



MARINE MAMMAL COMMISSION

13 August 2013

Donna Darm
Assistant Regional Administrator
Protected Resources Division
National Marine Fisheries Service
7600 Sand Point Way NE
Seattle, WA 98115

Dear Ms. Darm:

The Marine Mammal Commission (MMC), in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the National Marine Fisheries Service's (NMFS) 29 April 2013 notice (78 Fed. Reg. 25044) announcing a 90-day finding on a petition to include the killer whale (*Orcinus orca*) known as Lolita in the endangered species listing for the southern resident killer whale. The MMC also has reviewed the 23 January 2013 petition submitted by the People for the Ethical Treatment of Animals and others in support of the proposed listing. NMFS found that the petitioned action "may be warranted." NMFS also noted that it is conducting a status review of this distinct population segment and, as part of that review, will examine the application of its listing policies to this individual killer whale.

RECOMMENDATION

The Marine Mammal Commission recommends that the National Marine Fisheries Service adopt a policy consistent with the rationale provided by the Fish and Wildlife Service in the proposed chimpanzee listing rule, and treat all biological members of the southern resident killer whale (or any other listed species or species being considered for listing) as part of the species or distinct population segment, regardless of whether those individuals are in the wild or in captivity. If the National Marine Fisheries Service does not agree with the conclusions or rationale of the Fish and Wildlife Service on this issue, the Marine Mammal Commission recommends that it convene a meeting with the Fish and Wildlife Service and the Commission to try to reconcile such differences.

The Marine Mammal Commission further recommends that the National Marine Fisheries Service promptly initiate and complete a rulemaking to remove the exclusion for captive killer whales and their progeny from the existing listing rule. In addition, the Commission recommends that the Service consult with the permits division of its Office of Protected Species to determine whether, and under what conditions, an Endangered Species Act permit might be issued to authorize the continued maintenance of Lolita in captivity.

RATIONALE

It is unfortunate that the petition and the *Federal Register* notice both specifically address the listing status of a single animal, Lolita, under the Endangered Species Act. The MMC does not believe that a separate listing action for a single captive animal that is isolated from the breeding

population is something envisioned under the Act.¹ At the same time, as discussed below, we believe that NMFS erred in its original listing of the southern resident killer whale when it excluded “whales placed in captivity prior to listing or their captive born progeny.” Thus, even though Lolita currently is the only whale that fits within this exclusion, the MMC believes that the petitioned action should be viewed more broadly, as one to include all members of the southern resident killer whale, whether in the wild or in captivity, in the listing. When viewed in this light, the MMC believes that the proposed change to the current listing—the removal of the exception for captive animals, rather than the addition of Lolita to the listing—is warranted.

The MMC has repeatedly supported the view that the southern resident killer whale constitutes a distinct population segment under the Endangered Species Act (most recently in the enclosed 4 February 2013 letter commenting on a petition to delist the species) and merits listing as endangered. We will not repeat those reasons here. The next question to consider is whether Lolita (or any other captive killer whale that might be covered by the listing) is a southern resident killer whale. The petitioners claim that “Lolita’s biological heritage [as a member of the listed distinct population segment] is undisputed.” The MMC has no basis for disputing that claim.

The only real questions remaining are whether it is permissible for NMFS to treat captive and wild animals differently in an Endangered Species Act listing and, if so, whether that is appropriate in this instance. The MMC believes that there is no basis for treating captive and wild members of a species differently and, therefore, the second question need not be addressed.

NMFS, in its 2004 proposed listing of the southern resident killer whale (69 Fed. Reg. 76673), did not provide any indication that it was considering excluding captive animals from the listing. In excluding pre-listing captive whales and their progeny from the final listing rule (70 Fed. Reg. 69903), NMFS noted only that such animals are not part of the southern resident killer whale distinct population segment, but did not provide any rationale or analysis to support that conclusion. Had it done so, the MMC could provide more specific comments as to why such a conclusion does not comport with the requirements of the Endangered Species Act.

Some of the arguments supporting the view that the Endangered Species Act applies equally to wild and captive individuals are provided in Part II of the petition. However, the Fish and Wildlife Service (FWS) recently published a comprehensive analysis of this issue in its 12 June 2013 proposed rule (78 Fed. Reg. 35201) to change the listing status of the chimpanzee to merge the listings of captive and wild “populations.” The FWS concluded that “the Act does not allow for captive-held animals to be assigned separate legal status from their wild counterparts on the basis of their captive state, including through designation as a separate distinct population segment.” In support of this conclusion, the FWS noted, among other things, that—

- a group of animals held in captivity could not have separate legal status under the Act, because they have no “range” separate from the wild population;

¹ In accordance with the Act’s definition of species, listing should be considered only in the context of a species, subspecies, or distinct population segment. That does not mean that it is never appropriate to list an individual, such as when only a single individual constitutes the extant species or population (see e.g., the 5 September 2012 listing of the Franciscan manzanita, 77 Fed. Reg. 54434).

- certain exceptions in section 9 and 10 of the Act indicate Congressional intent that captive-held animals would generally have the same legal status as their wild counterparts because they provide exceptions for animals maintained in captivity;
- giving captive animals separate legal status, and thus excluding them from legal protection under the Act, would be inconsistent with the purposes of the Act as set forth in section 2; and
- the listing process under section 4 of the Act is not designed to assess the threats to captive animals held under controlled, artificial conditions.

