

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

GEORGIA AQUARIUM, INC.,)

Plaintiff,)

v.)

PENNY PRITZKER, in her official capacity as)
Secretary of Commerce,)

NATIONAL OCEANIC AND ATMOSPHERIC)
ADMINISTRATION, and)
NATIONAL MARINE FISHERIES SERVICE,)

Defendants,)

and)

ANIMAL WELFARE INSTITUTE,)
WHALE AND DOLPHIN CONSERVATION,)
WHALE AND DOLPHIN CONSERVATION,)
INC. (NORTH AMERICA),)
EARTH ISLAND INSTITUTE, and)
CETACEAN SOCIETY INTERNATIONAL,)

Intervenor-Defendants.)

**CIVIL ACTION NO.
1:13-CV-03241-AT**

**MEMORANDUM OF LAW IN SUPPORT OF INTERVENOR-
DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND
RESPONSE TO PLAINTIFF GEORGIA AQUARIUM'S MOTION FOR
SUMMARY JUDGMENT**

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	v
GLOSSARY	ix
INTRODUCTION	1
STATUTORY AND REGULATORY FRAMEWORK	2
I. GEORGIA AQUARIUM’S STRICT BURDEN TO DEMONSTRATE THAT THE PROPOSED IMPORT WOULD BE CONSISTENT WITH MMPA REGULATIONS AND THE PURPOSES OF THE MMPA	3
II. THE POTENTIAL BIOLOGICAL REMOVAL-BASED ANALYSIS OF SUSTAINABILITY AND ITS LIMITATIONS.....	5
STATEMENT OF FACTS	8
I. THE GLOBAL TRADE IN BELUGA WHALES FROM THE LIKELY DEPLETED SAKHALIN-AMUR STOCK FOR PUBLIC DISPLAY	8
II. DENIAL OF GEORGIA AQUARIUM’S PERMIT APPLICATION	15
STANDARD OF REVIEW	18
ARGUMENT	21
I. NMFS LAWFULLY DETERMINED THAT GEORGIA AQUARIUM FAILED TO DEMONSTRATE THAT THE PROPOSED IMPORT WOULD BE UNLIKELY TO HAVE A SIGNIFICANT ADVERSE IMPACT ON A LIKELY DEPLETED SAKHALIN-AMUR STOCK	21
A. NMFS’s Interpretation of 50 C.F.R. § 216.34(a)(4) as Requiring Georgia Aquarium to Demonstrate that the Beluga Whale Trade in the Sea of Okhotsk Is Sustainable Is Entitled to <i>Auer</i> Deference Because It Is Consistent with the Regulation’s Procedural History and Intent and the Precautionary Principle Built into the MMPA	21

B. NMFS’s Determination that Georgia Aquarium Failed to Demonstrate that the Trade in the Sea of Okhotsk Is Sustainable Is Rational Because the Aquarium’s PBR-Based Analysis of Sustainability Fails to Account for Relevant Factors and Its Use for the Relevant Stock Is Inconsistent with an International Standard of Sustainability that NMFS Lawfully Applied.....24

1. Georgia Aquarium’s PBR-based analysis of sustainability does not account for human-caused removals other than live captures, which, when accounted for, make it likely that average annual removals exceeded a PBR level of 29, historical harvest data indicating this PBR level is excessive for this likely depleted stock, and localized depletions26

2. Under the International Council for the Exploration of the Sea decision framework, which is within NMFS’s informed discretion to apply as an MMPA permit application review is an informal adjudication, no level of live captures from the likely depleted Sakhalin-Amur stock is sustainable.....31

C. Recent Findings of the International Whaling Commission’s Scientific Committee Further Support NMFS’s Determination that the Beluga Whale Trade in the Sea of Okhotsk Is Unsustainable34

II. NMFS LAWFULLY DETERMINED THAT GEORGIA AQUARIUM FAILED TO DEMONSTRATE THAT THE PROPOSED IMPORT IS UNLIKELY TO RESULT IN THE TAKING OF BELUGA WHALES BEYOND THE 18 PROPOSED FOR IMPORT36

A. NMFS’s Interpretation of 50 C.F.R. § 216.34(a)(7) as Requiring Georgia Aquarium to Demonstrate that the Proposed Import Is Unlikely to Result in Replacement Takes or Contribute to Demand for Live Captures Is Entitled to *Auer* Deference Because It Is Consistent with the Regulation’s Intent, Prior NMFS Permitting Decisions, and the MMPA’s Structure and Purposes36

B. NMFS’s Determination that Georgia Aquarium Failed to Demonstrate that the Proposed Import Is Unlikely to Result in Replacement Takes of Beluga Whales or Contribute to Demand for Beluga Whales Is Rational, as the Sea of Okhotsk Beluga Whale Trade Is Ongoing and there Is Strong International Demand to Capture Sakhalin-Amur Beluga Whales40

III. NMFS LAWFULLY DETERMINED THAT GEORGIA AQUARIUM FAILED TO DEMONSTRATE THAT FIVE BELUGA WHALES CAPTURED IN 2010 WERE NOT NURSING WHEN TAKEN.....44

A. NMFS’s Interpretation of 16 U.S.C. § 1372(b)(2) as Restricting the Import of Marine Mammals to Animals Taken After the Age at Which a Member of the Species Is Likely Fully Independent from Its Mother Is Entitled to *Chevron* Deference Because It Is Consistent with, and a Practical Implementation of, the MMPA’s Categorical and Unqualified Nursing Prohibition44

B. NMFS’s Determination that Georgia Aquarium Failed to Demonstrate that Five of the Beluga Whales Captured in 2010 Were Not Nursing When Taken Is Rational, as Georgia Aquarium Estimated Their Ages at Collection as 1.5 Years Old, an Age at Which Beluga Whales Are Not Likely Fully Independent, and Its Estimates May Be Inaccurate or Overstated.....47

CONCLUSION.....50

TABLE OF AUTHORITIES*

CASES	PAGE(S)
<i>Animal Protection Inst. of Am. v. Mosbacher</i> , 799 F. Supp. 173 (D.D.C. 1992)	18, 20, 41
* <i>Animal Welfare Inst. v. Kreps</i> , 561 F.2d 1002 (D.C. Cir. 1977)	<i>passim</i>
<i>Asarco, Inc. v. EPA</i> , 616 F.2d 1153 (9th Cir. 1980).....	7
* <i>Auer v. Robbins</i> , 519 U.S. 452 (1997)	<i>passim</i>
<i>Barnhart v. Walton</i> , 535 U.S. 212 (2002).....	20
* <i>Bowen v. Georgetown Univ. Hosp.</i> , 488 U.S. 204 (1988).....	34
<i>Bowman Transp., Inc. v. Ark.-Best Freight</i> , 419 U.S. 281 (1974)	19
* <i>Chevron U.S.A., Inc. v. Natural Resources Def. Council, Inc.</i> , 467 U.S. 837 (1984)	<i>passim</i>
<i>Citizens to Preserve Overton Park v. Volpe</i> , 401 U.S. 402 (1971)	19
* <i>Comm. for Humane Leg., Inc. v. Richardson</i> , 414 F. Supp. 297 (D.D.C. 1976)	3
<i>Decker v. Nw. Env'tl. Def. Ctr.</i> , 133 S. Ct. 1326 (2013)	20
<i>Env'tl. Def. Fund, Inc. v. Massey</i> , 986 F.2d 528 (D.C. Cir. 1993)	39
<i>Fed. Exp. Corp. v. Holowecki</i> , 552 U.S. 389 (2008)	22
<i>Gardebring v. Jenkins</i> , 485 U.S. 415 (1988)	22
<i>In re Polar Bear Endangered Species Act Listing and § 4(d) Rule Lit.</i> , 818 F. Supp. 2d 240 (D.D.C. 2011)	18, 20, 50

* Asterisks indicate authorities upon which Intervenors chiefly rely.

In re Subpoena Duces Tecum, 156 F.3d 1279 (D.C. Cir. 1998)19, 25

Izaak Walton League of Am. v. Marsh, 655 F.2d 346 (D.C. Cir. 1981)18

Mitchell v. United States, 553 F.2d 996 (5th Cir. 1977)40

**Motor Veh. Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983)19, 26, 29

Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs., 545 U.S. 967 (2005)46

Ramos-Barrientos v. Bland, 661 F.3d 587 (11th Cir. 2011).....20

**SEC v. Chenery Corp.*, 332 U.S. 194 (1947)34

Sierra Club v. Van ’Antwerp, 526 F.3d 1353, 1369 (11th Cir. 2008)50

**Stevens v. Premier Cruises, Inc.*, 215 F.3d 1237 (11th Cir. 2000)39

Talk Am., Inc. v. Mich. Bell Tel. Co., 131 S. Ct. 2254 (2011).....22

Weber v. U.S. Dep’t of State, 885 F. Supp. 2d 46 (D.D.C. 2012)50

STATUTES

5 U.S.C. § 706(2)(A) (Administrative Procedure Act)17, 18, 19, 25

16 U.S.C. § 1361(1) (Marine Mammal Protection Act)2

16 U.S.C. § 1361(2)4

16 U.S.C. § 1361(6)2, 24, 38

16 U.S.C. § 1362(1)(A).....2

16 U.S.C. § 1362(9)4

16 U.S.C. § 1362(20)6

16 U.S.C. § 1371(a)(1).....3, 38

16 U.S.C. § 1371(a)(3)(A)39

16 U.S.C. § 1372(b)(2)*passim*

16 U.S.C. § 1374(a)38, 50

16 U.S.C. § 1374(c)(2)(A)2

16 U.S.C. § 1374(c)(5).....18, 20

16 U.S.C. § 1374(d)(3)3, 4, 23

16 U.S.C. § 1386(f)(2)8

16 U.S.C. § 1387(f)8

28 U.S.C. § 1361 (Mandamus Act).....50

44 U.S.C. § 1507 (Judicial Notice of Federal Register Contents).....5

Pub. L. No. 103-238, 108 Stat. 532 (1994)8

REGULATORY MATERIALS

40 C.F.R. § 1508.7 (National Environmental Policy Act Regulations)24

50 C.F.R. § 216.3 (Marine Mammal Protection Act Regulations).....4

50 C.F.R. § 216.12(c)(2)4

50 C.F.R. § 216.33(e)(2)(iv)33

50 C.F.R. § 216.34(a)(4) *passim*

50 C.F.R. § 216.34(a)(7)*passim*

79 Fed. Reg. 44,733 (Aug. 1, 2014)13

75 Fed. Reg. 8,305 (Feb. 24, 2010)7

71 Fed. Reg. 26,340 (May 4, 2006)6

70 Fed. Reg. 59,726 (Oct. 13, 2005)38

70 Fed. Reg. 38,658 (July 5, 2005)38

68 Fed. Reg. 31,980 (May 29, 2003)5, 30

61 Fed. Reg. 21,926 (May 10, 1996)23, 37

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39 Fed. Reg. 1,851 (Jan. 15, 1974)22

OTHER AUTHORITIES

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What Is ICES?, ICES-USA, http://ices-usa.noaa.gov/what_is_ices.html31

Paul R. Wade, NMFS, *Calculating Limits to the Allowable Human-Caused Mortality of Cetaceans and Pinnipeds*, 14 MARINE MAMMAL SCIENCE 28 (1998)7

