019) (assessing how enrichment can be used to reduce, but not eliminate negative stereotypical behaviors in Eastern Pacific harbor seals).

⁴¹ See Conservation Education, Ass’n of Zoos & Aquariums, <https://www.aza.org/conservation-education?locale=en> (last visited Nov. 12, 2022) [<https://perma.cc/3KW3-PWGW>].

⁴² Jessica Sickler et al., *Social Narratives Surrounding Dolphins: Q Method Study*, 14 SOC’Y & ANIMALS 351, 370 (2006) [<https://perma.cc/EZJ2-25R6>].

Another survey of guests at three United States zoos discovered that guests visit to enjoy themselves, not to learn.⁴³ Researchers also observed that only 27 percent of visitors read the educational signage outside animal exhibits.⁴⁴ Moreover, a different study found that only 10 percent of guests increased their conservation-related knowledge by visiting public display facilities.⁴⁵

Additionally, to comply with the MMPA, public display facilities must promote conservation.⁴⁶ AZA-accredited zoos and aquariums must join the AZA's "Saving Animals From Extinction" (SAFE) program to meet this standard.⁴⁷ Still, other facilities can also meet this conservation standard by establishing their own rescue and rehabilitation programs to satisfy the requirement.⁴⁸ Despite the conservation mandate, only five to ten percent of zoos and aquariums are involved in substantial conservation programs.⁴⁹ Furthermore, fewer than half of all visitors believe that zoos and aquariums play an important role in conservation education and animal care.⁵⁰

These studies illustrate that public display facilities may not satisfy the education and conservation standards legally required by the MMPA. Moreover, even if guests do learn more about animals by visiting these facilities, they do not appear to use this information in a meaningful way, nor promote conservation efforts after they leave.⁵¹ Nonetheless, NMFS

⁴³ Susan Clayton et al., *Zoo Experiences: Conversations, Connections, and Concern for Animals*, 28 *ZOO BIOLOGY* 377, 393–94 (2009) (The survey asked visitors at the Bronx, Brookfield, and Cleveland Metroparks Zoos their primary purpose for attending the zoo.).

⁴⁴ *Id.* at 389.

⁴⁵ JOHN H. FALK ET AL., *WHY ZOOS & AQUARIUMS MATTER: ASSESSING THE IMPACT OF A VISIT TO A ZOO OR AQUARIUM* 9 (Nora L. Deans ed., 2007) [<https://perma.cc/SWP9-UJBS>].

⁴⁶ Marine Mammal Protection Act of 1972 § 104(C)(2)(A)(i), 16 U.S.C. § 1374.

⁴⁷ Emma Marris, *Modern Zoos are Not Worth the Moral Cost*, N.Y. TIMES (June 11, 2021); Kayla J. Ripple et al., *Increasing AZA-Accredited Zoo and Aquarium Engagement in Conservation*, 9 *FRONTIERS IN ENV'T SCI.* 1, 2 (2021).

⁴⁸ See *Animal Rescue Program*, MYSTIC AQUARIUM, <https://www.mysticaquarium.org/research-and-conservation/aquatic-animal-health/animal-rescue-program/> (last visited Apr. 3, 2023) [<https://perma.cc/EVC9-NSNA>]; *Rescue, Rehab, Release*, CLEARWATER MARINE AQUARIUM, <https://mission.cmaqarium.org/what-we-do/rescue-rehab-release/> (last visited Apr. 3, 2023) [<https://perma.cc/3XQ3-Y6AS>].

⁴⁹ NAOMI A. ROSE & E.C.M. PARSONS, ANIMAL WELFARE INS., *THE CASE AGAINST MARINE MAMMALS IN CAPTIVITY* 15 (5th ed., 2019), <https://awionline.org/sites/default/files/uploads/documents/AWI-ML-CAMMIC-5th-edition.pdf> [<https://perma.cc/EXY6-NXJU>].

⁵⁰ FALK ET AL., *supra* note 45, at 10.

