

# COMMITTEE NEWS

## Animal Law

### Special Aquatic Animals Issue

## Aquatic Animals: The Need for Understanding and Legal Protection

### Introduction

Aquatic animals are so overlooked and poorly understood that they are easily ignored even in general calls for the legal protection of animals. They are excluded from some laws<sup>1</sup> and their capabilities are less frequently studied by scientists than those of their land-based kin. Research into their well-being is more complicated and difficult due to the environments in which they live.<sup>2</sup> In the resulting absence of knowledge and understanding, harmful myths<sup>3</sup> suggesting they cannot feel, think, or suffer have left them ignored and exposed to harm. This short overview seeks to remedy some of that misunderstanding and offers information that may be useful when making legal and policy decisions about the use or protection of aquatic animals.

### The Need for Knowledge Who Are Aquatic Animals?

As a category, the term aquatic animals encompasses those animals who live in, or depend upon, marine and freshwater environments.<sup>4</sup> They include: Fish;

[Read more on page 18](#)

### Kathy Hessler

*Lewis & Clark Law School*

*Kathy Hessler is a clinical professor of law at Lewis & Clark Law School. She is the first faculty member hired to teach animal law full time in a law school. She is the Director of the Animal Law Clinic and the Aquatic Animal Law Initiative, as well as the faculty advisor for the L&C Student Animal Legal Defense Fund and Animal Law Review. She co-authored Animal Law in a Nutshell; Animal Law – New Perspectives on Teaching Traditional Law; and the amicus briefs submitted in the US v. Stevens and Justice v. Gwendolyn Vercher cases. She has written numerous*



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### Chair Message

Spring greetings, Animal Law Committee! This issue of the ALC Newsletter is devoted to the law relating to aquatic animals. Although protection of marine mammals and some aquatic reptiles has long been a concern in the United States, little action has been given for the welfare of other types of aquatic animals, other than from their protection as food sources or as a byproduct of pollution control. This may change, however, as aquatic animal law develops as an area of education and practice, beginning with the Aquatic Animal Law Initiative out of the Center for Animal Law Studies at Lewis & Clark Law School. The Initiative, with Professor Kathy Hessler and current fellow Amy Wilson at the helm, is currently working to increase the understanding of the role of aquatic species in the biosphere and to reform deficiencies in protection of aquatic species under the Animal Welfare Act and in their use in research. Thank you to the authors of the main articles in this issue—Kathy Hessler, David Cassuto, A.J. Albrecht, and Jim Gesualdi—for introducing us to important issues in this area.



**Fran Ortiz**

*Chair, TIPS Animal Law  
Committee*

### Resolutions

And we have good news from the ABA Mid-Year Meeting in February! The ABA House of Delegates voted to adopt both the police encounter and military working dog resolutions. Although slowed slightly by a motion to table, the police encounter resolution passed easily with no changes on a voice vote. The military working dog resolution, which the ALC cosponsored with the International Animal Law Committee of the ABA's International Section, also passed with a slight amendment to remove reference to veterinary care in retirement. Many thanks to Chris Green and Daina Bray, who presented the police encounter resolution, and to everyone involved in their development and passage.

### Lunch and Learns

In keeping with our aquatic theme this issue, our April lunch and learn speaker will be Kelly Levenda, Student Programs Attorney with the Animal Legal Defense Fund. Her presentation will be on Captive Aquatic Animals. Other lunch and learn programs scheduled for this year include a presentation on service animals by C.P. McKenna with the Family Resource Network in May and a presentation on breed specific provisions in homeowner's insurance by Graces Lopes with Travelers in July.

### Section Conference

As you know, the Section Conference was cancelled due to COVID-19. The ALC was to present a program entitled "Pet Insurance 101: Coverage and Regulation," with speakers Lynne Hennessey and Jules Benson both with Nationwide Insurance's Pet Insurance Division. We are currently working to present the panel as a webinar.



The program will address the different types of pet insurance products available and explain how coverage works, who may offer pet insurance policies, and the state of current and possible future regulation of the pet insurance industry. In addition to the program, the ALC would have held its award reception to present the “Excellence in the Advancement of Animal Law” Award to Daina Bray. The award will be presented at a future time.

### Webinar

In May, the ALC will host a webinar on the federal Preventing Animal Cruelty and Torture Act, with speakers Mila Zain and Ralph Henry of the Humane Society of the United States. Watch your inbox for details on the date and agenda as they develop.

As always, please be sure to contact me or any of the subcommittee chairs if you would like to get more involved with the ALC. Enjoy the issue! ➤

### Newsletter Editorial Board

**Editor** | Joan Schaffner

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A complete list of ALC subcommittees is available on the Committee homepage found [here](#).

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## **Animal Law Subcommittee Updates**

### **ANIMALS IN AGRICULTURE**

The Animals in Agriculture Subcommittee is always welcoming new members and holds monthly calls every third Thursday of the month at 2:00 pm EST. If you are interested in legal issues affecting farm animals, please email the Co-Chairs.

