

CITES and the Marine Mammal Protection Act: Comity and Conflict at Loro Parque

White Paper on Whale Laundering

Submitted to:
CITES Secretariat
European Commission
United States Marine Mammal Commission

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November 2015



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About the Free Morgan Foundation

The Free Morgan Foundation (FMF) is an NGO registered in the Netherlands to facilitate the rescue, rehabilitation and release of the wild-born female killer whale known as Morgan.

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Citation: Spiegl, Matthew V. and Visser, Ingrid N. (2015) *CITES and the Marine Mammal Protection Act: Comity and Conflict at Loro Parque*. 20151101.V1.3 © Free Morgan Foundation, pp. 124.
<http://www.freemorgan.org/pdfs/Spiegl-Visser-2015-CITES-and-the-MMPA-Comity-and-Conflict-at-Loro-Parque.pdf>

Preface: Navigating the Complex Issues of Whale Laundering

The authors of this white paper recognize that the issues discussed are inherently complex. They transcend the laws of three sovereign nations; concern officials from three different governments; and involve three different marine park companies, operating in three different countries. Historically, the material dates back to the 1960's, but the main focus of the paper is the last ten (10) years – still a decade of material.

We have done our best to organize this paper with a high degree of clarity and consistency in order to expose the rampant inconsistency with which the laws and regulations discussed herein are being applied, or misapplied, as the case may be. At times the paper may seem repetitive in its references: citing Article 8 of Council Regulation (EC) 338/97; using terms like “wild-born”, “Annex A”, “public display” and “scientific research”; and repeatedly stating that breeding is “not authorized”. It is necessary that we do so, however, because of the multiple and overlapping layers of laws and regulations that are involved. It is within this aura of regulatory complexity that whale laundering thrives.

Comparing the transfer of a set of four killer whales in 2006 with the transfer of a single killer whale in 2011 is not as simple as it sounds because the circumstances of the two transfers are entirely different. Yet the circumstances of each transfer in this case represent an integral part of understanding how whale laundering can, and does, occur when these “circumstances” intersect. Therefore it is necessary to jump back and forth both chronologically and geographically to provide the necessary linkages that would otherwise be missed or marginalized.

We have made a concerted effort to meticulously document and substantiate the factual representations in this paper through the use of endnotes. All of the critical documents referenced in the white paper such as applications, permits, government correspondence and other official documents, news articles and court decisions (with certified English translations when applicable) have been archived on the Free Morgan Foundation website to ensure their continued availability to the public, scientists and government officials as a resource for both educational and regulatory purposes. Hyperlinks to outside websites and offsite material were last accessed in November 2015 to verify the links.

For readers of the PDF version of the paper, you can scroll your pointer over the blue superscript numbers within the text of the document and click your mouse to go to the endnote where you will find additional text and/or hyperlinks to supporting documents and other material. Clicking on the corresponding blue superscript number in the endnotes will return the reader back to the body of the main document. In addition, the reader can click on a heading in the table of contents to jump to a particular section in the paper and also click on any heading within the body of the text to jump back to the table of contents.

To take advantage of the full interactive functionality of navigating this white paper, the authors recommend using Adobe Acrobat or Acrobat Reader as your pdf reader (as other readers may not allow you to hyperlink within the document).

Executive Brief:

The broad purpose of this white paper is to highlight the systemic inadequacies in the CITES framework when applied at the individual case level. The issues addressed have been left unresolved for far too long and deserve both discussion and resolution by the Parties at CoP17 (South Africa, 2016). For the purpose of initiating an international dialogue prior to CoP17, the Free Morgan Foundation presents the case of the wild-born, Norwegian female killer whale known as Morgan who was taken from the Wadden Sea in 2010 under the authority of the Kingdom of the Netherlands. The issues raised also link to a long overdue discussion in the United States (US) about revision of the Marine Mammal Protection Act (MMPA) concerning public display. Within the European Union (EU) the effectiveness of the Wildlife Trade Regulations (WTR), particularly for Annex A specimens, must be reexamined in light of Morgan's case.

However, as an individual case under CITES and the WTR, the issues specific to Morgan's situation cannot wait to be addressed at CoP17 or just debated in meetings – they require immediate attention by the Spanish CITES Management Authority (MA) and the US National Marine Fisheries Service (NMFS).

Morgan was transferred from *Dolfinarium Harderwijk* in the Netherlands to *Loro Parque* in the Canary Islands in 2011. The terms of her transfer and stay at *Loro Parque* are controlled by CITES and the WTR – specifically Article 8(3)(g) of Council Regulation (EC) 338/97, which provides a narrow exemption 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. Additionally, Morgan has been clearly traded/sold (to a third ex-situ party, *SeaWorld*, in the US) and is used commercially in shows.

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 the captive-birth of an ecotype-hybrid killer whale. Despite these provisos, Morgan is presently being held in the same tanks as Annex B (captive-born) male killer whales owned by *SeaWorld*. The *SeaWorld* killer whales are held at *Loro Parque* pursuant to the public display provisions of the MMPA.

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 the WTR. 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.**

Abstract:

This white paper on whale laundering is a case study of the rescued wild-born, Norwegian female killer whale (*Orcinus orca*) known as Morgan (microchip No. 528210002335926). The purpose of this white paper is to expose manifest deficiencies in the CITES framework. It does this by tracing the export of four captive-born killer whales from *SeaWorld* facilities in the United States (US) to *Loro Parque* at Tenerife in the Canary Islands, Spain, in 2006 and the subsequent export of Morgan from the *Dolfinarium Harderwijk* in the Netherlands to *Loro Parque* in 2011. It also explores the involvement of *SeaWorld* in these two transactions and highlights *SeaWorld's* commercial interest in acquiring and breeding the wild-born Morgan with its captive-born male killer whales. The discussion is framed through references to comments expressed by the US Marine Mammal Commission in 2002 which foretold the state of affairs facing Morgan at *Loro Parque* in 2015.

Morgan's plight illustrates the necessity for reform in the CITES permit process with particular emphasis on the need for: [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 non-breeding of rescued, free-ranging/wild-born cetaceans (whales, dolphins and porpoises), 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.

These last two points are also ripe for discussion within the US and the EU as they pertain to both MMPA and WTR jurisdiction. Both need scientifically acceptable standards and enforceable distinctions 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 cetaceans. As recently illustrated in the US, public sentiment concerning captive breeding has changed dramatically. On 8 October 2015, following unprecedented public petition and comment, the California Coastal Commission (CCC) imposed conditions that prohibit breeding of killer whales at *SeaWorld's* San Diego facility. It was compelled to act because of a regulatory vacuum in the MMPA.

Within the confines of a vast grey area of regulations, standards, definitions and enforcement policies, international transactions are manipulated and orchestrated between private marine parks. This enabled *SeaWorld*, *Loro Parque* and *Dolfinarium Harderwijk* to mask illicit, profit-driven commercial trade of a killer whale rescued in the wild. As such, this white paper illuminates how trade has resulted in whale 'laundering'. By focusing on Morgan, we bring to light the ease with which the underlying policy considerations and intent of CITES, the EU Wildlife Trade Regulations and the US Marine Mammal Protection Act are being circumvented. However, this is not just about a single killer whale -- it is about a pattern of conduct by an entire industry.

The institutional denial and manipulation of Morgan's rescue and rehabilitation and the commercial nature of the *Dolfinarium Harderwijk* transfer to *Loro Parque* should be a cause for concern. CITES -- in its role of controlling wildlife trade -- is empowered to not only rectify the present situation but prevent future cases of whale laundering as well.

Acknowledgements:

The authors of this white paper wish to acknowledge and thank everyone who has graciously assisted in the editing and vetting of this paper as it has evolved over the course of the last ten months. The selfless nature of your contributions and the amazing breadth of your combined knowledge, expertise and experience humble us beyond expression.

What began as a simple idea; a desire to raise awareness and call attention to the practical deficiencies in the application of CITES, the EU Wildlife Trade Regulations and the US Marine Mammal Protection Act at an individual transaction level, such as with Morgan, has evolved into a formidable document and a harbinger for change.

The rescue, rehabilitation and open ended retention of the wild-born female Morgan in captivity, along with other cetaceans (whales, dolphins and porpoises) similarly situated throughout the world, must not and cannot be ignored any longer.

It is because of your devotion to Morgan's cause and the broader protection of cetaceans both in the wild and in captivity that we dedicate this white paper as the cornerstone for "Morgan's Law" and call on the international community to adopt a uniform set of laws and regulations to ensure that nothing like the series of events in Morgan's case ever happen again.

In recognition, the Free Morgan Foundation is calling on the international community to impose a ban on breeding wild-born, rescued cetaceans, particularly with their captive-born and bred counterparts except, when scientifically proven to be necessary and then only when such captive-bred progeny are released into the wild to re-populate an endangered species.



Morgan at Dolfinarium Harderwijk 23 September 2011

Table of Acronyms & Abbreviations:

| | |
|----------|---|
| APHIS | Animal and Plant Health Inspection Service (US) |
| ASCOBANS | Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas |
| CMS | Convention on Migratory Species |
| AWA | Animal Welfare Act (US) |
| CITES | Convention on International Trade in Endangered Species of Wild Fauna and Flora |
| CFR | Code of Federal Regulations (US) |
| CoP | Conference of the Parties (CITES) |
| EC | European Community |
| ECJ | European Court of Justice |
| EU | European Union |
| FMF | Free Morgan Foundation |
| FWS | Fish and Wildlife Service (US) |
| ICCWC | International Consortium on Combating Wildlife Crime |
| ICJ | International Court of Justice |
| IUCN | International Union for Conservation of Nature |
| IWC | International Whaling Commission |
| JARPA | Japanese Whale Research Program under Special Permit in the Antarctic |
| MA | Management Authority (CITES) |
| MMDS | Marine Mammal Data Sheets (US) |
| MMIR | Marine Mammal Inventory Report (US) |
| MMPA | Marine Mammal Protection Act (US) |
| NMFS | National Marine Fisheries Service (US) |
| NOAA | National Oceanic and Atmospheric Administration (US) |
| OSHRC | Occupational Safety and Health Review Commission (US) |
| SA | Scientific Authority (CITES) |
| SEC | Securities and Exchange Commission (US) |
| US | United States |
| WTR | European Union Wildlife Trade Regulations |

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I. WHITE PAPER SUMMARY

In the world of killer whale capture, captivity, commercial breeding and display, not everything is black and white.

The consequences of whale laundering represent a vast grey area on the frontier of illicit wildlife trade. It involves the act of capturing, breeding and trading free-ranging killer whales or orcas (*Orcinus orca*) and their captive-born progeny for commercial profit, under the pretense of humane rescue and rehabilitation or the facade of scientific research. It demands increased oversight and scrutiny by the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the European Commission and in the United States (US) by the Marine Mammal Commission (MMC), the National Marine Fisheries Service (NMFS) and the Fish and Wildlife Service (FWS).

Action is required to ensure that the underlying policy considerations and intent of CITES,¹ the European Union (EU) Habitats Directive² and Wildlife Trade Regulations (WTR),³ and the US Marine Mammal Protection Act (MMPA)⁴ are not circumvented by means of international transactions orchestrated by marine theme parks, such as *SeaWorld*. There is a history, by *SeaWorld*, of utilizing clearing facilities such as *Dolphinarium Harderwijk*, in the Netherlands and off-shore breeding facilities like *Loro Parque* at Tenerife, Spain, in order to mask illicit commercial trade of killer whales captured in the wild. (See APPENDIX 2 - *Killer Whales Held at Dolfinarium Harderwijk and Loro Parque* for a detailed historical perspective on the use of these facilities to hold and launder wild-born killer whales.)

In the US, as early as 2002, the MMC was engaged in a discussion with the NMFS⁵ regarding export of marine mammals for the purpose of public display to foreign countries. Concerns were raised about laundering marine mammals through foreign facilities and the jurisdictional reach of comity (legal reciprocity) under the MMPA.⁶ In 2007 the FWS, in its role as the US CITES Management Authority (MA), was proposing revisions regarding the CITES purpose of transactions codes at the fourteenth meeting of the CITES Conference of the parties (CoP14).⁷

These same issues persist today, thirteen years later and are highlighted in this white paper. Specifically, questions concern the use of foreign facilities to launder marine mammals.⁸

“. . . marine mammals to be imported into the United States often come from display facilities in other countries, where animals are already on public display. Would the Service [NMFS] consider that such a transfer would have little or no effect on wild marine mammal populations, inasmuch as the animal is already in captivity, or would it look to the program in place in the country of origin to ensure that it met the least possible effect criteria? If the Service does not intend to look beyond the present circumstances of foreign-maintained animals, this would allow marine mammals taken under programs that do not meet the criteria (e.g., Japan’s drive fishery) to be laundered through foreign facilities. If the Service intends to look at circumstances surrounding the underlying capture, how would it treat the captive-born offspring of a marine mammal that, itself, would not meet the import criterion?” [Emphasis added.] (Excerpt from Letter from Robert H. Mattlin, Executive Director, Marine Mammal Commission to Donald R. Knowles, Director, Office of Protected Resources, National Marine Fisheries Service (3 April 2002) at p. 10.)

This is no longer an abstract concept or a hypothetical question; the laundering of the rescued, wild-born female killer whale Morgan is taking place currently and will continue as long as the NMFS remains silent and indifferent to the situation at *Loro Parque* and the series of transactions that led *SeaWorld Entertainment, Inc.* (*SeaWorld*) a US corporation, to identify Morgan, a wild-born (*res nullius*) killer whale as its commercial property.

Until meaningful and verifiable international protections are put in place to prevent further exploitation of Morgan and any progeny she might have, Morgan and other rescued cetaceans (whales, dolphins and porpoises) remain at risk.

In order to tackle the issue of whale laundering, it is necessary to address unresolved problems concerning the validity of MMPA and CITES export and import purpose codes; foreign assurances of comity to maintain the integrity of the MMPA; a meaningful and universally applicable definition of ‘primarily commercial purposes’; a meaningful and universally applicable definition of what constitutes *bona fide* ‘scientific research’ on captive cetaceans. The latter two are important in order to determine appropriate CITES purpose codes and introduce new and strengthen existing public display provisions in both the MMPA and the WTR; and additionally, to impose an international prohibition on captive breeding of rescued cetaceans.

The Free Morgan Foundation⁹ (FMF) is optimistic that the matters addressed in this white paper will be raised by the US delegation and addressed by all the Parties at CoP17. To that end, the FMF has already submitted public comment to the US CITES MA regarding provisional agenda items for CITES CoP17 (Johannesburg, South Africa, 2016).¹⁰

The European Commission has evolved in its ability to carry out the broadest possible protection of species of wild fauna and flora by the implementation of CITES through the WTR; taking account of the scientific knowledge acquired since the adoption of the Regulations and the current structure of trade between countries, scientific and zoological institutions and marine theme parks.¹¹

For example, Commission Recommendation 2007/425/EC was adopted in June 2007 and identified a set of actions for the enforcement of the WTR; acknowledging that international coordination and cooperation, which is also fundamental to fulfilling the objectives of CITES, is necessary to combat illegal trade.¹² But there is still much work to be done.

In December 2007 the European Commission was presented with the Final Report on the *Study on the Effectiveness of the EC Wildlife Trade Regulations*.¹³ Just as the MMC letter of 2002 foretold the issues and problems likely to be encountered by holding both captive-born and wild-born killer whales at *Loro Parque*, as is presently

the case with Morgan, the December 2007 Report to the European Commission predicted the very same inconsistencies in the application of Council Regulation (EC) 338/97¹⁴ and Commission Regulation (EC) 865/2006¹⁵ to individual, non-routine cases such as Morgan's:

"Beyond these fundamental issues, there is also a widespread view that the Regulations are too complex, so that when a non-routine case arises, it is difficult to decide how it should be treated. Often the provisions that might determine the outcome are in widely scattered articles of Regulation 338/97 and Regulation 865/2006. In addition, there are a number of inconsistencies or apparent inconsistencies within the texts. Inevitably, from time to time Member States interpret the Regulations differently and this can lead to problems when specimens move from one Member State to another. This complexity could also weaken the effectiveness of the Regulations in conservation terms.

*Allied to this – and despite the effort invested by the Commission in providing guidelines – it is felt that the guidance available on the operation of the Regulations is not sufficient and at times is not made widely available, leading to inconsistent application in the Community." [Emphasis added.] (Excerpt from *Study on the Effectiveness of the EC Wildlife Trade Regulations* (December 2007) at p. 11.)¹⁶*

The *Study on the Effectiveness of the EC Wildlife Trade Regulations* also recognized the need for clarification of what constitutes "primarily commercial" purposes and the discrepancies which exist between Article 2(m) which refers to 'primarily commercial purposes' and Article 8(1) and 8(3) of Council Regulation (EC) 338/97 which refer to 'commercial purposes':

*"The issuing of many permits and certificates is based upon a judgement by the Management Authority(ies) and the Scientific Authority(ies) as to whether the use of a specimen is "primarily commercial". The mix of activities to which a specimen is subject may be complex. For example a zoo may have a degree of education combined with entertainment and other commercial aspects. The definition of 'non-commercial' in this context is therefore open to considerable interpretation." [Emphasis added.] (Excerpt from *Study on the Effectiveness of the EC Wildlife Trade Regulations* (December 2007) at pp. 46-47.)¹⁷*

Discrepancies and inconsistencies in the use of the term ‘Scientific Institutions’ in Article 7(4) of Council Regulation (EC) 338/97 and Article 60 of Commission Regulation (EC) 865/2006 also need to be addressed. ‘Zoos’ and ‘Scientific Institutions’ are not synonymous (i.e., compliance with the Zoo Directive is not sufficient for a zoo to be considered a Scientific Institution):

“... it is unclear whether zoos, museums and botanical gardens fall within the definition of scientific institutions for the purpose of this Regulation, due to the ambiguity of their status as ‘commercial’ or ‘non-commercial’ operations. The [European] Commission has confirmed that the name “zoo” is not grounds for assuming primary non-commercial use, yet many zoos appear to be routinely given Article 60 certificates. However, since the transactions benefiting from the derogations under either provision can only take place with other registered institutions, it could be argued that this is sufficient.

Problems arise because of the overemphasis on educational value of zoos in general. in practice there is considerable diversity in the types of “zoos” found in the Community and there is a need for a better common understanding of the types of zoos that could qualify. It was suggested that Article 60 has been used in the past for relatively indiscriminate issuance of certificates to zoos in some Member States. It was also pointed out that there is no explicit provision in Article 60 for canceling these certificates, although it could be argued that it is implicit in the text that the relevant Management Authority can withdraw its approval of the institution and that this would render the certificate invalid.” [Emphasis added.] (Excerpts from *Study on the Effectiveness of the EC Wildlife Trade Regulations* (December 2007) at pp. 52-53.)¹⁸

The Dutch authorities have never explained why Article 60 of Commission Regulation (EC) 865/2006 (*Derogation from Article 8(1) of Regulation (EC) No 338/97 for the benefit of scientific institutions*) was not followed.¹⁹ Considering the specific facts of Morgan’s case and the restrictive terms of the *Dolfinarium Harderwijk*’s dispensation,²⁰ it is difficult, if not impossible, to understand why Morgan was transferred to a commercial facility like *Loro Parque* pursuant to Articles 48(1)(d) and 59(3) of Commission Regulation (EC) 865/2006, rather than transferred to a true ‘Scientific Institution’ pursuant to Article 60(2) of that same Commission Regulation.²¹

If, as the authors believe, Article 60 of Commission Regulation (EC) 865/2006 should have controlled Morgan's transfer, then this would necessitate a finding by a competent CITES MA that her transfer to *Loro Parque* pursuant to Articles 48 and 59 of Commission Regulation (EC) 865/2006, was unauthorized and improper. Such a finding would be consistent with the terms of *Dolphinarium Harderwijk*'s dispensation which controlled the conditions under which Morgan could be removed from the Wadden Sea. The implication being that only true or *bona fide* 'Scientific Institutions' can hold her and only for scientific research, not commercial use.²²

The accession of the European Union as a Party to CITES (effective 8 July 2015), reinforces visibility and accountability of the EU in this discussion. The EU will be speaking at CITES CoPs on issues of EU competence and as noted in its press release:²³

"The accession to CITES will strengthen the role of the EU as global actor in the environment and trade areas. Jointly, the EU and CITES will be able to develop a more effective response against wildlife trafficking."

It is the hope and intention of the authors of this white paper that the EU, as a Party with 28 votes on issues falling under EU competence, will resolve to take up the issue of international whale laundering and focus on the interplay of CITES and the WTR and their role in combating this form of illicit trade as wildlife crime.

As commercial interests of marine theme parks in the US continue to find favor with sympathetic foreign governments and their CITES MAs, the protections of CITES, the WTR and the MMPA are trivialized and the ability of individuals and non-governmental organizations to petition their governments -- to be heard by the MAs when there are concerns over CITES import/export notice, purpose and compliance -- are marginalized and ignored.

Now in 2015, it is clear that the failure to address and resolve these deficiencies in CITES, the WTR and the MMPA has emboldened marine theme parks like *SeaWorld* in the United States, *Loro Parque* in the Spanish Canary Islands and *Dolfinarium Harderwijk* in the Netherlands to engage in and continue whale laundering activities.

The significance of this failure to vigilantly monitor and regulate cetaceans in captivity is illustrated by the story of Morgan, a wild-born, rescued female killer whale who was the center of a controversial series of legal proceedings in the Netherlands between 2011 and 2014.²⁴

Unless immediate and purposeful action is taken by the CITES Secretariat, European Commission, MMC and NMFS, the wild-born Morgan will be forcibly bred and impregnated by *SeaWorld's* captive-born male killer whales which remain subject to US interests under the MMPA and Spanish letter of comity.

Such an act of captive breeding for commercial profit would be a violation of EU law, Morgan's Dutch issued EG [Europese Gemeenschap (EG) or European Community (EC)] Certificate for transfer within the EU (hereafter the EG-Certificate)²⁵ and contrary to the underlying principles of CITES, the WTR and MMPA.

As the issue of keeping killer whales in captivity continues to evolve through manifold levels of political, scientific and social discourse and action, full disclosure of how Morgan came to be listed as a commercial asset of *SeaWorld* will serve the public good and preserve the integrity of CITES, the WTR and the MMPA

II. QUESTIONS PRESENTED

1. Has the wild-born female killer whale, Morgan, become the private commercial property of *SeaWorld* without any process, without any paperwork, scrutiny or official decision granting legal title or ownership?
2. Can *SeaWorld* produce legally verifiable and acceptable documentation establishing its acquisition of a property right or ownership interest in the wild-born Morgan through proper Dutch and/or Spanish regulatory channels as claimed in its US Securities and Exchange Commission (SEC) filings?
3. Is it acceptable within the frameworks of CITES, WTR and MMPA for *Dolfinarium Harderwijk*, *Loro Parque* and *SeaWorld* to engage in the private commercial ‘sale’ or ‘trade’ of Morgan (as broadly defined by Article 2(p)(u) of Council Regulation (EC) 338/97), or grant legal title to any of her progeny without disclosure to, or authorization from, the respective MAs?
4. Did the Spanish CITES MA misrepresent to the Dutch Government that the primary purpose of the export of the original four killer whales from *SeaWorld* in the US to *Loro Parque* in Spain was for *bona fide* scientific research or necessary for species enhancement, rather than the purpose code stated on the export permits (i.e., public display by a commercial facility)?
5. What is the response of Dutch officials to the Spanish MAs failure to acknowledge during Dutch administrative and court proceedings that the primary purpose for export of *SeaWorld*'s captive-born killer whales to *Loro Parque* was, and remains, commercial shows and daily public display activities (per their US CITES export permit)?

6. Does the Dutch MA which administered *Dolfinarium Harderwijk*'s dispensation and issued Morgan's EG-Certificate, still have a legal duty under CITES, the EU Habitats Directive, WTR and the Dutch Flora and Fauna Act (FF Act) to oversee Morgan's care and well-being while she is at *Loro Parque*?
7. Does the "Letter of Comity" issued on 7 June 2005 by the Spanish Government to the NMFS, as one of the MMPA-required documents for export of the original four killer whales to *Loro Parque*, legally bind the Spanish Government to honor and enforce the provisions of the US Animal Welfare Act (AWA) and the US MMPA's "public display" and "scientific research" distinctions and provisions?
8. Is it acceptable within the frameworks of the EU Habitats Directive, WTR and MMPA to breed, for primarily commercial purposes, two widely-divergent ecotypes/hybrids, which would naturally be geographically isolated, i.e., a wild-born, rescued, female, Appendix II, Annex A killer whale with captive-born, male, Appendix II, Annex B killer whales?
9. What is the justification for breeding the wild-born, female, Annex A killer whale with captive-born, male, Annex B killer whales as Morgan's progeny would be considered un-releasable under the International Union for Conservation of Nature (IUCN) Guidelines for re-introductions issued in 1998²⁶ and the IUCN (2015) Guidelines for Reintroductions and other Conservation Translocations?²⁷
10. What recourse is there if the Spanish MA allows the US CITES-permitted, captive-born, male, Annex B killer whales at *Loro Parque* to mate and breed with the rescued, wild-born, female Annex A killer whale, in violation of Morgan's Dutch issued EG-Certificate, which does not authorize breeding her under the WTR?

III. INTRODUCTION TO WILDLIFE CRIME

Who owns Morgan in the eyes of the law? The question has been asked, but never answered and that is unacceptable.

There has been a veil of secrecy and concealment of documents and records concerning Morgan's capture and transfer from *Dolfinarium Harderwijk* to *Loro Parque*.

The Dutch Government failed to address the issue of Morgan's ownership and progeny before approving her transfer to *Loro Parque* and abdicated its *res publicae* responsibility for this wild-born killer whale to the private commercial interests of *SeaWorld*, *Dolfinarium Harderwijk* and *Loro Parque*.²⁸

Marine theme parks are careful to mask the transfer and exchange of killer whales to avoid documenting a sale or leaving a paper trail which could establish that a prohibited commercial transfer has taken place. But the WTR, as implemented through Article 2(p) of Council Regulation (EC) 338/97 provides a broad definition of acts constituting a sale:²⁹

'sale' shall mean any form of sale. For the purposes of this Regulation, hire, barter or exchange shall be regarded as sale; cognate expressions shall be similarly construed;

And Article 2(u) of Council Regulation (EC) 338/97 provides that:

'trade' shall mean . . . the use, movement and transfer of possession within the Community, including within a Member State, of specimens subject to the provisions of this Regulation;

In Morgan's case, *Dolfinarium Harderwijk* and *Loro Parque* are the only two parties identified on Morgan's Dutch EG-Certificate³⁰ and thereby are the only two parties authorized by the Dutch and Spanish MAs to transfer and hold Morgan pursuant to the provisions of CITES and the WTR. Under normal circumstances, that would have been all the public ever knew about the transaction.

However, on December 27, 2012 *SeaWorld* filed a Form S-1 Registration Statement with the US Securities and Exchange Commission (SEC) for the initial public offering (IPO) of its stock. In a series of regulatory filings along with an exchange of written correspondence between *SeaWorld*'s legal counsel and the SEC, *SeaWorld* publicly documented that it had acquired the wild-born Morgan as a commercial corporate asset; technically identifying itself as her 'holder'.

The SEC filings, read in conjunction with an earlier news report³¹ quoting *SeaWorld*'s Fred Jacobs (Vice President of Communications) in July 2011, suggests that *Dolfinarium Harderwijk* transferred ownership of Morgan to *SeaWorld* before she left the Netherlands, which would mean *SeaWorld* should have been identified as the 'holder' on the application for the Dutch EG-Certificate, not *Dolfinarium Harderwijk*.³²

In order to effectively combat acts of wildlife crime in its many forms and control the illicit trade of killer whales, the international community not only needs to understand how *SeaWorld* acquired Morgan; it needs to acknowledge why *SeaWorld* acquired Morgan – and condemn it.

When Morgan was taken from the Wadden Sea, her capture was conducted pursuant to a dispensation granted by the Dutch Government to *Dolfinarium Harderwijk* to enable it to serve as a rescue and rehabilitation facility for cetaceans. The dispensation exempted *Dolfinarium Harderwijk* from certain provisions of the Dutch FF Act, the EU Habitats Directive and the WTR, but imposed strict conditions for holding Morgan -- an Annex A specimen -- in captivity. CITES lists species in three different Appendixes (I through III)³³ but in the EU, species are additionally listed in four Annexes (A through D),³⁴ which provide the strictest protections for a broader list of species covered under Annex A as Morgan is.

As spelled out in the *Dolfinarium Harderwijk* Dispensation:³⁵

"11. It is not permitted to use the animal species listed in Annex A to Regulation (EC) 338/97 for predominantly commercial purposes, as referred to in Article 8(1) of that Regulation." [Emphasis added.] (Excerpt from Certified Translation, *Dolfinarium Harderwijk* Dispensation FF/75A/2008/064.)

The condition was explicit in its prohibition but still would have allowed *bona fide* scientific research to be carried out on Morgan provided that her time spent in captivity was not for predominantly commercial purposes.

The Dutch MA authorized Morgan's transfer to *Loro Parque* pursuant to Article 8(3)(g) of Council Regulation (EC) 338/97 on the assurance of the Spanish MA and *Loro Parque* that Morgan would be participating in *bona fide* scientific research that contributes to the preservation of her species.

Today, Morgan is prominently featured in *Loro Parque*'s commercial entertainment shows, performing tricks alongside *SeaWorld*'s captive-born killer whales.



Morgan, the wild-born (CITES Appendix II, Annex A) female killer whale, being used in a commercial show at *Loro Parque*, Spain, on 27 July 2012. Morgan is identifiable by the distinctive shape of her white eyepatch and is highlighted at the left of the 'slide out stage' in this image. She appears in the show with Kohana (♀) (middle) and Tekoa (♂) (right).

The Spanish MA failed to advise the Dutch MA or Dutch courts during the legal proceedings surrounding Morgan, that the *SeaWorld* killer whales held at *Loro Parque* were exported from the United States in 2006 specifically for public display purposes -- not scientific research or species enhancement purposes:³⁶

| | | | |
|--|---|--|--|
| MARINE MAMMAL DATA SHEET | | Date <u>02/23/2006</u> SHT# <u>SHT0010272</u> | OMB No. 0648-0084, exp 9/30/06 HN: PHF000116 SN: 039/001 For NMFS Use Only |
| I. Holder-Specific: | | | |
| Holder: <u>Sea World, Inc.</u> Person or other Entity With Custody of the Marine Mammal | Facility: <u>Loro Parque S A</u> Name of Facility (if different from Holder) | | |
| Date assumed custody: <u>1 1 - 0 8 - 0 0</u> | Date arrived at Facility: <u>0 2 - 1 3 - 0 6</u> | | |
| City/State/Zip (include Country for foreign facilities): <u>Tenerife, Spain, SP</u> Location of Facility | | | |
| Animal Identification No. <u>SWF-00-0001</u> (assigned by holder) | Animal Name: _____ (assigned by holder) | | |
| Captive Purpose(s): <input checked="" type="checkbox"/> Public display <input type="checkbox"/> Scientific research <input type="checkbox"/> Enhancement | | | |

Excerpt from US Marine Mammal Data Sheet (MMDS) issued by NMFS to *SeaWorld* for *Tekoa*, ♂ (NOA0005931; SWF-00-0001) one of the four original killer whales sent from *SeaWorld* facilities (United States) to *Loro Parque* (Spain) in 2006. He is documented as exported for public display purposes as listed on the US CITES export permit #05US107913/9. All four of the MMDS accompanying the killer whales to *Loro Parque* in 2006 listed the Captive Purpose as "Public Display."³⁷

Any scientific research or data collected since Morgan's arrival at *Loro Parque* is ancillary to the predominantly commercial use of Morgan and the other killer whales held in captivity there.

Morgan's legal protections have been transgressed through her commercial exploitation at *Loro Parque* and it is the responsibility of the international community to ensure that those protections are enforced. It should not matter whether it involves a killer whale or the ivory from an elephant; when appropriate, all violations of CITES, the WTR and the MMPA should be dealt with as wildlife crime.³⁸

The International Consortium on Combating Wildlife Crime (ICCWC)³⁹ is the collaborative effort of five inter-governmental organizations (CITES Secretariat, INTERPOL, the United Nations Office on Drugs and Crime, the World Bank and the

World Customs Organization) working under the auspices of the CITES Secretariat to bring coordinated support to the national wildlife law enforcement agencies and to the sub-regional and regional networks that, on a daily basis, act in defense of natural resources.

