

**LET WILLY FREE HIMSELF:  
THE CASE FOR EXPANDING STANDING TO MARINE  
MAMMALS TO CHALLENGE REGULATIONS  
OF THE PUBLIC DISPLAY INDUSTRY**

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*The beauty of marine mammals holds a special place in the heart of many Americans. As such, the taking of marine mammals for public display is subject to many regulations: international and domestic, federal and state. The public display facilities themselves are also subject to regulations concerned with ensuring the well-being of the captive marine mammals. These standards, concerning the physical characteristics of the enclosures and the qualifications of employees who interact with the captive animals, are largely left to industry self-regulation. This is problematic because research has demonstrated the harm that can stem from inadequate conditions of captivity and under-qualified trainers. However, the public display industry has been reluctant to modify its standards and has exposed both the captive marine mammals and the trainers interacting with the animals to harm. This Note proposes ways in which these deficiencies should be addressed.*

*With regard to the captive mammals, there are very limited circumstances in which a lawsuit could be brought to challenge the inadequacy of the conditions of captivity, due largely to the modern standing doctrine in federal courts. As a solution, this Note recommends a modest expansion of standing doctrine, allowing captive marine mammals to bring suit (in an ex rel capacity and represented by interest groups) to challenge these inadequate conditions. Such an expansion would address courts' concerns about "opening up the floodgates" for unnecessary litigation by allowing only the "individuals" that are harmed, to wit: the captive marine mammals, to bring suit, rather than any individual that just felt strongly about the conditions of captivity, ensuring that the court is hearing a "case or controversy."*

*This Note proceeds in five parts. Part I provides necessary background information discussing the web of regulations that govern the marine mammal public display industry. Part II discusses the educational requirements for public display facilities, the husbandry practices, and the problems with industry self-*

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*regulation. Part III proposes ways in which the deficiencies in the regulations should be remedied. Part IV briefly discusses the modern standing doctrine and proposes a modest expansion that would allow captive marine mammals to bring suit in an ex rel capacity to challenge the conditions of their captivity. Part V briefly concludes.*

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## I. INTRODUCTION

Members of the United States public have enjoyed observing marine mammals in captivity for several decades; we have planned family vacations to see the killer whales at Sea World in Orlando, Florida,<sup>1</sup> surprised significant others with “swim with the dolphins” encounters at Dolphin Quest in Oahu, Hawaii,<sup>2</sup> and gone to the local aquarium for an afternoon to observe sea otters playing in their enclosures.<sup>3</sup> All of these interactions between humans and marine mammals have something in common – they involve marine mammals which fall under the public display exception to the various moratoriums on takings of marine mammals, and are governed by a common set of regulations, written and enforced as a collaborative effort by both professional organizations and regulatory agencies.

Within the last decade, several commentators, as well as interest groups and concerned members of the public, have raised

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1. *One Ocean*, SEA WORLD PARKS, [http://seaworldparks.com/en/seaworld-orlando/attractions/shows/one-ocean/?from=Top\\_Nav](http://seaworldparks.com/en/seaworld-orlando/attractions/shows/one-ocean/?from=Top_Nav) (last visited Apr. 16, 2016).

2. *Dolphin Encounter*, DOLPHIN QUEST, <https://dolphinquest.com/activities/dolphin-encounter/> (last visited Oct. 14, 2016).

3. *See, e.g., Sea Otters*, AUDUBON NATURE INST., <http://www.auduboninstitute.org/visit/audubon-aquarium-americas/highlights/sea-otters> (last visited Apr. 16, 2016).

questions as to the adequacy of this regulatory scheme, whether it is being meaningfully enforced and, if not, how to successfully challenge the conditions which are imposed upon these creatures, which Congress has noted are “in urgent need of protection.”<sup>4</sup> If the regulations are inadequate and/or harmful to the marine mammals that are housed in captivity in public display facilities, is there someone who would be able to bring a legal challenge to the regulations under the Supreme Court’s modern standing doctrine?

This Note will argue that the current regulatory regime governing captive marine mammals is inadequate and provide one potential solution. It will proceed as follows. Part I will provide background information setting forth the current international law, statutes, and regulatory agencies that govern marine mammals from their home in the wild to captivity. Part II will discuss the problems of industry self-regulation, and articulate why it is particularly troublesome in the context of regulating captive marine mammals. Part III will set forth a proposed solution to this regulatory problem. Finally, Part IV will briefly describe federal courts’ narrowing of Article III standing doctrine and argue that, as a result of the reduction of individuals who can bring suit, marine mammals (in an *ex rel.* capacity) should be afforded standing to challenge the inadequacy, and lack of enforcement, of the relevant regulations.

## II. BACKGROUND

Marine mammals have been subject to significant regulation since 1946.<sup>5</sup> They are concurrently regulated by several different sources of law, including international treaties and domestic regulatory regimes. This section will discuss each in turn, providing necessary background information to set the scene for the regulatory problems considered in Part II, *infra*.

### A. *International Regulation*

The first noteworthy international regulation of marine mammals began with the passing of the International Convention for the Regulation of Whaling (ICRW or Convention).<sup>6</sup> This treaty was passed in 1946 and was subsequently adopted by eighty-eight

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4. H.R. REP. 92-707 (1972), reprinted in 1972 U.S.C.C.A.N. 4144, 4147-48.

5. See *infra* Part I.A.

6. International Convention for the Regulation of Whaling, Dec. 2, 1946, 62 Stat. 1716 (entered into force Nov. 10, 1948).

countries (excluding five countries that adopted the treaty but later chose to leave the agreement).<sup>7</sup> The treaty established an international body to regulate whaling and oversee compliance called the International Whaling Commission (IWC).<sup>8</sup> The IWC is composed of one representative from each country that is a party to the treaty with equal voting power for the purpose of passing resolutions.<sup>9</sup>

The IWC is charged with encouraging studies and investigations relating to whales and whaling, collecting and analyzing statistical information regarding the effects of whaling on whale populations, and studying and distributing information regarding methods of maintaining and increasing whale populations.<sup>10</sup> It also funds and coordinates international whale conservation efforts.<sup>11</sup> Most importantly, however, the IWC is charged with the task of amending the “Schedule,” a complex set of regulations contained within the ICRW.<sup>12</sup>

Under the ICRW, there is currently a moratorium on commercial taking of all whales.<sup>13</sup> This means that no nation which is a party to the Convention may take any whales for commercial purposes; but limited exceptions apply for research purposes.<sup>14</sup> Although this is surely a step forward for whale conservation, the IWC itself has no power to enforce the prohibitions contained in the Schedule.<sup>15</sup> Furthermore, amendments to the Schedule, such as the commercial whaling moratorium, are only binding on member-nations if they do not make timely objections to the amendment.<sup>16</sup> Accordingly, countries such as Iceland, Norway, and the Russian Federation are not currently bound by the moratorium.<sup>17</sup> It is also important to note that even attempts to enforce the purpose underlying the Schedule’s regulations in the courts of member-nations have previously been unsuccessful.<sup>18</sup>

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7. See *Membership and Contracting Governments*, INT’L WHALING COMM’N, <https://iwc.int/members> (last visited Apr. 16, 2015).

8. International Convention for the Regulation of Whaling, *supra* note 6, at Art. III.

9. *Id.*

10. *Id.* at Art. IV.

11. *History and Purpose*, INT’L WHALING COMM’N, <https://iwc.int/history-and-purpose> (last visited Apr. 16, 2016).

12. International Convention for the Regulation of Whaling, *supra* note 6, Art. V.

13. *Id.* at Schedule, ¶ 6.

14. *Id.*

15. See generally, *id.* at Art. IX.

16. *Id.* at Art. V.3

17. See *Catches Taken: Under Objection or Under Reservation*, INT’L WHALING COMM’N, [https://iwc.int/table\\_objection](https://iwc.int/table_objection) (last visited Apr. 16, 2016).

18. See, e.g., *Japan Whaling Ass’n v. Am. Cetacean Soc’y*, 478 U.S. 221 (1986).

Although the moratorium on commercial takings is currently in effect, member-nations may continue to take whales for purposes of scientific research or public display, so long as they comply with a permitting process.<sup>19</sup> The use of this permitting process has led to controversy, as the only three countries to continue taking whales under the guise of scientific research since 1987 have been Iceland, Norway, and Japan.<sup>20</sup> In the past decade Japan has been the only country to continue utilizing the scientific permit exception, and has annually taken between 400 and 1,200 whales annually pursuant to it.<sup>21</sup> In March 2014, the International Court of Justice condemned Japan's practice, finding that its use of scientific permits did not conform to its obligations under the ICRW.<sup>22</sup>

### B. Domestic Regulation

From the point of taking from the wild (which will not always be a prerequisite to obtaining a captive marine mammal) to the point of public display, the taking and holding in captivity of marine mammals is regulated by several sources of domestic law. This subsection will discuss the regulations imposed at various points in the captivity process by the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act),<sup>23</sup> the Marine Mammal Protection Act (MMPA),<sup>24</sup> the Endangered Species Act (ESA),<sup>25</sup> and the Animal Welfare Act (AWA).<sup>26</sup> Along with describing the regulations imposed by these various statutes, this section will describe which administrative agencies are tasked with the enforcement of each act and assess the effectiveness of the agency action.