**By: Irina Anta**

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### **COMPANION ANIMALS**

The Companion Animals Subcommittee began 2020 with a transition to a new Chair. Meredith Walsh will be taking over for Lenore Montanaro, who will be focusing on other subcommittee initiatives. The Subcommittee is developing Lunch & Learn presentations, which include a presentation by Barbara J. Gislason concerning “Pet Custody: Are Family Members Property?” presented on March 13, 2020, and a presentation on “Service Animals and the Law” by Charles McKenna of the Family Resource Network, scheduled for May 8, 2020. Presentations on animal hoarding and anti-cruelty campaigns are also in development. The Subcommittee welcomes new members, so please email the Chair if you are interested in joining.

**By: Meredith Walsh**

**Chair: Meredith Walsh**

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**Ariel Neumann**

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### **EQUINE LAW**

The Equine Law Subcommittee is planning a dinner and in-person meeting for members attending the University of Kentucky’s Equine Law Conference in May. If you are not attending the conference please consider attending one of the Subcommittee’s regular meetings to discuss how best to communicate amongst each other in order to exchange information on experts, equine professionals, and new laws. Additionally, the Subcommittee is planning at least two upcoming Lunch & Learn presentations. Lastly the Subcommittee is pleased to recognize Subcommittee members Yvonne Ocrant and Julie Fershtman, who co-authored an article published in the latest issue of the *ABA-TIPS Law Journal* titled “Animal Law for Insurance Lawyers,” and Julie Fershtman, who recently published a new edition of her ABA book “Equine Law and Horse Sense.”

**By: Elaine Fresch**

**Chair: Elaine Fresch**

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## INTERNATIONAL ISSUES

**By: Dr. Rajesh K. Reddy**

The International Issues Subcommittee is always welcoming new members. Those interested in legal issues affecting animals globally are encouraged to contact the Chair.

**Chair: Dr. Rajesh K. Reddy**  
[rajreddy@lclark.edu](mailto:rajreddy@lclark.edu)

## WILDLIFE

**By: Kimberly Fullerton**

The Wildlife Subcommittee recently hosted two Lunch & Learn presentations. In December, Kimberly Fullerton provided an overview of pangolin trafficking in a presentation entitled "Strategies in Pangolin Conservation," and in January, Guy Dicharry led a presentation entitled "Wildlife Corridors," which analyzed the implications of the New Mexico Wildlife Corridors Act. If you are interested in joining the Subcommittee, collaborating on a program, or sharing a wildlife update, please send an e-mail to the Chair. ➤

**Chair: Kimberly Fullerton**  
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## Headline Animal Law News

# ANIMALS IN AGRICULTURE

## Kansas Ag-Gag Law Overturned

**By: Irina Anta**

In January, Kansas became the latest state to have its ag-gag law overturned. Dan Flynn, [Kansas become 4<sup>th</sup> state with unconstitutional “ag-gag” law](#), Food Safety News (Jan. 29, 2020). Passed in 1990, the law was the oldest ag-gag legislation on the books, banning undercover investigations at factory farms and slaughterhouses. Animal Legal Defense Fund, the Center for Food Safety, Public Justice, Shy 38, and Hope Sanctuary challenged the constitutionality of this law in December 2018, and last month, the U.S. District Court struck down nearly all it for violating the First Amendment. The Court concluded that the “law plainly targets negative views about animal facilities and therefore discriminates based on viewpoint.”

Kansas joins a group of four other states where courts have recently overturned ag-gag laws. In the past five years, courts have struck down similar legislation in Idaho, Utah, Wyoming, and twice in Iowa. Several states, including Alabama, North Carolina, Montana, North Dakota, and Arkansas, still ban undercover investigations in some form, and Arkansas’s law is currently being challenged.

# COMPANION ANIMALS

## Denver Pit Bull Ban Remains in Effect

**By: Meredith Walsh**

On February 14, 2020, Denver Mayor Michael Hancock vetoed the Denver City Council’s proposed amendment of a city code that would have lifted a ban on pit bull breed dogs which had been in effect for over 30 years—implemented after the death of a child mauled by a pit bull in 1989. Michael Levenson, [Denver Mayor Says Pit Bull Ban Will Stand](#), N.Y. Times (Feb. 14, 2020). The repeal would have allowed residents to own pit bulls but with certain restrictions, including registering dogs with the city, capping the number of dogs at two, microchipping and mandatory spay/neutering, and obtaining a special dog license. Dogs demonstrating good behavior for three years would then be eligible for a regular dog license. Mayor Hancock opposed lifting the ban citing public safety and concerns about the risks of irresponsible owners. In his official statement to the public, the Mayor also questioned the effectiveness of the proposed tracking procedures implemented as part of the new code based on the small percentage of dogs in Denver that are actually licensed.



## EQUINE LAW

### Investigation Finds No Criminal Wrongdoing in Santa Anita Thoroughbred Deaths

The Los Angeles County DA's investigation into horse deaths at the Santa Anita racetrack found no evidence of criminal conduct, but it also turned up no real answers for the rash of deaths. John Cherwa, [Investigation into horse deaths at Santa Anita finds no unlawful conduct](#), L.A. TIMES (Dec. 19, 2019). This finding was met with sharp criticism from animal rights activists who have claimed that trainers have been pressured to run injured horses. However, according to the report, investigators found that even though the Santa Anita racing office "encourages participation in racing," no undue pressure was exerted. Activists further charge that if trainers run horses who have been medicated then trainers "obviously know that they are injured and sore, so they should be criminally culpable if they then force them to race to their deaths." *Id.* In response to the racetrack deaths, Santa Anita racetrack owner, Stronach Group, instituted a number of safety initiatives to include heightened veterinary oversight. To date, no root cause of the racetrack fatalities has been identified. Time will soon tell if safety measures instituted will prove to be successful. To date they have not. Eight horses have died at the Santa Anita Racetrack this year. Jay Croft & Hollie Silverman, [Eighth horse this year dies at Santa Anita racetrack](#), CNN (Mar. 1, 2020).