'Crime', as far as ICCWC is concerned, refers to acts committed contrary to national laws and regulations intended to protect natural resources and administer their management and use.⁴⁰

"Wildlife crime may start with the illicit exploitation of natural resources, such as the poaching of an elephant [or cetacean], uprooting of a rare orchid, unauthorized logging of trees, or unlicensed netting of sturgeons. It may also include subsequent acts, such as the processing of fauna and flora into products, their transportation, offer for sale, sale, possession, etc. Wildlife crime also includes the concealment and laundering of the financial benefits made out of these crimes. Some of these crimes will take place solely in the country of origin, whilst others will also occur in the country of destination, where live fauna or flora specimens, or their parts and derivatives, are finally consumed." [Emphasis added.] (ICCWC definition of Wildlife Crime.)

At the international level, wildlife crime also involves violations of CITES, which regulates exports, imports and re-exports of wildlife.

The European Commission's Environment CITES Enforcement Group provides the following guidance regarding eligibility and application requirements for an exemption certificate under Article 8(3) (f) and (g) of Council Regulation (EC) No. 338/97 and Article 60 of Commission Regulation (EC) No 865/2006):⁴¹

"Zoos, botanical gardens or similar establishments can use Annex A-listed specimens for commercial purposes (which includes the display of a specimen to the public) only if they are involved in captive breeding, artificial propagation, or research with conservation benefits for the species concerned, or if they provide an educational programme aimed at the conservation of the species. In order to qualify for this exemption, these institutions must register as scientific institutions and can then obtain a certificate from the responsible Management Authority. Any sale of specimens can only take place to another institution holding a similar certificate." [Emphasis added.] (Excerpt from discussion of general exemptions and derogations for internal trade at Section 2.7.4 of on-line European Commission guidance internal trade in the EU.)

Neither *Dolphinarium Harderwijk* nor *Loro Parque* are registered as scientific institutions with either CITES or the European Union. Likewise *SeaWorld* is not registered as a scientific institution with either CITES or the European Union and has never been granted an exemption to “own” or possess Morgan, a protected Annex A specimen under EU law.

The Dutch and Spanish MAs have not fulfilled their obligation to protect Morgan from commercial exploitation and sale despite evidence of both. As a consequence of the apparent confusion and uncertainty surrounding this matter, the FMF is submitting this white paper to the CITES Secretariat, the European Commission, the MMC and NMFS, for the purpose of clarification. As such, the FMF is also requesting a full, formal investigation into the events, actions and transactions leading to the capture, transfer, commercial display, unauthorized breeding and trade or sale of the wild-born Morgan.

In Morgan’s case, it is important to examine the decisions that led to her placement at *Loro Parque*, but it is equally, if not more important, to scrupulously examine the transactions between *Dolphinarium Harderwijk*, *Loro Parque* and *SeaWorld* to determine how they improperly concealed *SeaWorld*’s role in the matter. If they knowingly misrepresented material facts about the primary purpose for holding *SeaWorld*’s killer whales at *Loro Parque* and engaged in the transfer of Morgan (both physically and on paper) for commercial profit, in contravention of CITES and the WTR, these actions would fall into the category of Wildlife Crime as outlined by the ICCWC.

As set forth in the WTR, Article 8(1) Council Regulation (EC) 338/97:⁴²

“*1. The purchase, offer to purchase, acquisition for commercial purposes, display to the public for commercial purposes, use for commercial gain and sale, keeping for sale, offering for sale or transporting for sale of specimens of the species listed in Annex A shall be prohibited.*” [Emphasis added.]

Commission Recommendation 2007/425/EC was adopted in June 2007 and identified a set of actions for the enforcement of Council Regulation (EC) 338/97. Acknowledging that application of Council Regulation (EC) No 338/97 requires international co-operation, which is also fundamental to fulfilling the objectives of CITES, the Recommendation set out a series of measures that Member States should implement in order to enhance their efforts to combat illegal trade. Specifically, Recommendation II(c) states that the actions should include:⁴³

“c) ensuring that penalties for infringements of Regulation (EC) No 338/97 act as a deterrent against wildlife trade crime, in accordance with settled case law of the Court of Justice, are consistent as to their application and, in particular, that they take into account *inter alia* the market value of the specimens, . . .”
[Emphasis added.] (Recommendation II(c) of Commission Recommendation No 2007/425/EC.)

The most immediate and pressing matter requiring attention, concerns attempts to breed Morgan for commercial profit. On this point, a finding by NMFS that *Loro Parque* and *SeaWorld* are exceeding the bounds of Morgan’s EG-Certificate is warranted, as these attempts to breed Morgan necessarily involve *SeaWorld*’s male killer whales held at *Loro Parque* which, despite their location, remain subject to US jurisdiction under the MMPA.

Although *SeaWorld*’s captive-born killer whales can be legally used for commercial display at *Loro Parque* and are not restricted with respect to breeding activities or husbandry-related mating among themselves, the same is not true with respect to Morgan. Under EU law and the WTR, captive-born killer whales like the four original killer whales *SeaWorld* sent to *Loro Parque* in 2006 are classified as Annex B specimens. But as noted earlier, Morgan is a wild-born killer whale and therefore is classified as an Annex A specimen and thus afforded more stringent protection under EU law, such as prohibition of commercial exploitation.

Specifically, the exemption (in July 2011) under which Morgan's EG-Certificate was issued (Article 8(3)(g) of Council Regulation (EC) 338/97)⁴⁴ must be measured against the actions presently occurring at *Loro Parque* (November 2015), which subject Morgan to acts of mating/breeding that are not authorized under her EG-Certificate.

The US MMPA requires *Loro Parque* to comply with all applicable laws and regulations, whether national, local, or comparable to those in the US.⁴⁵ Because Spain is a member of the European Union, *Loro Parque* must not only comply with Spanish law, it is also obligated to comply with CITES, the WTR and the provisions of Morgan's EG-Certificate as long as she is held at *Loro Parque*.

Furthermore, in the letter of comity from the Island Administration of Tenerife Territory's Environment Management Technical Service, which was written for MMPA compliance to transfer four killer whales from *SeaWorld* facilities in the US to *Loro Parque* in 2006, the Spanish authorities agreed they would grant comity (legal reciprocity) to NMFS if it is found that *Loro Parque* is not complying with Spanish, CITES or EU regulations:⁴⁶

“. . . since they [Loro Parque] observe specifically the recommendations and adaptations required by the Spanish regulations which from time to time may be necessary to guarantee their [the killer whale’s] well-being and health. Should they not be complied with and should therefore the parties decide to return the animals to their country of origin, this authority will within its competence grant comity and not oppose to the animals return.” [Emphasis added.] (Excerpt from Certified Translation, Letter of Comity signed by Wladimiro Rodriguez Brito, Head of the Island Department for Environment and Landscape, 7 June 2005.)

It cannot be emphasized enough that breeding the wild-born Annex A killer whale Morgan with *SeaWorld*'s captive-born Annex B killer whales is not authorized by Morgan's EG-Certificate. Therefore breeding Morgan or exposing her to mating activity would also constitute a violation of the MMPA and the letter of comity from the Spanish authorities to the NMFS for export of the four original killer whales from *SeaWorld*. Such a breach would provide legal cause for the NMFS to seize *SeaWorld*'s killer whales and repatriate them to the United States.

Additionally, the commercial use of Morgan at *Loro Parque* also has implications under the MMPA. Article 11(2)(a) of Council Regulation (EC) 338/97 provides that:⁴⁷

“. . . any such permit or certificate, as well as any permit or certificate issued on the basis of it, shall be deemed void if a competent authority or the Commission, in consultation with the competent authority which issued the permit or certificate, establishes that it was issued on the false premise that the conditions for its issuance were met.” [Emphasis added.] (Article 11(2)(a) of Council Regulation (EC) 338/97.)

Therefore, a finding by any competent MA (Dutch, Spanish or US) that Morgan’s EG-Certificate was issued as a result of misrepresentation in the application could not only void Morgan’s EG-Certificate, it could also constitute a breach of the terms of the MMPA and letter of comity from the Spanish MA to the NMFS, again providing legal cause to seize and repatriate *SeaWorld’s* killer whales to the US.

The FMF recognizes that the issues raised in this white paper are complex. They require both the will and resolve of the international community to sort through. The transactions which have led to *SeaWorld’s* claim of ownership over Morgan appear to be beyond the bounds of Morgan’s EG-Certificate and the stringent protections afforded Annex A specimens under the WTR. Therefore a full investigation into this matter is necessary to determine if wildlife crimes have been committed, and if so, by whom.

IV. THE PROBLEM

Presently (November 2015) there are five captive-born, Appendix II⁴⁸, Annex B⁴⁹ killer whales held at *Loro Parque*.⁵⁰ The Annex B designation applies to captive-born specimens within Appendix II while Annex A designation applies to wild-born specimens which are subject to greater protections. Four of these killer whales were exported to *Loro Parque* from *SeaWorld* facilities in the United States in February 2006. They are inventoried by US National Oceanic and Atmospheric Administration (NOAA) identification numbers as follows: Keto, ♂ (NOA0005473); Tekoa, ♂ (NOA0005931); Kohana, ♀ (NOA0006021); and Skyla, ♀ (NOA0006172), as listed on the US CITES export permit #05US107913/9. Additionally they have *SeaWorld* designated identification numbers, as noted in APPENDIX 2 of this white paper which lists the killer whales that have been held at *Dolfinarium Harderwijk* and *Loro Parque*. The fifth killer whale is an inbred calf, Adán, ♂ (NOA0006690), born at *Loro Parque*, his parents, two of the original four killer whales, are related (uncle/niece and also cousins). These killer whales are subject to public display provisions of the MMPA as authorized by the NMFS⁵¹ and the CITES export permits issued by the FWS.⁵²

A sixth killer whale, Morgan, ♀ (microchip No. 528210002335926), a rescued wild-born Appendix II⁵³, Annex A⁵⁴ specimen, is also held at *Loro Parque*. Morgan, however, is subject to EU law and conventions by which both Dutch and Spanish authorities must abide. As noted in the Official Journal of the European Union, Commission Regulation (EU) No 1320/2014,⁵⁵ cetaceans are classified as Annex A when taken from the wild as Morgan was. She is further distinguished from *SeaWorld*'s captive-born, Annex B killer whales because she was exported from the Netherlands to *Loro Parque* five years subsequently and pursuant to a separate EG-Certificate (No. 11 NL 114808/20)⁵⁶ issued by the Kingdom of the Netherlands in 2011.

However, there are inconsistencies within the documentation for the export and import of the original four killer whales. The US CITES export permit for the *SeaWorld* killer whales sent to *Loro Parque* in 2006 listed the CITES purpose code of “Z” for Zoo, yet the MMPA purpose was identified as “Public Display”.⁵⁷ The CITES Trade Database for the transfer of killer whales from *SeaWorld* facilities in the US to *Loro Parque* lists the US export purpose code as “Z” for Zoo but the Spanish import purpose code is listed as “E” for Education; the source codes are also inconsistent.⁵⁸

| Year | App | Family | Taxon | Importer | Exporter | Origin | Importer reported quantity | Exporter reported quantity | Term | Unit | Purpose | Source |
|------|-----|--------------|-------|----------|----------|--------|----------------------------|----------------------------|------|------|---------|--------|
| 2006 | II | Cetacea spp. | | ES | US | | | | Live | | Z | C |

| Year | App | Family | Taxon | Importer | Exporter | Origin | Importer reported quantity | Exporter reported quantity | Term | Unit | Purpose | Source |
|------|-----|-------------|--------------|----------|----------|--------|----------------------------|----------------------------|------|------|---------|--------|
| 2006 | II | Delphinidae | Orcinus orca | ES | US | | 4 | | Live | | E | F |

The CITES Trade Database was developed and is maintained by UNEP-WCMC on behalf of the CITES Secretariat.
[CITES](#) | [UNEP-WCMC](#) | [Species+](#) | [Contact Us](#)

Excerpts from CITES Trade Database (2006) showing the transaction for four (4) killer whales (*Orcinus orca*) as reported by both United States and Spanish CITES officials. Yet, comparison of the last two columns shows the inconsistent use of both the export Purpose code (“Z” for Zoo) and import Purpose code (“E” for Education). Additionally, the Source codes (“C” for bred in captivity and “F” for born in captivity) are inconsistent.⁵⁹

The lack of consistency in the use of CITES purpose-of-transaction codes is a long-standing and still unresolved issue; one which the US recognized at CoP14 in 2007. It therefore proposed changes, because inconsistent use of the purpose-of-transaction codes leads to confusion over the purposes of shipments and inconsistent reporting of trade data.⁶⁰ The FMF feels it is necessary for the purpose-of-transaction codes to be identical on both sides of the same export/import transaction.

The confusion caused by these and other inconsistencies resulted in the Spanish MA's failure to independently verify the facts regarding the killer whales at *Loro Parque* during the course of the 2011-2014 Dutch legal proceedings regarding Morgan's transfer.⁶¹ Instead, the Spanish MA and SA simply repackaged the Tenerife Island Administrator's report, which was also incorporated into the letter of comity for the import of the *SeaWorld* killer whales in 2006. On that basis, the Spanish MA and SA made assurances to the Dutch MA that *Loro Parque* was a suitable location to hold Morgan:⁶²

*"As stated above, this Scientific Authority already had all the details and characteristic of the installations in Tenerife and had authorized the importation of four specimens of the same species in 2003. In May 2011 there were 5 *Orcinus orca* specimens at Loro Parque, two males and two females that were imported in 2003 [2006] and a male calf born in December 2010. Because of this, on 3 June 2011 we gave a positive report on the installations at Loro Parque in Tenerife to house a orca specimen originating from Holland."* [Emphasis added.] (Excerpt from Certified Translation, Spanish Ministry report on the installations at *Loro Parque*, Tenerife, for the keeping of an individual *Orcinus orca* from Holland, 16 May 2012.)

As a direct consequence of assurances made by the Spanish CITES MA and SA, the Dutch CITES MA erroneously proceeded on the basis that *Loro Parque* was a suitable facility for Morgan because it had been assured that *Loro Parque* was engaged in *bona fide* scientific research on killer whales between 2006 and 2011 and that Morgan would join *SeaWorld*'s captive-born, Annex B killer whales for scientific research predominantly focused on the preservation of the species.

Scientific research for the preservation of killer whales was not then and is not now the reason Morgan and the other killer whales are held in captivity at *Loro Parque*. When considered in this context, the Spanish MA's representation that "scientific research" was being conducted at *Loro Parque* is dubious at best.

As such, the Spanish CITES MA misinformed and/or misrepresented (it would seem either deliberately or recklessly) to the Dutch MA the true nature and purpose of the export of the four original killer whales from *SeaWorld* to *Loro Parque* in 2006. It was not for scientific purposes - it was for public display at a commercial facility. The most probable explanation for this conduct is that it was an effort to avoid strict scrutiny under the WTR that prohibits commercial exploitation of Annex A specimens which includes Morgan.

It is critical to note that the provisions in the WTR go well beyond CITES.⁶³ Also, in order to be consistent with other EU regulations on the protection of native species, such as the Habitats Directive,⁶⁴ certain indigenous species such as killer whales that are listed in Appendices II and III of CITES are included in Annex A and some that are not listed in CITES at all are covered by the WTR.

When Morgan was transferred from the *Dolfinarium Harderwijk* to *Loro Parque*, she was too young to breed. Since at least November 2013, however, Morgan has been ovulating⁶⁵ and holding her within the confines of the *Loro Parque* tanks with captive-born male killer whales that are subject to US CITES permits and the MMPA constitutes a *de facto* attempt to breed her; an act that is not authorized under the terms of Morgan's EG-Certificate.⁶⁶

Therefore, an irreconcilable conflict exists between the purpose codes for the US CITES permits issued in 2006 to transfer the original *SeaWorld* killer whales to *Loro Parque* for commercial display under the MMPA and the EG-Certificate used to transfer Morgan to *Loro Parque* in 2011 for research with no authorization for breeding.

Morgan's 2011 EG-Certificate was issued by the Dutch MA pursuant to a specific exemption to the WTR (Article 8(3)(g) of Council Regulation (EC) No 338/97), which only allows Morgan to be held at *Loro Parque* for purposes of research aimed at the preservation or conservation of her species. An exemption for breeding under Article 8(3)(f) of Council Regulation (EC) 338/97 was not applied for by *Dolphinarium Harderwijk* or granted by the Dutch MA:⁶⁷

"The orca is included in Appendix II of the CITES Convention and Appendix A of Council Regulation (EC) No. 338/97 ("the Regulation"). Furthermore this species is defined in Article a (1) (a) of the Flora and Fauna Act ("the FF Act") as a protected indigenous species. Finally the species is included in Appendix IV of Council Directive 92/43/EEC ("the Habitats Directive"). . . You want to transfer the orca to Loro Parque in the interests of scientific research, In your opinion Loro Parque is a good location, because the park already keeps a group of orcas and carries out scientific research on this species. You refer to Article 8(3)(g) of the Regulation . . . To this end you demonstrate that this location participates in scientific research. . . The Spanish CITES-MA subsequently consulted its scientific authority and has . . . confirmed that the park participates in scientific research that contributes to the conservation of this species. I am therefore of the opinion that Loro Parque will keep the orca for research as described in Article 8(3)(g) of the Regulation. . . I will therefore issue an EC Certificate for the transfer of the orca from the dolphinarium in Harderwijk to Loro Parque, Tenerife, on condition that the animal is kept for research." [Emphasis added.] (Excerpt from Certified Translation, Morgan's EG-Certificate Cover Letter by W.J.B.C Lauwerijssen on behalf of Dutch State Secretary of Economic Affairs, Agriculture and Innovation, 27 July 2011).

The Dutch MA's cover letter as the governing document, to which Morgan's EG-Certificate was attached, explicitly states that Morgan's transfer to *Loro Parque* was based on *Dolphinarium Harderwijk*'s application for an exemption under Article 8(3)(g) of Council Regulation (EC) 338/97. Furthermore, the dispensation granted to *Dolphinarium Harderwijk* that allowed it to take Morgan, an Annex A specimen, from the wild in the first place forbids her use for predominantly commercial purposes, which is in direct conflict with the predominantly commercial purposes for which *SeaWorld*'s captive-born, Annex B killer whales are held for public display at *Loro Parque*.⁶⁸

Unfortunately, the Spanish MA appears to be unwilling to honor and enforce the specific purposes and conditions imposed by US and Dutch law that is applicable to, and governing over, the two different sets of killer whales presently held at *Loro Parque*. Yet it is clear that the Spanish MA must intervene in this matter to resolve the conflict and enforce the restrictions applicable to Morgan's stay at *Loro Parque*.

The potential for a pregnancy to occur between different ecotypes and captive-born hybrids of killer whales and the consequences of a hybrid killer whale calf being born to Morgan in captivity, with all "ownership" rights going to *SeaWorld*, are real and must be addressed.

If no action is taken -- if no further clarification is demanded or provided -- then any of Morgan's progeny will assuredly result in the unjust commercial enrichment of *SeaWorld* (conservatively \$15 million to \$20 million US for each calf).⁶⁹ This enrichment would be in a direct and material manner, which would be in violation of EU prohibitions on the breeding and trade of Appendix II, Annex A species for primarily commercial purposes.

Exigent circumstances therefore exist which require immediate action to impose restrictions that call for keeping the *SeaWorld/Loro Parque* male captive-born killer whales away from the wild-born female Morgan at all times, at least until the conflicting CITES permit and EG-Certificate issues can be resolved. Furthermore, as part of the situation to be addressed, the establishment of legal title to and ownership of, the rescued wild-born Morgan (and any of her progeny) -- a matter ignored by the Dutch MA -- needs to be settled and made a matter of public record.

V. ACTION REQUESTED

Looking to next year (2016) the authors, on behalf of the FMF, are requesting that the international community go forth to CoP17 and formally address the broad policy issues raised in this white paper. Right now, however, we are requesting that the MMC facilitate a discussion with the NMFS and FWS and direct them to exert their full authority under the Spanish letter of comity and to work with the Spanish MA to protect Morgan's legal rights. We urge these US agencies to make all necessary recommendations, and take all necessary actions, to ensure that the presence of the wild-born, Annex A female Morgan is not exploited by *SeaWorld* and *Loro Parque* to establish an offshore captive breeding (whale laundering) program that would circumvent the sovereign interests of the United States and the integrity of CITES and the MMPA.

A. Immediate Separation of Morgan and Male Killer Whales

If the wild-born, female Morgan becomes pregnant while held at *Loro Parque*, then there will be no way to undo such a blatant and egregious violation of Morgan's EG-Certificate. Furthermore, the international legal ramifications surrounding the commercial exploitation of a new wild-born killer whale bloodline and any captive-born progeny from Morgan will have grave and long-term consequences.

In conjunction with the submission of this white paper, the FMF is petitioning the NMFS and the FWS for immediate review of the actions of *Loro Parque* with respect to Morgan. As such, the FMF is requesting that the NMFS and FWS cooperate with the Spanish MA to take all necessary actions to prohibit the simultaneous holding of Morgan in any tank (including during shows) with *SeaWorld*'s captive-born male killer whales. Any such cohabitation could result in prohibited mating and commercial breeding activity, in contravention of the authorized parameters of Morgan's EG-Certificate. It may require extreme action such as the confiscation and

repatriation of *SeaWorld*'s killer whales back to the United States, if *Loro Parque* will not cooperate with the required separation.

Immediate intervention and guidance from the CITES Secretariat, European Commission, MMC and NMFS is appropriate in this situation because of the nature of the conflict - three different CITES MAs interpreting the CITES framework, US, Dutch, Spanish and EU law, and the permits issued pursuant to them, in an otherwise irreconcilable manner.

B. Purpose-of-Transaction Codes to be Identical

In Decision 14.54, adopted at CoP14 at The Hague in 2007,⁷⁰ 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 US as Chair.⁷¹ The working group was re-established at the Standing Committee's 64th meeting (Bangkok, 2013), with Canada as Chair.⁷² The working group determined that, to achieve the aim of consistent use of purpose-of-transaction codes, clear definitions and uniform application of purpose codes was required. This is a long-standing and still unresolved issue; one which the FWS 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.⁷³ We have shown within this white paper how it also leads to the laundering of killer whales.

The CITES working group, of which the US is still a member, will not present its suggestions regarding the purpose-of-transaction codes until CoP17, to be held in South Africa in 2016. Therefore, the CITES Secretariat, the European Commission, the MMC, NMFS and FWS are all presented with a unique and timely opportunity to consider the real-world consequences of the working group's suggestions in light of the information provided in this white paper.

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-transaction codes enables whale laundering activities across international borders as is the case with Morgan. Therefore, we call for purpose-of-transaction codes to be identical on both sides of the same export/import transaction.

C. Disclosure of Legal Owner

Currently, the CITES forms do not require the identification of the “legal owner” of the animal which is to be, or that has been, transported. This should be corrected and included on all CITES forms. Currently, by identifying only the holder and facility, the CITES paperwork does not make clear who is ultimately responsible for the animal or product. In some cases this may be a sovereign nation, a private business or an individual. As in the situation with Morgan, it is currently not known through the CITES paperwork who “owns” Morgan. Consequently, the respective governments and their MAs 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, rather than taking responsibility themselves. Requiring that the true legal “owner” of a specimen be listed on all CITES permits in addition to the identity of the “holder” and “facility” will, among other things, ensure the necessary transparency to maintain both compliance and confidence in CITES.

D. Morgan’s Law – Scientific Research Versus Commercial Purposes

In order to combat illicit trade and misappropriation of rescued wild cetaceans and their progeny for primarily commercial purposes, the authors and the FMF wish to put forward the concept of “Morgan’s Law”.

Although this paper highlights the issues surrounding one individual whale, her case is unfortunately far from the only example of cetacean laundering. To date we have collected evidence that at least thirteen (13) *facilities* have exhibited and commercially displayed at least thirteen (13) *species of rescued cetaceans*.⁷⁴

Two of these species (gray whale, *Eschrichtius robustus*, and finless porpoise, *Neophocaena phocaenoides*) are Appendix I, which are the most endangered among CITES-listed animals, yet they were put on public display and used for primarily commercial purposes. The others, falling into Appendix II, have also been traded, bred, put on public display and used for primarily commercial purposes.

This is a discussion that has been started by the Parties, albeit with regards to Appendix I specimens; the issue at hand is also relevant to Appendix II specimens. Thirty (30) years later this conundrum continues as illustrated in Morgan's case. (See CITES Resolution Conf. 5.10 'Definition of "Primarily Commercial Purposes"' (1985)): ⁷⁵

"RECOGNIZING that, because the Convention does not define the terms 'primarily commercial purposes', 'commercial purposes' in paragraph 4 of Article VII, or 'non-commercial' in paragraph 6 of Article VII, the term 'primarily commercial purposes' (as well as the other terms mentioned above) may be interpreted by the Parties in different ways;

ACKNOWLEDGING that the Parties' differing legislation and legal traditions will make it difficult to reach agreement on a simple 'objective' interpretation of the term and that the facts concerning each import will determine whether a proposed use would be for primarily commercial purposes;

RECOGNIZING that lack of specific definitions for terms involving 'commercial' and the importance of the facts concerning each proposed transaction create a need for consensus by the Parties regarding general principles and examples to guide the Parties in assessing the commerciality of the intended use of those specimens of Appendix-I species to be imported;

AWARE that agreement on interpreting the term 'primarily commercial purposes' is important because of the fundamental principle in Article II, paragraph 1, of the Convention that trade in specimens of Appendix-I species must be subject to particularly strict regulation and only authorized in exceptional circumstances;

RECOMMENDS that . . . 3. The term 'commercial purposes' should be defined by the country of import as broadly as possible so that any transaction which is not wholly 'non-commercial' will be regarded as 'commercial'. In transposing this principle to the term 'primarily commercial purposes', it is agreed that all uses whose non-commercial aspects do not clearly predominate shall be considered to be primarily commercial in nature, with the result that the import of specimens of Appendix-I species should not be permitted. The burden of proof for showing that the intended use of specimens of Appendix-I species is clearly non-commercial shall rest with the person or entity seeking to import such specimens."

After such a long delay and given the current circumstances, the FMF is therefore 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.

There needs to be 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 cetaceans.

Given that there are likely even more cases of ‘rescued’ cetaceans being exploited, that we have not yet uncovered, the FMF proposes that the actions sought within this white paper become the basis for ‘Morgan’s Law’ – a set of internationally accepted treaties, laws, regulations, definitions and standards which protect future rescued cetaceans from becoming salvaged items used for commercial purposes.

VI. DISCUSSION OF FACTS, PERMITS AND AUTHORITIES

A. Laundering – Misappropriation, Accountability, Deniability

There is a long history of suspect transactions referred to as whale laundering⁷⁶ between *Dolfinarium Harderwijk* and *SeaWorld*, dating back approximately 50 years.⁷⁷ The tragic saga involving the 1987 breeding loan of a killer whale known as Gudrun was but just one of at least seven individuals laundered for *SeaWorld*. Gudrun's story was featured in the 1997 PBS (USA) Frontline documentary *A Whale of a Business*.⁷⁸ Those same illicit practices continue to persist today because the responsible CITES MAs knowingly ignore these types of institutional transactions.

1. The Misappropriation of a Wild-born Killer Whale:

The fundamental question of who “owns” the wild-born, rescued Morgan remains unanswered. This is perhaps the most pressing and critical legal issue that the Dutch Courts did not address during the years-long legal proceedings concerning the issuance of Morgan's EG-Certificate.⁷⁹

The commercial sale and ownership of the wild-born Morgan is also an issue which the Dutch MA purposely chose to ignore as illustrated in this exchange from a hearing conducted by the Dutch MA, between Mr. Wijngaarden (attorney for the Orka Coalitie and FMF), Mr. Nas (legal representative for *Dolfinarium Harderwijk*) and Ms. Verheul (Chair of hearing and representative of the Dutch Government):⁸⁰

“Mr Wijngaarden asked how much would be paid for Morgan if she were to be transferred to Loro Parque.

Mr Nas considered this question irrelevant.

Ms Verheul felt that this question did not contribute anything of substance.”

(Excerpt from Certified Translation, Minutes of 9 September 2011 hearing before the Dutch Ministry of Economic Affairs, Agriculture and Innovation, at p. 5.)

Two months later on 7 November 2011, at a hearing before the District Court of Amsterdam, *Dolfinarium Harderwijk* and *Loro Parque* were allowed to continue to avoid addressing the true commercial nature of the transaction or answer the critical issue of whether or not there has been a commercial sale of Morgan to *SeaWorld*.⁸¹

Ms. Verheul-Verkaik [Representative for the Dutch MA]:

"You put it to me that Article 8 of the CITES regulation concerns checks on commercial activities and that it isn't entirely transparent in this case what the agreements between the Dolfinarium [Harderwijk] and Loro Parque are. You ask me if the Defendant has looked into that. Article 2 gives the definition of trade, which has to be interpreted broadly. Article 8 talks about commerce/trade in the broad sense of the words. The Defendant inquired whether compensation would be paid for costs incurred by the Dolfinarium [Harderwijk] for the care. Loro Parque is a zoo and is not regarded as a commercial venture in the regulations. Defendant has noted that this is in accordance with the rules." [Emphasis added.] (Excerpt from Certified Translation, Process Verbal, 7 November 2011, District Court of Amsterdam hearing, Ms Verheul-Verkaik, representative of Dutch MA at pp. 5-6.)

***Dolfinarium Harderwijk's* legal representative:**

"You ask me if there is a contract between the Dolfinarium [Harderwijk] and Loro Parque. I don't know if a contract has been finalised. The parties are in discussion and agreements are being made. But nothing is definite yet. The Dolfinarium [Harderwijk] will receive compensation for costs incurred, but not for commercial purposes. These kinds of institutions help each other out. The Dolfinarium [Harderwijk] has an interest in the exchange of dolphins." [Emphasis added.] (Excerpt from Certified Translation, Process Verbal, 7 November 2011, District Court of Amsterdam hearing, Mr. Nas, legal representative for *Dolfinarium Harderwijk* at p. 6)

***Dolfinarium Harderwijk's* legal representative:**

"This is a normal exchange between zoos. The Dolfinarium [Harderwijk] has had to pay out at least hundreds of thousands of Euros for the rescue and care of Morgan. There is talk of compensation, but this does not even cover the costs. The Dolfinarium [Harderwijk] is happy to do this. To mention a commercial interest is hitting below the belt." [Emphasis added.] (Excerpt from Certified Translation, Process Verbal, 7 November 2011, District Court of Amsterdam hearing, Mr. Nas, legal representative for *Dolfinarium Harderwijk* at p. 8.)

From the moment Morgan was taken from the Wadden Sea, pursuant to a “rescue, rehabilitation and release” permit issued by the Dutch Government, the Dutch Government has abdicated its State responsibility to care for Morgan in public trust for the Kingdom of the Netherlands.

In response to an inquiry (“Why orca Morgan cannot be set free”) from the Committee of the Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas (ASCOBANS), considered at the 18th Advisory Committee meeting, Dutch State Secretary for Economic Affairs, Agriculture and Innovation, Henk Bleker wrote:⁸²

“The Dutch Ministry does not own animals collected from the wild. It only issues permits to keep wounded, traumatised, injured or orphaned animals with the intention of releasing these animals into the wild after revalidation. If no other possibility is available then a different solution based on solid scientific evidence is permitted.

In the case of Morgan the orca, all legal procedures have been followed, it’s now up to the Dolfinarium to find a good new home for the orca where she can be an ambassador for her species and help to raise awareness of the beauty of wildlife.” [Emphasis added.] (Excerpt from written response of Dutch State Secretary Henk Bleker, May 2011.)

More recently, on 23 January 2014, in response to a claim of ownership⁸³ and request to be appointed *guardian ad litem* for Morgan by the FMF, the spokesperson for the Dutch Ministry for Economic Affairs stated:⁸⁴

*“Orca Morgan has never been in the ownership of the State of the Netherlands. Orca Morgan was an animal living in the wild. Animals living in the wild belong to no one (*res nullius*). The ownership of matters that belong to no one is gained by appropriation of these matters. The State has never engaged in any action of appropriation nor attempted to do so. Therefore the State is not the owner of orca Morgan.”* [Emphasis added.] (Excerpt from Certified Translation of letter by A. Oppers on behalf of Dutch Ministry for Economic Affairs, 23 January 2014.)