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19. International Convention for the Regulation of Whaling, *supra* note 6, at Schedule, ¶ 30.

20. *Catches Taken: Special Permit*, INT'L WHALING COMM'N, [https://iwc.int/table\\_permit](https://iwc.int/table_permit) (last visited Apr. 16, 2016). Iceland briefly left the ICWR, but returned in 2002, noting reservations to the moratorium. *Iceland*, INT'L WHALING COMM'N, <https://iwc.int/iceland> (last visited Apr. 16, 2016). Norway continues commercial whaling. *Norwegian Whaling – Based on a Balanced Ecosystem*, FISHERIES.NO, [http://www.fisheries.no/ecosystems-and-stocks/marine\\_stocks/mammals/whales/whaling/#.VSXIYdzF8Xx](http://www.fisheries.no/ecosystems-and-stocks/marine_stocks/mammals/whales/whaling/#.VSXIYdzF8Xx) (last visited Apr. 16, 2016).

21. *Catches Taken: Special Permit*, INT'L WHALING COMM'N, [https://iwc.int/table\\_permit](https://iwc.int/table_permit) (last visited Apr. 16, 2016).

22. *Whaling in the Antarctic (Austl. v. Japan: N.Z. Intervening)*, Judgment, 2014 I.C.J. 148 (Mar. 31, 2014), <http://www.icj-cij.org/docket/files/148/18136.pdf>.

23. 16 U.S.C. §§ 1801-91 (2012).

24. 16 U.S.C. §§ 1361-1423 (2012).

25. 16 U.S.C. §§ 1531-44 (2012).

26. 7 U.S.C. §§ 2131-59 (2012).

## 1. Magnuson-Stevens Fishery Conservation and Management Act

The Magnuson-Stevens Act provides a regulatory scheme to govern fisheries that are contained within the jurisdiction of the United States, i.e., in the U.S. Exclusive Economic Zone (EEZ).<sup>27</sup> Although this law is generally concerned with the regulation of commercial and private fishing operations to ensure conservation of our fisheries,<sup>28</sup> it does generally govern living marine resources which are defined to include marine mammals.<sup>29</sup> This law does not significantly regulate the process of capturing marine mammals.<sup>30</sup> It does, however, provide measures to ensure that marine mammals are not incidentally harmed by the United States' fishing industry.<sup>31</sup> Within the context of regulating captive marine mammals, however, it is simply important to note the existence of this law and the narrow nature of its regulations.

## 2. Marine Mammal Protection Act

The MMPA regulates, among other things, the taking from the wild and import of marine mammals.<sup>32</sup> The 1981 amendments to the MMPA established a moratorium on the taking and import of marine mammals.<sup>33</sup> It did, however, provide exceptions to the moratorium for scientific research public display facilities.<sup>34</sup> Takings for scientific research or public display purposes may only be carried out pursuant to a permit.<sup>35</sup> These takings are regulated by, and permits issued by, the National Marine Fisheries Service (NMFS),<sup>36</sup> which is a branch of the National Oceanic and Atmospheric Administration (NOAA),<sup>37</sup> and the Fish and Wildlife Service (FWS),<sup>38</sup> which is a branch of the Department of the Interior.<sup>39</sup>

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27. 33 U.S.C. § 3507(4) (2012).

28. 16 U.S.C. § 1801(b) (2012).

29. 16 U.S.C. § 1826(h) (2012).

30. Instead, this process is governed by the MMPA, discussed *infra* Part I.B.2.

31. *See, e.g.*, 16 U.S.C. § 1826(d) (2012).

32. 16 U.S.C. § 1373 (2012).

33. Act of Oct. 9, 1981, Pub. L. No. 97-58, 95 Stat. 979.

34. 16 U.S.C. § 1371(a)(1) (2012).

35. *Id.*

36. 50 C.F.R. § 216.8 (2015).

37. *See Our Mission*, NOAA FISHERIES, [http://www.nmfs.noaa.gov/aboutus/our\\_mission.html](http://www.nmfs.noaa.gov/aboutus/our_mission.html) (last visited Apr. 16, 2016).

38. 16 U.S.C. § 1374 (2012).

39. *About the U.S. Fish and Wildlife Service*, U.S. FISH & WILDLIFE SERVICE, [http://www.fws.gov/help/about\\_us.html](http://www.fws.gov/help/about_us.html) (last visited Apr. 17, 2016).

When the MMPA was first passed, it allowed these permits to be issued for purposes of scientific research or public display.<sup>40</sup> After being amended several times, the statute now limits the public display permit by requiring the facility seeking a permit to “[offer] a program for education or conservation purposes *that is based on professionally recognized standards of the public display community*” (emphasis added).<sup>41</sup> Although this is a step in the right direction (as compared with not requiring any educational program at all), allowing the industry itself to determine what is a proper educational program has the potential to run counter to the very purpose of the MMPA itself.<sup>42</sup>

Allowing the industry of marine mammal parks and aquariums to regulate itself can easily lead to the propagation of inaccurate information, which is not based on science, as educational materials. The leading organization of members of this industry is the Alliance of Marine Mammal Parks & Aquariums (AMMPA).<sup>43</sup> Another professional organization in the industry is the Association of Zoos and Aquariums (AZA).<sup>44</sup> The AMMPA’s website does not discuss the accuracy of the information that is disseminated by its members’ educational programs and provides scarce objective measures of the educational impact that these programs have on visitors to the facilities; rather it contains polling results of the percentage of individuals that subjectively believe that they learned something from visiting one (or more) of the member facilities.<sup>45</sup> In fact, several organizations have pointed to the insufficiency of materials and inaccuracy of information which is disseminated by educational programs at public display facilities housing marine mammals.<sup>46</sup>

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40. Marine Mammal Protection Act of 1972, Pub. L. No. 95-522, 86 Stat. 1027, 1034 § 104.

41. 16 U.S.C. § 1374(c)(2)(A)(i) (2012).

42. See 16 U.S.C. § 1361(4) (2012) (legislative finding that steps should be taken to encourage arrangements “for research on, and conservation of, all marine mammals.”).

43. See *Our Members*, ALLIANCE OF MARINE MAMMAL PARKS & AQUARIUMS, <http://www.ammpa.org/ourmembers.html> (last visited Apr. 16, 2016).

44. See ASSOCIATION OF ZOOS & AQUARIUMS, <https://www.aza.org/> (last visited Apr. 16, 2016).

45. *Frequently Asked Questions*, ALLIANCE OF MARINE MAMMAL PARKS & AQUARIUMS, <http://ammpa.org/faqs.html#3> (last visited Apr. 16, 2016) (“The Alliance’s earliest poll, conducted by Roper Starch, in 1998, surveyed guests visiting Alliance member facilities. It found that almost everyone (97%) interviewed said their experience had an impact on their appreciation and knowledge of the animals. The impact was even greater for those visiting parks and aquariums where guests had an opportunity to interact with marine mammals. Ninety-four percent (94%) of the parks’ visitors interviewed for the poll said, “I learned a great deal about marine mammals today.”)

46. Stephanie Dodson Dougherty, Comment, *The Marine Mammal Protection Act: Fostering Unjust Captivity Practices Since 1972*, 28 J. LAND USE & ENVTL. L. 337, 340 (2013); Naomi A. Rose, *The Case Against Marine Mammals in Captivity*, THE HUMANE SOC’Y OF THE

According to the AMMPA's website, sixty-five percent of its members' captive marine mammals were born in captivity;<sup>47</sup> this means that thirty-five percent of the animals were born in the wild. Additionally, some of the marine mammals that are currently in captivity are part of rehabilitation programs, or consist of animals that are unable to be returned to the wild.<sup>48</sup>

By enacting the MMPA, Congress also created the Marine Mammal Commission (MMC).<sup>49</sup> One of the duties of the MMC is to appoint "nine scientists knowledgeable in marine ecology and marine mammal affairs" for a Committee of Scientific Advisors on marine mammals.<sup>50</sup>

While the MMC is committed to preserving "scientific integrity,"<sup>51</sup> there is currently no mechanism by which it can ensure the veracity of the educational materials relied upon by the industry in setting forth the "professionally recognized standards" with which an organization must comply in order to be entitled to obtain a takings or import permit for a marine mammal under the MMPA. This is problematic because the educational materials that are promulgated by public display facilities have been criticized as misleading by interest-groups.<sup>52</sup> The Humane Society of the United States points to the information promulgated by Sea World regarding evolution, its explanation of "drooping fin" syndrome, and the life-spans of captive orcas as examples of misleading education.<sup>53</sup>

### 3. Endangered Species Act

Several species of marine mammals are also regulated by the ESA. The ESA regulates any animal that is listed as "endangered" or "threatened."<sup>54</sup> In particular, such marine mammals as Chinese

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U.S. 3-4, [http://www.humanesociety.org/assets/pdfs/marine\\_mammals/case\\_against\\_marine\\_captivity.pdf](http://www.humanesociety.org/assets/pdfs/marine_mammals/case_against_marine_captivity.pdf).

