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Hillary T. Wise

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**ALL IS WHALE THAT ENDS WHALE? THE
DEFICIENCIES IN NATIONAL PROTECTION FOR ORCA
WHALES IN CAPTIVITY**

*Hillary T. Wise**

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I. INTRODUCTION

The last fifty years have given rise to an entirely new level of cognizance surrounding the treatment of animals and the law's role in regulating their care.¹ The Marine Mammal Protection Act² (MMPA) was passed in 1972 with the purpose of implementing administrative standards to preserve and protect aquatic mammals and their role in the marine ecosystem.³ Although the MMPA purports to ensure marine ecosystem stability by mandating a cessation on taking or importing marine mammals, it has become increasingly clear that the Act is filled with detrimental gaps.⁴

The MMPA's shortcomings have publicly manifested themselves in the controversial case between SeaWorld and the Occupational Safety and Health Administration (OSHA).⁵ The origins of this dispute began in 2010 when SeaWorld Orlando's pride and joy killer whale, Tilikum, killed senior whale trainer Dawn Brancheau (Brancheau) before the eyes of a horrified crowd.⁶ OSHA's investigations of the park's safety measures and precautions for SeaWorld employees revealed a checkered past of numerous injuries, other deaths, and misinformation at the hands of the park's upper management.⁷ The MMPA has also shed light on the features

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1. See generally Mariann Sullivan, *The Animal Welfare Act—What's That?*, 79 AUG N.Y. ST. B.J. 17 (2007) (discussing the rising awareness of the treatment of animals and monitoring their care).

2. Marine Mammal Protection Act, 16 U.S.C.A. §§ 1361-1423h (West, Westlaw through P.L. 114-37, excluding P.L. 114-27, 2015).

3. 16 U.S.C.A. §§ 1361-1423h (introducing the original purpose of the MMPA after it was passed in 1972).

4. Stephanie Dodson Dougherty, *The Marine Mammal Protection Act: Fostering Unjust Captivity Practices Since 1972*, 28 J. LAND USE & ENVTL. L. 337, 339 (2013).

5. BLACKFISH (Magnolia Pictures 2013) (focusing on the controversy following the accidental death of SeaWorld trainer, Dawn Brancheau and the disputed sanctions SeaWorld received from OSHA). See also Tilikum ex rel. People for the Ethical Treatment of Animals, Inc. v. SeaWorld Parks & Entertainment, Inc., 842 F. Supp. 2d 1259 (2012).

6. BLACKFISH, *supra* note 5.

7. BLACKFISH, *supra* note 5. "Blackfish utilizes interviews from a variety of sources, including former SeaWorld trainers and whale researchers to compile evidence against the marine park." Martha Sorren, *Blackfish Documentary Exposes Negligence, Corruption in SeaWorld's Quest for Profit*, TRUTHOUT, <http://www.truth-out.org/news/item/17851-blackfish-documentary-exposes-negligence-corruption-in-seaworlds-quest-for-profit> (Aug. 3, 2013). Whale researcher Dave Duffus explains, "The situation with Dawn Brancheau didn't just happen; it's not a singular event. You have to go back over 20 years to understand this." *Id.*

of killer whales, such as their integral role as the top predator in marine ecosystems and the consequences of breeding captive mammals that can reach over 27 feet in length and weigh over 13,000 pounds.⁸

Additionally, the powerful documentary *Blackfish* was released in 2013.⁹ *Blackfish* articulates the story of Brancheau's death and raises a plethora of questions about the safety for both whales and SeaWorld employees and the humaneness of keeping killer whales in captivity over the past thirty-nine years.¹⁰ The film introduces and interviews multiple former SeaWorld trainers, including John Jett who stated:

I am not at all interested in having my daughter who is three-and-a-half grow up thinking that it is normalized to have these intelligent, highly evolved animals in concrete pools. I don't want her to think that is how we treat the kin that we find around this planet. I think it's atrocious.¹¹

Further, to this day, there is no record of an orca whale ever harming a human being in the wild.¹² The MMPA's shortcomings have not only permitted the captivity of killer whales, but have also allowed these captive whales to be a spectacle of praise and awe by an unknowing, uninformed public. The MMPA's loopholes have left these creatures at the mercy of confinement, resulting in psychological and physical abuse for the whales and dire consequences for the humans who come into contact with them.¹³

The MMPA claims to support the protection and conservation of aquatic animals, such as the performing killer whales in the public display industry.¹⁴ However, the ambiguities in the enforcement and other provisions of the Act have made it possible for organizations such as SeaWorld to get away with mistreating and scientifically misrepresenting these animals in the name of turning over a profit. Specifically, the public

8. Derek O. Teaney, *The Insignificant Killer Whale: A Case Study of Inherent Flaws in the Wildlife Services' Distinct Population Segment Policy and a Proposed Solution*, 34 ENVTL. L. 647, 649 (2004) (discussing statistical features of killer whales' size, predatory habits, and popularity in the United States).

9. BLACKFISH, *supra* note 5. Kelly Wallace, 'Blackfish' Sparks Debate Over Taking Kids to Animal Parks, CNN, <http://www.cnn.com/2013/10/24/living/parents-blackfish-kids-seaworld-zoos/> (Oct. 28, 2013 11:29 AM).

10. *See* Wallace, *supra* note 9. *Blackfish* director Gabriela Cowperthwaite used to routinely take her kids to shows at SeaWorld in San Diego until the death of Dawn Brancheau occurred. *Id.* Brancheau's death acted as the catalyst for Cowperthwaite to create the documentary and raise questions about the ethics of keeping killer whales in captivity. *Id.*

11. *Id.* (John Jett also stated that he "grew increasingly concerned about the stressful conditions the animals were living under at SeaWorld.")

12. BLACKFISH, *supra* note 5.

13. *See* Dougherty, *supra* note 4, at 367.

14. *See id.*

display industry has control of the standards of protection for marine mammals because these facilities are only required to follow uncollected and unapproved “professionally recognized standards”¹⁵ for education or conservation programs.¹⁶ As a result, the MMPA gives the public display industry extremely broad control over these standards, which makes it very unlikely that any necessary tightening of the regulations will be possible in the future.¹⁷ The importance of killer whales to oceanic ecosystems and to our environment has been unquestionably established. The public display industry has not only detrimentally impacted both the environment and marine ecosystems, but it has also failed to recognize the dire consequences of the unjust, unsafe, and unethical capturing and breeding of orcas in captivity.¹⁸

In the wake of investigations and litigation between SeaWorld and OSHA and the release of *Blackfish*, public awareness about keeping orca whales in captivity has skyrocketed.¹⁹ It has become progressively more evident that the regulatory inadequacies of the MMPA have perpetuated highly deficient industry-set standards.²⁰ In the years since the release of *Blackfish* state and federal legislation has been proposed, including California Representative Adam Schiff’s recent introduction of H.R. 4019, The Orca Responsibility and Care Advancement Act (ORCA), which aims to outlaw orca captivity, prohibits breeding, and also prevents “taking,” or wild capture by prohibiting importation and exportation of all orca whales.²¹

By examining the background of marine mammal legislation, the inadequacies of the current laws in place, the history of aquatic entertainment, and the recent legislation and controversy surrounding SeaWorld, this Comment analyzes and concludes that if we implement Representative Schiff’s new ORCA proposal,²² we can begin to gradually phase out orca captivity and the exploitation of these mammals.

15. 16 U.S.C. § 1374(c)(2)(A)(i) (West, Westlaw through P.L. 114-37, excluding P.L. 114-27, 2015). The “professionally recognized standards” of the public display industry were created as a result of the AZA and AMMPA’s combined standards that were already being used by their members. § 1374(c)(2)(A)(i).

16. § 1374(c)(2)(A)(i).

17. See Dougherty, *supra* note 4, at 339.

18. BLACKFISH, *supra* note 5.

19. *Id.*

20. See Dougherty, *supra* note 4, at 367.

21. Orca Responsibility and Care Advancement Act of 2015, H.R. 4019, 114th Cong. (2015).

22. See H.R. 4019.

II. BACKGROUND

A. *United States Law: The Marine Mammal Protection Act of 1972*

In 1972, the federal government recognized that man's impact upon marine mammals had ranged from "malign neglect" to "virtual genocide."²³ It became clear that whales, porpoises, seals, sea otters, polar bears, manatees, and other animals had not simply failed to benefit from human interests, but they had gravely suffered from it.²⁴ In the name of monetary profit or recreational entertainment, marine mammals had been shot, blown up, clubbed to death, run down by boats, poisoned, and exposed to countless other atrocities.²⁵ In addition to the suffering of the marine mammals individually, Congress realized the potential impact of these indignities on the entire marine ecosystem.²⁶

A number of bills were introduced into the House on the general subject of protecting marine mammals attempting to regulate the use of these mammals in the public display industry.²⁷ The public display industry is made up of the American Zoo and Aquarium Association (AZA) and the Alliance of Marine Mammal Parks and Aquariums²⁸ (AMMPA), which represent approximately eighty percent of the marine parks, aquariums, dolphariums, zoos, and research facilities holding captive marine mammals.²⁹ These bills proposed a complete prohibition against the taking of marine mammals.³⁰

However, in 1971, Congressmen Clinton P. Anderson of New Mexico and Thomas M. Pelly of Washington introduced a radically different bill: H.R. 10320.³¹ This proposal was designed to provide the

23. MARINE MAMMAL PROTECTION ACT OF 1972, H.R. REP. NO. 92-707 (1972), available at <http://www.animallaw.info/statutes/stusfd1972uscan4144.htm>.

