

# Changing Tides for Captive Marine Mammals: What the Future Holds for Captive Care Requirements

ISABELLA LANGONE\*

*When the marine mammal entertainment industry emerged in the 1960s, companies like SeaWorld captured orcas and dolphins from the wild and put the animals on display to bring joy and entertainment to the masses. In 1972, Congress enacted the Marine Mammal Protection Act, which prohibited the capture of marine mammals from the wild.<sup>1</sup> In response to this legislation, SeaWorld and other parks implemented breeding programs to maintain their mammal collection without having to capture wild animals. Conservationists and animal rights activists have protested this practice for decades, but only recently has the larger public engaged in widespread disapproval of marine mammal captivity. In recent years, massive public protest erupted over the conditions in which captive marine mammals, particularly orcas, live. The public rallied alongside conservationists and animal rights activists with unprecedented and unexpected fervor, calling for change in the marine mammal entertainment industry, or even its end altogether.*

*SeaWorld responded to public demand, announcing on March 17, 2016, that it would immediately stop its orca breeding program.<sup>2</sup> Conservationists, animal rights activists, and the public celebrated this monumental step, but questions still remain as to what should be done to improve the lives of the remaining captive marine mammals. There is debate over whether SeaWorld should be compelled to release its captive animals into open-sea sanctuaries, or if it should be allowed to keep its animals in captivity for the remainder of their lives. While there are valid arguments on both sides of this debate, it seems that at least for the time being, marine mammal captivity is here to stay. This Note therefore examines the legal mechanisms that govern the captive care of marine mammals and how the law might be applied in novel ways to ensure more stringent captive care requirements for marine mammals.*

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1. Marine Mammal Protection Act, 16 U.S.C. 1372 (1972).

2. Amber Jamieson, *SeaWorld Decides to Stop Killer Whale Breeding Program*, THE GUARDIAN (Mar. 17, 2016, 10:52 AM), <https://www.theguardian.com/us-news/2016/mar/17/seaworld-to-stop-breeding-killer-whales-orcas-blackfish>.

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## INTRODUCTION

In recent years, the public has become very outspoken about its disapproval of the physical, emotional, and psychological toll captivity takes on marine mammals. In 2013 the documentary film *Blackfish* arguably brought to light the reality of orca captivity and incited mass public uproar against the marine mammal entertainment industry.<sup>3</sup> SeaWorld, a large corporation that displays marine mammals in five different U.S. states,<sup>4</sup> responded to *Blackfish*'s assertions by alleging that the film was "shamefully dishonest, deliberately misleading and scientifically inaccurate."<sup>5</sup> SeaWorld parks' attendance plummeted after the film aired on CNN in October 2013.<sup>6</sup> As a result, SeaWorld's profits dropped by eighty-four percent between 2014 and 2015.<sup>7</sup> By boycotting SeaWorld parks, the public was sending SeaWorld a message that less than adequate care for marine mammals would not be tolerated. That message was quickly

3. See Greg Allen, *Months After Blackfish Release, Controversy over SeaWorld Grows*, NAT'L PUB. RADIO (Jan. 15, 2014, 5:54 PM), <http://www.npr.org/2014/01/15/262767226/months-after-blackfish-release-controversy-for-seaworld-grows>.

4. *Parks*, SEAWORLD PARKS & ENT., [https://seaworldparks.com/en/corporate/what-we-do/parks?from=Top\\_Nav](https://seaworldparks.com/en/corporate/what-we-do/parks?from=Top_Nav) (last visited Jan. 16, 2017).

5. *Id.*

6. See Maya Rhodan, *SeaWorld's Profits Drop 84% After Blackfish Documentary*, TIME MAG. (Aug. 6, 2015), <http://time.com/3987998/seaworlds-profits-drop-84-after-blackfish-documentary/>.

7. *Id.*

received, and on March 17, 2016, SeaWorld announced that it would immediately stop breeding orcas in captivity.<sup>8</sup> This was an undeniably momentous development for orca welfare; especially considering that the decision appeared to come about at least primarily in response to public pressure—there was no court order, injunction, or other legal mandate requiring SeaWorld to stop its breeding program.<sup>9</sup>

Advocates take SeaWorld's promise to stop breeding orcas as a significant victory,<sup>10</sup> and societal views on the ethics of marine mammal captivity seem to be in transition. For example, another pivotal change for marine mammal captivity occurred on June 14, 2016, when the National Aquarium in Baltimore, Maryland announced plans to shut down its bottlenose dolphin exhibit and relocate the dolphins to the nation's first seaside dolphin sanctuary by the year 2020.<sup>11</sup> Though this is certainly not the cheapest or easiest course for the National Aquarium to select in order to take better care of its dolphins, aquarium executives made the decision because it was what was "right for the dolphins" and the aquarium's overall conservation goals.<sup>12</sup> Activists and conservationists celebrated the National Aquarium's pivotal decision and will most likely hold up the National Aquarium as an example of what all holders of marine mammals should do with their animals in the coming years. Even more recently, in September 2016, California Governor Jerry Brown signed into law a bill that prohibits orca breeding and captivity programs in the state and also bans the use of orcas in performances for entertainment purposes.<sup>13</sup> SeaWorld had already stopped theatrical shows at its parks in San Diego, San Antonio, and Orlando at the time this bill was signed,<sup>14</sup> but to have such a protection for marine mammals formally codified into law is nonetheless another historic advancement for marine mammal captivity.

Despite these recent victories, the fight for marine mammal justice still marches on. SeaWorld executives stated they will not release their current population of orcas into the wild because "no orca or dolphin born under human care has ever survived release into the wild."<sup>15</sup> In light

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8. Jamieson, *supra* note 2.

9. *See id.*

10. *See About Peta's Campaign Against SeaWorld*, SEAWORLDOFHURT, <http://www.seaworldofhurt.com/about/> (last visited Jan. 16, 2017).

11. John Racanelli, *National Aquarium: The Time Is Right to Move Our Dolphins to a Seaside Sanctuary*, BALTIMORE SUN (June 14, 2016, 5:30 AM), <http://www.baltimoresun.com/news/opinion/oped/bs-ed-aquarium-dolphins-20160613-story.html>.

12. *Id.*

13. Dominique Mosbergen, *California Bans Orca Captivity and Breeding*, HUFFINGTON POST (Sept. 14, 2016, 4:49 AM), [http://www.huffingtonpost.com/entry/orca-captivity-ban-california-seaworld\\_us\\_57d8c35de4b09d7a68808c30](http://www.huffingtonpost.com/entry/orca-captivity-ban-california-seaworld_us_57d8c35de4b09d7a68808c30).

14. *Id.*

15. Jamieson, *supra* note 2. *But see* Cathy Williamson, *Can Captive Whales or Dolphins Be Returned to the Wild?*, WHALE & DOLPHIN CONSERVATION (Feb. 26, 2014, 2:16 PM), <http://us.whales.org/blog/2014/02/can->

of the fact that SeaWorld, for the time being, has chosen to retain its marine mammals, it is necessary to look at how existing law can be used to improve captive care requirements.

There are three primary bodies of law that govern captive marine mammals: the Marine Mammal Protection Act (“MMPA”), the Animal Welfare Act (“AWA”), and the Endangered Species Act (“ESA”). This Note will first address the most directly related of these statutes—the MMPA—which forbids any “taking” of wild marine mammals, unless the taking is for the purpose of research or public display and a permit has been granted.<sup>16</sup> The MMPA defines the term “take” as “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill.”<sup>17</sup> A permit for “taking” a whale for public display is granted if the licensee can show: (1) they have incorporated a program for conservation or education purposes that conforms to the professionally recognized standards of the public display community; (2) they have registered or hold a license under the AWA provisions regulating the care and treatment of animals in interstate commerce; and (3) the animals are open to the public for viewing.<sup>18</sup> While the MMPA does not explicitly prohibit breeding captive animals, this Note argues that a breeding program for the sole purpose of maintaining the supply of entertainment whales is inconsistent with the purpose of the MMPA and should therefore constitute an unlawful “taking” within the meaning of the definitions outlined in section 1362:<sup>19</sup>

[A]ny act of pursuit, torment, or annoyance which—

(i) has the potential to injure a marine mammal or marine mammal stock in the wild; or

(ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering.<sup>20</sup>

It is the position of this Note that under the plain meaning of the MMPA any individual or corporation must obtain a permit before they engage in an activity that constitutes harassment of the mammal, regardless of whether that mammal is wild or captive. Under this interpretation, SeaWorld and other marine mammal entertainment parks should be

captive-whales-or-dolphins-be-returned-to-wild (discussing that some captive whales are good candidates for release into the wild, including even some who were bred in captivity).

