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1315 East-West Highway
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United States of America



6 November 2015
Our Ref: 20151106-1

Subject: Formal request for immediate action by the United States National Marine Fisheries Service (NMFS) and the Spanish CITES Management Authority (MA) regarding killer whales at Loro Parque.

RE: *Killer Whale Morgan*
(microchip No. 528210002335926)
Dutch EG-Certificate No. 11 NL 114808/20
Violation of Article 8(3)(g) Council Regulation (EC) 338/97

As explained in the accompanying white paper, *CITES and the Marine Mammal Protection Act: Comity and Conflict at Loro Parque*, the wild-born Norwegian killer whale Morgan was transferred from *Dolfinarium Harderwijk* in the Netherlands to *Loro Parque* in the Canary Islands in 2011. The terms of her transfer are controlled by CITES and EU Wildlife Trade Regulations – specifically **Article 8(3)(g)** of Council Regulation **(EC) 338/97**, which provides a narrow exemption (derogation) from the broad prohibition against commercial trade and exploitation of EU Annex A (wild-born) specimens, such as Morgan.

This exemption is to be strictly construed and only lists two (2) purposes: “research” or “education” aimed at the preservation or conservation of the species. The exemption issued for Morgan is restricted to “research” as stated in the governing letter from the Dutch MA, to which her exemption (EG-Certificate) is attached.

The EG-Certificate issued by the Dutch MA clearly does not authorize breeding Morgan or subjecting her to mating situations or opportunities that will result in a pregnancy and eventual captive-birth of an ecotype-hybrid killer whale.

Despite these provisos, Morgan, a wild-born Annex A female killer whale is presently being held in the same tanks as captive-born Annex B male killer whales owned by *SeaWorld*. The *SeaWorld* killer whales are held at *Loro Parque* pursuant to the public display provisions of the United States Marine Mammal Protection Act.

Loro Parque is intentionally keeping Morgan in the same tanks with *SeaWorld's* male killer whales with the knowledge that she is ovulating and the hope that she will breed. This exceeds the scope of her EG-Certificate and violates of the EU Wildlife Trade Regulations.

Notwithstanding the extremely limited parameters of Morgan's EG-Certificate, Dr. Javier Almunia, of *Loro Parque Fundación*, who is managing the husbandry of the *Loro Parque* killer whales, is acting under the erroneous belief that Morgan's Dutch-issued EG-Certificate allows *Loro Parque (SeaWorld)* to breed the wild-born female Morgan with *SeaWorld's* captive-born male killer whales.

Dr. Javier Almunia wrongly interprets Morgan's EG-Certificate without reference or adherence to the language of the actual EU Regulation (or the controlling cover letter from the Dutch CITES MA), and therefore misinterprets the disjunctive clause separators for Article 8(3)(e)(f)(g) of Council Regulation (EC) No 338/97.

A detailed discussion regarding the scope of the derogation provided by Article 8(3)(g) of Council Regulation (EC) 338/97 is included in the accompanying white paper at pages 51 through 56 and pages 76 through 78. These particular pages put forth the applicable law and include a comparison of similar regulations such as the Dutch Flora and Fauna Act, the EU Habitats Directive, EU Birds Directive and EU Zoo Directive.

The legal analysis provided in the white paper leads to only one conclusion; Morgan's EG-Certificate does not authorize breeding because Article 8(3)(g), which is the derogation for which Morgan's EG-Certificate was issued, does not include breeding.

The European Court of Justice (ECJ) has considered similar issues regarding the scope of derogations and strict interpretation to be applied to Article 8(3) of Council Regulation (EC) 338/97. The FMF analysis is in accord with the ECJ on this point:

"According to the Court's case-law, derogations from general provisions are to be interpreted restrictively. This also applies to Article 8(3) which provides for a derogation from the general prohibition contained in Article 8(1)." [Emphasis added.] (Excerpt from Opinion of Advocate General Stix-Hackl, ECJ Case C-510/99, 6 February 2001, page I-7795, paragraph 72.)

"Since, however, provisions on exemption cannot be given a broader scope than the rules for which they lay down an exemption, Article 8(3)(b) and Article 2(w) of Regulation No 338/97 cannot permit any more actions than are prohibited under Article 8(1)." [Emphasis added.] (Excerpt from Opinion of Advocate General Stix-Hackl, ECJ Case C-154/02, 15 May 2003, page I-12746, paragraph 55.)

Dr. Javier Almunia's position regarding the breeding of Morgan is not only troubling, it is wrong. He either does not understand the law or he chooses to ignore it. In order to stop this ongoing violation of Morgan's EG-Certificate and maintain the *status quo* until a full investigation into this matter can be conducted the following actions must be taken posthaste:

- **The Spanish CITES MA must act immediately to separate and keep the wild-born female killer whale Morgan isolated from SeaWorld's captive-born male killer whales at all times.**

- **The US National Marine Fisheries Service must consult with the Spanish CITES MA to determine if Loro Parque can and will ensure that SeaWorld's captive-born male killer whales will be prevented from breeding, mating or otherwise interacting with Morgan for purposes which violate the terms of her EG-Certificate.**

This request for action is simultaneously being submitted to the Spanish CITES MA. The Dutch CITES MA is also being provided a copy.

Please provide a formal written acknowledgement of receipt and acceptance of this request for action and include a detailed response concerning your intentions to address the issues raised herein to be delivered via e-mail to info@freemorgan.org no later than 20 November 2015

Sincerely,

Dr I. N. Visser (PhD)



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