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October 17, 2016

To: Secretary of Commerce Penny Pritzger
TheSec@DOC.gov

C.C. Ann M. Garrett

<Ann.Garrett@NOAA.gov>

Re: Extension of Time to Comment on NOAA Proposed Rule to prohibit Humans swimming with Dolphins. Docket Number: NOAA-2005-0226-0002

Dear Secretary Pritzger:

I am writing to encourage the Department of Interior to extend the time to comment in the above-referenced Docket. The current deadline for comments is October 23.

There are numerous reasons that this extension of time should be granted.

1. The Draft Environmental Impact Statement and Regulatory Impact Review issued in August 2016 is detailed and voluminous. Reviewing and understanding the document is time consuming for those who wish to comment in an informed manner.
2. Some issues are emerging that were not immediately obvious. One very significant issue is the question whether NOAA is attempting to amend the Marine Mammal Protection Act, an authority that rests with the Congress under the Separation of Powers.

The Marine Mammal Protection Act prohibits harassment of marine mammals.

Harassment – Amending the MMAP.

Under the 1994 Amendments to the MMPA, harassment is statutorily defined as, any act of pursuit, torment, or annoyance which—

(Level A Harassment) has the potential to injure a marine mammal or marine mammal stock in the wild; or,

(Level B Harassment) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering but which does not have the potential to injure a marine mammal or marine mammal stock in the wild.

(emphasis added).

There are thus two components to the MMPA: (1) the predicate actions that trigger the statute and (2) the impacts of those actions on the Dolphins. A violation of the act must involve the commission one of the predicate acts. Otherwise, a perfectly innocent act could be treated as a violation, if that act caused a change in behavior on the part of the Dolphins. As an example, if I put on scuba gear and sat on the floor of a bay where Dolphins were present and the Dolphins changed their behavior to come investigate my bubbles, that cannot be treated as a violation of the MMPA.

NOAA is proposing regulations to stop people from swimming with Dolphins relying upon the Marine Mammal Protection Act for the agency's authority to adopt such a regulation. While the no action alternative is included as statutorily required, NOAA's preferred option intends to prohibit a Human from being within 50 yards of a Dolphin. That prohibition would, therefore, be intended to prevent people from swimming with Dolphins;

As noted above, the MMPA requires a predicate act that constitutes "pursuit, torment, or annoyance." These are all predicate acts that demonstrate a negative intent on the part of the Human.

A Human swimming peacefully with Dolphins is not engaged in pursuit, torment, or annoyance. That is particularly true when the Dolphins approach the swimmer to initiate contact. That is even truer when a swimmer once engaged by a Dolphin is following the guidelines adopted generally throughout the Dolphinville community.

The following protocols appear on the website of Joan Ocean, one of the pioneers in establishing a Dolphin/Human connection.

The way we interact with dolphins is to become like a dolphin when entering the water. This means mimicking their behavior. ~~~If for example, they are joyful and playful, we laugh, dive and somersault with them. If they are quiet, we are meditative and slow with them. Then we do not dive right above them or startle them in any way. We let them approach us and softly swim among us. We swim in the same direction, never cutting directly toward them, but becoming a member of the pod and turning and diving slowly and evenly whenever they do. Very deep communications occur.

The dolphins do not want you to touch them. If you reach out they swim away. To keep them close to you, swim with your arms at your sides and propel yourself along by kicking your fins only. Mimicking their sounds is recommended. They appreciate your attempts to talk to them in their language.

When we leave the coastline by boat to meet the dolphins in the deep blue, we acknowledge the dolphins as the masters of the seas and we follow their lead. We enter the water when they have brought us to a safe bay or place in the ocean. When they are ready for us to swim among them, they mill around the boat, waiting for us.

<http://www.joanocean.com/Seminars.html>

NOAA is now proposing to ban such activities and impose a large fine and possibly criminal charges on anyone engaged in such activities.