**By: Mary Westman**

## INTERNATIONAL ISSUES

### Shark Cage Diving Not an Offense in New Zealand

New Zealand's Supreme Court recently overturned a Court of Appeal ruling that deemed shark cage diving an offense under the [Wildlife Act 1953](#) (the Act). Shark Experience Ltd. offers a shark cage diving experience east of Rakiura/Stewart Island. Experience uses berley and bait as attractants to bring the sharks to the cage. It is an offense under section 63A of the Act to "hunt or kill" a protected species. Section 2(1) defines "hunt or kill" broadly, to include "pursuing, disturbing, or molesting" wildlife. The Court of Appeal held shark cage diving violated section 63A as it amounted to "pursuing" or "disturbing" the sharks—even though this was not within the common meaning of the words, "hunt" or "kill." Shark Experience appealed, arguing the Act required the prohibited conduct to fall within the common meanings of "hunt" or "kill." The Supreme Court set aside the Court of Appeal's declaration that shark cage diving was an offense under the Act citing insufficient

**By: Bianka Atlas**



evidence demonstrating a significant risk of harm to the sharks. However, it did not disturb the finding that shark cage diving with the use of attractants could fall within the Act's definition of "hunt or kill," stating that luring sharks to the cage is aligned with hunting, which includes "pursuing" or "disturbing" wildlife. The Supreme Court stated the Act's purpose—absolute protection of wildlife—supports this broad, inclusive interpretation.

## **WILDLIFE**

### **Proposed Rule to Exempt Incidental Take Under the Migratory Bird Treaty Act**

Recently, the U.S. Fish and Wildlife Service (USFWS) proposed a rule seeking to exempt incidentally taking migratory birds under the Migratory Bird Treaty Act (MBTA). [Regulations Governing Take of Migratory Birds, 85 FR 5915-01](#). The MBTA was developed to meet U.S. commitments under the 1918 Migratory Bird Treaty to protect and preserve migratory birds. [16 U.S.C.A. § 703-711 \(West\)](#). The MBTA states "it shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill . . . any migratory bird, [or] any part, nest, or egg of any such bird." The MBTA does not explicitly require intent for liability.

On December 22, 2017, the Principal Deputy Solicitor of the Department of Interior issued a legal opinion entitled "[The Migratory Bird Treaty Act Does Not Prohibit Incidental Take](#)." M-37050. The USFWS proposed a rule to codify M-37050 requiring actions be directed at migratory birds to find liability. [85 FR 5915](#). ➤

**By: Deepti Bansal Gage**





## **Legislative And Regulatory Developments Affecting Animals**

### **ANIMALS IN AGRICULTURE**

#### **Maine Considers Cage-Free Legislation**

Most egg-laying hens in the United States are raised in windowless sheds containing rows of “battery cages” stacked on top of one another. Egg-laying hens are crammed together in wire cages so small they’re often unable to spread their wings or turn around.

**By: Alex Cerussi**

Fortunately, several states have passed cage-free laws in the past decade, and Maine could be next. Right now, the Maine legislature is considering a bill that would improve the lives of millions of egg-laying hens. [LD 2084](#), 129th Me. Leg., 2d Reg. Session (Me. 2020). If passed, this law would ensure that eggs sold throughout the state of Maine are sourced from farms using more humane, cage-free condition housing systems, allowing birds to have enough space to participate in natural behaviors such as perching, dustbathing, and spreading their wings. *Id.* Beginning in 2025, farm owners and operators in the State would be required to keep their egg-laying hens in cage free housing systems and business owners and operators would not be allowed to sell eggs from hens that are not kept in cage-free housing systems. *Id.*

### **INTERNATIONAL ISSUES**

#### **Coronavirus Outbreak Leads to Imperfect Ban on Wildlife Trade in China**

The first coronavirus-related illnesses were reported on New Year’s Eve, with evidence pointing to the disease having crossed over to humans at a game meat market in Wuhan. In just a month, the number infected rose into the tens of thousands, with hundreds dead. In response, China created a temporary ban on the trade of wildlife. Simon Denyer & Lyric Li, [China bans wild animal trade until coronavirus epidemic is eliminated](#), WASH. POST (Jan. 26, 2020, 12:12 PM). The initial restrictions targeted “supermarkets, restaurants and e-commerce platforms from trading in any form,” with officials promising severe penalties for violations. *Id.*

**By: Rajesh K. Reddy**



Health and environmental experts, alongside animal advocates, however, criticized China for the ban's temporary nature, as the country's game markets, where animals are often found crowded in filthy conditions, was also the source of the 2002 SARS outbreak, which claimed 750 lives. *Id.* As the number claimed by the coronavirus has now climbed into the thousands, China recently moved to permanently ban the trade and consumption of non-aquatic wildlife. James Gorman, [China's Ban on Wildlife Trade a Big Step, but Has Loopholes, Conservationists Say](#), N.Y. TIMES (Feb. 27, 2020). That said, while the ban targets the "root cause" of the epidemic, it does not address the wildlife trade as it relates to research, fur, or medicinal purposes, which may enable traffickers to circumvent the system. *Id.*