16. Marine Mammal Protection Act, 16 U.S.C. § 1371(a) (1972).

17. *Id.* § 1362(13).

18. *Id.* § 1374(c); see Animal Welfare Act, 7 U.S.C. § 2131 *et seq.* (1972).

19. SeaWorld has never released a captive-bred orca into the wild, and it is likely most of them would not survive if released. See David Kirby, *Saving the #SeaWorldx: If Calif. Bans Orca Captivity, What Happens to the SeaWorld Whales?*, TAKEPART (Mar. 12, 2014), <http://www.takepart.com/article/2014/03/11/saving-seaworld-to-california-bans-orcas-captivity-richard-bloom-killer-whales>; see also 16 U.S.C. § 1361; see Samantha Masunaga, *Here's Why SeaWorld Probably Won't Release Its Whales into the Wild*, L.A. TIMES (Mar. 17, 2016, 12:20 PM), <http://www.latimes.com/business/la-fi-seaworld-sea-pens-20160317-htmllstory.html>.

20. 16 U.S.C. § 1362(18)(A).

required to obtain a permit before making any of its orcas participate in a breeding program, performance, or other husbandry practice<sup>21</sup> that is harmful or elicits unnatural behavior, as these activities constitute harassment under the MMPA.

While the MMPA applies to marine mammals broadly, and SeaWorld along with similar organizations house a wide variety of marine mammals, this Note focuses particularly on captive orca whales given their recent prominence in the media. Part I gives a brief history of orca captivity and the current state of captive care requirements. Part II delves deeper into the three bodies of law governing standards of care, treatment, transportation of marine mammals, and the various requirements these laws impose on the marine mammal industry. Many marine mammal advocates, such as the People for the Ethical Treatment of Animals (commonly known as “PETA”), argue that the care requirements currently in place are insufficient. Accordingly, they believe that all captive orcas should be released into the wild or into open-sea sanctuaries.<sup>22</sup> This Note explores this debate and analyzes how the three laws just introduced—the MMPA, AWA, and ESA—could be applied in novel ways to improve the standards of care for orcas.

Part II further examines how the ESA could potentially provide increased protections for captive orcas if orcas were ever formally listed as an endangered species.<sup>23</sup> In 2015, the U.S. Fish and Wildlife Service (“FWS”) announced that *both* captive and wild chimpanzees would be listed as endangered species.<sup>24</sup> This was the first time the FWS formally ruled that a distinction between wild animals and their captive counterparts is not valid under the ESA.<sup>25</sup> Though the practical effects of the final rule have yet to manifest, it will presumably have a significant impact on captive chimps’ quality of life. Moreover, the FWS’s decision to list captive chimps as endangered could result in huge ramifications for all captive species, including orcas. Using these three pieces of law as the legal foundation for

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21. Such “husbandry” practices include “all methods and practices used to monitor the health of all marine mammals in human care.” Jenna Deedy, *Marine Mammal Husbandry*, WINTER DOLPHIN CHRON., <https://thewinterdolphinchronicles.wordpress.com/2012/03/03/marine-mammal-husbandry/> (last visited Jan. 16, 2017).

22. See *About PETA’s Campaign Against SeaWorld*, *supra* note 10. See generally Stav Ziv, *How to Retire a Captive Orca: The Sea Sanctuaries of the Future*, NEWSWEEK (Nov. 11, 2015, 10:12 AM), <http://www.newsweek.com/retire-captive-orcas-sea-sanctuaries-392943> (discussing the benefits of open-sea sanctuaries, recent developments in making sanctuaries a reality for captive marine mammals, and counterarguments against such sanctuaries).

23. See *Killer Whale (Orcinus Orca)*, NAT’L OCEANIC & ATMOSPHERIC ADMIN., <http://www.nmfs.noaa.gov/pr/species/mammals/whales/killer-whale.html> (last visited Jan. 16, 2017) (describing the species, habitat, and diet of killer whales, among other facts, and stating that only the Southern Resident population, not the killer whale species as a whole, has been listed as endangered under the ESA).

24. Endangered and Threatened Wildlife and Plants; Listing All Chimpanzees as Endangered Species, 80 Fed. Reg. 34,500, 34,500 (June 16, 2015) (to be codified at 50 C.F.R. pt. 17).

25. *Id.* at 34,501.

improving captive marine mammal care, this Note proposes that these laws—particularly the MMPA’s no-take provision—could be applied in ways that provide closer scrutiny and more stringent regulation of the marine mammal display industry. Finally, Part III will offer suggestions as to how the existing body of law can be used to increase protections for captive marine mammals.

## I. THE CURRENT STATE OF ORCA CAPTIVITY

### A. TRACING THE HISTORY OF ORCA CAPTURE FROM PAST TO PRESENT

The practice of taking orcas from the wild dates back to 1961.<sup>26</sup> Since then, a total of 150 orcas have been taken into captivity and of those, 127 are now dead.<sup>27</sup> As of December 2015 there were a total of fifty-six orcas held in captivity all over the world and of those, twenty-three had been captured from the wild and thirty-three were bred in captivity<sup>28</sup>—according to a recent SeaWorld advertisement, however, SeaWorld has not captured an orca from the wild in thirty-five years.<sup>29</sup> SeaWorld, however, currently holds twenty-three orcas in its three parks across the United States and an additional four orcas in a park in the Canary Islands.<sup>30</sup> At least forty-five orcas have died under SeaWorld’s care since the first park opened in 1964, and at least 163 orcas have died across the entire population of captive orcas since the practice of keeping orcas captive first began.<sup>31</sup>

The *Blackfish* documentary changed the tide of animal rights activism for captive orcas. The documentary highlights the harsh conditions of the marine mammal entertainment industry by focusing on the story of a particular whale, Tilikum, who killed three people throughout his captive life.<sup>32</sup> Widespread public denouncement of SeaWorld followed the film, and soon after celebrities like Jessica Biel and Bob Barker distanced themselves from the company.<sup>33</sup> Attendance steadily declined despite SeaWorld’s efforts to maintain their customer base by discounting tickets

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26. *The Fate of Captive Orcas*, WHALE & DOLPHIN CONSERVATION, <http://us.whales.org/wdc-in-action/fate-of-captive-orcas> (last visited Jan. 16, 2017).

27. *Id.*

28. *Id.*

29. SeaWorld® Parks & Entertainment, *What Should You Know About SeaWorld’s Killer Whales?*, YOUTUBE (Apr. 6, 2015), <https://www.youtube.com/watch?v=2fa6inwzLIA>.

30. *The Fate of Captive Orcas*, *supra* note 26.

31. *Id.*

32. BLACKFISH (CNN Films 2013). On January 6, 2017, Tilikum passed away in the SeaWorld Orlando park due to a bacterial lung infection. The death of this controversial but beloved whale, some say, may mark the “beginning of the end of a 50-year-long experiment in human-whale interaction.” Jen Kirby, *Tilikum, SeaWorld’s Literal Killer Whale and Star of Blackfish, Is Dead*, N.Y. MAG. (Jan. 6, 2017, 2:50 PM), <http://nymag.com/daily/intelligencer/2017/01/tilikum-seaworlds-literal-killer-whale-is-dead.html>.

33. *Celebrities’ Efforts and SeaWorld’s Step Forward*, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, <http://www.peta.org/features/celebrity-efforts-seaworld/> (last visited Jan. 16, 2017).

and creating a new marketing scheme which advertized shows with “experiences that are more natural.”<sup>34</sup> The film’s dramatic effect on the public was an unexpected but welcome boost for animal rights proponents.

