

VAN DEN BIESEN KLOOSTRA ADVOCATEN

State Secretary of Economic Affairs
p/a CITES Bureau
Rijksdienst voor Ondernemend Nederland
Postbus 19530
2500 CM DEN HAAG

DE GROENE BOCHT
Keizersgracht 452
1016 GD Amsterdam
The Netherlands
T +31 (0)20 737 18 69
F +31 (0)20 524 82 46
info@vdbkadvocaten.eu
www.vdbkadvocaten.eu

Also by fax: 070 - 37 86 139
and e-mail: cites@rvo.nl

Amsterdam, 25 August 2016

Re : Free Morgan Foundation / EA (EC certificate)
File number : D20140015
Subject : **APPLICATION FOR ANNULMENT OF and/or
WITHDRAWAL OF and/or CHANGE OF /AMENDMENT TO
DECISION AND EC CERTIFICATE IN RESPECT OF
MORGAN THE ORCA**

Dear Madam, Sir,

On behalf of the Stichting Free Morgan Foundation, located in Nijmegen, I am approaching you with a request for the annulment of the EC certificate of 27 July 2011, reference 11NL114808/20, granted in respect of Morgan the orca and/or of the decision of 27 July 2011 to issue the aforementioned EC certificate, alternatively with a request to amend or change that EC certificate.

Background and relevant facts

1. In 2010 an emaciated orca, Morgan, was discovered in de Wadden Sea by the patrol vessel “de Krukel” of the Ministry of Agriculture, Nature and Food Quality. Dolfinarium Harderwijk was called for advice about the orca that seemed lost in the shallow Wadden Sea. The Dolfinarium Harderwijk sent out a team aboard de Krukel and captured the young orca who was subsequently named Morgan and determined to be female. She was then taken to Dolfinarium Harderwijk for rehabilitation. The Ministry supported this intervention and declared it was in accordance with the permit the Dolfinarium Harderwijk holds for rescue and rehabilitation of toothed cetaceans. Fol-

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lowing her recovery Morgan was supposed to be returned to sea, *inter alia* on the basis of the Dutch Flora and Fauna Act ('FF Act') exemption. It was subsequently decided not to return Morgan to the sea, *inter alia* on the basis of reports from the Dolfinarium Harderwijk about her age. The Dolfinarium Harderwijk's vet stated that Morgan was only 18 months old when she was captured; other experts were unable to examine her.

2. It soon became clear that the Dolfinarium Harderwijk had another intended purpose for the wild orca. In a letter of 11 July 2011 Dolfinarium Harderwijk submitted an application for an EC certificate for Morgan the orca, under Article 8(3)(g) and Article 9(1) of Council Regulation (EC) No 338/97 of 9 December 1996 on the protection of species of wild fauna and flora by regulating trade therein, hereafter: the CITES Basic Regulation.

3. The aim of the application was to get Morgan moved to the Loro Parque theme park, where five captive-born orca performed daily in shows for the public. The application was for exemption for a commercial transaction 'intended for research or education aimed at the preservation or conservation of the species' (8(3)(g) of the CITES Basic Regulation), as evidenced by the letter of 11 July 2011, and for consent for the associated movement to the Loro Parque theme park (Article 9(1) of the CITES Basic Regulation). Along with the aforementioned letter, Dolfinarium Harderwijk submitted a completed EC application form, applying for a 'research' exemption. A copy of the application of 11 July 2011, as well as the accompanying EC application form with annexes, is appended hereto (**annex 1**).

4. Dolfinarium Harderwijk concluded an agreement with Loro Parque, with the upshot that, despite the fact that she was an animal from the wild, Morgan would stay at the Loro Parque theme park in Tenerife in exchange for a fee to cover Dolfinarium Harderwijk's costs and claim delivery of dolphins to the park in Harderwijk. Loro Parque is a theme park aimed at tourists.

5. In a decision of 27 July 2011 the State Secretary of Economic Affairs decided to issue the requested EC certificate. The aforementioned decision cites the two grounds for issue of the EC certificate: exemption under Article 8(3)(g) of the CITES Basic Regulation from the prohibition on commercial activities with strictly protected species as laid down in Article 8(1) of the CITES Basic Regulation, and consent for movement to Loro Parque under Article 9(1) of the CITES Basic Regulation. The EC certificate of 27 July 2011, reference 11NL114808/20, was issued on both grounds. In the decision of 27 July 2011 to issue the EC certificate the State Secretary holds the following:

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"I am therefore of the opinion that Loro Parque will keep the orca for research as described in Article 8(3)(g) of the CITES Regulation. Transportation will also take place in accordance with Article 9 of the CITES Regulation."