## WILDLIFE

### Petition Filed to List Iliamna Lake Seal as a Distinct Population Segment of the Eastern North Pacific Harbor Seal

By: Fernando Guerra


On February 6, 2020, The Center for Biological Diversity petitioned that Iliamna Lake Seal be listed as a distinct population segment of the Eastern North Pacific Harbor Seal under the Endangered Species Act. The Center for Biological Diversity had previously submitted a petition to the Secretary of Commerce and the National Oceanographic and Atmospheric Administration through the National Marine Fisheries Service, asking that this lake seal be listed as threatened or endangered. The Ctr. for Biological Diversity, [Petition to List the Iliamna Lake Seal, a Distinct Population Segment of Eastern North Pacific Harbor Seal \(Phoca vitulina richardii\), under the U.S. Endangered Species Act](#) (submitted Feb. 6, 2020). Although the NMFS initially issued a finding that the petition action might be warranted and initiated a status review on May 17, 2013, the agency ultimately concluded that listing was not warranted because the lake seal did not constitute a species, subspecies, or distinct population segment. *Id.*

The current petition comes as newly published science supports the argument that the lake seals are in fact a distinct species, subspecies, or distinct population segment. In addition, the new scientific publications demonstrate the ecological importance of the species and identify climate change and the proposed Pebble Mine project as threats to its survival. *Id.* Concerns about increased ship traffic





and noise in prime seal habitat persist, as the Army Corps of Engineers continues its environmental impact statement of the proposed mining project. Press Release, The Ctr. for Biological Diversity, [Federal Protection Sought for Rare Freshwater Alaska Seals](#) (Feb. 6, 2020).

The Iliamna Lake Seal is the only freshwater seal in America and is one of two harbor seal populations in the world that live exclusively in fresh water. The approximately 400 Iliamna Lake Seals are only found in Alaska's Iliamna Lake—Alaska's largest freshwater body, which is also home to the world's largest sockeye salmon run. *Id.* 

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# ANIMAL LAW DOCKET

## Practice Tips For Animal Law Cases

### Sharks Make Law

#### Introduction

“Speciesism” is a term familiar to many who work in animal protection. While originally coined by Peter Singer in his groundbreaking book, *Animal Liberation*,<sup>1</sup> and given a definition representing a type of odious discrimination akin to racism, the word has morphed into just a descriptive way of explaining the undeniable truth that all of us—even those of us who love and protect animals on an equal level to humans—differentiate between species in significant ways. For example, while you might let your teenager out of the house at night to spend time with her friends across town, you would not do that with your dog, because of the difference in the species. Nor would we or should we let wild animals roam the streets, even if we feel bad about their captivity. That is, there are logical, reasonable, non-offensive shifts in thinking when we look at other species. But leaning more towards Singer’s original definition is the way much of the world views sharks—as evil killers without redeemable qualities. This unfair vilification, and, yes, invidious form of discrimination of sharks, is rooted in a basic misunderstanding of them, partly because they do not look like us and partly because we fear them.

But sharks are a lot more like us than we want to admit—like so many species (and even groups of people) that we often dismiss. While there is a broad range of types of sharks, they all generally are intelligent, have keen senses, and are social in nature (the lone predator shark is really a rarity, not the common state of affairs)—they frolic and may recognize each other. And some of them live longer than humans. In fact, the longest-surviving vertebrate ever documented was a shark.<sup>2</sup>

But more to the point of this article, they have also been vital players in the legal world. And while calling a lawyer a shark is a measure of disrespect and

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[Read more on page 25](#)



## You Don't Need Lungs to Suffer<sup>1</sup>

### Introduction

Fish are a vital food source for billions. Fish are sentient; they feel pain and suffer like mammals and birds. Unlike with mammals and birds, however, fish suffering has received almost no attention and is not a management consideration for the fishing industry.<sup>2</sup>

### Role of Domestic & International Fisheries

#### **International Fisheries**

In the European Union, fisheries management is guided by the Common Fisheries Policy (CFP).<sup>3</sup> Goals of the CFP include maximizing sustainable yield, reducing bycatch, minimizing waste, and encouraging environmental and economically sustainable practices.<sup>4</sup> In 1995, the United Nations Conference on Straddling Fish Stocks and Migratory Species convened to draft an agreement (Agreement).<sup>5</sup> The Agreement aims to protect biodiversity and migrating fish, and minimize pollution in international waters.<sup>6</sup> Similarly, the International Commission for the Conservation of Atlantic Tunas (ICCAT) oversees the management of a variety of marine species.<sup>7</sup> Unfortunately these international efforts have failed. Shark populations are declining rapidly, with approximately 100 million disappearing each year.<sup>8</sup> In the past 40 years, global tuna and mackerel populations have plummeted by 75%,<sup>9</sup> and many other species have also dwindled to dangerous levels.