47. *Standards and Guidelines*, ALLIANCE OF MARINE MAMMAL PARKS & AQUARIUMS, 2 [http://www.ammpa.org/\\_docs/S\\_GSummary2010\\_2.pdf](http://www.ammpa.org/_docs/S_GSummary2010_2.pdf).

48. See NMFS Procedural Directive, *Process for Placing Non-Releasable Marine Mammals from the Stranding Program into Permanent Care Facilities* (2012), <http://www.nmfs.noaa.gov/op/pds/documents/02/308/02-308-02.pdf> (setting forth procedures for a public display facility to acquire a rehabilitated, non-releasable marine mammal).

49. 16 U.S.C. § 1401 (2012).

50. 16 U.S.C. § 1403(a) (2012).

51. *Scientific Integrity at the Marine Mammal Commission*, MARINE MAMMAL COMM'N, (Feb. 14, 2012), [http://www.mmc.gov/commission\\_policies/pdfs/sci\\_integrity\\_policy.pdf](http://www.mmc.gov/commission_policies/pdfs/sci_integrity_policy.pdf).

52. See, e.g., Rose, *supra* note 46, at 3-4; Vanessa Williams, *Captive Orcas Dying to Entertain You: The Full Story*, WHALE & DOLPHIN CONSERVATION SOC'Y, 51-53, <http://uk.whales.org/sites/default/files/dying-to-entertain-you.pdf>.

53. Rose, *supra* note 46, at 3.

54. 16 U.S.C. § 1531(b) (2012).

River Dolphin, Dugong, West Indian Manatee, Steller Sea Lion, Hawaiian Monk Seal, Beluga Whale, and Southern Resident Killer Whale are listed as endangered and Polar Bear, Bearded Seal, and Guadalupe Fur Seal are listed as threatened, among many others.<sup>55</sup> For example, in February 2015, administrative rulemaking procedures were initiated to list Lolita, a captive killer whale at the Miami Seaquarium, as part of the Southern Resident killer whales species, which is endangered.<sup>56</sup> Currently, Lolita falls under an exception to the federal regulations that allows her to not be categorized as part of the endangered subset of killer whales due to her status in captivity.<sup>57</sup> The proposed rules, however, would eliminate this exception and classify her as endangered.<sup>58</sup> The practical effect that this would have would be to require a permit, pursuant to the ESA, in order to sell her or release her into the wild.<sup>59</sup>

One may wonder how the ESA and the MMPA work together to regulate marine mammals. The ESA provides that if it and the MMPA ever conflict as to the regulation of a particular species, the MMPA will control so long as the conflicting MMPA provision is more restrictive than the ESA provision.<sup>60</sup>

#### 4. Animal Welfare Act

The main source of law that governs the conditions of marine mammals after they are taken from the wild is the AWA.<sup>61</sup> The AWA is enforced by the Animal and Plant Health Inspection Service (APHIS), which is an arm of the United States Department of Agriculture (USDA).<sup>62</sup> The AWA requires that any individual or organization obtain a license in order to transport or sell an

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55. 50 C.F.R. § 224.101(h) (2015); 50 C.F.R. § 17.11(h) (2015).

56. *Southern Resident Killer Whale – Lolita – Included in Endangered Listing*, NOAA FISHERIES, (Feb. 10, 2016), [http://www.westcoast.fisheries.noaa.gov/protected\\_species/marine\\_mammals/killer\\_whale/lolita\\_petition.html](http://www.westcoast.fisheries.noaa.gov/protected_species/marine_mammals/killer_whale/lolita_petition.html).

57. 50 C.F.R. § 224.101(h) (2015).

58. Listing Endangered or Threatened Species: Amendment to the Endangered Species Act Listing of the Southern Resident Killer Whale Distinct Population Segment, 80 Fed. Reg. 7380 (Feb. 10, 2015) (to be codified at 50 C.F.R. pt. 224), <http://www.westcoast.fisheries.noaa.gov/publications/frn/2015/80fr7380.pdf>.

59. *Questions & Answers on NOAA Fisheries' Final Rule on a Petition to Include Lolita in the ESA Listing of Southern Resident Killer Whales (Feb. 2015)*, NOAA FISHERIES, [http://www.westcoast.fisheries.noaa.gov/protected\\_species/marine\\_mammals/killer\\_whale/24\\_esa\\_status\\_-\\_lolita\\_final\\_rule.html](http://www.westcoast.fisheries.noaa.gov/protected_species/marine_mammals/killer_whale/24_esa_status_-_lolita_final_rule.html) (last visited Apr. 16, 2016).

60. 16 U.S.C. § 1543 (2012).

61. 7 U.S.C. § 2131 (2012).

62. See generally 7 U.S.C. § 2131 (2012); *Animal Welfare*, U.S. DEPT OF AGRIC. ANIMAL & PLANT HEALTH INSPECTION SERVICE, <http://www.aphis.usda.gov/wps/portal/aphis/ourfocus/animalwelfare> (last visited Apr. 16, 2016).

animal.<sup>63</sup> These individuals and organizations are further subject to regulation under the administrative rules that have been promulgated by APHIS for “Animal Health and Husbandry”<sup>64</sup> and “Transportation.”<sup>65</sup>

These regulations set forth the minimum requirements for a marine mammal’s enclosure,<sup>66</sup> conditions within those enclosures,<sup>67</sup> employee training,<sup>68</sup> and animal health requirements.<sup>69</sup> Many of these requirements were set by the 2001 amendments to the regulations which were developed by the Marine Mammal Negotiated Rulemaking Advisory Committee (Committee).<sup>70</sup> The Committee contained representatives from multiple organizations, including the American Zoo and Aquarium Association (now known as the Association of Zoos & Aquariums), the AMMPA, the International Association of Amusement Parks and Attractions, and the MMC, among others.<sup>71</sup>

These regulations, however, leave two important items to industry self-regulation: employee training requirements<sup>72</sup> and transportation restrictions.<sup>73</sup> APHIS regulations require that trainers and handlers of the captive marine mammals “must meet professionally recognized standards for experience and training.”<sup>74</sup> This phrase, however, is not defined anywhere. This is problematic because it leaves the industry to regulate itself on this particular issue (even more so than allowing the industry substantial input as to the captivity requirements) and essentially strips APHIS of power to meaningfully enforce any sort of experience or education requirements for trainers and employees, thus allowing organizations to employ under-qualified individuals to handle and interact with the animals.

### III. EDUCATIONAL REQUIREMENTS, HUSBANDRY PRACTICES AND INDUSTRY SELF-REGULATION

The two largest problems with the current regulatory regime governing captive marine mammals are the inaccuracy of

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63. 7 U.S.C. § 2134 (2012).

64. 9 C.F.R. § 3.100-.111 (2015).

65. 9 C.F.R. § 3.112-.118 (2015).

66. 9 C.F.R. § 3.101-.104 (2015).

67. 9 C.F.R. § 3.105-.107 (2015).

68. 9 C.F.R. § 3.108 (2015).

69. 9 C.F.R. § 3.109-.110 (2015).

70. See Animal Welfare; Marine Mammals, 66 Fed. Reg. 239-01 (Jan. 2, 2001) (to be codified at 9 C.F.R. pt. 3).

71. *Id.*

72. 9 C.F.R. § 3.108(d) (2015).

73. 9 C.F.R. § 3.113(c)(2) (2015).

74. 9 C.F.R. § 3.108(d) (2015).

educational materials that are promulgated by the public display facilities in order to obtain permits for taking marine mammals from the wild and the employment of under-qualified trainers and employees who handle the wild animals. Both of these are caused, or at least exacerbated, by the industry self-regulation which is endorsed by the regulations governing captive marine mammals.

#### *A. Inaccurate Educational Material*

Several organizations, including the Humane Society of the United States<sup>75</sup> and the Whale & Dolphin Conservation Society,<sup>76</sup> have condemned the education programs developed by organizations like Sea World as being inaccurate and inadequate to justify granting a public display permit.<sup>77</sup> Sea World and the AMMPA are alleged to distribute misleading statistics as educational material in order to acquire permits required under the takings moratorium in the MMPA. Specifically, the organizations offer misleading information regarding life expectancy in captivity vs. in the wild, the causes of a bent dorsal fin on killer whales, whether the marine mammals have better lives in captivity or in the wild, and whether the enclosures used to hold the animals in captivity are detrimental to their health.<sup>78</sup>

It is important to note before proceeding, however, that in at least one regard the industry has taken steps in the right direction. In recent years most public display facilities have opted to take rescued animals, rather than captured animals, for display purposes.<sup>79</sup> Although this is a step in the right direction, further steps must be taken to reduce the amount of industry-influence in the regulation of public display facilities.

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75. THE HUMANE SOCIETY OF THE UNITED STATES, <http://www.humanesociety.org/> (last visited Apr. 16, 2016).

