

# **EXHIBIT A**



## Sea Shepherd Legal

*Saving marine wildlife and habitats by enforcing, strengthening and developing protective laws, treaties, policies and practices worldwide*

December 21, 2018

### ***Submitted via FOIA Online***

National Oceanic and Atmospheric Administration  
Public Reference Facility (SOU1000)  
1315 East-West Highway (SSMC3)  
Room 9719  
Silver Spring, Maryland 20910

### **Re: Freedom of Information Act Request for Records Regarding Maui Dolphin (*Cephalorhynchus hectori maui*)**

Dear Sir or Madam:

I am writing on behalf of Sea Shepherd Legal (“SSL”) with a request for records maintained by the National Marine Fisheries Service (“NMFS”) regarding the Maui dolphin (*Cephalorhynchus hectori maui*) (a.k.a. Maui’s dolphin). Consistent with SSL’s mission and pursuant to 15 C.F.R. Part 4, Subpart A and the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, I respectfully request the following records from NMFS:

- 1. All records relating to NMFS’ analysis and final decision to list the Maui dolphin as endangered under the Endangered Species Act (“ESA”).<sup>1</sup> This request includes records relating to NMFS’ determination that “Maui dolphins continue to face threats of bycatch”<sup>2</sup> and that it is “unlikely that this subspecies will recover unless sources of anthropogenic mortality are eliminated,”<sup>3</sup> as well as NMFS’ “consideration of protective efforts” implemented by New Zealand.<sup>4</sup>**
- 2. All records relating to NMFS’ analysis of bycatch of, or other interactions with, Maui dolphins by the New Zealand fisheries identified in the 2018 Final List of Foreign Fisheries.<sup>5</sup>**

<sup>1</sup> 82 Fed. Reg. 43701 (Sept. 19, 2017).

<sup>2</sup> *Id.* at 43708 (col. 2).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> NOAA Fisheries, Final List of Foreign Fisheries (2018), *available at* <https://www.fisheries.noaa.gov/foreign/international-affairs/list-foreign-fisheries>; *see also* Notice of Availability: Fish and Fish Product Import Provisions of the Marine Mammal Protection Act List of Foreign Fisheries, 83 Fed. Reg. 11703 (March 16, 2018).

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3. **All records related to NMFS’ communications with New Zealand authorities in connection with NMFS’ preparation of, and since publication of, its Notice of Availability of the 2018 Final List of Foreign Fisheries,<sup>6</sup> including all documents related to:**
  - a. **the statement that New Zealand has “high levels of documented marine mammal bycatch” for “all gear types, especially trawl”;**<sup>7</sup>
  - b. **the statement that New Zealand has “currently calculated a bycatch limit” for marine mammals;**<sup>8</sup>
  - c. **the conclusion that New Zealand’s risk of marine mammal bycatch is “Average/High,”**<sup>9</sup> and the data upon which that conclusion is based;
  - d. **New Zealand’s preparation of a “PBR-like approach”;**<sup>10</sup> and
  - e. **New Zealand’s request to “aggregate all New Zealand fisheries into a single assessment, including those not currently exporting to the United States.”**<sup>11</sup>
  
4. **All records relating to NMFS’ analysis or consideration of the application of the Fish and Fish Product Import Provisions of the Marine Mammal Protection Act (“MMPA”)<sup>12</sup> to New Zealand fisheries interacting with the Maui dolphin. This includes analysis or consideration of whether New Zealand export fisheries interacting with the Maui dolphin are or may be eligible for a “comparability finding” as that term is used in 50 C.F.R. § 216.24.**

The items specifically requested are not meant to be exclusive of any other documents that, although not specially requested, have a reasonable relationship to the subject matter of this request. “Documents” and “records” include, but are not limited to, all permits, agreements, contracts, surveys, field notes, correspondence, minutes, memoranda, maps, plans, drawings, emails, reports, databases, emails, faxes, and notes. This request includes all documents that have ever been within your custody or control, including all inter- and intra-agency documents, whether they exist in agency working, investigative, retired, electronic mail, or other files currently or at any other time.

**REQUEST FOR FEE WAIVER**

SSL requests that NMFS waive all fees in connection with the procurement of this information pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). As demonstrated below, the nature of this request meets the test for fee waiver as expressed in FOIA, 5 U.S.C. § 552(a)(4)(A)(iii).

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<sup>6</sup> [Notice of Availability: Fish and Fish Product Import Provisions of the Marine Mammal Protection Act List of Foreign Fisheries, 83 Fed. Reg. 11703 \(March 16, 2018\).](#)

<sup>7</sup> *Id.* at 11709 (col. 3).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 11710 (Table 1).

<sup>10</sup> *Id.* at 11719 (col. 2).

<sup>11</sup> *Id.*

<sup>12</sup> 16 U.S.C. § 1371(a)(2); 50 C.F.R. § 216.24 (as amended).



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In deciding whether the fee waiver criteria are satisfied, SSL respectfully reminds NMFS that FOIA is inclined toward disclosure and that the fee waiver amendments were enacted to allow further disclosure to nonprofit, public interest organizations. *See* 132 Cong. Rec. S. 14270-01 (statement of Sen. Leahy) (“[A]gencies should not be allowed to use fees as an offensive weapon against requesters seeking access to Government information.”). Furthermore, the federal appellate courts have interpreted this fee waiver section broadly, holding that the section is to be “liberally construed in favor of waivers for noncommercial requesters.” *Judicial Watch, Inc. v. Rossotti*, 326 F.3d 1309, 1312 (D.C. Cir. 2003) (quoting *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir.1987) (citing Sen. Leahy)); *accord Forest Guardians v. U.S. Dep’t of Interior*, 416 F.3d 1173, 1178 (10th Cir. 2005).