However, animal rights advocates and organizations like PETA began speaking out against the industry long before *Blackfish*. In 2012, in a drastic—and some argue ill-advised and poorly timed<sup>35</sup>—attempt to assert Thirteenth Amendment rights for orcas, PETA sued SeaWorld on behalf of Tilikum and four other orcas for violating the Thirteenth Amendment’s proscription on slavery, arguing that the park had essentially enslaved the whales by holding them in captivity.<sup>36</sup> The court dismissed the suit for lack of subject matter jurisdiction, finding that the Thirteenth Amendment applies only to humans and “does not afford Plaintiffs any relief as non-humans.”<sup>37</sup> Despite this case’s failure, the fight to “free Tilly” did not end there.<sup>38</sup>

Following *Blackfish*’s release more than three years ago, there has been an exponential increase in the efforts to use legal mechanisms to create more protections for orcas. In 2015, a group of individuals filed a class action lawsuit against SeaWorld San Diego for violations of California’s unfair competition and false advertising laws as well as the California Consumer Legal Remedies Act.<sup>39</sup> The plaintiffs alleged that SeaWorld fraudulently sold them admission passes to the park under the false pretense that the orcas were “healthy and happy,” as indicated in SeaWorld advertisements.<sup>40</sup> The court dismissed the claim in December 2015 for failure to allege actual reliance on any of SeaWorld’s fraudulent

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34. Nathan Bomey, *SeaWorld Attendance Down Despite Discounts*, USA TODAY (last updated Aug. 6, 2015), <http://www.usatoday.com/story/money/2015/08/06/seaworld-attendance-down-despite-discounts/31207051/>; Michael Calia, *SeaWorld Attendance, Revenue Continue to Decline: Theme Park Operator Battling Criticism over Treatment of Killer Whales*, WALL ST. J. (Feb. 26, 2015, 8:07 AM), <http://www.wsj.com/articles/seaworld-attendance-revenue-continue-to-decline-1424956041>; Sandra Pedicini, *Struggling SeaWorld Reveals Plan for Transformation*, ORLANDO SENTINEL (Nov. 9, 2015, 7:44 PM), <http://www.orlandosentinel.com/business/tourism/os-seaworld-future-joel-manby-20151109-story.html>.

35. This lawsuit was highly contested by animal rights activists for being “grossly premature” and advancing an inevitably failing constitutional argument too soon. In order to succeed on a claim that nonhuman animals should be granted legal personhood and receive Thirteenth Amendment protections, there will need to be decades of social acceptance of the idea and a solid “foundation of courts recognizing that nonhuman animals could be considered legal persons under the common law.” See Charles Siebert, *Should a Chimp Be Able to Sue Its Owner?*, N.Y. TIMES MAG. (Apr. 23, 2014), [http://mobile.nytimes.com/2014/04/27/magazine/the-rights-of-man-and-beast.html?hp&\\_r=2&referrer=](http://mobile.nytimes.com/2014/04/27/magazine/the-rights-of-man-and-beast.html?hp&_r=2&referrer=).

36. *Tilikum v. Sea World Parks & Entm’t, Inc.*, 842 F. Supp. 2d 1259, 1260 (S.D. Cal. 2012).

37. *Id.* at 1263.

38. “Free Tilly” is a play on words referencing the 1993 film *Free Willy*, a fictional story about a boy who befriends and frees a captive orca whale. *FREE WILLY* (1993). At the time of its release, the film sparked public outcry (to a much smaller extent than *Blackfish*) over orca captivity, eventually leading to the release of Keiko, the whale who played Willy. Keiko was released in 1998, but he never joined a pod and died in December 2003. *The Fate of Captive Orcas*, *supra* note 26.

39. *Hall v. Sea World Entm’t, Inc.*, No. 3:15-cv-660, 2015 WL 9659911, at \*7 (S.D. Cal. Dec. 23, 2015).

40. *Id.* at \*3.

misrepresentations or omissions.<sup>41</sup> Despite its dismissal, the case represents an example of the widespread public outrage over SeaWorld's treatment of its animals. Although legal recourse failed in both of these cases, they represent a strong and outspoken public sentiment that SeaWorld's treatment of its animals must change. That sentiment is still very much alive today.

In addition to the public, regulatory agencies have also become part of the SeaWorld controversy. In October 2015, SeaWorld sought approval from the California Coastal Commission ("Coastal Commission") for a 100 million dollar expansion project. The Coastal Commission responded that they would approve the project only if SeaWorld stopped its orca-breeding program.<sup>42</sup> As previously discussed, requiring SeaWorld to end its breeding program would mean that its current population of orcas would be its last, as captive breeding is SeaWorld's only way to maintain its stock of orcas.<sup>43</sup> Though a very progressive stance by the Coastal Commission, it was highly questionable whether the Commission actually had the power to issue such a bold statement.<sup>44</sup>

SeaWorld quickly filed suit against California authorities contesting the action as an inappropriate exercise of the Coastal Commission's power and a violation of its jurisdiction, which is solely over the California coastlines and not over marine mammal husbandry.<sup>45</sup> To the delight of animal rights advocates, conservationists, and much of the general public, SeaWorld voluntarily agreed to stop its captive breeding program in March 2016.<sup>46</sup> SeaWorld President and CEO Joel Manby stated, "[b]y making this the last generation of orcas in our care and reimagining how guests will experience these beautiful animals, we are fulfilling our mission of providing visitors to our parks with experiences that matter."<sup>47</sup> While some organizations, like PETA, say this is still not enough and that orcas currently being held captive should be released to open-sea sanctuaries,<sup>48</sup> this is undoubtedly a "monumental and important first step in achieving a more humane business model for the company."<sup>49</sup>

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41. *Id.*

42. See Hugo Martin & Samantha Masunaga, *What the Coastal Commission's Ban on Orca Breeding Means for SeaWorld*, L.A. TIMES (Oct. 10, 2015, 4:00 AM), <http://www.latimes.com/business/la-fi-1010-seaworld-followup-20151010-story.html>.

43. SeaWorld has not captured an orca from the wild in over thirty years, and existing law would make it unfeasible for SeaWorld to begin capturing orcas from the wild. See ERICH HOYT, *THE PERFORMING ORCA—WHY THE SHOW MUST STOP* 17–20 (1992).

44. Marty Graham, *SeaWorld Sues California Authorities over Orca Breeding Ban: SeaWorld Claims the Ban Effectively Ends Its Popular Killer Whale Shows*, HUFFINGTON POST (Dec. 30, 2015, 2:36 AM), [http://www.huffingtonpost.com/entry/seaworld-lawsuit\\_us\\_56838565e4b014efe0d99b5d](http://www.huffingtonpost.com/entry/seaworld-lawsuit_us_56838565e4b014efe0d99b5d).

45. *Id.*

46. Jamieson, *supra* note 2.

47. *Id.*

48. *See id.*

49. *Id.*



## B. SHOULD CAPTIVE MARINE MAMMALS BE SET FREE?

Animal rights organizations are demanding that orca captivity end full stop, but questions remain as to whether it is legally enforceable, feasible, or even desirable for SeaWorld to release its remaining captive orcas or relocate them to open-sea sanctuaries. Only a select few captive orcas make good candidates for release into the wild.<sup>50</sup> Further, some argue that release is impossible and there has never been a successful case of a whale being released into the wild.<sup>51</sup> One example is Keiko, the star of the film *Free Willy*, who was released into the wild due to popular demand, only to die a few years later having never joined a wild orca pod.<sup>52</sup> Accordingly, some argue that setting these orcas free is “not a wise option” because they would likely die, and as such they should remain in SeaWorld’s care where they will “continue to receive the highest-quality care, based on the latest advances in marine veterinary medicine, science and zoological best practices.”<sup>53</sup>

On the other side of the debate, PETA and other animal welfare organizations argue that there is simply no way to keep such large and emotionally complex orcas in captivity, even if they are given the “highest-quality care” possible.<sup>54</sup> These activists call for all captive orcas to be moved to open-sea sanctuaries where they can experience the natural ocean environment and have “some semblance of natural life.”<sup>55</sup> The National Aquarium in Baltimore has already pledged to make this change with respect to its bottlenose dolphins.<sup>56</sup> Given the vast number of orcas in SeaWorld’s care, however, the entertainment park would have to

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50. Williamson, *supra* note 15.