76. WHALE & DOLPHIN CONSERVATION SOCIETY, <http://us.whales.org/> (last visited Apr. 16, 2016).

77. See, e.g., Rose, *supra* note 46, at 3-4; Williams, *supra* note 52, at 51-53.

78. See *infra* Part II.A.4.

79. See, e.g., *Marine Mammal FAQ*, Sea World, <http://seaworld.com/en/truth/killer-whales/marine-mammal-faq/#acquire> (last visited Apr. 16, 2016). See also NMFS Procedural Directive, *Process for Placing Non-Releasable Marine Mammals from the Stranding Program into Permanent Care Facilities* (2012), <http://www.nmfs.noaa.gov/op/pds/documents/02/308/02-308-02.pdf> (last visited Apr. 9, 2016) (setting forth the procedures for a public display facility to acquire a rehabilitated, non-releasable marine mammal).

## 1. Life Expectancy

Sea World's website informs visitors that "[n]o one knows for sure how long killer whales live."<sup>80</sup> It does, however, state that killer whales may live to thirty-five years, and that the life expectancy of killer whales that survive the first six months is between thirty and fifty years.<sup>81</sup> The AMMPA informs visitors to its website that "Beluga and killer whales in [their] facilities live as long as or longer than those in the wild."<sup>82</sup> These statements, however, are misleading. Several studies have shown that the estimated life expectancy for killer whales is between sixty and ninety years, depending on the sex of the whale.<sup>83</sup> The life expectancy for captive killer whales is often much shorter than this, with most dying before the age of twenty-five.<sup>84</sup> Furthermore, a relatively recent study of the life expectancy of wild Beluga whales indicated that they can routinely live to be sixty years old,<sup>85</sup> while the average life expectancy for captive Beluga whales is around twenty years.<sup>86</sup>

The AMMPA's website also indicates that "[t]he mortality rate of dolphins in marine parks is well below the mortality rate of dolphins in the wild."<sup>87</sup> However, studies have demonstrated that mortality rates for bottlenose dolphins and killer whales are much higher in captivity than in the wild.<sup>88</sup> This shortened life expectancy for marine mammals in captivity is likely caused by the stresses associated with being captured from the wild, the transportation between facilities, and the inadequate conditions at the facilities.<sup>89</sup>

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80. *Killer Whales: Longevity & Causes of Death*, SEA WORLD, <http://seaworld.org/en/animal-info/animal-infobooks/killer-whale/longevity-and-causes-of-death/> (last visited Apr. 16, 2016).

81. *Id.*

82. *Frequently Asked Questions*, ALLIANCE OF MARINE MAMMAL PARKS & AQUARIUMS, <http://www.ammpa.org/faqs.html#1> (last visited Apr. 16, 2016).

83. Williams, *supra* note 52, at 9-10, 14.

84. *Id.* at 40-41.

85. R.E.A. Stewart, S.E. Campana, C.M. Jones, & B.E. Stewart, *Bomb Radiocarbon Dating Calibrates Beluga (Delphinapterus leucas) Age Estimates*, 84 CANADIAN J. OF ZOOLOGY 1840, 1845-50 (2006).

86. Mike Schneider, *Analysis Shows Long Lives at SeaWorld: But Critics Say Quality of Life is the Real Issue*, THE BOSTON GLOBE, <http://www.bostonglobe.com/news/nation/2014/07/03/some-seaworld-mammals-survive-longercaptivity/JWxo6cwSRpmVXfEW9RRrxK/story.html> (July 4, 2014).

87. *Id.*

88. Erich Hoyt, Howard E. Garrett, & Naomi A. Rose, *Observations of Disparity Between Educational Material Related to Killer Whales (Orcinus Orca) Disseminated by Public Display Institutions and the Scientific Literature* at 8, <http://www.orcanetwork.org/nathist/biennial.pdf>; Williams, *supra* note 52, at 38-41.

89. Williams, *supra* note 52, at 41-42.

## 2. Bent Dorsal Fin

SeaWorld's website indicates that some killer whales may have bent dorsal fins.<sup>90</sup> It then provides a statistic about observations of wild killer whales around New Zealand, implying that this is a naturally occurring phenomenon.<sup>91</sup> Research indicates, however, that although this is naturally occurring, it occurs far less often in wild populations than it does in captive populations.<sup>92</sup> Furthermore, research has shown that bent dorsal fins can be a manifestation of poor health and stress, albeit in different cetacean species.<sup>93</sup>

## 3. Better Lives in Captivity?

Sea World and other members of the industry often imply that killer whales, dolphins, and other marine mammals live better lives in captivity than they would in the wild because they are well taken care of. For example, the AMMPA states that “[w]ild animals live daily with many challenges to their survival. Predators, hunger, noise, parasites, and environmental pollution are just a few of the challenges animals in the wild must contend with every day. Animals in Alliance member facilities live without the stress of these considerable daily challenges.”<sup>94</sup> This statement, however, fails to address the stress of living in a small enclosure on these animals that are used to traveling up to 100 miles per day in the wild.<sup>95</sup> Furthermore, this characterization does not account for the stress caused to whales, and other marine mammals, by removing them from their social group and injecting them into a different social group with unique and different dynamics.<sup>96</sup>

## 4. Effect of Enclosures on Health

The members of the public display industry fail to include any information in their educational materials that discuss the negative

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90. *Killer Whales: Physical Characteristics*, SEA WORLD, <http://seaworld.org/en/animal-info/animal-infobooks/killer-whale/physical-characteristics/> (last visited Apr. 16, 2016).

91. *Id.*

92. *See, e.g.*, Rose, *supra* note 46.

93. *See generally* Robin W. Baird & Antoinette M. Gorgone, *False Killer Whale Dorsal Fin Disfigurements as a Possible Indicator of Long-line Fishery Interactions in Hawaiian Waters*, 59 *PACIFIC SCIENCE* 593 (2005), [https://scholarspace.manoa.hawaii.edu/bitstream/handle/10125/24202/PacSci\\_593-602.pdf?sequence=1](https://scholarspace.manoa.hawaii.edu/bitstream/handle/10125/24202/PacSci_593-602.pdf?sequence=1).

94. *Frequently Asked Questions*, ALLIANCE OF MARINE MAMMAL PARKS & AQUARIUMS, <http://www.ammpa.org/faqs.html#2> (last visited Apr. 16, 2016).

95. *Whale Attack Renews Captive Animal Debate*, CBSNEWS, <http://www.cbsnews.com/news/whale-attack-renews-captive-animal-debate/> (Mar. 1, 2010).

96. *See* Williams, *supra* note 52, at 9-10.

effects that captivity, generally, or of the specific enclosures in which the animals are housed, imposes upon the marine mammals. The size of the enclosures, their use of artificially salinated and recycled water, the social-group dynamics of animals placed together in enclosures, and solitary confinement all pose potential harm to captive marine mammals. These particular harms are discussed more completely in Part II.C, *infra*. However, at this point, it is important to note that the public display facilities largely do not address these harms in their educational materials; rather, they often portray the conditions of captivity as preferable to the conditions of animals' natural habitats.<sup>97</sup>

*B. The Inherently Dangerous Nature  
of Interacting With Captive Marine Mammals*

Relatively recent events have shown that the industry is not doing enough to regulate its employees' interactions with marine mammals, leading to the injury and even death of several employees.<sup>98</sup> A recent administrative proceeding brought by OSHA has demonstrated the inherently dangerous nature of interacting with wild animals – even those bred in captivity.<sup>99</sup> This danger is exacerbated by the industry allowing under-qualified individuals<sup>100</sup> to interact with the animals in close proximity – a product of industry self-regulation.

The lack of meaningful safety precautions has led to the deaths of three trainers while interacting with killer whales in public display facilities.<sup>101</sup> Perhaps the public display facilities have taken every precaution that they could to ensure the safety of trainers once they begin to interact with captive marine mammals (specifically cetaceans); but perhaps, as OSHA found, the interaction itself is simply too dangerous to expose employees to.<sup>102</sup>

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97. See, *supra* Part II.A.3.

98. See, e.g., Anika Myers Palm & Eloisa Ruano Gonzalez, *SeaWorld Trainer Tribute: Shamu Believe Show Resumes with Standing Ovation*, ORLANDO SENTINEL, <http://www.orlandosentinel.com/business/tourism/os-seaworld-orlando-shamu-injury-20100224-story.html#page=1> (Feb. 27, 2010); *Corpse is Found on Whale*, N.Y. TIMES, <http://www.nytimes.com/1999/07/07/us/corpse-is-found-on-whale.html> (July 7, 1999).

99. Secretary of Labor v. SeaWorld of Florida, LLC, 244 O.S.H. Cas. (BNA) 1303 (2012).

100. See 9 C.F.R. § 3.108 (2015).

101. Secretary of Labor v. SeaWorld of Florida, LLC, 244 O.S.H. Cas. (BNA) 1303, at \*14 (2012).

102. *Id.* at 13-14.