#### **Domestic Fisheries Management.**

The National Oceanic and Atmospheric Administration (NOAA) is the U.S. government agency responsible for regulating domestic fisheries.<sup>10</sup> NOAA's enabling statute is the Magnuson-Stevens Fishery Conservation and Management Act (MSA) of 1976,<sup>11</sup> which sets standards to prevent overfishing, reduce bycatch, and ensure a sustainable seafood supply. Towards that end, NOAA works with eight regional fishery management councils to regulate commercial fishing.<sup>12</sup> The Marine Mammal Protection Act (MMPA) aims to protect marine mammals.<sup>13</sup> It requires that seafood exported to the U.S. come from countries with measures in place to reduce bycatch of marine mammals.<sup>14</sup> The Endangered Species Act (ESA) protects endangered and threatened species and their habitats from harm, harassment, and interference.<sup>15</sup>

NOAA has failed to create sustainable fishing practices. Over 31.4% of fish stocks are either fished to capacity or overfished, a percentage that continues to increase.<sup>16</sup> Studies reveal that if current trends continue, the seafood supply will disappear by

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*He holds a J.D. from the University of California, Berkeley, a Ph.D. from Indiana University, and a B.A. from Wesleyan University. Prior to entering legal academia, he was a Professor of English and founder of the Literature & Environment program at the University of Missouri-Rolla.*

[Read more on page 28](#)





## Furthering Marine Mammal Interests, Protection and Welfare Through Existing Law

### Introduction

Since the 1970s, marine mammal species have benefitted from federal statutory protections in the wild<sup>1</sup> and also while maintained in zoological settings.<sup>2</sup> In 1972, Congress enacted the U.S. Marine Mammal Protection Act (“MMPA”)<sup>3</sup> in order to combat the challenges marine mammals in our oceans and rivers face from human activities.<sup>4</sup> The law also sets requirements for lawfully maintaining marine mammals in a zoological setting. In the late 1970’s, specific regulations were added to the U.S. Animal Welfare Act (“AWA”) for marine mammals in zoological and research settings.<sup>5</sup> Those regulations cover facilities, space, food, water quality, sanitation, employees, veterinary care,<sup>6</sup> and transport.<sup>7</sup>

Under the MMPA, an organization must: i) offer “a program for education or conservation purposes that is based on professionally recognized standards of the public display community; ii) comply with the AWA; and iii) be open to the public.<sup>8</sup> The MMPA further requires individuals and entities lawfully in possession of marine mammals to furnish information to a detailed database on those animals. The required database information provides for birth (where known) to death reporting, including “the cause of death when determined.” That database, the National Inventory of Marine Mammals (“NIMM”) is available online.<sup>9</sup>

In 1994, the National Marine Fisheries Service, an office of the National Oceanic and Atmospheric Administration within the Department of Commerce (“NOAA Fisheries”) first published the “professionally recognized standards of the public display community” for conservation or education programs.<sup>10</sup> The representative standards, as published, were those of the Alliance of Marine Mammal Parks and Aquariums (“Alliance”)<sup>11</sup> and the Association of Zoos and Aquariums (“AZA”)<sup>12</sup>. The standards focused on education program elements, contained brief statements about educational materials with some conservation information, and noted that members should have written education plans.<sup>13</sup> To date, NOAA Fisheries has not published any updated standards.

In the last decade, the public has increasingly exhibited heightened consciousness about animals in research facilities, zoos, and aquariums. This article recommends opportunities for channeling that public attention and concern for marine mammals into constructive, voluntary actions supportable by diverse stakeholders with a shared commitment to elevating marine mammals’ interests, protection, and well-being.

[Read more on page 35](#)

**James F. Gesualdi**

*James F Gesualdi PC*

*James F. Gesualdi is an animal welfare attorney in Islip, Long Island, New York, and author of the book, Excellence Beyond Compliance: Enhancing Animal Welfare Through the Constructive Use of the Animal Welfare Act. He served as a special professor of law at Hofstra University School of Law, where he taught Animal Law; was a founding member and former Chair of the New York State Bar Association Committee on Animals and the Law; founding Co-Chair of the Suffolk County Bar Association Animal Law Committee; a vice-chair of the American Bar Association Tort Trial and Insurance Practice Section Animal Law Committee; and Deputy Managing Editor for the American Bar Association, Section of Administrative Law and Regulatory Practice, Administrative & Regulatory Law News. In 2018, he was the inaugural recipient of the New York State Bar Association Committee on Animals & the Law’s Exemplary Service Award and in 2019, he received the American Bar Association, Tort Trial and Insurance Practice Section, Animal Law Committee’s “Excellence in the Advancement of Animal Law” Award.*



## Driftnets: An Unnecessary Evil

There's a scene in Disney Pixar film *Finding Nemo* where Dory, the endearingly forgetful blue fish voice acted by Ellen DeGeneres, finds herself stuck in a net with hundreds of other fish, being dragged into a fishing boat. Marlin, Nemo's desperate father, coaches Dory and the other caught fish to "swim down" with as much strength and determination as possible to save themselves. As with most great Disney films, the beloved character prevails, and Dory is able to free herself from the net. But "IRL," as the kids say these days, our marine wildlife often isn't as lucky as Dory.