RULES

Fed. R. Evid. 201(c)(2)7

GLOSSARY

APA	Administrative Procedure Act
AR Doc.	Administrative Record Document Number
F_r	Recovery factor
GAMMS	Guidelines for Assessing Marine Mammal Stocks
ICES	International Council for the Exploration of the Sea
IUCN	International Union for Conservation of Nature
IWC	International Whaling Commission
MMC	U.S. Marine Mammal Commission
MMPA	Marine Mammal Protection Act
MNPL	Maximum net productivity level
NEPA	National Environmental Policy Act
N_{\min}	Minimum population estimate of marine mammal stock
NMFS	U.S. National Marine Fisheries Service
OSP	Optimum sustainable population
PBR	Potential biological removal
R_{\max}	Maximum theoretical or estimated net productivity rate of marine mammal stock

INTRODUCTION

The Marine Mammal Protection Act (“MMPA”) placed a strict burden on Georgia Aquarium to demonstrate that its proposal to import for public display 18 beluga whales captured in Russia would be consistent with the MMPA’s purposes and import permit issuance regulations. The National Marine Fisheries Service (“NMFS”) denied the permit application, explaining in a rigorous memorandum its determinations that the Aquarium failed to establish, as legally required, that the import would be unlikely to adversely impact the stock, result in future captures, and allow the import of animals nursing when captured. This challenge to these determinations as arbitrary under the Administrative Procedure Act fails under the Act’s deferential standard of review of agency actions and interpretations. Faced with a proposal to import 18 animals—five likely dependent on their mothers when captured—from a facility dealing in animals captured from a likely depleted stock subject to an unsustainable live capture trade, and the applicant’s non-precautionary analysis of available data, NMFS rationally denied the request. The Court should uphold NMFS’s determinations, as they rest on lawful statutory and regulatory interpretations, are differences in view resulting from precautionary analysis of available data and application of NMFS’s expertise, and are consistent with the MMPA’s precautionary approach to marine mammal management.

STATUTORY AND REGULATORY FRAMEWORK

The MMPA declares that “marine mammals have proven themselves to be resources of great international significance, esthetic and recreational [and] they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management.” 16 U.S.C. § 1361(6). The MMPA has two fundamental objectives: (1) maintaining stocks¹ of marine mammals as “significant functioning element[s] in the ecosystems of which they are a part,” and, “consistent with this major objective,” (2) maintaining stocks at “optimum sustainable population” levels. *Id.* at § 1361(1), (6). In furtherance of these objectives, the Act imposes a “moratorium” and prohibitions on the import of marine mammals, with limited exceptions. *Id.* at § 1371(a). Section 1372(b)(2) prohibits the import of any animal “nursing at the time of taking, or less than eight months old, whichever occurs later,” or “taken from a . . . stock . . . designated [by regulation] as a depleted . . . stock.”² At issue is an exception to the moratorium under which NMFS “**may**” issue permits for the import of animals for public display to applicants meeting certain qualifications. *Id.* at § 1374(c)(2)(A)(i)–(iii).

¹ A “stock” is “a group of marine mammals of the same species or smaller taxa in common spatial arrangement, that interbreed when mature.” 16 U.S.C. § 1362(11).

² “Depleted” means “any case in which [NMFS] after consultation with the Marine Mammal Commission . . . determines that a . . . stock is below its optimum sustainable population.” 16 U.S.C. § 1362(1)(A); *see infra* p. 5 (discussing OSP).

I. GEORGIA AQUARIUM’S STRICT BURDEN TO DEMONSTRATE THAT THE PROPOSED IMPORT WOULD BE CONSISTENT WITH MMPA REGULATIONS AND THE PURPOSES OF THE MMPA.

The MMPA “imposes a strict burden of proof on each applicant seeking to . . . import marine mammals [for public display],” *Comm. for Humane Leg., Inc. v. Richardson*, 414 F. Supp. 297, 303 (D.D.C. 1976), under which it “must demonstrate . . . that the . . . importation . . . under such permit will be consistent with”: (1) “the purposes of [the MMPA],” and (2) “the applicable regulations.” 16 U.S.C. § 1374(d)(3).³ The regulations at issue in this case are permit “issuance criteria” at 50 C.F.R. § 216.34.⁴ Under the relevant criteria, “the applicant must demonstrate” that: (1) “[t]he [proposed import] by itself or in combination with other activities, will not likely have a significant adverse impact on the species or stock,” *id.* at § 216.34(a)(4), and (2) “[a]ny requested import . . . will not likely

³ The legislative history elaborates on a permit applicant’s hefty burden:

In every case, the burden is placed upon those seeking permits to show that the [permitted activity] should be allowed and will not work to the disadvantage of the . . . stock of animals involved. If that burden is not carried—and it is by no means a light burden—the permit may not be issued. The effect of this [provision] is to insist that the management of the animal populations be carried out with the interests of the animals as the prime consideration.

H.R. Rep. No. 92-707, at 18 (1971), *reprinted in* 1972 U.S.C.C.A.N. 4144, 4152.

⁴ In determining whether an applicant carries its burden, NMFS may consider, but is not bound by, the views of the U.S. Marine Mammal Commission (“MMC”), an independent agency providing MMPA policy oversight. 16 U.S.C. § 1371(a)(1).

result in the taking of marine mammals . . . beyond those authorized by the permit.” *Id.* at § 216.34(a)(7). In addition, § 216.12(c)(2) requires an applicant to show that the animals it seeks to import were not “nursing at the time of taking.”

An essential piece of the separate requirement of § 1374(d)(3) that a permit applicant demonstrate a proposed import “will be consistent with the purposes of [the MMPA],” is that stocks “should not be permitted to diminish below their optimum sustainable population[s] [“OSP”].” *Id.* at § 1361(2). OSP means, “with respect to any population stock, the number of animals which will result in the maximum productivity of the population . . . keeping in mind the carrying capacity of the habitat and the health of the ecosystems of which they form a constituent element.” *Id.* at § 1362(9). OSP is a “population size which falls within a range from the population level of a given . . . stock that is the largest supportable within the ecosystem [“carrying capacity”] to the population level that results in maximum net productivity [“maximum net productivity level” or “MNPL”].” 50 C.F.R. § 216.3. MNPL is the population *level* resulting in the “greatest net annual increment in population numbers . . . resulting from additions to the population from reproduction and/or growth less losses due to natural mortality.” *Id.*

Because MNPL, the conservation goal of the MMPA, is difficult to estimate, NMFS uses an abundance equivalent of “60 percent of [carrying capacity]” when

existing data are insufficient to provide a more robust estimate. *E.g.*, 68 Fed. Reg. 31,980, 31980 (May 29, 2003).⁵ Carrying capacity is also difficult to assess, and, in cases with insufficient information, NMFS relies on the “best estimate . . . of maximum historical abundance [under pre-exploitation conditions] as a proxy for [carrying capacity].” *Id.* Thus, NMFS considers a stock depleted when it is less than 60 percent of its best estimate of maximum historical abundance. *Id.*⁶

II. THE POTENTIAL BIOLOGICAL REMOVAL-BASED ANALYSIS OF SUSTAINABILITY AND ITS LIMITATIONS.

In determining whether Georgia Aquarium demonstrated that the proposed import would be consistent with 50 C.F.R. § 216.34(a)(4), NMFS interpreted this criterion as requiring a demonstration that “the beluga whale trade in the Sea of Okhotsk [is] sustainable.” AR Doc. 8998 at 17443. Georgia Aquarium, “as [its] justification that the [trade is sustainable],” relied on a Potential Biological Removal (“PBR”)-based analysis of sustainability, “us[ing] a comparison of [a] calculated PBR [level] to the current removal rate for the live capture trade.” *Id.*

PBR is a management scheme incorporated into parts of the MMPA used to evaluate the impact of human-caused mortality of marine mammals. The MMPA

⁵ The Court must judicially notice Federal Register contents. 44 U.S.C. § 1507.

⁶ Under NMFS’s Guidelines for Assessing Marine Mammal Stocks (“GAMMS”), a stock with “evidence suggesting at least a 50% decline . . . based on . . . historical abundance” is “**below OSP with high probability.**” AR Doc. 8934 at 16335.

defines “PBR level” as “the maximum number of animals, not including natural mortalities, that may be removed from a . . . stock while allowing that stock to reach or maintain its [OSP].” 16 U.S.C. § 1362(20). The MMPA further defines PBR level as the product of three factors: (1) the “minimum population estimate of the stock” (“ N_{\min} ”); (2) “[o]ne-half the maximum theoretical or estimated net productivity rate of the stock [R_{\max}] at a small population size”; and (3) “[a] recovery factor of between 0.1 and 1.0 [F_r].” *Id.* The recovery factor is a “safety factor” used to hasten the recovery of a depleted stock by “allocat[ing] [more] net production towards population growth,” and used to “compensate for uncertainties that might prevent [stock] recovery.” AR Doc. 8934 at 16331. In PBR level calculations for depleted stocks, NMFS uses a recovery factor *between* 0.1 and 0.5, and, for stocks of “unknown” status, a default recovery factor of 0.5. *Id.* at 16303.

Because the MMPA defines PBR using OSP, the goal of the management scheme is to allow a stock to reach or maintain MNPL, a fundamental objective of the MMPA. A PBR level is an “appropriately conservative estimate” of a stock’s net production at MNPL. 71 Fed. Reg. 26,340, 26,345 (May 4, 2006). If estimated human-caused mortality exceeds a stock’s PBR level in one year, it is a “warning” that the mortality could lead to depletion of the stock and may warrant mitigation;

when it is greater than the PBR level over several years, the stock will likely decline, and in a period of time become or remain depleted with a fair probability.⁷

Precautionary application of the PBR management scheme requires consideration of its underlying assumptions and its limitations. It assumes that “a depleted stock will naturally grow toward OSP and that some surplus growth may be removed while still allowing recovery.” AR Doc. 8934 at 16328. This assumption is invalid where “a stock is below its OSP and is declining or stable, yet human-caused mortality is not a major factor in the [stock’s] trend.” *Id.* Critically, precautionary application of the scheme must account for all “sources of human-related mortality.”⁸ AR Doc. 8730 at 10095. Further, the scheme does not account for significant adverse impacts to a stock caused by removals other than a “reduction in animal numbers.” AR Doc. 8998 at 17443. Indeed, “selective removal of socially important individuals can devastate [stock] social structure,”

⁷ Paul R. Wade, NMFS, *Calculating Limits to the Allowable Human-Caused Mortality of Cetaceans and Pinnipeds*, 14 MARINE MAMMAL SCIENCE 28 (1998) (Ex. A). Intervenors request that the Court judicially notice this background information based on the Wade paper. Fed. R. Evid. 201(c)(2); *see also* 75 Fed. Reg. 8,305, 8,307 (Feb. 24, 2010) (discussing paper); AR Doc. 8915 at 13789, 13796 (citing paper); *Asarco, Inc. v. EPA*, 616 F.2d 1153, 1160 (9th Cir. 1980) (court may “go outside the administrative record” to “consider evidence relevant to the substantive merits of the agency action only for background information”).

⁸ Under the GAMMS, when comparing “[annual] mortality estimates to PBR,” estimates “should usually not be averaged over a time period of more than the most recent 5 years for which data have been analyzed.” AR Doc. 8934 at 16332.

and removals “long continued at [a few] favored sites . . . might deplete . . . local communit[ies],” i.e., result in “localized depletions.” AR Doc. 8915 at 13789.