And:

I therefore issue an EC Certificate for the transfer of the orca from the dolphinarium, Harderwijk, to Loro Parque, Tenerife, on condition that the animal is kept for research. For this reason clauses 18.8, 19.2 and 19.3 of the Certificate have been ticked." (Decision of 27 July 2011, pp. 3 and 4).

6. The aforementioned sections were indeed checked on the issued EC certificate. Attached to the EC certificate are the 'Conditions to and clarification of the certificate', in which, *inter alia*, the following is provided:

"2. The certificate will lose its validity if the live specimens specified herein have died, if live animals have escaped, if specimens have been destroyed or if any information provided in sections 2 or 4 of the certificate no longer corresponds with reality. (...)"

And:

"4. The specimens may only leave the address specified in section 2 with the permission of the issuing authority, unless an animal must be moved for urgent veterinary treatment and is thereafter returned directly to the location where it may be held."

7. A copy of the decision of 27 July 2011, the EC certificate of 27 July 2011, and the accompanying annex are appended hereto (**annex 2**).
8. Morgan the orca has been at Loro Parque since the end of November 2011. Vets have now acknowledged that when she was captured Morgan was much older than the Dolfinarium Harderwijk's vet Niels van Elk stated¹ at the time. Vet Dr. Greenwood, who occasionally evaluates the orca at Loro Parque, stated on 19 November 2013 that Morgan was at that time – in November 2013 – between five and six years old²:

"Estimated to be 5-6 years old, based on size and appearance at the time of rescue, and the onset of ovarian cyclic activity very recently. Retrospectively she is considered to have been small for her age at rescue."

Dr. Greenwood has been retained by Loro Parque as a veterinary consultant since 1986.

¹ <http://edepot.wur.nl/166250> , Van Elk (2010) 'Expert advice on the releasability of the rescued killer whale (Orcinus orca) Morgan' (p. 11): "Age estimated at 18 to 24 months upon admission (length upon admission 343 cm)".

² <http://www.freemorgan.org/pdfs/Greenwood-Andrew-Veterinarian-Health-Assessment-of-Killer-Whale-Morgan-19-November-2013.pdf>

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9. This finding confirms what the Free Morgan Foundation established when Morgan was in Harderwijk: that she was at least three, probably four and possibly even five years old when she was captured. It is relevant to mention this, because when the decision was taken by Dolfinarium Harderwijk not to return Morgan to the sea, her age was given predominance³.
10. Van Elk in his report on the ‘releasability’ of Morgan further incorrectly stated (his point 9, page 11) that “Imprinting on humans has taken place and was unavoidable as she has to be handled”. It must be noted that no ‘Imprinting’ occurred with Morgan as this is a biological term strictly describing a behaviour that occurs in the very early stages of an animal’s life (i.e., typically within hours or days of birth). Morgan, at the time of capture was at least 3 years old, most likely much older. Therefore, rather than ‘imprinting’ Morgan became ‘habituated’ to humans – that is, she became unafraid of humans. Such habituation is often seen in wild animals who, for example, live in open parklands where humans visit – the wild animals will not react by fleeing, when they see humans. The implications of Van Elk’s misuse of the term ‘imprinting’ may have added to negative impressions about Morgan’s suitability for subsequent release and influenced the decision making process unduly.
11. An important aspect of the captive-born orcas’ stay at Loro Parque, and now Morgan’s too, is that they take part in daily circus-like shows of a very repetitive nature for the public. It now transpires, from investigation and observations, that Morgan’s welfare is being seriously harmed at Loro Parque. After previous investigation of Morgan’s welfare in 2012, 2013 and 2014, new observations were carried out at Loro Parque in 2016, which are described and documented in the report published on 15 July 2016 ‘*Ongoing concerns regarding the SeaWorld orca held at Loro Parque, Tenerife, Spain*’, 2016, by I. N. Visser and R. B. Lisker. The report is submitted herewith (**annex 3**). The findings in this report bring to light new evidence regarding the lack of animal welfare and Morgan’s living conditions in Loro Parque. The report also makes it clear that problems found in 2012 were not incidental, but are still common practice at Loro Parque. The Loro Parque orcas indeed bear the marks of this.
12. The report reveals that Morgan the orca is in a poor condition and is showing signs that are important indicators of a lack of basic animal welfare. The observations illus-

³ <http://www.freemorgan.org/pdfs/Dolfinarium-Harderwijk-Application-for-EG-Certificate-11-07-2011.pdf>
“born: Approx. 01.01.09”. See also Raad van State 23 April 2014, case number 201300892/1/A3, par 6:
“(...). The State Secretary argued that he had no reasons to assume that Dolfinarium’s report dated 14 November 2010 had been prepared incorrectly or without due care. In this context, he took into consideration that Morgan’s family group had not been traced, that she belonged to a species of orca with a strict social structure and that she was a young animal of which it could not be said with certainty that she would be able to feed herself.”