24. H.R. REP. NO. 92-707. See also *The Marine Mammal Protection Act*, THE HUMANE SOCIETY OF THE UNITED STATES, http://www.humanesociety.org/animals/resources/facts/marine_mammal_protection_act.html (last visited Sept. 12, 2014) (generally describing the MMPA's history and what it purports to do).

25. H.R. REP. NO. 92-707.

26. H.R. REP. NO. 92-707.

27. H.R. REP. NO. 92-707.

28. See Michael Luck & Yixing Jiang, Keiko, *Shamu and Friends: Educating Visitors to Marine Parks and Aquaria?*, 6 J. ECOTOURISM 127, 127-38 (2007). See also ERICH HOYT ET. AL., OBSERVATIONS OF DISPARITY BETWEEN EDUCATIONAL MATERIAL RELATED TO KILLER WHALES (ORCINUS ORCA) DISSEMINATED BY THE PUBLIC DISPLAY INSTITUTIONS AND THE SCIENTIFIC LITERATURE 2 (Draft, 1995), available at <http://www.orcanetwork.org/nathist/biennial.pdf> (last visited Feb. 19, 2016).

29. Hoyt et al., *supra* note 28, at 2.

30. H.R. REP. NO. 92-707.

31. H.R. REP. NO. 92-707.

Department of the Interior with “more flexible authority to permit the taking of marine mammals under circumstances, which might be more closely controlled, and subject to public review and independent oversight by an independent Marine Mammal Commission.”³² The Committee unanimously ordered an amended Anderson-Pelly bill to satisfy the needs of marine mammals.³³

According to the National Oceanic and Atmospheric Administration (NOAA),³⁴ the MMPA was passed based on the following findings and policies: some marine mammal species or stocks may be in danger of extinction or depletion as a result of human activities; these species or stocks must not be permitted to fall below their optimum sustainable population level (“depletion”); measures should be taken to replenish these species or stocks; there is inadequate knowledge of the ecology and population dynamics; and marine mammals have proven to be resources of great international significance.³⁵

The MMPA divides the authority between NOAA in the Department of Commerce and the Department of the Interior.³⁶ The MMPA gives the Secretaries of the Interior and Commerce authorization and direction “to establish general limitations on the taking of all marine mammals, and within those limitations, to issue permits for their taking.”³⁷ NOAA provides for the continuous research, management, and protection of whales, porpoises, dolphins, and seals.³⁸ The other animals covered under the bill (walruses, sea otters, polar bears, and manatees) are protected and managed by the Department of the Interior.³⁹

32. H.R. REP. NO. 92-707.

33. H.R. REP. NO. 92-707.

34. The National Oceanic and Atmospheric Administration is a federal agency focused on the condition of the oceans and the atmosphere.

35. *Marine Mammal Protection Act (MMPA) Overview*, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, <http://www.nmfs.noaa.gov/pr/laws/mmpa/> (last updated Oct. 8, 2015).

36. H.R. REP. NO. 92-707.

37. H.R. REP. NO. 92-707. See also *U.S. Maritime Limits & Boundaries*, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION OFFICE OF COAST SURVEY, <http://www.nauticalcharts.noaa.gov/csdl/mbound.htm> (last visited Sept. 12, 2015) for an image depicting the United States’ water territory.

38. *U.S. Maritime Limits & Boundaries*, *supra* note 37.

39. *Id.* See also *The Marine Mammal Protection Act of 1972, Amended 1994*, THE MARINE MAMMAL CENTER, <http://www.marinemammalcenter.org/what-we-do/rescue/marine-mammal-protection-act.html> (last visited Sept. 12, 2014). “The National Marine Fisheries Service, part of the National Oceanic and Atmospheric Administration within the Department of Commerce, is responsible for managing cetaceans, otariids, and phocids. The U.S. Fish and Wildlife Service, part of the Department of the Interior, is responsible for managing odobenids, sirenians, otters, and polar bears. The Animal and Plant Health Inspection Service, part of the Department of Agriculture, is responsible for regulations managing the facilities that house marine mammals in captivity.” *Id.*

The MMPA's ostensibly limited exceptions on the "taking,"⁴⁰ or importing marine mammals, sanction permits holding the animals captive for the purposes of scientific research and public display.⁴¹ During their presentation of legislation, the House of Representatives stated:

The effect of this set of requirements is to insist that the management of the populations be carried out with the interests of the animals as the prime consideration The primary objective of this management must be to maintain the health and stability of the marine ecosystem; this in turn indicates that animals must be managed for their benefit and not for the benefit of commercial exploitation.⁴²

The MMPA was amended in 1988 and 1994.⁴³ The 1988 amendments introduced further eligibility restrictions on the public display permit by enumerating that such permits would only be granted to public display entities that intended to exhibit the animal for an "educational or conservation-oriented program"⁴⁴ that conforms to professionally recognized standards of the public display community.⁴⁵ The standards also had to be approved by the Secretaries of Commerce and the Interior.⁴⁶ Then, in 1994, the Act was amended once again to remove the requirement for Secretarial approval of the standards to govern the public display industry.⁴⁷

The 1994 amendment also shifted the central power for the care and maintenance of captive marine mammals to the Animal and Plant Health Inspection Service (APHIS).⁴⁸ The amendments removed the requirement for facilities to receive MMPA permits to keep marine mammals for public display.⁴⁹ This means that the only permits issued for public display

40. "The term 'take' means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." 16 U.S.C. § 1362 (West, Westlaw through P.L. 114-37, excluding P.L. 114-27, 2015). "The MMPA prohibits, with certain exceptions, the 'take' of marine mammals in U.S. waters and by U.S. citizens on the high seas, and the importation of marine mammals and marine mammal products into the U.S." *Marine Mammal Protection Act Overview*, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, <http://www.nmfs.noaa.gov/pr/laws/mmpa/> (last visited Sep. 15, 2015).

41. See Dougherty, *supra* note 4, at 338 (discussing the presentation of legislation by the House of Representatives in regards to the authorized takings of marine mammals).

42. H.R. REP. NO. 92-707.

43. See Dougherty, *supra* note 4, at 338.

44. See *id.* at 340.

45. Marine Mammal Protection Act Permits, 16 U.S.C. § 1374(c)(3)(A)(i) (West, Westlaw through P.L. 114-37, excluding P.L. 114-27, 2015).

46. Marine Mammal Protection Act Amendments of 1988, Pub. L. No. 100-711, 102 Stat. 4755 (1988).

47. Marine Mammal Protection Act of 1972, Pub. L. No. 92-552, 86 Stat. 1165 (1972).

48. Pub. L. No. 92-552, 86 Stat. 1165.

49. See 16 U.S.C. § 1374 (West, Westlaw through P.L. 114-37, excluding P.L. 114-27, 2015).

purposes are for capture from the wild, which includes obtaining releasable stranded marine mammals and importing marine mammals.⁵⁰ APHIS enacted new standards of care under the Animal Welfare Act.⁵¹ After further negotiating the public display industry rules involving animal protection groups, veterinarians, and government managers, APHIS also published new standards for care,⁵² treatment, and transportation of captive marine mammals in 2001.⁵³

B. Inadequacies of the Marine Mammal Protection Act

Regardless of the MMPA's seemingly notable species management and sustainable population objectives, the Act has a multitude of shortcomings that interfere with its policy and conservation goals.⁵⁴ The Act's deficiencies include the questionable public display industry-set standards and the lack of oversight and enforcement of these standards, which are evidenced and exacerbated through divided agency responsibility and inconsistent regulation reinforcement.⁵⁵

One of the largest gaps in the MMPA is the industry's control of the standards.⁵⁶ Public display facilities have to abide by uncollected and unapproved "professionally recognized standards" for education or conservation programs, which require them to completely self-regulate.⁵⁷

50. See 16 U.S.C. § 1374.

51. See generally 7 U.S.C. §§ 2131-2159 (West, Westlaw through P.L. 114-37, excluding P.L. 114-27, 2015).

52. APHIS's new standards for care introduced requirements for enclosures constructed so as to keep unwanted animals from entering and established new medical and feeding recordkeeping requirements for individual animals, including a requirement that facilities maintain necropsy records for three years and make them available to Advisory Committee inspectors upon request. APHIS implemented the rule after establishing a Marine Mammal Negotiated Rulemaking Advisory Committee to recommend revisions to the marine mammal regulations. The Committee met for three sessions and—under the rules governing the negotiated rulemaking process, and in accordance with the organizational protocols established by the Committee—APHIS agreed to publish as a proposed rule any consensus language developed during the meetings unless substantive changes were made as a result of authority exercised by another Federal Government entity. *The Animal Welfare Act: A Legislative and Regulatory History*, APHIS, https://www.aphis.usda.gov/animal_welfare/downloads/awa_leg_history.pdf.