### *C. Harm to the Captive Marine Mammals*

Members of the marine mammal public display industry assure the public that the practices used in holding marine mammals captive are adequate to ensure the health and well-being of the animals.<sup>103</sup> This, however, is not true. Scientific research and observation have demonstrated that captivity can be harmful to multiple species of marine mammals.<sup>104</sup>

This is not to say that the marine mammals public display industry has not taken steps in the right direction. To be sure, a majority of marine mammals that are currently held in captivity were either birthed in captivity or are part of a rehabilitation program and have been deemed unfit for release into the wild.<sup>105</sup> Although this is an improvement over the practice of capturing wild animals for display, which can only be done under the public display and scientific research exceptions to the MMPA's moratorium on taking wild marine mammals, it is not ideal. This practice is not ideal because the conditions of captivity themselves are detrimental to the animals' health.<sup>106</sup>

#### 1. Conditions of Captivity

The overarching problem with holding marine mammals in captivity is that it is nearly impossible for even the most diligent and well-funded facility to maintain an environment which is comparable to the natural environments of most species of marine mammals. This section will explore the problems inherent in maintaining cetaceans (whales and dolphins), pinnipeds (seals, walruses, and sea otters), and polar bears in captivity to provide examples of the problems inherent with marine mammal captivity.

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103. See, e.g., *Frequently Asked Questions*, ALLIANCE OF MARINE MAMMAL PARKS & AQUARIUMS, <http://ammpa.org/faqs.html#1> (last visited Apr. 16, 2016); *Polar Bears: Conservation & Research*, SEA WORLD, <https://seaworld.org/Animal-Info/Animal-InfoBooks/Polar-Bears/Conservation-and-Research> (last visited Apr. 16, 2016).

104. See *infra* Part II.C.1.

105. See *Frequently Asked Questions*, ALLIANCE OF MARINE MAMMAL PARKS & AQUARIUMS, <HTTP://AMMPA.ORG/FAQS.HTML#13> (last visited Apr. 16, 2016); *Frequently Asked Questions (FAQ's) - Ask Shamu*, SEA WORLD, [http://seaworld.org/en/animal-info/ask-shamu/faq/?\\_utma=1.1950111309.1428626960.1428626960.1428715766.2&\\_utmb=1.15.10.1428715766&\\_utmc=1&\\_utmz=&\\_utmz=1.1428715766.2.2.utmcsr=seaworldparks.com|utmccn=\(referral\)|utmcmd=referral|utmctt=/en/seaworldorlando/&\\_utmv=&\\_utmkt=213570580](http://seaworld.org/en/animal-info/ask-shamu/faq/?_utma=1.1950111309.1428626960.1428626960.1428715766.2&_utmb=1.15.10.1428715766&_utmc=1&_utmz=&_utmz=1.1428715766.2.2.utmcsr=seaworldparks.com|utmccn=(referral)|utmcmd=referral|utmctt=/en/seaworldorlando/&_utmv=&_utmkt=213570580) (last visited Apr. 16, 2016).

106. See Rose, *supra* note 46, at 13.

*a. Cetaceans*

The main problems that are present with housing cetaceans in captivity are the small size of the enclosures when compared with the open ocean and the lack of natural social interactions among the individual animals.<sup>107</sup> Most facilities utilize either completely artificial habitats or structures called “sea-pens,” depending on the facility’s location, to hold captive cetaceans.<sup>108</sup> Both of these types of enclosures present unique stresses for the animals.

Artificial habitats are utilized in inland facilities such as Sea World. These enclosures are typically made of concrete, surrounded by bleachers for audiences, and are filled with artificially-salinated water that is constantly filtered. These enclosures severely constrain movement, as the AWA regulations require enclosure sizes that are drastically smaller than the area that the average cetacean would swim in a day.<sup>109</sup> Furthermore, the wild-caught animals are often placed in enclosures with animals from other social groupings, resulting in conflict among the animals housed in a single enclosure.<sup>110</sup>

Sea-pens may be utilized by facilities that are located on the coast. Sea-pens consist of a portion of the coastal ocean that has been fenced off in order to provide an enclosure for captive marine animals.<sup>111</sup> Although sea pens are thought to be better for marine mammals’ health than the alternatives, there are several conditions which pose problems for animal well-being. Namely, although sea pens provide captive cetaceans with actual sea water, and provide a much more stimulating and interesting environment, these types of enclosures open their inhabitants up to magnified harms from pollution, sound, and the effects of natural catastrophes such as hurricanes.<sup>112</sup>

*b. Pinnipeds*

The main problem with housing pinnipeds in captivity is the size of the enclosures compared with the wild. Most pinnipeds are migratory by nature, traveling thousands of miles each year on

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107. Rose, *supra* note 46, at 17-18, 21-22.

108. *Id.*

109. *See* 9 C.F.R. § 3.104 (2015). Cetaceans, depending on the species, can swim up to 150 miles per day. Rose, *supra* note 46, at 21.

110. Rose, *supra* note 46, at 21-22; Naomi A. Rose, *A Win-win Solution for Captive Orcas and Marine Theme Parks*, CNN, <http://www.cnn.com/2013/10/24/opinion/blackfish-captive-orcas-solutions/> (Oct. 28, 2013).

111. Rose, *A Win-win Solution*, *supra* note 110.

112. Rose, *supra* note 46, at 17-18.

such a journey.<sup>113</sup> Any sort of captivity facility will be unable to accommodate such travel, for which many pinniped species have evolved for thousands of years.<sup>114</sup> Furthermore, although most facilities provide a reasonable amount of dry space for seals and walruses, they fail to provide an adequately large area for the animals to swim and exercise.

### *c. Polar Bears*

The small size of the enclosures, along with the inability of artificial enclosures to adequately mimic essential aspects of the polar bears' native environment, such as the ability for mothers to den with their young, have been shown to be detrimental to polar bears' health.<sup>115</sup> These problems are similar to those which plague the captivity of other marine mammal species.<sup>116</sup> Along with this is the fact that polar bears are often placed in a single enclosure with other polar bears for many years at a time, something that would not necessarily occur in nature, and can cause a harmful level of stress to captive polar bears.<sup>117</sup> The effects of these harms can be witnessed by watching polar bears pace back and forth for hours in their small enclosures, trying to get exercise that would be similar to the amount that they receive in the wild.<sup>118</sup>

## 2. Problems with Breeding of Captive Marine Mammals

Although breeding animals for purposes of public display does not raise the concern of holding a *wild* animal in captivity, it still does raise concerns about the adequacy of captivity generally for marine mammals. In particular, it still presents the concern of unnecessarily subjecting animals to conditions of captivity, e.g., artificial enclosures, forced interaction with members of other social groups, etc., ostensibly for the purpose of public display. As has been discussed, *supra*, public display programs do not adequately educate

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113. For instance, northern elephant seals migrate up to 13,000 miles per year. Kara Rogers, *Northern Elephant Seals: Masters of Mammal Migration*, ENCYCLOPEDIA BRITANNICA BLOG, <http://blogs.britannica.com/2011/05/northern-elephant-seals-masters-mammal-migration/> (May 4, 2011). The Pacific walrus is another species that migrates every year. Francis H. Fay, *Ecology and Biology of the Pacific Walrus*, *Odobenus Rosmarus Divergens Illiger*, U.S. DEPT. OF THE INTERIOR, FISH & WILDLIFE SERVICE (1982), <http://fwspubs.org/doi/pdf/10.3996/nafa.74.0001>.

114. See Rose, *supra* note 110.

115. Rose, *supra* note 46, at 19-20.

116. See generally, *supra* Part II.C.

117. Rose, *supra* note 46, at 19.

118. See, e.g., *Pacing Polar Bears*, YOUTUBE, <https://www.youtube.com/watch?v=DZshi2kj9T4> (Feb. 8, 2008).

the visitors to justify the harms inflicted on marine mammals.<sup>119</sup> This is problematic because animals are being bred solely to be subjected to these conditions of captivity.

Many public display facilities breed the captive marine mammals for conservation purposes.<sup>120</sup> This practice, however, yields a low number of captive-bred animals that are subsequently released into the wild (or are even capable of being released).<sup>121</sup> Therefore, it does not adequately serve the interest of conservation to justify the harms imposed on the captive marine mammals.

### 3. Conflicts of Interest

The point of this Note is not to argue that the public display industry is evil or indifferent to the welfare of the animals that are placed on display. Rather the argument is that the industry should not be left to regulate itself because various actions which are in the best interests of the member-facilities are at odds with the best interests of the animals that are on display. This section will briefly discuss this conflict of interests, and highlight why it is a problem.

#### *a. Educating the Public About Effects of Captivity on Wild Animals*

Industry self-regulation fails to adequately protect the interests of the captive marine mammals in the context of the educational information promulgated by the public display facilities, because the industry and the animals have conflicting interests. The public display industry has an incentive to only promulgate educational material that casts marine mammal captivity in a positive light. It would harm the public display facilities' image to distribute information that details the harm caused by captivity to marine mammals.<sup>122</sup> Rather, the display facilities act in-line with their own interests, and distribute the information that comports with "professionally recognized standards," in accordance with the requirements of the MMPA,<sup>123</sup> and paints the industry in a good light.<sup>124</sup>

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119. See *supra* Part II.A.

120. See *Frequently Asked Questions*, ALLIANCE OF MARINE MAMMAL PARKS & AQUARIUMS, <http://ammpa.org/faqs.html> (last visited Apr. 16, 2016).