WDC recommends that the return of any whale or dolphin to the wild should follow strict guidelines. Any release should, where possible, help to conserve wild populations as well as consider the health and long-term survival of the individual whales and dolphins returned to the wild. They should be released into, or close to, a population of whales and dolphins they would naturally be a part of, and into an area which is not heavily polluted. Local dolphin experts should be involved and the whale or dolphin carefully screened for any disease that might harm wild whales and dolphins. Those released should be healthy, able to feed themselves on live fish and free of behaviour that could jeopardise their long-term survival, such as approaching boats looking for food. Whale and dolphin releases should be supported as far as possible by local people, through positive education campaigns. Monitoring of individuals is vital so we know whether the release has been successful.

*Id.*

51. See Jamieson, *supra* note 2.

52. ASSOCIATED PRESS, *Keiko the Killer Whale Dies*, NBCNEWS.COM (Dec. 13, 2003, 12:51 AM), [http://www.nbcnews.com/id/3700297/ns/world\\_news/t/keiko-killer-whale-dies/#.VwC8RMrLBI](http://www.nbcnews.com/id/3700297/ns/world_news/t/keiko-killer-whale-dies/#.VwC8RMrLBI).

53. Joel Manby, *SeaWorld CEO: We’re Ending Our Orca Breeding Program, Here’s Why*, L.A. TIMES (Mar. 17, 2016, 2:00 AM), <http://www.latimes.com/opinion/op-ed/la-oe-0317-manby-sea-world-orca-breeding-20160317-story.html>.

54. See Ziv, *supra* note 22.

55. See *id.*

56. See Mosbergen, *supra* note 13.

internalize a tremendous expense if it were to create open-sea enclosures for all of its orcas.<sup>57</sup> The cost of merely one open-sea enclosure is estimated to cost as much as five million dollars, with the annual maintenance reaching \$500,000 per year.<sup>58</sup> Open-sea sanctuaries remain an elusive and expensive alternative to captivity, but perhaps the National Aquarium will set a precedent that SeaWorld will one day follow, creating its own plan for relocating its animals to seaside sanctuaries.

SeaWorld's decision to suspend its breeding program is undoubtedly a huge step forward for captive marine mammal rights, as is California's choice to pass a law banning orca breeding programs and entertainment performances. But these advancements are by no means the final word in orca advocacy. The remainder of this Note will address how current laws may be used to improve the care requirements for the orcas and all other marine mammals that will live the remainder of their lives in captivity.

### C. HARM TO CAPTIVE MAMMALS

There is ample evidence documenting how harmful captivity is to orcas. Whales are social animals with highly developed cognitive and emotional centers.<sup>59</sup> In the wild, orcas spend the duration of their lives in tight-knit social groupings composed of whales who share the same language and behavioral ties.<sup>60</sup> In captivity, however, they are deprived of natural social groupings which are fundamental to their health and well-being.<sup>61</sup> The most common stressors for captive whales include the following: "separation, social isolation, movement from an established environment to one with a different social order, poor nutrition, overcrowding, and housing with over-aggressive pen mates or in poorly designed enclosures."<sup>62</sup> Moreover, captive whales live in close quarters with whales with whom they have no natural cultural or family ties and no way to escape aggressive attacks such as cuts, rakes,<sup>63</sup> and rammings.<sup>64</sup> In one particularly horrific incident that occurred in front of a SeaWorld audience in 1989, an orca rammed another whale, severing a major artery in her jaw which caused her to bleed to death.<sup>65</sup>

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57. See Tim Zimmerman, *The Monumental Plans That Could Set Captive Orcas Free*, THE DODO, (Mar. 22, 2014), <https://www.thedodo.com/the-monumental-plans-that-coul-479028620.html>.

58. *Id.*; Masunaga, *supra* note 19.

59. Megan J. Rechberg, *Dying to Entertain Us or Living to Educate Us? A Comprehensive Investigation of Captive Killer Whales, Their Trainers, and How the Law Must Evolve to Meet Their Needs*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 720, 800 (2011).

60. *Id.*

61. *Id.*

62. *Id.* at 736-37.

63. A rake is a type of superficial abrasion made by the teeth of another animal that are commonly found on both wild and captive whales. *What Are the Facts About Rake Marks on Whales and Dolphins?*, SEAWORLD PARKS & ENT., <https://ask.seaworldcares.com/2015/3/what-are-the-facts-about-rake-marks-on-whales-and-dolphins/> (last visited Jan. 16, 2017).

64. Rechberg, *supra* note 59, at 735-37.

65. *Id.* at 736.

Captive whales also suffer from sickness and disease, some of which stems from the negative side effects of the prophylactic treatment they receive to ward off other diseases.<sup>66</sup> For example, trainers fill the animals' food with antibiotics to prevent bacterial infection, but the overuse of antibiotics can lead to "disruption of normal bacterial flora in the gut, malnutrition, and susceptibility of the host to opportunistic pathogens . . ."<sup>67</sup> Additionally, the whales often must have holes drilled into their teeth to prevent infection due to the buildup of food, an uncomfortable process that requires the teeth to be flushed three times daily for the duration of their lives.<sup>68</sup>

SeaWorld's breeding program, despite its reputation for being the best in the world, has very high stillborn calf mortality rates.<sup>69</sup> SeaWorld breeds young females much earlier than they would naturally breed in the wild, contributing to calf mortality and increasing the risk that the mother will not know how to nurse her calf, or in some cases even display aggression towards her calf.<sup>70</sup>

## II. HOW CURRENT LAWS CAN BE APPLIED TO IMPROVE CAPTIVE CARE

### A. THE MARINE MAMMAL PROTECTION ACT

The public is a major impetus of ecological and animal rights reform. In 1972 Congress enacted the MMPA in response to widespread public disapproval of inhumane treatment of wild marine mammals—in 1972 particularly, the public was distraught over the slaughter of seal pups and the rampant death of dolphins and porpoises that suffocated after being caught in fishing lines<sup>71</sup>—and the fear that certain marine species would eventually become extinct due to human activities.<sup>72</sup> The purpose of the MMPA is twofold: (1) to keep populations high enough to prevent extinction; and (2) to legalize the moral desire to protect these charismatic and adored creatures from suffering harm.<sup>73</sup> The legislative history details the manner in which these animals were killed, stating:

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66. *Id.* at 801.

67. *Id.*

68. *Id.* at 800–01.

69. *Id.* at 802.

70. *Id.* at 802–03.

71. LaVonne R. Dye, Note, *The Marine Mammal Protection Act: Maintaining the Commitment to Marine Mammal Conservation*, 43 *CASE W. RES. L. REV.* 1411, 1414 n.11 (1993) (quoting H.R. REP. NO. 707, 92nd Cong., 2d Sess. 11–12 (1972), reprinted in 1972 *U.S.C.A.N.* 4144, 4144–45).

72. *Id.*

73. See H.R. REP. NO. 92-707, at 4144–46 (1971) (discussing the legislative history of the adoption of the MMPA in 1972).

Recent history indicates that man's impact upon marine mammals has ranged from what might be termed neglect to virtual genocide. These animals, including whales, porpoises, seals, sea otters, polar bears, manatees and others, have only rarely benefitted from our interest: they have been shot, blown up, clubbed to death, run down by boats, poisoned, and exposed to a multitude of other *indignities*, all in the interests of profit or recreation, with little or no consideration of the potential impact of these activities on the animal populations involved.<sup>74</sup>

The long description of the "indignities" these animals were suffering is evidence that mere pragmatism was not the sole driving force behind this legislation. However, conflict between these dual motivations of preventing extinction and minimizing suffering arises when conservation of the marine mammal stock runs up against the need to protect the mammals from harm. For example, breeding programs are often a necessary tool for bringing a species away from the brink of extinction, but the programs can be very stressful and harmful to the animals participating in them. As discussed later in this Note, organizations like SeaWorld often try to justify exploitative breeding practices under the guise of conservation or scientific research. In some cases, however, the *sole* purpose of a breeding program is to provide entertainment with little to no scientific or educational value.<sup>75</sup>

The legislative findings concerning the MMPA outline six major points:

- (1) certain populations of marine mammals are in danger of becoming extinct due to human activity;
- (2) "such species . . . should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem . . . or to diminish below their optimum sustainable population;"
- (3) there is inadequate knowledge of the ecology and population dynamics of such marine mammals;
- (4) there should be international agreements on research and conservation of all marine mammals;
- (5) protecting and conserving marine mammals is a necessary part of protecting interstate commerce; and
- (6) "the primary objective of [the] management [of marine mammals] should be to maintain the health and stability of the marine ecosystem . . . it should be the goal to obtain an optimum sustainable population keeping in mind the carrying capacity of the habitat."<sup>76</sup>

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74. Dye, *supra* note 71, at 1414-15, n.11 (emphasis added).