**I. The present disclosure is in the public interest because it will significantly contribute to public understanding of the operations or activities of government.**

The requested disclosure will contribute to public understanding of the operations or activities of the government. 5 U.S.C. § 552(a)(4)(A)(iii).

**A. The subject of the disclosure concerns “the operations and activities of the government.”**

The requested information pertains to (1) NMFS’ implementation of the ESA as applied to the Maui dolphin, and (2) NMFS’ implementation of the import provisions of the MMPA as applied to fisheries associated with bycatch of the Maui dolphin. There can be no question that NMFS’ implementation of the ESA and MMPA qualify as “operations and activities of the government.”

**B. The disclosure is “likely to contribute significantly to public understanding” of government operations or activities.**

The present disclosure by NMFS will provide the public a better understanding of how NMFS has approached (1) the issue of marine mammal bycatch in foreign fisheries in general, (2) the threat that bycatch poses to the Maui dolphin in particular (and New Zealand’s response to this threat), and (3) implementation of the imports provision of the MMPA and the associated regulatory requirement of a “comparability finding,” both generally and in the specific context of New Zealand export fisheries interacting with the Maui dolphin.

SSL is a public interest organization that will utilize this information to gain a better understanding of how NMFS is implementing its statutory duties under the ESA and MMPA in the context of the Maui

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dolphin. We inform, educate and counsel the public—via legal action, our website, our weblog, and ongoing training and capacity-building activities—on risks to marine wildlife and habitat. SSL works to achieve its goals through policy work, education, and litigation. Accordingly, SSL is an effective vehicle to disseminate information on NMFS' implementation of the ESA and MMPA as applied to the Maui dolphin.

Perhaps most importantly, this FOIA request will help SSL fulfill its well-established function of public oversight of government action. Public oversight of agency action is a vital component in our democratic system and is the bedrock principle upon which FOIA is built. As NMFS knows, the Maui dolphin is the world's rarest dolphin—and its population numbers are declining at an alarming rate.<sup>13</sup> As a result, the public is paying close attention to this matter and is interested to learn about NMFS' work related to this species. The present request responds to the public's call for more information.

### **II. Obtaining the information is of no commercial interest to SSL.**

SSL is a 501(c)(3) nonprofit, public interest environmental law firm with a mission to save marine wildlife and habitats by enforcing, strengthening, and developing protective laws, treaties, policies, and practices worldwide. SSL works on a range of matters from ensuring proper governmental agency action to developing innovative policy approaches to encourage greater protections for marine wildlife and ecosystems.

Under FOIA, a commercial interest is one that furthers a commercial, trade, or profit interest as those terms are commonly understood. *See, e.g.*, OMB Fee Guidelines, 52 Fed. Reg. 10017-18. Such interests are not present in this request. In no manner does SSL seek information from NMFS for commercial gain or interest. Upon request and free of charge, SSL will provide members of the public with relevant information obtained from NMFS.

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Based upon the foregoing, SSL asks that this FOIA request be classified within NMFS' fee waiver category and that NMFS send the requested information as required by law.

We look forward to your reply within twenty working days as required by FOIA. 5 U.S.C. § 552(a)(6)(A)(i). If the responsive records are voluminous, please contact me to discuss the proper scope of the response.

If any exemption from FOIA's disclosure requirement is claimed, please describe in writing the general nature of the document and the particular legal basis upon which the exemption is claimed. We

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<sup>13</sup> Christopher Pala, *Endangering the World's Rarest Dolphin*, THE INVESTIGATIVE FUND (Feb. 27, 2017), available at <https://www.theinvestigativefund.org/investigation/2017/02/27/endangering-worlds-rarest-dolphins/>.



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respectfully remind NMFS that, pursuant to the FOIA Improvement Act of 2016, Congress amended FOIA to authorize withholding “only if the agency reasonably foresees that disclosure would harm an interest protected by an exemption” or “disclosure is prohibited by law.”<sup>14</sup> In other words, the technical application of an exemption is no longer sufficient to justify withholding; the agency must also identify a foreseeable harm or make a determination that disclosure is affirmatively illegal.

Should any document be redacted, please indicate the location of the redaction through the use of black ink and provide a ledger with as much information as possible regarding the redacted information. Please provide any and all non-exempt portions of any document that may be partially exempt, as required by *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

To expedite our review of the records, we kindly ask that you upload responsive documents to FOIA Online or send responsive documents via electronic mail to the address listed below. Should physical delivery be necessary, please send all materials to 2226 Eastlake Avenue East, #108, Seattle, WA 98102.

You may call me at (206) 504-1600 if you have any further questions about this request. Thank you for your prompt attention to this matter.

Sincerely,

s/Nicholas Fromherz

Nicholas Fromherz

Senior Attorney

Sea Shepherd Legal

(206) 504-1600

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<sup>14</sup> FOIA Improvement Act of 2016 (Public Law No. 114-185) (codified at 5 U.S.C. § 552 (a)(8)(A)(i)(I)).