Congress added the PBR management scheme to the MMPA in 1994. Pub. L. No. 103-238, § 12 (1994). NMFS “interprets the primary intent of the[se] amendments and the PBR [scheme] as a mechanism to respond to the uncertainty associated with assessing and reducing marine mammal mortality from incidental fisheries takes,” **not** live captures for public display. AR Doc. 8934 at 16325. Congress added a section on takings “incidental to commercial fishing operations.” Pub. L. No. 103-238, § 118. This section directs NMFS to implement “take reduction plans” for “strategic” stocks on which commercial fisheries are inflicting certain levels of incidental take. 16 U.S.C. § 1387(f). The immediate goal of such plans is reducing incidental take “to levels less than the [PBR] level established for [each] stock under” NMFS stock assessments. *Id.* at § 1386(f)(2). MMPA provisions and regulations on import permits for public display *neither refer to nor mandate* use of a PBR management scheme. *Id.* at § 1374; 50 C.F.R. § 216.34.

STATEMENT OF FACTS

I. THE GLOBAL TRADE IN BELUGA WHALES FROM THE LIKELY DEPLETED SAKHALIN-AMUR STOCK FOR PUBLIC DISPLAY.

The beluga whale is a “circumpolar Arctic” cetacean species. AR Doc. 8923 at 13915. The species is “highly social, occurring in close-knit pods, often of the

same sex and age class.” *Id.* at 13914. As with other cetaceans, “[m]atrilineal units are the basic unit of [beluga whale] social groupings, which consists of a female (matriarch) and her descendants.” AR Doc. 8998 at 17452. Stocks exhibit “strong fidelity to summering areas,” AR Doc. 8915 at 13780, with “groups consisting of mothers and their dependent calves” observed in the summer. AR Doc. 8923 at 13914. The “matrilineal transfer of knowledge of . . . feeding sites, and summering areas is thought to be important” to “how beluga society functions.” AR Doc. 8915 at 13788. Calves are “nursed for two years and may continue to associate with their mothers for a considerable time thereafter.” AR Doc. 8923 at 13915.

The International Union for Conservation of Nature (“IUCN”) classifies the species on a whole as “near threatened.” AR Doc. 8933 at 15599. Its “aggregate abundance was much greater in the past, before commercial hunting decimated some [stocks],” AR Doc. 8923 at 13915, including the stock at issue. In 1999, the International Whaling Commission’s (“IWC”) Scientific Committee recognized three stocks in the western Sea of Okhotsk region, the Sakhalin Bay-Amur River, Shantar Bay,⁹ and Shelikov Bay stocks, and deemed them to be of “likely depleted status relative to historical abundance.” AR Doc. 8934 at 16111. Commercial hunting in the region originated from incidental capture of animals of the Sakhalin-

⁹ The Shantar Bay stock includes beluga whale summer aggregations in the smaller Ulbansky, Tugursky, Udskeya, and Nikolaya Bays. AR Doc. 9221 at 21544.

Amur stock in salmon fishing nets in 1915. AR Doc. 8915 at 13785. “Large scale beluga whaling started in Sakhalinsky Bay in 1915 and lasted at least to 1937,” with an “average annual take [of] approximately 1,000 belugas,” and a peak of 2,800 killed in 1933. AR Doc. 9221 at 21548. During World War II, “[s]ome harvest still existed . . . and by 1957 it ceased.” *Id.* By 1963, all hunting in the region ceased “because there were few [animals] left to catch.” AR Doc. 8915 at 13784. Based on these data, the historical abundance of the Sakhalin-Amur stock “had to be at least 13,000–15,000 whales during this period to support the removal of [an] average [of] 1,000 whales per year for 20 years.” AR Doc. 8955 at 17452.

Beluga whales “have always been popular show animals.” AR Doc. 9220 at 21523. In 1986, a “beluga live-capture operation for oceanaria was initiated in the Sakhalin-Amur region by Nikolay Marchenko,” which in 1989 began live captures for Utrish Dolphinarium, Ltd., to supply aquariums. AR Doc. 8915 at 13784. Today, “particularly since Canada’s ban on captures [of beluga whales] for export in 1992,” AR Doc. 9220 at 21523, when Russia became the “sole regular supplier of belugas to the oceanarium industry,” AR Doc. 8915 at 13784, a “brisk international trade is fuelled by the easy, relatively low-cost availability of belugas from [the Sakhalin-Amur stock],” AR Doc. 9220 at 21523. From 1988 to 1990, there were twelve live captures from the stock. *Id.* at 21520. Complete data on

live captures from 1990 to 2000 are unavailable. AR Doc. 8915 at 13785. Available data indicates that Russia exported 237 live beluga whales from 1990 to 2010, likely with most captured from this stock. AR Doc. 8988 at 17444. From 2000 to 2012, there were 300 live captures from the stock, with a five-year average of 31.2 live captures from 2008 to 2012. *See* Table 1; AR Doc. 9221 at 21550.

Table 1. Live Captures of Beluga Whales from the Sakhalin-Amur Stock.¹⁰

Year	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013
Live Captures	10	22	10	26	25	31	20	0	25	24	30	33	44	Readily Available
Live Capture Quota	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A	42	212	263

Of the beluga whales at issue here, two were captured in 2006, five in 2010, and 11 in 2011. AR Doc. 8927 at 14286. In furtherance of its application, Georgia Aquarium co-funded research on the Sea of Okhotsk stocks led by Olga Shpak, a Russian scientist. AR Doc. 8915 at 13778. Surveys conducted in 2009 and 2010 resulted in an abundance estimate for the Sakhalin-Amur stock of 3,961 animals, and a minimum abundance estimate of 2,891 animals. *Id.* at 13783. A panel of cetacean scientists, convened at Georgia Aquarium's request under the auspices of the IUCN, reviewed this research and calculated a PBR level of 29, *id.* at 13790, which Shpak increased to 30 based on a refined N_{\min} of 2,972. AR Doc. 8911 at

¹⁰ AR Doc. 9211 at 21550. The live capture quota is for the W. Sea of Okhotsk region, but live capture operations target only the Sakhalin-Amur stock. *Id.*

13708.¹¹ The IUCN Panel applied a “cetacean default” R_{\max} of 0.04, and, despite noting that the stock is depleted relative to historical abundance and its recovery “has been slow and is still not complete,” applied a recovery factor of 0.5 under the reasoning that its status is “at best” unknown.¹² AR Doc. 8915 at 13790.

The IUCN Panel “accepted [a PBR level of 29] with reservations.” AR Doc. 8998 at 17444. It expressed concern that flawed survey methodologies resulted in “probably an overestimate of [beluga whale] numbers.” AR Doc. 8915 at 13809. It also considered the validity of the underlying assumptions, and limitations, of the PBR-based analysis of sustainability for the stock. *See supra* pp. 7–8. First, it expressed concern about an underestimation of human-caused mortality for the stock. *See* AR Doc. 8915 at 13784–86. Second, it expressed concern that “there has been a slight preponderance of [socially important] females in the catches over the last few years.” *Id.* at 13789. Third, it expressed concern about localized depletions given that the “same live-capture sites are used repeatedly, year after year,” and the evidence of fine-scale fidelity to such sites. *Id.* at 13789, 13792.

¹¹ As Intervenor noted in comments, Georgia Aquarium’s proposal to import animals captured before the IUCN Panel review, “undermine[s] both statutory and regulatory requirements under the MMPA,” and is contrary to IUCN standards, co-authored by MMC Chairman Dr. Randall Reeves, which provide that a “[stock] assessment, including delineation of stock . . . abundance . . . mortality, **and status (trend)**,” should occur “before any captures are made.” AR Doc. 8663 at 8671.

¹² The IUCN Panel’s PBR level calculation is $0.5(0.04)(2,891)(0.5) = 28.91$.

Today, the Sakhalin-Amur stock remains likely depleted, its recovery hampered by live captures and other human-caused mortality. NMFS, the Marine Mammal Commission (“MMC”), and the IUCN Panel all recognize that the stock is likely below 50 percent of the best estimate of maximum historical abundance,¹³ *see* AR Doc. 8995 at 17427; AR Doc. 8730 at 10095; AR Doc. 8915 at 13789, the level at which NMFS considers a stock below OSP with a “high probability,” AR Doc. 8934 at 16335. Using the recent abundance estimate of 3,961 animals, the stock is less than 26.5% of “a **highly conservative** historical maximum” of 15,000 animals. AR Doc. 8995 at 17452. In 2013, increases in the live-capture quota for the western Sea of Okhotsk region set by the Russian fisheries agency and the number of entities applying to the Russian government for capture permits “led to [an] increase in the number of capture operations.” AR Doc. 9221 at 21550. Now, at the two sites [in the Sakhalin-Amur region] where the live-capture operation has historically operated, “there [are] at least 3 separate capture teams operating simultaneously.” *Id.* Based on evidence confirming that the animals of the stock “demonstrate ‘fine-scale’ site-fidelity” suspected by the IUCN Panel, Shpak concluded that the capture teams “with high probability, will cause a chronic stress

¹³ In response to a petition by Intervenor to designate the Sakhalin-Amur stock as “depleted,” NMFS has made an initial finding that there is “substantial information indicating that the [stock] declined from historical levels and a depleted designation therefore may be warranted.” 79 Fed. Reg. 44,733 (Aug. 1, 2014).

in resident groups,” bolstering concern over localized depletions. *Id.* While other sources of human-caused mortality are difficult to estimate due to the lack of monitoring in this remote region, confirmed and likely sources include subsistence take, deaths during live capture, incidental take during fishing operations, climate change, and pollution. *See* AR Doc. 8915 at 13785–87; AR Doc. 9221 at 21548.

The IWC Scientific Committee reviewed this research and concluded that the 2013 quota “was *at least* 6 to 8 times higher than likely to be sustainable for the Sakhalin-Amur [stock],” recognizing that, “[i]n practical terms, the live captures . . . will target only the Sakhalin-Amur [stock] which raises concerns about local depletion.” AR Doc. 9174 at 21256.¹⁴ Likewise, the IWC Subcommittee on Small Cetaceans noted that the “intensive capture operations . . . would result in considerable stress to the animals and possibly also accidental mortality that may or may not be documented,” and “agreed that this additional concern should affect the choice of recovery factor for any PBR . . . calculation.” *Id.* at 21258. Agreeing with Shpak, AR Doc. 9221 at 21552, the IWC Scientific Committee recommended: (1) reduction of the quota “to a level that is consistent with available scientific data,” and (2) management of the five summer aggregations (Sakhalin-Amur and the Shantar bays) as separate stocks, AR Doc. 9174 at 21256.

¹⁴ Intervenors accurately quoted the IWC reports in a comment. AR Doc. 9174. Intervenors will file the reports if the Court or a party questions their accuracy.

II. DENIAL OF GEORGIA AQUARIUM'S PERMIT APPLICATION.

On June 15, 2012, Georgia Aquarium submitted an application to NMFS for a permit to import for public display the 18 beluga whales captured in 2006, 2010, and 2011, from the likely depleted Sakhalin-Amur stock. AR Doc. 8927. NMFS last considered an application to capture wild cetaceans more than 20 years ago. AR Doc. 9141 at 20456. NMFS last permitted the import of cetaceans recently captured in foreign waters in 1992 when Shedd Aquarium imported beluga whales captured in Canada. *Id.* The Aquarium would distribute most of the animals under “breeding loans” to SeaWorld and Shedd Aquarium. AR Doc. 8956 at 17255.