In a follow-up letter, Sharon Dijksma, Dutch Minister for Agriculture wrote:⁸⁵

“. . . the Kingdom of the Netherlands is not the owner of orca Morgan, nor can I disclose to you who the owner is. In Dutch law the guiding principle is that the owner of a good is deemed to keep this private and as such is the owner. To determine who is the real owner of orca Morgan also depends on the intentions of and agreements made by the private parties involved in this case – Dolfinarium Harderwijk, Loro Parque and SeaWorld.” [Emphasis added.] (Excerpt from letter to Matthew Spiegl by Sharon Dijksma, Dutch Minister for Agriculture, 12 February 2014.)

The assertion of Minister Dijksma, that the commercial sale and ownership of a wild-born killer whale that is protected under CITES Appendix II, EU Annex A, is a private matter that does not concern the Kingdom of the Netherlands, is in direct contradiction of CITES and EU law and regulations.

With respect to the issue of the exemption held by *Dolphinarium Harderwijk* and the Minister Dijksma's assertion that the Dutch Government had no authority concerning the sale of Morgan, the *Reference Guide to the European Union Wildlife Trade Regulations* notes the following:⁸⁶

4.4.1 “Under this exemption, a Management Authority may grant a single certificate to the scientific institution it has approved for the purpose of this exemption, which allows it to carry out any of the activities referred to in Article 8(1) of Regulation (EC) No 338/97 that would normally require the issuance of a certificate on a case-by-case basis. Note, however, that if there is a prescribed location for live specimens of Annex A-listed species, the movement of such specimens still requires prior authorisation from the Management Authority (see Section 5.3)309. Another limitation is that sale or exchange without specific authorisation can only be to another scientific institution holding a certificate under this exemption.” [Emphasis added.] (Excerpt from European Commission and TRAFFIC (2015) *Reference Guide to the European Union Wildlife Trade Regulations*.)

The Dutch Government granted a dispensation to *Dolphinarium Harderwijk* which allowed *Dolphinarium Harderwijk* to capture and temporarily hold Morgan for purposes of rescue, rehabilitation and release.⁸⁷ But *Dolphinarium Harderwijk*, just like *Loro Parque*, is not listed in the CITES online Register of Scientific Institutions.⁸⁸

The Dutch Government never granted *Dolfinarium Harderwijk* an “ownership” interest in orca Morgan and by the Dutch Ministry of Agriculture’s own admission, the act of granting the dispensation to *Dolfinarium Harderwijk* did not constitute an act of appropriation over a wild animal, which would confer a legal right of ownership.⁸⁹

“The then State Secretary of Economic Affairs, Agriculture and Innovation has given a property dispensation to the Dolfinarium Harderwijk B.V. and an EG Certificate for the transport of Morgan to Loro Parque. The dispensation and the EG Certificate are based on the rules that have the aim of protection of threatened species and preservation of the population. The dispensation and the EG Certificate need to be interpreted in that sense. Both were granted with the view of the protection of orca Morgan as a threatened species and therefore don’t have the nature of an act of appropriation. Therefore the dispensation and the EG Certificate subsequently can’t be considered as an act through which ownership of orca Morgan has been acquired.” [Emphasis added.] (Excerpt from Certified Translation of letter by A. Oppers on behalf of Dutch Ministry for Economic Affairs, 23 January 2014).

In the context of this discussion it is vital to remember that *Dolfinarium Harderwijk*’s exemption under the Dutch FF Act regulations does not allow the use of Annex A species for predominantly commercial purposes. The exemption also states that rehabilitated animals that cannot be returned to the wild may only be kept for conducting scientific research that is relevant in connection with obligations set out in the WTR, Bern Convention, and ASCOBANS.⁹⁰

The CITES guidelines (Resolution Conf. 10.7 (Rev COP15)) state that the terms and conditions of transfers should be agreed between the confiscating authority and the receiving institution; and that the terms and conditions for such agreements should include a clear specification of ownership of the specimens concerned and, where breeding may occur, the offspring.⁹¹ Because the Dutch MA prepared a cover letter as the governing document to Morgan’s EG-Certificate and the EG-Certificate itself does not mention anything about ownership of offspring, the only logical presumption has to be that offspring (progeny) of Morgan were not considered because breeding is not authorized by the terms and conditions of her EG-Certificate.

These same CITES guidelines further state that depending on the circumstances, ownership may be vested with the confiscating authority, the country of origin, or the receiving facility.⁹² Morgan’s EG-Certificate does not list *SeaWorld* as her owner or her holder, which is problematic if *SeaWorld* had in fact acquired Morgan from *Dolfinarium Harderwijk* by means of a “sale”, where sale is broadly defined in the WTR, prior to Morgan leaving the Kingdom of the Netherlands.

SeaWorld was not a party to the Dutch court proceedings and at all times throughout the appeal process, the transfer of Morgan from the Netherlands to Spain was couched in terms of the Dutch Government asking *Loro Parque* to hold Morgan because the *Dolfinarium Harderwijk* lacked appropriate facilities to care for her. There has never been an adequate explanation why the Dutch Government was not listed as the owner or “holder” on Morgan’s EG-Certificate. Meanwhile, outside of the courtroom and beyond the purview of the Dutch CITES authorities, *SeaWorld*, *Dolfinarium Harderwijk*, and *Loro Parque* were negotiating the “sale” of Morgan.⁹³

Yet, the Dutch Government did not grant dispensations to *Loro Parque* or *SeaWorld* and no documentation has been produced to date which establishes *SeaWorld*’s claim to the wild-born Morgan as its property (i.e. one of six killer whales on loan to *Loro Parque*) as stated in *SeaWorld*’s Securities and Exchange Commission (SEC) filing.⁹⁴

A full and transparent legal explanation of how Morgan was used in a private, commercial property trade to *SeaWorld* remains elusive. It is clear that a definitive ruling on the issue of ownership of Morgan as a wild-born killer whale (who is therefore *res nullius* i.e., literally “nobody’s property”) is clearly necessary to prevent any subsequent attempts at trading her.

2. Accountability and Deniability:

Of all killer whales held globally in captivity today, over half are claimed as the property of *SeaWorld*; this includes the rescued, wild-born Morgan. Furthermore, and to put this in perspective, approximately one-fourth of all *SeaWorld*'s killer whales are kept in the tanks at *Loro Parque*. This makes *Loro Parque*'s actions relevant in the context of this discussion.

As outlined above, there is no reference in Morgan's Dutch-issued EG-Certificate that contemplates or confers ownership of this wild-born killer whale to *SeaWorld*, therefore, clearly there are questions to be raised over how she became *SeaWorld*'s property.⁹⁵ As such, there is currently no way to ensure that, from the very beginning, a whale laundering transaction between *Dolfinarium Harderwijk* and *SeaWorld* wasn't the true intention of this alleged rescue and rehabilitation, in order to secure a new breeding bloodline for *SeaWorld*'s captive breeding program.

Given that *SeaWorld*'s killer whales at *Loro Parque* are closely related and therefore are already producing inbred calves (two as of November 2015), the need for new genes is indisputable if *SeaWorld*'s present breeding program is to continue, and therefore this alone is a strong motive for *SeaWorld* to launder Morgan and her progeny, through its offshore breeding facility at *Loro Parque*.

During one of the Dutch Court hearings in 2011 regarding Morgan, the judge hearing the case criticized the agreement between *Dolfinarium Harderwijk* and *Loro Parque*, saying it is "not sufficiently transparent and is 'hanging over the case like a cloud'".⁹⁶ At the same time, however, the Dutch administrative courts would not address, and therefore did not resolve, fundamental questions concerning the issues of appropriation and ownership of Morgan.⁹⁷

The question of ownership and *SeaWorld's* involvement in the whole matter was also asked in the public Dutch Parliament Chambers in 2010 and 2011 by Esther Ouwehand, a member of the Dutch Parliament. Regardless, Dutch State Secretary Henk Bleker never provided an official answer as to whether *SeaWorld* “owned” Morgan.⁹⁸

Morgan has not been physically held in the US by *SeaWorld* and the facilities in which Morgan has been held -- the *Dolfinarium Harderwijk* in the Netherlands and *Loro Parque* in Tenerife, Spain -- are not owned by *SeaWorld*. Yet in a paper published (July 2015) in the *Journal of Mammalogy*, the authors, two of whom are employed by *SeaWorld*, not only identify Morgan by name as one of the killer whales owned by *SeaWorld*, they also identify *Loro Parque* as a *SeaWorld* facility. Most important, the authors misstate that Morgan was brought into captivity as a result of being stranded.⁹⁹ However, in fact Morgan was free-swimming at the time of, and during, the capture process.¹⁰⁰ The Dutch High Court (Raad van State) even stated that Morgan was not “stranded”.¹⁰¹

| | Adan | 10/12/10 | 2010 | NA | 10/12/2010 | NA | Captive Born | Kohana | PNW/N. Atlantic |
|--------|--------|----------|------|------|----------------------|-----------|---------------------------|---------|------------------|
| | Morgan | N/A | 2008 | 2010 | ??/2011 ⁴ | NA | Wild Born | Unknown | N. Atlantic |
| Vicky | | 8/3/12 | 2012 | NA | 8/3/2012 | 6/16/2013 | Captive Born | Kohana | PNW/N. Atlantic |
| Shouka | | 2/25/93 | 1993 | NA | 2/25/2012 | NA | Captive Born ³ | Sharkan | N. Atlantic |
| Sakari | | 1/7/10 | 2010 | NA | 1/7/2010 | NA | Captive Born | Takara | N. Atlantic |
| Makani | | 2/14/13 | 2013 | NA | 2/14/2013 | NA | Captive Born | Kasatka | N. & S. Atlantic |
| Kamea | | 12/6/13 | 2013 | NA | 12/6/2013 | NA | Captive Born | Takara | N. & S. Atlantic |
| Amaya | | 12/2/14 | 2014 | NA | 12/2/2014 | NA | Captive Born | Kalia | N. Atlantic |

¹For this research, SeaWorld Facilities include killer whales located at: SeaWorld San Diego (San Diego, CA), SeaWorld San Antonio (San Antonio, TX), SeaWorld Orlando (Orlando, FL) and Loro Parque (Tenerife, Spain).

²Year of birth for wild caught estimated from length at birth data with the exception of Frankie who was of adult size when collected.

³Animals captive born at other facilities and transferred to SEA. These animals were not included in analysis of captive born at Sea Animals, but were included in all SEA animals starting at their date of arrival to SEA.

⁴Animal was not collected but brought into captivity as a result of being stranded.

⁵This animal was not included in any longevity analysis, however, she is included in this table for completeness. She arrived at SEA from another facility where she had been living alone. She was moved with known chronic pneumonia and it was decided to bring her to SEA to allow her contact with conspecifics, even at the risk of exacerbating the known disease.

Excerpt from Robeck, et al., *Journal of Mammalogy* 10 July 2015 – (S1) at p. 19, fn. 1 and 4. In reference to facilities, Footnote 1, reads “For this research, SeaWorld Facilities include killer whales located at: SeaWorld San Diego (San Diego, CA), SeaWorld San Antonio (San Antonio, TX), SeaWorld Orlando (Orlando, FL) and Loro Parque (Tenerife, Spain)”. In reference to Morgan (second in the table above), Footnote 4 reads “Animal was not collected but brought into captivity as a result of being stranded.”

Despite repeated attempts by various parties, to date it has proven impossible to get a clear explanation as to how the wild-born Morgan became the property of *SeaWorld* - if indeed she has. On 5 December 2013, Dr. Javier Almunia of *Loro Parque* stated:¹⁰²

“. . . we are just taking care of her [Morgan] following a request of the Dutch Government.” (Excerpt from E-mail by Dr. Javier Almunia, *Loro Parque Fundación* 5 December 2013)

When asked who owns Morgan and her calves if she becomes pregnant, Dr. Javier Almunia responded:¹⁰³

“I do not have information about this. You can ask the Dutch Government. Loro Parque is just the holding facility.” (Excerpt from E-mail by Dr. Javier Almunia, *Loro Parque Fundación* 10 December 2013)

Furthermore, Wolfgang Kiessling, President of *Loro Parque Fundación* and owner of *Loro Parque*, perpetuates a “smoke and mirrors” cover-up concerning the ownership issue:¹⁰⁴

“Loro Parque never asked to incorporate Morgan into its group of orcas, but the Dutch government requested our help which we accepted, as we always do when a government asks for help to improve the welfare of a rescued or captured animal.” (Excerpt from Letter to the Editor, Fortnightly Tenerife News by Wolfgang Kiessling, President of *Loro Parque Fundación*, 22 May 2014)

This statement is both awkward and suspect because *Loro Parque* does not own any of the killer whales held there and Mr. Kiessling knows that. To suggest otherwise would be in direct conflict with representations that *SeaWorld* made to the SEC through its Form S-1 Registration Statements for the initial offering of stock and the correspondence between the SEC and *SeaWorld* clarifying the terms of the “loan” of killer whales to *Loro Parque*.¹⁰⁵

Still, as revealed in this white paper, there is a paper trail that begs for regulatory inspection and investigative scrutiny. For example, consider – and try to reconcile – the following facts.

On 19 July 2011, the Orlando Sentinel newspaper reported that “*SeaWorld Parks & Entertainment is attempting to acquire a young female killer whale rescued off the coast of the Netherlands last year.*” The article stated that:¹⁰⁶

“*SeaWorld is now seeking to have Morgan transferred to Loro Parque, a marine park in the Canary Islands that has five other SeaWorld-owned killer whales on display. Dolfinarium [Harderwijk] this month applied for a government transfer permit.*” (Excerpt from Orlando Sentinel, 19 July 2011)

The article in the Orlando Sentinel went on to note that *SeaWorld* refused to state whether or not it would pay money or exchange animals with *Dolfinarium Harderwijk* for Morgan:

“*SeaWorld would not say whether it will pay any compensation - in the form of money or other animals - to Dolfinarium [Harderwijk] in exchange for Morgan.*” [Emphasis added.] (Excerpt from Orlando Sentinel, 19 July 2011)

As noted earlier, on 7 November 2011, at a Dutch court hearing about Morgan, representatives of *Dolfinarium Harderwijk* which included Martin Foppen (director) and Niels van Elk (veterinarian), told the court that *Dolfinarium Harderwijk* and *Loro Parque* had exchanged money to help defray the cost of caring for Morgan.¹⁰⁷ The inference was that *Loro Parque* was doing the Dutch Government a favor by accepting the transfer of Morgan.

As reported by Dutchnews.nl on 7 November 2011:¹⁰⁸

“. . . the Dolfinarium [Harderwijk] went to court to speed up the animal’s transfer to the amusement park [Loro Parque]. During the hearing, it emerged the Dolfinarium [Harderwijk] is swapping Morgan for a number of dolphins. The park has also agreed to pay €100,000 to the Spanish centre because the cost of taking care of her will not pay for itself, news agency ANP said. The judge hearing the case criticised the agreement between the Dolfinarium in Harderwijk and Loro Parque, saying it is not sufficiently transparent and is ‘hanging over the case like a cloud.’” [Emphasis added.] (Excerpt from DutchNews.nl and ANP news agency story from 11 November 2011.)

Furthermore, on 29 November 2011, the day Morgan arrived at *Loro Parque*, the Orlando Sentinel headline read:¹⁰⁹

“*Rescued Dutch killer whale now part of SeaWorld's corporate collection.*”

So why would *Dolfinarium Harderwijk* and *Loro Parque* be telling a Dutch court that money was exchanged between them to cover the costs of caring for Morgan, when in fact (according to news reports) one of them had already transferred ownership of the *res nullius* killer whale, Morgan, to *SeaWorld*?

Based on *SeaWorld's* correspondence and filings with the SEC, all of the killer whales (including Morgan) presently held at *Loro Parque* are “owned” by *SeaWorld* and are only “on loan” to *Loro Parque*, subject exclusively to the provisions of the 2004 *Loro Parque Killer Whale Facility Service and Loan Agreement*.¹¹⁰ This assertion is echoed in an article appearing in the Orlando Sentinel on 18 June 2013, following the death of the 10-month-old inbred, captive-born killer whale calf Victoria (Vicky) at Loro Parque:¹¹¹

“*Vicky was one of seven killer whales held at Loro Parque, all of which are property of SeaWorld. The Orlando-based marine-park chain has stored some of its killer whales at the Spanish facility since 2006 through breeding-loan agreements, as SeaWorld needed to find more room for its growing orca collection. . . Loro Parque's killer whales include "Morgan," a young female who was rescued off the Dutch coast in 2010.*” [Emphasis added.] (Excerpt from Orlando Sentinel, 18 June 2013.)

SeaWorld makes its assertion about ownership of Morgan to the SEC, without any explanation of how a loan agreement contemplating the transfer of four killer whales from *SeaWorld* facilities in the US to *Loro Parque* in Spain, which occurred in 2006, could have foretold the acquisition of a wild-born rescued killer whale from the territorial waters of the Kingdom of the Netherlands in 2010 and which was subsequently sent to *Loro Parque* in 2011.¹¹²

SeaWorld also skirted around the issue of ownership and its involvement with *Dolfinarium Harderwijk* and *Loro Parque* when it was specifically asked by the SEC about Morgan's legal case in the Netherlands:¹¹³

SEC Question – “We note your disclosure that claims or lawsuits are sometimes filed against you to impede your ability to retain, exhibit, acquire or breed animals, and the negative publicity associated with such suits could adversely affect your reputation and results of operations. We are aware of several news reports discussing legal challenges concerning the validity of the transfer of a rescued [killer] whale. Please tell us whether the outcome of this challenge could have a material impact on your business.” [Emphasis added.] (SEC correspondence to *SeaWorld*, 27 February 2013, at p. 2, comment 7.)

SeaWorld Answer – “The Registrant respectfully advises the Staff that the Registrant is not a party to litigation relating to the above-referenced matter. The Registrant does not presently expect the outcome of such matter to have a material impact on the Registrant’s business. The Registrant further advises the Staff that the Registrant does not rely on rescued animals for its animal collection in any material respect.” [Emphasis added.] (*SeaWorld* correspondence to SEC, 25 March 2013, at pp 3-4, comment 7.)

Therefore, *SeaWorld* told the SEC that acquiring the wild-born, female Morgan would have no material impact on its business and yet it clearly does. In an article appearing in the Orlando Sentinel on 10 August 2011, the headline read *Dutch court blocks transfer of killer whale with SeaWorld ties - Orca named Morgan was to become part of SeaWorld Parks' corporate collection:*¹¹⁴

“A court in the Netherlands has blocked the transfer of a rescued killer whale to a Spanish marine park, where the animal would have become part of Orlando-based SeaWorld Parks & Entertainment’s corporate collection of whales. . . A representative for Dolfinarium [Harderwijk] could not be reached for comment. But a spokesman for SeaWorld, which has been deeply involved in efforts to rehabilitate (sic) and transfer Morgan, said the company was disappointed with the ruling. . . ‘We’re disappointed, but hopeful that Dutch authorities will reach the decision soon that the best and most humane outcome for Morgan is to join other members of her species in a professionally operated zoological facility’ SeaWorld spokesman Fred Jacobs said.” [Emphasis added.] (Excerpt from Orlando Sentinel, 10 August 2011.)

Morgan represents a new bloodline that *SeaWorld* is attempting to exploit through use of its offshore captive breeding facility at *Loro Parque*. The commercial exploitation of a wild-born Annex A killer whale such as Morgan most certainly has a material impact on the marine theme park industry. It relies on killer whales as marquee performers and requires new bloodlines to maintain the stock at existing facilities and provide new, captive-born killer whale stock for the expansion of marine theme parks globally.

The SEC considers a company's registration statement the bedrock on which its stock is offered to the general public; therefore, it is essential to provide accurate and complete information, to which investors are entitled when deciding whether it is appropriate to invest in the company.¹¹⁵ In its correspondence with the SEC, *SeaWorld* misrepresented the impact of the Dutch court ruling that sent Morgan to *Loro Parque* and downplayed both her immediate and long term monetary value to *SeaWorld*'s killer whale entertainment business; Morgan herself is valued at \$15 million to \$20 million US, and each calf she produces will be equally valuable.¹¹⁶

The average female orca held in captivity by *SeaWorld* is expected to give birth to 2.8 calves during her lifetime.¹¹⁷ As such, a conservative projected asset valuation of Morgan to *SeaWorld* and its stockholders is \$60 million to \$80 million US; which does not take into account the value of an entirely new bloodline for *SeaWorld*'s captive breeding program, which has been recognized as inbred.

SEC Rule 10B-5¹¹⁸ states that it shall be unlawful for any person, directly or indirectly:

“. . . (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.” (Title 17 Code of Federal Regulations (CFR) Part 240.10B-5.)

The absence of any written documentation accounting for *SeaWorld*'s acquisition of ownership of the wild-born (*res nullius*) Annex A killer whale Morgan could impact an investor's decision regarding acquisition of *SeaWorld* stock. As such, it is all the more reason for *Dolfinarium Harderwijk*, *Loro Parque* and *SeaWorld* to be open and transparent about the transfer of ownership of Morgan between them. This also gives rise, again, to the need for a formal investigation into this matter by CITES, the European Commission, the Dutch and Spanish MAs, the NMFS and indeed, even the SEC.

Also, in direct contradiction of the ownership assertions made to the SEC, and in a duplicitous manner, neither *SeaWorld* nor *Loro Parque* have reported or accounted for Morgan's presence at *Loro Parque* in the legally required US Marine Mammal Inventory Reports (MMIR's), which consistently reflect one fewer killer whale at *Loro Parque* than *SeaWorld* reported to the SEC:

8 April 2013 - *SeaWorld* filed an amended form S-1 registration statement with the SEC.¹¹⁹ The statement specifically noted that **seven** (7) killer whales were on loan to *Loro Parque*. However, a NMFS printout of the MMIR dated **1 May 2013**, shows that *SeaWorld* and *Loro Parque* were only reporting **six** (6) killer whales; the four (4) original killer whales sent to *Loro Parque* pursuant to the MMPA in 2006 and their two (2) captive-born (inbred) offspring. Even though Morgan was present at *Loro Parque* at the time and included in the killer whale count supplied to the SEC, *SeaWorld* did not report her "loan" to *Loro Parque* as part of the MMIR supplied to the NMFS as required by the MMPA.

20 November 2013 - *SeaWorld* filed another form S-1 registration statement with the SEC.¹²⁰ The statement now specifically noted that **six** (6) killer whales were on loan to *Loro Parque*. Once again, however, the corresponding NMFS printout of the MMIR dated **16 December 2013**, shows that *SeaWorld* and *Loro Parque* were only reporting **five** (5) living killer whales; the four (4) original killer whales sent to *Loro Parque* pursuant to the MMPA in 2006 and the one (1) surviving captive-born offspring. A sixth killer whale was reported on the MMIR as deceased; this was the captive-born offspring previously reported as living on the 1 May 2013 MMIR. Again, even though Morgan was present at *Loro Parque* at the time and included in the amended killer whale count supplied to the SEC, *SeaWorld* did not report her "loan" to *Loro Parque* as part of the MMIR supplied to the NMFS as required by the MMPA.

The MMIR's referenced above were obtained by the FMF through FOIA requests to the NMFS. *SeaWorld*, coincidentally, also utilizes FOIA requests to the NMFS to acquire the MMIR of killer whales held in marine parks around the world. As recently as **5 May 2015**, Michael Scarpuzzi, vice president of zoological operations for *SeaWorld* San Diego, requested the MMIR for killer whales in captivity.¹²¹ This MMIR which the NMFS provided to *SeaWorld* – like all other current MMIR's for killer whales in captivity – omits any record of Morgan at *Loro Parque*.

The omission of Morgan in the MMIR was most recently evident at the California Coastal Commission hearing on 8 October 2015, concerning *SeaWorld*'s application to build a larger killer whale tank at its San Diego facility. The Coastal Commission's staff report noted:¹²²

"Existing Orcas and Facility[:]

According to the NIMM [National Inventory of Marine Mammals also referred to as MMIR] maintained by NMFS, there are four facilities in the United States that hold captive orcas, three of them being SeaWorld facilities: SeaWorld San Diego has eleven, SeaWorld San Antonio has seven, and SeaWorld Orlando has six, for a total of 24 orcas. The fourth facility – Miami Seaquarium – has only one orca. Of the eleven orcas at SeaWorld San Diego, eight were born in captivity and three originated in the wild. There are currently 56 orcas in captivity worldwide, with 24 of them (43%) under SeaWorld's care." [Emphasis added.] (Excerpt from California Coastal Commission Staff Report at page 16, *SeaWorld* San Diego, Application No. 6-15-0424, report date: 24 September 2015, hearing date: 8 October 2015, Agenda Item Th14a.)

All of the MMIR's listing killer whales in captivity identify *SeaWorld* as the "holder" of five (5) living killer whales at *Loro Parque*. Those killer whales are still legally "under *SeaWorld*'s care" and should have been included in the Coastal Commission's staff report. Again, this is what *SeaWorld* told the SEC on 20 November 2013:¹²³

"With 28 killer whales, we care for the largest killer whale population in zoological facilities worldwide and today have the most genetically diverse killer whale and dolphin collection in our history. Six of these killer whales are presently on loan to a third party pursuant to an agreement entered into in February 2004. Pursuant to this agreement, we receive an annual fee, which is not material to our results of operations. In addition to generating incremental revenue for our business, the agreement provides for additional housing capacity for our killer whales."

By process of its own FOIA request to the NMFS, *SeaWorld* is on notice of Morgan's omission from the MMIR. This raises the questions: (1) why is Morgan not being reported? And (2) If *SeaWorld* and *Loro Parque* are not reporting the wild-born Morgan on the MMIR, will they also fail to report her captive-born progeny?

Prior to publishing this white paper a further FOIA request was made to the NMFS dated **5 August 2015** asking for the most current MMIR for killer whales held at *Loro Parque*, Tenerife, Spain. The MMIR for *SeaWorld*'s killer whales held at *Loro Parque* continues to omit reporting of Morgan.¹²⁴

This lack of consistency in the legally required documentation is not just about a single killer whale -- it is about a pattern of conduct by an entire industry. The institutional denial and manipulation of Morgan's rescue and rehabilitation as well as the true commercial nature of the *Dolfinarium Harderwijk* transfer to *Loro Parque* should be a cause for concern by the CITES Secretariat, the European Commission, the MMC, NMFS and FWS, as well as the Dutch and Spanish MAs. The transaction that led to Morgan being listed as a corporate asset by *SeaWorld* should be a cause for concern by the SEC as well.

B. Dutch Permit Facts – Erroneous Scientific Justification

From the very outset of Morgan's legal case in the Netherlands, the Dutch Government and the Dutch Courts have justified their decisions to place Morgan at *Loro Parque* on the erroneous belief that *bona fide* "scientific research" as recognized by CITES, EU law and the MMPA is carried out on killer whales at *Loro Parque*. Under EU law,¹²⁵ an Annex A species may not be imported unless the CITES MA is satisfied that:

- *The specimens are not to be used for primarily commercial purposes (i.e. will be used for purposes of which the non-commercial aspects clearly predominate).*

- *Import is under exceptional circumstances required for the advancement of science or for essential biomedical purposes; species is the only one suitable and there are no captive bred animals.* [Emphasis added.]

The emphasized section of the second caveat listed here calls into question the validity of any transport of Morgan, given that there were, at the time of her transport, five (5) captive-born killer whales held already within the EU, at *Marineland Antibes*, France, in addition to the six (6) held at *Loro Parque*. Regardless of this blatant oversight, which was pointed out to the Dutch Court during legal proceedings, there is no question that Morgan's EG-Certificate is restrictive and limits her to being used exclusively for research.

In the governing three (3) page cover letter of 27 July 2011, to which Morgan's EG-Certificate was attached,¹²⁶ the State Secretary for Economic Affairs, Agriculture and Innovation (the Dutch Government department responsible for issuing CITES EG Certificates) states no less than seven (7) times the intention for Morgan to be used for scientific purposes by a facility that conducts scientific research on killer whales and yet, within that same document not one mention is made of use for shows, education or breeding.

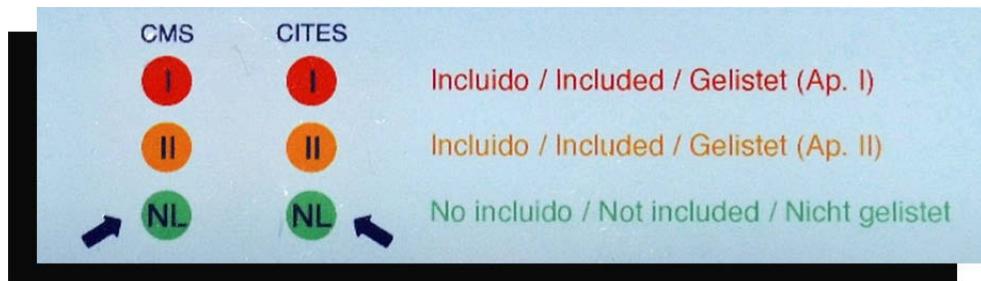
It is clear that Morgan's EG-Certificate does not allow her to be used for breeding, or for performance in staged shows, particularly those for predominantly commercial purposes with little to no educational value, which is the present case.¹²⁷

Under the Article 3 of Council Directive 1999/22/EC¹²⁸ -- the EU Zoo Directive -- *Loro Parque* is required to promote public education and awareness in relation to the conservation of biodiversity, particularly by providing information about the species exhibited and their natural habitats.



The killer whale (*Orcinus orca*) education component, in signage format, for the public at *Loro Parque* consists of nominal information signage [Left]. While the Orca Ocean entertainment “Showtime” signage and warnings to visitors of the prohibitions against eating, drinking and smoking [Right] both literally and figuratively dwarf the education information section of the sign for killer whales at *Loro Parque*. (6 October 2015)

The token information provided in the educational signage noted above for killer whales at *Loro Parque* stretches the definition of compliance to its breaking point. Not only is the information provided on the signage hollow, it is also specious – misleading the public by indicating (incorrectly) that *Orcinus orca* are not included (NL) under either CMS or CITES as depicted in this close-up of the above information sign:



The arrows pointing to the “NL” (Not included) designation under the CMS and CITES classifications are a permanent graphic on the sign as it appeared 6 October 2015. (This misinformation has persisted on the educational signage for killer whales at *Loro Parque* since at least 16 November 2011.)

In direct contrast to the explicit and restricted use for which Morgan has been authorized, *SeaWorld's* captive-born, Annex B killer whales held at *Loro Parque* pursuant to US CITES permits are there for public display, which includes commercial performances where the killer whales perform tricks in daily shows for a paying public. However, they are not held at *Loro Parque* for primarily *bona fide* scientific purposes as per their export permit and as reflected in the paucity of peer-reviewed scientific articles published during their tenure there, with no scientific articles at all related to species preservation or enhancement in the wild.

Based on observations of Morgan at *Loro Parque*,¹²⁹ this wild-born, Annex A killer whale is treated no differently than any of *SeaWorld's* captive-born, Annex B killer whales which are held at *Loro Parque* pursuant to the public display provisions of the MMPA. That is, her schedule does not differ to take into account the different purpose of her transfer dispensation as provided under EU law and her Dutch EG-Certificate.

1. *Dolfinarium Harderwijk – Application and “Motivation”:*

Consider the following excerpts from *Dolfinarium Harderwijk's* “Motivation” document¹³⁰ which was submitted to the Dutch MA as part of its application¹³¹ for an exemption to transfer Morgan to *Loro Parque* pursuant to Article 8(3)(g) of Council Regulation (EC) 338/97. This “Motivation” document shows a high degree of obscuring or embellishing the truth by suggesting misleading information of the situation. This is all couched within a framework that implies compliance without ever actually establishing it:

“. . . the requirement of scientific research, as required under ASCOBANS, the Habitats Directive, the CITES Regulation and the supplementary requirements of the Dolfinarium's discretionary permit, must be fulfilled.

Furthermore it is considered desirable for Morgan to be kept at a location within the EU, so as to ensure that the animal continues to be subject to strict European regulations.

A location has been found that satisfies all these criteria: that is Loro Parque, on Tenerife [Canary Islands].