53. See generally 9 C.F.R. §§ 3.100-118 (2012).

54. See Dougherty, *supra* note 4, at 339.

55. Naomi Rose et al., *The Case Against Marine Mammals in Captivity*, THE HUMANE SOCIETY OF THE UNITED STATES & WORLD SOCIETY FOR THE PROTECTION OF ANIMALS, 51, available at http://www.humanesociety.org/assets/pdfs/marine_mammals/case_against_marine_captivity.pdf. See also Dougherty, *supra* note 4, at 339-41.

56. See Dougherty, *supra* note 4, at 339.

57. 16 U.S.C. § 1374(c)(2)(A)(i) (West, Westlaw through P.L. 114-37, excluding P.L. 114-27, 2015).

Since Congress allows the public display industry to have this expansive control, they have inhibited any future narrowing of regulations that may be necessary for conservational or animal welfare purposes.⁵⁸ The AZA and AMMPA members have combined the standards that their members already used, which are now known as the public display industry's "professionally recognized standards."⁵⁹ Their educational and conservational programs require that all institutions have a mission statement including education, a written education plan, and structured education programs directed by a professional with educational programming training.⁶⁰ Permit-holding public display facilities' education programs must offer "multiple levels of learning opportunities, which include advanced education programming for all ages, as well as teacher training."⁶¹ The information that these display facilities present to the general public about marine wildlife conservation, the animals, and their ecosystems must also be based on the "best current scientific knowledge."⁶²

Although these standards are compiled and published, there is very little supervision to ensure that the measures are adequately met.⁶³ The loose management of regulation has resulted in a vast range of both quality and accuracy of the current scientific content being represented to the public.⁶⁴ The regulating agency has "no process for ongoing evaluation of education and conservation programs at public display facilities to ensure that they are meeting the mandatory professional standards that the industry has established."⁶⁵

Furthermore, the divided regulatory responsibilities among the various implementing agencies contribute to the shortcomings of the MMPA.⁶⁶ Under the Department of Commerce, the National Marine Fisheries Service (NMFS) protects whales, dolphins, porpoises, seals, and sea lions.⁶⁷ Under the Department of the Interior, the Fish and Wildlife

58. See Dougherty, *supra* note 4, at 339.

59. *Id.* at 340.

60. *Standards and Guidelines*, ALLIANCE OF MARINE MAMMAL PARKS & AQUARIUMS 5, http://ammipa.org/_docs/S_GSummary2010.pdf.

61. *Id.* at 4.

62. *Id.*

63. See Dougherty, *supra* note 4, at 340.

64. *Id.*

65. *Marine Mammals in Captivity: What Constitutes Meaningful Public Education?*, COMMITTEE ON NATURAL RESOURCES, <http://naturalresources.house.gov/calendar/eventsingle.aspx?EventID=181362> (last visited Feb. 23, 2014).

66. See Dougherty, *supra* note 4, at 340.

67. See generally 16 U.S.C. §§ 1361-1423h (West, Westlaw through P.L. 114-37, excluding P.L. 114-27, 2015). See also *Annual Report to Congress 2009*, THE MARINE MAMMAL COMMITTEE,

Service (FWS) maintains supervisory authority over walrus, manatees, dugongs, sea otters, and polar bears.⁶⁸ While the NMFS is required to maintain life history records of the animals under their jurisdiction in U.S. display facilities and all foreign dolphinariums and aquaria with which they trade,⁶⁹ the FWS is not required to maintain life history or inventory records of the species they regulate.⁷⁰ Under this requirement, facilities must submit their records to NMFS so that NMFS can compile the documents and update the Marine Mammal Inventory Report (MMIR).⁷¹ These inventories reveal the document history of “disturbing causes of death, high mortality rates, and low birth rates.”⁷² The public display industry contends that these mortality rates and statistics are evidence of the “steep learning curve” of marine mammal care; however, the World Society for the Protection of Animals, the Humane Society of the United States, and numerous other animal welfare groups have identified that these rates are indicative of the animals’ inability to adapt well to captivity.⁷³

Under the Department of Agriculture, APHIS is in charge of enforcing the regulations of the Animal Welfare Act for facilities that keep marine mammals in captivity.⁷⁴ These captivity enclosure standards address facilities and operations, space requirements,⁷⁵ health and husbandry, water quality,⁷⁶ sanitation,⁷⁷ and transportation.⁷⁸ In 1993, APHIS acknowledged how outdated many of these standards were, and they announced revision plans.⁷⁹ It was not until eight years later, in 2001,

available at <http://www.mmc.gov/wp-content/uploads/2009annualreport.pdf> [hereinafter MMC Ann. Rep.].

68. 16 U.S.C. §§ 1361-1423h. See also MMC Ann. Rep., *supra* note 67, at 34-98.

69. 16 U.S.C. § 1374(c)(10) (West, Westlaw through P.L. 114-37, excluding P.L. 114-27, 2015); Rose et al., *supra* note 55, at 2.

70. Dougherty, *supra* note 4, at 341.

71. See 16 U.S.C. § 1374(c)(10). See also Database: U.S. Marine Mammal Inventory, SUN SENTINEL, <http://databases.sun-sentinel.com/news/broward/flaudMarineMammals4/> (last visited Feb. 3, 2014) (provides a searchable database of the complete inventory through March 24, 2010). For the orca whale MMIR, see John Kieley, *Marine Mammal Inventory Report: Killer Whales (Orcinus orca) in Captivity*, available at <http://theorcaproject.files.wordpress.com/2011/03/mmir-deficiency-evaluation-killer-whales2.pdf>.

72. Rose et al., *supra* note 55, at 2.

73. *Id.* at 11.

74. See generally 9 C.F.R. §§ 3.100-118 (2012) (providing the specifications of the humane handling, care and transportation of marine mammals).

75. 9 C.F.R. § 3.104.

76. 9 C.F.R. § 3.106.

77. 9 C.F.R. § 3.107.

78. 9 C.F.R. § 3.116.

79. See 58 Fed. Reg. 39, 458 (July 23, 1993) (codified at 9 C.F.R. pt. 1 & 3).

that the agency eventually released some modified sections.⁸⁰

Despite APHIS's 2001 modifications, there have still been issues with marine mammals' captivity enclosures because APHIS continued to avoid issuing necessary citations to various members of the public display industry.⁸¹ Members of animal protection and activist communities have disputed APHIS's jurisdiction and argued that it be removed or limited in favor of reestablishing NMFS and FWS as the regulation agencies for these standards.⁸² These activists argue that APHIS's areas of proficiency and expertise do not include aquatic mammal care and that their substandard record of regulation and oversight establishes their inability to properly supervise marine mammal care.⁸³

The split responsibility and limited supervision of the public display industry's self-regulation creates a regulatory void. One example of this void can be seen in swim-with-the-dolphins (SWTD) programs.⁸⁴ In 1994, APHIS began their authority over SWTD programs, and published their proposed regulations a few months later.⁸⁵ Nearly four years after these proposals, APHIS had still not published final regulations,⁸⁶ meaning that these interactive programs operated without any federal regulations during this extensive period of time.⁸⁷ In 1998, the final regulations were released and reflected animal welfare policies by requiring protective refuge areas, regulating the appropriate swimmer-to-dolphin ratios, the

80. 9 C.F.R. §§ 3.101-118.

81. See 9 C.F.R. §§ 3.101-118. One notable example of APHIS's failure to properly cite occurred in Miami, Florida at the Miami Seaquarium. For forty-three years, twenty-one-foot-long, 7,000-pound orca whale Lolita has been exhibited at Seaquarium. Since her capture in 1970, Lolita has been living in a tank that is too small, which is illegal under APHIS's standards for size requirements. Lolita's thirty-five foot by eighty foot tank is only twenty feet deep at the deepest point, and twelve feet deep on the surrounding edges. The pool is thirteen feet shorter than is required by the Animal Welfare Act §3.104; offers her no protection against sunlight or inclement weather, violating AWA § 3.103(3)(b); Lolita's pool does not meet the perimeter fence requirements to protect her from unauthorized people or animals invading her space, violating AWA §§ 3.103(3)(c) and 3.101(2); and Lolita has been isolated from other orca whales since 1980, violating AWA§3.109 Separation. See *Justice for Lolita. Taking Her Fight with APHIS to the Next Level*, THE ORCA PROJECT (June 7, 2011), <https://theorcaproject.wordpress.com/2011/06/07/usda-aphis-fails-killer-whale-lolita-at-miami-seaquarium/>. Even after years of qualified animal specialists and concerned citizens' attempts to contact APHIS and report these violations, APHIS released a statement that they inspected Miami Seaquarium and reported, "No non-compliant items found . . ." *Id.*

82. PATRICIA LAWSON & EUGENE H. BUCK, CONG. RESEARCH SERV., 95-517 ENR, MARINE MAMMALS IN CAPTIVITY: BACKGROUND AND MANAGEMENT ISSUES IN THE UNITED STATES (1997).

83. See CONG. RESEARCH SERV. 95-517 ENR.

84. Dougherty, *supra* note 4, at 342.

85. See 60 Fed. Reg. 4383 (Jan. 23, 1995) (codified at C.F.R. pt. 1 & 3).

86. 9 C.F.R. §§ 3.100-118 (2012).