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trate a clear lack of welfare, particularly when taking into account the restricted access, e.g. observations were only able to be made during public viewing (show) times and from public areas.

13. One of the major indicators of stress and lack of welfare is the state of the dentition of orcas kept in captivity. Since Morgan's arrival at Loro Parque her teeth have deteriorated badly (worn down and broken teeth). Self-mutilation as a result of stress or boredom is the major cause of this (chewing the concrete, Visser & Lisker, 2016, p. 51). This has meant that in three years the damage to 75% of her right mandibular (lower jaw) teeth qualifies as 'severe' (Visser & Lisker 2016, p. 16). The other orcas have also incurred severe damage to their teeth in the space of a few years. Loro Parque is seen to be performing well below industry standards and certainly below the internationally accepted 'best practice' for healthcare, as well as welfare management for captive orca (Visser & Lisker 2016, p.18).
14. Further indicators and evidence of the lack of welfare at Loro Parque and of Morgan in particular are: aggression within the group, bite marks, abnormal and/or repetitive behaviour, confinement, poor health and the generally poor conditions in which they are being kept.
15. As mentioned, the observations show that Morgan takes part in circus-like, repetitive shows. There is little other diversion. The medical tank – very small for an orca – is used as a holding tank by Loro Parque. Normal behaviour and even natural body posture are not possible in this tank (Visser & Lisker 2016, p. 35). Morgan is regularly left there for long periods of time, and regularly with one or several male orcas (p. 38). Being kept in this tank is a cause of stress (repeatedly banging her head against the side, p. 37). The medical tank offers no possibility of staying in the shade and is painted a very pale colour, which reflects a lot of light; these are very poor conditions for the light-sensitive orcas to be kept in.
16. Within the group there is a lot of violence, as evidenced by the bite marks on various orcas, including Morgan (p. 51). Sustained aggression in this non-socialised group of orcas at Loro Parque is also the possible cause of Morgan's unnatural behaviour whereby she comes out of the water and lies outside the water, as witnessed on several occasions (p. 50).
17. From the foregoing it also emerges that Morgan is not being used at Loro Parque solely for the scientific 'research' permitted under Article 8(3)(g) of the CITES Basic Regulation; despite being born in the wild she has to perform regularly, probably dai-

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ly, in circus-like shows for the public, shows of which the added value for her welfare is more than dubious due to their repetitive nature, but which are big crowd-pullers.

18. In addition there is absolutely no indication that Morgan is being used for 'research', the purpose for which she is at Loro Parque. Since her arrival in November 2011 one paper was published, describing some hearing tests. It should be noted that this publication is only about the potential for hearing deficits in Morgan and is not a contribution to the conservation of the species. In other words: there is no trace of evidence of scientific research with Morgan at Loro Parque, although she has been there for almost five years.
19. Furthermore, it appears Morgan is being used for breeding purposes: she is being kept with male orca who are not from her breeding stock.
20. As a result she may become pregnant with a calf that would – from a genetic viewpoint – no longer belong to a population of killer whales that live in the wild. It is clear that orcas born in captivity are allowed to be treated with far fewer restrictions under CITES, meaning that any calf of Morgan's, although without value for the natural population, would have considerable commercial value⁴.
21. The constant and unnatural sexual pressure placed on Morgan by leaving her locked up in tanks with male killer whales means that she finds herself in circumstances in which she has insufficient space to avoid the males should she wish to. In the wild female orcas do not generally give birth until they are around twelve to fourteen years old. The virtually constant sexual pressure from males observed in captivity is not observed in the wild. Additionally, it should be noted that even if an orca is sexually mature (i.e., physically able to produce a calf) there are social restrictions in the wild and these vary from population to population but in all cases it is the female that makes the choice, not the male, compared to Loro Parque, where the male dominate Morgan.
22. Breeding with Morgan at Loro Parque is therefore contrary to Morgan's natural behaviour and natural needs. She is exhibiting avoidance behaviours including leaving the water altogether for prolonged periods. This is a completely modified behaviour, which in the wild is only observed for extremely short periods and during foraging and

⁴ See for example <http://www.sandiegouniontribune.com/news/2014/may/11/seaworld-kalia-killer-whales-breeding/> "Dennis Speigel, president of International Theme Park Services, a Cincinnati-based leisure consultant, said a recent study by his company pegs each SeaWorld killer whale's worth at \$15 million to \$20 million. "From an asset-based standpoint, to have another killer whale among their animal brood is a great thing," he said."