The accommodation and care provided by Loro Parque has been generally approved by the Scientific Authority of Spain as referred to in the CITES Regulation... .

In addition, Loro Parque carries out extensive scientific research into this species, covering various aspects that are of great importance to the continued existence of the species in the wild. This research is carried out in close collaboration with Orcinus orca experts from all around the world. . .

Transfer under the CITES Regulation . . .

. . . a discretionary permit is required for transport, and such a permit may only be issued if the Scientific Authority in the destination Member State determines that the destination location is fit for purpose.

Dolphinarium Harderwijk therefore requests exemption from the provisions of Article 8 and also Article 9 of the CITES Regulation in respect of scientific research. . .

. . . the chosen destination fulfils the requirements for scientific research, not only the aspect of transfer but also the aspect of the destination location will have to be tested against these statutory requirements. The Dolphinarium [Harderwijk] assumes that Loro Parque satisfies all these requirements and therefore makes the application for that destination location.

Supplementary conditions in the discretionary permit no. FF/75A/2008/064. When issuing discretionary permit no. FF/75A/2008/064, the Minister [for Agriculture, Nature and Food Quality] supplemented the requirements set by the Habitats Directive and the CITES Regulation, by formulating the requirement that the animal could only be kept in captivity with a view to returning the animal to the wild or, if that proved impossible, for the purposes of a scientific research programme that is relevant in light of the Habitats Directive, the Bern Convention and the Obligations imposed by ASCOBANS. On the basis of the descriptions of various research programmes at Loro Parque, the Dolphinarium intends to show that these requirements are fulfilled. . . [Emphasis added.]

(Excerpts from Certified Translation of *Dolphinarium Harderwijk's "Motivation"* document to Dutch MA 11 July 2011, at pages 13-15.)

The representation by *Dolphinarium Harderwijk* that *Loro Parque* conducts extensive scientific research into killer whales, covering various aspects that are of great importance to the continued existence of the species in the wild, is more than misleading, it is simply not true. The paucity of peer-reviewed papers backs that up.

Since the arrival of *SeaWorld's* killer whales at *Loro Parque* on 14 February 2006, only three (3) peer-reviewed papers have been published.¹³² The first in 2010 was four years after *Loro Parque* acquired its original killer whales. The second, published in 2011, was prior to Morgan's arrival (November 2011) and the third and last, although published in 2012, used data from 2009.

The *Dolfinarium Harderwijk* misrepresented the contribution of *Loro Parque's* scientific research in their application to the Dutch MA for the EG-Certificate.¹³³ They use the words “three research reports, which form part of this application.” [Emphasis added]. Additionally, the Managing Director writes “*Scientific research reports concerning the research being conducted by Loro Parque*” [Emphasis added]. It should be noted that these documents were only proposals, i.e., not reports and certainly not of reports of scientific research that had been conducted.

By any reasonable standard of measure, neither *Dolfinarium Harderwijk* nor *Loro Parque* ever showed the Dutch or Spanish MAs that the requirements stated in the “Motivation” were fulfilled. Even a perfunctory investigation by either (or better yet, both) the Dutch or Spanish MAs would have revealed gaping holes in the “Motivation” document, including repeated reference to ‘scientific research’ (referred to not less than seven (7) times) that have no supporting evidence. In stark contrast, there is not a single reference in the “Motivation” document for authorization to breed Morgan because there is no justifiable necessity under Dutch and EU law to do so. To put the level of misfeasance into perspective, had these two MAs competently performed their duties as prescribed under CITES and the WTR, an EG-Certificate to transfer Morgan for purposes of scientific research could not and would not have been issued.

As we note later in this white paper, the ICJ’s ruling in Australia v. Japan,¹³⁴ and Dr. Marc Mangel’s analysis¹³⁵ regarding the issue of determining what constitutes “scientific research” requires consideration of the Parties at CoP17. The application of Dr. Mangel’s analysis to define “scientific research” in the MMPA and WTR also warrants discussion in the US and EU respectively.

2. Morgan's EG-Certificate and Cover Letter:

On 27 July 2011, the Dutch CITES MA prepared a cover letter as the governing document, with the EG-Certificate (No. 11 NL 114808/20) that was issued for Morgan as an appendix. The EG-Certificate, which must, therefore, be read in conjunction with the Dutch MA's governing cover letter, spelled out the extremely limited "purpose" of Morgan's transfer to *Loro Parque*.¹³⁶

The exemption that was granted by the Dutch MA was pursuant to Article 8(3)(g) of Council Regulation (EC) 338/97,¹³⁷ which only allows Morgan to be held at *Loro Parque* predominantly for purposes of research or education aimed at the preservation or conservation of her species. However, an exemption for breeding under Article 8(3)(f) of Council Regulation (EC) 338/97, was not applied for by *Dolphinarium Harderwijk* or granted by the Dutch MA.

Article 8(3) of Council Regulation (EC) No 338/97 provides that exemption from the prohibitions referred to in Article 8(1) may be granted by issuance of a certificate to that effect by a management authority of the Member State in which the specimens are located, on a case-by-case basis where the specimens:

- (e) are required under exceptional circumstances for the advancement of science or for essential biomedical purposes pursuant to Council Directive 86/609/EEC of 24 November 1986 on the approximation of laws, regulations and administrative provisions of the Member States regarding the protection of animals used for experimental and other scientific purposes where the species in question proves to be the only one suitable for those purposes and where there are no specimens of the species which have been born and bred in captivity; or
- (f) are intended for breeding or propagation purposes from which conservation benefits will accrue to the species concerned; or
- (g) are intended for research or education aimed at the preservation or conservation of the species; or

It is obvious that clauses (e), (f) and (g) of Article 8(3) are listed in a disjunctive manner, expressing a choice between mutually exclusive activities, with each clause separated by the word "or". The same disjunctive listing for exemptions under Article

8(3)(e)(f)(g) of Council Regulation (EC) No 338/97 are combined for brevity, separated with a slash (/), and appear on line 18.8 of Morgan's EG-Certificate form:¹³⁸

bestemd zijn om te worden gebruikt ter vergroting van de wetenschappelijke kennis/voor het fokken of kweken/voor onderzoek of educatieve doeleinden of voor een ander onschadelijk doel /
are to be used for the advancement of science/breeding or propagation/research or education or other non-detrimental purposes.

*"bestemd zijn om te worden gebruikt ter vergroting van de wetenschappelijke kennis/vor
het fokken of kwwken/voor onderzoek of educatieve doeleinden of voor een ander
onschadelijk doel /*

*are to be used for the advancement of science/breeding or propagation/research or
education or other non-detrimental purposes."*

(Line 18.8 of Morgan's EG-Certificate 11NL114808/20 issued by Dutch MA 27/07/2011)

The explicit limitation granting an exemption pursuant to Article 8(3)(g) of Council Regulation (EC) 338/97 is also clearly spelled out in the Dutch MA's governing cover letter:¹³⁹

"I am therefore of the opinion that Loro Parque will keep the orca for research as described in article 8(3)(g) of the Regulation. . . ¶ I therefore will issue an EG-Certificate for the transfer of the orca from the Dolfinarium, Harderwijk, to Loro Parque, Tenerife, on condition that the animal is kept for research. For this reason the clauses 18.8, 19.2 and 19.3 have been ticked." [Emphasis added.] (Excerpt from Certified Translation, Morgan's EG-Certificate Cover Letter by W.J.B.C Lauwerijssen on behalf of Dutch State Secretary of Economic Affairs, Agriculture and Innovation, 27 July 2011).

Furthermore, in the European Commission report *Study on the Effectiveness of the EC Wildlife Trade Regulations*, there is a side-by-side comparison and analysis of the differences between the derogation provided in Article 8(3)(g) of Council Regulation (EC) No 338/97 and similar provisions found in Article 16(1) of the Habitats Directive and Article 9(1) of the Birds Directive. This comparison makes it patently clear that a derogation or exemption certificate issued under the WTR pursuant to Article 8(3)(g) of Council Regulation (EC) 338/97 does not contemplate or authorize breeding:¹⁴⁰

Comparison of the provisions relating to the derogation from the trade prohibition in the EC Regulation 338/97 and the Birds and Habitats Directives

(taken from Chamoux, op.cit.)

The blank spaces reflect that there is no similar or corresponding requirement in the text of the instrument.

| ARTICLE 8(3) REGULATION 338/97 | ARTICLE 9(1) BIRDS DIRECTIVE | ARTICLE 16(1) HABITATS DIRECTIVE |
|--|--|--|
| (g) specimens intended for research or education aimed at the preservation or conservation of the species | (b) for the purpose of research and teaching and for the breeding necessary for this purpose | (d) for the purpose of research and education , and for the breeding operations necessary for this purpose, including the artificial propagation of plants |

Excerpt from *Study on the Effectiveness of the EC Wildlife Trade Regulations* Annex 3, at p. 235-236 - 'breeding' is not an authorized derogation in Article 8(3)(g) of Regulation 338/97.

This distinction is also noted in the introductory paragraphs of the EU Zoo Directive which, in reference to Council Regulation (EC) 338/97 and the EU Habitats Directive, states:¹⁴¹

"... whereas that Regulation prohibits the display to the public for commercial purposes of specimens of species listed in Annex A thereof unless a specific exemption was granted for education, research or breeding purposes; ... whilst providing for exemptions for specific reasons, such as research and education, repopulation, reintroduction and breeding;" [Emphasis added.] (Excerpt from introductory paragraphs, EU Zoo Directive – Council Directive 1999/22/EC.)

Finally, Article 75 (6)(a) of the Dutch FF Act must be followed by Morgan's holders at *Loro Parque*. This Article is specifically referenced in, *Dolfinarium Harderwijk*'s "Dispensation" and states:¹⁴²

"... exemption shall be granted only when there is no other satisfactory solution:

- a. for the purpose of research and education, of repopulating and reintroduction and for the necessary breeding, including the artificial propagation of plants;" [Emphasis added.] (Author's Translation.)

As explicitly stated in the Dutch MA's governing cover letter, “an EG-Certificate for an Appendix A species can, according to Article 8(3) of the Regulation [338/97], only be issued if this is in accordance with the requirements of other Community Legislation on the conservation of wild fauna and flora. In the Netherlands this is the FF Act which implements the Habitats Directive. and incorporated into Morgan's EG-Certificate.”¹⁴³

There is no legitimate scientific, research or educational purpose to breed Morgan. Neither the Dutch nor Spanish Governments have said that breeding Morgan is necessary within the framework of the Dutch FF Act or the EU Habitats Directive. Furthermore, *Dolphinarium Harderwijk*, *Loro Parque* and *SeaWorld* have never asked for permission to breed Morgan or been granted authorization to do so under any of the applicable laws and regulations (as cited above), which are supposed to protect an Appendix A specimen like Morgan, from such a flagrant violation of her rights solely for the purpose of commercial profit.

Despite the overwhelming evidence to the contrary and as explicitly stated in the Dutch MA's cover letter, which as noted earlier, serves as the governing document to Morgan's EG-Certificate, Dr. Javier Almunia of *Loro Parque Fundación* takes the position that Morgan's EG-Certificate from the Dutch Government does not limit Morgan to use in research or even to just education but rather actually allows breeding and predominantly commercial use (public shows under the guise of ‘education’).¹⁴⁴

“*The CITES permit issued by the Dutch Government for Morgan clearly states that Morgan is “to be used for the advancement of science/breeding or propagation/research or education or other non-detrimental purposes.” Loro Parque holds a valid license as a Zoo under the European and Spanish law; its facilities are regularly inspected by the competent authorities and the compliance of its conservation, research and education plans and activities verified. Specific ongoing research work involving Morgan has been reported to the Dutch Government, the Dutch court, Spanish competent authorities and the public.*” (Excerpt from Comments by Dr. Javier Almunia, *Loro Parque Fundación*, November 2013.)

Dr. Almunia's interpretation of Morgan's EG-Certificate is incorrect on the issue of education as well as public display but in particular with regards to breeding and therefore it is the responsibility of the Spanish MA to correct Dr. Almunia on these points with special reference to the critical aspect of no breeding being permitted. If the Spanish MA does not act, then the NMFS should take action to prevent the US CITES and MMPA-regulated killer whales at Loro Parque from being used to violate the strict provisions of Morgan's EG-Certificate through any form of breeding, such as artificial insemination or through mating activities.

Again, it is imperative that it is understood that Morgan's transfer was only to be *for research that contributes to the conservation of her species*, yet Dr. Almunia also fails to list 'peer-reviewed' *bona fide* science in his statement. While the EG-Certificate form used by the European Union may be misleading particularly with respect to the manner in which form box 18.8 is presented with respect to Article 8(3)(e)(f)(g), it is the language of Council Regulation (EC) No 338/97 and the Dutch MA's governing cover letter dated 27 July 2011, signed by W.J.B.C Lauwerijssen, that controls Morgan's exemption, not the check-box on line 18.8 of the form.

Although authorized to conduct 'scientific research' it should also be made clear that *Loro Parque* cannot subject Morgan to invasive scientific or medical experimentation (see Article 8(3)(e) of Council Regulation (EC) 338/97¹⁴⁵ and Council Directive 86/609/EEC,¹⁴⁶ Animals used for Scientific Purposes). This is on the basis of her EG-Certificate issued pursuant to Article 8(3)(g) of Council Regulation (EC) 338/97. Scientific/medical experimentation and breeding for conservation purposes simply were not the exemptions that *Dolfinarium Harderwijk* applied for and therefore they are not permitted (exempted) uses for Morgan. Any suggestion that they are is incorrect.

Scientific research is repeatedly referenced by the Dutch Government and its Courts as the principal justification for Morgan's transfer to *Loro Parque*. But authorization for breeding Morgan cannot be found anywhere in the administrative record or extensive court record in the Netherlands and therefore was clearly not part of the

permitting process. As such, any act to facilitate breeding or captive mating must be avoided.¹⁴⁷

As discussed earlier (see Section VI, A, 1. The Misappropriation of a Wild-born Killer Whale.), the exemption granted by the Dutch authorities to *Dolfinarium Harderwijk* under Dutch law,¹⁴⁸ stipulates that “*if release is not possible, such animals may be kept permanently for the purpose of conducting scientific research that is relevant in the context of obligations imposed by the EU Habitats Directive, the Bern Convention and ASCOBANS.*”¹⁴⁹

But conducting scientific research under ASCOBANS has apparently also been misconstrued by the Dutch MA, as it does not provide a viable justification for retaining a wild-born killer whale like Morgan in permanent captivity. For one thing, the research exception only applies to activities undertaken for the ends outlined in paragraph 2 of the annex to ASCOBANS. As the second half of the same paragraph clarifies, these predominantly concern field research, to be carried out at sea. Moreover, the research exception is conditional upon the return to sea of any captured animals involved, "in good health".¹⁵⁰

The complications raised by this state of affairs are all the greater when considering that research considerations have become the official basis for the Dutch authorities to justify the permanent captivity of Morgan and her transfer to *Loro Parque*. Again, the Dutch MA's governing cover letter accompanying Morgan's EG-Certificate, authorizing Morgan's transfer to Spain, was granted ". . . under condition that the animal will be kept for research."¹⁵¹

Furthermore, in order for the EG-Certificate to be compliant within the framework of the overarching EU Directives, Regulations and Conventions (such as the Habitats Directive, the WTR, the Dutch Fauna and Flora Act and ASCOBANS), Morgan could not be exported for any purpose other than research or education.

3. Ministry of Economic Affairs – Dutch CITES Authority:

In a letter to the Dutch Parliament dated 12 October 2011, Dutch State Secretary Henk Bleker explained his decision to authorize the transfer of Morgan from *Dolfinarium Harderwijk* to *Loro Parque* on the following grounds:¹⁵²

“It [Loro Parque] currently has a group of five orcas, and it has been plausibly demonstrated that scientific research is carried out into orcas at Loro Parque. This has been confirmed by Spain’s scientific CITES Authority, and in compliance with EU CITES legislation, I am to base my decision in such a case on the determination of the Spanish authorities.” (Excerpt from letter by Dutch State Secretary, Henk Bleker, 12 October 2011.)

The Dutch MA’s erroneous belief regarding *Loro Parque*’s emphasis on scientific research on killer whales and conservation of the species has persisted and yet it is also in direct conflict with the US CITES permit issued for the four captive-born *SeaWorld* killer whales, which was for public display. (See further discussion of this issue below under Section D. United States Permit Facts – Public Display Only.)

4. Dutch High Court – Final Ruling on Morgan Appeal:

The final decision about Morgan’s transfer to *Loro Parque*, rendered by the Raad van State (Dutch High Court) on 23 April 2014 specifically notes that:¹⁵³

“7. By a decision dated 27 July 2011, the State Secretary issued Dolfinarium [Harderwijk] with an EC certificate as referred to in Article 8(3) of the Basic Regulation to transfer Morgan to Loro Parque. . . the State Secretary takes the position that he asked the Spanish CITES Management Authority, in accordance with Article 59(3) of the Implementing Regulation, whether Loro Parque was sufficiently equipped to maintain Morgan and look after her properly. This [Spanish] authority then consulted its scientific authority and stated that it had no objection to Morgan being transferred. The authority confirmed that Loro Parque participates in scientific research which contributes to the conservation of this species...” [Emphasis added.] (Excerpt from Certified Translation, Decision of the Raad van State, 23 April 2014 at page 9, paragraph 7.)

The Spanish CITES MA never made any attempt to correct the Dutch Government's misconception that the primary purpose of the killer whales at *Loro Parque* was *bona fide* scientific research. This facilitated the Dutch Government's failure to acknowledge that scientific research was never the principal or primary purpose of *Loro Parque* holding the *SeaWorld* killer whales pursuant to the US CITES permit and MMPA "public display" provisions.

As a direct consequence of the Spanish authorities' misrepresentation, at each stage of the legal proceedings in the Netherlands, *bona fide* "scientific research" was falsely relied upon as justification for finding *Loro Parque* a suitable location for Morgan and was at the core of every lower court ruling and the eventual High Court (Raad van State) ruling.

The decision of the Raad van State on 23 April 2014 is not the last word on the fate of Morgan. The Dutch court's decision was extremely limited in its scope and material issues of fact and fundamental issues of international legal consequence remain unanswered and must be resolved.¹⁵⁴

5. Dutch State Obligations:

The importance of the "scientific research" argument as a justification for Morgan's transfer to *Loro Parque* is also discussed by Arie Trouwborst, Richard Caddell and Ed Couzens (2013) in their peer-reviewed legal journal article - *To Free or Not to Free? State Obligations and the Rescue and Release of Marine Mammals: A Case Study of 'Morgan the Orca'*,¹⁵⁵ where the authors state at p. 12:

"Moreover, the EU CITES certificate was considered valid on the basis that the authorities could reasonably reach the conclusion that Morgan is transferred to Loro Parque for research and education aimed at the preservation or conservation of the species' . . . The November ruling thereby confirms that scientific research is subordinate to other interests at Loro Parque – inter alia, that of education – but no longer seems to consider this to be important. The judgment thus fails to acknowledge that the EU certificate for the killer whale was issued exclusively for research purposes. The latter circumstance, in turn, is undoubtedly a direct consequence of the conditions stipulated in the

Dolfinarium's [Harderwijk] exemption, according to which permanent captivity of rescued cetaceans is permitted exclusively for the purpose of scientific research. [See journal fn: 79.] Interestingly, the animal could be affected if different conclusions are reached in a future Dutch judgment on the merits, even though it has left the jurisdiction, as there could be repercussions for the validity of the EU CITES certificate for the original transfer. The EU CITES Regulation specifies in this regard that a certificate 'shall be deemed void if a competent authority or the Commission, in consultation with the competent authority which issued the permit or certificate, establishes that it was issued on the false premise that the conditions for its issuance were met'. [See journal fn: 78, 80.] [Emphasis added.] (Arie Trouwborst, Richard Caddell and Ed Couzens (2013) *To Free or Not to Free? State Obligations and the Rescue and Release of Marine Mammals: A Case Study of 'Morgan the Orca'* at p. 12.)

In this case, the FWS acting as the US CITES MA is arguably a “competent authority” capable of establishing the “false premise” of scientific research at *Loro Parque*. The whole foundation of the EG-Certificate used to transfer Morgan to *Loro Parque* is based upon the US CITES export of the four (4) original *SeaWorld* killer whales to *Loro Parque* in 2006, exclusively under the “public display” provisions of the MMPA, rather than *bona fide* scientific research as claimed by the Spanish MA. As a Party, the US CITES MA should, at a minimum, clarify to both the Dutch and Spanish MAs that *SeaWorld*'s killer whales were sent to *Loro Parque* primarily for public display, not scientific research.

As such, it is clear that the Dutch Government, with the blessing of the Dutch Courts, allowed the transfer of Morgan on a false premise that *bona fide* scientific research was being conducted on killer whales at *Loro Parque* as a primary purpose, prior to Morgan's transfer to that facility. This false premise was facilitated by misrepresentations made by the Spanish CITES MA, and *Loro Parque* itself, to the Dutch Government as evidenced by the statements of Dutch State Secretary Henk Bleker and documents supplied by *Loro Parque*¹⁵⁶ and as memorialized in the series of Dutch court verdicts.

Since this material misrepresentation of fact was never corrected in communications with the Dutch Government or its Courts by the Spanish Government or by the representatives of *Dolfinarium Harderwijk*, *Loro Parque*, or *SeaWorld*, Morgan's EG-

Certificate should therefore be deemed void as having been issued on the false premise that the conditions for its issuance were met, when they were not.

C. Comity – Why it Matters

In 2002 the NMFS and the MMC held diametrically opposed positions concerning the validity of the comity provision in the MMPA.¹⁵⁷

The NMFS was operating under the belief that even if a letter of comity was provided, the agency had no legal basis to enforce the provisions of the MMPA on foreign holders of protected species covered by the MMPA once the animals were exported. However, the MMC believed that comity was a valid and vital tool to implement the protections of the MMPA and to ensure that the US had a diplomatic means of recourse if concerns warranted further action following the export of any MMPA-protected species.

Absence of a unified position regarding the legitimacy and importance of the MMPA's letter of comity requirement for foreign export set the stage for *SeaWorld*, reluctantly and under protest, to submit a letter of comity from the Spanish Government to the NMFS as part of its 15-day notice and information packet for the four killer whales sent to *Loro Parque* in 2006:¹⁵⁸

"Enclosed also is a letter from the Island Administration of Tenerife Territory's Environment Management Technical Service that satisfies the requirement of the National Marine Fisheries Service, albeit with which for the record SeaWorld takes exception, for a letter of comity." [Emphasis added.] (Excerpt from *SeaWorld*'s 15-day notice by Brad Andrews to NMFS, 22 June 2005.)

The comment by Brad Andrews, *SeaWorld*'s Chief Zoological Officer,¹⁵⁹ regarding the issue of comity concerning the 2006 export to *Loro Parque* should have raised a red flag for the NMFS – but if it did, unfortunately, the agency did nothing about it.

Four years later in 2010, *SeaWorld* relied on a scoping document on marine mammal permit regulations from the NMFS¹⁶⁰ to re-state its position against comity and Governmental intervention. Again *SeaWorld*'s Brad Andrews suggested that the NMFS should just 'mind its own business':¹⁶¹

"In any event, NMFS has no authority to confiscate the killer whales . . . we reserve all our rights to object to any enforcement action by NMFS . . . Because Loro Parque has no, and needs no, permit to possess the killer whales, there is nothing for the Secretary to revoke and thus no basis in Section 1374(c)(2)(D)¹⁶² to be able to seize the killer whales." [Endnote added.][Emphasis added.] (Excerpt from *SeaWorld* letter by Brad Andrews to NMFS, 13 December 2010.)

Erroneously, Mr Andrews states that *Loro Parque* needs no permit to hold a CITES Appendix II species and he fails to realize that naturally a decision to honor the letter of comity would be for the Spanish Government to make, not *SeaWorld*.

The FMF holds the position that the situation regarding the killer whales at *Loro Parque* is demonstrably the business of the MMC, the NMFS and the FWS and as such that resolving the issue of comity in this particular case is not only warranted but imperative. The comity issue rests squarely within the larger context of the discussion about the purpose codes that needs to be addressed at CITES' CoP17, to be held in South Africa in 2016.¹⁶³

The US has an opportunity to exercise leadership on the issue of comity on the international stage. This case study of Morgan should leave no doubt as to why this issue can no longer be ignored by the MMC and NMFS and why their guidance is needed to preserve the integrity of the MMPA and its implementation as long as export of cetaceans to foreign facilities continues to be authorized.

D. United States Permit Facts – Public Display Only

In February 2006, *SeaWorld* exported four killer whales from its parks in the US to *Loro Parque* at Tenerife, Canary Islands, Spain. The export of the killer whales involved three separate US Government agencies responsible for complying with three different sets of regulations, as explained below.

1. National Marine Fisheries Service – Marine Mammal Protection Act:

The NMFS is tasked with enforcing the MMPA as it applies to cetaceans including killer whales. Under the MMPA there are only three (3) purposes for which *SeaWorld* could have exported the original four killer whales to *Loro Parque*: Public Display, Scientific Research, or Species Enhancement.¹⁶⁴

SeaWorld exported the four killer whales to *Loro Parque* exclusively for “Public Display” purposes subject to Section 104 of the MMPA.¹⁶⁵ Pursuant to the MMPA’s Public Display provisions, the export of the four killer whales only required *SeaWorld* to give the NMFS fifteen (15) day notice of intent to transfer the killer whales to *Loro Parque*.¹⁶⁶

The MMPA also provides for Scientific Research and Species Enhancement permits; however, those permits require proof that legitimate, *bona fide* scientific research is the primary purpose for the export, or that enhancement of the species is a necessary justification for the export.¹⁶⁷ In those situations, the MMPA provides that marine mammals held under a permit for scientific research shall not be placed on public display, including in an interactive program or activity, or trained for performance unless such activities are necessary to address scientific research objectives and have been specifically authorized by the Office Director under the scientific research permit.¹⁶⁸

It is undeniable that *SeaWorld* did not export the four killer whales to *Loro Parque* for *bona fide* scientific research or species enhancement. The corresponding US Marine Mammal Data Sheets (MMDS) for these killer whales identify them as captive-born and state that they are held captive for the purpose of “public display,” to the exclusion of *bona fide* scientific research or enhancement purposes since research and enhancement permits were never applied for or issued.¹⁶⁹

Public display and scientific research are not mutually exclusive under the MMPA. Some non-impact, observational research may be conducted on public display animals, but scientific research that may impact public display animals can only be conducted if a separate scientific research permit is issued under the MMPA and then the public display of animals under specific scientific research permits is strictly controlled. Criticisms concerning the deficiencies of the MMPA’s public display provisions are not new and deference toward the interests of marine theme parks and the public display industry are well documented.¹⁷⁰

Had *SeaWorld* intended to export the four captive-born killer whales solely for scientific research or species enhancement purposes, *SeaWorld* should have applied for specific permits under the MMPA to do so. But that would have prevented their primary commercial use at *Loro Parque* which is evidenced today by their daily trained public performances which occur three times a day, every day of the year¹⁷¹ and which now also include the wild-born Morgan.¹⁷²

Looking forward to CITES CoP17, a bright-line rule providing unambiguous criteria and guidelines differentiating between transactions for “primarily commercial” purposes and “*bona fide* scientific research” needs to be established in order to reconcile the different meanings of the terms in satisfaction of the various international laws and conventions at play including, but not limited to, CITES, the WTR and the MMPA.

On this last point, insight and guidance on how to address the issue of scientific research as an overriding justification for keeping wild-born 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.¹⁷³ The ICJ accepted that the program was "scientific" but not primarily motivated by scientific concern.

Marc Mangel, PhD., provided expert testimony to the ICJ on the issue of what constitutes scientific research.¹⁷⁴ In his conclusion, Dr. Mangel states that a program for purposes of scientific research has periodic review of research proposals and results and adjustments in response to those reviews. Dr. Mangel noted that JARPA II is an activity that collects data in the Southern Ocean. However, by reference to standard accepted practices of science and the IWC special permit criteria, it is not a program for purposes of scientific research in the context of conservation and management of whales.

SeaWorld and *Loro Parque* are collecting data on killer whales but that in and of itself should not be enough to justify open-ended research in captivity for the life of a rescued, wild-born killer whale such as Morgan. Despite Morgan being held by *Loro Parque* for over three years, with 24 hour access, no scientific peer-reviewed papers based on data from studying her have been published in journals. Peer-reviewed publications need to be produced periodically to warrant such open-ended research on killer whales held in captivity.

Finally, there needs to be 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.

Applying a similar analysis as formulated by Dr. Mangel regarding Japan's JARPA II whaling activity to the definitions of scientific research used in CITES, the WTR and the MMPA for issuing permits for cetaceans in captivity certainly warrants discussion at CoP17.¹⁷⁵

2. Fish and Wildlife Service – U.S. CITES Management Authority:

The FWS serves as the CITES MA as well as the CITES Scientific Authority (SA) in the US.

Although *SeaWorld* was only required to give the NMFS a 15-day notice of intent to transfer the four killer whales pursuant to the US MMPA, it was still required to comply with the provisions of CITES and therefore had to apply for CITES export permits for the transfer of its killer whales to *Loro Parque* in Spain.

Consistent with the “public display” purpose designation under the US MMPA, *SeaWorld* applied to the FWS for CITES export permits for the four killer whales stating that the purpose for the export was Public Display, not Scientific Research or Species Enhancement purposes, neither of which were marked on the CITES export permit or application form.¹⁷⁶

Specifically, *SeaWorld* filled out FWS application form 3-200-53 (Rev. 05/2005), Export/Re-Export of Live Captive-Held Marine Mammals (CITES) and in response to Section D, question No. 3, which asks: *What is the purpose of the export/re-export?* *SeaWorld* stated: *Public Display.*¹⁷⁷

SeaWorld, however, did not provide any responses to Section D, questions No. 12 and 13 (copied below), because the export of the four killer whales was clearly not being authorized for Scientific Research or Species Enhancement purposes and *SeaWorld* simply made “not applicable” (N/A) notations in response to questions 12 and 13:¹⁷⁸

12. For Scientific Research provide information indicating that the export of the animal meets the MMPA definition of “bona fide research,” i.e., scientific research on marine mammals, the results of which—(A) likely would be accepted for publication in a referred scientific journal; (B) are likely to contribute to the basic knowledge of marine mammal biology or ecology; or (C) are likely to identify, evaluate, or resolve conservation problems.

13. For Enhancement, explain the purpose of the export/re-export and provide a description of how the proposed activities will enhance or benefit the wild population (e.g., in-situ or ex-situ conservation; recovery plan.). (For questions 12 and 13 see FWS Form 3-200-53 Rev. 05/2005.)

The actual US CITES Export Permit listed the purpose of transaction (Box 5a) as “Z” for zoo¹⁷⁹ compared to “S” for scientific or “B” for breeding.¹⁸⁰ Furthermore, *Loro Parque* is not listed in the CITES online Register of Scientific Institutions.¹⁸¹ Clearly scientific research and species enhancement activities are not the primary or authorized activities under the MMPA for the four original killer whales and the one surviving captive-born male progeny presently held at *Loro Parque*.

As previously discussed, the CITES on-line “Trade Database” confirms that the US export and Spanish import permits for the four original killer whales sent by *SeaWorld* to *Loro Parque* were not issued for scientific or enhancement purposes. According to the CITES database, the US export purpose was “Z” for zoo and the source of the killer whales was identified as “C” for animals bred in captivity.¹⁸² The corresponding Spanish import purpose was listed as “E” for education and the source was listed as “F” for animals born in captivity.¹⁸³

Therefore it was a misrepresentation for the Spanish MA to assure the Dutch Government as part of the Court documentation and proceedings for Morgan that the original four (4) killer whales were sent to *Loro Parque* for science or enhancement.