### Understanding driftnets

Driftnets (also called "gill nets") have been used for millennia, as a method of fishing various species of fish and other marine animals.<sup>1</sup> The nets work by entangling fish in the meshes of a sheet, which is held vertically in the water by weights beneath the water's surface.<sup>2</sup> Driftnets can be rigged to float near the top of the water, the bottom of the seabed, or at any other depth.<sup>3</sup> In addition, the nets can be connected to make them multiple kilometers long, although in 1991 the United Nations General Assembly passed a resolution that called for a moratorium on drift nets longer than 2.5 km long in international waters, which went into effect in 1993. Notably, however, the resolution has no provision for enforcement.<sup>4</sup>

Driftnetting is a passive method of fishing, in that fish are caught as they swim into the net and the meshes of the net catch behind the gills of the fish.<sup>5</sup> The nets are sometimes attached to a boat in order to be collected later, but often are left to drift free and recovered later.<sup>6</sup> Driftnets are designed to be minimally visible to the fish, and often used at night to minimize that visibility even further.<sup>7</sup> To add to the minimally visible design, the material used most frequently is a monofilament, clear plastic.<sup>8</sup>

### The negative impacts of driftnets on animals and the environment

There are two main criticisms of driftnets that drive the controversy surrounding them: competitive conflicts between driftnet fisheries and non-driftnet fishers, and the detrimental impact driftnets have on the marine environment. In line with the TIPS Animal Law Committee's mission, only the latter will be addressed in this article.

Driftnets catch fish indiscriminately and therefore they catch species that may not only not be the target of a particular fishery but may be endangered or threatened. Salmon, for example, are particularly susceptible to driftnet catches.<sup>9</sup> Due to salmon being such a high value species, there have been regulations put in place to avoid

*Read more on page 39*

### AJ Albrecht

*Mercy For Animals*

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### Mikalah Singer

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## Student Spotlight

### Developing a Paper Topic—An Interdisciplinary Approach

If you are anything like me, you may find choosing a paper topic to be exceptionally difficult. I am continually lured into making policy arguments when the assignment is to find a *legal* solution to a problem I see in the world. In my experience, I've found the best tactic for developing these legal solutions is to look into interdisciplinary issues. In keeping with this newsletter's theme, I thought I'd focus on aquatic animal law, which has abundant connections to other areas of law and is a great starting point for your next paper!

"Aquatic animal" is a catchall term for millions of different species, including fish, amphibians, crustaceans, marine mammals, corals, sponges, and more. Yet many of these are grouped together by the law despite significant biological differences among the species.

As you will no doubt gather from the other pieces in this newsletter, aquatic animal law touches upon many federal laws, such as the Endangered Species Act, Marine Mammal Protection Act, Magnuson-Stevens Fishery Conservation Act, Animal Welfare Act, Clean Water Act, Federal Meat Inspection Act, and state laws regarding fishing, captive wild animals, and animal cruelty.

For example, seals are often killed for consuming salmon in open ocean fisheries despite marine mammal protections. Whether these killings are incidental to commercial fishing operations, and therefore exempted under the Marine Mammal Protection Act, is not clear. One could argue that these killings are unlawful by using another federal statute in our arsenal, perhaps by drawing a creative analogy.

Another idea one could look into is the link between aquatic animals and animal agriculture. Terrestrial animal agriculture is a significant source of pollutant run-off in our waterways, causing massive fish kills. In fact, there is a dead zone by the mouth of the Mississippi River caused by nutrient oversaturation—specifically, nitrogen and phosphorous, which is found in animal waste. How can we use the Clean Water Act to better combat this pollution and, in the process, protect aquatic animals? If we can establish liability under the Clean Water Act, what more is needed to establish liability under the Endangered Species Act?

I implore you to flip through the articles in this newsletter to inspire your next paper and advocate for aquatic animals!

As always, if you would like to reach out about the Student Spotlight, including ideas for future topics, don't hesitate to reach out at [mhou@law.gwu.edu](mailto:mhou@law.gwu.edu). ➤

#### **Meredith Hou**

*The George Washington University Law School,*

*Meredith Hou is a 3L at The George Washington University Law School, where she is President of the Student Animal Legal Defense Fund and an Associate of GW's Law Review and Alternative Dispute Resolution Board. She is an avid horsewoman and worked in veterinary medicine prior to law school. Since shifting to a legal career, Meredith has interned at Animal Wellness Action, the Animal Welfare Institute and the Humane Society Legislative Fund, and is excited to serve as an animal advocate upon graduation.*

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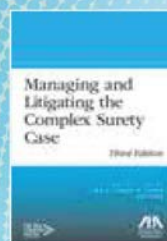
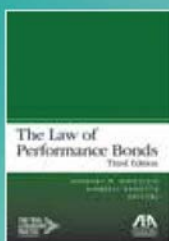
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*Aquatic... Continued from page 1*

Amphibians; Cetaceans; Echinoderms; Mollusks; Cephalopods (a subgroup of Mollusks); Crustaceans; Reptiles; Marine Mammals; Pinnipeds (a subgroup of Marine Mammals); Cnidaria; Porifera; Aquatic Insects and Spiders; and Water Birds.

Most people likely think of finfish (fish), sea turtles (reptiles), and whales, porpoises, and dolphins (cetaceans) when hearing the term aquatic animals. They may also consider octopus (cephalopods) as well as lobsters, shrimp, and crabs (crustaceans).