87. 9 C.F.R. §§ 3.100-118.

length of interaction times, and more.⁸⁸ However, less than six weeks after they were published, public display industry opposition received an exemption from these regulations;⁸⁹ and in 1999, the regulations were suspended altogether.⁹⁰ Thus, SWTD facilities and programs are presently operating without any federal regulations.⁹¹

Despite all of these deficiencies, the MMPA still allows exemptions for public display by purporting that the primary justification of these exhibits is their “educational benefit.”⁹² The law reads, “A permit may be issued to take or import a marine mammal for the purpose of public display only to a person which the Secretary [of Commerce] determines . . . offers a program for education or conservation purposes that is based on professionally recognized standards of the public display community.”⁹³ Sadly, the educational value of dolpharia and aquaria’s programs has been proven to be not only questionable, but also disreputable.⁹⁴

III. HARM TO HUMANS AND KILLER WHALES FROM HUMAN-WHALE INTERACTION

A. “Kings of the Sea”: Killer Whales Decoded

It was only forty years ago that the public’s perception of killer whales was filled with inaccurate superstition and fear.⁹⁵ People thought that these whales were vicious, man-hunting killers who would stop at

88. 9 C.F.R. §§ 3.100-118.

89. See Swim-With-the-Dolphin Programs, 63 Fed. Reg. 55,012-01 (Oct. 14, 1998) (codified at 9 C.F.R. pt. 3). “The exemption was based on the unanswered question of whether the standards for swimming interactions should apply to sessions when visitors remain standing and non-buoyant.” See *id.*

90. See Rose, et. al., *supra* note 55, at 67-88 n. 205 (citing an article in the Washington Legal Times that discussed an influential lobbyist for the public display industry, Stephen Wynn, who was the owner of the Mirage Hotel in Las Vegas in 1999. Wynn wanted to open interactive programs with the display dolphins he owned.).

91. See Dougherty, *supra* note 4, at 342.

92. *Id.* at 343.

93. 16 U.S.C. § 1374(c)(2)(A)(i) (West, Westlaw through P.L. 114-37, excluding P.L. 114-27, 2015).

94. See VANESSA WILLIAMS & WHALE & DOLPHIN CONSERVATION SOC’Y, CAPTIVE ORCAS ‘DYING TO ENTERTAIN YOU’: THE FULL STORY, 51 (1999), http://www.wdcs.org/submissions_bin/orcareport.pdf (“The larger parks also claim to educate through the medium of a wide variety of glossy brochures, educational packs for schoolchildren, ‘Killer Whale Fact Sheets’ and other pamphlets. In these, as in the show commentaries, a highly selective view of orcas is presented, carefully orchestrated to present the captive situation in the best possible light and deflect any potential opposition.”).

95. BLACKFISH, *supra* note 5.

nothing to rip them to shreds.⁹⁶ Through the years, orca researchers and scientists discovered that killer whales are far from vicious. These mammals are friendly, understanding, tolerant, and intuitively seek companionship.⁹⁷ To this day, there is no record of an orca doing any harm to any human in the wild.⁹⁸ These whales live in large family communities and have lifespans that mirror the human lifespan.⁹⁹ Each community has a completely different set of behaviors, which include an individual repertoire of vocalizations with no overlap.¹⁰⁰ The scientific community is reluctant to deem these vocalizations as “languages”; however, researchers have speculated that they closely resemble the different dialects of human languages.¹⁰¹

Neuroscientists have also performed in-depth studies on the orca whale’s brain. Scientists and researchers have discovered that orca whales have a part of the brain that human beings do not have.¹⁰² A part of an orca whale’s brain extends outward adjacent to their limbic system into what neuroscientists call a para-limbic cleft, which processes emotions.¹⁰³ According to neuroscientist, Lori Marino, “the safest inference would be that these are animals who have highly elaborated emotional lives. Dolphins and whales have a sense of self and a sense of social bonding that is on another level. This level is far more complex than other animals, including humans.”¹⁰⁴

The unique characteristics of killer whales make holding these marine mammals in captivity not only a serious risk to the animals, but also to the human beings that the animals interact with. In 2008, the U.S. Marine Mammal Commission conducted a marine mammal survey, which found that more than half of marine mammal workers have been injured by the animals that they work and train.¹⁰⁵ Over one-third of these injuries

96. *Id.* See also David Kirby, *Killer Whales Not in Captivity: 7 Things You’ll Never Learn at SeaWorld*, TAKEPART (last visited Sept. 12, 2014). “In the wild, most orcas stay near or with their families for life, travel up to 100 miles a day, and display complex communal rituals that provide stability, cooperation and regular opportunities for the unbridled expression of sheer joy.” *Id.*

97. Kirby, *supra* note 96.

98. *Id.*

99. *Id.*

100. *Id.* See also *Basic Facts About Orcas*, DEFENDERS OF WILDLIFE, <http://www.defenders.org/orca/basic-facts> (last visited Sept. 12, 2014) (Orca whales’ complex communication dialects are unique to each pod.).

101. BLACKFISH, *supra* note 5.

102. *Id.*

103. *Id.*

104. *Id.*

105. Tania D. Hunt et al., *Health Risks for Marine Mammal Workers*, 81 DISEASES OF AQUATIC ORGANISMS 81, 84 (2008).

are classified as “severe”, which include deep wounds, fractures, or lacerations that require stitches.¹⁰⁶ The trainers and staff who are in contact with captive marine mammals for more than fifty days per year are several times more likely to endure traumatic injuries from the animals.¹⁰⁷

The captive marine mammals suffer from a vast range of conditions, diseases, mental instability, and causes of death that are not found in wild populations.¹⁰⁸ These conditions include high levels of stress, fungal bacterial pneumonia, bleeding ulcers, myocardial fibrosis, heart failure, chronic colitis, agranulocytosis, pseudomonas, and shortened life spans.¹⁰⁹

B. A History of Entertainment: SeaWorld’s Captive Killer Whales

For over four decades, killer whales populating the waters of the mid-Puget Sound to British Columbia have faced enormous pressure to survive in their own habitats.¹¹⁰ In the late 1960s and early 1970s, public display and exhibition organizations caused the “single largest impact on the whales when they captured at least sixty-eight individuals as sculpture models, for display and scientific research.”¹¹¹

Orca capture methods have changed over the years.¹¹² The learning curve occurred after the first whales were caught in 1961 and 1964 when several orcas died accidentally after becoming entangled in the nets.¹¹³ In 1962, collectors for one of California’s aquatic parks, Marineland shot and killed a mature female orca after the boat’s propeller became entwined in a line attached to a hoopnet that had snared the whale.¹¹⁴ The whales in her pod attacked the boat, which led the collectors to “defend” themselves

106. *Id.*

107. *Id.*

108. See Dougherty, *supra* note 4, at 360.

109. See generally Kielty, *supra* note 71.

110. See *Proposed Conservation Plan for Southern Resident Killer Whales (Orcinus Orca)*, NAT’L MARINE FISHERIES SERV., <http://www.nwr.noaa.gov/Marine-Mammals/Whales-Dolphins-Porpoise/Killer-Whales/Conservation-Planning/Index.cfm> (last visited Feb. 8, 2014) [hereinafter NMFS, *Conservation Plan*].

111. See Beth Phillips, *The Southern Resident Orcinus Orca Population in Puget Sound: Hypotheses on Population Ratios and the Effects of the Capture Era on Behavior of the Whales*, 8-10 (1999) (unpublished B.S. thesis, Western Washington University) (on file with the Western Washington University Library).

112. ERICH HOYT & WHALE AND DOLPHIN CONSERVATION SOCIETY, *THE PERFORMING ORCA—WHY THE SHOW MUST STOP SOCIETY*, (Bath U.K. ed., Whale and Dolphin Conservation 1992).

113. *Id.*

114. *Id.*

with guns.¹¹⁵ Ted Griffin and Don Goldsberry were the first collectors to perfect a successful catching method in the late 1960s. Goldsberry continued to catch orcas in the Puget Sound throughout the 1970s, and eventually became SeaWorld Entertainment, Inc.'s ("SeaWorld") "Corporate Director of Collecting."¹¹⁶

Goldsberry utilized aircrafts, spotters, speedboats, and bombs to herd and capture killer whales for SeaWorld.¹¹⁷ Goldsberry employed two main capture methods. The first method involved waiting to pounce on the whales as they swim into a narrow, shallow water inlet, and then stringing a net across the mouth, entrapping the entire pod.¹¹⁸ Once the entire pod was trapped, individual orcas¹¹⁹ could be handpicked from the group, often by corralling them into separate enclosures.¹²⁰ If the orcas refused to swim into an inlet or bay, Goldsberry used explosives called seal bombs to force the whales in.¹²¹ This method is primarily used in the waters surrounding British Columbia and Washington.¹²² The second method, which is primarily used in waters near Iceland, involves catching orcas in the open sea far from land, and requires that one or more whales be encircled with a purse seine net.¹²³ This is the most popular method of capture and the one that is still used today.¹²⁴ In 1976, a court order regulated orca-capture operations and ejected SeaWorld from the Washington waters.¹²⁵ Without missing a beat, SeaWorld began whale

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. The orca is the apex predator of the sea and the largest member of the dolphin family. It is highly intelligent, highly adaptable, and able to communicate and coordinate hunting tactics. Not typically a migratory species, orca 'migrations' are principally in response to changes in favored prey abundance and can sometimes be long, e.g., between Alaska and California. Depending on the type of social group and location, orcas will hunt fish, squid, seals, sea lions, seabirds, and even whales much larger than themselves. There has never been a documented attack on a human in the wild, and there are some stories of orcas actually protecting humans at sea from sharks. *Orca (Killer Whale) Orcinus orca*, WHALE AND DOLPHIN CONSERVATION (WDC), <http://us.whales.org/species-guide/orca-killer-whale> (last visited Jan. 26, 2016).