3. Animal and Plant Health Inspection Service – Animal Welfare Act:

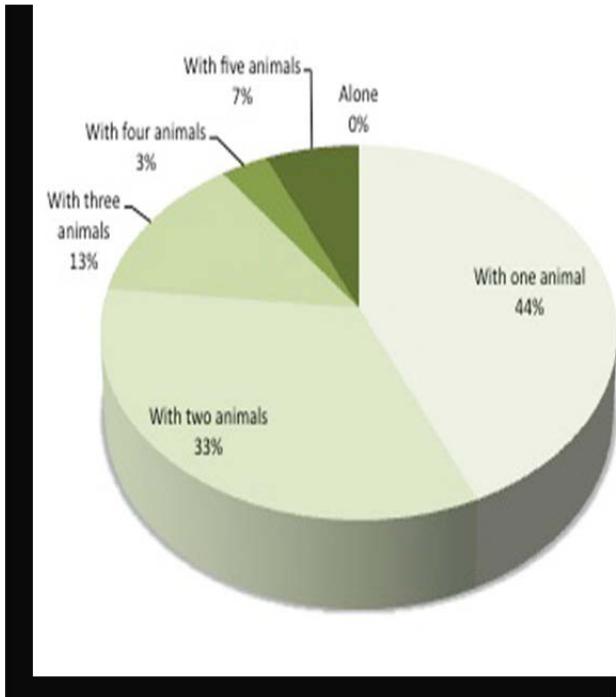
The US Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) is responsible for ensuring facility compliance with the Animal Welfare Act (AWA). APHIS did not physically inspect the *Loro Parque* facility; rather it reviewed building plans while the orca tanks were in construction in 2005 and approved export based on the representation that four (4) killer whales would be housed at *Loro Parque*.¹⁸⁴

However, there are presently six (6) killer whales (three males and three females) and at one point there were seven (7) killer whales (three males and four females) held in *Loro Parque*'s tanks. APHIS never considered the issue of keeping male and female killer whales separated due to conflicting CITES permit conditions.¹⁸⁵

The APHIS evaluation of *Loro Parque* should be reconsidered in light of the change in circumstances brought about by the birth of two additional animals and the subsequent arrival of the wild-born, female Morgan on 29 November 2011.

Under the WTR, one of the conditions for issuing a permit for an Annex A species is that the intended accommodation for a live specimen at the place of destination is adequately equipped to conserve and care for it properly. The AWA implementing regulations require that marine mammals that are not compatible be housed separately.¹⁸⁶

Because Morgan's EG-Certificate does not authorize breeding, adequate care for her within the “intended” dictates of her EG-Certificate requires that she be kept separated from the male killer whales at *Loro Parque* (currently three individuals) at all times; that clearly is not happening. As explained by Dr. Javier Almunia, *Loro Parque Fundación*:¹⁸⁷



“Morgan is spending time with any animal of the group, she is able to use any of the pools in the installations and can be grouped in any possible configuration. She can also spend the night time (12 hours without direct supervision of the keepers) with any animal, and in any of the pools. As an example, the graph of the night time configurations for Morgan during the month of October [2012] is included, showing that she was not alone any night, but in pairs or groups of three, four, five or all the animals together.” [Emphasis added.] (Dr. Javier Almunia, Loro Parque Fundación, 5 October 2012.)

At a minimum, for purposes of ensuring continued compliance with the AWA standards as it pertains to the US permitted killer whales at *Loro Parque*, APHIS should reevaluate the *Loro Parque* facility and report on its ability to keep and care for the male killer whales and female Morgan in separate tanks at all times – including public performances – to comply with EU regulations and the conditions of Morgan’s EG-Certificate.

Finally, APHIS and NMFS should take note of the witness testimony and evidence introduced during the case of *Secretary of Labor vs. Sea World of Florida, LLC*. (2011) US Occupational Safety and Health Review Commission (OSHRC Docket No. 10-1705), concerning the death of *SeaWorld* trainer Dawn Brancheau. Criticism and concern over the *Loro Parque* killer whale staff’s ability to properly care for killer whales was raised in connection with the death of a *Loro Parque* trainer, Alexis Martinez, who was killed at *Loro Parque* by *SeaWorld* killer whale Keto just two months before Brancheau’s death.¹⁸⁸

One of the requirements of the AWA is that a facility maintains a staff that is adequately trained and able to provide proper care for the animals it holds. What was revealed during the *Brancheau* matter was that *Loro Parque*'s killer whale trainers committed layers of mistakes, were inexperienced and lacked the same level of skill and experience as *SeaWorld* trainers.¹⁸⁹

Alexis Martinez was killed nearly three years after *SeaWorld*'s killer whales were first transferred to *Loro Parque*. That raises the question: If *Loro Parque*'s staff was inexperienced and lacked the skills to safely interact and care for the killer whales in 2009, did they ever possess adequate skills to care for the killer whales in the three years prior to, or the six years since, Alexis Martinez's death?

If not, then why have APHIS and NMFS not taken action to hold *Loro Parque* accountable for keeping *SeaWorld*'s killer whales in a safe environment pursuant to the provisions of the MMPA and AWA?

E. Spanish CITES Authority - A Tenerife Disconnect

As explained in detail in the discussion above, the Dutch government has attempted to wash its hands of Morgan's situation, stating that ownership is a private matter to be decided between *Dolfinarium Harderwijk*, *Loro Parque* and *SeaWorld*.¹⁹⁰

The response of the Spanish MA to date is no better. The following is but one of many mistakes, misunderstandings and misrepresentations made by the Spanish authorities, with additional confusion concerning the purpose of the import of the four original killer whales from *SeaWorld* in 2006 as well as Morgan's transfer from *Dolfinarium Harderwijk* in 2011.

In reply to an inquiry made by the FMF, the answer of the Spanish CITES MA located on the Spanish mainland in Madrid, illustrates the likelihood that it is acting on misinformation, misconception and misapplication of CITES and the WTR¹⁹¹ with

respect to holding Morgan at *Loro Parque* on the island of Tenerife in the Canary Islands:¹⁹²

“This specimen comes from a stranding on the coast of Holland, not from a wild capture, therefore this administrative Authority has no competence in disposing of her.” (Excerpt from Certified Translation, correspondence from Alicia Sánchez Muñoz, Subdirectora General, de inspección, certificación y asistencia técnica del comercio exterior, to FMF, 7 February 2014.)

The above quote from Alicia Sánchez Muñoz highlights the Spanish MA’s mistaken belief that Morgan was stranded, when in fact she was captured by the *Dolfinarium Harderwijk* from the wild, while free-swimming in the Wadden Sea.

To assist with placing such an error into the overarching framework, it is worth noting that ASCOBANS -- as controlled by the Convention on Migratory Species (CMS) -- prohibits deliberate taking of cetaceans, without qualification.¹⁹³

“. . .the Parties shall endeavour to establish (a) the prohibition under national law, of the intentional taking and killing of small cetaceans where such regulations are not already in force, and (b) the obligation to release immediately any animals caught alive and in good health. Measures to enforce these regulations shall be worked out at the national level.” [Emphasis added.] (Excerpt from ASCOBANS Agreement, annex paragraph 4.)

Although ASCOBANS itself lacks a definition of “taking”, the agreement provides for a definition in its parent treaty, the CMS. As explained by Professor Arie Trouwborst in a recent peer-reviewed journal article, the Convention stipulates that “taking” comprises “capturing”, without restricting the latter concept in any way. This is in accordance with the broad interpretation generally accorded to the term “taking” in the context of international wildlife law, as covering all types of anthropogenic impacts or removals. ASCOBANS does not truncate the meaning of “taking”, except to qualify that the requisite prohibition applies to “intentional” removals only. Morgan’s “rescue” was, of course, a deliberate act, meaning that it fell well within the scope of the prohibition called for under paragraph 4(a) of the ASCOBANS annex.¹⁹⁴

Likewise, when the Dutch Court could not fit the facts to the law, in order to reach the desired result, the court simply disregarded the legally binding definition of “taking” and held that Morgan’s removal from the Wadden Sea was the result of neither a “stranding” nor a “taking”. The Dutch court stripped Morgan of the legal protections that arise from, and are dependent on, those definitions under ASCOBANS and the CMS:¹⁹⁵

“8.1 . . . Furthermore, it is not in dispute that Morgan was not a by-catch or a stranded (deceased) animal as referred to in section 3 of the Annex to the ASCOBANS Agreement. The Division shares the District Court's view that accommodating Morgan does not classify either as "intentional taking", as referred to in section 4 of the Annex to the ASCOBANS Agreement.” [Emphasis added.] (Excerpt from Certified Translation, Decision of the Raad van State, Morgan Verdict, 23 April 2014, page 11, paragraph 8.1.)

A key consideration for understanding the significance of the transfer of Morgan to *Loro Parque* in 2011 lies with the details of *SeaWorld*’s loan of the original four (4) killer whales to *Loro Parque* in 2006. It should be noted that *Loro Parque* is not located on the Spanish mainland; rather it is situated on the Spanish island of Tenerife in the Canary Islands. *Loro Parque* is arguably Tenerife’s largest employer and it is the island’s principal tourist attraction.

The June 2005 letter of comity submitted to the NMFS, in support of the 2006 transfer of the original four killer whales from *SeaWorld* facilities in the US to *Loro Parque* was prepared by the Island Administration of Tenerife Territory’s Environment Management Technical Service.¹⁹⁶

The letter of comity makes a point of noting that the relations between *Loro Parque*, through the *Loro Parque Fundación*, and the Island Administration, through the area of environmental concern, have been constant and led to the signing of different agreements and conventions for the improvement of this mutual cooperation.

Furthermore, the letter of comity does not refer to scientific research as a basis for the import of the four original killer whales to *Loro Parque*. Rather, it describes the purpose as follows:

*“. . . the construction of a specific area for exhibition, maintenance and reproduction of 4 specimens of Orca or Killer Whale (*Orcinus orca*), as well as for importing these specimens from SeaWorld (United States).”* [Emphasis added.] (Excerpt from Certified Translation, Letter of Comity from Island Administration of Tenerife Territory's Environment Management Technical Service, 7 June 2005.)

With respect to *Loro Parque* to be used as a breeding facility, the letter goes on to state:

“Loro Parque’s experience in the captive breeding of specimen [sic] of aquatic mammals is guaranteed, since the facilities devoted to them in the park, such as the area of sea-lions and dolphins, where not only has been established [sic] a successful routine breeding in captivity, but the advanced knowledge in ethology has permitted to establish a highly satisfactory protocol of training and man-animal relation.” (Excerpt from Certified Translation, Letter of Comity from Island Administration of Tenerife Territory's Environment Management Technical Service, 7 June 2005.)

The 2006 transfer was not a typical breeding loan like those normally engaged in between marine parks and zoos, as *SeaWorld* was not sending its killer whales to *Loro Parque* to mate with *Loro Parque*'s killer whales. *Loro Parque* had no killer whales of its own at the time (and still doesn't in 2015) and in 2005 when the letter of comity was written, *Loro Parque* didn't even have facilities to house killer whales; the tanks were still under construction.

Additionally, within the context of a usual breeding loan the progeny are normally divided between the two facilities. However, in *Loro Parque*'s case, there have been two captive killer whale progeny (1 male and 1 female) born since the transfer of the original four (4) killer whales from *SeaWorld* to *Loro Parque*, and both progeny were assigned *SeaWorld* identifications codes for the MMIR and identified as *SeaWorld*'s property in its Form S-1 SEC filing. This suggests that *SeaWorld* is likely to claim any progeny of Morgan as its property as well.

In December 2010 the European Court of Justice ruled that Spain was failing to license zoos properly in a number of regions, including the Canary Islands.¹⁹⁷ The issue first arose in April 2002, the original deadline for transposing the 1999 Zoo Directive.¹⁹⁸ As Spain did not meet all the Directive's requirements at that time, the Commission responded with a series of letters which culminated in a referral to the European Court of Justice.

On 29 September 2011, the European Commission sent Spain a reminder about its obligation to comply with the Zoo Directive and the European Court of Justice ruling. The European Commission noted that while Spain did subsequently transpose the Zoo Directive into national law, the new laws had not been properly implemented at a local level. Furthermore, Spain had not provided the Commission with sufficient proof that a number of zoos were being managed in line with the EU requirements, in particular with regard to licenses, inspections and procedures for zoo closures. The zoos affected were in the regions of Aragon, Asturias, the Balearic Islands, the Canary Islands, Cantabria, Castile and Leon, Extremadura and Galicia.¹⁹⁹

It was during this same period that the Spanish Government – while defending itself in the European Court of Justice for violating the Zoo Directive – was making assurances to the Dutch Government and its Courts that the Zoo Directive was being fully implemented and enforced in Spain, including in its territory in the Canary Islands, and provided Morgan all the legal protection she needed:

“. . . the District Court rightly took into consideration that the State Secretary, when designating Loro Parque as a suitable location for Morgan, considered it important inter alia that Loro Parque had extensive experience with keeping orcas, that a plan was available for introducing Morgan to the other orcas present, and that the Spanish CITES authority had stated that no irregularities had occurred with regard to Loro Parque. There was no indication as yet that Morgan’s living at Loro Parque would not be conducive to her welfare. As the District Court rightly established, it follows from the Zoos Directive that living in a zoo and animal welfare are not mutually exclusive. Furthermore, based on European Union Law, including the Zoos Directive, there are legally enforceable guarantees for Morgan’s welfare.” [Emphasis added.] (Excerpt from Certified Translation, final decision of the Raad van State, 23 April 2014, page 15, paragraph 8.6.)²⁰⁰

The disconnect between the Island Administration of Tenerife Territory's Environment Management Technical Service and the Spanish CITES MA regarding the justification for approving and authorizing the transfer of Morgan to *Loro Parque* continued and is clearly illustrated in an executive report from the Spanish Ministry of the Environment.²⁰¹

This report was prepared in response to an inquiry by the Queen of Spain on behalf of the Great Ape Project concerning the adequacy of the facilities and appropriateness of the transfer of Morgan to *Loro Parque*. It states that the Spanish CITES Scientific Authority validated *Loro Parque* as an appropriate facility to care for Morgan based on the 19 November 2003 validation for the transfer of the original four (4) killer whales from *SeaWorld* to *Loro Parque* for public display.

The timeline of events that the Spanish Ministry of the Environment relied on for certification to the Dutch Government that *Loro Parque* is an appropriate facility for Morgan, further illustrates the Tenerife disconnect between the Spanish CITES MA and *Loro Parque*:

- **November 2003** - The General Subdirectorate issued a positive report on the *Loro Parque* installations that would house 3-4 live specimens of orca imported from *SeaWorld*. [The installations were being approved by the Spanish authorities even though the orca tanks had not yet been constructed.]
- **February 2004** – *SeaWorld* and *Loro Parque* enter into the *Loro Parque Killer Whale Service and Loan Agreement*.
- **June 2005** – Letter of Comity for *Loro Parque* is provided to the NMFS by the Island Administration of Tenerife Territory's Environment Management Technical Service. [The letter of comity relies on an inspection allegedly carried out on the building work still in the execution phase and notes that according to what has been executed, the building work corresponds to the rough drafts produced.]
- **September 2005** – NMFS provides *SeaWorld* with final pool of eight (8) killer whales from which two (2) males and two (2) females can be selected for export to *Loro Parque*.
- **February 2006** – *SeaWorld* exports four (4) captive-born, Annex B killer whales to *Loro Parque* for public display purposes under the MMPA.

The Spanish Ministry of the Environment report also states that *Loro Parque* identified three purposes that formed the basis for justifying the import of the four original killer whales from *SeaWorld* in 2006: Education, Breeding, and Scientific.²⁰²

As discussed in detail in the preceding sections of this white paper, species enhancement (breeding) and *bona fide* scientific research were not in 2006 -- and still are not in 2015 -- the purposes under the MMPA for the transfer and holding of the four *SeaWorld* killer whales to *Loro Parque*.

The NMFS authorized *SeaWorld* to select from a pool of killer whales at its three parks and instructed *SeaWorld* to pick two male and two female killer whales to send to *Loro Parque*. Therefore, it was apparently assumed that mating or animal breeding and husbandry would take place amongst *SeaWorld*'s captive-born Annex B killer whales, while held at *Loro Parque*. But what was not contemplated by the NMFS at the time of the MMPA authorization was the comingling of these four captive-born, Annex B killer whales with a rescued, wild-born Annex A killer whale that is subject to EU law and regulations, which laws also provide strict protections for Annex A specimens such as Morgan pursuant to the WTR.

The FMF contends that through the Spanish letter of comity and the MMPA (Section 104(c)(2)(D)),²⁰³ the NMFS and FWS can still exert some level of control over the original four killer whales sent to *Loro Parque* and the lone surviving progeny. *Inter alia*, this could extend to seizing and repatriating those killer whales into the US, if *Loro Parque* is held to be in violation of Morgan's EG-Certificate under EU law. Violation is occurring by allowing mating and breeding activity to take place and because of the active misrepresentation at multiple levels of the purpose for the US CITES permit as "scientific" rather than the issued "public display."

F. Ecotype Interbreeding – Wild and Captive Killer Whales

Finally, the ethical and scientific consequences of allowing a rescued wild-born killer whale to be bred with captive-born killer whales from different populations needs to be addressed and protocols and regulations developed to prevent breeding between different CITES designated biological ecotypes for commercial purpose and profit.

This is an issue that has been a subject of discussion for far too long without any satisfactory resolution. As a consequence, it continues to foster the incentive to engage in whale laundering activities in order to introduce new bloodlines of wild-sourced killer whales to captive populations. This thereby extends the available pool of commercially exploitable killer whales within the global public display industry.

In the particular case of Morgan, there is no scientific value or species preservation logic or necessity to justify breeding a rescued, wild-born Appendix II, Annex A, killer whale with *SeaWorld's* captive-born and commercially exploited Annex B killer whales at *Loro Parque*. Furthermore, *SeaWorld* and *Loro Parque* state that captive-born individuals can never be released into the wild; negating any reason to breed under a species preservation model, regardless of the source of the sire (i.e., under this model, even if sperm were sourced from a Norwegian wild male and Morgan was artificially inseminated, the offspring would be kept within the confines of the captivity industry, not introduced into the wild).

Once again, within this context it is pointed out that Morgan's EG-Certificate - as authorized by the Dutch CITES MA's governing cover letter to which the Certificate is appended – does not authorize *Loro Parque* (or *SeaWorld*) to use Morgan for breeding.²⁰⁴

"I therefore will issue an EG-Certificate for the transfer of the orca from the Dolfinarium, Harderwijk, to Loro Parque, Tenerife, on condition that the animal is kept for research. For this reason the clauses 18.8, 19.2 and 19.3 have been ticked." [Emphasis added.] (Excerpt from Certified Translation, Morgan's EG-Certificate Cover Letter by W.J.B.C Lauwerijssen on behalf of Dutch State Secretary of Economic Affairs, Agriculture and Innovation, 27 July 2011).

As discussed earlier, Morgan's EG-Certificate was issued pursuant to Article 8(3)(g) of Council Regulation (EC) No 338/97, which only allows Morgan to be held at *Loro Parque* for purposes of research aimed at the preservation or conservation of her species. An exemption for breeding under Article 8(3)(f) of Council Regulation (EC) 338/97 was not applied for by *Dolfinarium Harderwijk* or granted by the Dutch MA.²⁰⁵

Despite 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. According to Dr. Javier Almunia:²⁰⁶

"The CITES permit issued by the Dutch Government for Morgan clearly states that Morgan is to be used for the advancement of science/breeding or propagation/research or education or other non-detrimental purposes."
(Excerpt from Comments by Dr. Javier Almunia, November 2013)

Dr. Javier Almunia wrongly interprets Morgan's EG-Certificate without reference or adherence to the language of the actual EU Regulation (or the governing 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.

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 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.)²⁰⁷

"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.)²⁰⁸

Dr. Javier Almunia's position regarding the breeding of Morgan is troubling. He either does not understand the law or he chooses to ignore it. Even more disconcerting is his contention that breeding in captivity is a choice of the animals:²⁰⁹

"The fact is that animals reproduce instinctively, and are not able to control their sexual impulses or their reproduction." (Excerpt from Comments by Dr. Javier Almunia, November 2013)

The truth, however, is that in captivity the keepers determine if, when and with whom the animals will breed. Dr. Javier Almunia has even stated that Morgan "can be grouped in any possible configuration." (See the pie chart on page 68.) Therefore, it is possible to keep Morgan separated from the male killer whales at *Loro Parque*.

The intention to breed the wild-born female Morgan with *SeaWorld's* captive-born male killer whales at *Loro Parque* and establish a new bloodline for commercial gain is well documented as evidenced by comments from Dr. Javier Almunia and *Loro Parque's* owner, Wolfgang Kiessling in the Spanish media service EL DIA.es.²¹⁰

Thus it is patently clear that unless decisive action is taken immediately by one or more of the CITES MAs from the US, Spain or the Netherlands, Morgan will become pregnant with a wild-born/captive-born Norwegian/hybrid progeny, for purely commercial purposes and profit, in violation of the WTR and her EG-Certificate.

Due to the constraints of the MMPA and EU law, it would be very difficult if not impossible for *SeaWorld* to ever import Morgan into the United States.²¹¹ However, allowing this type of breeding activity to occur offshore at *Loro Parque* should be scrutinized as an effort to circumvent the provisions of the MMPA. In the course of the maneuverings that have been explained here, Morgan is vulnerable to exploitation; to be used to introduce a new bloodline into the captive population through her progeny, which could then be imported into *SeaWorld's* theme parks in the US for commercial purpose and profit or traded based on their high value of approximately US \$15 million to \$20 Million each.

This is "whale laundering".

VII. CONCLUSION

Wolfgang Kiessling, President of *Loro Parque* believes his park is the “Rolls Royce” of marine theme parks and he has said so.²¹² In fact Mr. Kiessling has a penchant for overstating *Loro Parque*'s competence to hold killer whales. In August 2011, Mr. Kiessling wrote a letter to Mr. Jan Reuvers a representative of *Dolfinarium Harderwijk*, to express support for *Dolfinarium Harderwijk* during the Dutch court proceedings regarding Morgan. In the letter, Mr. Kiessling said the information supplied by *Loro Parque* supports the necessary legal finding that *Loro Parque* not only meets the “Adequacy” test of Article 9(2) of Council Regulation (EC) 338/97 but far exceeds it.²¹³

But while Mr. Kiessling was doing his best to frame the Dutch court's perception of *Loro Parque* as an appropriate home for Morgan, *SeaWorld* was painting a much different picture of *Loro Parque* during the legal proceedings brought by the US Government against *SeaWorld* as a result of the death of *SeaWorld* trainer Dawn Brancheau. During the administrative law hearing, which ran from 19 September 2011 through 18 November 2011, *SeaWorld*'s attorney and multiple witnesses made statements and gave testimony calling into question *Loro Parque*'s competence to hold and care for killer whales.

This damaging criticism of *Loro Parque* includes the following excerpt from the official transcript of proceedings as stated by Carla Gunnin, *SeaWorld*'s lead counsel in the matter of Secretary of Labor vs. Sea World of Florida, LLC. (2011) US Occupational Safety and Health Review Commission (OSHRC) Docket No. 10-1705:²¹⁴

“*There has been no establishment that Loro Parque is a company that would be considered [by] someone as a leader in the field to be someone that you would attribute industry recognition from. In fact, the testimony that has been presented in this case would be the opposite. They're not an industry leader.*“ [Emphasis added.] (Carla Gunnin, Esq., trial objection made to Judge Welsch, OSHRC Docket No. 10-1705, 15 November 2011, Transcript of Proceedings, Volume VI, page 1118, line 18 through page 1119, line 7.)

This white paper is not the first time that concerns and complaints have been raised about *Loro Parque*. In a report from Susanne M. Allee^{[215](#)} dated 10 October 2010, followed by a letter from Dr. Naomi Rose on behalf of The Humane Society of the US, Animal Welfare Institute and the Whale and Dolphin Conservation Society^{[216](#)} dated 11 November 2010, red flags were raised with the NMFS, but the warnings went unheeded. Now in 2015, in light of the presence of the rescued, wild-born Morgan and the fact that she is now sexually mature, the conflict at *Loro Parque* can no longer be ignored.

Inconsistencies, ambiguities, loopholes or violations; regardless of the intent, there are consequences of each party's actions in the matter of Morgan and they must not and cannot be ignored any longer. If the CITES Secretariat, the European Commission, and the MMC working closely with the relevant Dutch and Spanish MAs and the NMFS and FWS do not act to address this problem now, it will continue to plague any legitimate use of killer whales and other cetaceans to advance scientific knowledge.

This white paper reports on the problem of international whale laundering, using Morgan as a case study. It illustrates the pressing need for and makes the case for, why it is essential that the purpose-of-transaction codes on CITES permits are identical on both export and import documents involving the same transaction.

The issue of comity is also critically important and clarification of the US Government's position is long overdue and necessary to maintain the integrity of the MMPA and avoid the mischief that ensues when adherence to US permit and purpose code designations are not honored or enforced by another country's CITES MA.

To ensure full and faithful compliance with the MMPA and to avoid complicity in violations concerning Morgan's EG-Certificate, the MMC, NMFS and FWS must focus on and resolve the issues that are raised herein, without further delay.

The discrepancies between the US and Dutch permits for the killer whales at *Loro Parque* are manifold and must be addressed. The corresponding conflicts between US and EU laws and conventions must also be resolved before the rescued, wild-born Morgan becomes pregnant. Otherwise, the whale laundering process will be facilitated by the three respective MAs, albeit completed by the businesses. Morgan and her progeny will be nothing more than commercial commodities used to advance corporate profit, rather than her being used in the role of legitimate science or conservation.

Respectfully submitted for your consideration, advice and action,

The Free Morgan Foundation.



Matthew V. Spiegl, J.D.
California, United States



Ingrid N. Visser, Ph.D.
Northland, New Zealand

APPENDIX 1 – Letter of Legal Merits

Letter from M.F. (Marq) Wijngaarden (3 July 2015) attorney at law at the Amsterdam Bar in the Netherlands and acting attorney for the 2011, 2012 and 2013 cases held in the Courts of the Netherlands with respect to Morgan.

This letter states that Morgan's EG-Certificate (transfer permit) and governing cover letter do not authorize breeding and further explains that the Dutch courts did not address or make any findings on the issue of Morgan's ownership which would support *SeaWorld*'s claim of owning her as reflected in its SEC filings.

Morgan's present holding arrangement with captive born male killer whales at *Loro Parque* represents an unauthorized and unacceptable breeding situation which *SeaWorld* and *Loro Parque* appear eager to exploit based on nothing more than their own self-serving interpretation of Morgan's permit coupled with the apparent disregard for the Dutch MA's governing cover letter.

No authoritative ruling -- judicial or administrative -- addressing the issue of Morgan's ownership or breeding/progeny pursuant to Morgan's EG-Certificate as read in context with the Dutch MA's governing cover letter has been issued to date; but such a ruling is necessary to ensure that the protections guaranteed Morgan under the EU WTR are not circumvented.

Mr. Wijngaarden represented the Orca Coalition (a coalition of marine preservation organizations) in proceedings before Dutch Courts concerning the captivity of Morgan in the Netherlands and her transfer to *Loro Parque*, Spain.

Reference:

http://www.freemorgan.org/pdfs/Wijngaarden-Marq-Letter-of-Legal-Merits_3-July-2015.pdf

<http://www.freemorgan.org/pdfs/Dutch-EG-Certificate-11NL11480820-and-Cover-Letter-27-July-2011.pdf>

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United States Marine Mammal Commission
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United States of America

Amsterdam, 3 July 2015
Onze ref. 20130062.MW/MW

Direct tel.nr: ++31-20-3446200
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Re.: Orca Morgan, letter of legal merits

Dear madams, sirs,

1. My name is M.F. (Marq) Wijngaarden, attorney at law at the Amsterdam Bar in the Netherlands. I have represented the Orca Coalition (a coalition of marine preservation organisations) in proceedings before Dutch Courts, concerning the captivity in the Netherlands and transfer to Loro Parque, Spain of an Orca widely known as Morgan. In this capacity I have closely cooperated with the Free Morgan Foundation, a member of the Orca Coalition.

2. I have read the white paper report that the Free Morgan Foundation has prepared (CITES and the Marine Mammal Protection Act: Comity and Conflict at Loro Parque.) , and feel that the points raised in the paper have merit with respect to certain unresolved issues of fact and law.

PRAKKEN D'OLIVEIRA HUMAN RIGHTS LAWYERS COÖPERATIEF U.A. INGESCHREVEN ONDER K.V.K. AMSTERDAM NR 63477645
IEDERE AANSPRAKELIJKHED IS BEPERKT TOT HET BEDRAG DAT IN HET DESBETREFFENDE GEVAL ONDER ONZE BEROEPSAANSPRAKELIJKSVERZEKERING WORDT UITBETAALD
ANY LIABILITY SHALL BE LIMITED TO THE AMOUNT WHICH IS PAID UNDER THE FIRM'S PROFESSIONAL LIABILITY POLICY IN THE MATTER CONCERNED

**Prakken
d'Oliveira**

3 July 2015, pagina 2

3. As the lawyer in these proceedings I have read Morgan's EU CITES permit and the cover letter, and in my opinion the cover letter modifies the EU CITES permit (serves as a controlling appendix to the permit) and prohibits breeding Morgan with other orca at Loro Parque. It is also my opinion that keeping Morgan in the same tanks with male orca at Loro Parque would be in violation of Morgan's CITES permit for "scientific research" because whether or not intended, the consequences of any natural mating activity amongst the orca while confined together in the Loro Parque tanks would still be a violation of Morgan's permit.

4. I have of course read the final verdict of the Raad van State dated 23 April 2014 and am familiar with the earlier court rulings and the position and statements of the Dutch Ministry (Bleker and Dijksma) regarding the justification for believing that Loro Parque is a suitable location for Morgan. The representations made by Loro Parque and the Spanish CITES authorities concerning scientific research for species enhancement/preservation activities at Loro Parque were the primary deciding factor for basing their decision to send Morgan there, together with "educational purposes" – which appear to be nothing more than Morgan's "public display" at Loro Parque, and were not mentioned in the CITES-permit – only in the covering letter. The purpose of the transfer of the original four orca from SeaWorld to Loro Parque was never presented or discussed in the Dutch Court proceedings and were not known by me until reading the report the Free Morgan Foundation prepared, especially that there was a conflict in the CITES purpose of transfer codes issued by the U.S. CITES management Authority and the representations made by the Spanish CITES Management Authority to the Dutch Government regarding the purpose of the orca at Loro Parque before Morgan was transferred.

5. Finally, the Dutch Courts did not consider or decide the issue of ownership as it pertains to Morgan, and I am not aware of any documents filed with the Courts or presented to or by the Dutch Ministry which document a valid sale of Morgan to SeaWorld or vest the Dolfinarium Harderwijk, Loro Parque, or SeaWorld with legal title or ownership in the wild killer whale (orca) known as Morgan. For Dutch law only the keeper of Morgan was relevant, ownership was not at all and was never an issue in the Dutch proceedings.

I hope to have informed you sufficiently. Would you need any further information or clarification, please do not hesitate and contact me.

Kind regards,



M.F. Wijngaarden
Attorney at law

APPENDIX 2 -

Killer Whales Held at Dolfinarium Harderwijk and Loro Parque:

There is a long history of *SeaWorld* killer whales passing through *Dolfinarium Harderwijk* dating back to 1976-1977. The close bond between these two marine theme parks and their historical cooperation in the capture of killer whales is noted in this letter from F. B. den Herder, Director of *Dolfinarium Harderwijk* to Dr. Lanny Cornell of *SeaWorld* in January 1987:

Dr. L.H. Cornell, D.V.M.
Zoological Director
Sea World Enterprises, Inc.
1720 South Shores Road
San Diego
Ca 92109
U.S.A.

FB-HM/RK-350 January 1987

Dear Dr. Cornell,

In autumn of 1976 and 1977 Sea World Inc. in cooperation with the Delfinarium of Harderwijk caught several Killer Whales (*Orcinus orca*) in the waters of Iceland. Two animals were kept at the Delfinarium of Harderwijk for display (one female called "Gudrun", code nr. 0eZH001, estimated date of birth: 1975; and one male called "Jaguar", code nr. 0eZH002, estimated date of birth: 1974).

Unfortunately the male died of anaemia one month after arriving at our park. Between 1976 and 1987 our female Killer Whale has lived without conspecifics companions. Fortunately social bonds were made between her and our Bottlenose Dolphins (*Tursiops truncatus*). However, she has recently reached a reproductive age (At 5 September 1986: Total length: 510 cm., Weight: 1850 kg.). In nature probably most ovulations in females of this species are followed by insemination by males. We would like to mimic this natural process which would be beneficial to the well-being of our female, but we have no possibility to provide a male Killer Whale.

