



**CITES and the Marine Mammal Protection Act
CITES Purpose of Transaction Codes and Whale Laundering**

Recommendations for Resolutions, Decisions and Agenda Items for Discussion at CoP17

Public Comments Processing
Attn: FWS-HQ-IA-2014-0018
Division of Policy and Directives Management
U.S. Fish and Wildlife Service (FWS)
5275 Leesburg Pike
MS: BPHC
Falls Church, VA 22041

Comments of the Free Morgan Foundation
RE: Provisional Agenda Items for CITES CoP17
(Johannesburg, South Africa, 2016)

For purposes of this public comment submission, the FMF specifically requests that the United States consider the following four (4) issues to be submitted for inclusion on the agenda and also for discussion at CoP17:

- [1] Consistent and conforming purpose codes on both sides of a single import/export transaction;
- [2] Full disclosure of the legal owner in addition to identifying the name of the holder and facility on all CITES permits;
- [3] The establishment of a clear policy regarding the breeding of rescued, wild cetaceans with their captive-born counterparts; and
- [4] A bright-line rule providing unambiguous criteria and guidelines differentiating between transactions for primarily commercial purposes and bona fide scientific research.

www.freemorgan.org

Before the end of August 2015, the Free Morgan Foundation (FMF) will be submitting a white paper to the CITES Secretariat, the European Commission, the United States Marine Mammal Commission and the National Marine Fisheries Service which addresses the issue of whale laundering and the need for reform of the CITES permit process. A pre-publication copy of the Abstract is being submitted as a separate attachment for reference on the issues addressed in this public comment submission.

The FMF white paper will be presented as a case study of the rescued, wild female killer whale (orca; *Orcinus orca*) known as Morgan (microchip No. 528210002335926). The purpose of the white paper is to expose manifest deficiencies in the CITES framework and illustrate the necessity for reform in the CITES permit process in order to combat illicit trade and misappropriation of rescued wild cetaceans and their progeny for primarily commercial purposes.

Consistent Purpose Codes

In Decision 14.54, adopted at the 14th CITES Conference of the Parties (The Hague, 2007), the CITES Standing Committee was instructed to establish - and at its 57th meeting (Geneva, 2008) did establish - an intersessional joint working group to review the use of purpose-of-transaction codes, with the United States as Chair.

The working group was re-established at the Standing Committee's 64th meeting (Bangkok, 2013), with Canada as Chair. The working group determined that, to achieve the aim of consistent use of purpose-of-transactions codes, clear definitions and uniform application of purpose codes was required.

This is a long-standing and still unresolved issue; one which the United States recognized at CoP14, proposing changes because inconsistent use of the purpose-of-transaction codes leads to confusion over the purposes of shipments and inconsistent reporting of trade data as documented here:

http://www.cites.org/common/cop/14/raw_docs/E-US02-Purpose_of_transaction_codes.pdf

The CITES working group, of which the United States is still a member, will present its suggestions regarding the purpose-of-transaction codes at CoP17.

The FMF feels it is necessary for the purpose of transactions codes to be identical on both sides of the same export/import transaction. In its experience, the real world implication of not having matching purpose codes is mainly to circumvent national laws.

The lack of consistency in CITES purpose-of-transactions codes enables whale laundering activities across international borders as is the case with Morgan, where three different CITES MAs are called upon to interpret the CITES framework, US, Dutch, Spanish and EU law, and two CITES permits issued by two different MAs, in an otherwise irreconcilable manner.

Labeling of transactions should not be for the economical or political convenience of parties to that transaction, but should reflect the veracity of the transaction regardless of obligations under national law. The United States should take forward this issue at CoP17 and advocate for well-defined and consistently employed purpose codes.

Disclosure of Legal Owner

Currently, the CITES forms do not allow for identification of the owner of the animal to be or that has been transported. This should be corrected and included on the form. By identifying the holder and facility, the CITES paperwork does not make clear who is ultimately responsible for the animal or product. As in the situation with Morgan, it is currently not known through the CITES paperwork who owns Morgan. Consequently, the respective governments are confused as to who is responsible for the welfare of the animal, pointing their fingers at each other and several private entities as the owners and responsible parties.

Breeding Wild Cetaceans with Captive Cetaceans

There is a disturbing trend of finding that rescued wild cetaceans are not good candidates for release. In the case of Morgan, and as explored more thoroughly in the white paper, some of these cetaceans then find themselves performing for commercial entities and subject to breeding for the benefit of the commercial entity. Cetaceans, in particular orcas, are valuable commodities in the marine park world.

Allowing these policies only encourages the capture of wild cetaceans rather than their release back into the wild. Like the illicit rhino horns found by traffickers, it should be impermissible to breed a wild cetacean when the progeny of that whale will be used for commercial purposes.

Scientific Research versus Commercial Purposes

The FMF is also calling on CITES to adopt a bright-line rule providing unambiguous criteria and guidelines differentiating between transactions for 'primarily commercial' purposes and 'bona fide scientific research' in order to reconcile the different meanings of the terms in satisfaction of the various international

laws and conventions including, but not limited to, CITES, ASCOBANS, the EU Habitats Directive and the US Marine Mammal Protection Act.

The FMF believes that insight and guidance on how to address the issue of scientific research as an overriding justification for keeping wild cetaceans in captivity can be found in the recent landmark ruling by the International Court of Justice (ICJ) in the case of Australia v. Japan, where it was ruled that Japan's JARPA II whaling program in the Antarctic is not for scientific purposes and ordering that all permits given under JARPA II be revoked. The ICJ accepted that the program was 'scientific' but ultimately found that it was not primarily motivated by scientific concern.

CITES needs to establish a scientifically accepted standard and enforceable distinction between bona fide scientific research on cetaceans held in captivity with public display access for educational purposes and scientific activities that are ancillary to commercially driven public performance entertainment shows featuring killer whales.

Adoption of a similar analysis as formulated by Dr. Mangel, an expert in Australia v. Japan, to the definition of scientific research used in CITES for issuing permits for cetaceans in captivity warrants discussion at the CoP17.

The FMF appreciates the opportunity to contribute to this important process.

Respectfully submitted,



Matthew Spiegl, Esq.
Legal Advisor - FMF
Salinas, California



Natalie Barefoot, Esq.
Legal Advisor – FMF
Key Largo, Florida