120. HOYT, *supra* note 112.

121. *Id.*

122. *Id.*

123. *Id.* "A purse seine is a large wall of netting deployed around an entire area or school of fish that has floats along the top line with a lead line threaded through rings along the bottom. Once [the target] is located, a skiff encircles the [target] with the net. The lead line is then pulled in, 'pursing' the net closed on the bottom, preventing [the target] from escaping by swimming downward." *Purse Seine: Fishing Gear and Risks to Protected Species*, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, <http://www.nmfs.noaa.gov/pr/interactions/gear/purseseine.htm> (last visited Jan. 21, 2015).

124. *Purse Seine: Fishing Gear and Risks to Protected Species*, *supra* note 123.

125. BLACKFISH, *supra* note 5.

hunting in the waters surrounding Iceland.¹²⁶

C. Life and History of Tilikum—A Story of Injury to Trainers and Harm to Whales in Captivity

In 1983, Tilikum, a male killer whale, was captured in the North Atlantic off the east coast of Iceland.¹²⁷ At two years old, he was already over 11.5 feet long.¹²⁸ After Tilikum was forced away from his family, he was kept in a cement holding tank for almost a year at the Hafnarfjörður Marine Zoo near Reykjavik, Iceland.¹²⁹ Tilikum was housed in a tank that was far too small for him, and he was only able to swim in circles and float.¹³⁰ Finally, he was transferred to Sealand of the Pacific, which is now closed. Sealand was a dilapidated aquatic park in South Oak Bay, British Columbia, Canada.¹³¹ Tilikum's new "home" was a 100-by-150 foot pool that was only 35 feet deep.¹³² In the wild, killer whales live in incredibly matriarchal societies, and males are kept at the perimeter.¹³³ At Sealand, Tilikum was at the bottom of the orca social structure.¹³⁴ When he was introduced, two older female orcas, Haida II and Nootka IV regularly ganged up on Tilikum.¹³⁵ Sealand employees recalled that there would be times during certain seasons where Tilikum's entire body would be covered head-to-fin with rakes.¹³⁶ Raking is a way that orcas show dominance by forcefully digging into each other's bodies and scratching with their teeth.¹³⁷

Scott Huxton, former director of Sealand, stated that when Tilikum was first introduced to the facility and its trainers, everything went "fine and dandy."¹³⁸ Sealand employees described Tilikum as "extremely well-behaved and always eager to please" and even stated that Tilikum was the

126. *Id.*

127. *30 Years and Three Deaths: Tilikum's Tragic Story*, SEAWORLD OF HURT, <http://www.seaworldofhurt.com/tilikum-captivity.aspx> (last visited Feb. 14, 2014).

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. BLACKFISH, *supra* note 5.

135. *A Whale of a Business: Inside SeaWorld*, PBS FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/whales/seaworld/tilikum/> (last visited Feb. 14, 2014) [hereinafter *A Whale of a Business*].

136. BLACKFISH, *supra* note 5.

137. *Corky's Story*, THE ORCA ZONE, <http://www.orca-zone.com/aboutorcas/corkysstory.html> (last visited Feb. 10, 2014).

138. BLACKFISH, *supra* note 5.

whale they trusted most.¹³⁹ However, the previous head trainer employed instruction techniques that involved punishment.¹⁴⁰ In his interview for the documentary, *Blackfish*, Huxton described these punishment techniques:

He [the head orca trainer at Sealand during Tilikum's time there] would team a trained orca with Tilikum, who was untrained and send them both off to perform the same behavior. If Tilikum didn't do it, then both animals were punished . . . deprived of food to keep them hungry. This caused a lot of frustration with the larger, trained orca whales, which in turn became frustrated with Tilikum and would rake him with their teeth.¹⁴¹

Sealand employees speculated that the main issue regarding the aggression between Tilikum and the older females was the process of storing the whales at night.¹⁴² The three whales were stored together in a twenty-by-thirty foot pool called a module, to prevent people from cutting the nets and stealing the whales.¹⁴³ The lights were also completely extinguished, so the whales were kept completely without stimulation in these small, dark, metal pools for a large majority of their lives.¹⁴⁴ When the whales first arrived at Sealand, they were small enough to fit into the modules; however, Huxton stated bluntly that by the time the whales were full-grown, they were basically immobile while in the modules.¹⁴⁵ The whales ultimately refused to be lured into the modules at night.¹⁴⁶ As a consequence, the trainers began to hold back food except in the modules. The whales knew that they would be fed if they went into the module.¹⁴⁷ Former SeaWorld trainer, Christopher Porter who worked with Tilikum at Sealand stated that when the whales were released in the morning, they would often see new rake marks and blood on Tilikum.¹⁴⁸

D. Danger to Humans from Interaction with Whales in Captivity

On February 20, 1991, Keltie Byrne, a 20-year-old marine biology student and competitive swimmer who worked part-time as a Sealand

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

trainer, slipped and fell into Tilikum, Haida and Nootka's pool during a Sealand show.¹⁴⁹ Tilikum took her in his mouth and dragged her repeatedly around the pool. After being released by Tilikum, and despite Byrne's efforts, the female whales refused to let her out of the pool and held her underwater until she drowned.¹⁵⁰ It took the Sealand employees over two hours to recover Byrne's body from the whales.¹⁵¹ In September 1991, Sealand closed its doors and put the three whales up for sale.¹⁵² Huxton stated that it was Sealand's understanding that the three whales would not be used in shows or as performance animals.¹⁵³ He further recalled that his understanding of the whales' behavior was that the performances were so highly stimulating for the animals that they were likely to repeat the aggressive behavior.¹⁵⁴

When SeaWorld heard about Tilikum's availability, they immediately applied to the NMFS for a permit to import all three of them for display.¹⁵⁵ According to former SeaWorld trainer, Samantha Berg, SeaWorld was thrilled to hear about Tilikum because it needed a breeder.¹⁵⁶ In 1992, 12,000-pound Tilikum arrived at SeaWorld.¹⁵⁷ Tilikum was twice as large as the next killer whale in the facility. When Tilikum arrived at SeaWorld, the other whales, especially females, viciously and repeatedly attacked him.¹⁵⁸ Given Tilikum's incredible size, and the close quarters the whales were squeezed into, Tilikum could not get away from the females.¹⁵⁹ Although SeaWorld claimed that Tilikum was always with the other whales, trainers stated that he was often put into isolation and was usually with the females for breeding purposes only.¹⁶⁰ Tilikum's sperm was used to build up a collection of orcas throughout the years, and now fifty-four percent of SeaWorld's orcas have his genes.¹⁶¹

Multiple SeaWorld trainers described Tilikum (who they lovingly nicknamed "Tilly") as a happy, eager, and quick learner.¹⁶² However, the SeaWorld employees were also led to believe that Tilikum had nothing to

149. *See A Whale of a Business*, *supra* note 135.

150. *Id.*

151. *See 30 Years and Three Deaths: Tilikum's Tragic Story*, *supra* note 127.

152. *Id.*

153. BLACKFISH, *supra* note 5.

154. *Id.*

155. *See A Whale of a Business*, *supra* note 135.

156. BLACKFISH, *supra* note 5.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *See 30 Years and Three Deaths: Tilikum's Tragic Story*, *supra* note 127.

162. BLACKFISH, *supra* note 5.

do with Keltie Byrne's death and that her death had been entirely a result of the female whales' aggression.¹⁶³ Samantha Berg noted that during Tilikum's first few days at SeaWorld, one of the senior trainers was walking near Tilikum's pool with her wetsuit pulled down to cover only her lower body.¹⁶⁴ The trainer began talking to Tilikum and making cooing noises at him.¹⁶⁵ Berg recalled that one of the managing supervisors began screaming, "Get her out of there!"¹⁶⁶ Berg further explicated that SeaWorld's management made it clear that there was a need to exercise caution around Tilikum, despite what they had told the trainers and employees.¹⁶⁷

After eight years of living in SeaWorld's captivity, Tilikum was tied to a second human death.¹⁶⁸ Early one morning in July 1999, twenty-seven-year-old Daniel Dukes was found lifeless draped over Tilikum's back.¹⁶⁹ Dukes reportedly got past security at SeaWorld after the park had closed.¹⁷⁰ Dukes entered Tilikum's enclosure wearing only his underwear, and the autopsy reported that he either fell or was pulled into the whale's tank.¹⁷¹

In 2010, the third and most infamous death occurred in Tilikum's tank.¹⁷² During a SeaWorld performance, forty-year-old senior orca trainer, Brancheau, was petting Tilikum on the nose. When she turned her back, Tilikum reached up and grabbed her, swinging her in his mouth while he dragged her deeper and deeper underwater.¹⁷³ Horrified SeaWorld patrons were hurriedly ushered out of the arena as workers tried to confine Tilikum.¹⁷⁴ Tragically, by the time SeaWorld's staff was able to get to Brancheau's body, she was dead.¹⁷⁵ The autopsy determined that Tilikum's violent thrashing motions were so severe that Brancheau was

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.*

168. *Man Drowns in Orca Pool at SeaWorld Orlando*, ENVIRONMENTAL NEWS SERVICE (July 7, 1999).