⁵¹ Marc Bekoff, *It's Not Happening at the Zoo: There's no Evidence Zoos Educate in a Meaningful Way*, THE HUFFINGTON POST (Dec. 12, 2014, 5:39PM, updated Feb. 11, 2015), https://www.huffpost.com/entry/its-not-happening-at-the-zoo_b_6315614 [<https://perma.cc/BS7M-J6LK>].

continues to grant take permits to zoos and aquariums. Consequently, many releasable and rehabilitated marine mammals spend their lives in captivity instead of the ocean.

B. Captivity Threatens Marine Mammals' Health and Welfare

Unfortunately, research shows that captivity can be unhealthy for marine mammals. Captive animals exhibit stereotypies or abnormal repetitive behaviors (ARBs),⁵² which are behaviors that are unnatural and unobserved in their wild counterparts.⁵³ Researchers often use stereotypies to assess animal welfare because they indicate stress and discomfort.⁵⁴ Stereotypies displayed by marine mammals include head bobbing, habitually rubbing on pool walls, flipper chewing, logging (remaining at the pool surface for long periods of time), and regurgitation.⁵⁵ Zoos and aquariums have tried to minimize these behaviors using enrichment and other stimulating exercises with little success.⁵⁶

Furthermore, federal documents spanning more than 30 years report that over 3,850 marine mammals have died under human care.⁵⁷ Of the deaths with a recorded cause, one in five resulted from avoidable human hazards.⁵⁸ Moreover, a 2010 NMFS report listed numerous stress-related disorders caused by captivity as the cause of death for many marine

⁵² Joseph P. Garner, *Stereotypies and Other Abnormal Repetitive Behaviors: Potential Impact on Validity, Reliability, and Replicability of Scientific Outcomes*, 46 INST. FOR LAB. ANIMAL RSCH. J. 106, 106 (2005).

⁵³ See G.J. Mason & N.R. Latham, *Can't Stop, Won't Stop: Is Stereotypy a Reliable Animal Welfare Indicator?*, 13 ANIMAL WELFARE (SUPPL.) 57, 57 (2004) (discussing and categorizing unique behaviors exhibited by captive animals but not seen in wild specimens).

⁵⁴ *Id.*

⁵⁵ Chudeau et al., *supra* note 40, at 3; *Pinnipeds in Captivity*, *supra* note 19; *Pinnipeds in Captivity*, CETACEAN INSPIRATION (Aug. 15, 2012), <https://cetaceaninspiration.wordpress.com/2012/08/15/pinnipeds-in-captivity/> [<https://perma.cc/BY7K-LCRY>]; Eve Copeland, *Cognitive Enrichment Intervention for Captive Orcas*, BARD DIGIT. COMMONS 14 (2015), <https://www.sciencedirect.com/science/article/abs/pii/S0168159118306300?via%3Dihub> [<https://perma.cc/ZRP3-TD77>].

⁵⁶ G.J. Mason et al., *Why and How Should We Use Environmental Enrichment to Tackle Stereotypic Behaviour?*, 102 APPLIED ANIMAL BEHAV. SCI. 163, 163 (2007) [<https://perma.cc/79HN-RWX2>].

⁵⁷ Sally Kestin, *Sea Show Industry's Record Spotty, Probe Finds*, CHI. TRIB. (May 16, 2004, 12:00 AM),

<https://www.chicagotribune.com/news/ct-xpm-2004-05-16-0405160422-story.html> [<https://perma.cc/7JE9-T9HY>].

⁵⁸ *Id.*

mammals, namely ulcerative gastritis, perforating ulcers, cardiogenic shock, and psychogenic shock.⁵⁹

Additionally, some marine mammal species have shortened lifespans and high mortality rates in captivity.⁶⁰ Even species with extended lifespans in captivity face adversities and require medical intervention that is unnecessary in the wild. For example, captive pinnipeds, such as seals and sea lions, suffer from ocular diseases due to overexposure to UV light caused by the reflective paint of pools and improper water conditions.⁶¹

Further, captive diets lack the nutritional value of wild diets.⁶² As a result, nearly all marine mammals must consume artificial supplements that their wild counterparts would not need.⁶³ Insufficient nourishment from captive diets has been linked to kidney stones, hemochromatosis, and other unnatural causes of death in captive marine mammals.⁶⁴

These health problems illustrate that captivity is not the healthy alternative to life in the wild that applicant facilities present it to be. In fact, releasable marine mammals are typically worse off in captivity than if they had been released back to the wild. This paradox is problematic because one reason for enacting the MMPA was to protect marine mammals from human harm. Nevertheless, by allowing facilities to retain releasable rehabilitated marine mammals, the MMPA enables humans to continue harming individual animals.