The FWS also determined that it would be inconsistent with Congressional intent simply to exclude captive-held members of a species, subspecies, or distinct population segment from the protections of the Act or to designate only wild members of a taxonomic species as a distinct population segment.²

The MMC will not repeat the FWS's full analysis here, but rather, refer you to the more extensive discussion in the referenced document. The FWS has made a compelling case that excluding captive animals from a species (including a distinct population segment) that qualifies for listing, or treating captive and wild animals differently in any such listing, is contrary to the provisions of the Endangered Species Act, the Act's legislative history, and the purposes of the Act. The MMC, therefore, recommends that NMFS adopt a policy³ consistent with the rationale provided by the FWS in its proposed chimpanzee listing rule, and treat all biological members of the southern resident killer whale (or any other listed species or species being considered for listing) as part of the species or distinct population segment, regardless of whether those individuals are in the wild or in captivity. Consistent with such a policy, the MMC further recommends that NMFS promptly initiate and complete a rulemaking to remove the exclusion for captive killer whales and their progeny from the existing listing rule.

The MMC firmly believes that the two regulatory agencies charged with implementing the Endangered Species Act should be consistent in their interpretations and policies (since they are derived from the same statutory language, mandates, policies, and legislative intent), or have a well-reasoned rationale for any differences.⁴ In this case, NMFS has provided no rationale for its earlier decision to exclude captive animals from its listing, something that it would need to do if it disagrees with the MMC's recommendations (or the FWS's underlying analysis of the listing requirements as they pertain to members of a listed species maintained in captivity). If NMFS does not agree with the conclusions or rationale of the FWS on this issue, the MMC recommends that it convene a meeting with the FWS and the MMC to reconcile such differences.

If NMFS agrees that it should not exclude captive animals from a listing under the Endangered Species Act, then it also will need to consider what can or should be done with Lolita. The petitioners advocate that Lolita be transferred to a sea pen within the range of the wild southern resident killer whale population or be released back into the wild.

² Because NMFS provided no explanation for its decision to exclude captive animals from its listing of southern resident killer whales, it is unclear which of these scenarios applies in this instance.

³ Better yet, the two agencies should adopt a consistent, joint policy.

⁴ This general principle applies to other statutes as well, such as the Marine Mammal Protection Act.

As the petitioners point out, section 9(b)(1) of the Endangered Species Act provides an exemption for species held in captivity or a controlled environment prior to the effective date of the Act or the species listing, but excludes such holding in the course of a commercial activity. In this case, although Lolita was placed in captivity before enactment of the Endangered Species Act, she is being used for a commercial purpose. Thus, if and when Lolita is included in the listing of southern resident killer whales, and the Act's prohibitions become applicable, this exception would not apply. Nevertheless, NMFS should assess whether continued maintenance of Lolita at the current facility could be authorized under other provisions of the Act.⁵

One possible mechanism for authorizing the continued maintenance of Lolita at Miami Seaquarium under the Endangered Species Act is the issuance of a research or enhancement permit under section 10(a)(1)(A) of the Act. It does not appear that a research permit would be appropriate in this instance unless the purpose of maintaining the animal in captivity were significantly changed. And, although maintaining an unreleasable marine mammal in captivity and using it for educational purposes, by itself, would not meet the enhancement permit requirements under the Marine Mammal Protection Act, the enhancement provisions of the Endangered Species Act have been interpreted more liberally. Thus, it is possible that NMFS could determine that an enhancement permit could be issued in this instance. As such, the MMC recommends that NMFS consult with the permit division of its Office of Protected Species to determine whether, and under what conditions, an Endangered Species Act permit might be issued to authorize the continued maintenance of Lolita in captivity. If NMFS determines that such a permit cannot be issued, it should consider not only the alternatives identified by the petitioners, but also whether continued maintenance at a traditional public display facility, albeit outside of any commercial activity, might be in the best interest of this animal, which was removed from the wild more than 40 years ago.

The petitioners also express concerns about the conditions under which Lolita has been and is being maintained. The petitioners' concerns about these aspects of Lolita's enclosure and care are misdirected to NMFS and are not particularly relevant to the listing decision at issue. Nevertheless, they merit attention and response.

The petitioners allege that the facility is not in full compliance with the existing Animal and Plant Health Inspection Service (APHIS) standards for the humane handling, care, treatment, and transportation of captive marine mammals. Although, some of these allegations (e.g., inadequate pool size) have previously been considered and dismissed by APHIS, it is not clear that all of the alleged deficiencies have been addressed. Therefore, if it has not already done so, NMFS should forward the petition to APHIS for review, consideration of the alleged violations of the applicable standards, and response.

The petitioners also question the adequacy of the standards themselves. The MMC has raised similar concerns in the past and has recommended that those standards be reviewed and updated. We understand that a proposed rule has been drafted to amend the standards and currently is undergoing review within the Administration. Given NMFS's past involvement with issues related to the care and maintenance of marine mammals and its expertise in the biology, behavior, and

⁵ Because Lolita was captured from the wild in 1970, she is considered a pre-Act animal under section 102(e) of the Marine Mammal Protection Act and no authorization under that statute is needed.

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physiology of these animals, the Commission encourages NMFS to play an active role in reviewing those proposed revisions.

The Commission hopes these comments are useful. Please contact me if you have any questions about them.

Sincerely,

A handwritten signature in blue ink that reads "Rebecca J. Lent". The signature is written in a cursive style with a large initial "R" and a distinct "J".

Rebecca Lent, Ph.D.
Executive Director

Enclosure

Cc: Lois J. Schiffer
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