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RE: Conference of the Parties to CITES (CoP17)

Dear Ms. Fiore,

Please convey our sincere gratitude to MEP Affronte for seeking input from the Free Morgan Foundation (FMF). It is encouraging to know that Mr. Affronte is serving as one of the European Parliament co-sponsors and is taking an active role in formulating the Parliament's positions concerning wildlife trade issues for the upcoming 17th meeting of the Conference of the Parties to CITES (CoP17).

The FMF has been actively lobbying the CITES Secretariat and European Commission to address four (4) specific issues at CoP17. We refer to these as the cornerstones of "Morgan's Law" and believe they should be brought forth for discussion at CoP17; not because they apply to Morgan the wild-born orca's case, but because they concern all wildlife transactions. We list them here in summary and subsequently outline more details:

**[1] The establishment of a clear CITES policy regarding the breeding of rescued, wild cetaceans (whales, dolphins, and porpoises) with their captive-born counterparts;**

**[2] A bright-line CITES rule providing unambiguous criteria and guidelines differentiating between transactions for primarily commercial purposes and bona fide scientific research;**

**[3] Consistent and conforming purpose-of-transaction codes on CITES permits for both sides of a single import/export transaction; and**

**[4] Full disclosure of the legal owner in addition to identifying the name of the holder and facility on all CITES permits.**

To give you some background and justification for these requests, we provide here more details about each of the four specific issues. The FMF has submitted these same four issues to the United States CITES representatives and requested that the United States Government also present them to the CITES Secretariat for consideration as agenda items for CoP17. The FMF has also brought these very issues to the attention of the European Commission DG-Environment and Director General Calleja. We have received no feedback that either entity will present these. However, there is no doubt that support of the European Parliament will be critical to ensuring that these issues are given the consideration they deserve so that meaningful and timely resolution can be pursued for the benefit of all wildlife.

### **Breeding Wild Cetaceans with Captive Cetaceans**

There is a disturbing trend that rescued wild cetaceans are later found to not be good candidates for release. As in the case of Morgan, some of these cetaceans then find themselves performing for commercial entities and are subject to breeding, all for the benefit of the commercial industry. Cetaceans, in particular orcas, are valuable commodities in the marine park world. Allowing these lax policies to persist only encourages the keeping of wild-rescued cetaceans rather than their release back into the wild. It should be impermissible to breed a wild-born rescued cetacean, especially when the progeny of that whale will be used for primarily commercial purposes. One of the guidelines of the Global Federation of Animal Sanctuaries<sup>1</sup>, is that breeding should not be permitted of rescued animals.

The FMF believes that the issue of breeding wild-born cetaceans with their captive-bred counterparts is an issue warranting international resolution. Situations like this occur with greater frequency than authorities acknowledge and it involves all cetaceans, not just orca. We have evidence<sup>2</sup> that at least 13 species of rescued cetaceans, processed through at least 13 facilities around the world, have been used for primarily commercial purposes, including but not limited to, breeding.

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<sup>1</sup> <http://www.sanctuaryfederation.org/gfas/>

<sup>2</sup> <http://www.orcaresearch.org/wp-content/uploads/2011/08/VISSER-2015-RESCUED-CETACEANS-POSTER-Compassionate-Conservation-FINAL.pdf>

This practice needs to be measured against the growing public disgust that captive breeding of rescued cetaceans is occurring at all. On 17 March 2016, the Humane Society of the United States and SeaWorld entered into a historic agreement whereby SeaWorld agreed to put an end to its captive orca breeding program. While that is a start in the United States, this issue transcends national borders, as illustrated in the case of Morgan, a wild-born Norwegian orca, rescued in Dutch waters, transferred to a Spanish territory and now apparently subject to breeding decisions made at the direction of a United States corporation.

The FMF wishes to point out that the United States Marine Mammal Commission (Dr. Rebecca J. Lent, Ph.D., Executive Director) wrote a letter to the United States CITES Management Authority dated 29 January 2016, wherein the Marine Mammal Commission made a point of specifically dressing this issue as a possible agenda item to submit to the CITES Secretariat for CoP17:

“With respect to the question of whether the United States should “support establishing a clear policy [in CITES] regarding the breeding of rescued, wild cetaceans with their captive-bred counterparts,” the Commission notes the potential difficulties that can arise if cetaceans from different species or stocks are allowed to interbreed. Among other things, it may make it unwise to release the captive-bred offspring into the wild, should that ever be deemed desirable. The Commission therefore supports the adoption of clear policies regarding the breeding of rescued, wild cetaceans with captive-bred counterparts. However, we question whether this is something best accomplished within the framework of CITES. This is something that Parties should first address domestically or in some other forum, and then bring to CITES at a later stage if there are international trade implications that need to be addressed.”

The United States Marine Mammal Commission is correct in recognizing that breeding rescued, wild cetaceans with their captive-bred counterparts is unwise and presents numerous potential difficulties. The FMF, however, disagrees with the Marine Mammal Commission that this issue should be brought to CITES at a later stage. The time for action is now. Society had changed and there has also been a dramatic shift by the industry itself due to that public opinion, away from captive breeding of cetaceans for entertainment and other primarily commercial purposes.