In its application, Georgia Aquarium claimed that the beluga whale trade in the Sea of Okhotsk is sustainable because the five-year average of annual live captures from the Sakhalin-Amur stock from 2007 to 2011 is 22.4, which is less than the PBR level of 29 calculated by the IUCN Panel. AR Doc. 8927 at 14296–97. The application did not address the IUCN Panel’s reservations with this PBR-based analysis of sustainability. *See id.* at 14313–37. To demonstrate that no beluga whale was nursing when captured, the application contained point estimates of ages at collection. *Id.* at 14286. In the application submitted on June 15, 2012, the five youngest beluga whales, all captured in August or September 2010, were estimated to be 1.5 years old when captured. *Id.* For eight of the 18 captured

animals, however, including two of the five youngest animals, the estimated ages “on January 1, 2012” were greater *by a full year* from those in a draft application submitted on March 7, 2012 to NMFS. *Compare id.*, with AR Doc. 8925 at 13961; *infra* p. 50, Table 2. When asked to explain the increase, Georgia Aquarium curiously claimed it made “typographical errors.” *See* AR Doc. 8931 at 14676.

On August 5, 2013, after receiving almost 9,000 public comments, AR Doc. 8998 at 17425, “the majority . . . opposed [to] the import,” *id.* at 17432, NMFS denied the application. NMFS determined that Georgia Aquarium did not adequately demonstrate that the import would be consistent with two issuance criteria, 50 C.F.R. § 216.34(a)(4) & (7), and, for five animals, the prohibition on the import of animals nursing when captured, 16 U.S.C. § 1372(b)(2). AR Doc. 8997 at 17414. Regarding § 216.34(a)(4), NMFS found that it is “unable to determine” if the import, by itself or in combination with other activities, would not likely have a significant adverse impact on the Sakhalin-Amur stock because “information available . . . suggests that the level of total removal, including past and present live capture operations, have likely contributed to an adverse impact on this population.” *Id.* Regarding § 216.34(a)(7), NMFS found that the import will “likely” result in the capture of additional animals from this stock, as: (1) the live-capture trade from the stock is “expected to continue,” and (2) “issuance of th[e]

permit would contribute to the demand to capture belugas from this stock for the purpose of public display worldwide.” *Id.* Regarding the nursing prohibition, NMFS found that five of the animals captured in 2010, estimated to be 1.5 years old when captured, “were potentially still nursing and not yet independent.” *Id.*

On September 30, 2013, Georgia Aquarium filed this action and stated three claims for relief that allege NMFS’s determinations that Georgia Aquarium failed to satisfy its strict statutory burden with respect to two issuance criteria and the nursing prohibition are arbitrary and unlawful under § 706(2)(A) of the APA. Regarding 50 C.F.R. § 216.34(a)(4), it alleges that NMFS unlawfully rejected its use of PBR-based analysis of sustainability. Compl. ¶ 112. It also asserts that the IUCN Panel concluded that the trade from the Sakhalin-Amur stock is sustainable and claims that NMFS “ignored” this conclusion. *Id.* at ¶ 111. Further, it argues that NMFS’s finding that removals have likely exceeded the level assumed in the Aquarium’s PBR-based analysis of sustainability is unsubstantiated. *Id.* at ¶ 123.

Regarding 50 C.F.R. § 216.34(a)(7), Georgia Aquarium alleges that NMFS’s interpretation of this criterion as requiring a demonstration that the proposed import will not likely result in replacement takes or contribute to demand to capture beluga whales from the relevant stock for public display is unlawful. Compl. ¶ 131. Specifically, it argues that the interpretation “nullifies” the

exception to the MMPA's moratorium under which NMFS "may" issue permits to import marine mammals for public display in that it purportedly requires Russia to prohibit any additional live captures for public display from the relevant stock before NMFS may grant the permit application. *Id.* Further, it contends that NMFS provided no evidence that the import will contribute to demand to capture beluga whales from the Sakhalin-Amur stock for public display. *Id.* at ¶ 136.

Finally, with respect to the MMPA's nursing prohibition, Georgia Aquarium asserts that specialists at the time of collection "confirmed the presence of no lactating female and no nursing calf." *Id.* at ¶ 143. It also contends that NMFS "offer[s] no evidence contradicting" these facts, and instead merely "assert[s] it was *theoretically* possible the animals were nursing [when captured]." *Id.* at ¶ 145.

STANDARD OF REVIEW

A decision by NMFS on an application for a permit to import marine mammals pursuant to § 1374 of the MMPA is an informal adjudication,¹⁵ which the Court reviews under the deferential standard of § 706(2)(A) of the APA. *Animal Prot. Inst. of Am. v. Mosbacher*, 799 F. Supp. 173, 175 (D.D.C. 1992).

¹⁵ "Informal adjudication is a residual category [of agency action] including all . . . actions that are not rulemaking and that need not be conducted through 'on the record' hearings." *Izaak Walton League of Am. v. Marsh*, 655 F.2d 346, 361 n.37 (D.C. Cir. 1981); *In re Polar Bear Endangered Species Act Listing and § 4(d) Rule Lit.*, 818 F. Supp. 2d 240, 258 (D.D.C. 2011) (treating denial of permit applications submitted pursuant to § 1374(c)(5) of the MMPA as informal adjudications).

Section 706(2)(A) provides that a “reviewing court shall . . . hold unlawful and set aside agency action [that is] arbitrary . . . or otherwise not in accordance with law.”

On a motion for summary judgment in an APA case, the “reasonableness of the agency’s action is judged in accordance with its stated reasons.” *In re Subpoena Duces Tecum*, 156 F.3d 1279, 1279 (D.C. Cir. 1998) (citing *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971)). In making this determination, “the court must consider whether the decision was based on consideration of the relevant factors and whether there has been a clear error of judgment.” *Volpe*, 401 U.S. at 416. “Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. The court is not empowered to substitute its judgment for that of the agency.” *Id.* An action is rational if the agency did not “offer[] an explanation for its decision that . . . is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Motor Veh. Mfrs. Ass’n of the U.S. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). “A reviewing court may not set aside an agency [action] that is rational, based on consideration of the relevant factors, and within the scope of the authority delegated to the agency by statute,” *id.* at 43, and it must “uphold a decision of less than ideal clarity if the agency’s path may reasonably be discerned,” *Bowman Transp., Inc. v. Ark.-Best Freight*, 419 U.S. 281, 286 (1974).

Where NMFS's decision on the application depends on its interpretation of the MMPA, the framework of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), governs review of such an interpretation.¹⁶ Under the framework's first step, the Court must determine whether Congress has "directly spoken to the precise question at issue." *Id.* at 842. If it has, the Court "must give effect to the unambiguously expressed intent of Congress." *Id.* at 843. If the Court concludes that the "statute is silent or ambiguous with respect to the specific issue," under the second step, the Court will defer to an agency's interpretation if "based on a permissible construction of the statute." *Id.* Finally, under the "deferential standard" of *Auer v. Robbins*, 519 U.S. 452, 461 (1997), it is "well established" that where NMFS's decision turns on an interpretation of "its own [ambiguous] regulations, the Court, as a general rule, defers to it unless that interpretation is 'plainly erroneous or inconsistent with the regulation.'" *Decker v. Nw. Env'tl. Def. Ctr.*, 133 S. Ct. 1326, 1329 (2013) (quoting *Auer*, 519 U.S. at 461); accord *Ramos-Barrientos v. Bland*, 661 F.3d 587, 596–97 (11th Cir. 2011).

¹⁶ Whether the *Chevron* framework applies to an agency interpretation of a statute in an informal adjudication depends on multiple factors. See *Barnhart v. Walton*, 535 U.S. 212, 222 (2002) (applying factors). Courts have applied the framework to interpretations of the MMPA adopted by NMFS and the U.S. Fish & Wildlife Service in decisions on permit applications submitted pursuant to § 1374 of the MMPA. See *In re Polar Bear*, 818 F. Supp. 2d at 258 n.14 (applying framework to interpretation of MMPA adopted in denial of import permit applications submitted pursuant to § 1374(c)(5) of the MMPA); accord *Mosbacher*, 799 F. Supp. at 179.

ARGUMENT

I. NMFS LAWFULLY DETERMINED THAT GEORGIA AQUARIUM FAILED TO DEMONSTRATE THAT THE PROPOSED IMPORT WOULD BE UNLIKELY TO HAVE A SIGNIFICANT ADVERSE IMPACT ON A LIKELY DEPLETED SAKHALIN-AMUR STOCK.

Georgia Aquarium had to demonstrate that the proposed import “by itself or in combination with other activities, will not likely have a significant adverse impact on the . . . stock.” 50 C.F.R. § 216.34(a)(4). NMFS interpreted this criterion as requiring a demonstration that the “trade in the Sea of Okhotsk [is] sustainable,” AR Doc. 8998 at 17443, an interpretation entitled to *Auer* deference, as it is consistent with the criterion’s procedural history and intent and the precautionary principle. NMFS’s determination that Georgia Aquarium failed to make this demonstration is rational, as its PBR-based analysis of sustainability fails to account for relevant factors, and its use for the likely depleted Sakhalin-Amur stock is inconsistent with an international standard of sustainability lawfully applied. It is also supported by recent IWC Scientific Committee findings.

A. NMFS’s Interpretation of 50 C.F.R. § 216.34(a)(4) as Requiring Georgia Aquarium to Demonstrate that the Beluga Whale Trade in the Sea of Okhotsk Is Sustainable Is Entitled to *Auer* Deference Because It Is Consistent with the Regulation’s Procedural History and Intent and the Precautionary Principle Built into the MMPA.

NMFS, in determining that Georgia Aquarium failed to demonstrate that the proposed import will be consistent with 50 C.F.R. § 216.34(a)(4), interpreted the

ambiguous phrase “other activities” to mean “other past, present, and foreseeable future actions affecting the stock, including the ongoing live-captures from this stock.” AR Doc. 8998 at 17423. NMFS interpreted the entire criterion as requiring a demonstration that “the beluga whale trade in the Sea of Okhotsk [is] sustainable.” *Id.* at 17443. In deciding whether an agency’s interpretation of its ambiguous regulation is entitled to *Auer* deference, the Court may look to a regulation’s procedural history and intent and the purposes of the authorizing statute. *See Gardebring v. Jenkins*, 485 U.S. 415, 428 n.14 (1988) (considering “history of the[] regulations” in reading word into final regulation).¹⁷

MMPA regulations originally stated that “[i]n determining whether to issue a public display permit, [NMFS] shall . . . consider whether the proposed . . . importation will be consistent with the policies and purposes of the Act,” which required “taking into account . . . the effect of the proposed . . . importation on the . . . stocks . . . in question.” 39 Fed. Reg. 1,851, 1,856 (Jan. 15, 1974). In 1993, NMFS proposed regulatory revisions, in part, to make the applicant “responsible for submitting information adequate for NMFS to address [National Environmental Policy Act (“NEPA”)] concerns,” including “other activities affecting or that may

¹⁷ *See also Talk Am., Inc. v. Mich. Bell Tel. Co.*, 131 S. Ct. 2254, 2260–65 (2011) (relying on statement of need in construing regulation); *Fed. Exp. Corp. v. Holowecki*, 552 U.S. 389, 401 (2008) (rejecting interpretation “in tension with [the statute’s] structure and purposes.”).

affect the same protected species and . . . the likely individual or cumulative effects of the proposed activity.” 58 Fed. Reg. 53,320, 53,323 (Oct. 14, 1993). The proposed regulations required a permit applicant to demonstrate that “[t]he source of the proposed . . . importation . . . is one that will present the **least practicable** effects on wild populations.” *Id.* at 53,343. They also required a demonstration that “[a]ny proposed permanent removal from the wild” would not have “by itself or in combination with all other known takes and sources of mortality, a significant direct or indirect adverse effect on the . . . stock, based on the best available information on cumulative take.” *Id.* The final rule modified this language to its current form without explanation. 61 Fed. Reg. 21,926, 21,936 (May 10, 1996).