III. PROPOSED SOLUTIONS

Due to both the legal issues and health problems associated with marine mammals in captivity, the option to keep releasable marine mammals for display purposes should be revoked. Rescued marine mammals should be, as the MMPA states, released back to the wild upon

⁵⁹ Lori Marino & Toni Frohoff, *Towards a New Paradigm of Non-Captive Research on Cetacean Cognition*, 6 PUB. LIBR. OF SCI. ONE, 1, 3 (Sept. 2011); NAT'L MARINE FISHERIES SERV., U.S. MARINE MAMMAL INVENTORY REP. (2010).

⁶⁰ Orcas have higher mortality rates in captivity than in the wild, whereas pinnipeds tend to live at least as long as their wild counterparts. Survivorship for bottlenose dolphins is similar between wild and captive populations. Insufficient information is available to compare populations of other species. See Lorna C. Scribner, *The Debate on Marine Mammals in Captivity* (DEC. 15, 2012) (Honors Thesis, Coastal Carolina University) (DIGIT. COMMONS) [<https://perma.cc/KH5E-UTH4>].

⁶¹ *Pinnipeds in Captivity*, *supra* note 55.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ ROSE & PARSONS, *supra* note 49, at 51.

their successful rehabilitation whenever feasible. To achieve this end, the MMPA or NMFS's application process should be amended to prohibit take permits to retain otherwise releasable marine mammals. This outcome would be morally sound, in the best interest of the animal's welfare, and would align with Congress' explicit directive in Section 109(h) of the MMPA. The following parts of this section will discuss the two proposed solutions, then analyze the benefits and consequences of each.

A. Amending the MMPA

To prohibit the issuance of take permits for the display of marine mammals, Congress would need to change two sections of the MMPA:

- (1) Section 101(a)(1) currently reads, “[c]onsistent with the provisions of section 104, permits may be issued by the Secretary for taking, and importation for purposes of scientific research, public display, photography for educational purposes....”⁶⁵
- (2) Section 104(c) stipulates that for “[a]ny permit issued by the Secretary which authorizes the taking or importation of a marine mammal for purposes of scientific research, public display, or enhancing the survival or recovery of a species or stock shall specify [certain requirements]”⁶⁶

In each section, the underlined phrase, “public display,” would need to be removed. In fact, the requirements for public display facilities in Section 104(c) could also be deleted due to irrelevance. The updated MMPA language would require facilities to release fully rehabilitated marine mammals whenever feasible. More generally, the amendment would prohibit granting take permits via any method if the purpose was to publicly display the animal.

Amending the MMPA in this way would impact NMFS's permitting process by eliminating the availability of permits to “take” marine mammals for the purpose of public display. This change would decrease the number of permits NMFS receives; and therefore, no additional resources—human or monetary—would need to be allocated to the Agency. Otherwise, NMFS's current process would remain unchanged: applications

⁶⁵ Marine Mammal Protection Act § 101(a)(1), 16 U.S.C. § 1371 (emphasis added).

⁶⁶ Marine Mammal Protection Act § 104(c), 16 U.S.C. § 1374 (emphasis added).

for permits would still be submitted, evaluated, and approved by NMFS and the Secretary. Whereas with the amendment, any permits for public display purposes would be automatically denied without consideration, in turn potentially saving NMFS money and resources.