169. *Id.*

170. *SeaWorld's Killer Whale Makes Splashy Return to Stage, Gets Thunderous Ovation*, ABC NEWS (Mar. 20, 2011), available at <http://abcnews.go.com/US/killer-whale-tilikum-makes-big-splash-seaworld-13/story?id=13254217>.

171. *Id.*

172. *SeaWorld Trainer Killed by Whale had Fractured Jaw and Dislocated Joints*, ABC NEWS (Mar. 31, 2010), available at <http://abcnews.go.com/GMA/seaworld-trainer-dawn-brancheau-suffered-broken-jaw-fractured/story?id=10252808>.

173. *Id.*

174. *Id.*

175. *Id.*

partially scalped and suffered from a multitude of injuries, including a fractured lower jaw, partially fractured vertebra, several cracked ribs, and a dislocated elbow and knee.¹⁷⁶

The initial news reports about Brancheau's death reported that she had fallen into Tilikum's pool and drowned.¹⁷⁷ After eyewitness accounts disputed the reports, SeaWorld released a statement that Brancheau had made a critical mistake in leaving her long ponytail free, which caused an unfamiliar sensation for Tilikum and made him attack her.¹⁷⁸ SeaWorld management made recurring statements asserting that Tilikum was not an aggressive whale.¹⁷⁹

E. Occupational Safety and Health Act—Some Protection for Trainers and Indirect, but Insufficient, Protection for Whales

Following Brancheau's death, OSHA investigated SeaWorld.¹⁸⁰ OSHA determined that SeaWorld had willfully violated employee safety regulations by putting their trainers in the water in close interaction with the captive orca whales.¹⁸¹ OSHA cited SeaWorld with multiple safety violations and \$75,000 in fines, and most notably, OSHA ruled that SeaWorld trainers were not to be in close physical contact with whales in captivity.¹⁸² Because SeaWorld's "Shamu" shows have been their trademark moneymaker for years, the company quickly appealed OSHA's findings to the independent Occupational Safety and Health Review Commission (the Commission).¹⁸³

The Commission appointed Judge Welsch to hear the case, and SeaWorld and OSHA each presented testimony for two weeks in the fall of 2012.¹⁸⁴ In Judge Welsch's forty-seven-page ruling, he wrote, "As the custodian of its killer whales, SeaWorld has an ethical duty to provide health and medical care to them. Unlike show performances, which can successfully continue without close contact between the killer whales and the trainers, SeaWorld's husbandry activities require a certain amount of

176. *Id.*

177. BLACKFISH, *supra* note 5.

178. *Id.*

179. *Id.*

180. Jennifer Mishler & Sandy McElhaney, *SeaWorld vs. OSHA: No Matter Who Wins, the Whales Lose*, <http://www.seashepherd.org/commentary-and-editorials/2013/11/12/seaworld-vs-osha-no-matter-who-wins-the-whales-lose-624/> (last visited Feb. 14, 2014).

181. *SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202 (2014).

182. *Id.*

183. *Id.*

184. *See* Mishler & McElhaney, *supra* note 180.

contact between the trainers and the killer whales.”¹⁸⁵ Despite Judge Welsch’s decision to reduce the “willful” violation of the OSHA down to “serious,” which downgraded SeaWorld’s fines to a mere \$12,000, his ruling was undeniably critical of SeaWorld’s upper management.¹⁸⁶ SeaWorld asserted that they were unaware that working with killer whales posed a hazard to its employees.¹⁸⁷ Judge Welsch openly criticized these claims by calling them both “implausible” and “difficult to reconcile” with the plethora of injuries and deaths that had occurred over the years.¹⁸⁸ Judge Welsch further admonished a SeaWorld executive who claimed SeaWorld predicts whale behaviors with a ninety-eight percent success rate, calling this “questionable data use with guesswork and averaging.”¹⁸⁹

Judge Welsch’s strongest reactions against SeaWorld’s management practices were in response to SeaWorld’s conclusion that any perilous incident between whales and trainers has been solely the result of the trainer’s mistake.¹⁹⁰ In his ruling, Judge Welsch included that:

Since it is not part of SeaWorld’s corporate culture to acknowledge unpredictable behavior by its killer whales, it must necessarily find that its trainers are implementing the program incorrectly. SeaWorld holds trainers to a near-impossible standard set by upper management, who engage in a form of Monday-morning quarterbacking . . . Any trainer unfortunate enough to have to file an incident report is subject to second-guessing by his or her superiors, who will always find the trainer did something wrong, otherwise there would be no incident to report.¹⁹¹

In its original citation, OSHA commented that it would accept some safety solution other than a physical barrier, such as pool floors that lift or emergency oxygen systems, but only if these systems could give “the same or greater level of protection” as the physical barriers.¹⁹² Legal experts suggest that it is highly unlikely anything could provide this level of protection, and a top OSHA manager testified that the only option he could imagine was physical distance between the trainer and whale.¹⁹³ However, SeaWorld argued that these requirements are not practicable

185. Jason Garcia, *Judge Rules SeaWorld Killer-Whale Trainers Must Be Protected by Physical Barriers*, ORLANDO SENTINEL (May 30, 2012).

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. Garcia, *supra* note 185.

192. *Id.* “Physical barriers” refers to the fact that SeaWorld’s park trainers will not be allowed to interact with orca whales during performances. *Id.*

193. *Id.*

because the trainers need to be in close physical proximity with the orcas in order to adequately care for them.¹⁹⁴ This did not impact Welsch's opinion because he strictly limited his ruling to SeaWorld's shows.¹⁹⁵ Finally, Judge Welsch ruled that because SeaWorld's Orlando-based park posted record earnings in 2011 (the year following Brancheau's death), prohibiting water work shows would not harm the park economically.¹⁹⁶

Once again, SeaWorld disagreed with these decisions and filed an appeal with the United States Court of Appeals for the D.C. Circuit.¹⁹⁷ On November 12, 2013, SeaWorld appealed to the D.C. Circuit Court to overturn OSHA's safety citations and ban restricting the interaction requirements between humans and killer whales during performances.¹⁹⁸ OSHA argued that SeaWorld had violated the general duty clause¹⁹⁹ of the Occupational Safety and Health Act by exposing its workers to a known hazard in the work place.²⁰⁰

Eugene Scalia, son of Supreme Court Justice Antonin Scalia and former solicitor of the United States Department of Labor, represented SeaWorld.²⁰¹ Scalia argued that OSHA overstepped its federal bounds, and had "no more of a right to impose restrictions on a specialized industry like SeaWorld than it does to regulate tackling in the NFL or impose speed limits in NASCAR."²⁰² Scalia further argued that OSHA's restrictions present a "fundamental difference and stark change" in the premise of SeaWorld's existing business model, which is based on exhibiting humans interacting with killer whales.²⁰³ OSHA's representative, Amy Tryon, responded that despite the fact that SeaWorld has been known for its

194. *Id.*

195. *Id.*

196. *Id.*

197. Gabrielle Levy, *SeaWorld Killer Whale Case Back in Court*, UPI (Nov. 13, 2013), <http://www.upi.com/blog/2013/11/13/SeaWorld-killer-whale-case-back-in-court/6591384347037/>.

198. *SeaWorld Challenges Ban Limiting Interaction Between Whale and Trainer*, CNN (Nov. 12, 2013), <http://www.cnn.com/2013/11/12/us/seaworld-court-challenge/> [hereinafter *SeaWorld Challenges Ban*].

199. OSHA's general duty clause states:

(a) Each employer (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees; (2) shall comply with occupational safety and health standards promulgated under this Act. (b) Each employee shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this Act which are applicable to his own actions and conduct.

29 U.S.C. § 654 (West, Westlaw through P.L. 114-115 (excluding 114-94 and 114-95) 2015).

200. *SeaWorld Challenges Ban*, *supra* note 198.

