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June 30, 1999

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**RE: Docket No. 93-076-13**

To whom it may concern:

On behalf of the more than 7.5 million members and constituents of The Humane Society of the United States (HSUS) and Earth Island Institute (EII), I am submitting comments in reference to Docket No. 93-076-13, reconsideration of final rule and suspension of enforcement of swim-with-the-dolphin (SWTD) program regulations (64 FR 15918, April 2, 1999).

The HSUS and EII strongly object to the suspension of enforcement of the final rule governing SWTD programs (63 FR 47128, September 4, 1998). Given the publication (63 FR 55012, October 14, 1998) of a modification to the final rule to exclude wading programs from the SWTD program regulations' space and human participant/attendant ratio requirements, The HSUS and EII fail to see the need to suspend the SWTD program regulations, in their entirety and for all interactive programs, for the reasons stated in 64 FR 15918.

The HSUS and EII consider the rationale for suspending enforcement of the final rule in its entirety to be questionable at best. The supplementary information, as published in 64 FR 15918, which states that APHIS' intention to include wading programs was ambiguous, seems disingenuous given the clear language of the proposed rule and the ample opportunity that interactive program operators had to communicate with APHIS to clarify the agency's intent. Indeed, the proposed rule (60 FR 4383, January 23, 1995) offered only two exclusions to the definition of "swim-with-the-dolphins SWTD program" [sic] - feeding and petting pools and minor segments of educational shows. *All* other human/dolphin interactions where a member of the public enters the primary enclosure were included in the definition, which clearly would include wading/shallow water interactive programs.

In addition, the final rule clearly stated, in §1.1, definition of terms, that "Swim-with-the-dolphin (SWTD) program means any human-cetacean interactive program" which includes, but such inclusion is not limited to "*wading, swimming, snorkeling, or scuba-diving...*" (emphasis added; p. 47148). However, given that wading program operators apparently were confused and failed to take advantage of their opportunity to participate in the rule-making process, APHIS' notice to exclude wading programs (63 FR 55012, October 14, 1998) sufficiently addressed this situation. It exempted wading programs from all space and human participant/attendant ratio requirements under the rule, allowing wading program operators to make their views known to APHIS and allowing APHIS to clarify its intent and reconsider wading program regulations. We see absolutely no basis or justification for suspending enforcement of the final rule for *all* interactive programs, especially those programs that are clearly *swim-with-the-dolphin* programs under any definition.

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The notice of reconsideration in 64 FR 15918 states, in its Supplementary Information, that APHIS “was made aware of concerns” expressed by SWTD program operators regarding the personnel and veterinarian requirements and interactive session time limits outlined in the final rule. APHIS does not indicate that there was any misunderstanding among standard SWTD program operators regarding their inclusion in the scope of the rule; therefore, as a procedural matter, SWTD program operators were provided ample opportunity to submit comments on all issues covered in the draft rule, including those listed above. While it is perhaps unsurprising that these operators expressed subsequent concerns regarding the restrictions and standards contained in the final rule, they are nevertheless subject to them, having been provided with more than adequate opportunity, as required under the Administrative Procedures Act, to participate in the rule-making process.

The HSUS and EII believe that the rationale behind this notice of reconsideration and suspension of enforcement has already been addressed by the notice published in 63 FR 55012. If the confusion and ambiguity of the original final rule lies in whether or not it includes in its scope wading and/or shallow water interactive programs, then the October 14, 1998 modification of applicability adequately addresses the situation. If wading/shallow water interactive program operators still have concerns about the rest of the regulations, then APHIS can take a far less drastic step and simply suspend enforcement of the regulations for these specific programs. There is no logical reason to suspend enforcement for those programs that are clearly *swim-with-the-dolphin* programs, where the participants enter the enclosure, are buoyant, and are capable of moving with the dolphins.

In response to the questions posed, The HSUS and EII offer the following responses:

1. Based on past and present experience with human/marine mammal interactive programs, is there a need to have regulations specific to these programs under the Animal Welfare Act?

APHIS provided, in its publication of the final rule (63 FR 47128), ample justification for developing and publishing specific regulations for SWTD programs. APHIS stated that it “consider[s] the special circumstances of SWTD programs, both for the cetaceans involved and the people who participate in them, to require specific regulatory language. The regulations promulgated in this final rule address the humane care and maintenance of marine mammals used in these specialized programs, and we consider them necessary to ensure the marine mammals’ continued well-being” (p. 47129). Given the veterinary expertise of APHIS officials, The HSUS and EII fail to see the need to question this conclusion.