For this reason we propose to you the possibility to send our female Killer Whale to one of the Sea World Inc. Killer Whale breeding facilities on a breeding loan basis for a period of at least 4 years. The ownership of the potential young should be decided on in a future stage of negotiation.

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Because "Gudrun" is a major attraction of our park, we are afraid that her absence will decrease the number of future visitors. To overcome this potential problem we request the exchange of two (male and female) False Killer Whales (*Pseudorca crassidens*) from the Sea World Inc. facilities to the Dolfinarium of Harderwijk for the same period that our female Killer Whale is at Sea World for breeding purposes. We are also interested in two (male and female or two females) Pacific White-sided Dolphins (*Lagenorhynchus obliquidens*). This would give the public a chance to come in contact with other species of toothed whales than the "Flipper" dolphins (*Tursiops truncatus*).

If you can agree with our proposal, we would like to exchange the animals in the beginning of November 1987. This will be immediately after the ending of our 1987 season. In case of a positive response could you propose an arrangement for the division of shipment costs?

You will understand that the proposed exchange will be dependent on the necessary permits from the Dutch and U.S. governments.

Thank you in advance for your effort.

Sincerely yours,


F.D. den Herder
Director

Letter from Mr. F.B. den Herder, Dolfinarium Harderwijk to Dr. Lanny Cornell, SeaWorld, January 1987. <http://www.pbs.org/wgbh/pages/frontline/shows/whales/seaworld/gudrun/>

A full historical listing of the killer whales which passed through or were held at *Dolfinarium Harderwijk* and a list of killer whales presently held at *Loro Parque* has been compiled and they are presented in chart form on the pages below.

LORO PARQUE ORCA (alive & deceased as of October 2015)¹. Dates given in YYYYMMDD format, animals listed in order of age, then acquisition date.

| CODE | NAME | GENDER | WILD/CAPTIVE BORN, SOURCE | ESTIMATED AGE at capture | DATE capture /birth | ARRIVAL at LP | DURATION at LP* | DESTINATION (OWNER) | DATE DECEASED |
|--------------------------------|------------------|--------|-----------------------------------|--------------------------------|--|------------------|---|---|--|
| NOA0005473 SWO-OO-9501 | Keto | ♂ | CAPTIVE; SeaWorld , USA | 0 | 19950617 | 20060213 | 3517 days (9 years, 7 months, 18 days) | Loro Parque (SeaWorld , USA) | Alive as of 20151001 |
| NOA0006172 SWF-OO-0401 | Skyla | ♀ | CAPTIVE; SeaWorld , USA | 0 | 20040209 | 20060213 | 3517 days (9 years, 7 months, 18 days) | Loro Parque (SeaWorld , USA) | Alive as of 20151001 |
| NOA0006021 SWC-OO-0226 | Kohana | ♀ | CAPTIVE; SeaWorld , USA | 0 | 20020504 | 20060213 | 3517 days (9 years, 7 months, 18 days) | Loro Parque (SeaWorld , USA) | Alive as of 20151001 |
| NOA0005931 SWF-OO-0001 | Tekoa | ♂ | CAPTIVE; SeaWorld , UA | 0 | 20001108 | 20060213 | 3517 days (9 years, 7 months, 18 days) | Loro Parque (SeaWorld , USA) | Alive as of 20151001 |
| NOA0006690 SWF-OO-1003 | Adán | ♂ | CAPTIVE; Loro Parque, Spain | 0 | 20101012 | 20101012 | 1815 days (4 years, 11 months, 19 days) | Loro Parque (SeaWorld , USA) | Alive as of 20151001 |
| NOA0010000 SWF-OO-1201 | Victoria / Vicky | ♀ | CAPTIVE; Loro Parque, Spain | 2.4m, 152 kg 0 yr | 20120803 ¹ (20120817) ² | 20120817 | 300 days (9 months, 27 days) DIED AT LP | Loro Parque (SeaWorld , USA) | 20130616 ³ 20130613 ⁴ |
| Microchip # 528210002335926 | Morgan | ♀ | WILD; Norway (Netherlands) | >3 years | 20100623 | 20111129 | 1815 days (3 years, 10 months, 2 days) | Loro Parque (ownership claimed by SeaWorld , USA) | Alive as of 20151001 |

* As of 20151001

Continued on next page

¹ Date given as 08/03/2012 (03 August 2012, in USA date format of MM/DD/YYYY) in the Marine Mammal Inventory Report, filed with the USA Government (copy acquired through FOIA #on 16 December 2013, available at: <http://www.freemorgan.org/pdfs/MMIR-16-December-2013-SW-Killer-Whales-at-LP.pdf>). However, see footnote 2.

² Date given as 17 August 2012 on the *Loro Parque* official website, archived on the internet at: <https://web.archive.org/web/20150924225941/http://blog.loroparque.com/victoria-is-born/>

³ Date given as 16 August 2012 on the *Loro Parque* official facebook page, via Yahoo News; <http://news.yahoo.com/breaking-seaworld-orca-dies-spain-184028768.html> However, see footnote 4.

⁴ Date given as 06/13/2012 (13 June 2012, in USA date format of MM/DD/YYYY) in the Marine Mammal Inventory Report, filed with the USA Government (copy acquired through FOIA #on 16 December 2013, available at: <http://www.freemorgan.org/pdfs/MMIR-16-December-2013-SW-Killer-Whales-at-LP.pdf>). However, see footnote 3.

DOLFINARIUM HARDERWIJK ORCA (alive & deceased as of October 2015)^o. Dates given in YYYYMMDD format, animals listed in order of capture date. If exact dates are not known, default date of 01 of each month is used.

| CODE | NAME | GENDER | WILD/CAPTIVE BORN, SOURCE | ESTIMATED SIZE /AGE at capture | DATE of capture/birth | ARRIVAL at DH | DEPARTURE from DH | DURATION at DH | DESTINATION (s) | DATE DECEASED |
|---------------------------|--------------------------------|--------|--|--------------------------------|-----------------------|---------------|-------------------|--|--|---------------|
| PH0002 | Tula | ♂ | WILD; Malcolm Island, British Columbia, Canada | ~ 4m, 1,100 kg | 196807XX | 19680817 | - | 67 days DIED AT DH | - | 19681023 |
| NOA0002920 SWFOO8702 | Gudrun | ♀ | WILD; Skeiðarársandur, Iceland | 2.7 m, 300 kg | 19761025 | 19761123 | 19871116 | 4010 days (10 years, 11 months, 24 days) | 19871116, SeaWorld Orlando, Florida, USA | 19960225 |
| NOA0002506 SWC-00-7602 | Kenau | ♀ | WILD; Skeiðarársandur, Iceland | ~ 1 year | 19761025 | 19761113 | 197705XX | 69 days (5 months, 18 days) | SeaWorld, San Diego, California, USA | 19910806 |
| NOA0002508 SWC-00-7705 | Canuck (2) | ♂ | WILD; Skeiðarársandur, Iceland | ~ 2 years | 19771012 | 197711XX | 197712XX | 30 days (1 month) | SeaWorld, San Diego, California, USA | 19810802 |
| FOR0000436 | Hoi Wai / Suzie Wong / Peanuts | ♀ | WILD; Skeiðarársandur, Iceland | < 1 year | 19771012 | 197711XX | 197712XX | 30 days (1 month) | Windsor Safari Park, England. Clacton Pier, England → Ocean Park, Hong Kong | 19970421 |
| NOA0002509 SWC-00-7706 | Kandu (5) | ♀ | WILD; Skeiðarársandur, Iceland | ~ 3 years | 19771012 | 197711XX | 197712XX | 30 days (1 month) | SeaWorld, San Diego, California, USA | 19890821 |
| NOA0002507 SWF-00-7701 | Kona (2) | ♀ | WILD; Skeiðarársandur, Iceland | ~ 2 years | 19771012 | 197711XX | 197712XX | 30 days (1 month) | SeaWorld Orlando, Florida, USA | |

Continued on next page

Cont'd. DOLFINARIUM HARDERWIJK ORCA (alive & deceased as of October 2015)^Ω. Dates given in YYYYMMDD format, animals listed in order of capture date. If exact dates are not known, default date of 01 of each month is used.

| CODE | NAME | GENDER | WILD/CAPTIVE BORN, SOURCE | ESTIMATED SIZE /AGE at capture | DATE of capture/birth | ARRIVAL at DH | DEPARTURE from DH | DURATION at DH | DESTINATION (s) | DATE DECEASED |
|--|--------|--------|--------------------------------------|--------------------------------|-----------------------|---------------|-------------------|--|--|----------------------|
| FOR0000091 | Magnus | ♂ | WILD; Skeiðarársandur, Iceland | ~ 1 year | 19771012 | 19771026 | 19771218 | 53 days (1 month, 22 days) DIED AT DH | - | 19771218 |
| UNK0000585 NOAA0003035 SWF-00-9101 | Winnie | ♀ | WILD; Skeiðarársandur, Iceland | < 1 year | 19771012 | 197711XX | 19780317 | 136 days (4 months, 16 days) | Windsor Safari Park, England → October 1991, SeaWorld, Texas USA | 20020411 |
| Microchip # 528210002335926 | Morgan | ♀ | WILD; Norway (Netherlands) | >3 years | 20100623 | 20100623 | 20111129 | 524 days (1 year, 5 months, 6 days) | Loro Parque (ownership claimed by SeaWorld, USA) | Alive as of 20151003 |

^Ω Sources;

Dudok van Heel, W.H., Kamminga, C & van der Toorn, J. D. (1982) An experiment in two-way communication in Orcinus orca L. Aquatic Mammals 9(3): 69-82;

http://aquaticmammalsjournal.org/share/AquaticMammalsIssueArchives/1982/Aquatic_Mammals_9_3/Dudok_Van_Heel.pdf

Hoyt, E. (1984). *Orca: The whale called killer* (3rd ed.). Ontario: Camden House Publishing Ltd. Pp 291; <http://www.amazon.com/Orca-The-Whale-Called-Killer/dp/0920656250>

Sigurjonsson, J., & Leatherwood, S. (1988). The Icelandic live-capture fishery for killer whales, 1976-1988. *Rit Fiskideildar*, 11(North Atlantic killer whales), 307-316; <http://www.orcahome.de/iceland.htm>

Orca Home www.orcahome.de;

Cetabase www.ceta-base.com;

The Orca Project <https://theorcaproject.wordpress.com/2011/03/18/noaa-nmfs-marine-mammal-inventory-report-deficiencies/>

Media/News sources online (e.g., Dutch Press Image Archive <http://www.geheugenvannederland.nl/?/nl/items/ANP01:14164426>, Frontline, Whale of a Business <http://www.pbs.org/wgbh/pages/frontline/shows/whales/etc/chart1.html>)

Freedom of Information Act (FOIA) requests from various parties (e.g., Scarpuzzi (2015) FOIA-DOC-NOAA-2015-001242

<https://foiaonline.regulations.gov/foia/action/public/view/request?objectId=090004d2806e1115>)

APPENDIX 3 – Table of Laws and Regulations Cited:

Acts, Agreements, Conventions, Directives, Legislation, Regulations and Treaties referenced in this white paper are listed alphabetically and include jurisdictional reference.

| | |
|---|--------------------------------------|
| Animal Welfare Act (AWA). https://www.aphis.usda.gov/animal_welfare/downloads/Animal%20Care%20Blue%20Book%20-%202013%20-%20FINAL.pdf | United States (US) |
| Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas (ASCOBANS). http://www.ascobans.org/ | Baltic & North Sea bounded countries |
| Annex A (wild specimens within Appendix II), (to Regulation (EC) 338/97, Protection of Species of Wild Fauna and Flora. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1997R0338:20080411:EN:PDF | European Union (EU) |
| Annex B (captive-bred and captive-born specimens within Appendix II), to Regulation (EC) 338/97, Protection of Species of Wild Fauna and Flora. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1997R0338:20080411:EN:PDF | European Union (EU) |
| Appendix II to CITES (Convention on International Trade in Endangered Species of Wild Fauna and Flora. https://www.cites.org/eng/app/index.php | International |
| Bern Convention. http://www.coe.int/t/dg4/cultureheritage/nature/bern/default_en.asp | European Union (EU) |
| Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). https://www.cites.org/ | International |
| Convention on Migratory Species (CMS) (also known as the Bonn Convention). http://www.cms.int/en/legalinstrument/cms | International |
| Habitats Directive (Council Directive 92/43/EEC). http://ec.europa.eu/environment/nature/legislation/habitatsdirective/index_en.htm | European Union (EU) |
| Council Directive 86/1609/EEC, Animals used for Scientific Purposes). http://ec.europa.eu/environment/chemicals/lab_animals/home_en.htm | European Union (EU) |
| Council Regulation (EC) 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein. http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:31997R0338 | European Union (EU) |
| Commission Regulation (EC) No 865/2006 of 4 May 2006 laying down detailed rules concerning the implementation of Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2006R0865:20080225:EN:PDF | European Union (EU) |
| Commission Recommendation 2007/425/EC of 13 June 2007 identifying a set of actions for the enforcement of Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein. http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2007:159:0045:0047:EN:PDF | European Union (EU) |

| | |
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| Commission Regulation (EU) No 1320/2014 of 1 December 2014 amending Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein. http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32014R1320 | European Union (EU) |
| Dutch Flora and Fauna Act (FF Act). http://faolex.fao.org/cgi-bin/faolex.exe?rec_id=012500&database=faolex&search_type=link&table=result&lang=en&format_name=@ERALL | Kingdom of the Netherlands (NL) |
| Marine Mammal Protection Act (MMPA). http://www.nmfs.noaa.gov/pr/laws/mmpa/ | United States (US) |
| Securities and Exchange Commission (SEC) Rule 10B-5 . Title 17 Code of Federal Regulations (CFR) Part 240.10B-5 http://www.gpo.gov/fdsys/pkg/CFR-2011-title17-vol3/pdf/CFR-2011-title17-vol3-sec240-10b-5.pdf | United States (US) |
| Wildlife Trade Regulations. The provisions of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) have to be implemented uniformly in all EU Member States. CITES is implemented in the EU through a set of Regulations known as the EU Wildlife Trade Regulations. Currently these are <i>Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein</i> (the Basic Regulation), <i>Commission Regulation (EC) No 865/2006</i> (as amended by <i>Commission Regulation (EC) No 100/2008</i> , <i>Commission Regulation (EU) No 791/2012</i> and <i>Commission Implementing Regulation (EU) No 792/2012</i>) <i>laying down detailed rules concerning the implementation of Council Regulation (EC) No 338/97</i> (the Implementing Regulation), and <i>Commission Implementing Regulation (EU) No 792/2012 of 23 August 2012 laying down rules for the design of permits, certificates and other documents provided for in Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating the trade therein and amending Regulation (EC) No 865/2006</i> (the Permit Regulation). Commission Recommendation to Member States (Commission Recommendation No 2007/425/EC identifying a set of actions for the enforcement of Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein, commonly referred to as the 'EU Enforcement Action Plan') specifies further the measures that should be taken for enforcement of the EU Wildlife Trade Regulations. http://ec.europa.eu/environment/cites/legislation_en.htm | European Union (EU) |
| Zoo Directive (Council Directive 1999/22/EC) http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31999L0022&from=EN | European Union (EU) |

ENDNOTES

¹ The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) is an international agreement to which States (countries) adhere voluntarily. States that have agreed to be bound by the Convention ('joined' CITES) are known as Parties. Although CITES is legally binding on the Parties – in other words they have to implement the Convention – it does not take the place of national laws. Rather it provides a framework to be respected by each Party, which has to adopt its own domestic legislation to ensure that CITES is implemented at the national level. Its aim is to ensure that international trade in specimens of wild animals and plants does not threaten their survival. The covered specimens include all species of cetaceans (whales, dolphins and porpoises).
<http://www.cites.org/>

² The EU Habitats Directive (together with the Birds Directive) forms the cornerstone of Europe's nature conservation policy. It is built around two pillars: the Natura 2000 network of protected sites and the strict system of species protection. All in all the directive protects over 1000 animals and plant species and over 200 so called "habitat types" (e.g. special types of forests, meadows, wetlands, etc.), which are of European importance.

http://ec.europa.eu/environment/nature/legislation/habitatsdirective/index_en.htm

CITES is buttressed in the EU by Regulation (EC) No. 338/97 on the Protection of Species of Wild Fauna and Flora by Regulating Trade Therein (CITES Regulation). The EU provision lists killer whales in its Appendix A as a species for which all commercial and translocation activities are prohibited without prior approval, thereby prescribing a stricter regime than CITES itself
<http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:31997R0338&from=en>

Also note that the Netherlands has a law specifically for protecting wild species, the Flora and Fauna Act (FF Act). The European treaties and directives (Habitat and Bird Directives) and international treaties (CITES) have been translated in this Act. It regulates the protection of species, establishment of protected habitats, possibilities for management and damage control, and trade in protected species.
http://faolex.fao.org/cgi-bin/faolex.exe?rec_id=012500&database=fao&search_type=link&table=result&lang=eng&format_name=@ERALL

Under the Dutch FF Act protected species are appointed under article 3, 4 and 5 (and further specified in Designation order). All endemic species through article 4 and exotic through article 5 (mostly the CITES species; listed with automatic reference to EU regulations). Article 13 gives all prohibitions and regulations (not allow take, import, export, sale, trade etc.) Article 75 gives the possibility to have exemptions (to allow actions/trade/import allowed internationally under CITES)

See full text of Dutch FF Act (in Dutch). <http://faolex.fao.org/docs/texts/net17422.doc>

³ Due to the European Single Market and the absence of systematic border controls within the EU, the provisions of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) have to be implemented uniformly in all EU Member States. CITES is implemented in the EU through a set of Regulations known as the EU Wildlife Trade Regulations (WTR). Currently these are Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating trade therein (the Basic Regulation), Commission Regulation (EC) No 865/2006 (as amended by Commission Regulation (EC) No 100/2008, Commission Regulation (EU) No 791/2012 and Commission Implementing Regulation (EU) No 792/2012) laying down detailed rules concerning the implementation of Council Regulation (EC) No 338/97 (the Implementing Regulation), and Commission Implementing Regulation (EU) No 792/2012 of 23 August 2012 laying down rules for the design of permits, certificates and other documents provided for in Council Regulation (EC) No 338/97 on the protection of species of wild fauna and flora by regulating the trade therein and amending Regulation (EC) No 865/2006 (the Permit Regulation).

http://ec.europa.eu/environment/cites/legislation_en.htm

⁴ The US Marine Mammal Protection Act (MMPA) (16 U.S.C. 1361-1407) was enacted in 1972 in partial response to growing concerns among scientists and the general public that certain species and populations of marine mammals were in danger of extinction or depletion as a result of human activities. The MMPA includes a general moratorium on the taking and importing of marine mammals, which is subject to a number of exceptions. The MMPA also established the Marine Mammal Commission and provides the authority under which the Commission operates.

<http://www.nmfs.noaa.gov/pr/laws/mmpa/text.htm>

See also [Title 50 Code of Federal Regulations \(CFR\) Section 216 et seq.](#).

⁵ The National Marine Fisheries Service (NMFS) is a division of the US Department of Commerce, National Oceanic and Atmospheric Administration (NOAA) and is the US agency responsible for implementing the Marine Mammal Protection Act (MMPA).

⁶ Letter from Robert H. Mattlin, Executive Director, Marine Mammal Commission to Donald R. Knowles, Director, Office of Protected Resources, National Marine Fisheries Service (**3 April 2002**) commenting on public display permits under the MMPA, the application of the MMPA to foreign facilities and stating the Commission's position on comity. (Document produced by the NMFS pursuant to a Freedom of Information Act (FOIA) request, NMFS 2011 No. 00327.)

<http://www.freemorgan.org/pdfs/Mattlin-Robert-MMC-Letter-to-Knowles-Donald-NMFS-3-April-2002-RE-Comity.pdf>

⁷ https://cites.org/common/cop/14/raw_docs/E-US02-Purpose_of_transaction_codes.pdf

⁸ Letter from Robert H. Mattlin, Executive Director, Marine Mammal Commission to Donald R. Knowles, Director, Office of Protected Resources, National Marine Fisheries Service (**3 April 2002**) at p. 10.

<http://www.freemorgan.org/pdfs/Mattlin-Robert-MMC-Letter-to-Knowles-Donald-NMFS-3-April-2002-RE-Comity.pdf>

⁹ www.freemorgan.org

¹⁰ Comments of the Free Morgan Foundation to US Fish and Wildlife Service (US CITES MA) **10 July 2015** RE: Provisional Agenda Items for CITES CoP17 (Johannesburg, South Africa, 2016)
<http://www.freemorgan.org/pdfs/FMF-Letter-to-US-FWS-10-July-2015-RE-CITES-CoP17-FWS-HQ-IA-2014-0018.pdf>

¹¹ See adoption of Council Regulation (EC) No. 338/97 of **9 December 1996**.
<http://www.freemorgan.org/pdfs/EC-Council-Regulation-338-97.pdf>

See Commission Regulation (EC) No. 865/2006 of **4 May 2006**.
<http://www.freemorgan.org/pdfs/EC-Commission-Regulation-865-2006.pdf>

See also Commission Implementing Regulation (EU) No. 792/2012 of **23 August 2012**.
<http://www.freemorgan.org/pdfs/EU-Commission-Implementing-Regulation-792-2012-Forms-Permits-Certificates.pdf>

¹² See Commission Recommendation 2007/425/EC adopted **June 2007**.
<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007H0425&from=EN>

¹³ See TRAFFIC Europe report for the European Commission, Brussels, Belgium (**December 2007**). *Study on the Effectiveness of the EC Wildlife Trade Regulations.*

<http://www.freemorgan.org/pdfs/Study-on-the-Effectiveness-of-the-EC-Wildlife-Trade-Regulations-A-Traffic-Europe-report-for-the-European-Commission-December-2007.pdf>

¹⁴ <http://www.freemorgan.org/pdfs/EC-Council-Regulation-338-97.pdf>

¹⁵ <http://www.freemorgan.org/pdfs/EC-Commission-Regulation-865-2006.pdf>

¹⁶ See *Study on the Effectiveness of the EC Wildlife Trade Regulations* at p. 11.
<http://www.freemorgan.org/pdfs/Study-on-the-Effectiveness-of-the-EC-Wildlife-Trade-Regulations-A-Traffic-Europe-report-for-the-European-Commission-December-2007.pdf>

¹⁷ Ibid., at pp. 46-47.

¹⁸ Ibid., at pp. 52-53.

¹⁹ See Article 60 of Commission Regulation (EC) 865/2006:

"Without prejudice to Article 9 of Regulation (EC) No 338/97 a derogation from the prohibition laid down in Article 8(1) thereof may be granted to scientific institutions, approved by a management authority in consultation with a scientific authority, by the issue of a certificate covering all specimens in their collection of species listed in Annex A to that Regulation, that are intended for either of the following:

- (1) *captive breeding or artificial propagation from which conservation benefits will accrue to the species concerned;*
- (2) *research or education aimed at the preservation or conservation of the species concerned.*

Any sale of specimens covered by such a certificate may be made only to other scientific institutions holding such a certificate." [Emphasis added.]

<http://www.freemorgan.org/pdfs/EC-Commission-Regulation-865-2006.pdf>

²⁰ See *Dolfinarium Harderwijk Dispensation FF/75A/2008/064* with Certified Translation at condition No's 1, 2, 6, 8, 9 and 11:

"1. This dispensation is subject to the following conditions:

2. The management of the dispensation holder must monitor the strict compliance with this dispensation and the general and specific conditions it contains . . .

6. The operations specified may only be performed in relation to the projects 'Accommodation and Rehabilitation at Dolfinarium', 'Scientific Research at Dolfinarium Harderwijk' and 'Dolfinarium Education', in accordance with the appendices attached to the application. . .

8. Captured specimens of cetaceans (Cetaceae) may be kept temporarily for rehabilitation purposes, with the aim of releasing them at a later stage. If release is not possible, such animals may be kept permanently for the purpose of conducting scientific research that is relevant in the context of obligations imposed by the EU Habitats Directive, the Bern Convention and ASCOBANS. The scientific research has to be conducted in accordance with a research plan that must be submitted to the National Service for the implementation of Regulations.

9. As soon as possible after revalidation (and, where applicable, research), stranded and captured animals must be released into a suitable habitat as close as possible to the place where they were found. . .

11. It is not permitted to use the animal species listed in Annex A to Regulation (EC) 338/97 for predominantly commercial purposes, as referred to in Article 8(1) of that Regulation.” [Emphasis added.]

<http://www.freemorgan.org/pdfs/Dolphinarium-Harderwijk-Dispensation-FF75A2008064-2009-to-2014.pdf>

²¹ Compare Articles 48 and 59 with Article 60 of Commission Regulation (EC) 865/2006.

<http://www.freemorgan.org/pdfs/EC-Commission-Regulation-865-2006.pdf>

²² See *Dolphinarium Harderwijk’s Dispensation FF/75A/2008/064*.

<http://www.freemorgan.org/pdfs/Dolphinarium-Harderwijk-Dispensation-FF75A2008064-2009-to-2014.pdf>

²³ http://ec.europa.eu/environment/cites/gaborone_en.htm

²⁴ See chronological summary of the proceedings at page 2 of Certified Translation of the final verdict of the Raad van State. <http://www.freemorgan.org/pdfs/Morgan-Appeal-Final-Verdict-Raad-van-State-23-April-2014-with-Official-English-Translation.pdf>

²⁵ See Morgan’s Dutch EG-Certificate No. 11 NL 114808/20 and Dutch MA governing cover letter with Certified Translation.

<http://www.freemorgan.org/pdfs/Dutch-EG-Certificate-11NL11480820-and-Cover-Letter-27-July-2011.pdf>

²⁶ If captive or artificially propagated stock is to be used, it must be from a population which has been soundly managed both demographically and genetically, according to the principles of contemporary conservation biology. (IUCN Guidelines for re-introductions issued in 1998 V(4), page 8.)

²⁷ Translocation of a population into the close vicinity of a closely related species may result in inter-specific hybridisation which would not have occurred naturally. This is particularly likely in cases where a conservation introduction moves a species out of its extant range and overcomes natural geographical barriers to hybridisation with related species. In these situations, hybridization can potentially threaten the genetic integrity/distinctiveness of the resident species, and in extreme cases, extinction-by-hybridisation is possible. (IUCN (2015) Guidelines for Reintroductions and other Conservation Translocations, 6.6 Gene escape, page 22.)

²⁸ Letter from Sharon Dijksma, Dutch Minister for Agriculture to Matthew Spiegl, Free Morgan Foundation **12 February 2014** regarding Dutch Government response to FMF claim of ownership/guardianship. <http://www.freemorgan.org/pdfs/Dijksma-Sharon-Dutch-Minister-Letter-to-Spiegl-Matthew-FMF-RE-Morgan-Ownership-Guardianship-12-February-2014.pdf>

²⁹ EU Wildlife Trade Regulations – Council Regulation (EC) 338/97.

<http://www.freemorgan.org/pdfs/EC-Council-Regulation-338-97.pdf>

³⁰ See Morgan’s Dutch EG-Certificate No. 11 NL 114808/20 and Dutch MA governing cover letter with Certified Translation.

<http://www.freemorgan.org/pdfs/Dutch-EG-Certificate-11NL11480820-and-Cover-Letter-27-July-2011.pdf>

³¹ *SeaWorld wants to acquire Dutch killer whale (19 July 2011)* Jason Garcia, Orlando Sentinel.
http://articles.orlandosentinel.com/2011-07-19/business/os-seaworld-killer-whale-morgan-20110719_1_loro-parque-killer-whale-experts-killer-whale

³² The instruction for Box No. 1 of the EG-Certificate clearly states that the applicant is to list the full name and address of the holder of the certificate, not of an agent.

See Morgan's Dutch EG-Certificate No. 11 NL 114808/20 and Dutch MA governing cover letter with Certified Translation.

<http://www.freemorgan.org/pdfs/Dutch-EG-Certificate-11NL11480820-and-Cover-Letter-27-July-2011.pdf>

³³ Species covered by CITES are listed in different appendices according to their conservation status:
<http://www.cites.org/eng/app/index.php>

Appendix I includes species threatened with extinction and provides the greatest level of protection, including restrictions on commercial trade.

Appendix II includes species that although currently not threatened with extinction, may become so without trade controls. Regulated trade is allowed provided that the exporting country issues a permit based on findings that the specimens were legally acquired, and the trade will not be detrimental to the survival of the species or its role in the ecosystem.

Appendix III includes species for which a country has asked other CITES Parties to help in controlling international trade. Trade in Appendix-III species is regulated using CITES export permits (issued by the country that listed the species in Appendix III) and certificates of origin (issued by all other countries).

³⁴ See Council Regulation (EC) 338/97.
<http://www.freemorgan.org/pdfs/EC-Council-Regulation-338-97.pdf>

Council Regulation (EC) 338/97, which applies the CITES agreement in law in the EU, lists the species in four annexes to the regulation: http://ec.europa.eu/environment/cites/legislation_en.htm#chapter2

Annex A - all CITES Appendix I species, some CITES Appendix II and III species for which the Community has adopted stricter domestic measures, and some non-CITES species

Annex B - all other CITES Appendix II species, some CITES Appendix III species, and some non-CITES species

Annex C - all other CITES Appendix III species

Annex D - some CITES Appendix III species for which the Community holds a reservation, and some non-CITES species.

³⁵ See *Dolfinarium Harderwijk Dispensation FF/75A/2008/064* with Certified Translation at condition No. 11.
<http://www.freemorgan.org/pdfs/Dolfinarium-Harderwijk-Dispensation-FF75A2008064-2009-to-2014.pdf>

³⁶ <http://www.freemorgan.org/pdfs/Marine-Mammal-Data-Sheets-SW-Killer-Whales-to-LP-23-February-2006.pdf>

³⁷ <http://www.freemorgan.org/pdfs/US-CITES-Export-Permits-4-Killer-Whales-SW-to-LP-FOIA-FWS-2014-01150.pdf>

³⁸ The International Consortium on Combating Wildlife Crime (ICCWC) is the collaborative effort of five inter-governmental organizations working under the auspices of the CITES Secretariat to bring coordinated support to the national wildlife law enforcement agencies and to the sub-regional and regional networks that, on a daily basis, act in defense of natural resources.

The ICCWC partners are the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) Secretariat, INTERPOL, the United Nations Office on Drugs and Crime, the World Bank and the World Customs Organization. <http://www.cites.org/eng/prog/iccwc.php>

The ICCWC defines ‘Wildlife’ to mean all fauna and flora. ‘Fauna’ are animals and birds, such as tigers and falcons, but also includes fish and cetaceans such as killer whales.

‘Crime’, as far as ICCWC is concerned, refers to acts committed contrary to national laws and regulations intended to protect natural resources and to administer their management and use:

See ICCWC definition of Wildlife Crime.

<http://www.cites.org/eng/prog/iccwc.php/Wildlife-Crime>

See also United Nations (2012) Wildlife and Forest Crime Analytic Toolkit.

http://www.cites.org/common/resources/pub/ICCWC_Toolkit_v2_english.pdf

Relevant sections:

Tool I - Section 3.4 Trafficking, trade, sale and supply at page 41.

Tool I - Section 3.5 - Import and export offences at page 41.

Tool I - Section 4.1 - Document fraud and related matters at page 46.

Tool III - Section 3.3 - Confiscation of assets at page 132.

Tool III - Section 5 - Restitution, compensation and restoration at page 139.

Tool V7 – Section 1.2 - Cites Reporting at page 174.

³⁹ The International Consortium on Combating Wildlife Crime (ICCWC).

<http://www.cites.org/eng/prog/iccwc.php>

⁴⁰ See ICCWC definition of Wildlife Crime.

<http://www.cites.org/eng/prog/iccwc.php/Wildlife-Crime>

⁴¹ See discussion of general exemptions and derogations for internal trade at Section 2.7.4.

http://ec.europa.eu/environment/cites/info_permits_en.htm

⁴² See Article 8 of Council Regulation (EC) 338/97 – Provisions relating to the control of commercial activities. <http://www.freemorgan.org/pdfs/EC-Council-Regulation-338-97.pdf>

⁴³ See Commission Recommendation No 2007/425/EC.