B. Changing NMFS's Permitting Procedure

Even if the MMPA is not amended, NMFS could change its internal permitting procedures by publishing a new “Procedural Directive” in the NOAA Fisheries Policy Directive System.⁶⁷ Currently, facilities seeking to retain a releasable rehabilitated marine mammal must submit a standard take permit application.⁶⁸ If the permit is granted, the Office of Protected Resources Director may then authorize retention of the rehabilitated animal instead of “taking” a wild one.⁶⁹

This procedural change would still allow NMFS to grant take permits for public display but would no longer allow grant take permits for releasable marine mammals. Like amending the MMPA, this change would not require additional resources. Rather, the procedural directive would likely decrease NMFS's workload, as well as decrease the number of permit applications it receives.

C. Amending the MMPA Provides Additional Protection from Importation

Either amending the MMPA or changing the NMFS's internal procedures would prevent zoos and aquariums from retaining releasable rehabilitated marine mammals for public display. Altering NMFS's permitting procedures could prevent the retention of releasable marine mammals for any purpose—public display, research, photography, or educational purposes—if the Agency wanted it to. Conversely, because of the MMPA's language, removing “public display” from Sections 101 and 104 would prohibit both retaining releasable marine mammals for that

⁶⁷ The NOAA Policy Directive System is the repository for NOAA Fisheries policy directives. A procedural policy directive “provide[s] guidance for how to apply the direction and objectives stated in policies.” *Policy Directive System*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/national/laws-and-policies/policy-directive-system> (last visited Nov. 28, 2022) [<https://perma.cc/87CZ-DQTW>].

⁶⁸ NMFS Directive 02-308-03, NMFS Process for Permit Application to Retain Releasable Rehabilitated Marine Mammals for Public Display (NOAA 2018), https://media.fisheries.noaa.gov/2021-11/02-308-03%20renewal_signed.pdf [<https://perma.cc/KH2V-RCH4>].

⁶⁹ *Id.*

purpose and importing marine mammals. But, changing the MMPA in this way would still allow the retention of releasable rehabilitated individuals for research, photography, and educational purposes.

The timeline for amending and implementation would likely vary significantly between these two options. Amending the MMPA would likely take longer than changing NMFS's internal procedure because to amend a statute, both chambers of Congress and the President must support the change. In contrast, NMFS could review and change its own procedure without additional approval, so long as the changes are not unconstitutional nor outside of its statutory authority. Despite these differences, either solution would address the issue of releasable marine mammals being kept in captivity for public display. Moreover, current social, judicial, and legislative trends indicate that either option would likely have significant support.

IV. OVERCOMING OBSTACLES TO IMPLEMENTATION

Undoubtedly, obstacles would need to be overcome to amend the MMPA or NMFS's permitting procedures and subsequently implement those changes. Zoos and aquariums that house captive marine mammals would likely oppose these changes because it would mean facilities could only increase their marine mammal inventory through captive breeding. There is, however, strong public support against marine mammal captivity, which is evident in social movements and attendance trends at public display facilities across the country. In addition, recent judicial and legislative decisions at both the state and federal levels appear to disfavor continuing marine mammal captivity.

A. Social Movements and Trends

Zoos and aquariums rely on public attendance as a source of profit to maintain their businesses. Thus, people can significantly impact the success of public display facilities. Organizations such as People for the Ethical Treatment of Animals (PETA), the Humane Society, the International Marine Mammal Project, and Whale & Dolphin Conservation have opposed marine mammal captivity for decades.⁷⁰ Yet, the most

⁷⁰ See *Aquariums and Marine Parks*, PETA, <https://www.peta.org/issues/animals-in-entertainment/zoos-pseudo-sanctuaries/aquariums-marine-parks/> (last visited Apr. 4, 2023) [<https://perma.cc/Q5ZQ-XWJ6>]; *Marine Mammals in Captivity*, HUMANE SOC'Y, <https://www.humanesociety.org/resources/marine-mammals-captivity> (last visited Apr. 4,

palpable shift in public perception came after the release of *Blackfish* in 2013.⁷¹

Prior to *Blackfish*, public interest in the controversy of marine mammal captivity was minimal.⁷² But after the documentary, every animal death, trainer injury, and negative incident at captive facilities received public attention.⁷³ Though the documentary focused on the plight of captive orca whales, it sparked outrage over the captivity of other marine mammals as well. As people realized that most marine mammal species are not suited for life in captivity,⁷⁴ they began protesting across the country.⁷⁵ While SeaWorld faced the brunt of the backlash, as the backdrop of the documentary, zoos and aquariums worldwide saw attendance and profits drop.⁷⁶