Based on this regulatory history, the intent of 50 C.F.R. § 216.34(a)(4) is to: (1) ensure that a proposed import “will be consistent with the purposes of [the MMPA],” 16 U.S.C. § 1374(d)(3), and (2) assist NMFS in evaluating the environmental impacts of a proposed import under NEPA. NMFS’s interpretation of this criterion is consistent with its history and intent. Defining “other activities” to mean “other past, present, and foreseeable future actions affecting the stock, including the ongoing live-captures,” is similar to language in the proposed and prior rules and nearly identical to the NEPA regulation defining “cumulative

impact.” *See* 40 C.F.R. § 1508.7.¹⁸ Likewise, interpreting the criterion on the whole as requiring a demonstration that the beluga whale trade in the Sea of Okhotsk is sustainable is consistent with ensuring that the likely depleted Sakhalin-Amur stock eventually reaches its OSP level, a fundamental objective of the MMPA. 16 U.S.C. § 1361(6). Moreover, interpreting the criterion as requiring consideration of the adverse impacts of not only the past removal of 18 beluga whales, but also the cumulative adverse impacts of past, present, and foreseeable future live captures from this stock, is consistent with the precautionary principle built into the MMPA. *Supra* p. 3 n.3 (quoting H.R. Rep. No. 92-707).¹⁹ Therefore, NMFS’s interpretation of 50 C.F.R. § 216.34(a)(4) is entitled to *Auer* deference.

NMFS’s Determination that Georgia Aquarium Failed to Demonstrate that the Trade in the Sea of Okhotsk Is Sustainable Is Rational Because the Aquarium’s PBR-Based Analysis of Sustainability Fails to Account for Relevant Factors and Its Use for the Relevant Stock Is Inconsistent with an International Standard of Sustainability NMFS Lawfully Applied.

Georgia Aquarium, “as [its] justification that the proposed importation meets [this] criterion,” relied on a PBR-based analysis of sustainability, in which it “used

¹⁸ § 1508.7 defines “cumulative impact” as “other past, present, and reasonably foreseeable future actions regardless of what . . . person undertakes [them].”

¹⁹ *See also* H.R. Rep. No. 92-707, at 22, 24 (explaining that, under the MMPA, “animals must be managed for their benefit and not for the benefit of commercial exploitation,” and noting that, “[a]s far as could be done [the House committee] endeavored to build . . . a conservative bias into [the MMPA]”).

a comparison of [a] calculated PBR [level] to the current removal rate for the live capture trade.” AR Doc. 8998 at 17443–44. It claimed that the beluga whale trade in the Sea of Okhotsk is sustainable because the five-year average of annual live captures from the Sakhalin-Amur stock from 2007 to 2011 is 22.4, which is less than the PBR level of 29 calculated by the IUCN Panel. AR Doc. 8927 at 14296. In an 11-page attachment to its decision memorandum, NMFS analyzed in detail its determination that Georgia Aquarium did not adequately demonstrate that the trade is sustainable. NMFS stated that “the information available leads us to believe that removals likely exceed PBR [level],” AR Doc. 8998 at 17443, and that the “broader effects of the capture operations have not been adequately monitored and evaluated,” *id.* at 17452. NMFS further stated that, under an International Council for the Exploration of the Sea (“ICES”) decision framework, no level of live captures from the likely depleted Sakhalin-Amur stock is sustainable. *Id.*

“[J]udged in accordance with [these] stated reasons,” *In re Subpoena Duces Tecum*, 156 F.3d at 1279, NMFS’s determination is not arbitrary under the deferential standard of review of § 706(2)(A) of the APA, and the Court should not “substitute its judgment for [that of NMFS].” *Overton Park*, 401 U.S. at 416. Georgia Aquarium’s PBR-based analysis of sustainability does not account for: (1) human-caused removals other than live captures, which, when accounted for, make

it likely that average annual removals exceeded a PBR level of 29; (2) historical harvest data indicating that this PBR level is excessive for a likely depleted stock; and (3) localized depletions. Because under the MMPA the applicant bears a strict burden of proof, Georgia Aquarium’s “fail[ure] to consider [these] important aspect[s] of the [sustainability] problem,” *State Farm*, 463 U.S. at 42, makes its sustainability analysis flawed. Also, in this “data poor” situation, AR Doc. 8998 at 17443, NMFS’s precautionary view of available data is “a difference in view [and] the product of agency expertise.” *State Farm*, 463 U.S. at 42. It was also within NMFS’s informed discretion to apply the ICES decision framework, as an MMPA permit application review is an informal adjudication. Finally, recent findings of the IWC’s Scientific Committee further support NMFS’s determination.

- 1. Georgia Aquarium’s PBR-based analysis of sustainability does not account for human-caused removals other than live captures, which, when accounted for, make it likely that average annual removals exceeded a PBR level of 29, historical harvest data indicating this PBR level is excessive for this likely depleted stock, and localized depletions.**

NMFS reasonably determined that Georgia Aquarium’s sustainability analysis did not apply the PBR management scheme in a precautionary manner, failing to consider its underlying assumptions and limitations.²⁰ NMFS noted:

²⁰ As such, the Court need not decide if the scheme can be applied to a declining stock, Pl.’s Br. at 10–17, an issue of scientific debate, AR Doc. 8934 at 16286–88.

[I]n three separate years 30 or more animals were taken (including 2010 and 2011, years in which animals proposed for importation were captured). In these years, the entire calculated PBR [level] was taken in live captures, allowing for no buffer to account for other sources of human-caused mortality, which is of particular concern to us. In addition, . . . these numbers appear to be trending upward over time.

AR Doc. 8998 at 17445. *See supra* p. 11, Table 1.

NMFS, recognizing that a precautionary application of the scheme must account for all “sources of human-related mortality,” AR Doc. 8730 at 10095, reviewed available data on such sources other than live captures. Specifically, NMFS noted that Georgia Aquarium’s *own application* acknowledged Shpak’s report of subsistence take of one to three animals per village, AR Doc. 8927 at 14322.²¹ NMFS also stated that “there is the potential for mortality associated with the capture events and these mortalities may not be adequately reflected in the capture records,” and supported this statement by noting one reported death of a calf between 2007 and 2010, “the only years for which we have data.” AR Doc. 8998 at 17446. Further, NMFS noted that Shpak reports “a few specific instances of beluga entanglements [in fishing nets],” *id.*, which is further supported by the fact that commercial hunting in the region originated from incidental capture of animals of the Sakhalin-Amur stock in a seine net for salmon in 1915. AR Doc.

²¹ The level of subsistence take is also a concern as it is unknown how many villages take animals, AR Doc. 8998 at 17446, and villages request and the Russian government grants “traditional harvest” quotas. AR Doc. 9221 at 21549.

8915 at 13785. Finally, NMFS discussed research finding beluga whales “moderately sensitive” to climate change impacts, *see* AR Doc. 8918 at 13850, and a “worsening of the quality of natural water and fish in the lower Amur [River]” from Chinese industrial and agricultural pollution, AR Doc. 8922 at 13905. If these potential sources of human-caused mortality resulted in the annual removal of just six to seven additional animals, it would place the five-year average of annual removals from 2007 to 2011 above a PBR level of 29. *See* Table 1.²²

From this review, NMFS found that “[a]lthough the full extent of other sources of mortality cannot be determined, it cannot be fully discounted or assumed to be zero,” AR Doc. 8998 at 17445–47, and given the lack of a buffer between a PBR level of 29 and live captures, “[t]he most plausible scenario” is that total removals exceeded a PBR level of 29 regularly since 2000, *see id.* at 17453.²³ In so finding, NMFS agreed with the IUCN Panel’s concern about an underestimation of human-caused mortality for the Sakhalin-Amur stock. *See* AR

²² **If the four-year average of annual removal from 2008–2011 is used (28), the annual removal of just one additional animal would exceed a PBR level of 29.** Use of the four-year average is appropriate under the GAMMS, as 2007 is the only year from 2000–2012 in which no live captures occurred, an anomaly, particularly given the trend of increasing live captures. *See* AR Doc. 8934 at 16332 (GAMMS explaining it is “more appropriate to use only the most recent relevant data [when it] most accurately reflect[s] the current level of annual mortality”).

²³ Intervenors emphasized this point in their public comments. *See* AR Doc. 8750 at 9326; AR Doc. 7866 at 8667; AR Doc. 8729 at 10082.

Doc. 8915 at 13784–86. In this “data poor” situation, AR Doc. 8998 at 17443, where “monitoring of other types of take in this region is low, if existent at all,” *id.* at 17445, NMFS’s more precautionary view of the available data is “a difference in view [and] the product of agency expertise.” *State Farm*, 463 U.S. at 42. Indeed, it is consistent with conservation biology’s basic tenet that “absence of evidence is not evidence of absence,” stressed by Intervenors in their comments. AR Doc. 8750 at 9329. Moreover, this finding is a rational basis on which to conclude that the trade is likely unsustainable because, if human-caused mortality repeatedly exceeds a PBR level, the stock will likely remain depleted and decline. *Supra* p. 7.

Georgia Aquarium’s PBR-based analysis of sustainability also does not account for historical harvest data indicating that a PBR level of 29 is excessive for the Sakhalin-Amur stock, not “artificially low.” Pl.’s Br. at 30. In calculations for depleted stocks, NMFS uses a recovery factor *between* 0.1 and 0.5. AR Doc. 8934 at 16303. NMFS, the MMC, and the IUCN Panel all recognize that the Sakhalin-Amur stock is likely below 50 percent of the best estimate of maximum historical abundance, *see supra* p. 13, the level at which NMFS considers a stock below OSP with a “high probability,” AR Doc. 8934 at 16335. In fact, using the abundance estimate of 3,961 animals, the stock is just 30.5 percent of NMFS’s estimate of the “lower end of an historical maximum.” *See* AR Doc. 8995 at 17452. As such, a

recovery factor of 0.1 is more appropriate and consistent with NMFS's guidelines. It also would "compensate for uncertainties" in levels of human-caused mortality and adverse impacts of localized depletions, which "might prevent [stock] recovery." AR Doc. 8934 at 16331. Further, 0.1 is the factor that NMFS initially assumed the Aquarium used to calculate a PBR level of 29 and believed would "limit . . . total mortality . . . to a level that is considered sustainable." AR Doc. 9001 at 17503. If this recovery factor is used, the PBR level for the stock would drop to 5.9, well below 22.4, the average annual live captures from 2007–2011 for the Sakhalin-Amur stock used by Georgia Aquarium. AR Doc. 8927 at 14297.²⁴

Finally, the PBR-based analysis of sustainability does not account for significant adverse impacts caused by removals other than a "reduction in animal numbers." AR Doc. 8998 at 17443. NMFS again agreed with the IUCN Panel's concerns: (1) that "there has been a slight preponderance of [socially important] females in the catches over the last few years," AR Doc. 8915 at 13789, and (2) about localized depletions, given the "same live-capture sites are used repeatedly, year after year," and the fine-scale fidelity to such sites, *id.* at 13789, 13792.²⁵

²⁴ If instead 0.3 is used, the PBR level calculation is $0.5(0.04)(2,972)(0.3) = 17.8$, which is still well below the 2007–2011 average of annual live captures (22.4).