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training for foraging. Furthermore, breeding at Loro Parque has no added value for the species. In view of the above, an orca bred at Loro Parque does not benefit the conservation status of the wild population either, as the State Secretary correctly stated in the decision of 27 July 2011. Given the ground on which the granted exemption was based, i.e. for research under Article 8(3)(g) of the CITES Basic Regulation, breeding is therefore not permitted.

23. According to the Spanish authorities breeding with Morgan is permitted, because section 18.8 of the EC certificate for Morgan has been checked. The Spanish authorities ignore the contents of the decision of 27 July 2011 issuing that EC certificate. The following printed text appears underneath section 18.8 of the EC certificate:

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

It is standard text setting out the different grounds for exemption as laid down in Article 8(3)(e), (f) and (g) of the CITES Basic Regulation without making it clear on the basis of which specific ground for exemption the EC certificate was issued. With regard to Morgan, the specific grounds for exemption that apply have been set in the set Flora- and fauna Act based decision of the State Secretary of 27 July 2011 issuing the EC certificate.

24. However, Dr. Javier Almunia, director of environmental affairs at Loro Parque who is responsible for the orcas, stated that Loro Parque is trying to breed Morgan (**annex 4**).

25. The Spanish authorities acknowledge that the EC certificate is still the (sole) legal basis for Morgan's stay at Loro Parque and that the contents thereof determine Morgan's permitted ‘use’. However, the authorities do not acknowledge that it is abundantly clear that Morgan was made available to Loro Parque only on the basis of the exception in Article 8(3)(g) of the CITES Basic Regulation for ‘research’ and not for any other purpose, such as breeding, for which the separate ground for exemption under Article 8(3)(f) of the CITES Basic Regulation applies. It is precisely that ground for exemption that was not given as the basis for the decision on Morgan. The Spanish Ministry of Economic Affairs wrote the following to the Free Morgan Foundation, in response to questions about Morgan:

"This Management Authority performs regular inspections to ensure that the terms and conditions established in relation to the keeping of the orca Morgan are obeyed. In this regard, it should be noted that the Community Certificate issued by the Dutch CITES MA doesn't set any express legal limitation to breeding and authorized to keep the orca for research, breeding or educational purposes. We are unaware of the content and scope of the governing letter submitted by the Dutch CITES MA you are referring to in your letter. However, it is necessary to note that the only binding document for this

Management Authority is the CITES certificate accompanying the specimen." (Letter from the Ministry of Economic Affairs of 14 December 2015 in reply to the questions raised about Morgan the Orca in a letter of 6 November 2015 from the Free Morgan Foundation).

26. A copy of the Spanish authorities' reply of 14 December 2015 is attached hereto (**annex 5**). This reply from the Spanish authorities leaves no doubt that, contrary to the Dutch decision regarding Morgan, in their mind, the possibility of breeding Morgan is left open.

Legal framework: laws and regulations, FF Act exemption and EC certificate

27. The core of the European legislation implementing the CITES Convention – *Convention on International Trade in Endangered Species of Wild Fauna and Flora* – is to better protect species of wild fauna and flora that could be threatened by trade therein. A protection regime applies to protected species. Within the European Union it concerns the protected species listed in the Annexes to the CITES Basic Regulation. This is necessary for their conservation given the status of those species. Orca are one of the species listed in Annex B, but as Morgan is also wild-born she falls into the category of Annex A and therefore is provided even further protection. Under the CITES Basic Regulation Annex A species cannot be traded or used for commercial purposes.

28. Insofar as trade in endangered species is permitted under the CITES Basic Regulation, the protection of those specimens, including during movement and the way in which they are housed, is always a condition precedent:

Whereas there is a need, in order to ensure the broadest possible protection for species covered by this Regulation, to lay down provisions for controlling trade and movement of specimens within the Community, and the conditions for housing specimens (10th recital of the CITES Basic Regulation).

29. According to Article 2(m) of the CITES Basic Regulation 'primarily commercial purposes' shall mean all purposes the non-commercial aspects of which do not clearly predominate. To offer the best possible protection, the term 'sale' is broadly defined in the CITES Basic Regulation. Under Article 2(p) of the CITES Basic Regulation hire, barter or exchange shall be regarded as sale; cognate expressions shall be similarly construed. Sale of protected species is prohibited, with the exception of a few specifically defined possibilities of exemption. Article 2(u) of the CITES Basic Regulation provides that 'trade' shall mean the introduction into the Community, including introduction from the sea, and the export and re-export therefrom, as well as the use,

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movement and transfer of possession within the Community, including within a Member State, of specimens subject to the provisions of the Regulation.