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## Scientific Research versus Commercial Purposes

Resolution Conf. 5.10 (Rev. CoP15) provides guidance to Parties on making “not for primarily commercial purposes” findings, as required under Article III of the Convention. However, this resolution only provides guidance, not strict criteria. The FMF is therefore also calling on CITES to adopt a bright-line rule providing unambiguous criteria and guidelines differentiating between transactions for ‘primarily commercial’ purposes and ‘bona fide scientific research’. This is in order to reconcile the different meanings of the terms in satisfaction of the various international laws and conventions including, but not limited to, CITES, ASCOBANS, the EU Habitats Directive and the US Marine Mammal Protection Act.

The FMF takes the position that the current resolution is not adequate to provide Parties with a consistent understanding of the required finding. We cite the FMF white paper<sup>3</sup> on whale laundering as evidence for how the current resolution and its interpretation across the various cultural and language challenges lead to circumvention of true science for commercial exploitation for profit.

Certainly with respect to “research” on wild-born and rescued cetaceans, allowing open-ended collection of data with no particular peer reviewed scientific study or research project in place leads to the very type of abuse and exploitation in the name of science as that found by the ICJ concerning the Japanese whaling program. Clarification by CITES is required to ensure legitimate, bona fide scientific research is not tainted by faux science to justify captivity of wild-born and rescued cetaceans, as has been the case for Morgan.

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

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<sup>3</sup> Spiegl & Visser (2015) CITES and the Marine Mammal Protection Act: Comity and Conflict at *Loro Parque*. Available from <http://www.freemorgan.org/spiegl-visser-2015-white-paper-whale-laundering/>

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

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

### **Consistent Purpose-of-Transaction Codes**

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

The working group was re-established at the Standing Committee's 64th meeting (Bangkok, 2013) and 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. The working group was expected to present its suggestions regarding the purpose-of-transaction codes at CoP17 but action on this issue now appears to be facing delay once again and could be pushed back to CoP18.

The FMF and other NGO's interested in protecting wildlife are frustrated by the lack of progress on this issue. The FMF is calling for the extremely simple but effective requirement of the consistent use of CITES purpose-of-transaction codes so that the same code is used on both import and export CITES documents. As illustrated in the FMF white paper on whale laundering cited in the previous section, this is presently not the case and a refocusing of this global issue is clearly required.

The FMF feels that it is necessary to ensure transparency and accountability in the application process and in the actual transfer of specimens, that the purpose-of-transaction codes should be identical on both sides of the same export/import transaction. In our 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, where three different CITES MAs are called upon to interpret the CITES framework, US, Dutch, Spanish and EU law, and two CITES permits issued by two different MAs, in an otherwise irreconcilable manner.

Labeling of transactions should not be for the economic or political convenience of parties to that transaction, but should reflect the veracity of the transaction regardless of obligations under national law.

### **Disclosure of Legal Owner**

At the present time, CITES import, export and transfer permits do not provide for identification of the actual owner of the specimen. This should be included on the form. Currently, by only identifying the holder and facility, the CITES paperwork does not make clear who is ultimately responsible for the animal or product. An example of this is once again the case study we keep referring too; Morgan, where, despite years of attempting to untangle the details it is still not possible, through the CITES paperwork, to ascertain who owns her. Consequently, the respective governments are confused as to who is responsible for the implementation of the permits which were issued for her transport and for the welfare of the animal. This has resulted in a virtual 'pointing of fingers' at each other (as well as at several private entities), as to who is the actual owner and therefore who is/are the responsible parties. As such, to date, none have been held accountable.

Certainly in the case of Morgan, her legal ownership was apparently not known by the exporting (issuing) CITES Management Authority. As documented in the FMF white paper on whale laundering, through subterfuge in the permit process, two different marine theme parks identified as "holder" and "destination" on CITES documents masked the true "owner"; they in effect acted as agents for the true owner (if there ever was one) and prevented the responsible authorities from issuing a permit based on a full and complete understanding of the intended purpose for the transaction. This is a clear case of illicit wildlife trade and as such is nothing more than 'Whale Laundering' as a direct result of no required disclosure of the owner, on the paperwork.

To this date there is dispute over the ownership of Morgan with SeaWorld currently listing her as an asset. Therefore, the FMF contends that the legal ownership interest (be it a case of *'res nullius'*, Government guardianship, a private individual or business) in any wildlife transactions is vital. In this case-study a wild-born (rescued) cetacean's ownership was part of a transaction. That ownership is directly relevant to determining the legitimacy for the intended purpose of and trade of this individual. Such a case-study clearly illustrates why ownership should be mandated on all CITES documents.

In conclusion, we encourage Mr. Affronte to put forward these four issues at CoP17. They are issues that can be effectively implemented and will provide better, well-defined and consistently applied protection for the animals which are being traded – the fundamental and underlying basis of CITES.

The FMF appreciates the opportunity to contribute to this important process and we welcome any further questions you might have regarding our submission to you.

Respectfully submitted,



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