²⁵ Live captures for public display have depleted other marine mammal stocks, including the now-endangered Southern Resident orcas. *See* AR Doc. 8738 at 10110; AR Doc. 8890 at 13423; 68 Fed. Reg. 31,980, 31,982 (May 29, 2003).

2. Under the International Council for the Exploration of the Sea decision framework, which is within NMFS’s informed discretion to apply as an MMPA permit application review is an informal adjudication, no level of live captures from the likely depleted Sakhalin-Amur stock is sustainable.

As an “additional tool to examine the sustainability of the [beluga whale trade in the Sea of Okhotsk,” AR Doc. 8998 at NMFS used a decision framework for applying a precautionary approach to marine mammal management developed by the International Council for the Exploration of the Sea (“ICES”)—the “world’s oldest intergovernmental marine science organization.”²⁶ The framework reasonably “does not accept the absence of information as a reason for not implementing conservation measures,” as by the time the extent of human-caused mortality could be determined, “populations [of large cetaceans] often had already suffered serious harm.” AR Doc. 8912 at 13712. The framework, used to manage seals in Canada, adopts “decision rules for stock management when the resource reaches clearly stated reference points.” *Id.* For “data-poor” stocks—those with less than three abundance estimates over a 15-year period or no estimate within the past five years—a sustainable level of removals is set using the PBR management scheme, unless a stock is below 30 percent of the “highest accurate historical estimate,” in which case “no harvest should occur.” AR Doc. 8914 at 13748–49.

²⁶ *What Is ICES?*, ICES-USA, http://ices-usa.noaa.gov/what_is_ices.html. The Court may judicially notice this background information on ICES. *Supra* p. 7 n.7.

NMFS applied the ICES framework to this case on the recommendation of its Chief Science Advisor, Dr. Richard Merrick, *see* AR Doc. 9018 at 17725–28, who helped develop the framework, AR Doc. 8914 at 13746, 13751. NMFS found the Sakhalin-Amur stock unequivocally “data poor” under the framework because it has one “recent abundance estimate [of 2,972 animals] from 2010.” AR Doc. 8998 at 17451. NMFS then found that this current abundance is less than 30 percent of the “*lower end* of a highly conservative historical maximum” abundance estimate for the stock of 13,000 to 15,000 animals. *Id.*²⁷ NMFS reasonably found that “[b]ased on the more reliable commercial harvest data, the population had to be **at least** 13,000–15,000 whales during [the commercial hunting] period to support the removal of over 20,000 whales (average 1,000 whales per year for 20 years).”²⁸ *Id.* Thus, NMFS rationally concluded that, under the ICES framework, no level of live captures from the Sakhalin-Amur stock is sustainable. *Id.*²⁹

²⁷ It was not “inherently arbitrary,” *see* Pl.’s Br. at 18, for NMFS to use the minimum abundance estimate, as there is just one recent abundance estimate for the Sakhalin-Amur stock. In addition, the Georgia Aquarium’s preferred abundance estimate of 3,961 animals is still less than 26.5% of a “**highly conservative** historical maximum” abundance estimate of 15,000 animals.

²⁸ Based on this analysis, NMFS reasonably found that the less reliable 1989 historical abundance estimate of 10,000 animals that Georgia Aquarium focuses extensively on, *see* Pl.’s Br. at 19–22, is “below the lower end of an historical maximum.” AR Doc. 8998 at 17452.

²⁹ Georgia Aquarium suggests that NMFS arbitrarily applied the ICES framework because the agency did not provide evidence that the stock is increasing. Pl.’s Br.

Under bedrock principles of administrative law, it was well within NMFS's informed discretion to apply the ICES framework as an independent basis for determining that Georgia Aquarium failed to adequately demonstrate that the trade is sustainable. Under 50 C.F.R. § 216.33(e)(2)(iv), NMFS may consider "[a]ny other information or data . . . deem[ed] relevant" in making a decision on a permit application. Such information reasonably can include an international standard of sustainability developed in part by leading NMFS scientists that incorporates the PBR management scheme and the precautionary principle built into the MMPA. In fact, the framework's "no removal reference point" of 30 percent of historical maximum abundance is based on a recommendation in a 2002 NMFS technical memorandum, *see* AR Doc. 8912 at 13713, 13715, and it "equates with [a] point where [the stock] in the U.S. would be considered depleted," AR Doc. 8914 at 13748. Moreover, NMFS's denial of an import permit application is an informal adjudication, *see supra* p. 18 n.15, and neither the MMPA nor MMPA regulations require the use of a particular framework in demonstrating or determining the consistency of the proposed import with the purposes of the MMPA or 50 C.F.R. § 216.34(a)(4). As such, it is within NMFS's "informed discretion," and consistent with its "case-by-case" consideration of applications submitted under § 1374 of the

at 19. Georgia Aquarium bore such burden under the MMPA, *supra* p. 3–5, and neither the IUCN, IWC, MMC, nor NMFS contend that the stock is increasing.

MMPA, to consider the “particular problem[s]” posed by the beluga whale trade in the Sea of Okhotsk and decide to apply the ICES framework to the Aquarium’s permit application, which, contrary to Georgia Aquarium, Pl.’s Br. at 18, NMFS does not need to first adopt by regulation. *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (agency in an informal adjudication may consider a particular proposal before it and formulate and apply new standards unless there are unreasonable retroactive effects); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 220 (1988).³⁰ This is particularly true given that such applications dealing with the sustainability of wild removals are “so specialized and varying in nature as to be impossible to capture within the boundaries of a general rule.” 332 U.S. at 203.

C. Recent Findings of the International Whaling Commission’s Scientific Committee Further Support a Determination that the Beluga Whale Trade in the Sea of Okhotsk Is Unsustainable.

Finally, recent findings of the IWC’s Scientific Committee, *see supra* p. 14, further support NMFS’s determination that the trade in the Sea of Okhotsk is

³⁰ Application of the ICES framework as an independent tool does not have unreasonable retroactive effects because: (1) the Aquarium’s use of a PBR-based analysis of sustainability for an import permit application was a “case of first impression”; (2) the framework incorporates the PBR management scheme and the precautionary principle built into the MMPA; and (3) the framework was developed by NMFS scientists and based on a NMFS technical memorandum. *See Chenery*, 332 U.S. at 203 (“[e]very case of first impression has a retroactive effect”); *Bowen*, 488 U.S. at 221 (“retroactivity is not only permissible but standard” in adjudications).

unsustainable. Shpak (2013), AR Doc. 9221, considered by the Committee, revealed that live captures from the Sakhalin-Amur stock continue to increase, a concern NMFS cited, AR Doc. 8998 at 17445. In fact, with the 44 live captures in 2012 reported in Shpak (2013), the most recent five-year average of annual live captures from the stock (2008–2012) is 31.2—*above Georgia Aquarium’s PBR level of 30*. AR Doc. 9221 at 21550; *supra* p. 11. This validates NMFS’s concern that Georgia Aquarium’s PBR level lacks an adequate buffer to account for other sources of human-caused mortality.³¹ It is reasonable to assume live captures increased further in 2013 given the “increase in the number of capture operations.” AR Doc. 9221 at 21550. Likewise, based on this increase in the number of capture teams operating “at a single site,” AR Doc. 9165 at 21256, and confirmation that the animals of the stock “demonstrate ‘fine-scale’ site-fidelity,” AR Doc. 9221 at 21550, suspected by the IUCN Panel, the Committee expressed “concerns about localized depletions,” AR Doc. 9165 at 21256, validating this concern by NMFS.

Thus, NMFS lawfully denied the application under 50 C.F.R. § 216.34(a)(4).

³¹ Undercutting Georgia Aquarium’s assertion that there is no subsistence take in the Sakhalin-Amur area, Shpak (2013) reports that in “Priamurye (Sakhalinsky to Udkaya Bay) around 20–30 whales can be taken annually by locals,” and “at present local people of the Shantar region may kill 1–3 belugas per village.” AR Doc. 9221 at 21548. Shpak also reports finding “several corpses,” presumably from such takes. *Id.* Further, “local communities” in the area request quotas for subsistence take and such a quota was issued for 90 animals in 2012. *Id.* at 21549.

II. NMFS LAWFULLY DETERMINED THAT GEORGIA AQUARIUM FAILED TO DEMONSTRATE THAT THE PROPOSED IMPORT IS UNLIKELY TO RESULT IN THE TAKING OF BELUGA WHALES BEYOND THE 18 PROPOSED FOR IMPORT.

Georgia Aquarium “must demonstrate” that the proposed import “will not likely result in the taking of marine mammals . . . beyond those authorized by the permit.” 50 C.F.R. § 216.34(a)(7). NMFS interpreted this criterion as requiring a demonstration that the proposed import will not likely result in replacement takes or contribute to demand for live captures. AR Doc. 8998 at 17424. This interpretation is entitled to *Auer* deference, as it is consistent with the regulation’s intent, prior NMFS decisions, and the MMPA’s structure and purposes. NMFS’s determination that the Aquarium failed to make this demonstration is rational because the Sea of Okhotsk beluga whale trade is ongoing and there is strong and specific demand to capture belugas from the Sakhalin-Amur stock. Recent data presented to the IWC’s Scientific Committee further support this determination.

A. NMFS’s Interpretation of 50 C.F.R. § 216.34(a)(7) as Requiring Georgia Aquarium to Demonstrate that the Proposed Import Is Unlikely to Result in Replacement Takes or Contribute to Demand for Live Captures Is Entitled to *Auer* Deference Because It Is Consistent with the Regulation’s Intent, Prior NMFS Permitting Decisions, and the MMPA’s Structure and Purposes.

NMFS’s determination that Georgia Aquarium failed to demonstrate that the proposed import will be consistent with 50 C.F.R. § 216.34(a)(7) relied on its

interpretation of this criterion as requiring a demonstration that the proposed import will not likely result in “replacement takes” or “contribute to demand” for marine mammals. *See* AR Doc. 8998 at 17424; AR Doc. 8997 at 17415.