30. Commercial activities involving protected species are prohibited under Article 8(1) of the CITES Basic Regulation, and exemption can only be granted for one or several of the exceptions formulated in Article 8(3) of the CITES Basic Regulation. The application from the Dolfinarium Harderwijk and the State Secretary's decision of 27 July 2011 show that consent for commercial activities with Morgan the orca between the Dolfinarium Harderwijk and Loro Parque was granted, through issue of the EC certificate, for the ground for exemption under Article 8(3)(g) of the CITES Basic Regulation. That exemption may be used for protected specimens such as those:

“intended for research or education aimed at the preservation or conservation of the species”

31. In any event there is no question of use of a specimen pursuant to one of the grounds for exemption under Article 8(3) of the CITES Basic Regulation if it is being used for primarily commercial purposes. This is defined as follows in Article 2(m):

“primarily commercial purposes” shall mean all purposes the non-commercial aspects of which do not clearly predominate;

32. With regard to the movement of protected species Article 9(1) and (2) provides as follows:

1. Any movement within the Community of a live specimen of a species listed in Annex A from the location indicated in the import permit or in any certificate issued in compliance with this Regulation shall require prior authorization from a management authority of the Member State in which the specimen is located . In other cases of movement, the person responsible for moving the specimen must be able, where applicable, to provide proof of the legal origin of the specimen.

2. Such authorization shall :

(a) be granted only when the competent scientific authority of such Member State or, where the movement is to another Member State, the competent scientific authority of the latter, is satisfied that the intended accommodation for a live specimen at the place of destination is adequately equipped to conserve and care for it properly (...).

33. The European Commission has transposed the provisions of the CITES Basic Regulation into Commission Regulation (EC) No 865/2006 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, hereafter: the Implementing Regulation. Article 59(3) of the Implementing Regulation provides for the following:

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The exemption for specimens referred to in Article 8(3)(e), (f) and (g) of Regulation (EC) No 338/97 shall be granted only if the applicant has satisfied the competent management authority, the latter having consulted with a competent scientific authority, that the conditions referred to therein and in Article 48 of this Regulation are met.

34. Making his evaluation in the light of Article 8(3) and Article 9 of the CITES Basic Regulation, the State Secretary decided to grant the requested exemption and to issue the EC certificate for research at Loro Parque:

"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. For this reason clauses 18.8, 19.2 and 19.3 of the Certificate have been ticked. The future destination of the orca is mentioned in box 2. (Decision of 27 July 2011, p. 4)

35. The State Secretary made the evaluation prescribed in Article 59(3) of the Implementing Regulation as follows, as set out in the decision of 27 July 2011:

"Finally I have, in accordance with Article 59(3) of the Implementation Regulation, asked the Spanish CITES-MA if Loro Parque is adequately equipped to conserve and care for the animal properly. The Spanish CITES-MA subsequently consulted its scientific authority and has replied that it has no objection to the transfer of the orca. The authority also 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 CITES Basic Regulation." (Decision of 27 July 2011, p. 3)

36. The following conditions were also attached to the EC certificate issued for Morgan:

"CONDITIONS ATTACHED TO AND CLARIFICATION OF THE CERTIFICATE

1. The holder of this certificate must present it to the officer referred to in Section 104 of the Dutch Flora and Fauna Act (*Flora- en faunawet*) when the latter so requests.
2. The certificate will lose its validity if the live specimens specified herein have died, if live animals have escaped, if specimens have been destroyed or if any information provided in sections 2 or 4 of the certificate no longer corresponds with reality.
- (...)

4. The specimens may only leave the address specified in section 2 with the permission of the issuing authority, unless an animal must be moved for urgent veterinary treatment and is thereafter returned directly to the location where it may be held."

37. Article 11(1) and (2) of the CITES Basic Regulation are also relevant:

1. Without prejudice to stricter measures which the Member States may adopt or maintain permits and certificates issued by the competent authorities of the Member States in accordance with this Regulation shall be valid throughout the Community.

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2. (a) However, 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.

(b) Specimens situated in the territory of a Member State and covered by such documents shall be seized by the competent authorities of that Member State and may be confiscated.

38. Article 14(1) of the CITES Basic Regulation prescribes the following under the heading 'Monitoring of compliance and investigation of infringements':

(a) The competent authorities of the Member States shall monitor compliance with the provisions of this Regulation.

(b) If, at any time, the competent authorities have reason to believe that these provisions are being infringed, they shall take the appropriate steps to ensure compliance or to instigate legal action.