121. See Dougherty, *supra* note 46, at 353-57.

122. See *supra* Parts II.A.4 and II.C.

123. 16 U.S.C. § 1374(c)(2)(A)(i) (2012).

124. The inaccuracies of this information are discussed, *supra* Part II.A.

*b. Housing Animals in Enclosures that Would be Least Harmful to Their Health*

The interests of the public display industry and those of the captive marine mammals do not align with regard to the size and adequacy of housing enclosures. It is in the best interest of the public display industry to have the most cost-effective enclosures possible. This is in conflict with the best interest of the captive marine mammals, which is to have the conditions of captivity closely mimic (if not perfectly mirror) those that exist in the animals' natural habitats.

Surely, public display facilities do have an interest in having enclosures that will maintain the health of the captive marine mammals; otherwise they can derive no income from the animals. However, due to the prohibitive costs that would be imposed by constructing enclosures that would more closely resemble the conditions of the animals' natural environments,<sup>125</sup> it is not in the best interest of the public display facility to construct enclosures that are much better than the bare minimum required by the AWA regulations.<sup>126</sup> Recent public outcry in response to the documentary *Blackfish* has even prompted Sea World to double the size of its killer whale enclosures.<sup>127</sup> However, not all public display facilities have the resources that Sea World does, as many are smaller seaquariums or aquariums.<sup>128</sup>

*c. When the Interests of the Industry and the Animals Align – Housing Rehabilitated Animals that Cannot be Released.*

One instance in which the interests of the public display industry and those of the captive animals overlap is when public display facilities make the choice to house rehabilitated animals that are not fit for release into the wild. In this case, the industry's interest generally in housing marine mammals for public display and that of the animals in being held in captivity (as they have been deemed unfit for release into the wild) are aligned. This will be

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125. See Rose, *supra* note 46, at 21-22.

126. See 9 C.F.R. § 3.104 (2015).

127. *SeaWorld to Double Size of Killer Whale Enclosure*, CBS8.com, <http://www.cbs8.com/story/26288856/seaworld-to-double-size-of-killer-whale-enclosure> (Aug. 15, 2014).

128. See, e.g., *Our Members*, ALLIANCE OF MARINE MAMMAL PARKS & AQUARIUMS, <http://ammpa.org/ourmembers.html> (last visited Apr. 17, 2016); *Find an AZA-Accredited Zoo or Aquarium*, ASSOCIATION OF ZOOS & AQUARIUMS, <https://www.aza.org/findzooaquarium/> (last visited Apr. 17, 2016).

discussed further, *supra* in Part III.3 as a possible solution to the problems presented by this Note.

#### *D. Problems with APHIS Enforcement.*

Although APHIS does have a history of enforcing regulations related to animal welfare, the agency does not have expertise in conditions unique to marine mammals, and it has a track record of lax enforcement.<sup>129</sup> APHIS has also previously been criticized for its inadequate enforcement of the AWA in other settings, such as animal testing for pharmaceutical purposes.<sup>130</sup> Furthermore, the regulations governing enclosure size, themselves, demonstrate APHIS's inadequacy in enforcing the welfare of captive marine mammals, as the enclosure sizes, rather than being based on objective scientific evidence, were merely adopted from the already-existing sizes in public display facilities at the time that the regulations were passed.<sup>131</sup> This is problematic because it demonstrates that there is nothing, be it regulations or agency enforcement, that provides meaningful protection for the wellbeing of captive marine mammals.

### IV. PROPOSED SOLUTION

Although the MMPA does, and the AWA should, require that the “professionally recognized standards” be informed by scientific evidence, it provides the industry ample discretion to regulate itself.<sup>132</sup> This is problematic because, as discussed above, the public display industry has interests that conflict with embracing objective scientific evidence.<sup>133</sup> Furthermore, having multiple agencies enforce different portions of the regulatory regime governing these organizations leads to a disconnect in enforcement, particularly since the agency that oversees the care of captive marine mammals after they have been taken from the wild, i.e., once they are in transport and in the housing facilities, is the agency that has less expertise in dealing with marine mammals.<sup>134</sup>

In order to remedy these two problems, this section will propose a solution that will incorporate two main points: 1) that the public display facilities should be subject to objective regulations that are

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129. Dougherty, *supra* note 46, at 360-64.

130. GARY L. FRANCONI, RAIN WITHOUT THUNDER: THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT 115-16 (Temple University Press 1996).

131. Dougherty, *supra* note 46, at 361.

132. See 16 U.S.C. § 1374(e)(2)(A)(i) (2012); 9 C.F.R. § 3.108(d) (2015).

133. See *supra* Part II.C.

134. APHIS vs. NMFS (advised by the MMC).

based on the best scientific information available, and 2) that this regime should be enforced by an agency with expertise in the care of marine mammals, such as NOAA. Furthermore, these facilities should only house animals which have been injured and subsequently rescued from the wild and undergone rehabilitation, yet are unable to be released into the wild.

*A. Base Regulations on Best  
Scientific Information Available*

The MMPA already includes a mandate that its regulations be based upon the “best scientific evidence available.”<sup>135</sup> This mandate should be added to the AWA as well, as it concerns the goals of conservation and preservation of marine mammals as much as, if not more than the MMPA does, in the context of the public display industry.

Currently, although the MMPA does, and the AWA should, require that regulations issued under them are based on scientific evidence, the statutes give broad self-regulatory authority to the industry itself. As discussed above, this industry self-regulation results in conflicts of interest that inhibit the use of objectively reliable material being placed in the industry members’ educational material, or to provide the best conditions of captivity possible for the marine mammals.<sup>136</sup> Requiring that the educational materials be based on objective scientific evidence would ensure that the public is fully informed about the harms to the animals caused by the conditions of captivity and the benefits of public display and reach an unbiased conclusion as to whether the harms are justified by the benefits. Additionally, if trainer qualifications were dictated by objective measures, rather than by industry self-regulation, then perhaps there would be less under qualified individuals interacting with potentially dangerous creatures, and less injuries resulting from interactions.

*B. Empower a Specialized Agency  
with Experience in Regulating Marine  
Mammals, such as NOAA, with  
Setting Captivity Guidelines*

Due to APHIS’s lack of meaningful enforcement of the AWA in the context of captive marine mammals,<sup>137</sup> NOAA should be given

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135. See 16 U.S.C. § 1373 (2012).

136. *Supra* Part II.C.3.

137. *Supra* Part II.D.

authority to regulate the conditions of captivity for marine mammals. This would be beneficial for the animals because NOAA (particularly the NMFS) has expertise in understanding the needs of marine mammals, as it is the main agency that is tasked with enforcing the MMPA.<sup>138</sup> Furthermore, NOAA is not plagued by the same reputation of acquiescence that plagues APHIS regarding the enforcement of its regulations.

*C. Only House Rehabilitated Animals  
that Cannot be Released Into the Wild.*

Some animals that are held in public display facilities are rehabilitated animals that are ineligible for release into the wild.<sup>139</sup> As mentioned in Part III.C, *supra*, this can happen when a marine mammal is stranded and, after rehabilitation, is considered by the NMFS to be “non-releasable” because either 1) the animal’s release could be detrimental to the wild animal population and/or 2) the animal is not likely to survive.<sup>140</sup> After this initial determination is made, the NMFS must then determine into which public display facility the non-releasable mammal will be placed.<sup>141</sup>

Some of the things that can be considered are the demographics of the other animals that will be housed in the same enclosure (e.g., how many males/females, age of animals), specific information regarding the enclosure in which the animal will be housed (e.g., whether there is a nursery area, if the animal will need to be quarantined), details regarding transportation to the facility (e.g., how long will transportation take, what type of transportation will be employed, how soon the transportation can be arranged), and information regarding veterinarians on staff.<sup>142</sup>

Although the practice of housing non-releasable marine mammals for public display is preferable to the alternatives (i.e., taking marine mammals from the wild, purchasing marine mammals which have been taken from the wild, or breeding them in captivity), it is far from perfect. This practice does not address the concerns with the adequacy of the conditions of captivity, and thus the humane treatment, of these animals.<sup>143</sup> The public display industry, collectively, is already embracing the practice of

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138. 16 U.S.C. § 1374 (2012).

139. *See* 16 U.S.C. § 1421 (2012); NMFS Procedural Directive, *Process for Placing Non-Releasable Marine Mammals from the Stranding Program into Permanent Care Facilities* (2012), <http://www.nmfs.noaa.gov/op/pds/documents/02/308/02-308-02.pdf>

140. *Id.*

141. *Id.*

142. *Id.* at 7-9.

143. *See supra* Part II.C.1.

displaying non-releasable and captive-bred animals, rather than capturing wild animals, as the AMMPA already boasts that a majority of the animals in its members' facilities have either been bred in captivity, or taken in as non-releasable rehabilitated animals.<sup>144</sup>

## V. STANDING AND ENFORCEMENT OF STANDARDS FOR MARINE MAMMALS IN CAPTIVITY

Since the implementation of our Constitution, our federal courts have been ones of limited jurisdiction.<sup>145</sup> One of the ways in which the Supreme Court has ensured that only "cases" and "controversies" are brought before it has been to employ the doctrine of "standing," which limits who is able to bring a claim. This part will first briefly discuss the relevant history of the standing doctrine in federal courts. It will then discuss the modern standing doctrine and the problems that it has created with regard to enforcement of the AWA. Last, this part will propose a solution to this problem and discuss recent attempts at implementing it.