However, even popular animals, such as: polar bears, manatees, and sea otters (marine mammals); penguins and seagulls (seabirds); seals and sea lions (pinnipeds); and frogs and salamanders (amphibians) may not come to mind quickly or at all. Less popular animals such as: alligators, snakes, and crocodiles (reptiles); walruses (pinnipeds); eels (fish); snails, slugs, and mussels (mollusks); squid (cephalopods); and crayfish and krill (crustaceans) are often completely beyond our consideration when thinking about aquatic animals. At least, however, we would recognize them as aquatic animals.

There are still others who generally receive no consideration at all because most people do not know what they are or that they are indeed aquatic animals, including: corals (cnidaria); sponges (porifera); sea urchins, sand dollars and sea cucumbers (echinoderms); water boatmen (aquatic insects); and diving bell spiders (aquatic spiders).

If we do not know about certain creatures, we cannot consider their needs when framing legal protections for them or for their water habitats. Thus, we need to fill these knowledge gaps.

## **What Capacities Do Aquatic Animals Have?**

There is growing scientific evidence that many aquatic animals have capabilities similar to terrestrial animals, including humans. They can feel pain and they can suffer.<sup>5</sup> Some are proven to be sentient,<sup>6</sup> or self-aware,<sup>7</sup> or to have consciousness.<sup>8</sup> Some have been shown to be aware of time and have both short and long-term memory.<sup>9</sup> Some have emotional responses,<sup>10</sup> complex cognition,<sup>11</sup> and the ability to use tools.<sup>12</sup> Some aquatic animals also have the ability to cooperate across species, choose to protect their young and one another, and demonstrate social learning, including the capacity for deception.<sup>13</sup> Perhaps the most important capacity to convince policy makers of is their ability to experience the physical feeling of pain.<sup>14</sup> The scientific evidence indicating that some aquatic animals feel pain is growing to the point (for some animals) of scientific consensus, though there are still some who debate these findings. The evidence is robust and significant enough that it must now be considered in the legal domain as well.

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New scientific evidence documenting the above capacities of aquatic animals, and more, is constantly being published. This new evidence does not mean that these capacities are new, but rather that the scientific community is now willing to ratify their existence. This means that we have been using aquatic animals without regard to how those uses affect them, their abilities to act, and to suffer.

The scope of this new scientific data highlights our lack of understanding with respect to aquatic animals and creates the responsibility to reevaluate our decision-making processes regarding the use of these animals. Going forward, we should apply the precautionary principle<sup>15</sup> in making decisions about how to use, or interact with, aquatic animals (as well as terrestrial animals). This would suggest that we not undertake interaction if there is a risk of harm to the animal, without at least first considering ways to eliminate or reduce those risks and harms.

### How are Aquatic Animals Used?

Aquatic animals are used far beyond the ways that people typically think of, and in most all of the same ways as terrestrial non-human animals. Thus, aquatic animals can be: companions/pets; food and fiber (for humans, non-human animals, and industrial uses); wildlife; work animals (navy sonar); pests; and used for entertainment (aquariums, zoos, theme parks); research; and education.

Legal and policy decision-makers generally do not have a good understanding of the scope of aquatic animal usage, both in terms of the breadth of uses and the high numbers. For instance, many people are familiar with families keeping fish as pets. However, they might be surprised to learn that there are 57.7 million fish kept annually,<sup>16</sup> and that at least fifty percent of the twenty million exotic fish destined for the U.S. die during capture or transportation.<sup>17</sup> People might be further surprised to learn that breeding a killer whale costs at least one million dollars;<sup>18</sup> that dolphins can be sold for \$150,000;<sup>19</sup> that seismic surveys for oil and gas exploration harmed marine mammals over thirty million times in the Gulf of Mexico alone;<sup>20</sup> that there may be only ten Vaquitas left in the world;<sup>21</sup> and only 72 Orcas remaining in the Southern Resident Killer Whale Pod.<sup>22</sup>

In the fishing context, the number of animals killed is enormous, both in the wild caught context and in aquaculture (factory farms for aquatic animals). In 2009, for the first time, more fish were produced through aquaculture than wild caught fishing.<sup>23</sup> Some think this is more environmentally friendly, without realizing how many fish are caught in the wild to feed to farmed fish. It can take five pounds of fish to produce one pound of farmed salmon.<sup>24</sup> Further, conditions in aquaculture facilities are not always environmentally sound. Pesticides and other chemicals are



used in feed, disease prevention or treatment, and for other uses leading to high rates of chemicals found in farmed fish. For instance, dioxins were found in 96% of samples taken from farmed catfish.<sup>25</sup>

The amount of fish killed for food is so vast that we represent the numbers in tons rather than counting individual animals. The Food and Agriculture Organization of the United Nations (FAO) indicates in a 2018 report that fish production was about 171 million tons in 2016, with 90.0 million tons coming from capture (wild caught) and the remaining eighty percent coming from aquaculture.<sup>26</sup> Of this total, about 19.7 million tons were not produced for food.<sup>27</sup> The FAO projects a global increase in fisheries of 30 million additional tons annually by 2030,<sup>28</sup> though it suggests that the U.S. is likely to increase only slightly over its current 5.3 million tons.<sup>29</sup>

These numbers do not include animals killed due to poaching, pollution, boat strikes, disease, thrown away as by-catch (unintentional killing), or caught in fishing gear. It is estimated that another 650 million animals die each year due to discarded or lost fishing gear alone.<sup>30</sup> Tens of thousands of sea turtles were being killed as by-catch each year, though those numbers have been drastically reduced after significant social and policy efforts were made.<sup>31</sup> More recently, only about 4,600 turtles die annually from the fishing industry.<sup>32</sup> This indicates that change is possible once information about these problems becomes widespread.