<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32007H0425&from=EN>

⁴⁴ See Article 8 of Council Regulation (EC) 338/97 – Provisions relating to the control of commercial activities. <http://www.freemorgan.org/pdfs/EC-Council-Regulation-338-97.pdf>

⁴⁵ See MMPA Comity requirement - 50 CFR §216.33(b)(2): “Include a certification from the foreign government that: (i) The information set forth in the application is accurate; (ii) The laws and regulations of the foreign government involved allow enforcement of the terms and conditions of the permit, and that the foreign government will enforce all terms and conditions; and (iii) The foreign government involved will afford comity to any permit amendment, modification, suspension or revocation decision.” <http://www.gpo.gov/fdsys/pkg/CFR-2001-title50-vol2/pdf/CFR-2001-title50-vol2-part216-subpartD.pdf>

⁴⁶ Spanish Letter of Comity for transfer of killer whales from *SeaWorld* Facilities in the US to *Loro Parque* in 2006, with Certified Translation. <http://www.freemorgan.org/pdfs/Spanish-Letter-of-Comity-to-NMFS-SW-Killer-Whales-to-LP-7-June-2005.pdf>

⁴⁷ See Council Regulation (EC) 338/97.
<http://www.freemorgan.org/pdfs/EC-Council-Regulation-338-97.pdf>

⁴⁸ Species covered by CITES are listed in different appendices according to their conservation status:
<http://www.cites.org/eng/app/index.php>

⁴⁹ See Council Regulation (EC) 338/97.
<http://www.freemorgan.org/pdfs/EC-Council-Regulation-338-97.pdf>

Council Regulation (EC) 338/97, which applies the CITES agreement in law in the EU, lists the species in four annexes to the regulation: http://ec.europa.eu/environment/cites/legislation_en.htm#chapter2

⁵⁰ Marine Mammal Data Sheets for the four (4) original killer whales sent to *Loro Parque* in 2006 state that they are captive born. <http://www.freemorgan.org/pdfs/Marine-Mammal-Data-Sheets-SW-Killer-Whales-to-LP-23-February-2006.pdf>

Note that documents pertaining to US CITES permits and MMPA notice and transfer of *SeaWorld* killer whales to *Loro Parque* were obtained pursuant to the United States Freedom of Information Act (FOIA) requests to the U.S. Fish and Wildlife Service, the National Marine Fisheries Service (NOAA) and the United States Department of Agriculture (APHIS) including:

<http://www.freemorgan.org/pdfs/FWS-2014-01150-FOIA-Production-CITES-Export-Permits-SW-to-LP.pdf>

<http://www.freemorgan.org/pdfs/NMFS-Loro-Parque-Comity-NOAA-2011-00327-FOIA-Full-Release.pdf>

<http://www.freemorgan.org/pdfs/USDA-APHIS-AWA-Evaluation-4-Killer-Whales-SW-to-LP-USDA-FOIA-11-313.pdf>

See also Marine Mammal Inventory Report (MMIR) for killer whales at Loro Parque dated **29 December 2014** identifying all listed killer whales as captive born and omission of Morgan altogether. <http://www.freemorgan.org/pdfs/MMIR-29-December-2014-SW-Killer-Whales-at-LP.pdf>

⁵¹ *SeaWorld* 15-day notification and supporting documents for the application to export four (4) killer whales to Loro Parque pursuant to the public display provisions of the US MMPA in 2006.
<http://www.freemorgan.org/pdfs/SeaWorld-MMPA-15-Day-Public-Display-Transfer-Notification-to-NMFS-4-Killer-Whales-to-LP-22-June-2005.pdf>

⁵² SeaWorld US CITES export permit, application and supporting documents for the export of four (4) killer whales to *Loro Parque* in 2006.

<http://www.freemorgan.org/pdfs/US-CITES-Export-Permits-4-Killer-Whales-SW-to-LP-FOIA-FWS-2014-01150.pdf>

⁵³ See <http://www.cites.org/eng/app/index.php>

⁵⁴ See http://ec.europa.eu/environment/cites/legislation_en.htm#chapter2

⁵⁵ Killer whales, orcas (*Orcinus orca*) are classified as Appendix II, Annex A species.

See, Official Journal of the European Union, Commission Regulation (EU) No 1320/2014, at page 17.
http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:JOL_2014_361_R_0001&from=EN

See http://www.speciesplus.net/#/taxon_concepts/6391/legal

⁵⁶ Morgan's EG-Certificate No. 11 NL 114808/20 and Dutch MA governing cover letter with Certified Translation.

<http://www.freemorgan.org/pdfs/Dutch-EG-Certificate-11NL11480820-and-Cover-Letter-27-July-2011.pdf>

⁵⁷ <http://www.freemorgan.org/pdfs/US-CITES-Export-Permits-4-Killer-Whales-SW-to-LP-FOIA-FWS-2014-01150.pdf>

⁵⁸ <http://www.freemorgan.org/pdfs/CITES-Trade-Database-2006-SW-to-LP-United-States-EXPORT-Purpose.pdf>

<http://www.freemorgan.org/pdfs/CITES-Trade-Database-2006-SW-to-LP-Spanish-IMPORT-Purpose.pdf>

⁵⁹ CITES Trade Database Guide - See page 12 for discussion of purpose and source codes.
http://trade.cites.org/cites_trade_guidelines/en-CITES_Trade_Database_Guide.pdf

⁶⁰ http://www.cites.org/common/cop/14/raw_docs/E-US02-Purpose_of_transaction_codes.pdf

⁶¹ See chronological summary of the proceedings at page 2 of Certified Translation of the final verdict of the Raad van State. <http://www.freemorgan.org/pdfs/Morgan-Appeal-Final-Verdict-Raad-van-State-23-April-2014-with-Official-English-Translation.pdf>

⁶² See the Spanish Ministry report on the installations at *Loro Parque*, Tenerife, for the keeping of an individual *Orcinus orca* from Holland, with Certified Translation.

<http://www.freemorgan.org/pdfs/Spanish-Informe-Ministerio-Orca-Morgan-16-May-2012-with-English-translation.pdf>

⁶³ Differences between EU and CITES. <http://www.freemorgan.org/pdfs/The-Differences-Between-EU-and-CITES-Provisions-in-a-Nutshell.pdf>

See <http://www.freemorgan.org/pdfs/Wildlife-Trade-Regulations-in-EU-An-Introduction-to-CITES-and-its-Implementation-in-the-EU.pdf>

See also <http://www.freemorgan.org/pdfs/European-Commission-and-TRAFFIC-2015-Reference-Guide-to-the-European-Union-Wildlife-Trade.pdf>

⁶⁴ EU Habitats Directive.

http://ec.europa.eu/environment/nature/legislation/habitatsdirective/index_en.htm

⁶⁵ <http://www.freemorgan.org/pdfs/Greenwood-Andrew-Veterinarian-Health-Assessment-of-Killer-Whale-Morgan-19-November-2013.pdf>

⁶⁶ Morgan's permit does not authorize breeding. See Morgan's Dutch EG-Certificate No. 11 NL 114808/20 and Dutch MA governing cover letter with Certified Translation.

<http://www.freemorgan.org/pdfs/Dutch-EG-Certificate-11NL11480820-and-Cover-Letter-27-July-2011.pdf>

See also APPENDIX 1 – Letter of Legal Merits.

http://www.freemorgan.org/pdfs/Wijngaarden-Marq-Letter-of-Legal-Merits_3-July-2015.pdf

⁶⁷ Ibid.

⁶⁸ Ibid.

⁶⁹ Hargrove, J (2015) Beneath the Surface. Killer whales, SeaWorld and the truth beyond *Blackfish*. Palgrave Macmillan, New York. Pp 264. At page 152-153 “According to the newspaper U-T San Diego, Dennis Spiegel, president of International Theme Park Services, a Cincinnati-based leisure consultancy, said a study by his company put a price of about \$15 million to \$20 million on each of *SeaWorld’s* killer whales.” <http://www.amazon.com/Beneath-Surface-Killer-SeaWorld-Blackfish/dp/1137280107>

See San Diego Union Tribune article by Brennan, D S from **11 May 2014**.

<http://www.sandiegouniontribune.com/news/2014/may/11/seaworld-kalia-killer-whales-breeding/>

See Wall Street Journal - Marine park industry watchers estimate a killer whale could fetch as much as \$10 million on the open market, **9 March 2010**.

<http://www.freemorgan.org/pdfs/Wall-Street-Journal-9-March-2010-Marine-Park-Operator-Faces-a-Big-Dilemma-Orca-Value-10-Million.pdf>

See also Denver Post, **27 February 2010**.

<http://www.freemorgan.org/pdfs/Denver-Post-27-February-2010-Depth-of-Orcas-Value-for-SeaWorld-Immeasurable-Estimate-10-Million-Dollars.pdf>

⁷⁰ <http://www.cites.org/eng/com/sc/61/E61-34.pdf>

⁷¹ In **2009**, the United States reported on progress at the 58th meeting of the CITES Standing Committee (Geneva, **2009**). Specifically, the United States reported that: a) The working group had agreed that Parties were using purpose codes inconsistently and that there was a need for clear definitions of the codes to avoid the use of different codes for any particular purpose. b) There was no consensus on the question of whether the purpose code on an import permit must match the code used on the corresponding export permit, but the majority believed that no match was necessary, although in most cases it was likely.

See <http://www.cites.org/sites/default/files/eng/cop/15/doc/E15-31.pdf>

⁷² The working group on purpose-of-transaction codes was re-established at the CITES 64th Standing Committee meeting (Bangkok, 2013), in order to initiate implementation of Decision 14.54. However, they did not adopt the amendments to Conf. 12.3 proposed in Document 38 at CoP16. Instead, they adopted amendments to decision 14.54 that directs the Standing Committee to continue its working group on purpose-of-transaction codes, and report to CoP17. This issue will be addressed at the 66th Standing Committee Meeting (Geneva, January 2016) and CoP17 which will be held in South Africa in 2016.

See Sixteenth meeting of the Conference of the Parties Bangkok (Thailand), 3-14 March 2013, Interpretation and implementation of the Convention trade control and marking, *PURPOSE CODES ON CITES PERMITS AND CERTIFICATES*. <http://www.cites.org/sites/default/files/eng/cop/16/doc/E-CoP16-38.pdf>

See Resolution Conf. 12.3 (Rev. CoP16) Permits and certificates. <http://www.cites.org/eng/res/12/12-03R16.php>

See also Direction to the Standing Committee. <http://www.cites.org/eng/dec/valid16/203>

⁷³ US FWS submission to Cop14 (2007) Proposed changes to Resolution Conf. 12.3 (Rev. CoP13), Section I, paragraph f) under RECOMMENDS: I. Regarding standardization of CITES permits and certificates: http://www.cites.org/common/cop/14/raw_docs/E-US02-Purpose_of_transaction_codes.pdf

⁷⁴ <http://www.orcarenseach.org/wp-content/uploads/2011/08/VISSEER-2015-RESCUED-CETACEANS-POSTER-Compassionate-Conservation-FINAL.pdf>

⁷⁵ See CITES Resolution Conf. 5.10 ‘Definition of “Primarily Commercial Purposes”’ (1985). <https://cites.org/sites/default/files/eng/res/all/05/E05-10R15.pdf>

⁷⁶ Hall, John (1993) Whale Laundering Exposed *Earth Island Journal*, Fall 1993, 14. <http://www.freemorgan.org/pdfs/Hall-John-1993-Earth-Island-Journal-Whale-Laundering-Exposed.pdf>

See also 1997 PBS *Frontline* interview of John Hall. <http://www.pbs.org/wgbh/pages/frontline/shows/whales/interviews/hall1.html>

⁷⁷ See APPENDIX 2 - *Killer Whales Held at Dolfinarium Harderwijk and Loro Parque* for a detailed historical perspective on the use of these facilities to hold and launder wild-born killer whales.

⁷⁸ “A Whale of a Business” (1997) PBS *Frontline* documentary. <http://www.pbs.org/wgbh/pages/frontline/shows/whales/seaworld/>

⁷⁹ See APPENDIX 1 – Letter of Legal Merits. http://www.freemorgan.org/pdfs/Wijngaarden-Marg-Letter-of-Legal-Merits_3-July-2015.pdf

⁸⁰ See the minutes from the 9 September 2011 administrative hearing before the Dutch Ministry of Economic Affairs, Agriculture and Innovation with Certified Translation at p. 5.) <http://www.freemorgan.org/pdfs/Minutes-from-Administrative-Hearing-Ministry-Economic-Affairs-Agriculture-Innovation-9-September-2011.pdf>

See also Orka Coalitie letter to Minister of Economy, Agriculture and Innovation National Service, Department of Law and Legal Protection, dated 16 September 2011, Subject: The Blackfish Foundation and others / Response to arguments *Dolfinarium* dated 9 September 2011, and the writing

of Loro Parque (received on 5 September 2011). <http://www.freemorgan.org/pdfs/Orkacoalitie-Response-to-Arguments-of-Dolfinarium-16-September-2011.pdf> at pages 7-9:

"Our counselor, Mr. M.F. van Wijngaarden, wanted at the time of the hearing dated September 9, 2011 to ask the representative of Loro Parque (Mr [] the question whether Morgan would become property of SeaWorld if she would be transferred to Loro Parque, now that on p. 7 of the letter of Loro Parque was stated that the orcas at Loro Parque are owned by SeaWorld. The counselor of the Dolfinarium stated that this question was not relevant and that Mr. [] of Loro Parque did not have to answer it.

Chairwoman Ms [] of the Ministry of EA & directly met the wish of the Dolfinarium and prevented our counselor to ask the above question. When our counselor said that he wanted to ask the question to clarify the commercial interests of the Dolfinarium, Mrs. [] of the Ministry stated that she did not find the question "pleasant". With this she indicated that this question was apparently considered irrelevant for the decision of the Secretary of State.

This demonstrates unwillingness of the Secretary of State to investigate all relevant interests the Dolfinarium has in the transfer of Morgan to Loro Parque and to assess that." [Emphasis added.]

⁸¹ See pages 6 and 8 of the Certified Translation of the Process Verbal (court record) from the 7 November 2011 District Court of Amsterdam hearing. <http://www.freemorgan.org/pdfs/Process-Verbal-Transcript-7-November-2011-with-English-Translation.pdf>

⁸² Henk Bleker, Dutch State Secretary written response submitted by the Netherlands to ASCOBANS 18th Advisory Committee meeting (Why orca Morgan cannot be set free), considered 4-6 May 2011. <http://www.freemorgan.org/pdfs/ASCOBANS-4-through-6-May-2011-Why-Orca-Morgan-Cannot-Be-Set-Free-AC18-8-02-NLMinistry-Release-Morgan.pdf>

⁸³ *Notice of Claim and Claim of Legal Custody, Ownership, Title and Interest in the Property Known as the Orca Morgan*; filed with the Dutch Ministry of Economic Affairs, Agriculture and Innovation by the Free Morgan Foundation, 20 December 2013. <http://www.freemorgan.org/pdfs/Notice-of-Claim-and-Claim-of-Legal-Ownership-Guardianship-by-Free-Morgan-Foundation-20-December-2013.pdf>

⁸⁴ Dutch Ministry for Economic Affairs written response to Free Morgan Foundation claim of ownership/guardianship 23 January 2014, with Certified Translation. <http://www.freemorgan.org/pdfs/Dutch-Ministry-Response-to-Morgan-Ownership-Claim-23-January-2014-with-English-Translation.pdf>

⁸⁵ Letter from Sharon Dijksma, Dutch Minister for Agriculture to Matthew Spiegl, Free Morgan Foundation 12 February 2014 regarding Dutch Government response to FMF claim of ownership/guardianship. <http://www.freemorgan.org/pdfs/Dijksma-Sharon-Dutch-Minister-Letter-to-Spiegl-Matthew-FMF-RE-Morgan-Ownership-Guardianship-12-February-2014.pdf>

⁸⁶ European Commission and TRAFFIC (2015) Reference Guide to the European Union Wildlife Trade Regulations – <http://www.freemorgan.org/pdfs/European-Commission-and-TRAFFIC-2015-Reference-Guide-to-the-European-Union-Wildlife-Trade.pdf>

⁸⁷ See Dolfinarium Harderwijk Dispensation FF/75A/2008/064 with Certified Translation. <http://www.freemorgan.org/pdfs/Dolfinarium-Harderwijk-Dispensation-FF75A2008064-2009-to-2014.pdf>

⁸⁸ <https://cites.org/eng/common/reg/si/NL>

⁸⁹ See Dutch Ministry for Economic Affairs written response to Free Morgan Foundation claim of ownership/guardianship **23 January 2014** with Certified Translation: “Therefore the dispensation and the EG-Certificate subsequently can’t be considered as an act through which ownership of orca Morgan has been acquired.” <http://www.freemorgan.org/pdfs/Dutch-Ministry-Response-to-Morgan-Ownership-Claim-23-January-2014-with-English-Translation.pdf>

⁹⁰ See *Dolfinarium Harderwijk* Dispensation with Certified Translation at exemption conditions 8 and 11. <http://www.freemorgan.org/pdfs/Dolfinarium-Harderwijk-Dispensation-FF75A2008064-2009-to-2014.pdf>

⁹¹ The CITES guidelines note that sale of an Appendix II species should only be considered in certain circumstances and that where animals are transferred by the confiscating authority but not sold, ownership should be specified as one of the terms and conditions of the transfer. Also, the terms and conditions of the transfer should be agreed between the confiscating authority and the recipient institution; and that the terms and conditions for such agreements should include a clear specification of ownership of the specimens concerned and, where breeding may occur, the offspring. (See *Resolution Conf. 10.7 (Rev. COP15)* at p. 4.) <http://cites.org/sites/default/files/eng/res/all/10/E10-07R15.pdf>

⁹² The CITES guidelines state that depending on the circumstances, ownership may be vested with the confiscating authority, country of origin, or recipient facility. (See *Resolution Conf. 10.7 (Rev. COP15)* at p. 8, 9.) <http://cites.org/sites/default/files/eng/res/all/10/E10-07R15.pdf>

⁹³ *SeaWorld wants to acquire Dutch killer whale (19 July 2011)* Jason Garcia, Orlando Sentinel. http://articles.orlandosentinel.com/2011-07-19/business/os-seaworld-killer-whale-morgan-20110719_1_loro-parque-killer-whale-experts-killer-whale

⁹⁴ Chronology of *SeaWorld Entertainment, Inc.*’s US Securities and Exchange Commission (SEC) Filings:

(a) On **27 December 2012**, *SeaWorld Entertainment, Inc.*, filed the first in a series of Form S-1 Registration Statements with the Securities and Exchange Commission for an initial public offering (IPO) of stock. This first filing made no specific reference to the killer whales at *Loro Parque* in its description of its animals at p. 74. But as noted below in (b) and (c), *SeaWorld’s* subsequent Form S-1’s specifically singled out the killer whales at *Loro Parque* and provided additional details. <http://www.sec.gov/Archives/edgar/data/1564902/000119312512515221/d448022ds1.htm>

(b) On **8 April 2013**, *SeaWorld Entertainment, Inc.*, filed an amended Form S-1 statement with the SEC which included further clarification regarding the killer whales at *Loro Parque* as noted in this revised statement at p. 73:

“With **29 killer whales**, we care for the largest killer whale population in zoological facilities worldwide and today have the most genetically diverse killer whale and dolphin collection in our history. **Seven of these killer whales** are presently on loan to a third party pursuant to an agreement entered into in February 2004. Pursuant to this agreement, we receive an annual fee, which is not material to our results of operations. In addition to generating incremental revenue for our business, the agreement provides for additional housing capacity for our killer whales. The agreement expires in **2031** and is renewable at the option of the parties.” [Emphasis added.] <http://www.sec.gov/Archives/edgar/data/1564902/000119312513145346/d448022ds1a.htm>

(c) On 20 November 2013, *SeaWorld Entertainment, Inc.*, filed another Form S-1. It is important to note that in this filing with the SEC, *SeaWorld* has reduced the number of killer whales at *Loro Parque* from **seven (7)** to **six (6)** which reflects the death of killer whale Victoria (Vicky) at *Loro Parque* on 13 June 2013. See p. 76:

*"With **28 killer whales**, we care for the largest killer whale population in zoological facilities worldwide and today have the most genetically diverse killer whale and dolphin collection in our history. **Six of these killer whales** are presently on loan to a third party pursuant to an agreement entered into in February 2004. Pursuant to this agreement, we receive an annual fee, which is not material to our results of operations. In addition to generating incremental revenue for our business, the agreement provides for additional housing capacity for our killer whales. The agreement expires in 2031 and is renewable at the option of the parties."* [Emphasis added.]

<http://www.sec.gov/Archives/edgar/data/1564902/000119312513447594/d600440ds1.htm>

⁹⁵ Rescued Dutch killer whale now part of *SeaWorld's* corporate collection (29 November 2011) Jason Garcia, Orlando Sentinel. http://articles.orlandosentinel.com/2011-11-29/business/os-seaworld-morgan-killer-whale-20111129_1_loro-parque-killer-whale-seaworld-san-antonio

⁹⁶ ANP news service (Amsterdam) 7 November 2011.

http://www.dutchnews.nl/news/archives/2011/11/orca_morgan_decision_in_two_we.php/

⁹⁷ See APPENDIX 1 – Letter of Legal Merits. http://www.freemorgan.org/pdfs/Wijngaarden-Marq-Letter-of-Legal-Merits_3-July-2015.pdf

⁹⁸ Parliamentary Questions from Esther Ouwehand to Dutch Secretary of State for Economic Affairs, Agriculture and Innovation:

<https://www.partijvoordedieren.nl/tweedekamer/kamervragen/i/2296>

<https://www.partijvoordedieren.nl/tweedekamer/kamervragen/i/2272>

<https://www.partijvoordedieren.nl/tweedekamer/kamervragen/i/2204>

<https://www.partijvoordedieren.nl/tweedekamer/kamervragen/i/2154>

See also:

Questions about the future of orca Morgan from Esther Ouwehand dated 5 October 2010.

<https://www.partijvoordedieren.nl/kamervragen/vragen-over-de-toekomst-van-orka-morgan>

Further questions about the future of orca Morgan from Esther Ouwehand dated 10 March 2011.

<https://www.partijvoordedieren.nl/kamervragen/vervolgvragen-over-het-terugplaatsen-van-orka-morgan>

Questions about the message that will be used in a breeding program orca Morgan and Shows from Esther Ouwehand and Marianne Thieme dated 23 December 2011.

<https://www.partijvoordedieren.nl/kamervragen/vragen-over-het-bericht-dat-orka-morgan-gebruikt-zal-worden-in-een-fokprogramma-en-in-shows>

⁹⁹ See Robeck, et al., Journal of Mammalogy 10 July 2015 - Comparisons of life-history parameters between free-ranging and captive killer whale (*Orcinus orca*) populations for application toward species management – Supporting Information (S1) at p. 19, fn. 1 and 4.

<http://www.freemorgan.org/pdfs/Robeck-et-al-Journal-of-Mammology-10-July-2015.pdf>

¹⁰⁰ Visser, Ingrid - Unpublished data.

¹⁰¹ See section 8.1 of the decision of the Raad van State with Certified Translation.
<http://www.freemorgan.org/pdfs/Morgan-Appeal-Final-Verdict-Raad-van-State-28-April-2014-with-Official-English-Translation.pdf>

¹⁰² E-mail correspondence between Charlotte de Jong and Dr. Javier Almunia, *Loro Parque Fundación* 5 December 2013. <http://www.freemorgan.org/pdfs/Almunia-Email-Responses-to-Charlotte-de-Jong-10-December-2013.pdf>

¹⁰³ Ibid.

¹⁰⁴ Wolfgang Kiessling Letter to the Editor at p. 44. <http://www.freemorgan.org/pdfs/Kiessling-Wolfgang-Letter-to-Editor-The-Fortnightly-Tenerife-News-9-May-through-22-May-2014-Edition-at-page-44.pdf>

¹⁰⁵ See Form S-1 filed by *SeaWorld Entertainment, Inc.*, with the SEC on 20 November 2013 stating all the killer whales held at *Loro Parque* are owned by *SeaWorld* and merely on loan to *Loro Parque*.
<http://www.sec.gov/Archives/edgar/data/1564902/000119312513447594/d600440ds1.htm>

¹⁰⁶ See Orlando Sentinel article 19 July 2011. http://articles.orlandosentinel.com/2011-07-19/business/os-seaworld-killer-whale-morgan-20110719_1_loro-parque-killer-whale-experts-killer-whale

¹⁰⁷ Process Verbal 7 November 2011 (Official Dutch Court record of proceedings in Case No. AMS 11 / 5033 BESLU 09.) with Certified Translation. <http://www.freemorgan.org/pdfs/Process-Verbal-Transcript-7-November-2011-with-English-Translation.pdf>

¹⁰⁸ See DutchNews.nl and ANP news agency story from 11 November 2011.
<http://www.freemorgan.org/pdfs/Dutch-News-NL-ANP-7-November-2011.pdf>

¹⁰⁹ Rescued Dutch killer whale now part of *SeaWorld's* corporate collection:

“Morgan, a young killer whale rescued off the Dutch coast in June 2010, joined SeaWorld Parks & Entertainment’s corporate collection on Tuesday [29 November 2011].

The female whale was transferred from Dolfinarium, a park in the Netherlands where she had been since she was nursed back to health, to Loro Parque, a marine park in Tenerife, Spain, where SeaWorld currently keeps five other whales.

SeaWorld has said it does not plan to bring Morgan to the U.S. She is the 27th killer whale in SeaWorld’s collection, including eight at SeaWorld San Diego, seven at SeaWorld Orlando, and six each at SeaWorld San Antonio and Loro Parque.”
[Emphasis added.] Jason Garcia, Orlando Sentinel, 29 November 2011.

http://articles.orlandosentinel.com/2011-11-29/business/os-seaword-morgan-killer-whale-20111129_1_loro-parque-killer-whale-seaworld-san-antonio

¹¹⁰ *Loro Parque Killer Whale Facility Service and Loan Agreement* (*SeaWorld* 2681-2721), identified as Exhibit 25 in Secretary’s Pre-Hearing Exchange, *Secretary of Labor v. Sea World of Florida, LLC.*, OSHRC Docket No. 10-1705 (see page 11). OSHRC FOIA File No. 14-0047
<http://www.freemorgan.org/pdfs/Secretary-of-Labor-vs-SeaWorld-Secretarys-Pre-Hearing-Exchange-OSHRC-Docket-No-10-1705.pdf>

¹¹¹ Jason Garcia, Orlando Sentinel, **18 June 2013**.

http://articles.orlandosentinel.com/2013-06-18/news/os-seaworld-owned-killer-whale-calf-dies-20130618_1_loro-parque-marine-park-marine-park

¹¹² On **22 February 2013**, a written inquiry was submitted to the Office of the Chief Counsel for the SEC by Matthew Spiegl legal advisor for the Free Morgan Foundation questioning *SeaWorld Entertainment, Inc.*'s claim of ownership of Morgan as reflected in Form S-1 SEC filing.
<http://www.freemorgan.org/pdfs/SEC-SeaWorld-IPO-Inquiry-and-Correspondence-22-February-2013.pdf>

On **23 February 2013** the inquiry was brought to the attention of Kim McManus, special counsel in the office of the chief counsel for the SEC who spoke with Matthew Spiegl by telephone and on **24 February 2013** the inquiry was forwarded to Justin Dobbie, legal branch chief in the SEC's Office 5, which was responsible for *SeaWorld Entertainment, Inc.*'s IPO filing. Dobbie also spoke with Matthew Spiegl by telephone. The inquiry triggered a series of questions from the SEC to *SeaWorld* regarding its claims concerning Morgan and *Loro Parque*. Unfortunately, the SEC didn't ask the questions as directly as they should have; failing to fully vet *SeaWorld*'s Form S-1 representations and ultimately allowing *SeaWorld* to avoid answering the SEC's questions regarding Morgan.

Chronology of SEC inquiry regarding: *SeaWorld Entertainment, Inc.*'s claim of ownership and subsequent correspondence:

February 22, 2013 - On-line Inquiry sent to SEC ownership claim by *SeaWorld*
February 24, 2013 - Justin Dobbie (SEC) receives inquiry RE: ownership claim by *SeaWorld*(SEC)
February 27, 2013 - Letter from Justin Dobbie (SEC) to Jim Atchison (*SeaWorld*)
March 25, 2013 - Letter from Igor Fert, Esq (*SeaWorld*) to Justin Dobbie (SEC)
April 4, 2013 - Letter from Justin Dobbie (SEC) to Jim Atchison (*SeaWorld*)
April 8, 2013 - Letter from Igor Fert, Esq. (*SeaWorld*) to Justin Dobbie (SEC)
April 8, 2013 - *SeaWorld* files Third Amended Form S-1 registration statement

¹¹³ Correspondence from Justin Dobbie, SEC to Jim Atchison *SeaWorld Entertainment, Inc.*, dated **27 February 2013**.

<http://www.sec.gov/Archives/edgar/data/1564902/000000000013010900/filename1.pdf>

See correspondence from Igor Fert, legal counsel for *SeaWorld Entertainment, Inc.*, to Justin Dobbie, SEC dated **25 March 2013**.

<http://www.sec.gov/Archives/edgar/data/1564902/000119312513123157/filename29.htm>

See correspondence from Justin Dobbie, SEC to Jim Atchison *SeaWorld Entertainment, Inc.*, dated **4 April 2013**.

<http://www.sec.gov/Archives/edgar/data/1564902/000000000013018160/filename1.pdf>

See correspondence from Igor Fert, legal counsel for *SeaWorld Entertainment, Inc.*, to Justin Dobbie, SEC dated **8 March 2013**.

<http://www.sec.gov/Archives/edgar/data/1564902/000119312513145346/filename23.htm>

¹¹⁴ Jason Garcia, Orlando Sentinel **10 August 2011**.

http://articles.orlandosentinel.com/2011-08-10/business/os-seaworld-dutch-killer-whale-20110810_1_loro-parque-killer-whale-seaworld-parks-entertainment

¹¹⁵ See http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370539788096#.UoqKycT_lng

¹¹⁶ Hargrove, J (2015) Beneath the Surface. Killer whales, SeaWorld and the truth beyond *Blackfish*. Palgrave Macmillan, New York. Pp 264. At page 152-153 “According to the newspaper U-T San Diego, Dennis Spiegel, president of International Theme Park Services, a Cincinnati-based leisure consultancy, said a study by his company put a price of about \$15 million to \$20 million on each of *SeaWorld’s* killer whales.” <http://www.amazon.com/Beneath-Surface-Killer-SeaWorld-Blackfish/dp/1137280107>

See San Diego Union Tribune article by Brennan, D S from **11 May 2014**.

<http://www.sandiegouniontribune.com/news/2014/may/11/seaworld-kalia-killer-whales-breeding/>

See <http://www.freemorgan.org/pdfs/Denver-Post-27-February-2010-Depth-of-Orcas-Value-for-SeaWorld-Immeasurable-Estimate-10-Million-Dollars.pdf>

See also <http://www.freemorgan.org/pdfs/Wall-Street-Journal-9-March-2010-Marine-Park-Operator-Faces-a-Big-Dilemma-Orca-Value-10-Million.pdf>

¹¹⁷ Visser, Ingrid – Unpublished data.

¹¹⁸ SEC Rule 10B-5. <http://www.gpo.gov/fdsys/pkg/CFR-2011-title17-vol3/pdf/CFR-2011-title17-vol3-sec240-10b-5.pdf>

¹¹⁹ Compare page 73 (Our Animals) in *SeaWorld Entertainment, Inc.*’s SEC Form S-1 Statement, **8 April 2013**,

<http://www.sec.gov/Archives/edgar/data/1564902/000119312513145346/d448022ds1a.htm>
with MMIR for *SeaWorld* killer whales at *Loro Parque*, **1 May 2013**.

<http://www.freemorgan.org/pdfs/MMIR-1-May-2013-SW-Killer-Whales-at-LP.pdf>

¹²⁰ Compare page 76 (Our Animals) in *SeaWorld Entertainment, Inc.*’s SEC Form S-1 Statement, **20 November 2013**,

<http://www.sec.gov/Archives/edgar/data/1564902/000119312513447594/d600440ds1.htm>
with MMIR for *SeaWorld* killer whales at *Loro Parque*, **16 December 2013**.

<http://www.freemorgan.org/pdfs/MMIR-16-December-2013-SW-Killer-Whales-at-LP.pdf>

¹²¹ MMIR for killer whales requested by Michael Scarpuzzi, *SeaWorld* San Diego, **5 May 2015**.