### *A. History of Federal Standing Doctrine*

Over the years, the Court's standing doctrine has evolved significantly. Rather than being set by Congress, this doctrine has been developed by the courts, serving as one way to ensure judicial restraint. Justice O'Connor, in the Court's opinion in *Allen v. Wright*,<sup>146</sup> described standing doctrine as:

embrac[ing] several judicially self-imposed limits on the exercise of federal jurisdiction, such as the general prohibition on a litigant's raising another person's legal rights, the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches, and the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked.<sup>147</sup>

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144. See, e.g., *Frequently Asked Questions*, ALLIANCE OF MARINE MAMMAL PARKS & AQUARIUMS, <http://ammpa.org/faqs.html#14> (last visited Apr. 16, 2016).

145. See U.S. CONST. ART. III § 2.

146. *Allen v. Wright*, 468 U.S. 737 (1984).

147. *Id.* at 751.

In line with this description of standing, the doctrine itself is often thought of as an act of judicial restraint, as to lessen concerns about the counter-majoritarian nature of a court of unelected officials serving life tenures.<sup>148</sup> In light of this description of the role of the standing doctrine, it has developed specifically in order to prevent two specific types of lawsuits: advisory opinions<sup>149</sup> and collusive, or non-adversarial, lawsuits.<sup>150</sup>

In 1940, the Supreme Court had begun expanding standing doctrine (at least when there was a statutory provision allowing it<sup>151</sup>), in order to allow a person who had no legal right, but was nonetheless affected by an agency decision, to challenge that decision.<sup>152</sup> When the Administrative Procedures Act (APA) was passed in 1946, it contained language that essentially codified this understanding of the standing doctrine with respect to all administrative actions.<sup>153</sup>

Over the next several decades, however, the Supreme Court further expanded the rights of the public to bring suit under the standing doctrine<sup>154</sup> before it began to contract the groups of individuals that were able to bring suit under the doctrine.<sup>155</sup> For instance, the Court limited the scope of public standing when it required in *Warth v. Seldin*<sup>156</sup> that, as one commentator phrased it, “Article III requires every plaintiff to show an individual injury that is caused by the defendant and can be redressed by the Court.”<sup>157</sup> This continued to happen until the Court’s decision in *Lujan v. Defenders of Wildlife*<sup>158</sup> narrowed the standing doctrine to the point at which it lies today.

Up until the 1970s, in the context of challenging administrative actions, the Court only required that an individual be able to show he or she has suffered an infringement

148. See Stone, et al., CONSTITUTIONAL LAW 91 (Aspen Publishers 2009).

149. See *Chicago & Southern Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 113-14 (1948) (explaining the Court’s refusal to issue advisory opinions).

150. *United States v. Johnson*, 319 U.S. 302, 303-05 (1943) (stating that collusive suits “[do] not assume the ‘honest and actual antagonistic assertion of rights’ to be adjudicated—a safeguard essential to the integrity of the judicial process, and one which we have held to be indispensable to adjudication of constitutional questions by this Court.”).

151. See, e.g., *F.C.C. v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940).

152. See *id.* at 477; Magill, *infra* note 159, at 1139-41.

153. 5 U.S.C. § 702 (2012) (“A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”); Magill, *infra* note 159, at 1150.

154. For instance, the D.C. Circuit Court of Appeals allowed consumers to challenge FCC regulations in *Office of Comm’n of United Church of Christ v. F.C.C.*, 359 F.2d 994 (D.C. Cir. 1966).

155. See discussion, *infra* Part IV.B.

156. 422 U.S. 490 (1975).

157. Magill, *infra* note 159, at 1178.

158. 504 U.S. 555 (1992).

of a legally recognizable right in order to have standing.<sup>159</sup> As Professor Magill explains, “the inquiry was straightforward: has the challenger asserted that the law requires the agency to take account of his interest and that agency has failed to do so?”<sup>160</sup> If the agency did not have to take the challenger’s interest into account, then he had no legal right and therefore could not have standing (absent a statutory provision that granted standing).<sup>161</sup>

*B. Modern Standing  
Doctrine and the Problems it  
Creates for AWA Enforcement*

The Supreme Court’s 1992 decision in *Lujan* severely limited standing for the public to challenge enforcement of laws. This case provides the modern view of the standing doctrine and requires that a plaintiff be able to demonstrate that he or she has suffered a legally cognizable injury (injury-in-fact),<sup>162</sup> that there was a causal relationship between the injury and the complained-of conduct (causation),<sup>163</sup> and that a favorable decision is likely to redress the harm (redressability).<sup>164</sup> Each of these requirements is discussed below.

### 1. Injury-in-Fact

The Court determined that, in order for a plaintiff to meet the Article III standing requirements, he must be able to show that the injury-in-fact there has been the intrusion of a legally protected interest, that intrusion is “concrete and particularized,” and “actual or imminent, not conjectural or hypothetical.”<sup>165</sup> The Court listed things such as aesthetic, environmental, and economic harms as invasions of legal rights which could qualify for injury-in-fact.<sup>166</sup> The “concrete and particularized” requirements necessitate that the plaintiff suffers the injury in a “personal and individual way,”<sup>167</sup>

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159. Elizabeth Magill, *Standing for the Public: A Lost History*, 95 VA. L. REV. 1131, 1136 (2009).

160. *Id.* at 1139.

161. *Id.*

162. *Id.* at 560.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.* at 560; *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972).

167. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 n.1 (1992).

rather than “just having a special interest in the subject.”<sup>168</sup> And the Court has interpreted the “actual or imminent” requirement as only allowing standing where the plaintiff can show that the injury is not hypothetical, as the Court found it was in *Lujan* for plaintiffs that had traveled to Sri Lanka to observe the natural habitat of several endangered species and based injury off of the intent to return “in the future.”<sup>169</sup>

## 2. Causation

On causation, the Court noted that the injury must be “fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court.”<sup>170</sup> In other words, the causal chain must not be attenuated in order for a plaintiff to have standing to challenge an injury. This requirement ties into the next requirement, redressability, because the more attenuated the causal chain, the more difficult it is for a plaintiff to show that the lawsuit’s resolution is likely to remedy the injury.<sup>171</sup> For instance, if the harm to plaintiffs is caused by the actions of a third-party that is not regulated by the challenged agency action, it is much more difficult for the plaintiff to show that the Court’s action against the agency is likely to remedy the injury.<sup>172</sup>

## 3. Redressability

Last, the Court noted that it must be “likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.”<sup>173</sup> In other words, “Article III requires not only that the defendant have caused the plaintiff’s injury in fact, but also that the federal court hearing the case be able to issue an order that could remedy the alleged injury in fact.”<sup>174</sup> If, for instance, a plaintiff requests that the defendant be jailed for failing to make payments to her because of the defendant’s lack of money, the plaintiff will

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168. Michael J. Ritter, Note, *Standing in the Way of Animal Welfare: a Reconsideration of the Zone-of-Interest “Gloss” on the Administrative Procedures Act*, 29 REV. LITIG. 951, 966 (2010).

169. *Lujan*, 504 U.S. at 563.

170. *Id.* at 560.

171. *Id.* at 561-62.

172. *Id.*

173. *Id.* at 561.

174. Ritter, *supra* note 168, at 967.

likely not have standing under the redressability requirement because that remedy cannot cure the plaintiff's injury.<sup>175</sup>

#### 4. "Zone of Interest" Test for Administrative Procedures Act Enforcement Challenges

Under the Administrative Procedures Act (APA), a party "suffering a legal wrong because of agency action, or adversely affected or aggrieved by agency action . . . is entitled to judicial review thereof."<sup>176</sup> In addition to the Article III's standing requirements, a court may require that a party be in the "zone of interest" in order to bring a claim under this provision i.e., "when the plaintiff is . . . within the class of persons that the relevant statutory . . . provisions intend to protect."<sup>177</sup> This provision has been interpreted to allow interested parties (who can demonstrate standing) to challenge agency actions, as well as agency inaction.<sup>178</sup> Challenges to agency inaction brought under this provision, however, will only be allowed to proceed if the agency action is one that it is required to take, rather than one that the agency has discretion to take.<sup>179</sup>

#### 5. Challenges that Standing Pose to Enforcement of AWA and MMPA

The AWA, unlike the ESA, lacks a citizen-suit provision that can be used to compel APHIS to enforce it.<sup>180</sup> This can stand as a barrier to challenges of APHIS's enforcement of the AWA because plaintiffs who wish to challenge agency action must be able to demonstrate compliance with both Article III standing doctrine and that they are within the "zone of interest." Previous challenges to the AWA's lack of enforcement have been largely unfruitful.<sup>181</sup>

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175. *See, e.g.*, *Linda R.S. v. Richard D.*, 410 U.S. 614, 615-16 (1973).

176. 5 U.S.C. § 702 (2012).