This so-called “*Blackfish* effect” proves that people can influence the welfare of captive marine mammals without legal action. Furthermore, if Congress or NMFS were to take legal action, such action would have public support. The downward trend in zoo and aquarium attendance and increased public scrutiny faced by those facilities show that many people oppose marine mammal captivity. Therefore, the public would similarly support banning permits to keep releasable rehabilitated marine mammals for the purpose of public display in zoos and aquariums.

2023) [<https://perma.cc/482Q-USYS>]; *About – Overview*, INT’L MARINE MAMMAL PROJECT, <https://savedolphins.eii.org/about> (last visited Apr. 4, 2023) [<https://perma.cc/6EET-JZ2G>]; *End Captivity*, WHALE AND DOLPHIN CONSERVATION, <https://us.whales.org/our-4-goals/end-captivity/> (last visited Apr. 4, 2023) [<https://perma.cc/G79V-NQFB>].

⁷¹ *Blackfish* is a documentary that illuminated the numerous marine mammal trainer injuries and casualties caused by captive orca whales that were historically swept under the rug. ROSE & PARSONS, *supra* note 49, at 84.

⁷² *See id.*

⁷³ *Id.* at 85.

⁷⁴ *Just Like Orcas, Pinnipeds are Prisoners at SeaWorld*, SEAWORLD OF HURT (Dec. 17, 2018), <https://www.seaworldofhurt.com/features/problems-with-imprisoning-pinnipeds/> (discussing the reasons why pinnipeds, like orcas, are not suitable for life in captivity) [<https://perma.cc/GFZ6-DHL2>].

⁷⁵ *See* Jonathon Kendall, *Animal Rights Activists Protest Proposed Miami Megamall’s Sea Lion Show*, MIA. NEW TIMES (Mar. 24, 2015), <https://www.miaminewtimes.com/news/animal-rights-activists-protest-proposed-miami-megamalls-sea-lion-show-7549277> (reporting about protests against traveling sea lion entertainment shows) [<https://perma.cc/KD9J-3QCT>].

⁷⁶ Kelly Wallace, *After SeaWorld, a ‘Blackfish Effect’ on Circuses and Zoos?*, WGNO (Mar. 19, 2016), <https://wgno.com/news/after-seaworld-a-blackfish-effect-on-circuses-and-zoos/> [<https://perma.cc/7LML-R3VB>].

B. Judicial Decisions

Despite the prevalence of take permits, NMFS has denied permit requests for displaying marine mammals. Consequently, after exhausting their administrative remedies, denied applicants have sought relief in the courts. Many of these denied applicants were large, notorious facilities like the Georgia Aquarium, Shedd Aquarium, and numerous SeaWorld Parks. In most cases, the permit denial is upheld by the court. This unwillingness of NMFS and federal courts to acquiesce to these entities illustrates that captivity proponents are a surmountable obstacle.

In 2013, NMFS denied an application from the Georgia Aquarium and four other facilities to import beluga whales for public display from a research station on Russia's Black Sea Coast.⁷⁷ The Aquarium's stated goal in obtaining the permit was to "enhance the North American beluga breeding cooperative;" "promot[ing] conservation and education" was listed as a secondary goal.⁷⁸ When NMFS denied the permit, Georgia Aquarium sought review in federal court.⁷⁹ The United States District Court for the Northern District of Georgia upheld the permit denial.⁸⁰

In its opinion, the court found:

The primary purpose of the MMPA is to protect marine mammals; the Act was not intended as a 'balancing act' between the interests of industry and the animals. The interests of the marine mammals come first under the statutory scheme, and the interests of the industry, important as they are, must be served only after protection of the animals is assured.⁸¹

⁷⁷ Matt Potter, *Feds Deny Import Permits for Beluga Whales for SeaWorld*, SAN DIEGO READER (Aug. 7, 2013), <https://www.sandiegoreader.com/weblogs/news-ticker/2013/aug/07/feds-deny-import-permits-for-beluga-whales-for-sea> [<https://perma.cc/R86W-K4VP>].

