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ANIMAL LAW COMMITTEE

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March 25, 2014

Public Comments Processing  
Attn: NOAA-NMFS-2013-0056

Protected Resource Division  
National Marine Fisheries Service  
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U.S. Fish and Wildlife Service  
4401 N. Fairfax Drive  
MS 2042-PDM  
Arlington, VA 22203

**RE: Docket # NOAA-NMFS-2013-0056-1841**

The Committee on Animal Law of the New York City Bar Association (the “Committee”) respectfully submits this response to the request in Federal Register 2014-01506 (January 27, 2014) for comments to the proposal to include the killer whale “Lolita” as a protected member of the endangered Southern Resident killer whale Distinct Population Segment (“DPS”) under the

Endangered Species Act of 1973 (the “Act”).

The New York City Bar Association is an independent non-governmental organization of more than 24,000 legal professionals, predominantly from New York City and also from throughout the United States and fifty other countries. The Committee is the first committee of its kind in the country and has a history of supporting federal, state, and local anti-cruelty legislation. When warranted, our Committee takes positions on various issues of concern involving the Endangered Species Act of 1973.<sup>1</sup>

### Recommendation

The Committee recommends that the killer whale “Lolita” be included as a protected member of the endangered Southern Resident killer whale DPS and that the regulatory language of the Act regarding listing of the DPS be amended by removing the exclusion of captive members of the population.

#### **A. The killer whale “Lolita” should be a protected member of the endangered Southern Resident killer whale DPS as the Act does not provide for separate legal status of captive and wild members of a population.**

According to the Act, the term “species” “includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature” (section 3 (16)). As noted by the U.S. Fish and Wildlife Service, “there is no evidence that Congress intended for the agency to use the authority to separately list groups of animals that have been artificially separated from other members of the species through human removal from the wild and maintenance in a controlled environment.”<sup>2</sup>

Giving separate legal status under the Act to captive members of a threatened or endangered population on the basis of their captive state, thereby resulting in inconsistent protection of captive members as compared to their wild counterparts, is inconsistent with the Act’s purpose of conserving endangered and threatened species (section 2(b)). The three purposes<sup>3</sup> listed in section 2(b) are intended to have independent meaning. The first purpose of the Act is to provide a means for conservation of ecosystems upon which endangered and threatened species depend. Although this purpose refers to the ecosystems (*i.e.*, habitats) within which a species has evolved it does not indicate that it is limited to native ecosystems. The second purpose provides for programs for the conservation of endangered and threatened species. The language refers to “species” and makes no distinction between specimens located in the wild and those held in captivity. The treaties and conventions under the third purpose are expressly those listed in

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<sup>1</sup> See, *e.g.*, Letter to the U.S. Fish and Wildlife Service regarding a proposal to remove the Gray Wolf for the list of Endangered and Threatened Wildlife under the Endangered Species Act of 1973 (October 2013), available at <http://www2.nycbar.org/pdf/report/uploads/20072582-CommentonGrayWolf.pdf> (last visited February 15, 2014), and Letter to the U.S. Fish and Wildlife Service urging the African Lion be added as an Endangered species under the Endangered Species Act of 1973 (January 2013), available at <http://www2.nycbar.org/pdf/report/uploads/20072384-CommentsreAfricanLionasEndangeredSpecies.pdf> (last visited Mar. 13, 2014).

<sup>2</sup> 78 FR 33790, June 5, 2013, available at <https://federalregister.gov/a/2013-13268> (last visited 6 March 2014).

<sup>3</sup> The full purposes of the Act, stated in section 2(b), are “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved [hereafter referred to as the first purpose], to provide a program for the conservation of such endangered species and threatened species [hereafter referred to as the second purpose], and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section [hereafter referred to as the third purpose]”.

section 2(a)(4) of the Act, all of which are for the protection of wildlife and plants, and none of which is limited to protection of endangered or threatened specimens in the wild.

**B. Separate legal status of captive and wild members of a population under the Act has been deemed impermissible.**

In the U.S. Fish and Wildlife Service 12-month finding on the petition to classify both wild and captive chimpanzees as endangered, the Service determined that providing separate legal status to captive specimens of listed species is not permissible under the Act.<sup>4</sup> Moreover, in *Alsea Valley Alliance v. Evans*,<sup>5</sup> the United States District Court for the District of Oregon, set aside the National Marine Fisheries Service (“NMFS”) 1998 listing of Oregon Coast coho salmon under the Act. The Court found NMFS’s listing decision invalid because it excluded hatchery populations (fish held in captivity) even though they were part of the same DPS (or evolutionary significant unit (ESU)). The Court held that “Congress expressly limited the Secretary’s ability to make listing distinctions below that of subspecies or a DPS of a species”. NMFS subsequently changed its Hatchery Policy in 2005, stating that all hatchery fish that qualify as members of the ESU would be considered in determining whether the ESU should be listed as endangered or threatened, and would be included in any listing under the Act.<sup>6</sup>

**C. Separate legal status of captive and wild members of a population under the Act can negatively impact endangered and threatened specimens.**

As long as captive members such as “Lolita” are not protected under the Act, there is no restriction or regulation on the taking, sale, import, export, or transport in the course of commercial activities in interstate or foreign commerce by persons subject to U.S. jurisdiction. This provides for a legal U.S. market in captive members of endangered or threatened species, operating in parallel to any illegal U.S. market in wild specimens.

Separate legal status under the Act could also lead to an increased take of animals from the wild and illegal transfer of wild animals into captivity. There would be an increased incentive for smugglers and poachers to take animals from the wild to captive facilities, as once in captivity, there would be no restrictions on the use of the animal or its offspring.

Conclusion

The text of the Act does not allow a captive member of a population to be assigned different legal status from their wild counterparts at the time of listing. The Southern Resident killer whale DPS was listed as endangered on November 18, 2005, at which time Lolita was the only living member of that DPS (L pod) not listed as she was living in captivity.

The exclusion of captive members impact endangered and threatened specimens, and, as such, an interpretation allowing for separate legal status creates a loophole in the law that is inconsistent with the intent of the law and its implementation in other cases.

Based on the foregoing reasons, we recommend that killer whale “Lolita” be included as a protected member of the endangered Southern Resident killer whale DPS and that the regulatory

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<sup>4</sup> 78 FR 35202, June 12, 2013, available at <http://www.fws.gov/policy/library/2013/2013-14007.pdf> (last visited March 1, 2014).

<sup>5</sup> 161 F. Supp. 2d 1154 (D. Or. 2001).

<sup>6</sup> 70 FR 37204 of June 28, 2005, available at <http://www.nmfs.noaa.gov/pr/pdfs/fr/fr70-37204.pdf> (last visited on March 6, 2014).

language of the Act regarding listing of the DPS be amended by removing the exclusion of captive members of the population.

Sincerely,

A handwritten signature in cursive script, appearing to read "C. Mott".

Christine Mott