(c) Member States shall inform the Commission and, in the case of species listed in the Appendices to the Convention, the Convention Secretariat of any steps taken by the competent authorities in relation to significant infringements of this Regulation, including seizures and confiscations.

39. For the assessment of this particular application it is also relevant that the decision of 27 July 2011 to grant an EC certificate for Morgan involves an exemption within the meaning of Article 75(5) and (6) of the Dutch Flora and Fauna Act (FF Act) under the conditions set therein. Finally, it is relevant that Article 80(e) of the FF Act provides the following:

A permit or exemption can be withdrawn if:

(...)

c. the holder of a permit or exemption acts contrary to the permit or exemption granted to him or contrary to conditions attached thereto;

d. the information on which the permit or exemption is granted proves to be so incorrect that, had the correct information been known, a different decision would have been taken or

e. the circumstances since the date on which the permit or exemption was granted have changed in such a way that these would not have been granted if these circumstances had existed at the time they were granted.

Request for annulment or withdrawal of the EC certificate and the FF Act decision of 27 July 2011

40. The facts outlined above lead to the conclusion that the State Secretary's decision of 27 July 2011 to grant an EC certificate and the issuing of that EC certificate was based

on an erroneous assumption that the conditions for issue had been met, as set out in Article 11(2) and (a) of the CITES Basic Regulation. The grounds for withdrawal under Article 80 of the FF Act have also been met, because the information on which the exemption for the transaction with Morgan and transfer was granted appears to be so incorrect that, had the correct information been known, a different decision would have been taken, or, in the alternative, that the situation since the issue of the decision of 27 July 2011 and/or EC certificate has changed to such an extent that these would not have been granted if these circumstances had existed at the time these were granted.

41. When assessing whether, with regard to the decision-making in respect of Morgan, there was any such erroneous assumption and/or inaccurate information and/or changed situation at Loro Parque, the following is relevant. Article 8(1) of the CITES Basic Regulation contains a prohibition on trade in protected species. Article 8(3) of the CITES Basic Regulation provides specific grounds for exemption from this prohibition under strict conditions. This regime, with a prohibition and specific exemption criteria, must be interpreted restrictively, so that the system laid down in Article 8 does not undermine the general system of monitoring (international) trade in protected animals. This is also why in Article 2(m) of the CITES Basic Regulation “primarily commercial purposes” are defined as all purposes the non-commercial aspects of which do not clearly predominate. It is precisely such commercial purposes that are prohibited and for those, no exemption can be granted.
42. The State Secretary’s assumption that Morgan’s stay at Loro Parque would predominantly serve research purposes was also erroneous. From the facts outlined above it transpires that Morgan the orca, a strictly protected species listed in Annex A, was taken to Loro Parque on the ground for exemption of ‘research’, even though no – or at best hardly any – research and probably no scientific research, as applied for, has been carried out, while no or hardly any results of that research have been published (Free Morgan Foundation found no evidence of any scientific research at Loro Parque in which Morgan played a role and only one publication in which her role was marginal). Given the fact that only one article regarding hearing tests was published within a more than reasonable timescale of nearly five years the State Secretary should have, of his own volition, investigated if Loro Parque has been acting in compliance with the FF Act decision of 27 July 2011, the EC certificate and the conditions thereto, and with the CITES Basic Regulation, based on Articles 11 and 14 of the CITES Basic Regulation and the Dutch FF Act.