⁷⁸ *Ga. Aquarium, Inc. v. Pritzker*, 135 F. Supp. 3d 1280, 1286 (N.D. Ga. 2015) (quoting Permit Application, AR 8927).

⁷⁹ *Id.*

⁸⁰ *Id.* at 1340. Georgia Aquarium later announced it would not appeal the decision. See Carla Caldwell, *Georgia Aquarium Will Not Appeal Decision to Block Import of Beluga Whales*, Atlanta Bus. Chron. (Nov. 18, 2015), https://www.bizjournals.com/atlanta/morning_call/2015/11/georgia-aquarium-will-not-appeal-decision-to-block.html [<https://perma.cc/ZS3Q-L5XW>].

⁸¹ *Ga. Aquarium, Inc.*, 135 F. Supp. 3d at 1292 (quoting *Fed'n of Japan Salmon Fisheries Co-op. Ass'n v. Baldrige*, 679 F. Supp. 37, 46 (D.D.C. 1987)).

Following the court's interpretation of the statutory scheme and considering the negative impacts of captivity, such as stereotypies and premature deaths, it would be nearly impossible to find that captive life is in the marine mammals' best interest. Granting a permit in such a situation, to retain a releasable and rehabilitated marine mammal for public display and human entertainment, places the industry's interests above the animal's best interest—precisely what the District Court in Georgia said must be avoided when evaluating permits. The court's holding indicates that changing current laws or agency procedures to prohibit permits for the retention of releasable rehabilitated marine mammals would be consistent with federal judicial trends.

C. Legislative Decisions

To date, no legislation specifically regarding releasable rehabilitated marine mammals has been introduced. Nevertheless, Congress and state legislatures have introduced legislation prohibiting marine mammal captivity generally. The following examples show that the public display of marine mammals is a contemporary issue and that banning permits to publicly display releasable marine mammals would have widespread support.

At the federal level, the Strengthening Welfare in Marine Settings (SWIMS) Act was introduced in the House of Representatives on July 26, 2022, and in the Senate on August 2, 2022.⁸² The SWIMS Act would amend the MMPA to prohibit the breeding, taking, and importation of orcas, beluga whales, pilot whales, and false killer whales.⁸³ The bill was most recently referred to the House Subcommittee on Livestock and Foreign Agriculture

⁸² The Strengthening Welfare in Marine Settings Act of 2022 (SWIMS Act) was introduced by Senator Dianne Feinstein and Representatives Adam Schiff, Jared Huffman, and Suzan DelBene. Margie Fishman, *Legislation to Phase Out Public Displays of Captive Whales Introduced in Congress*, Animal Welfare Institute (July 26, 2022), <https://awionline.org/press-releases/legislation-phase-out-public-display-captive-whales-introduced-congress> [<https://perma.cc/RQ7F-G4D5>].

See Strengthening Welfare in Marine Settings Act of 2022, H.R. 8514, 117th Cong. (2022); Strengthening Welfare in Marine Settings Act of 2022, S. 4740, 117th Cong. (2022).

⁸³ H.R. 8514; S. 4740.

and the Senate Committee on Commerce, Science, and Transportation.⁸⁴ The bill has gained 28 cosponsors since its introduction.⁸⁵

While federal action is still pending, many states have successfully passed laws banning marine mammals in captivity. Most recently, in 2016, California passed the Orca Protection Act.⁸⁶ The California law bans holding orca whales in captivity for entertainment or performance purposes.⁸⁷ Additionally, the Orca Protection Act ended captive breeding programs, along with the import and export of orcas and their genetic material in and out of California.⁸⁸

State marine mammal captivity laws are not a new concept though. For example, South Carolina's ban on captive marine mammal display has been in place in some form since 1992.⁸⁹ The original law prohibited "the display of dolphins and porpoises."⁹⁰ In 2000, the law was expanded to prohibit display of all marine mammals.⁹¹ However, in 2011, the law was narrowed to prohibit only the display of cetaceans.⁹² Regardless of this back and forth, South Carolina maintaining the law in some form shows that it is another state against marine mammal captivity.