What NOAA is attempting to do is amend the Marine Mammal Protection Act to include peaceful swimming with Dolphins within the predicate acts specified in the statute as "pursuit, torment, and annoyance." The swimming actions noted above lack any negative intent on the part of the swimmer. To include such swimming as a predicate act under the MMPA is to include a turtle (peaceful swimming) in the category of sharks (pursuit, torment, and annoyance). Swimming does not fit and the statute does not cover such activity.

NOAA does not have the authority to amend the statute to include an act that is not covered already by the statute. Such an *ultra vires* amendment is constitutionally a violation of the Separation of Powers.

With this issue having surfaced in the discussions generated by the NOAA proposal, there is a need to review the DEIS again to determine where, if at all, the NOAA proposal made the attempt to amend the MMPA and how that attempt was justified.

3. One area of significant concern in the community is the economic impact of the NOAA proposal. The research conducted by NOAA to date is totally inadequate and unsupported. There are people within the community who are attempting to answer that inquiry more comprehensively, who need more time to complete their analysis.

4. Speaking of people within the community, the NOAA proposed rule has generated a great deal of community interest and involvement. Coming out of the two NOAA hearings on the Island of Hawai'i, members of the community arranged a facilitated community meeting to discuss optional approaches to the NOAA heavy hand.

On October 15, fifty-two people showed up to engage in the process. A very productive discussion ensued. Everyone agreed that at least a second meeting should be organized, which will probably be scheduled in mid-November. These discussions are surfacing observations and creative initiatives that could well benefit the NOAA review process. The comment period should be extended to allow incorporation of whatever the facilitated meetings develop.

5. Boat captains are now going back years into their logs to pull together information that may fill some of the many data gaps in the NOAA presentation. As a general observation, the DEIS is filled with conclusions that are qualified with "may" or "might" or similar terms because the available data is not sufficient to reach any definitive conclusion, e.g. have the number of Dolphin in the affected areas increased or decreased over time. There are numerous comments already filed that address the deficiencies of the scientific data. The boat captains need more time to gather and analyze their data.

As an observation, the fact that NOAA did not go to the boat captains in the first place to determine whether they had useful data is a serious deficiency in the process. Relying on observers on land or in boats for a limited period of time and ignoring those who are with the Dolphins day in and day out gathering data from people in the water was a serious omission.

6. Evidence is surfacing that the research by NOAA was, in part, funded by Dolphin Quest, a facility that specializes in captive Dolphins. This business had a competing interest in that prohibiting Humans from swimming with wild Dolphins may send those who want the Dolphin contact experience to Dolphin Quest.

There is also the more fundamental question about why capturing wild Dolphins and sending them to live in small tanks to be trained to entertain Humans is an acceptable practice under the MMPA. We call it the Dolphin Slave Trade and question the sincerity of NOAA's claim to want to protect Dolphins, while leaving imprisoned Dolphins in the hands of those who exploit them. At least Dolphins in the wild have the option of moving away, if they do not want Human contact.

Of course, our community is well aware of NOAA/NMFS granting permits to the Navy to "take" millions of sea creatures, including Whales and Dolphins. We understand that the push to stop Humans from swimming with Dolphins is one means of rehabilitating NOAA's and NMFS's reputation, i.e. they can portray themselves as Dolphin protectors, go on National Public Radio to achieve their public relations goals, and otherwise reposition the agency as something other than the enabler of the Dolphin Slave

Trade and something less than the terror of the oceans (or at least the granter of permits to the terror of the oceans, i.e. the U.S. Navy).

Getting accurate data on the Dolphin Quest-NOAA connection requires more time.

The Dolphin Quest funding is not the only information surfacing about potential conflicts of interest that may have taken place in violation of federal guidelines for research. We are still investigating that subject.

7. There is very limited or no information available in the DEIS on research results from islands other than the Island of Hawai'i. There are people trying to gather such information to include in comments. They, too, need more time.

Based on the good cause shown above, I trust that you will encourage your staff to grant more time for those truly seeking to protect the Dolphins to provide input to the comment process.

Mahalo,

A handwritten signature in black ink, reading "Lanny Seukin". The signature is written in a cursive style with a large, looping initial "L".