NMFS’s interpretation is consistent with its intent and prior import permit application decisions. As NMFS noted in its decision memorandum, AR Doc. 8998 at 17424, in its 1993 proposed revisions to its MMPA regulations, it explained that this criterion requires a showing that “the import . . . is not likely to result in replacement takes or otherwise increase demand for protected species . . . resulting in takes to meet such anticipated demand.” 58 Fed. Reg. at 53,342. In addition, an appendix on “permit application information” to the proposed regulations required an applicant to provide “[a] statement whether taking of protected species will occur in order to replace th[ose] to be imported . . . or whether the proposed import . . . will result in an increased demand for protected species.” *Id.* at 53,364. While the final rule did not include this explanation or appendix, *see* 61 Fed. Reg. at 21,928, 21,936, as NMFS stated in its decision memorandum, the explanation “describes the intent of this criterion and [it] ha[s] applied it as such in past decisions,” AR Doc. 8998 at 17424. In addition, NMFS noted that “[f]or previous imports of beluga whales (from Mexico, Germany, and Canada), the shipping facilities in those countries ha[d] provided assurances that

additional animals would not be acquired as a result of the import.”³² *Id.*; *see, e.g.*, AR Doc. 9030 at 18032 (noting NMFS decision memorandum for an application by Georgia Aquarium to import beluga whales from a Mexican aquarium found significant that the aquarium manager “stated in a letter to [Georgia Aquarium] that the park ha[d] no intentions of acquiring belugas to be housed at the facility”).

NMFS’s interpretation is also consistent with the structure and purposes of the MMPA, as it helps ensure that a stock eventually reaches its OSP level, a fundamental objective of the MMPA. 16 U.S.C. § 1361(6). It also furthers the “congressional decision that denial [or regulation] of import privileges is an effective method of protecting marine mammals in other parts of the world.” *Animal Welfare Inst. v. Kreps*, 561 F.2d 1002, 1010 (D.C. Cir. 1977). It does not “nullify” NMFS’s authority to issue import permits, Compl. ¶ 131, which is *discretionary*, *see* 16 U.S.C. §§ 1371(a)(1), 1374(a). NMFS may, for example, decide to issue a permit to import a wild-caught marine mammal as a “medical rescue,” as when it permitted Georgia Aquarium to import beluga whales from the

³² Georgia Aquarium was aware of NMFS’s interpretation of this criterion before submitting the application at issue, as NMFS in fact granted Georgia Aquarium the permit to import beluga whales from the aquarium in Mexico. *See* 70 Fed. Reg. 59,726, 59,726 (Oct. 13, 2005); 70 Fed. Reg. 38,658, 38,659 (July 5, 2005). In addition, NMFS officials reminded Georgia Aquarium and its counsel before they submitted its application that “[o]ne comment that is predicted [and it would need to address] is the allegation that this will increase the international trade in belugas and encourage additional captures from the wild.” AR Doc. 8938 at 17177.

Mexican aquarium in 2005, *see* AR Doc. 8322 at 9316; AR Doc. 8334 at 9376, or to import captive-bred marine mammals, as when it permitted SeaWorld to import captive-bred beluga whales from Canada in 2006, *see* AR Doc. 8322 at 9317.

Likewise, NMFS's interpretation does not require a foreign sovereign to prohibit live captures, Compl. ¶ 131, but rather requires a *U.S. facility* applying for a *U.S. permit* to: (1) obtain assurances from its private, foreign business partner, that the partner does not plan to capture, or acquire additional wild-caught, marine mammals from the relevant stock because of the proposed import,³³ and (2) analyze whether its proposed import will contribute to demand for live captures from the relevant stock. Because the criterion, as interpreted, regulates "American importing practices," *Kreps*, 561 F.2d 1002 at 1010, i.e., where *U.S. facilities* source marine mammals for import, and NMFS's decision-making process, it does not extraterritorially apply the MMPA. *Stevens v. Premier Cruises*, 215 F.3d 1237, 1242 (11th Cir. 2000) (citing *Env'tl. Def. Fund v. Massey*, 986 F.2d 528, 531 (D.C. Cir. 1993) ("where the significant effects of the regulated conduct are felt outside U.S. borders, the [regulation] itself does not present a problem of extraterritoriality

³³ This requirement is similar to § 1371(a)(3)(A) of the MMPA, which prohibits the granting of a waiver of the moratorium on importation by U.S. facilities "unless [NMFS] certifies that the program for taking marine mammals in the country of origin is consistent with the provisions and policies of th[e] [MMPA]."

[if] the conduct . . . occurs largely within the United States.”).³⁴ Therefore, NMFS’s interpretation of 50 C.F.R. § 216.34(a)(7) is entitled to *Auer* deference.

B. NMFS’s Determination that Georgia Aquarium Failed to Demonstrate that the Proposed Import Is Unlikely to Result in Replacement Takes of Beluga Whales or Contribute to Demand for Beluga Whales Is Rational, as the Sea of Okhotsk Beluga Whale Trade Is Ongoing and there Is Strong International Demand to Capture Sakhalin-Amur Beluga Whales.

NMFS determined that the “requested import will *likely* result” in replacement takes of beluga whales by Utrish Dolphinarium, Ltd., and contribute to demand to capture beluga whales from the Sakhalin-Amur stock for public display. AR Doc. 8997 at 17414 (emphasis added). Georgia Aquarium contends that NMFS “offer[s] no evidence” for this determination. Compl. at ¶ 135–36. Georgia Aquarium, however, *not NMFS*, bears a strict statutory burden to make the required demonstration under this criterion. Regarding the likelihood that the proposed import would result in replacement takes, Georgia Aquarium, unlike with its prior import permit applications, *supra* p. 38, failed to obtain and include in its application assurances from Utrish Dolphinarium, Ltd., that it does not plan to

³⁴ *Mitchell v. United States*, 553 F.2d 996, 997 (5th Cir. 1977) (MMPA’s criminal prohibitions do not reach conduct in the territorial waters of a foreign sovereign), is inapplicable, as it did not consider the MMPA’s regulation of American importing practices. *See id.* at 1004 (noting that congressional committee, concerned with foreign sealing practices, “proposed only a ban on importing the skins,” and did not explicitly “forb[id] Americans from participating in the hunt”).

capture or acquire additional, wild-caught Sakhalin-Amur beluga whales after the proposed import occurs, i.e., replenish its inventory of beluga whales to sell for public display. Despite such a failure, NMFS reasoned that, because “the ongoing, legal marine mammal capture operation in Russia is expected to continue”:

We cannot obtain the assurance that an additional 18 whales would not be captured in the future in place of the 18 whales requested for import. If these 18 beluga whales are not imported to the U.S. they could be made available to public display facilities in other countries and it is possible that 18 fewer beluga whales would be captured.

AR Doc. 8998 at 17424; *accord* AR Doc. 8999 at 17479 (same conclusion).

As Intervenors noted in their comments, “it is indisputable that if the import is allowed this will make more captive space available for new captures.” AR Doc. 8729 at 10086. Utrish Dolphinarium, Ltd., is certain to fill such space, as it has captured and sold Sakhalin-Amur beluga whales to supply oceanaria since 1989, AR Doc. 8915 at 13784; *see* AR Doc. 8322 at 9366 (company “is becoming the number one exporter of [w]ild [c]aught [c]etaceans in the [w]orld”), and, according to the MMC, the strong international demand to capture animals from this stock “almost certainly will continue through the foreseeable future,” AR Doc. 8730 at 10098; *see Mosbacher*, 799 F. Supp. at 177 n.7 (finding the potential for entities to “export their whales elsewhere [would cause a] diminution in demand”). In fact, Utrish Dolphinarium Ltd.’s Director, Dr. Lev Mukhametov, AR Doc. 8927

at 14292, represented to this Court that, if the proposed import does not occur, “[m]ost likely, these beluga whales will be sold to the [o]ceanariums of China,” ECF No. 20-2, an admission that the import will likely result in the acquisition of freshly captured Sakhalin-Amur beluga whales to sell to interested buyers.³⁵

Likewise, Georgia Aquarium’s application ignores the likelihood that the proposed import would contribute to specific demand to capture Sakhalin-Amur beluga whales for public display beyond replacement takes. Again, the record clearly supports NMFS’s determination that it would have such an effect. NMFS recognized that this proposed import “is the closest thing to a ‘live-capture’ that [it] has processed in decades,” and that issuing the permit would provide U.S. support for “a live-capture business and . . . begin[] to shift the nature of public display requests from the last 20 years of avoiding collections from the wild.” AR Doc. 8979 at 17320. With this shift, and the U.S. “becom[ing] a party to an . . . unsustainable trade that is sending young belugas to China, Egypt, Iran and other destinations that have little to no expertise in maintaining captive belugas,” as comments argued, “[c]apture operators in [Russia] would perceive an incentive to

³⁵ Contrary to the Aquarium, Pl.’s Br. at 34, future applications to import belugas are likely, given the failed “five decades of effort by the public display industry to make its beluga collection self-sustaining,” AR Doc. 8322 at 9324. Indeed, “captive belugas experience *at best* life history trajectories that match . . . those of [wild] belugas” and “it is plausible . . . that captive belugas lead less healthy lives.” AR Doc. 8722 at 9978 (comment of 29 marine mammal scientists in opposition).

capture additional animals,” because the “United States [is] seen as having minimal corruption within its environmental agencies and strong environmental laws” protecting marine mammals. AR Doc. 8750 at 9317; AR Doc. 6067 at 6620.

Finally, recent data in the record, presented in 2013 to the IWC’s Scientific Committee by the researcher co-funded by Georgia Aquarium, further supports NMFS’s determination regarding replacement takes and increased demand. Shpak (2013) reports that during the summer of 2012 when Georgia Aquarium submitted its application, the Marchenko live-capture operation captured 44 beluga whales from the Sakhalin-Amur stock, **the most in the past decade**, continuing the trend of increasing live captures. AR Doc. 9221 at 21550. It also reveals that during this period, the number of entities applying to the Russian government for capture permits for 2013 increased to 14 (from three to five in previous years), which “has led to [an] increase in the number of capture operations” for the first time from one to three. *Id.* The sharp increases in live captures, entities applying for capture permits for 2013, and capture teams, during the period when the Aquarium aggressively pursued the proposed import, is not coincidental. It indicates that the proposed import is encouraging other aquariums to acquire Sakhalin-Amur beluga whales and Russian entities involved or interested in the trade to “perceive [and act on] an incentive to capture additional animals.” AR Doc. 8750 at 9317. Thus,

NMFS's determination that the Aquarium failed to demonstrate that the proposed import will be consistent with 50 C.F.R. § 216.34(a)(7) is not arbitrary.

III. NMFS LAWFULLY DETERMINED THAT GEORGIA AQUARIUM FAILED TO DEMONSTRATE THAT FIVE BELUGA WHALES CAPTURED IN 2010 WERE NOT NURSING WHEN TAKEN.

Georgia Aquarium had to demonstrate that none of the animals were nursing when captured. 16 U.S.C. § 1372(b)(2). NMFS interpreted § 1372(b)(2) as restricting imports to animals taken after the age at which a member of the species is likely fully independent from its mother. AR Doc. 8998 at 17426. This interpretation is entitled to *Chevron* deference, as it is consistent with, and a practical implementation of, the MMPA's categorical and unqualified nursing prohibition. The determination that the Aquarium failed to demonstrate that five beluga whales captured in 2010 were not nursing when captured is rational, as the Aquarium estimated their ages at collection as 1.5 years old, an age at which calves are likely still dependent. Its age estimates also may be inaccurate and overstated.

