

EXHIBIT A



Sea Shepherd Legal

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

July 15, 2019

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: Supplemental 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”) and/or the National Oceanic and Atmospheric Administration (“NOAA”) regarding the Maui dolphin (*Cephalorhynchus hectori maui*) (a.k.a. Maui’s dolphin). This request is supplemental to, but partially distinct from, a similar request that I made on December 21, 2018 (DOC-NOAA-2019-000461). Please note that I seek only those records that NMFS created or acquired **between March 18, 2019 and the date of any searches performed pursuant to the present request.**

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’s analysis of bycatch of, or other interactions with, Maui dolphins by the New Zealand fisheries identified in the 2018 Final List of Foreign Fisheries.¹**
- 2. All records related to NMFS’s communications with New Zealand authorities in connection with NMFS’s preparation of the *Notification of the Rejection of the Petition To Ban Imports of All Fish and Fish Products From New Zealand That Do Not Satisfy the Marine Mammal Protection Act*, 84 Fed. Reg. 32853 (July 10, 2019) (“Notification”). It is clear from the Notification that NMFS personnel engaged in communications with New Zealand authorities in connection with the preparation of the Notification. *See, e.g., id.* at 32857 (col. 1) (“While there are set net and trawl fisheries on the List of Foreign Fisheries that**

¹ 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).

Sea Shepherd Legal

operate within the Māui dolphin range, NMFS, *working with the Government of New Zealand*, has not been able to establish conclusively that these fisheries export to the United States.”) (emphasis added).

3. **All records relating to NMFS’s analysis or consideration of the application of the Fish and Fish Product Import Provisions of the Marine Mammal Protection Act (“MMPA”)² to New Zealand fisheries interacting with the Maui dolphin. This request includes all records generated in connection with any 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.

Nevertheless, I reiterate that I seek only those records, covered by the above requests, that NMFS created or acquired **between March 18, 2019 and the date of any searches performed pursuant to the present request**. According to an email message from Assistant U.S. Attorney Michelle Lambert, searches performed by NMFS personnel in response to FOIA request DOC-NOAA-2019-000461 should have captured relevant documents through at least March 17, 2019. *See Appendix A, Email Correspondence from AUSA Michelle Lambert* (June 14, 2019).

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). I also note that NMFS granted a fee waiver in request DOC-NOAA-2019-000461.

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)

² 16 U.S.C. § 1371(a)(2); 50 C.F.R. § 216.24 (as amended).



Sea Shepherd Legal

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

(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 NMFS’s 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’s implementation of the 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, 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 MMPA in the context of the Maui 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’s implementation of the 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

Sea Shepherd Legal

the world's rarest dolphin—and its population numbers are declining at an alarming rate.³ As a result, the public is paying close attention to this matter and is interested to learn about NMFS's 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.

Based upon the foregoing, SSL asks that this FOIA request be classified within NMFS's 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 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."⁴ 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

³ 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/>.

⁴ FOIA Improvement Act of 2016 (Public Law No. 114-185) (codified at 5 U.S.C. § 552 (a)(8)(A)(i)(I)).



Sea Shepherd Legal

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

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

nick@seashepherdlegal.org