Presumably APHIS (and the National Marine Fisheries Service prior to the 1994 re-authorization of the Marine Mammal Protection Act) gave careful consideration to this question and came to the conclusion that the answer was “yes.” Revisiting this question with the regulated parties is not only unnecessary, but ill-conceived. Undoubtedly regulated parties tend to believe that they do not need to be regulated, but reality clearly demonstrates that, in many situations, regulation is very necessary. APHIS regulations address *minimum* standards; they are not for the state-of-the-art, best-funded operators, but for everyone else. Given the potential for untrained, inexperienced members of the public to be injured by SWTD program dolphins and for dolphins to be harassed and even injured in turn by members of the public, The HSUS and EII feel it is imperative for SWTD programs to have specific and specialized regulations above and beyond the minimum standards for care and maintenance. APHIS apparently agrees with us; the matter should be closed.

2. Should shallow water interactive programs be regulated in the same way as other regulated interactive programs?

The HSUS and EII follow the logic that shallow water interactive programs, where participants stand in shallow water and do not become buoyant, do not require the same space in the enclosure (that is, do not require both a buffer and a sanctuary area) nor the same human participant/attendant ratio as do true swim-with-the-dolphin programs. Given that the dolphins need merely swim into deeper water to avoid contact with human participants, who cannot follow dolphins around the enclosure, requiring an

additional buffer area or additional attendants could arguably be dispensed with. However, we do not see any rationale for requiring differing veterinary, record-keeping, or reporting requirements, differing staff experience, or differing interactive session time limits. Human participants still interact with dolphins to a much greater extent in wading/shallow water interactive programs than in feeding and petting pool interactions or in minor segments of an educational show (note: The HSUS and EII believe very strongly that feeding and petting pools require additional regulations beyond the minimum standards for care and maintenance). The potential exposure of dolphins to human-transmitted disease is similar in both types of programs. The potential for injury to humans and for stress to dolphins is still significant. The HSUS and EII strongly recommend against the establishment of differing regulations for anything other than space and human participant/attendant ratio requirements for wading/ shallow water interactive programs.

3. How much space (length, width, and depth) is needed in the interactive area for shallow water interactive programs? Is there a need for deeper water somewhere in the interactive area?

The area in the enclosure in which interactions occur (if it is the animals' primary enclosure) that can exclude wading human participants should be equal to or exceed the standard minimum space requirements (including depth) under the Animal Welfare Act (AWA). If it is not the primary enclosure, then access to the primary enclosure must be free and unrestricted for the program animals. In other words, the area to which the animals can retreat, by swimming away from the human participants to a part of the enclosure that exceeds the depth at which human participants can wade, should be equal to or exceed the standard minimum space requirements of the AWA. This will ensure that the *de facto* sanctuary of the area that human waders cannot access in the interactive enclosure is attractive to the dolphins and does not in any way restrict or discourage the dolphins from using it when they feel the need.

4. For shallow water interactive programs, what participant-to-attendant and participant-to-animal ratios have been or can be used safely?

The HSUS and EII do not have any data to address this question, but strongly caution against APHIS relying too heavily on any anecdotal data provided by wading/shallow water interactive program operators. Simply because a program has never yet experienced a serious problem (assuming a program would accurately keep such records) does not mean its participant-to-attendant and -animal ratios are adequate for safety. The HSUS and EII strongly encourage the undertaking of a well-designed, adequately controlled scientific examination of what ratios are adequate for safety.

5. For the purposes of this notice, we consider shallow water interactive programs to be those in which human participants enter the primary enclosure of the marine mammal to interact with the animal, but in which human participants remain primarily stationary and non-buoyant. Do you believe this definition adequately describes shallow water interactive programs? If not, what definition do you consider satisfactory?

My only concern with this definition has to do with the use of the term "primary enclosure." Some shallow water interactive programs have separate enclosures, leading from the primary enclosure (as defined by AWA regulations), that they use for interactions with the public. The HSUS and EII believe it is vital that *all* shallow water interactive programs are included in the definition; therefore, we recommend that the definition simply refer to programs in which human participants enter "the enclosure" of a marine mammal.

6. If shallow water interactive programs are regulated in the same way as other programs, should the heading for Sec. 3.111 of the regulations, which currently reads "Swim-with-the-dolphin programs," be amended to read "Human/marine mammal interactive programs" or something similar?

The HSUS and EII see no reason to object to this suggestion; however, we do recommend that §1.1 of the regulations, definition of terms, continue to include a specific definition of SWTD programs. Frankly, belaboring the semantics of whether a wading program can be referred to as a *swim-with-the-dolphin* program seems disingenuous to us. The phrase “swim-with-the-dolphin” has entered the lexicon and has referred in common usage to any kind of program where a member of the public enters the enclosure of a captive cetacean. However, we recognize the value of precision in regulatory language and the revision suggested here is acceptable.