75. See generally Rechberg, *supra* note 59 (questioning the educational value of SeaWorld facilities).

76. Marine Mammal Protection Act, 16 U.S.C. § 1361 (1972).

Though the MMPA includes no explicit differentiation between captive and wild mammals, the plain language seems to be directed more toward protecting wild populations. This leaves captive marine mammals, such as those bred and housed by SeaWorld, vulnerable to exploitative practices in the marine mammal public display industry.<sup>77</sup>

One issue with marine mammal amusement parks is that it can be difficult to tell whether they actually offer some contribution to conservation and education. While companies like SeaWorld are a for-profit business, they also strive to make contributions to scientific research and participate in conservation efforts by donating a portion of their profits to certain conservation projects.<sup>78</sup> For example, SeaWorld San Diego plays a huge role in rescuing and rehabilitating stranded mammals on the California Coast.<sup>79</sup> However, despite SeaWorld's attempts at making positive contributions to the marine ecosystem, the public is understandably outraged over the physical and emotional suffering captive orcas endure. In light of the significant public scrutiny SeaWorld has faced since 2013, it is prudent to examine how existing laws may be used to provide increased protections for captive marine mammals.

One way to improve captive conditions is through the MMPA's strict moratorium on wild marine mammal takings.<sup>80</sup> Under the statute, the definition of "take" includes harassing or capturing any marine mammal.<sup>81</sup> The Act creates limited exceptions to the moratorium, which is how organizations like SeaWorld, aquariums, and other research facilities are able to hold marine mammals without violating the no-take provision of the Act. Take permits may be issued for "purposes of scientific research, public display, photography for educational or commercial purposes, or enhancing the survival or recovery of a species or stock . . ."<sup>82</sup> This provision creates a broad exception to the moratorium and excuses many behaviors that otherwise would be inconsistent with the MMPA. Once the Marine Mammal Commission reviews the permit and the Secretary of the Department of Commerce approves it, SeaWorld is free to capture

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77. The National Marine Fisheries Service, a subsidiary of the National Oceanic and Atmospheric Administration, administers the MMPA with respect to cetaceans, otariids, and phocids (the taxonomic names for whales, dolphins, and seals). Both are agencies within the Department of Commerce. Walrus, otters, and polar bears are regulated by the U.S. Fish and Wildlife Service within the Department of the Interior. *The Marine Mammal Protection Act of 1972, Amended 1994*, MARINE MAMMAL CTR., <http://www.marinemammalcenter.org/what-we-do/rescue/marine-mammal-protection-act.html> (last visited Jan. 16, 2017).

78. The *SeaWorld® & Busch Gardens®* Conservation Fund supports "wildlife research, habitat protection, animal rescue and conservation education . . . all over the world." *Conservation*, SEAWORLD SAN DIEGO, <https://seaworldparks.com/en/seaworld-sandiego/animals/conservation> (last visited Jan. 16, 2017).

79. *Animal Rescue*, SEAWORLD SAN DIEGO, <https://seaworldparks.com/en/seaworld-sandiego/Animals/Animal-Rescue/> (last visited Jan. 16, 2017).

80. 16 U.S.C. § 1372.

81. *Id.* § 1362(13).

82. *Id.* § 1371(a)(1).

and import the animals for public display.<sup>83</sup> After the Secretary has issued the permit the MMPA does very little to monitor what happens to the whales once they are in captivity. The Animal Welfare Act (“AWA”) is the primary source of law that regulates the treatment and conditions of all captive animals.<sup>84</sup> Once SeaWorld obtains the permit for public display, it can essentially do whatever it wants to the animal so long as it is in compliance with the AWA—for example, training the whales to do tricks and performances, as well as engaging in an artificial breeding program.

In the original 1972 framework of the MMPA, the National Marine Fisheries Service (“NMFS”), a subsidiary of the National Oceanic and Atmospheric Administration (“NOAA”), was the primary agency responsible for issuing permits for public display under the MMPA as well as regulating the requirements of care for captive animals.<sup>85</sup> Since 1994, the responsibility of regulating captive care requirements has shifted from the NMFS to the Animal and Plant Health Inspection Service (“APHIS”) under the authority of the AWA.<sup>86</sup> Under this regime there are two separate agencies responsible for issuing the public display permits and ensuring the animals are cared for properly after they are captured. While the NMFS is still responsible for issuing permits under the authority of the MMPA with oversight from the Marine Mammal Commission and the Departments of the Interior and Commerce, the APHIS is the sole regulatory agency monitoring the care of captive animals.<sup>87</sup> Under this framework, institutions holding marine mammals have two separate agencies to answer to and two bodies of law to comply with: (1) the NMFS, which issues the permits under the authority of the MMPA; and (2) the APHIS, which enforces captive care requirements under the authority of the AWA. This dual-agency system has created enormous confusion over which agency is responsible for enforcing which provisions, leading to diminished oversight over the animals after they are taken into captivity.<sup>88</sup>

While the NMFS will issue take permits for the purposes of scientific research or public display,<sup>89</sup> there are three criteria that must be met before such a permit is issued:

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83. *Id.*

84. Rechberg, *supra* note 59, at 765.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 770.

89. 16 U.S.C. § 1374(a)(2).

A permit may be issued to take or import a marine mammal for the purpose of display only to a person which the Secretary determines (i) offers a program for education or conservation purposes that is based on professionally recognized standards of the public display community; (ii) is registered or holds a license issued under 7 U.S.C. 2131 et seq.; and (iii) maintains facilities for the public display of marine mammals that are open to the public on a regularly scheduled basis and that access to such facilities is not limited or restricted other than by charging of an admission fee.<sup>90</sup>

Of these three criteria, the first is the most problematic. The standard for what constitutes a proper educational or conservation program is too lax because it is based on “professionally recognized standards of the public display community.”<sup>91</sup> In this scheme, it is the industry, not the agency, which creates the regulatory standards with which the industry must comply. Whenever the regulated entity is allowed to create the very standards by which they are regulated there is a risk that the statute’s goal—in this case, the safety and protection of captive marine mammals—will be overpowered by the interests of the industry.<sup>92</sup> In this setup the fox is being allowed to guard the henhouse, so to speak.

In the case of SeaWorld and other marine-focused entertainment parks, the educational value of the services they offer is minimal.<sup>93</sup> The focus is on entertainment—wowing audiences with fancy tricks during performances and drawing crowds into the stands.<sup>94</sup> Trainers and employees are not required to have any specialized training or expertise and it is more important for the trainers to be physically fit and have an attractive stage presence than to have any education or previous experience working with large animals.<sup>95</sup> Employees who linger around observation areas to answer guests’ questions also are not required to have specialized knowledge, but rather are trained to reiterate certain phrases and buzzwords that SeaWorld tells them to impart on the guests.<sup>96</sup> SeaWorld is in complete control of every aspect of the information that gets disseminated to its millions of visitors. There is very little regulation from outside sources monitoring what information SeaWorld is disseminating to the public, or ensuring that SeaWorld is actually in compliance with the law by offering truly educational programs to its guests.<sup>97</sup>

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90. *Id.* § 1374(c)(2).

91. *Id.*

92. Rechberg, *supra* note 59, at 770.

93. *Id.* at 777–89.