201. *Id.*

202. *Id.*

203. *Id.*

famous Shamu shows for many years, the park is not being asked to prevent all activities or shows with the animals and that the reductions imposed are completely feasible because SeaWorld is currently complying with them.²⁰⁴

SeaWorld contended that the close physical contact between whale trainers and the animals makes their interactions more predictable; thus, by reducing this contact and creating barriers and greater distances between the humans and animals, the safety and predictability will be undermined, and it will also harm their ability to properly care for the animals, impeding their operations in a fundamental way.²⁰⁵ The park also asserted that trainers have been in close contact with orca whales since the 1960s, and OSHA could have opened an investigation at any time if it believed that close contact presented a known and recognized hazard for SeaWorld employees.²⁰⁶ Benjamin Briggs, a labor law specialist, commented that although these arguments are valid, SeaWorld faced an “uphill battle” because the most critical piece of OSHA’s arguments was the “long and well-documented track record of captive killer whales behaving aggressively toward humans to the point that they have caused a number of fatalities at SeaWorld and other facilities.”²⁰⁷ This track record could not be ignored and was crucial to the case.²⁰⁸

This case generated quite a public stir, and on April 11, 2014, the U.S. Court of Appeals for the D.C. Circuit denied SeaWorld’s appeal of the safety citations issued by OSHA.²⁰⁹ In a two-to-one decision, the three-judge panel held that SeaWorld had defied its duties as an employer by subjecting trainers to “recognized hazards” when working with orca whales.²¹⁰ This decision is noteworthy because it allows OSHA to require SeaWorld to limit the interactions trainers have with orca whales.²¹¹ The United States Department of Labor, which includes OSHA, stated that it was pleased with the court’s findings.²¹² The agency reported, “[T]he D.C. Circuit Court found that SeaWorld knew about the hazards associated with killer whale performances, and that the company did not adequately

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *SeaWorld of Fla., LLC v. Perez*, 748 F.3d 1202 (2014).

210. *See id.* *See also* Lawrence Hurley, *Court Upholds Ruling Against SeaWorld Over Trainer Safety*, REUTERS (Apr. 11, 2014, 3:03 PM), <http://www.reuters.com/article/2014/04/11/us-usa-courts-employment-idUSBREA3A19Q20140411>.

211. *Id.*

212. *See* Vivian Kuo, *SeaWorld Appeal of OSHA Citations Denied*, CNN (Apr. 13, 2014), <http://www.cnn.com/2014/04/11/us/seaworld-ruling/>.

address those hazards.”²¹³ In August 2014, SeaWorld filed a report with the Securities and Exchange Commission stating that they were not going to pursue an appeal of the April 2014 decision.²¹⁴

One of the unresolved aspects of the 2014 OSHA case against SeaWorld is that the Court of Appeals decision did not address the most crucial issue of the whole situation. While the case captured immense public notoriety and put SeaWorld under a microscope, the actual issues under contention failed to acknowledge—since it is not within the authority of the Occupational Safety and Health Commission—the injustice of keeping killer whales in captivity and the dire impact on our aquatic ecosystems. The decision did benefit killer whales indirectly. By limiting trainer contact with whales to protect the trainers, the opinion indirectly protected the orca whales, to some extent, from use for human amusement. Animal rights group People for the Ethical Treatment of Animals (PETA) expressed public approval of the court’s decision.²¹⁵ PETA’s director of animal law, Jared Goodman, stated that the decision “brings to an end days of trainers standing and riding on orcas for human amusement.”²¹⁶

Nevertheless, SeaWorld released a statement specifying that it had already introduced new safety procedures, such as moving trainers from the water during shows. Even after the court’s ruling, however, “there will still be human interactions and performances with killer whales.”²¹⁷ Judge Judith Roberts wrote on behalf of the court that “statements by SeaWorld managers do not indicate that SeaWorld’s safety protocols and training made the killer whales safe; rather, they demonstrate SeaWorld’s recognition that the killer whales interacting with trainers are dangerous.”²¹⁸ Judge Roberts also criticized SeaWorld’s concerns about the decision’s impact on its operations, saying, “The improved safety does not change the essential nature of the business.”²¹⁹

IV. PROPOSED CHANGES FOR NEW FEDERAL LEGISLATION:

213. *Id.*

214. Elizabeth McDonald, *SeaWorld Drops OSHA Appeal to Keep Trainers Away From Orcas*, FOX BUSINESS (Aug. 21, 2014), <http://www.foxbusiness.com/industries/2014/08/21/seaworld-drops-osha-appeal-to-keep-trainers-away-from-orcas/>.

215. *See* Hurley, *supra* note 210.

216. *Id.*

217. *See id.*

218. *Id.*

219. *Id.*

IMPLEMENTING ORCA

A. *The Need for Conservation and Rehabilitation*

Although animal activists and welfare groups have attempted to lobby for the rights of these mammals for many years, these incredibly powerful wild animals are still being forced to live their lives in what can essentially be seen as a life of imprisonment. Due to the public display industry's dominant influence, vast resources, and powerful lobbying, the animal protection community's attempts at meaningful change for killer whales have been summarily defeated.²²⁰ The public display industry utilizes huge amounts of resources fighting changes to the standards for fear that stricter regulations would require massive overhaul of facilities' structures, pools, holding tanks, veterinary care areas, policies, staff training, procedures, and shows.²²¹

The argument concerning the living conditions and quality of life enjoyed by captive animals versus wild is completely unbalanced.²²² The public display industry and researchers dependent on captive subjects assert that the wild environment is dangerous for marine mammals, often containing both predators and pollution.²²³ SeaWorld also continues a propaganda campaign against allowing wild animals to live in their natural habitats; SeaWorld researchers have claimed:

Our orcas live in habitats where the water quality and temperature are carefully monitored and controlled. Unlike killer whales in the oceans, those at SeaWorld are not forced to contend with dangers such as shortages of food, parasites, and threats from humans . . . they receive a balanced, nutritious diet, and we make sure their day includes plenty of

220. See Rose et al., *supra* note 55, n.150.

221. WILLIAMS, *supra* note 94, at 69. In 1994, with cash donations of up to \$35,000 from Anheuser-Busch, AZA and AMMPA representative Robert Jenkins boasted that they had weakened the MMPA "through a consistent, coordinated and unrelenting approach to Capitol Hill and the Congressional staff responsible for the MMPA reauthorization [sic]; the public display community was able to achieve virtually all of [its] agenda." *Id.* citing Summer Jenkins, *Re-authorization of the Marine Mammal Protection Act*, 19 IMATA SOUNDINGS (1994). For annual SeaWorld Parks' lobbying budgets, see *SeaWorld Parks & Entertainment*, OPENSECRETS.ORG, <http://www.opensecrets.org/lobby/clientsum.php?id=D000056553&year=2010> (last visited Feb. 10, 2014). See also Ryan Skukowskis, *Double Trouble for Bart Stupak, SeaWorld Makes Waves in D.C. and More in Capital Eye Opener*, <http://www.opensecrets.org/news/2010/03/double-trouble-for-bart-stupak-seaw.html> (last visited Feb. 10, 2014).

222. See generally Summer Jenkins, *Re-authorization of the Marine Mammal Protection Act*, 19 IMATA SOUNDINGS (1994).

223. LAWSON & BUCK, *supra* note 82. See also David Riley, *Our Love of Dolphins has Turned into a Questionable Affair*, 23 SMITHSONIAN 58, 63 (1993); HOYT et al., *supra* note 28, at 13.

exercise.²²⁴

Evidence supports that this statement is a complete and utter fallacy. The death rate for captive orcas is three-fold that of wild orcas.²²⁵ Board Chairman Bryan Pease of the Animal Protection and Rescue League was quoted saying, “I am sure the trainers will say that the whales are well taken care of, but you can’t meet the behavioral needs of these large marine mammals in a marine park.”²²⁶ The psychological and even suicidal conditions that the whales develop increase the risk of injury and death faced by the other animals held with killer whales and to the human beings they come into contact with.²²⁷

Tilikum and other captive orca whales have been forced from their natural habitats and constrained to exist completely differently from their lives in the wild. SeaWorld has portrayed killer whales as “huggable, cuddly sea pandas that let children sit on their backs and playfully splash crowds with water” rather than the powerful, intelligent animals that they are.²²⁸ Thus, despite the strides made in *SeaWorld of Fla., LLC v. Perez*,²²⁹ to keep SeaWorld employees safe by requiring orca whales to be separated by a physical barrier during water shows, this does not even begin to address the real problems the whales face.

From the animal rights and conservation perspectives, the ideal solution to the various issues surrounding the public display industry would be to completely eliminate marine mammal captivity.²³⁰ Despite the increased publicity and awareness resulting from the OSHA/SeaWorld case, we are many years away from dispensing with orca whale captivity. Therefore, the government, marine parks, and the public should come together to create a common goal that does not sweep the harm to orca whales and the real environmental damage that we are allowing under the

224. Dan O’Dell, *Marine Zoological Parks: The Public Benefit*, in GETTING TO KNOW THE WHALES 120, 121 (Larry Wade ed., 1995).

225. See Rose et al., *supra* note 55, at 46.

226. Mike Lee, *SeaWorld San Diego Suspends Shamu Show*, SAN DIEGO UNION-TRIBUNE (Feb. 24, 2010, 10:47 PM), <http://www.utsandiego.com/news/2010/feb/24/seaworld-san-diego-suspends-shamu-show-after/?print&page=all>.

227. See Naomi Rose, *Killer Controversy: Why Orcas Should No Longer Be Kept in Captivity*, HUMANE SOCIETY INTERNATIONAL & THE HUMANE SOCIETY OF THE UNITED STATES 7, available at http://www.hsi.org/assets/pdfs/orca_white_paper.pdf.