177. Ritter, *supra* note 168, at 969.

178. *See, e.g.*, *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 873 (1990) (stating that the action "will not be 'ripe' for challenge until some further agency action or inaction more immediately harming respondent occurs.") (emphasis added).

179. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004).

180. Ritter, *supra* note 168, at 972.

181. *Id.*; *Inst. of Marine Mammal Studies v. Nat'l Marine Fisheries Serv.*, 23 F. Supp. 3d 705, 713 (S.D. Miss. 2014).

*C. Solution and Recent  
Attempts at Implementing It*

Although the only true solution to the concerns raised above is for Congress to amend the MMPA and for APHIS to amend the existing rules that pertain to captive marine mammals, a step in the right direction could be taken by the courts. In light of the recent contraction of standing law under the citizen-suit provision of the APA,<sup>182</sup> the courts should allow organizations concerned with the welfare of captive marine mammals, such as the Whale and Dolphin Conservancy, the Humane Society of the United States, and People for the Ethical Treatment of Animals, to challenge the adequacy of the regulations and the failure of the agencies to meaningfully enforce the regulations on behalf of the injured captive marine mammals, in an *ex rel* capacity.

This has been attempted in the context of a couple of lawsuits brought in federal district courts in the past two decades. For instance, in 1993 the group Citizens to End Animal Suffering and Exploitation (CEASE) brought suit against the Department of the Navy challenging the transfer of a dolphin from the New England Aquarium to the Department of the Navy.<sup>183</sup> In that case, CEASE named the dolphin, Kama, as a plaintiff, and the Department of the Navy moved to dismiss Kama's claim for lack of standing.<sup>184</sup> The district court found that Kama did not have standing to bring suit under the MMPA or APA because the citizen-suit provisions were intended to only extend to "persons"; it would have required a clear statement from Congress that non-human animals were intended to have standing under these provisions in order to "take the extraordinary step of authorizing animals as well as people and legal entities to sue."<sup>185</sup>

Another example is a lawsuit that was brought in the Southern District of California,<sup>186</sup> though that suit did not challenge the public display regulations under the citizen-suit provision of the APA. Instead, the lawsuit alleged that five killer whales were being

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182. A notable exception to this contraction can be found in a 1998 opinion by the D.C. Circuit that allowed a volunteer/employee at multiple zoos bring suit, alleging an aesthetic harm, to enforce the USDA's statutory mandate to ensure humane conditions of captivity for primates. *See generally*, Animal Legal Defense Fund, Inc. v. Glickman, 154 F.3d 426 (D.C. Cir. 1998).

183. Citizens to End Animal Suffering & Exploitation, Inc. v. New England Aquarium, 836 F. Supp. 45 (D. Mass. 1993).

184. *Id.* at 48-49.

185. *Id.* at 49.

186. Tilikum *ex rel.* People for the Ethical Treatment of Animals, Inc. v. Sea World Parks & Entm't, Inc., 842 F. Supp. 2d 1259 (S.D. Cal. 2012).

held by SeaWorld in captivity in violation of the Thirteenth Amendment's prohibition on slavery.<sup>187</sup> The district court dismissed the case because it found that the whales did not have standing to bring suit.<sup>188</sup> The court reasoned that, in order to have standing, the plaintiff must assert a "case or controversy" that presents a legally cognizable claim.<sup>189</sup> It found that the Thirteenth Amendment was only intended to apply to humans, and thus, there was no case or controversy.<sup>190</sup>

However, the court's opinion did not foreclose the possibility of whales having standing to bring suits that would present legally cognizable claims. As such, a suit could be brought with a non-human plaintiff under the citizen-suit provision of the APA to challenge the conditions of captivity of marine mammals in the public display industry, so long as a court would entertain the argument that a non-human animal could be a "person suffering legal wrong because of an agency action."<sup>191</sup> Although this is not likely, such an expansion of the term "person" is certainly conceivable, particularly in light of the recent expansion of the definition to include non-human legal entities such as corporations and other business organizations.<sup>192</sup>

Expanding the standing doctrine to allow suits brought by captive marine mammals, under the APA's citizen-suit provision, would address the enforcement and animal-welfare concerns addressed above by allowing recourse to the judiciary for unjust captivity practices, while balancing the Court's concern about only entertaining "cases and controversies" within the meaning of Article III of the Constitution. Such a modest expansion would allow the individuals that are actually being harmed to bring suit (in an *ex rel.* capacity, of course) to challenge the conditions of their captivity. This expansion, in conjunction with the above-listed solutions,<sup>193</sup> would protect the interests of captive marine mammals.

Critics of this solution may argue that such an expansion of the modern standing doctrine would open up the floodgates of new lawsuits with non-human animals listed as plaintiffs. It is important to note, however, that this practice, i.e., naming non-human animals as plaintiffs, is already common in the enforcement

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187. *Id.* at 1260-61.

188. *Id.* at 1264.

189. *Id.*

190. *Id.*

191. *See* 5 U.S.C. § 702 (2012).

192. *See, e.g.,* *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010).

193. *Supra* Part III.

of the ESA.<sup>194</sup> It is important to note, however, that in the ESA cases the defendants often do not challenge the standing of the non-human animal listed as plaintiff.<sup>195</sup> However, the modest expansion of the standing doctrine that this Note proposes would not open the floodgates; rather, it would only allow legal challenges to inhumane conditions affecting captive marine mammals in light of their exceptional treatment and regulations by Congress (by providing more legal protections than most other groups of animals receive).

Critics may also argue that expanding standing under the citizen-suit provision of the APA would be impermissible expansion of the doctrine by unelected judges and would circumvent congressional intent. This may be a compelling argument if the law is to be given a textualist interpretation,<sup>196</sup> which would highlight that a marine mammal is not a “person” within the meaning of the APA, or even a purposivist<sup>197</sup> interpretation examining only the congressional intent in passing this single provision. Although these criticisms are valid and, depending on the court before which a case to expand standing might be brought, could be compelling, one could argue that such a modest expanding of standing to only the class of marine mammals that are protected by the MMPA would comport with the legislative intent in implementing the entire regulatory scheme governing the captivity of marine mammals (which was put into place after the most recent amendment of the APA’s citizen-suit provision).<sup>198</sup> Because such an expansion of standing would only be for the benefit of marine mammals, for whose protection Congress has enacted a comprehensive regulatory scheme,<sup>199</sup> rather than for all nonhuman animals, this would be in line with Congress’s intent in enacting the scheme.

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194. *See, e.g.*, *Mt. Graham Red Squirrel v. Yeutter*, 930 F.2d 703 (9th Cir. 1991); *Palila v. Haw. Dept. of Land & Natural Resources*, 852 F.2d 1106 (9th Cir. 1988); *Northern Spotted Owl v. Lujan*, 758 F. Supp. 621 (W.D. Wash. 1991); *Northern Spotted Owl v. Hodel*, 716 F. Supp. 479 (W.D. Wash. 1988).

195. *Citizens to End Animal Suffering & Exploitation, Inc. v. New England Aquarium*, 836 F. Supp. 45, 49 (D. Mass. 1993).

196. “Textualists” generally turn only to the text of a statute or regulation, attempting to reason away any ambiguities in the plain language with a variety of semantic devices to discern the apparent intent of Congress. They are loathe to turn to the legislative history of the law, unlike “purposivists.” *See generally* JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION* 49-66 (2010).

197. “Purposivists” generally look to the plain language of the provision first, then resolve ambiguities by turning to the legislative history in an effort to determine congressional intent. *See generally, id.* at 67-79.

198. *See Keifer & Keifer v. Reconstruction Fin. Corp.*, 306 U.S. 381, 389 (1939) (“The Congressional will must be divined, and by a process of interpretation which, in effect, is the ascertainment of policy immanent not merely in the single statute . . . but in a series of statutes . . .”); *see also* JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION* 48 (2010).

199. *See supra* Part I.B.

## VI. CONCLUSION

The web of regulations that cover the marine mammal public display industry is complicated: from capture to display, any particular animal could be regulated by up to five different sets of regulations<sup>200</sup> and enforced and overseen by five different entities.<sup>201</sup> This web of regulations, intended to protect marine mammals and conserve them for future generations to enjoy, leaves the marine mammal public display industry to regulate itself with regard to education requirements for its members' programs and qualifications of trainers. Industry self-regulation in the realm of educational materials has led to the dissemination of inaccurate materials that distort the consequences of captivity for these marine mammals and serve to justify the practices of captivity by painting the animals' natural environments as more dangerous to the animals than captivity. The self-regulation of husbandry practices has led to the injuries of countless trainers and the deaths of three. This is a failure on the part of the regulating agencies by giving regulatory discretion to entities that have adverse interests to the creatures which the regulations are intended to protect.

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200. *E.g.*, International Whaling Convention, Marine Mammal Protection Act, Magnuson-Stevens Act, Endangered Species Act, and the Animal Welfare Act.

201. International Whaling Commission, National Oceanic and Atmospheric Administration (likely by either the Marine Mammal Commission or the National Marine Fisheries Service), the United States Department of Agriculture (likely by the Fish and Wildlife Service), and the Animal and Plant Health Inspection Service., respectively.