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43. Independent of that, the Free Morgan Foundation feels that, on the basis of the facts outlined above, it is clear that there has been no scientific research, or that it is only very limited – so limited, in fact, that the non-commercial purpose for which the EC certificate and the exemption were granted, to wit: research, does not ‘clearly predominate’. By virtue of Article 2(m) of the CITES Basic Regulation in combination with Article 8(1) and (3) of the CITES Basic Regulation this leads to the conclusion that the assumption that Morgan’s stay would be dominated by ‘research’ purposes and not by the primarily commercial use of Morgan, as has proved to be the case, was an erroneous assumption at the time of granting the exemption and issuing the EC certificate.
44. In view of the fact that Morgan is being held at Loro Parque under Article 8(3) of the CITES Basic Regulation and was moved there on that basis, Morgan’s stay at Loro Parque must always satisfy the condition that she is used for ‘research’. The finding that no, or at best hardly any, publications about Morgan have appeared, means that the conditions for her move to and her stay at Loro Parque have not been met.
45. This leads to the conclusion that the State Secretary should take a decision, declaring in that decision that the issued EC certificate and the FF Act exemption of 27 July 2011 must be deemed void within the meaning of Article 11(2) of the CITES Basic Regulation, and/or to decide that the FF Act decision of 27 July 2011 and the EC certificate pursuant to Article 80 of the FF Act be withdrawn.
46. Also erroneous was the State Secretary’s assumption that Loro Parque satisfies the conditions of 59(3) of the Implementing Regulation and is sufficiently equipped for the conservation and proper care of Morgan, in view of the observations and publications discussed above, which reveal that Morgan is being exposed to poor living conditions and aggression, is exhibiting unnatural behaviour and self-mutilation, that the group of orcas at Loro Parque appears to be dysfunctional and that Morgan is regularly left alone or with male orcas in an extremely small ‘medical tank’ which is not fit for that purpose. These facts, too, therefore lead to the conclusion that the State Secretary should decide that the EC certificate issued for Morgan and the FF Act decision of 27 July 2011 must be deemed void within the meaning of Article 11(2) and (a) of the CITES Basic Regulation and/or that he should withdraw that the decision of 27 July 2011 and the EC certificate be withdrawn, based on Article 80 of the FF Act.
47. Furthermore, the State Secretary’s assumption that, at the time of granting the exemption and the EC certificate, the shows in which Morgan is forced to take part virtually daily served a purpose from the viewpoint of animal welfare is erroneous. Given the repetitive nature of the shows these have no added value for Morgan’s welfare, and, as

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a result, the only purpose Morgan is serving is the commercial purpose of entertainment for the public. This fact, too, should lead to the conclusion that the State Secretary must decide that the EC certificate issued for Morgan and the exemption must be deemed void within the meaning of Article 11(2) and (a) of the CITES Basic Regulation and that he should withdraw the granted exemption and EC certificate under Article 80 of the FF Act.

48. It follows from the facts set out before that Loro Parque is breeding or trying to breed Morgan and/or putting her in a situation to breed, although the EC certificate and decision of 27 July 2011 do not permit breeding. As was put forward above, in any case the conditions to be fulfilled for obtaining a breeding exemption under Article 8(3)(f) of the CITES Basic Regulation have not been and are not fulfilled with regard to Morgan. As it is clear that Loro Parque by exposing Morgan to breeding and breeding situations infringes the decision of 27 July 2011 and/or the EC certificate, the decision of 27 July 2011 should be withdrawn and/or the EC certificate should be declared void.
49. Further, an important aspect for granting the EC certificate and taking the decision of 27 July 2011 was the erroneous presumption that Morgan the orca was very young (18 months). This false information about her age has been of crucial importance for the decision-making with regard to Morgan. As it has been confirmed – Free Morgan Foundation was right, she was much older at the time – that Morgan the orca was much older than the State Secretary took into account in the decision-taking, it should be concluded that the EC certificate and/or the 27 July 2011 decision should be deemed void and/or should be withdrawn as the conditions of Article 11 of the CITES Basic Regulation and/or of Article 80 of the FF Act are fulfilled.
50. From the above follows that the EC certificate and the State Secretary's decision of 27 July 2011 should not have been granted. It thus follows from these various grounds as described before that the State Secretary should decide that the EC certificate should be deemed void and/or that the decision of 27 July 2011 to grant the EC certificate should be withdrawn.
51. In addition the Free Morgan Foundation also notes the following. The legal basis for the 'using' of Morgan at Loro Parque was and is the State Secretary's decision of 27 July 2011 and the EC certificate granted thereby. As long as Morgan is at Loro Parque on the basis of the transaction with the Dolfinarium Harderwijk, that stay falls under the FF Act exemption and EC certificate issued for it. This follows from Article 11(1) of the CITES Basic Regulation, in which it is provided that permits and EC certificates shall be valid throughout the Community (read: Union). The conditions under

which the EC certificate for Morgan was issued confirm the validity of the EC certificate that was granted and as a consequence the competence of the State Secretary to decide to declare the FF Act decision of 27 July 2011 and the EC certificate void, based on Article 11 of the CITES Basic Regulation. That validity would only be lost in case Morgan would have died or escaped, or in case the information in sections 2 and 4 of the EC certificate no longer corresponded with reality. None of this is at issue.

52. Apart from that, in order for a decision to be taken stipulating that the issued ‘permit or certificate shall be deemed void’ within the meaning of Article 11(2)(a) of the CITES Basic Regulation, actual validity is not relevant. In the event of such permit or certificate being deemed ‘void’ a CITES legal ground for transaction and transfer involving Morgan is lacking, meaning that the legal title for her stay at Loro Parque must be considered as never having been issued.