While not all passed, marine mammal protection bills have been introduced coast to coast in the United States. Washington and New York introduced bills in their Senates to ban the breeding, import, and export of orcas for entertainment purposes, but neither state successfully passed a

⁸⁴ *H.R. 8514 – SWIMS Act of 2022*, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/house-bill/8514/all-actions-without-amendments?s=1&r=9> (last visited Nov. 30, 2022) [<https://perma.cc/AE7K-YM69>]; *S. 4740 – SWIMS Act of 2022*, CONGRESS.GOV, <https://www.congress.gov/bill/117th-congress/senate-bill/4740/all-actions-without-amendments> (last visited Nov. 30, 2022) [<https://perma.cc/W7LV-USGZ>].

⁸⁵ *H.R. 8514 – SWIMS Act of 2022*, CONGRESS.GOV, [https://www.congress.gov/bill/117th-congress/house-bill/8514?s=1&r=9#:~:text=Introduced%20in%20House%20\(07%2F26%2F2022\)&text=This%20bill%20establishes%20prohibitions%20on,the%20purpose%20of%20public%20display](https://www.congress.gov/bill/117th-congress/house-bill/8514?s=1&r=9#:~:text=Introduced%20in%20House%20(07%2F26%2F2022)&text=This%20bill%20establishes%20prohibitions%20on,the%20purpose%20of%20public%20display) (last visited Nov. 30, 2022) [<https://perma.cc/8MNQ-J94X>].

⁸⁶ California Orca Protection Act, CAL. FISH & GAME CODE § 4502.5 (2016).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Cetacean Anti-Captivity Legislation and Laws*, ANIMAL WELFARE INST., <https://awionline.org/content/cetacean-anti-captivity-legislation> (last visited Nov. 12, 2022) [<https://perma.cc/J8DZ-24EB>].

⁹⁰ S.C. CODE ANN. § 50-17-105 (1992).

⁹¹ S.C. CODE ANN. § 50-5-2310 (2000).

⁹² S.C. CODE ANN. § 50-5-2310 (2011).

law.⁹³ Hawaii also introduced legislation urging facilities holding cetaceans for entertainment purposes to discontinue their breeding programs and phase out captivity,⁹⁴ but this resolution would not result in binding law.⁹⁵ Likewise, Florida introduced the Florida Orca Protection Act in 2018, but it died in the Natural Resources & Public Lands Subcommittee.⁹⁶

Although few states have successfully enacted legislation to prohibit marine mammal captivity, the fact that legislation has been consistently introduced reiterates that this is an important issue with national support. Further, the introduction of bills at the federal level indicates that elected representatives are listening to their constituents and taking a stance on this issue.

CONCLUSION

Keeping rehabilitated marine mammals that are deemed releasable in captivity for public display should be prohibited. Not only do zoos and aquariums fail to meet their legal obligations for education and conservation programs as required by the MMPA, but research has also shown that captivity negatively impacts marine mammals' health. Furthermore, the MMPA mandates that stranded marine mammals be released back to the ocean following rehabilitation whenever feasible.

To protect rehabilitated marine mammals, either the MMPA or NMFS's permitting procedures should be amended. Though there may be opposition to these changes, the vast public and political support apparent in current social, judicial, and legislative trends would outweigh any opposition. Wild marine mammals that require rehabilitation, most commonly because of human actions, deserve to return to the wild once they are healthy and capable. These animals should not suffer, nor serve as entertainment to the people who originally caused injury.

⁹³ S.B. 5666, 64th Leg., 2015 Reg. Sess. (Wash. 2015); S.B. S6613A, 2013-2014 Leg. Sess. (N.Y. 2014).

⁹⁴ H.R. 136, 2017 Leg., 29th Sess. (Haw. 2017).

⁹⁵ *Id.*

⁹⁶ H.B. 1305, Reg. Sess. 2018 (Fla. 2018).