<http://www.freemorgan.org/pdfs/Scarpuzzi-SeaWorld-San-Diego-MMIR-Request-NMFS-FOIA-DOC-NOAA-2015-001242.pdf>

¹²² California Coastal Commission Staff Report at page 16, *SeaWorld* San Diego, Application No. 6-15-0424, report date: **24 September, 2015**, hearing date: **8 October, 2015**, Agenda Item Th14a.

<http://documents.coastal.ca.gov/reports/2015/10/Th14a-10-2015.pdf>

¹²³ *SeaWorld Entertainment, Inc.*’s SEC Form S-1 Statement, **20 November 2013**.

<http://www.sec.gov/Archives/edgar/data/1564902/000119312513447594/d600440ds1.htm>

¹²⁴ MMIR for *SeaWorld* killer whales at *Loro Parque*, **21 August 2015**.

<http://www.freemorgan.org/pdfs/MMIR-21-August-2015-SW-Killer-Whales-at-LP.pdf>

¹²⁵ See Council Regulation (EC) No 338/97.

<http://www.freemorgan.org/pdfs/EC-Council-Regulation-338-97.pdf>

See also <https://cites.org/sites/default/files/eng/res/all/05/E05-10R15.pdf>

¹²⁶ Morgan's EG-Certificate No. 11 NL 114808/20 and Dutch MA governing cover letter with Certified Translation.

<http://www.freemorgan.org/pdfs/Dutch-EG-Certificate-11NL11480820-and-Cover-Letter-27-July-2011.pdf>

¹²⁷ See <http://www.loroparque.com/Forms/shows/Exhibitions.aspx>

¹²⁸ EU Zoo Directive – Council Directive 1999/22/EC.

<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31999L0022&from=EN>

¹²⁹ Visser, Ingrid unpublished data. See also <http://www.freemorgan.org/wp-content/uploads/2012/11/Visser-2012-Report-on-the-Physical-Status-of-Morgan-V1.2.pdf>

¹³⁰ *Dolphinarium Harderwijk* "Motivation" document submitted to Dutch MA as part of its application for an exemption under Article 8(3)(g) of Council Regulation (EC) 338/97 to transfer Morgan to *Loro Parque* for scientific research **11 July 2011**, see Certified Translation pages 13-15.

<http://www.freemorgan.org/pdfs/Dolphinarium-Harderwijk-Motivation-Document-for-EG-Certificate-11-07-2011.pdf>

¹³¹ *Dolphinarium Harderwijk* "Application" for exemption to transfer Morgan to *Loro Parque* pursuant to Article 8(3)(g) of Council Regulation 338/97. <http://www.freemorgan.org/pdfs/Dolphinarium-Harderwijk-Application-for-EG-Certificate-11-07-2011.pdf>

¹³² Scientific peer-reviewed papers produced by *Loro Parque* regarding *Orcinus orca* utilizing the killer whales held in captivity at that facility between **14 February 2006** and **15 October 2015**.

<http://www.freemorgan.org/pdfs/Scientific-Peer-Reviewed-Papers-By-Loro-Parque-Orca-Related-15-October-2015.pdf>

¹³³ See *Dolphinarium Harderwijk's* Application for Morgan's EG-Certificate by J. Reuvers, **11 July 2011**.
<http://www.freemorgan.org/pdfs/Dolphinarium-Harderwijk-Application-for-EG-Certificate-11-07-2011.pdf>

¹³⁴ International Court of Justice - Australia v. Japan, Judgment dated **31 March 2014**.

<http://www.icj-cij.org/docket/files/148/18136.pdf>

¹³⁵ International Court of Justice - Australia v. Japan, Expert Report by Marc Mangel: *An Assessment of Japanese Whale Research Programs Under Special Permit in the Antarctic (JARPA, JARPA II) as Programs for Purposes of Scientific Research in the Context of Conservation and Management of Whales*. <http://www.icj-cij.org/docket/files/148/17404.pdf>

¹³⁶ Morgan's EG-Certificate No. 11 NL 114808/20 and Dutch MA governing cover letter with Certified Translation.

<http://www.freemorgan.org/pdfs/Dutch-EG-Certificate-11NL11480820-and-Cover-Letter-27-July-2011.pdf>

¹³⁷ <http://www.freemorgan.org/pdfs/EC-Council-Regulation-338-97.pdf>

¹³⁸ <http://www.freemorgan.org/pdfs/Dutch-EG-Certificate-11NL11480820-and-Cover-Letter-27-July-2011.pdf>

¹³⁹ Ibid.

¹⁴⁰ See European Commission Report *Study-on-the-Effectiveness-of-the-EC-Wildlife-Trade-Regulations* Annex 3 at p. 236 comparing Council Regulation (EC) No 338/97, article 8(3)(g), and similar provisions found in Article 16(1) of the Habitats Directive and Article 9(1) of the Birds Directive.

<http://www.freemorgan.org/pdfs/Study-on-the-Effectiveness-of-the-EC-Wildlife-Trade-Regulations-A-Traffic-Europe-report-for-the-European-Commission-December-2007.pdf>

¹⁴¹ EU Zoo Directive – Council Directive 1999/22/EC.

<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31999L0022&from=EN>

¹⁴² Dutch Flora and Fauna Act (FF Act). http://faolex.fao.org/cgi-bin/faolex.exe?rec_id=012500&database=faolex&search_type=link&table=result&lang=eng&format_name=@ERALL

¹⁴³ See Dutch MA's governing cover letter with Certified Translation.

<http://www.freemorgan.org/pdfs/Dutch-EG-Certificate-11NL11480820-and-Cover-Letter-27-July-2011.pdf>

¹⁴⁴ Dr. Javier Almunia, *Loro Parque Fundación* - Comments by *Loro Parque* on the Report on the Physical & Behavioural Status of Morgan, the Wild-Born Orca held in Captivity at *Loro Parque*, Tenerife, Spain by Dr. Ingrid Visser. See Almunia comment 46.

<http://www.freemorgan.org/pdfs/Almunia-LP-Comments-to-the-Report-on-the-Physical-Status-of-Morgan-November-2013.pdf>

¹⁴⁵ <http://www.freemorgan.org/pdfs/EC-Council-Regulation-338-97.pdf>

¹⁴⁶ When Morgan's EG-Certificate was issued, the EU had in place specific legislation (Directive 86/609/EEC) covering the use of animals for scientific purposes. On 22 September 2010 the EU adopted Directive 2010/63/EU which updated and replaced the 1986 Directive 86/609/EEC on the protection of animals used for scientific purposes. Directive 2010/63/EU took full effect on 1 January 2013. http://ec.europa.eu/environment/chemicals/lab_animals/home_en.htm

¹⁴⁷ See APPENDIX 1 – Letter of Legal Merits. http://www.freemorgan.org/pdfs/Wijngaarden-Marq-Letter-of-Legal-Merits_3-July-2015.pdf

¹⁴⁸ See *Dolfinarium Harderwijk* Dispensation FF/75A/2008/064 with Certified Translation.

<http://www.freemorgan.org/pdfs/Dolfinarium-Harderwijk-Dispensation-FF75A2008064-2009-to-2014.pdf>

¹⁴⁹ <http://www.ascobans.org/>

¹⁵⁰ Trouwborst, Arie (**April 2015**) *Caught Napping by (Sea) Wolves: International Wildlife Law and Unforeseen Circumstances involving the Killer Whale (Orcinus orca) and the Gray Wolf (Canis lupus)*. [http://www.freemorgan.org/pdfs/Trouwborst-2015-Caught-Napping-by-\(Sea\)-Wolves.pdf](http://www.freemorgan.org/pdfs/Trouwborst-2015-Caught-Napping-by-(Sea)-Wolves.pdf)

¹⁵¹ Ibid.

¹⁵² Letter from Dutch State Secretary Henk Bleker to Parliament, **12 October 2011**, *Update on Morgan the orca*. <http://www.freemorgan.org/pdfs/Bleker-Update-on-Morgan-the-Orca-12-Oct-2011.pdf>

¹⁵³ Final decision in Morgan appeal rendered by the Raad van State (Dutch High Court) Judgment No. 201300892/UA3 on **23 April 2014**. See page 9, paragraph 7 of Certified Translation.

<http://www.freemorgan.org/pdfs/Morgan-Appeal-Final-Verdict-Raad-van-State-23-April-2014-with-Official-English-Translation.pdf>

¹⁵⁴ See APPENDIX 1 – Letter of Legal Merits. http://www.freemorgan.org/pdfs/Wijngaarden-Marq-Letter-of-Legal-Merits_3-July-2015.pdf

¹⁵⁵ Arie Trouwborst, Richard Caddell and Ed Couzens (2013) *To Free or Not to Free? State Obligations and the Rescue and Release of Marine Mammals: A Case Study of 'Morgan the Orca'* (Transnational Environmental Law, 2, pp 117-144 doi:10.1017/S2047102512000222). See page 12, fn. 78, 79 and 80. <http://www.freemorgan.org/pdfs/Trouwborst-et-al-2013-Transnational-Environmental-Law-Case-Study-of-Morgan-the-Orca.pdf>

¹⁵⁶ Comparison of 2006 and 2011 Loro Parque Research Projects submitted in support of CITES Permit applications for killer whales. <http://www.freemorgan.org/pdfs/Comparison-of-2006-and-2011-Loro-Parque-Research-Projects-for-CITES-Permits.pdf>

¹⁵⁷ Letter from Robert H. Mattlin, Executive Director, Marine Mammal Commission to Donald R. Knowles, Director, Office of Protected Resources, National Marine Fisheries Service (3 April 2002) at p. 6-7:

"In this regard, the Service apparently does not intend to ask the foreign government for assurances that it will give comity to actions taken to enforce U.S. laws with respect to the exported marine mammals. Rather, the Service intends to ask the government to indicate that it will use its own laws to ensure (1) continued compliance with care and maintenance standards comparable to those established under the Animal Welfare Act, (2) that the animals will continue to be held for the intended purpose, and (3) that inventory information is provided to the United States.

The Commission has several problems with the proposed approach. Despite the Service's characterization of this as a comity statement, it is not based on the recipient country providing comity to actions taken by the Service or U.S. courts. Instead, the Service is proposing to rely on foreign law and the independent actions of the foreign government in administering its laws as the basis for ensuring compliance with the comparability provisions of the marine Mammal Protection Act. This being the case, the statement would not provide the Service with the necessary assurance that its actions to enforce the Act with respect to the foreign facility will be recognized by the foreign government. In fact, such a statement serves to make it less likely that the foreign government will afford comity to U.S. enforcement actions because there would be at least a tacit understanding that enforcement would be carried out under the aegis of the foreign law rather than the Marine Mammal Protection Act. Under such a system, it is not clear that the facility would be held accountable if it failed to meet its responsibilities under the Act or that the Service would be able to meet its responsibility to ensure compliance with the statutory provisions as they apply to foreign facilities."

<http://www.freemorgan.org/pdfs/Mattlin-Robert-MMC-Letter-to-Knowles-Donald-NMFS-3-April-2002-RE-Comity.pdf>

¹⁵⁸ SeaWorld MMPA 15-day public display transfer notification to NMFS for 4 killer whales to Loro Parque 22 June 2005 including letter of comity to comply with §104 of the MMPA public display transfer of killer whales to Loro Parque.

<http://www.freemorgan.org/pdfs/SeaWorld-MMPA-15-Day-Public-Display-Transfer-Notification-to-NMFS-4-Killer-Whales-to-LP-22-June-2005.pdf>

¹⁵⁹ Brad Andrews has been SeaWorld's Chief Zoological Officer since 2010. He served as Corporate Vice President of Zoological Operations of Busch Entertainment Corporation (*SeaWorld*) from 1991 to 2010. <http://seaworldentertainment.com/en/who-we-are/leadership-team/brad-andrews/>

¹⁶⁰ <http://www.freemorgan.org/pdfs/NMFS-Scoping-Document-on-Marine-Mammal-Permit-Regulations-March-2010.pdf> at p. 16-17:

"Comity. NMFS proposes removing the requirements currently found at §216.33(b) regarding applications to export living marine mammals. As currently written, §216.33(b) requires applicants to obtain assurances from foreign governments that application information is accurate, that the government could and would enforce permit conditions, and that the government would allow NMFS to amend, modify, suspend or revoke a permit issued to an entity within their country. Some members of the public display community argue that NMFS has no jurisdiction over export of marine mammals held for public display. NMFS, however, was not relieved of all responsibility for marine mammals once they are held for public display. Inventory compilation requirements found in the MMPA at Sec. 104 (c)(10), as well as requirements that export be allowed only to receiving facilities meeting standards comparable to APHIS requirements within the United States (MMPA Sec. 104 (c)(9)) clearly identify continued responsibility for monitoring the fate of marine mammals in captivity.

However, NMFS agrees that there is little recourse if foreign governments do not comply with comity assurances. That is, once animals are outside of the United States, NMFS cannot control reporting, tracking, monitoring or enforcement of permit conditions. Given the lack of enforceability, and therefore utility, of this provision, NMFS has decided to remove the comity assurance requirement."

¹⁶¹ Letter from Brad Andrews, *SeaWorld* to P. Michael Payne, NMFS 13 December 2010 regarding issue of comity and complaints about care of killer whales at *Loro Parque* as raised by reports from Suzanne Allee and Dr. Naomi Rose. <http://www.freemorgan.org/pdfs/Andrews-Brad-SeaWorld-to-Payne-Michael-NMFS-RE-Loro-Parque-13-December-2010.pdf>

¹⁶² 16 U.S. Code § 1374 – Permits. <http://www.law.cornell.edu/uscode/text/16/1374>

¹⁶³ See <http://www.freemorgan.org/pdfs/FMF-Letter-to-US-FWS-10-July-2015-RE-CITES-CoP17-FWS-HQ-IA-2014-0018.pdf>

¹⁶⁴ See Section 104 of US MMPA. <http://www.nmfs.noaa.gov/pr/laws/mmpa/text.htm#section104>

¹⁶⁵ Ibid.

¹⁶⁶ <http://www.freemorgan.org/pdfs/SeaWorld-MMPA-15-Day-Public-Display-Transfer-Notification-to-NMFS-4-Killer-Whales-to-LP-22-June-2005.pdf>

See <http://www.nmfs.noaa.gov/pr/laws/mmpa/text.htm#section104>

¹⁶⁷ http://www.nmfs.noaa.gov/pr/permits/mmpa_permits.htm#enhancement

See http://www.nmfs.noaa.gov/pr/pdfs/permits/instructions_research_enhancement.pdf

See also <http://www.nmfs.noaa.gov/pr/pdfs/fr/50cfr216.pdf>

¹⁶⁸ Title 50, Code of Federal Regulations (CFR) at §216.41. <http://www.gpo.gov/fdsys/pkg/CFR-2001-title50-vol2/pdf/CFR-2001-title50-vol2-sec216-41.pdf>

¹⁶⁹ Marine Mammal Data Sheets provided by the NMFS to *SeaWorld* to accompany the four (4) original killer whales exported from *SeaWorld* facilities in the United States to *Loro Parque* for public display purposes pursuant to Section 104 of the MMPA.

<http://www.freemorgan.org/pdfs/Marine-Mammal-Data-Sheets-SW-Killer-Whales-to-LP-23-February-2006.pdf>

¹⁷⁰ Criticism concerning the deficiencies of the US MMPA public display provisions are not new and deference toward the interests of marine parks and the public display industry are well documented. See Dougherty, Stephanie Dodson. *The Marine Mammal Protection Act: Fostering Unjust Captivity Practices since 1972*. Florida State University - Journal of Land Use and Environmental Law (Spring 2013) Vol. 28:2 http://archive.law.fsu.edu/journals/landuse/vol28_2/dodson.pdf

¹⁷¹ Examples of *Loro Parque* advertising Morgan's participation in commercial entertainment shows:

<http://www.freemorgan.org/pdfs/Loro-Parque-Shows-Advertising-Morgan.pdf>

<http://www.freemorgan.org/pdfs/Morgan-Showcased-to-Sell-Tickets-Loro-Parque.pdf>

<http://www.loroparque.com/Forms/shows/Exhibitions.aspx>

¹⁷² Evidence of Morgan in shows was collected over repeated visits to the facility by the Free Morgan Foundation <http://www.freemorgan.org/wp-content/uploads/2012/11/Visser-2012-Report-on-the-Physical-Status-of-Morgan-V1.2.pdf> and continues to be documented through both public postings (e.g., <http://orcaocean.blogspot.com> and <https://www.facebook.com/LoroParqueOrcas>) and official documentation by *Loro Parque* http://www.loroparque.com/morgan/index_en.html

¹⁷³ International Court of Justice - *Australia v. Japan*, Judgment dated **31 March 2014**.

<http://www.icj-cij.org/docket/files/148/18136.pdf>

¹⁷⁴ International Court of Justice - *Australia v. Japan*, Expert Report by Marc Mangel: *An Assessment of Japanese Whale Research Programs Under Special Permit in the Antarctic (JARPA, JARPA II) as Programs for Purposes of Scientific Research in the Context of Conservation and Management of Whales*. <http://www.icj-cij.org/docket/files/148/17404.pdf>

¹⁷⁵ See <http://www.freemorgan.org/pdfs/FMF-Letter-to-US-FWS-10-July-2015-RE-CITES-CoP17-FWS-HQ-IA-2014-0018.pdf>

¹⁷⁶ *SeaWorld* CITES export permit application submitted to the NMFS for purposes of exporting four (4) killer whales from *SeaWorld* facilities in the United States to *Loro Parque* in **2006**. (The full *SeaWorld* CITES export permit application file for this transaction was produced by the FWS in response to FOIA FWS-2014-01150.)

<http://www.freemorgan.org/pdfs/US-CITES-Export-Permits-4-Killer-Whales-SW-to-LP-FOIA-FWS-2014-01150.pdf>

For reference to above noted CITES application see copy of “blank” FWS Form 3-200-53 Rev. **05/2005**:
<http://www.freemorgan.org/pdfs/Blank-FWS-Form-3-200-53-Rev-05-2005.pdf>

¹⁷⁷ Ibid.

¹⁷⁸ Ibid.

¹⁷⁹ CITES Export Permit No. 05US107913/9, issued by NMFS on **23 August 2005**, valid through **22 February 2006**. <http://www.freemorgan.org/pdfs/US-CITES-Export-Permits-4-Killer-Whales-SW-to-LP-FOIA-FWS-2014-01150.pdf>

¹⁸⁰ These codes are pre-assigned by the US Fish and Wildlife Service (the US CITES Management Authority who issues US CITES permits). Available from:
<https://www.fws.gov/le/pdf/CITESDocumentRequirements11142007.pdf>

¹⁸¹ <http://www.cites.org/eng/common/reg/si/ES>

¹⁸² CITES Trade Database printout for **2006** US export of four (4) killer whales from *SeaWorld* to *Loro Parque*. <http://www.freemorgan.org/pdfs/CITES-Trade-Database-2006-SW-to-LP-United-States-EXPORT-Purpose.pdf>

Source <http://trade.cites.org/>

¹⁸³ CITES Trade Database printout for **2006** Spanish import of four (4) killer whales from *SeaWorld* to *Loro Parque*. <http://www.freemorgan.org/pdfs/CITES-Trade-Database-2006-SW-to-LP-Spanish-IMPORT-Purpose.pdf>

Source <http://trade.cites.org/>

See also <http://www.freemorgan.org/pdfs/Spanish-Informe-Ministerio-Orca-Morgan-16-May-2012-with-English-translation.pdf>

¹⁸⁴ Correspondence, reports, file material regarding APHIS review of *Loro Parque* from Barbara Kohn, Senior Staff Veterinarian. <http://www.freemorgan.org/pdfs/USDA-APHIS-AWA-Evaluation-4-Killer-Whales-SW-to-LP-USDA-FOIA-11-313.pdf>

¹⁸⁵ Ibid.

¹⁸⁶ Title 9 Code Federal Regulations §3.109. <http://www.gpo.gov/fdsys/pkg/CFR-1998-title9-vol1/xml/CFR-1998-title9-vol1-sec3-109.xml>

¹⁸⁷ <http://www.freemorgan.org/pdfs/Almunia-Report-on-the-Introduction-of-a-Rescued-Orcinus-Orca-Individual-Into-the-Orca-Ocean-Group-5-October-2012.pdf>

¹⁸⁸ See *Blood in the Water* by Tim Zimmerman (15 July 2011).
<http://www.outsideonline.com/1886916/blood-water>

¹⁸⁹ Transcript of Proceedings - Secretary of Labor vs. Sea World of Florida, LLC. (2011) US Occupational Safety and Health Review Commission (OSHRC Docket No. 10-1705), **19 September 2011** through **18 November 2011**. <http://www.freemorgan.org/pdfs/Secretary-of-Labor-vs-SeaWorld-Transcript-of-Proceedings-OSHRC-Docket-No-10-1705.pdf>

See witness Jennifer Mairot, *SeaWorld* animal trainer - transcript pages 1347-1356:
Mairot regarding Alexis Martinez death - "what happened at *Loro Parque* was layers of mistakes." Mairot regarding differences between experience level of *SeaWorld* and *Loro Parque* killer whale trainers - "They have a very raw staff who is just learning killer whales. They have a very unique social structure out there, all young whales, no adults."

See witness Jeffrey Andrews, *SeaWorld* trial expert - transcript pages 1970-1972:
Andrews regarding skill and experience of *Loro Parque* personnel characterized as substandard – "didn't have the same level of skill and experience and mentoring that the *SeaWorld* teams have."

¹⁹⁰ Letter from Sharon Dijksma, Dutch Minister for Agriculture to Matthew Spiegl, Free Morgan Foundation (**12 February 2014**) regarding Dutch Government response to FMF claim of ownership/guardianship of Morgan.

<http://www.freemorgan.org/pdfs/Dijksma-Sharon-Dutch-Minister-Letter-to-Spiegl-Matthew-FMF-RE-Morgan-Ownership-Guardianship-12-February-2014.pdf>

¹⁹¹ *The Reference Guide July 2015 European Union Wildlife Trade Regulations* is reference material regarding CITES, for Management and Scientific Authorities, wildlife trade enforcement officials, wildlife traders and anyone interested in the legislation and the technicalities of its provisions. Section 4 of the WTR reference guide details internal EU trade and specify that specimens listed in Annex A (which includes orca), “*... are generally not allowed to be used for commercial purposes and their movement inside the EU is also regulated.*”

Furthermore, the WTR reference guide states that “*Commercial purposes includes the purchase, offer to purchase, acquisition for commercial purposes, display to the public for commercial purposes, use for commercial gain, sale, keeping for sale, offering for sale, and transport for sale.*

<http://www.freemorgan.org/pdfs/European-Commission-and-TRAFFIC-2015-Reference-Guide-to-the-European-Union-Wildlife-Trade.pdf>

¹⁹² Letter from Alicia Sánchez Muñoz, Spanish Soivre Subdirectora General letter to Dr. Ingrid Visser, Free Morgan Foundation (**7 February 2014**) with Certified Translation regarding Spanish CITES MAs authority over Morgan.

<http://www.freemorgan.org/pdfs/Munoz-Alicia-Sanchez-Soivre-CITES-Spain-Letter-to-Visser-Ingrid-FMF-7-February-2014.pdf>

¹⁹³ See text of ASCOBANS Agreement, annex paragraph 4.

http://www.ascobans.org/sites/default/files/basic_page_documents/ASCOBANS_AgreementText_English_integratedAmendment.pdf

¹⁹⁴ Trouwborst, Arie (**April 2015**) *Caught Napping by (Sea) Wolves: International Wildlife Law and Unforeseen Circumstances involving the Killer Whale (*Orcinus orca*) and the Gray Wolf (*Canis lupus*)*. Arie Trouwborst is an Associate Professor of Environmental Law at Tilburg University Department of European and International Public Law, Tilburg, Netherlands. Professor Trouwborst discusses the Dutch Government’s obligation concerning the intentional taking of the wild-born Morgan in conjunction with the objectives of ASCOBANS. [http://www.freemorgan.org/pdfs/Trouwborst-2015-Caught-Napping-by-\(Sea\)-Wolves.pdf](http://www.freemorgan.org/pdfs/Trouwborst-2015-Caught-Napping-by-(Sea)-Wolves.pdf)

¹⁹⁵ See section 8.1 of the decision of the Raad van State. (See page 11, paragraph 8.1 of Certified Translation.) <http://www.freemorgan.org/pdfs/Morgan-Appeal-Final-Verdict-Raad-van-State-23-April-2014-with-Official-English-Translation.pdf>

¹⁹⁶ Letter of Comity from Island Administration of Tenerife Territory's Environment Management Technical Service (with Certified Translation), signed by Vladimiro Rodriguez Brito, Head of the Island Department for Environment and Landscape to *SeaWorld* for transmission to NMFS with MMPA 15-day notice, dated **7 June 2005**. (Document produced by the NMFS pursuant to a FOIA request.)

<http://www.freemorgan.org/pdfs/Spanish-Letter-of-Comity-to-NMFS-SW-Killer-Whales-to-LP-7-June-2005.pdf>

¹⁹⁷ Judgment of the European Court of Justice – Spain in violation of Zoo Directive.

<http://www.freemorgan.org/pdfs/Judgment-of-the-Court-ECJ-Fifth-Chamber-of-9-December-2010-European-Commission-v-Kingdom-of-Spain.pdf>

¹⁹⁸ EU Zoo Directive – Council Directive 1999/22/EC.

<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31999L0022&from=EN>

¹⁹⁹ See press release from European Commission – Spain still in violation of Zoo Directive.

<http://www.freemorgan.org/pdfs/ECJ-Zoos-Directive-Followup-to-Spain-Zoo-Directive-29-September-2011.pdf>

²⁰⁰ See Raad van State Opinion at section 8.6. (See page 15, paragraph 8.6 of Certified Translation.)

<http://www.freemorgan.org/pdfs/Morgan-Appeal-Final-Verdict-Raad-van-State-23-April-2014-with-Official-English-Translation.pdf>

²⁰¹ See Spanish Ministry Report - *Informe Sobre Las Instalaciones De Loro Parque, Para El Alojamiento De Un Ejemplar De Orcinus orca Procedente De Holanda*, dated **16 May 2012** with Certified Translation.

<http://www.freemorgan.org/pdfs/Spanish-Informe-Ministerio-Orca-Morgan-16-May-2012-with-English-translation.pdf>

²⁰² Letter from José Luis Herranz Saez, Director General, Spanish Ministry of the Environment to Cathy Williamson, Whale and Dolphin Conservancy, dated **13 April 2006**.

<http://www.freemorgan.org/pdfs/Jose-Luis-Herranz-Saez-Letter-to-Cathy-Williamson-13-April-2006.pdf>

²⁰³ See Section 104(c)(2)(D) MMPA:

"If the Secretary (i) finds in concurrence with the Secretary of Agriculture, that a person that holds a permit under this paragraph for a marine mammal, or a person exercising rights under subparagraph (C), no longer meets the requirements of subparagraph (A)(ii) and is not reasonably likely to meet those requirements in the near future, or (ii) finds that a person that holds a permit under this paragraph for a marine mammal, or a personal exercising rights under subparagraph (C), no longer meets the requirements of subparagraph (A) (i) or (iii) and is not reasonably likely to meet those requirements in the near future, the Secretary may revoke the permit in accordance with section 104(e), seize the marine mammal, or cooperate with other persons authorized to hold marine mammals under this Act for disposition of the marine mammal. The Secretary may recover from the person expenses incurred by the Secretary for that seizure."

<http://www.nmfs.noaa.gov/pr/laws/mmpa/text.htm#section104>

²⁰⁴ See Morgan's Dutch EG-Certificate No. 11 NL 114808/20 and Dutch MA governing cover letter with Certified Translation.

<http://www.freemorgan.org/pdfs/Dutch-EG-Certificate-11NL11480820-and-Cover-Letter-27-July-2011.pdf>

²⁰⁵ See *Dolfinarium Harderwijk* "Application" for exemption to transfer Morgan to *Loro Parque* pursuant to Article 8(3)(g) of Council Regulation 338/97. <http://www.freemorgan.org/pdfs/Dolfinarium-Harderwijk-Application-for-EG-Certificate-11-07-2011.pdf>

²⁰⁶ See Almunia comment No. 46 - Dr. Javier Almunia, *Loro Parque Fundación* - Comments by *Loro Parque* on the Report on the Physical & Behavioural Status of Morgan, the Wild-Born Orca held in Captivity at *Loro Parque*, Tenerife, Spain by Dr. Ingrid Visser.

<http://www.freemorgan.org/pdfs/Almunia-LP-Comments-to-the-Report-on-the-Physical-Status-of-Morgan-November-2013.pdf>

²⁰⁷ Opinion of Advocate General Stix-Hackl in European Court of Justice (ECJ) Case C-510/99, **6 February 2001**, European Court Reports 2001 I-07777, page I-7795, paragraph 72. (ECLI identifier: ECLI:EU:C:2001:77) [Dr. Christine Stix-Hackl served as Advocate General at the European Court of Justice (ECJ) from 2000 to 2006]. <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61999CC0510&rid=41>

²⁰⁸ Opinion of Advocate General Stix-Hackl in ECJ Case C-154/02, **15 May 2003**, European Court Reports 2003 I-12733, page I-12746, paragraph 55. (ECLI identifier: ECLI:EU:C:2003:293) <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62002CC0154&from=EN>

²⁰⁹ See Almunia comment No. 13 - Dr. Javier Almunia, *Loro Parque Fundación* - Comments by *Loro Parque* on the Report on the Physical & Behavioural Status of Morgan, the Wild-Born Orca held in Captivity at *Loro Parque*, Tenerife, Spain by Dr. Ingrid Visser.
<http://www.freemorgan.org/pdfs/Almunia-LP-Comments-to-the-Report-on-the-Physical-Status-of-Morgan-November-2013.pdf>

²¹⁰ Comments from Dr. Javier Almunia and *Loro Parque*'s owner, Wolfgang Kiessling about Morgan as a new bloodline reported in EL DIA.es news article from **1 December 2011**, with Certified Translation. <http://www.freemorgan.org/pdfs/EL-DIA-es-1-December-2011-Morgan-for-Breeding-with-English-Translation.pdf>

²¹¹ *SeaWorld* has said it does not plan to bring Morgan to the U.S.
http://articles.orlandosentinel.com/2011-11-29/business/os-seaworld-morgan-killer-whale-20111129_1_loro-parque-killer-whale-seaworld-san-antonio

²¹² Wolfgang Kiessling calls *Loro Parque* the Rolls Royce of marine parks in Certified Translation of EL DIA.es, **1 December 2011**. <http://www.freemorgan.org/pdfs/EL-DIA-es-1-December-2011-Morgan-for-Breeding-with-English-Translation.pdf>

²¹³ <http://www.freemorgan.org/pdfs/Kiessling-Wolfgang-Letter-to-Reuvers-Jan-Dolfinarium-Harderwijk-Regarding-Loro-Parque-Facilities-31-August-2011.pdf>

²¹⁴ Transcript of Proceedings - Secretary of Labor vs. Sea World of Florida, LLC. (2011) US Occupational Safety and Health Review Commission (OSHRC Docket No. 10-1705), **19 September 2011** through **18 November 2011**.

See attorney Carla Gunnin, *SeaWorld*'s lead trial counsel – transcript pages 1118-1119: Gunnin regarding *Loro Parque* - “not an industry leader”.

<http://www.freemorgan.org/pdfs/Secretary-of-Labor-vs-SeaWorld-Transcript-of-Proceedings-OSHRC-Docket-No-10-1705.pdf>

²¹⁵ Allee, Suzanne M. Letter brief dated **10 October 2010** - *Sea World's "Excess Orcas" at Loro Parque, Tenerife, Spain.* <http://www.freemorgan.org/pdfs/Allee-Suzanne-SeaWorlds-Excess-Orcas-at-LP-10-October-2011.pdf>

²¹⁶ Rose, Naomi. Letter report on behalf of the Humane Society of the United States, Animal Welfare Institute, The Whale and Dolphin Conservation Society and Suzanne Allee regarding *Loro Parque*, to P. Michael Payne, NMFS and Chester A. Gipson, APHIS, dated **11 November 2010**.

<http://www.freemorgan.org/pdfs/Rose-Naomi-HSI-Report-on-Orcas-at-LP-11-Novewmber-2011.pdf>



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