Application in the alternative for change of/amendment to FF Act decision of 27 July 2011 and/or the EC certificate in respect of Morgan the orca

53. In the alternative the Free Morgan Foundation is seeking change of/amendment to the EC certificate and the accompanying decision of 27 July 2011, the FF Act exemption. It concerns the following.
54. Loro Parque and the Spanish competent Ministry have stated that Loro Parque would be entitled to breed Morgan. But, the application by Dolfinarium Harderwijk for an exemption/EC certificate for Morgan solely concerned and concerns the obtaining of an exemption for ‘scientific research’. Therefore, as already mentioned, the application falls under Article 8(3)(g) of the CITES Basic Regulation. The subsequent decision by the State Secretary of 27 July 2011 therefore states explicitly and clearly that the EC certificate is granted exclusively for the purpose of research involving Morgan at Loro Parque, as previously cited. The State Secretary checked section 18.8 of the EC certificate, which indicates that the specimen in question is to be used for one of the following purposes: the advancement of science/breeding or propagation/research or education or other non-detrimental purposes. This is a reference to the various options for exemption in Article 8(3)(e), (f) and (g). From the accompanying decision of 27 July 2011 it is clear that only the ‘research’ exception under (g) applies to Morgan. For each of the grounds for exemption under (e), (f) and (g) of Article 8(3) of the CITES Basic Regulation evaluation and compliance based on different criteria are needed.

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55. The Dolfinarium Harderwijk sought an exemption for Morgan solely under Article 8(3)(g) of the CITES Basic Regulation, and only for scientific research. It was stipulated in the decision of 27 July 2011 that moving Morgan to Loro Parque was permitted solely on that ground. In its judgment on the decision of 27 July 2011 and the EC certificate the Administrative Jurisdiction Division of the Raad van State confirmed that only the ground of Article 8(3)(g) of the CITES Basic Regulation had been applied. Under that ground for exemption, breeding is not permitted.
56. It has now become clear that both Loro Parque and the competent Spanish authorities erred – in derogation of the State Secretary’s decision – in assuming the applicability of ground for exemption (f), which permits trade for breeding purposes from which ‘conservation benefits will accrue to the species concerned’. However, no exemption under Article 8(3)(f) was granted for Morgan, and the conditions for it were not met either.
57. Independent of that, the given situation, where Morgan is under great pressure from sexually mature males, does not contribute to the needed level of welfare for Morgan, with behaviour and living conditions that are aligned as closely as possible to the natural behaviour of orcas. There is therefore every reason to take action against this contravention of the FF Act exemption of 27 July 2011.
58. Since the State Secretary proceeded from the erroneous assumption that Loro Parque and the Spanish authorities would interpret the EC certificate in the light of the decision of 27 July 2011 and this subsequently proved not to be the case, the State Secretary should – in the interests of the correct application of and compliance with the CITES Basic Regulation – append the decision of 27 July 2011 to the EC certificate for Morgan, pursuant to Article 6 of the Implementing Regulation and/or amend the EC certificate in another appropriate way to prevent breeding (situations) with regard to Morgan the orca.
59. Article 51 of the Implementing Regulation provides that an EC certificate can be changed. Article 79 of the FF Act provides that the conditions under which an exemption is granted can be changed. The Free Morgan Foundation believes that the foregoing – in the alternative in case the request to declare void the EC certificate and/or withdraw the 27 July 2011 decision would be rejected - should lead to amending – as far as necessary – the granted EC certificate and FF Act exemption, to prevent Loro Parque from breeding Morgan, and so doing infracting Article 8(1) and (3) of the CITES Basic Regulation as well as – the conditions to – the FF Act decision of 27 Ju-

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ly 2011 and the EC certificate that was issued with regard to Morgan, as well as to prevent misinterpretations and misunderstanding about the fact that breeding Morgan is prohibited, because of the fact that she was transferred to Loro Parque only for the purpose of 'research'.

APPLICATION

The Free Morgan Foundation requests the State Secretary:

- to decide that the EC certificate 11NL114808/20 shall be deemed void and, insofar as necessary, to withdraw the decision of 27 July 2011 in by which decision the s EC certificate was granted;
- to immediately inform the under the CITES Basis Regulation competent Spanish authorities of the annulment of the aforementioned EC certificate forthwith.

In the alternative the Free Morgan Foundation asks the State Secretary:

- to amend the EC certificate by including the State Secretary's decision of 27 July 2011, pursuant to Article 6 of the CITES Basic Regulation, and/or to amend the EC certificate in another appropriate way to clarify that breeding Morgan is not authorized in the exemption granted under Article 8(3)(g) of the CITES Basic Regulation.

Yours sincerely,

B.N. Kloostra