94. *Id.*

95. BLACKFISH, *supra* note 32.

96. Rechberg, *supra* note 59, at 780–83.

97. *See id.*

Moreover, there is no mechanism under the current regime for ensuring that these parks are actually providing an educational experience to their customers. It is easy for organizations like SeaWorld to argue that their guests walk away from the parks with a better understanding of marine mammals, but this is almost impossible to verify. Even if it is true that patrons leave the parks with more knowledge than they arrived with, there is no way to verify that the information they receive is accurate. In fact, SeaWorld has come under fire for hiding the truth and deliberately misleading their customers about the health and happiness of their orcas.<sup>98</sup>

SeaWorld boasts that it has the most successful breeding program in the world, “with 24 successful killer whale births since the program’s inception in 1985.”<sup>99</sup> While breeding whales in captivity technically increases the total number of orcas in existence, captive breeding does nothing to contribute to the overall conservation of the marine mammal stock because the whales live forever in captivity and are not adding to the genetic diversity of the natural populations in the wild.<sup>100</sup> Further, captive breeding programs have never been successfully implemented to bolster wild orca populations because once a whale has spent a majority or all of its life in captivity, it lacks the necessary survival instincts and behaviors to be reintroduced into the wild.<sup>101</sup> This practice is not only harmful to the animals,<sup>102</sup> but is also inconsistent with the purpose and intent of the MMPA.

#### B. THE ANIMAL WELFARE ACT

The MMPA has “limited jurisdiction over marine mammals once they are inside a public display facility.”<sup>103</sup> When it comes to caring for captive animals, the AWA is the sole statute with which every organization must comply. In 1994, an amendment to the MMPA transferred oversight of the public display industry from the Secretaries of the Departments of Commerce and the Interior to APHIS under the

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98. In 2015 a class action lawsuit was brought against SeaWorld by customers who alleged that SeaWorld fraudulently sold them admission tickets by leading them to believe the whales were healthy and happy. *See* *Hall v. Sea World Entm’t, Inc.*, No. 3:15-cv-660, 2015 WL 9659911, at \*7 (S.D. Cal. Dec. 23, 2015).

99. *Successful Breeding Programs*, SEAWORLD PARKS & ENT., <https://seaworldentertainment.com/en/media/photo-gallery/successful-breeding-programs> (last visited Jan. 16, 2017).

100. Rechberg, *supra* note 59, at 771.

101. Though it is very risky, there have been some successful reports of long-term captive marine mammals that were released into the wild. “It may even be possible for those born in captivity to learn hunting skills from other whales and dolphins who have lived in the wild, if they are returned in a social group.” *See* Williamson, *supra* note 15. The case of Keiko, however, illustrates that some released captive animals never find a pod to join after they are released from captivity. *Id.*

102. *See generally* Melissa Cronin, *5 Reasons Why SeaWorld’s Orca Breeding Program Is Seriously Bad News*, THE DODO (Apr. 30, 2014), <https://www.thedodo.com/5-reasons-why-seaworlds-orca-b-531056663.html> (outlining the main arguments against captive breeding programs).

103. Rechberg, *supra* note 59, at 771.



authority of the AWA.<sup>104</sup> As previously discussed, this amendment created a bifurcation in agency oversight of marine mammal protection, resulting in increased confusion for the industry and inadequate protection for the mammals.<sup>105</sup> Essentially, the 1994 amendment weakened the MMPA's effectiveness for captive-bred animals because the NMFS, which is charged with making sure requirements of the MMPA are met prior to issuing the permits, no longer does any monitoring to see if the MMPA requirements continue to be followed after the animal is taken into captivity. As one of the most robust bodies of law safeguarding the health and welfare of marine mammals, the loss of MMPA protections has left captive marine mammals vulnerable to the AWA's deficient standards, as the AWA does not share the MMPA's goals of promoting marine mammal conservation and protecting the animals' well-being.

Congress enacted the AWA in 1966 to protect animals used in research laboratories.<sup>106</sup> Over the years, the AWA was amended to encompass all "exhibitors," which includes any entity "exhibiting any animals . . . to the public for compensation."<sup>107</sup> The Secretary of the U.S. Department of Agriculture issues a permit to the exhibitor if the exhibitor pays a fee and demonstrates that the facilities comply with the basic standards of care enumerated in the AWA.<sup>108</sup> Those basic standards include "handling, housing, feeding, watering, sanitation, ventilation, shelter from extremes of weather and temperatures, adequate veterinary care, and separation of species where the Secretary finds *necessary for the humane handling, care, or treatment of animals.*"<sup>109</sup> Under the MMPA, once the Secretary issues the permit it is then the sole responsibility of APHIS to ensure that the exhibitor maintains the facilities in compliance with the statute's "humane handling, care, or treatment" mandate.<sup>110</sup>

APHIS conducts yearly unannounced inspections and instances of non-compliance are reviewed by administrative law judges.<sup>111</sup> APHIS also sets the regulatory standards for managing marine mammal captivity enclosures.<sup>112</sup> However, many have criticized APHIS's lack of expertise in marine mammal biology and for inadequately enforcing its own standards,<sup>113</sup> arguing that agency representatives lack the expertise necessary to

104. Stephanie Dodson Dougherty, *The Marine Mammal Protection Act: Fostering Unjust Captivity Practices Since 1972*, 28 J. LAND USE & ENVTL. L. 337, 338 (2013).

105. See *supra* Part II.A.

106. Rechberg, *supra* note 59, at 792.

107. Animal Welfare Act, 7 U.S.C. § 2132(h) (2008).

108. *Id.* § 2133.

109. *Id.* § 2143 (emphasis added).

110. APHIS's standards are outlined in the Code of Federal Regulations. 9 C.F.R. § 3.100 (2016) ("Specifications for the Humane Handling, Care, Treatment, and Transportation of Marine Mammals").

111. *Id.*

112. Dougherty, *supra* note 104, at 341.

113. *Id.* at 341-42.

adequately monitor the health of the animals.<sup>114</sup> For example, if a representative from APHIS did an on-site inspection at a SeaWorld park, there is no guarantee that the particular representative conducting the inspections would have any advanced biological or zoological education.<sup>115</sup>

Even if APHIS rigorously enforces the standards outlined in Title 9 of the Code of Federal Regulations, standards are still inadequate for protecting the orcas' basic needs because they give far too much discretion to the industry.<sup>116</sup> In 2001, when Title 9 was updated to reflect APHIS's most recent standards, APHIS allowed public comment during the rulemaking negotiation.<sup>117</sup> Those who posted comments include "the public display industry, animal protection groups, veterinarians, and government managers" and their comments strongly influenced the newly published standards.<sup>118</sup> The public display industry was represented by the American Zoo and Aquarium Association and the Alliance of Marine Mammal Parks and Aquariums.<sup>119</sup> Together these associations "represent approximately eighty percent of the marine parks, aquariums, dolphariums, zoos, and research facilities holding captive marine mammals."<sup>120</sup> APHIS's standards have been widely criticized for being overbroad and leaving far too much discretion to the regulated entity.<sup>121</sup> For example, Title 9 of the Code of Federal Regulations uses unclear terms that leave too much room for interpretation by the industry, including "[p]hrases, like 'best interest of the marine mammals,' 'adequately trained,' 'experienced trainers,' 'professionally recognized standards,'... and 'as determined by the attending veterinarian . . .'"<sup>122</sup> These terms are unclear, ambiguous, and provide APHIS with little room to question the industry's practices.

In the context of marine mammal welfare, there are particularly negative consequences when the law gives the industry too much discretion. For example, for-profit corporations have an interest in using the most cost-effective care methods, which are often harmful to the animals.<sup>123</sup> As one study reveals, almost all captive orca whales have at least moderate, or in many cases severe health issues such as those discussed in previous parts of this Note.<sup>124</sup> Many argue that it is simply

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114. Rechberg, *supra* note 59, at 797–98.

115. *Id.* at 789.

116. *Id.* at 803.

117. Dougherty, *supra* note 104, at 338.

118. *Id.*

119. *Id.* at 338–39.

120. *Id.*

121. Rechberg, *supra* note 59, at 803; *see also* Dougherty, *supra* note 104, at 340.

122. Rechberg, *supra* note 59, at 804.

123. One example is SeaWorld's use of prophylactic antibiotics to stop orcas from becoming sick. While the practice works for preventing infections, it forces the animal to live with chronic ulcers or other digestive issues. *See id.* at 801.

