ALLIANCE
of Marine Mammal Parks & Aquariums

An international organization dedicated to conservation through public display, education, and research

April 11, 2016

Chairman Levine
Vice Chair Gallagher
Members of the Water, Parks & Wildlife Committee
State Capitol, Room 2003
Sacramento, CA 95814

RE: AB 2305 California Captive Orca Welfare and Safety Act

Dear Chairman Levine, Vice Chair Gallagher, and Members of the Water, Parks & Wildlife Committee:

I am writing on behalf the Alliance of Marine Mammal Parks & Aquariums (the "Alliance") to express our strong opposition to AB 2305. The Alliance is an international organization of 61 licensed zoological parks, zoos, aquariums, and research facilities dedicated to the highest standards of care for marine mammals and to their conservation in the wild through education, scientific study, and public display.

Collectively, Alliance members represent the greatest body of expertise and experience in marine mammal husbandry and in-water interactive programs in the world. Membership in the Alliance is based on successful completion of the Alliance's stringent accreditation process that helps ensure professionally accepted standards in animal care and handling. Alliance member facilities also are regularly inspected by the U.S. Department of Agriculture's Animal & Plant Health Inspection Service and are under the oversight of the U.S. Fish & Wildlife Service and the National Marine Fisheries Service.

Among other reasons, the Alliance is opposed to the bill because it is contrary to the express terms of the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. §1361 *et seq.*, and, therefore, preempted by federal law. In pertinent part, the MMPA authorizes the collection and public display of marine mammals, including orcas. 16 U.S.C. §1371(a)(1). Yet the bill prohibits such actions, particularly by limiting public display of orcas in California. This runs afoul of the MMPA and, as such, is unlawful.

The U.S. Supreme Court has identified five ways in which federal law may supersede state law: (1) where preemption is expressly provided by Congress; (2) where the scheme

of federal regulation is sufficiently comprehensive to leave no room for supplementary state regulation; (3) where the field is one in which the federal interest is inherently dominant;(4) where the state law conflicts with the federal law so that compliance with both is not possible; and (5) where state law stands as an obstacle to the accomplishment and execution of the federal objectives. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985). In determining whether a particular state regulation is preempted by federal law, the critical inquiry is one of Congressional intent. As applied here, the relevant question is whether Congress, in passing the MMPA intended to preempt state regulation in this area. The answer is unquestionably yes. *See, e.g., People of Togiak v. United States,* 470 F. Supp. 423, 424-425 (D.D.C. 1979); *Fouke Co. v. Mandel*, 386 F. Supp. 1341, 1356-1360 (D. Md. 1974).

Section 1379 of the MMPA expressly provides: "No State may enforce, or attempt to enforce, any State law or regulation relating to the taking of any species (which term for purposes of this section includes any population stock) of marine mammal within the State unless the Secretary has transferred authority for the conservation and management of that species to the State…." Because the Secretary has not transferred conservation and management of orcas to the State, AB 2305 is preempted by federal law. Indeed, all five of the factors identified above are satisfied in this instance. Section 1379 expressly indicates that Congress intended the MMPA to preempt State law. The MMPA is a comprehensive regulatory scheme governing the management of marine mammals and does not allow room for supplementary state regulation. Thus, it inherently dominates the field of public display of orcas.

In addition, compliance with the MMPA fundamentally conflicts with the bill, which prohibits activities that the MMPA expressly allows. Congress has long recognized the value of public display of marine mammals, and the bill stands as an obstacle to accomplishing those federal objectives. *See, e.g.*, 61 Fed. Reg. 21926, 21927 (May 10, 1996) ("Since the passage of the MMPA in 1972, Congress has recognized the public display of marine mammals as an exception to the moratorium on taking. Congress continued to recognize public display in the 1994 Amendments by continuing to provide for this activity in the statute."); H. Rep. No. 970, 100th Cong., 2d Sess., 33-34 (1988) ("[E]ducation is an important tool that can be used to teach the public that marine mammals are resources of great aesthetic, recreational and economic significance, as well as an important part of the marine ecosystem. It is important, therefore, that public display permits be issued to entities that help inform the public about marine mammals as well as perform other functions.") In sum, it is clear that the bill is preempted by federal law and that its passage would be unlawful.

Provisions in this bill to "end performance-based entertainment for all orcas in the state" and otherwise limit the amount of trainer interaction with the animals may not be in the best interest of the killer whales that reside at SeaWorld San Diego. Participation in shows and regular interaction with trainers who use operant conditioning and reward-based training techniques are part of a comprehensive and preventative health and

behavioral plan to promote the physical and psychological well-being of the animals through stimulation, fun, and exercise. Positive reinforcement training also helps facilitate medical examinations and sample collection, all of which promotes the physical and psychological well-being of the animals. Therefore, AB 2305's prohibition against such aspects of public display could undermine the well-being of the orcas, which would also be in conflict with federal law.

Leading animal trainers in the domestic pet world have embraced the operant conditioning training techniques pioneered by SeaWorld and others with killer whales and, as a result, millions of domestic pets throughout the world now benefit from gentler, kinder, more humane care, training, and handling. SeaWorld's demonstrated expertise in the training and care of orcas is world-renowned. Decisions related to the management and care of these killer whales should be left to their professionals, who have the best interests of the animals and their species in mind, and AB 2305 impermissibly narrows such options.

This legislation would also have a substantial adverse effect on important ongoing scientific research with killer whales in human care, which benefits killer whales in the wild. Research conducted on killer whales in human care has contributed immeasurably to our understanding of the animals' behavior, development, reproductive physiology, vocalizations, and learning and is helping us understand the effects of human activity, including noise, on the animals.

Much of this research cannot be done in the wild, and limitations on research on killer whales in human care will adversely affect the ability of federal resource managers to address factors contributing to declines to wild populations, including those listed under the Endangered Species Act (16 U.S.C. Section 1531 *et seq*.)("ESA"). For example, the Southern Resident orca population, (J, K, and L pods), are the only resident population located in the U.S., and is listed as Endangered under the ESA. Ongoing research related to the impact of toxins on this population is facilitated by access to dynamic groups of orcas in human care, and will be impeded without such access.

The MMPA expressly allows for the public display of marine mammals because Congress recognized the importance of allowing the public to see and learn about these extraordinary animals and thereby encourage conservation. It also supports the valuable scientific research that contributes to the overall welfare of wild populations, including the Southern Resident population of orcas. AB 2305 will undermine those goals, and as stated above is contrary to federal law.

Marine mammals in human care are ambassador species that enable children and adults to make strong emotional connections with the animals through up-close, personal interactions. We know through the collective experience of our member organizations that introducing people to live animals is a powerful way to promote wildlife and ocean conservation.

This experience was confirmed in a 2012 Harris poll conducted by Harris Interactive® for the Alliance which found that the vast majority (97%) of the American public believes that seeing and experiencing live marine mammals is the best way for children to not only learn about the animals but to inspire conservation action that can help marine mammals and their ocean environments.

For these reasons, the Alliance of Marine Mammal Parks & Aquariums strongly opposes AB 2305.

Sincerely,

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