A. NMFS's Interpretation of 16 U.S.C. § 1372(b)(2) as Restricting the Import of Marine Mammals to Animals Taken After the Age at Which a Member of the Species Is Likely Fully Independent from Its Mother Is Entitled to *Chevron* Deference Because It Is Consistent with, and a Practical Implementation of, the MMPA's Categorical and Unqualified Nursing Prohibition.

In its decision memorandum, NMFS stated that it had to "consider whether . . . nursing in th[e] context [of § 1372(b)(2)] means a calf is fully dependent on its

mother for survival, or if it is a broader concept in that while the calf is in the process of becoming independent, it is still occasionally nursing.” AR Doc. 8998 at 17225. NMFS interpreted § 1372(b)(2) as restricting the import of marine mammals to animals taken after the age at which a member of the species is likely fully independent from its mother. *See* AR Doc. 8998 at 17426. To determine whether, under the *Chevron* framework’s first step, Congress has “directly spoken to the precise question at issue,” *Chevron*, 467 U.S. at 842, a court must use “traditional tools of statutory construction” and examine the language, context, and purpose of the provision, and the legislative history, *id.* at 859–64.

In *Kreps*, 561 F.2d 1002 at 1011, *cert. denied*, 434 U.S. 1013, the D.C. Circuit reviewed a prior NMFS interpretation of the nursing prohibition that drew a distinction between “obligatory nursing,” i.e., “nursing which is obligatory for the physical health and survival of the nursing animal,” and “convenience nursing,” i.e., all other nursing, as a basis to “allow more importation of seals.” *Id.*³⁶ Examining the language, context, and purpose of the prohibition and the legislative history, the court rejected the distinction as contrary to the “plain” language of the nursing prohibition, noting that it is “categorical [and] unqualified.” *Id.* It also noted that because, based on the legislative history, “nursing seems to have been

³⁶ The MMC characterized this distinction as an “empty one” with “no rational scientific basis.” 40 Fed. Reg. 17845, 17846 (Apr. 23, 1975).

used as a measure of infancy, of vulnerability and helplessness” to respond to “emotional concerns” about “cruel” treatment, “there is clearly no justification for [any] technical distinction between obligatory and convenience nursing.” *Id.*³⁷

Section 1372(b)(2) does not directly speak to how a permit applicant is to demonstrate or NMFS is to determine whether a marine mammal was nursing when captured. Here, NMFS’s interpretation of § 1372(b)(2) relies on a comparison of a marine mammal’s estimated age at collection with the age at which a member of the species is likely fully independent from its mother. This interpretation is consistent with the categorical and unqualified nursing prohibition because it affords protection to animals that were convenience nursing when captured. Reliance on the age at which a member of a species is likely fully independent is also a practical implementation of the nursing prohibition because, as NMFS stated in its decision memorandum, “[i]t is difficult to visually determine when an animal is fully independent if it is still nursing to some extent.” AR Doc. 8998 at 17426. In addition, “only animals in human care can be observed for a definite termination of when mother-calf dependency ends.” *Id.* In *Kreps*, the D.C. Circuit stated that NMFS could use an “undisputed” date or age by which

³⁷ Even if *Kreps* upheld the prior NMFS interpretation, NMFS did not adopt it by regulation and thus may lawfully reject the prior policy. *Nat’l Cable & Telecomm. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (“if the agency adequately explains the reasons for a reversal of policy, change is not invaliding”).

juvenile members of a species “cease all nursing” as “a workable, standard method of applying the [nursing prohibition].” 561 F.2d at 1011. While reliance on the age at which a member of a species is *likely* fully independent may allow the import of the rare dependent calf, *Kreps* suggested that NMFS could, “as a practical matter,” lawfully use or “fix a date [or age] which allows importation of a few nursing [marine mammals],” *id.* at 1011 n.60. Thus, NMFS’s interpretation of § 1372(b)(2) is entitled to *Chevron* deference because it is consistent with, and a practical implementation of, the categorical and unqualified nursing prohibition.

B. NMFS’s Determination that Georgia Aquarium Failed to Demonstrate that Five of the Beluga Whales Captured in 2010 Were Not Nursing When Taken Is Rational, as Georgia Aquarium Estimated Their Ages at Collection as 1.5 Years Old, an Age at Which Beluga Whales Are Likely Not Fully Independent, and Its Estimates May Be Inaccurate or Overstated.

In its application, Georgia Aquarium estimated that five of the beluga whales captured in 2010 were 1.5 years old when taken. AR Doc. 8927 at 14286. Georgia Aquarium provided these ages as point estimates, *not* the “bottom of [a] range.” AR Doc. 8998 at 17426. Georgia Aquarium stated that it estimated the ages using “standard methodologies,” including “morphometrics (length, girth, fluke sizes), skin color, tooth emergence, and behavior.” AR Doc. 8931 at 14676. Under its interpretation of § 1372(b)(2), NMFS compared Georgia Aquarium’s own estimated age at collection for these five beluga whales to the age at which a

beluga whale calf is likely fully independent from its mother. NMFS found that “calves are nursed for two years and may continue to associate with their mothers for a considerable time thereafter,” and, thus, “[a]t 1.5 years of age, beluga whale calves are likely not independent from their mothers.” AR Doc. 8998 at 17426. These findings are unequivocally supported by the scientific publications cited by NMFS in its decision memorandum,³⁸ *see id.*, in Intervenor’s comments, *see* AR Doc. 8750 at 9321 (“belugas are dependent on their mothers for up to two years in the wild”), and in Georgia Aquarium’s *own application*, *see* AR Doc. 8934 at 15950 (“disassociation of calves and mothers [is] at about two years old”).³⁹

As NMFS noted, this determination is also supported by serious “questions about the accuracy of [Georgia Aquarium’s] estimated ages at collection.” *Id.* at 17427. In its application, for eight animals, including two of the five youngest, the estimated ages “on January 1, 2012” were greater by a full year from those in a

³⁸ *See* AR Doc. 8998 at 17426 (citing AR Doc. 8923 at 13915 (“[y]oung [b]elugas are nursed for two years and may continue to associate with their mothers for a considerable time thereafter”; co-authored by lead member of IUCN Panel); AR Doc. 8917 at 13830 (“Calves are completely dependent on nursing for a year, supplement mother’s milk during the second year with food caught by hunting, and are weaned at age 2.”); AR Doc. 9219 at 21510 (“Belukha calves may suckle for one to two years. Weaning is a gradual process. Because they are toothless for the first year, young belukhas are . . . restricted to feeding on . . . small animals.”)).

³⁹ Georgia Aquarium argues that visual inspections before the captures reported no mother-calf pairs, Pl.’s Br. at 44, yet such confirmation through visual inspection is unreliable, *supra* p. 46, and Georgia Aquarium does not deny the possibility that mothers of the five juvenile beluga whales were nearby during the captures.

draft application submitted on March 7, 2012. *Compare id.*, with AR Doc. 8925 at 13961. This “would mean that in 2010 (at time of capture) they were approximately one year old.” AR Doc. 8998 at 17426. When asked to explain the increase, the Aquarium claimed it made “typographical errors.” AR Doc. 8931 at 14676. The application does not state who took the measurements, whether they used them to estimate ages at collection, and whether anyone took measurements at the time of taking. Thus, it is unclear whether the Aquarium estimated ages at the time of capture, or simply back calculated from the January 1, 2012 measurements, casting additional doubt on the accuracy of Georgia Aquarium’s estimated ages.

Moreover, Georgia Aquarium’s estimated ages may be overstated. A beluga whale’s age can be estimated based on its body length using a growth curve formula, AR Doc. 8934 at 15980, which varies between stocks. *See id.* at 15995–99, 16008. Applying this formula using constants for Chukchi Sea beluga whales,⁴⁰ *id.* at 16008, and estimated lengths in the application, produces lower estimated ages as of January 1, 2012 than those stated in the application for four of the five youngest beluga whales captured in August or September 2010. Table 2. Likewise, the “length of disassociation of calves and mothers [for Chukchi beluga

⁴⁰ The record does not contain constants for Sea of Okhotsk beluga whales. Application of constants for Chukchi Sea beluga whales is conservative, as beluga whales “from . . . the Sea of Okhotsk are the longest [and] those from northwestern Alaska [Chukchi Sea] are of intermediate length.” AR Doc. 8934 at 15997.

whales is] about [2.46 m],” *id.* at 15950, which is greater than or close to the length of the five beluga whales on January 1, 2012, about 1.33 years *after* their capture.

Table 2. Five Youngest Beluga Whales, Captured in Aug. or Sept. 2010.⁴¹

ID No.	Sex	Est. Weight	Est. Length on Jan. 1, 2012	Appl. Est. Age on Jan. 1, 2012	Draft Appl. Est. Age on Jan. 1, 2012	Appl. Est. Age at Capture	Formula Est. Age on Jan. 1, 2012
1/10	M	250 kg	2.66 m	3.5 years	2.5 years	1.5 years	2.61 years
2/10	M	310 kg	2.62 m	3.5 years	3.5 years	1.5 years	2.23 years
3/10	M	360 kg	2.73 m	3.5 years	3.5 years	1.5 years	3.28 years
7/10	M	350 kg	2.74 m	3.5 years	3.5 years	1.5 years	3.38 years
9/10	F	180 kg	2.40 m	3.5 years	2.5 years	1.5 years	2.08 years

Thus, NMFS rationally and lawfully determined that Plaintiff failed to demonstrate that five of the animals captured in 2010 were not nursing when taken.

CONCLUSION

As a matter of law, NMFS rationally and lawfully denied the application.⁴²

⁴¹ AR Doc. 8927 at 14286; AR Doc. 8925 at 13961.

⁴² If the Court finds for Georgia Aquarium, the appropriate and “ordinary” remedy is to vacate the permitting decision and remand it to NMFS. *Sierra Club v. Van’Antwerp*, 526 F.3d 1353, 1369 (11th Cir. 2008) (Kravitch, J., concurring in relevant part). The Court should not order issuance of the permit under the mandamus statute, 28 U.S.C. § 1361, as Georgia Aquarium requests, Compl. ¶ 14, p. 63, because: (1) the MMPA commits issuance of the permit to the discretion of NMFS, 16 U.S.C. § 1374(a); *see In re Polar Bear*, 818 F. Supp. 2d at 258 n.14 (MMPA authorizes issuance of permits under § 1374(a) “on a case-by-case basis”); (2) there is no “indisputable right to relief”; and (3) there is no showing of “compelling equitable grounds for mandamus to issue.” *Weber v. U.S. Dep’t of State*, 885 F. Supp. 2d 46, 52 (D.D.C. 2012) (finding plaintiff not entitled to mandamus relief directing agency to issue a loss of nationality certification).

Respectfully submitted,

Date: **March 16, 2015**

s/ Tyler J. Sniff, Esq.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 5.1 of the U.S. District Court for the Northern District of Georgia, I hereby certify that the foregoing has been prepared with Times New Roman 14-point font, double-spaced, with a top margin of not less than 1.5 inches and a left margin of not less than 1.0 inch.

Date: **March 16, 2015**

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CERTIFICATE OF SERVICE

I, Tyler J. Sniff, hereby certify that on the date indicated below I electronically filed the foregoing with the Clerk of the Court for filing and uploading to the CM/ECF system, which will automatically send e-mail notification of such filing to the following attorneys of record:

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