124. *See supra* Part I.C.

impossible to hold a captive orca without detrimental effects to the animal's well-being.<sup>125</sup>

The economic reality of attempting to care for such massive creatures often precludes the possibility of providing for their basic needs—it is expensive, even impossible, to provide for the whales' minimum needs and still turn a profit.<sup>126</sup> Though SeaWorld may set the gold standard in terms of caring for orca whales, it is simply impossible to provide the basic minimum care required by the AWA for animals as large as orcas that have complex emotional and social needs.<sup>127</sup> One prominent view is as follows:

It is nearly impossible for an agency like APHIS to serve the purpose of the AWA, which is to protect animals from exploitation, when the regulations it enforces are set by “professionally recognized standards” . . . . This allows entities that exhibit animals like killer whales for profit to regulate themselves, a privilege reserved for no other businesses.<sup>128</sup>

The AWA, as it stands, is too ambiguous and far too lenient to the industry to achieve better protections for captive marine mammals. These regulatory standards require significant revision if they are to create improved captive care requirements, in addition to the cooperation of the agencies in enforcing those standards. Without relying on congressional or agency intervention in the enforcement of the AWA, this Note proposes that the MMPA should be used to bolster the deficiencies of the AWA's oversight of the marine mammal entertainment industry.

### C. THE ENDANGERED SPECIES ACT

A discussion of animal welfare protection is not complete without reference to the ESA. Like the MMPA, the ESA has a strict moratorium on the taking of any species that is officially listed as endangered.<sup>129</sup> Similar to the MMPA, under the ESA “take” also means “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”<sup>130</sup> Another highly important ESA mechanism is the designation and protection of critical habitats for listed species.<sup>131</sup> Orca whales may one day enjoy ESA protections if the species as a whole is listed as endangered. At present only three pods of Southern Resident killer whales are on the endangered species list and

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125. See *Aquariums and Marine Parks*, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, <http://www.peta.org/issues/animals-in-entertainment/zoo-pseudo-sanctuaries/aquariums-marine-parks/> (last visited Jan. 16, 2017).

126. See Masunaga, *supra* note 19.

127. *Aquariums and Marine Parks*, *supra* note 125.

128. Rechberg, *supra* note 59, at 804.

129. Endangered Species Act, 16 U.S.C. §1538(a) (2016).

130. *Id.* § 1532(19).

131. *Id.* § 1533(a)(3)(A).

receive the full range of ESA protections.<sup>132</sup> Moreover, similar to the MMPA, it is unclear what protections the ESA offers to captive and captive-bred species.

Recently, however, new developments have hinted at the full scope of ESA protections soon being given to captive-bred animals. When the Fish and Wildlife Service (“FWS”) issued its final ruling in June 2015, that all chimpanzees—both wild and captive—are endangered under the ESA,<sup>133</sup> FWS Director Dan Ashe stated that extending endangered species status to captive chimps would “ensure humane treatment and restrict commercial activities under the ESA.”<sup>134</sup> Specifically, the FWS found the following:

[T]he [Endangered Species] Act does not allow for captive chimpanzees to be assigned separate legal status from their wild counterparts on the basis of their captive state . . . . It is also not possible to separate out captive chimpanzees for different legal status under the Act by other approaches.<sup>135</sup>

Prior to this ruling, captive chimpanzee were differentiated from wild chimpanzees, and thus barred from the protections granted to their wild counterparts.<sup>136</sup> With this new rule, however, captive chimps will now have the same protections as chimps in the wild.

However, it is unclear exactly what this final rule will mean for captive chimps aside from its symbolic value expressing that captive and wild animals deserve the same care and protection. The tangible differences this rule will create have yet to manifest and it is unclear what form they will take, as most ESA protections cannot be readily applied to captive animals. For example, a captive chimp’s critical habitat is rarely threatened because its habitat is a privately owned enclosure, stripping them of the protections afforded wild chimps.

According to the FWS’s final rule, the most notable change is the requirement of incidental take permits for any “taking” of captive animals.<sup>137</sup> One might wonder how exactly a captive-bred animal can be “taken” if they were bred in captivity: Under the ESA and MMPA, the definition of “take” includes harassment of the animal.<sup>138</sup> The MMPA goes as far as defining “harassment” as any act which has the “potential

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132. *Killer Whale (Orcinus Orca)*, *supra* note 23.

133. Press Release, U.S. Fish & Wildlife Service, U.S. Fish and Wildlife Service Finalizes Rule Listing All Chimpanzees as Endangered Under the Endangered Species Act (June 12, 2015), <http://www.fws.gov/news/ShowNews.cfm?ID=E81DA137-BAF2-9619-3492A2972E9854D9>.

134. *Id.*

135. Endangered and Threatened Wildlife and Plants; Listing All Chimpanzees as Endangered Species, 80 Fed. Reg. 34,500, 34,500 (June 15, 2015) (to be codified at 50 C.F.R. pt. 17).

136. *Id.*

137. *Id.* at 34,515.

138. Endangered Species Act, 16 U.S.C. § 1532(19) (2016); Marine Mammal Protection Act, 16 U.S.C. § 1362(13) (2016).

to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering.”<sup>139</sup> Thus, now that captive chimps enjoy the full protection of the ESA, any activity that might constitute “harassment” in captivity would require an incidental take permit.<sup>140</sup> This means that captivity is no longer a veil that entities can use to mask what they do to the animals within their cages. As this decision is so recent, only time will tell exactly what the FWS’s rule will mean for captive chimps, but it is undoubtedly a step in the right direction toward ensuring better treatment and increased regulation of captive care requirements.

Notwithstanding the uncertain effects of the FWS’s final rule just discussed, it is a pivotal victory for animal rights and could have momentous effects on increasing protections for all captive species. In the case of orcas in particular, this rule could extend ESA protections to captive populations, which could bolster the existing inadequate protections offered by the MMPA and AWA. Specifically, the FWS could require that SeaWorld apply for and receive incidental take permits before doing anything to their orcas that might constitute a taking. Because the definition of “take” under the ESA (similar to the MMPA) includes harassing the animal,<sup>141</sup> SeaWorld would be subject to closer scrutiny and would need express permission from the FWS before it made the animals perform or participate in a breeding program, as such activities may “harass” the animal within the meaning of the statutory definition. Even if the agency ultimately decides to issue the permit the process of applying for the permit in and of itself will provide increased oversight and protection of orca welfare. Extending rights to captive orcas, even if only symbolic, could be instrumental in filling the gaps in existing law and ensuring marine mammal parks finally receive appropriate oversight.

### III. ENFORCING THE MMPA NO-TAKE PROVISION AND OTHER LEGISLATION

Since 2013 the masses have rallied behind captive orcas with unprecedented support. Though declining SeaWorld attendance shows that the public generally disapproves of what is happening to captive orcas,<sup>142</sup> it is less clear what legal remedies exist to end captivity, or to at

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139. 16 U.S.C. § 1362(18)(A)(ii).

140. 80 Fed. Reg. 34,500, 34,500.

141. 16 U.S.C. § 1532(19).

142. See Rupert Neate, *SeaWorld Sees Profits Plunge 84% as Customers Desert Controversial Park*, THE GUARDIAN (Aug. 6, 2015, 12:04 PM), <http://www.theguardian.com/us-news/2015/aug/06/seaworld-profits-plunge-customers>.

least improve it. SeaWorld has voluntarily stopped its breeding program<sup>143</sup> and California has passed a law banning orca breeding,<sup>144</sup> a trend that other states will hopefully soon follow. However, these developments will not ensure that conditions will improve for the orcas that will live out the remainder of their lives in captivity.

The FWS final rule regarding captive chimps is a momentous development and its effects will hopefully ripple into the field of marine mammal law, ideally to the benefit of the animals still in captivity. Both the MMPA and ESA include strict moratoriums on takings—the ESA on takings of species listed as endangered, and the MMPA on takings of marine mammals in general.<sup>145</sup> Further, neither statute in its plain language distinguishes between captive and wild animals.<sup>146</sup> Finally, both statutes define “take” as encompassing harassment of the listed animal or marine mammal. The FWS final rule regarding captive chimps should be used as a model for how the MMPA’s no-take provision could be utilized in order to mobilize efforts for the protection of captive marine mammals.