7. In the final rule, we explained that the requirement set forth in the proposed rule that the attending veterinarian for an SWTD program have at least 2 years of full-time experience with cetacean medicine meant that the veterinarian needed at least 4,160 hours of experience. This inclusion of a specific number of hours generated a number of questions and concerns from regulated parties. Is the SWTD rule the appropriate place to address this issue?

In response to the first part of this question, The HSUS and EII strongly agree that the SWTD rule is the appropriate place to address the issue of required veterinary experience. SWTD (and shallow water interactive) program marine mammals are subject to additional levels of stress over animals in standard public display situations, given the persistent presence of novel humans in their enclosures. While there is little scientific information regarding this stress, the results published in Samuels and Spradlin (1995) do indicate that, under certain circumstances, SWTD programs elicit distress behaviors in dolphins. Therefore, The HSUS and EII feel specific regulatory requirements for veterinarians caring for SWTD program animals are a very reasonable precaution. In addition, SWTD program operators had ample opportunity to comment on this aspect of the proposed rule. APHIS’ decision to include this requirement in the final rule should in fact be final.

If so, do you think we should remove the reference to a specific number of hours (while retaining the requirement for at least 2 years experience)?

The HSUS and EII fail to see the problem with including a specific number of hours, if it is simply the equivalent of the full-time number of years already stated. Including the number of hours removes all ambiguity about what the number-of-years requirement means. Given the apparent concerns the regulated parties have had regarding ambiguous references and language, this additional specificity should arguably be welcome.

Is there a better way to make the experience requirement clear? In this notice, we are soliciting information on whether there are alternative requirements that would assure an adequate level of experience and knowledge to achieve the purposes of the regulations.

The HSUS and EII feel the reference to the number of hours required is sufficiently clear and unambiguous and clearly assures an adequate level of experience and knowledge.

8. In the final rule, we required that certain employees at a SWTD facility have a specified minimum number of years of experience or training, as follows:

Licensee or manager: At least 6 years experience in a professional or managerial position dealing with captive cetaceans.

Head trainer/behaviorist: At least 6 years experience in training cetaceans for SWTD behaviors in the past 10 years, or an equivalent amount of experience involving in-water training of cetaceans.

Trainer/supervising attendant: At least 3 years training and/or handling experience involving human/cetacean interaction programs.

In this notice, we are soliciting information on whether there are alternative requirements that would assure an adequate level of experience and knowledge to achieve the purposes of the regulations.

The only comment that HSUS and EII have to this question is that the proposed rule was published in January 1995. The comment period was long and the period between the close of the comment period and the publication of the final rule was very long - over two years. We feel that the regulated parties and all other members of the public had ample opportunity to comment on this aspect of the regulations and APHIS had ample opportunity to consider these comments. We absolutely fail to see why APHIS is reopening these issues for discussion. The final rule was subject to more than an adequate period of scrutiny and consideration by the agency - the final rule should be final.

9. Should therapy sessions (i.e., interactive sessions involving a therapist or established programs that deal with mentally or physically handicapped persons) be excluded from or covered by regulation? Why do you consider therapy sessions different from or the same as other shallow water interactive programs? Should regulation of therapy sessions be based on the frequency of sessions at the facility or other criteria? If based on frequency, what should be the threshold for regulation?

The HSUS and EII firmly believe that therapy sessions should be covered by regulation and indeed by the same regulations as all other interactive programs. While therapy sessions are presumably subject to even greater attendant oversight than standard interactive programs (therefore, they would usually meet and even exceed the human participant/attendant ratio requirement), the need for sanctuary for the animals would remain the same. In addition, the veterinary, staff experience, record-keeping, and reporting needs and the need for session time limits would also remain the same. If sessions are relatively infrequent, then the program would meet and even exceed the last of these requirements. The HSUS and EII strongly caution against excluding therapy sessions from human/marine mammal interactive program requirements. Excluding them would provide a strong incentive for facilities to label their interactive programs as therapeutic in an attempt to avoid having to comply with regulations.

In closing, in light of the clear and unambiguous language of the prior rules, The HSUS and EII cannot agree with the stated rationale for this latest action. We note with interest, however, that on March 2, the *Washington Legal Times* published a small paragraph announcing that Stephen Wynn of Mirage Resorts, Inc. had hired the law firm of O'Connor and Hannan "to seek a nullification of 1998 Department of Agriculture rules governing attractions that allow people to swim with dolphins." While we are not alleging a claim of undue influence or preferential treatment, we are extremely disturbed to note that exactly one month later, APHIS published the notice to suspend enforcement of the regulations.

Thank you for providing this opportunity to submit our comments for your consideration of Docket No. 93-076-13.

Sincerely,

Naomi A. Rose, Ph.D.  
Marine Mammal Scientist  
Wildlife and Habitat Protection

cc: Mark Berman, Earth Island Institute  
John Twiss, Marine Mammal Commission