



Animal Welfare Institute

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October 21, 2021

The Honorable Gina M. Raimondo
Secretary
U.S. Department of Commerce
1401 Constitution Ave NW
Washington, D.C. 20230
TheSec@doc.gov

Sent via email

Dear Secretary Raimondo:

We are writing to you regarding the recently-released June 8, 2021, inspection report for Miami Seaquarium by an inspector of the Animal and Plant Health Inspection Service (APHIS) in the U.S. Department of Agriculture. (See Attachment.)

It is very clear something extremely harmful to the animals has been occurring at this facility. Most relevant to your department, the 56-year-old orca at the Seaquarium, Lolita (also known as Tokitae, Toki, and Sk'aliCh'elh-tenaut), is a member of the endangered Southern Resident killer whale distinct population segment. Given her preexisting health conditions, we believe this whale is in imminent danger.

The 17-page inspection report—longer and more detailed than is typical and describing blatant and frankly outrageous infractions of USDA regulations, as well as simply unprecedented poor management decisions—details numerous violations of APHIS regulations, including requiring Lolita to perform moves, which were ill-advised given her age and the size of her tank, that resulted in a jaw injury; feeding animals (including Lolita) rotting fish for two to eight days; decreasing Lolita's "base" (the total weight of fish fed per day) from 160 lbs to 130 lbs, leading to veterinary concerns about dehydration; fluctuations between over-chlorinating and under-chlorinating enclosure water, leading generally to poor water quality; and failing to keep track of which dolphins were in which enclosures, leading to incompatibility issues that, in at least three cases, led to individual dolphin deaths.

Nearly all of these violations occurred over the attending veterinarian's objections. Thus most glaringly, the June inspection report demonstrates MSQ's failure to provide adequate veterinary care, which one federal district court recently held to be a violation of the ESA.¹ When a facility

¹ *People for the Ethical Treatment of Animals v. Tri-State Zoological Park of Western Maryland*, 397 F. Supp. 3d 768 (D. Md. 2019), *aff'd*, 843 Fed.Appx. 493 (4th Cir. 2021). The tiger involved in this case, Cayenne, died following complications suffered under anesthesia when, in contradiction of generally accepted veterinary standards, she was left to recover alone post-procedure. Arguably, though, the facility would have been in violation of the ESA even if Cayenne had not died, because the vet acted contrary to generally accepted veterinary standards. The June

blatantly disregards the advice of its veterinarian(s), it is clearly *not following* accepted veterinary standards. The APHIS system, which is intended to safeguard the welfare of wildlife held in zoos and aquariums, relies on licensed and experienced wildlife veterinarians being able to control decisions made regarding animal welfare at a given facility, and being allowed to override contraindicated decisions made by facility management. The Seaquarium's behavior completely undermined that system.

NMFS has defined "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect." 50 CFR § 222.102. In turn, the agency has defined "harm" in the definition of "take" to mean "an act which actually kills or injures fish or wildlife. Such an act may include significant habitat modification or degradation which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns, including breeding, spawning, rearing, migrating, feeding or sheltering." *Id.* We believe the Seaquarium's treatment of Lolita *clearly* rises to the level of a "take" (see next paragraph) as defined under the Endangered Species Act (ESA), 16 U.S.C. § 1532(19) and NMFS's implementing regulations at 50 CFR § 222.102.

During the course of litigation over Lolita, the U.S. Court of Appeals for the Eleventh Circuit has acknowledged that the ESA "provides captive endangered animals with an additional layer of protection from harmful conditions of captivity" beyond the AWA's minimum standards, and articulated a standard based on "serious harm" to the animal(s).² The evidence presented by the June inspection report demonstrates that Miami Seaquarium has inflicted "serious harm" upon Lolita. Requiring her to perform fast-swims, against the advice of the attending veterinarian, injured her jaw severely enough that it was recorded in her records for six weeks between February 25 and April 7, 2021. Given her age, any impact on her health is a serious concern; the report also outlines that her bloodwork showed inflammation as a result of the week of being fed bad fish and she has developed an eye lesion from inadequate shade. Poor water quality generally could lead to complications for other organ systems. It is simply not acceptable for her to have any unnecessary pressures on her immune system, which current management at the Seaquarium has clearly inflicted.

We have sent a complaint today to APHIS (subsequent to our first letter sent in July after receiving anonymous phone calls outlining mistreatment of Seaquarium animals, as the inspection report confirms the concerns outlined in these calls) regarding the multiple infractions of the Animal Welfare Act marine mammal regulations, which we have copied to the Office of Protected Resources at the National Marine Fisheries Service (NMFS). However, these infractions also constitute take, as defined in the ESA and NMFS's implementing regulations, and have put Lolita in jeopardy.

inspection report for MSQ shows that other animals there have died due to the facility's mismanagement. *Lolita should not have to die in order to prove the MSQ is in violation of the ESA.*

² *People for the Ethical Treatment of Animals v. Miami Seaquarium*, 879 F.3d 1142, 1148 (11th Cir. 2018). Based on the evidence presented to the Southern District of Florida, the appellate court upheld the district court's order because it did not believe that Lolita's case met its "serious harm" standard.

It is imperative that NMFS do its utmost, in concert with APHIS, to secure this endangered whale's health and welfare, which have suffered over the past year or more, according to the APHIS inspection report.

Confiscation is a viable option. There are locations where Lolita could realistically be placed—remaining at the Seaquarium is not her (or the other animals') only option. Quite frankly, her remaining at the Seaquarium should not be an option at all at this point. A management team that ignores its veterinarian and sees nothing wrong with feeding its marine mammals rotting fish cannot be relied upon to follow any directives from APHIS or NMFS or to maintain any corrections to these infractions.

We thank you for your prompt and diligent attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Naomi Rose".

Naomi A. Rose, Ph.D.
Marine Mammal Scientist

A handwritten signature in black ink, appearing to read "Georgia Hancock".

Georgia Hancock, Esq.
Of Counsel

CC: Amy Sloan, Office of Protected Resources, National Marine Fisheries Service
Peter Thomas, Ph.D., Executive Director, Marine Mammal Commission
Carolyn McKinnie, D.V.M., Animal Care, Animal and Plant Health Inspection Service