The FWS rule declared once and for all that the plain language of the ESA provides no logical basis for interpreting it to differentiate between captive and wild chimps.<sup>147</sup> The text of the MMPA similarly provides for no plausible interpretation of the law as covering only wild marine mammals. In fact, up until the 1994 amendments to the MMPA, the National Marine Fisheries Service was in charge of monitoring captive care requirements under the authority of the MMPA.<sup>148</sup> This demonstrates that under the original 1972 framework, Congress envisioned that the MMPA would protect both wild and captive mammals. The MMPA as it exists, even without amendments or modifications, has legal mechanisms that can help improve captive orcas’ quality of life.

#### A. HOW THE MMPA CAN BE EMPLOYED TO HELP CAPTIVE ORCAS

The statute’s inclusion of both “marine mammal” and “marine mammal stock in the wild” supports the conclusion that the statute was intended to be applied equally to both captive and wild populations. Because the MMPA taking moratorium encompasses any activity that has the potential to injure or disturb a marine mammal in a captive or wild setting,<sup>149</sup> this would in practice require SeaWorld and other public display facilities to obtain a take permit before engaging in any activity

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143. Manby, *supra* note 53.

144. Mosbergen, *supra* note 13.

145. 16 U.S.C. § 1538; *id.* § 1361.

146. *See generally id.* at ch. 35 (covering endangered species); *id.* at ch. 31 (covering marine mammal protection).

147. 80 Fed. Reg. 34,500, 34,500.

148. Rechberg, *supra* note 59, at 765.

149. *Id.* § 1371.

that might harass its captive animals under section 1371(a)(1) of the MMPA. With respect to SeaWorld, applying the MMPA in this way would increase oversight of captive care and drastically improve the way the entertainment park cares for its animals for the reasons that follow.

Under this proposed application of the law, SeaWorld would be required to justify its breeding program, husbandry techniques, and performance shows to fall under one of the acceptable exceptions of section 1371 of the MMPA. Every activity that might constitute a taking would require a permit, and to receive such a permit SeaWorld must show that the activity is for the purpose of “scientific research, public display . . . or enhancing the survival or recovery of a species or stock . . . .”<sup>150</sup> Stated differently, SeaWorld would need to continually apply for permits every time it did something to the animals that might constitute harassment.

Enforcing the MMPA in this way would help ensure that marine mammal holders’ husbandry practices align with the intent and purpose of the MMPA, and such enforcement has been severely lacking since the 1994 amendments which diverted oversight authority to the AWA. Specifically, the NMFS—whose authority is derived from the MMPA—should have a prominent role in monitoring captive care requirements after permits have been issued, as they are in the best position to verify that the requirements of the MMPA continue to be met. Of course, there is still the question of whether SeaWorld would be able to subvert the take permits requirement by convincing the NMFS that its practices satisfy the MMPA’s goals. For example, SeaWorld might argue that every activity it engages in is for the broad purpose of educating the public or keeping the animals alive in captivity. Even if SeaWorld did make this argument, however, the fact that it is engaging in that discussion with the regulatory agency at all will increase the accountability of SeaWorld (and similar organizations) for their husbandry practices. Even if the NMFS ultimately found that issuing a permit is justified, holding corporations accountable for justifying their husbandry practices would be a remarkable improvement over the way the industry is currently regulated.

#### B. HOW THE ESA CAN BE USED TO HELP CAPTIVE ORCAS

The ESA is being utilized in exciting new ways that could potentially lead to increased protection for captive marine mammals. Now that the ESA has dispensed with the misconception that captive animals may be given distinct legal status from their wild counterparts, huge improvements may be in store for captive marine mammals. As of now, orca whales are not listed as threatened or endangered. Although only a few select pods of whales are currently listed as endangered as distinct population segments,

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150. *Id.* § 1371(a)(1).

if the species in its entirety is ever listed, the FWS's rule could mean that all captive orcas would enjoy the full protections of the ESA.

The most ideal way for this to occur would be for the FWS to issue a policy statement outlining guidelines for the owners of captive listed species in the wake of the final rule. There is certainly symbolic value to the statement made by the FWS in deciding that the ESA's plain language leaves no room for distinguishing between captive and wild animals: "[E]xtending captive chimpanzees the protections afforded their endangered cousins in the wild will ensure humane treatment and restrict commercial activities under the Endangered Species Act."<sup>151</sup> The final rule may also lead to more stringent enforcement of the requirement that incidental take permits be obtained. As previously discussed, any activity constituting harassment would be considered a taking and would require a permit under section 9 of the ESA unless an exception or other statutory provision provides otherwise.<sup>152</sup> Requiring take permits for captive animals would in turn increase the oversight and accountability of captive animal holders. In the case of SeaWorld in particular, requiring a permit for every activity the whales engage in would significantly improve the current framework. This is because even if the FWS does issue the permits, merely undertaking the process required to obtain the permit would still nonetheless increase the amount of oversight over SeaWorld's captive care practices, which at present is severely lacking.

### C. THE FUTURE OF CAPTIVE BREEDING PROGRAMS

Despite the negative consequences that can result from breeding programs, such programs can also often serve an important function in the conservation of endangered and threatened species. For example, neither the MMPA or ESA proscribe the use of breeding programs to increase the stock of a vulnerable species, nor breeding programs in many cases have been successful at reviving species on the brink of extinction.<sup>153</sup> It is not, however, consistent with the purpose of the MMPA, AWA, or ESA to breed animals for entertainment, as SeaWorld and similar businesses had been doing for the last thirty years, until recently. Breeding programs for the purpose of entertainment are inconsistent with the purpose behind the MMPA because they do not increase the wild population stock of the marine mammal. Captive-bred animals are never released into the wild, thus they offer no meaningful contribution to conservation efforts, nor do they contribute biological or

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151. Press Release, U.S. Fish & Wildlife Service, *supra* note 133.

152. *See id.* In particular, there is a specific take exception written into the ESA for scientific research. *Id.*

153. The California Condor is a famous example of a species near extinction, but thanks to *ex situ* conservation efforts, its population has increased to a healthier level. *See DEFENDERS OF WILDLIFE, Conservation Efforts and Current Status of the Endangered California Condor*, [http://www.defenders.org/sites/default/files/publications/california\\_condor\\_presentation.pdf](http://www.defenders.org/sites/default/files/publications/california_condor_presentation.pdf).



genetic value to the population.<sup>154</sup> Such programs are further inconsistent with the AWA because the orcas involved are bred too young and too often, resulting in serious health consequences.<sup>155</sup>

This Note further argues that captive breeding programs are inconsistent with current laws—the MMPA, AWA, and ESA in particular—that should be fully enforced. The result of such full enforcement would be to preclude SeaWorld or any holder of marine mammals from breeding them for purely entertainment purposes. Increased agency oversight and stricter regulatory enforcement is the first step toward improving captive marine mammals' quality of life.<sup>156</sup> The second step is permanently foreclosing the possibility of captive breeding for entertainment purposes altogether.

#### CONCLUSION

In response to public pressure, SeaWorld has suspended its breeding program with the intent of developing a more humane business model. The National Aquarium in Baltimore has upped the ante by pledging to build seaside sanctuaries for its bottlenose dolphins by the year 2020. California has also broken new ground by passing legislation that outlaws orca breeding as well as the use of orcas in entertainment performances. These developments mark a palpable changing of tides for captive marine mammals and a new hope for their welfare, but the journey toward increased protections for these beloved creatures is far from over. The federal laws protecting marine mammals have historically failed captive populations and to this day are not being executed to their full potential. If utilized in the novel ways suggested in this Note, the MMPA, AWA, and ESA can improve the standards of care for captive mammals. Increased oversight would necessarily follow more stringent enforcement of the MMPA's no-take provision, ensuring that every marine mammal—captive and wild alike—would receive the protections they are entitled to by law.

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154. 16 U.S.C. § 1362; *see* Rechberg, *supra* note 59.

155. *See supra* Part II.B.

156. *See supra* Part III.B.

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