228. See WILLIAMS, *supra* note 94 (“The larger parks also claim to educate through the medium of a wide variety of glossy brochures, educational packs for schoolchildren, ‘Killer Whale Fact Sheets’ and other pamphlets. In these, as in the show commentaries, a highly selective view of orcas is presented, carefully orchestrated to present the captive situation in the best possible light and deflect any potential opposition.”).

229. 748 F.3d 1202 (2014).

230. See Dougherty, *supra* note 4, at 365.

rug, but works to create a conservation-oriented plan to gradually phase out keeping orca whales in captivity.

B. Blackfish Backlash: Public and Political Support for Orcas in Captivity

Since the 2013 release of the CNN documentary *Blackfish*, captive orca whales have become an extremely popular and newsworthy topic, especially in the world of Hollywood. Within a few months of the film's release, numerous celebrated musicians cancelled performances at SeaWorld Orlando due to the alleged mistreatment of the whales.²³¹ In November 2012, fans started posting petitions to change.org asking musicians to cancel their SeaWorld performances.²³² The first of these petitions specifically addressed the band Barenaked Ladies.²³³ The band chose to cancel their performance at the park, and by December 2014, there were over 56,000 signatures asking other bands to cancel their performances as well.²³⁴ Pulin Modi, the senior campaign manager of change.org told CBS News, "[T]his is a larger snowball effect where in pop culture, SeaWorld has become a prime target for people who are concerned about the treatment of animals."²³⁵ In addition to the Barenaked Ladies, artists Martina McBride, Willie Nelson, and REO Speedwagon also canceled performances in 2014 at SeaWorld Orlando.²³⁶ Only two of the originally scheduled musicians performed at SeaWorld Orlando in 2014.²³⁷

During the last two years, public disdain toward SeaWorld did not die down, and the backlash since *Blackfish* premiered in 2013 has earned the name "the Blackfish effect."²³⁸ After SeaWorld's CEO and president, Jim Atchison, stepped down in December 2014, attendance to the

231. *Musicians Cancel SeaWorld Concerts Over Alleged Whale Mistreatment*, CBS NEWS (Dec. 20, 2013, 12:04 PM), <http://www.cbsnews.com/news/seaworld-buys-newspaper-ads-in-wake-of-blackfish-backlash/>.

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

236. Alex Sundby, *SeaWorld Launches Ad Counterattack in Wake of Blackfish Backlash*, CBS NEWS (Dec. 20, 2013, 12:04 PM), <http://www.cbsnews.com/news/seaworld-buys-newspaper-ads-in-wake-of-blackfish-backlash/>.

237. *Id.*

238. See Associated Press & Alexandra Klausner, *The Blackfish effect: SeaWorld loses \$25.4 million after documentary criticizing treatment of killer whales cuts park attendance*, DAILYMAIL.COM, <http://www.dailymail.co.uk/news/article-2971294/The-Blackfish-effect-SeaWorld-loses-25-4-million-documentary-criticizing-company-s-treatment-killer-whales-lowers-park-attendance.html> (last updated Feb. 26, 2015).

company's eleven parks began to decline.²³⁹ In August 2015, the SeaWorld Entertainment Inc. Report reported suffering an eighty-four percent drop in its net second-quarter income.²⁴⁰ Further, on September 18, 2015, attorneys for SeaWorld Entertainment in San Diego, California began opening statements to refute the four citations California's division of OSHA issued against the park that alleged inadequate protection for employees who rode or swam on killer whales in a pool used for providing medical attention and for employees who were in close quarters with killer whales on "pool-side slide outs" where whales can briefly emerge from the water.²⁴¹ The park's training and safety protocol and procedures are confidential, and SeaWorld reportedly is refusing to release them in light of the new citations against them.²⁴²

In addition to the general public's reactions, the celebrity response to SeaWorld's treatment of captive whales introduces an interesting ethical and legal question for our country: why is it that pop culture and Hollywood is seemingly ahead of our current legislation concerning the treatment of these animals? *Blackfish's* release has shed light on what has been occurring for years and years in our society, not only with performance orca whales, but also with other exhibition mammals with high intelligence levels, such as Asian elephants used in circuses. As much as our society has attempted to understand animals, it is becoming more and more apparent that we are behind. Our country's legislation needs to reflect the knowledge that scientists and researchers have gained in order for the legal system to protect these animals in the ways the Animal Welfare and Endangered Species Acts purport to.

C. Post-Blackfish Legislative Attempts to Quash Orca Captivity

In 2014, California Assembly member Richard Bloom proposed the Orca Welfare and Safety Act,²⁴³ which focused on ending orca captive breeding performances.²⁴⁴ Unfortunately, Bloom died in committee

239. *See id.*

240. *SeaWorld Entertainment, Inc. Reports Second Quarter 2015 Results*, PR NEWswire (Aug. 6, 2015), <http://www.prnewswire.com/news-releases/seaworld-entertainment-inc-reports-second-quarter-2015-results-300124561.html>. "A fine of \$25,770 was attached to the four state citations against SeaWorld." *Id.*

241. Morgan Lee, *SeaWorld fights worker safety citations*, THE SAN DIEGO UNION-TRIBUNE (Sept. 18, 2015, 6:08 PM), <http://www.sandiegouniontribune.com/news/2015/sep/18/seaworld-fights-safety-citations/>.

242. *Id.*

243. The Orca Welfare and Safety Act, A.B. 2140, 2013-2014 Reg. Sess. (Cal. 2014).

244. A.B. 2140. The Orca Welfare and Safety Act would have made it illegal to "hold in captivity, or use a wild-caught or captive-bred orca for performance or entertainment purposes." A.B.

before A.B. 2140 could come to a vote, but it captured the attention of animal rights activists, lobbyists, and the public display industry, and Representative Adam Schiff modeled his own ORCA bill proposal after Bloom's efforts.²⁴⁵ The language of Representative Schiff's efforts captures the importance a transitional, phase-out process that would "giv[e] orca-holding facilities time to shift to a more humane future."²⁴⁶ Only three days after Schiff introduced the ORCA bill, SeaWorld made a statement on November 9, 2015, that the park was going to gradually curtail its traditional Shamu show in San Diego and replace it with one that focuses on "orcas' natural behaviors in the wild."²⁴⁷

SeaWorld stated that 2016 will be the last year for theatrical performances and that in 2017, they will introduce a "new orca experience designed to take place in a more natural setting."²⁴⁸ SeaWorld's CEO, Joel Manby, did admit that the San Diego park specifically hasn't had "good attraction" lately, especially with the state and federal movements to end orca captivity.²⁴⁹ Manby went on to say, "[W]ith the regulatory environment out there with orcas and what's happened in California with the reputation, we'd be foolish if we didn't look at options."²⁵⁰ This orca phase-out only applies to the San Diego park right now, and both Orlando and San Antonio have not clarified whether or not they plan on following San Diego's lead.²⁵¹ Although this is a long-awaited step for SeaWorld to phase out their orca trick shows, captivity is the true issue that continues to deny these whales the freedom and natural habitat they need and deserve.²⁵² The MMPA's provisions do not allow for a complete ban of orca whale captivity, which is why it is so detrimental that we adopt the ORCA Act so that we can begin the reintroduction and rehabilitation processes for the whales in the healthiest way possible.

For captive killer whales, the MMPA's most severe shortcomings

2140.

245. Taylor Hill, *Can the ORCA Act Shut Down SeaWorld?*, TAKEPART (Nov. 6, 2015), <http://www.takepart.com/article/2015/11/06/captive-orca-legislation>.

246. *Id.*

247. Lori Weisberg & Jennifer Van Grove, *SeaWorld to end theatrical killer whale show*, THE SAN DIEGO UNION TRIBUNE, <http://www.sandiegouniontribune.com/news/2015/nov/09/seaworld-san-diego-phase-out-killer-whale-show> (last updated Nov. 9, 2015, 7:11 PM).

248. *Id.*

249. *Id.*

250. *Id.* Manby continued, "We're not comfortable putting \$100 million into a market when there are regulatory questions. Until that whole issue settles, we'll make a decision at that time." In response to the new orca attraction resulting in a temporary halt of a project aimed to spend over \$100 million to double the amount of orcas in SeaWorld San Diego's tanks. *Id.*

251. *See id.*

252. *See id.*

surround its industry-controlled standards that allow public-display organizations like SeaWorld to self-regulate the compiled standards of conservation and education without enough oversight to ensure their compliance with the MMPA's purported goals.²⁵³ The MMPA is essentially allowing the public display industry to identify the appropriate standards for scientific research and educational permits to be issued. This defeats the purpose of having scientific or educational permit requirements because the industry is able to tailor requirements to fit their needs. The ORCA bill offers these amazing mammals the federal protection they so desperately deserve.

V. CONCLUSION

The past several years have mobilized public support in favor of the humane treatment of marine mammals. Although the importance of killer whales to our aquatic ecosystems and our environment has been well established, the 2013 release of the documentary *Blackfish* has publicized SeaWorld's mistreatment of its captive whales. Currently, our animal laws fail to adequately protect these beloved mammals. Specifically, the MMPA contains expansive loopholes that allow the public display industry to effectively regulate itself. It is crucial that we take action to implement an act like ORCA that will gradually phase out orca whale captivity safely with a focus on the well-being of these creatures, and also prohibit their future exploitation.

253. See Dougherty, *supra* note 4, at 365.