### What Legal Protections do Aquatic Animals Have?

Aquatic animals are generally ignored, or explicitly excluded from, statutes conferring some legal protections for animals. They are not included in most state anti-cruelty laws,<sup>33</sup> sometimes excluded from the definition of animals entirely, or not included in the categories of covered animals. When a statute is vague about protecting “animals” prosecutors must decide both whether aquatic animals are within the purview of the statute, *and* whether using limited resources to protect them is justified. Some cruelty cases have been successfully brought, as in *People v. Garcia*, a 2006 New York companion animal case,<sup>34</sup> and unusually, in a Florida case involving sharks.<sup>35</sup> Others have been dismissed, even after prosecutors decided to proceed, such as in a 2019 North Carolina case.<sup>36</sup> Of course, many more cases are never brought.

The Animal Welfare Act (AWA), which has some protections for animals used in the context of research, breeding, and exhibition, only protects marine mammals (whales, dolphins, porpoises, seals, sea lions, walruses, dugongs, manatees, sea otters) under Subpart E of the AWA regulations.<sup>37</sup> This means that none of the non-marine mammal, aquatic animals used in research or entertainment have even the minimal protections of the AWA.



Some aquatic animals have protections because they are listed as threatened or endangered under the Endangered Species Act (ESA).<sup>38</sup> The ESA does not protect captive-bred animals, but now does include captive animals who were taken from the wild. In 2015, the National Oceanic and Atmospheric Administration changed its rules to make it clear that ESA protections include Lolita, a captive killer whale. However, this change did not affect the status or conditions of Lolita's captivity.<sup>39</sup>

Marine mammals have some additional federal protections under the Marine Mammal Protection Act.<sup>40</sup> The Act requires resource users "to show that proposed taking of living marine resources would not adversely affect the resource or the ecosystem."<sup>41</sup> The goal of the Act is to establish "optimum sustainable populations" to ensure healthy ecosystems and therefore taking of these animals is limited. Incidental takes are those that are unintentional and therefore do not result from a permit but can result from permitted activity. Authorized takes for non-fishing activities include: oil and gas development, military readiness activities, renewable energy projects, and construction projects. Permitted direct takes and imports are allowed for scientific research, activities designed for the enhancement of the species, commercial or educational photography, and public display.

The Lacey Act<sup>42</sup> includes fish and other aquatic animals in its protections and can be very useful because of its criminal sanctions. The National Marine Monuments and Sanctuaries in the U.S. also offer some protections for aquatic animals.<sup>43</sup> There are thirteen sanctuaries, as well as four monuments in the Pacific, and one in the Atlantic.<sup>44</sup> And there are a number of other federal laws that address specific species of aquatic animals from a conservation, rather than animal protection, perspective.<sup>45</sup> The federal transportation and humane slaughter laws do not protect aquatic animals<sup>46</sup> and there are no equivalent statutes that do. However, there are some state laws that offer specific protections, such as the California Orca Protection Act.<sup>47</sup>

But for the most part, aquatic animals are generally not mentioned in laws—which means their exclusion is assumed. This indicates the amount of work necessary in order to raise them to the visible level *before* we can have conversations about what regulations are needed to give them appropriate protection.

### What Can We Do to Protect Aquatic Animals?

Seeing the lack of awareness, resources, and advocacy for aquatic animals, I started developing the Aquatic Animal Law Initiative (AALI) in 2015 as a project of the Animal Law Clinic at Lewis & Clark Law School. We saw the need for AALI because: Aquatic animals are generally left out of the legal frameworks of protection and regulation; We have too little understanding about the environmental, public health,



consumer, and worker safety issues associated with production, transportation, slaughter, processing, breeding, testing, and exhibition of aquatic animals; No organization dedicated to the legal analysis of these issues exists; Without research and consideration of the scientific, economic, and legal contours of these matters, policy development is necessarily constrained and poorly informed; and Without explicit exploration of these issues, opportunities for multi-disciplinary collaboration and problem-solving are lost.

So, I, and my clinic students, created AALI and this mission statement: The Aquatic Animal Law Initiative (AALI) works to protect and promote the interest of aquatic animals by: advocating on their behalf through the legal system; promoting their value to the public by providing education about their cognitive, emotional, and physiological capacities; and harmonizing human, animal, and environmental interests.

AALI has been working with clients and partners in the U.S. and around the world to change the status of aquatic animals. We are working on a national consumer class action filed against Petco and a number of other retailers, producers, and distributors of betta fish tanks, arguing that the tanks sold as permanent housing for these animals are much too small. These practices result in adverse welfare conditions and early death for the fish, and consequently, adverse consumer outcomes. We have also worked to support the Green Party of Ireland move toward developing marine protected sanctuaries, argue for designating and protecting endangered aquatic animals, enhance its animal welfare platform and work cooperatively with relevant jurisdictions sharing waterways. We produced a 50-state survey of the status of legal protections for aquatic animals under cruelty laws, and we worked with the Center for Biological Diversity to reduce the unlimited takes of turtles allowed in certain states.

Doing this, and other work, provides a great opportunity to show that change is possible, to have conversations across many communities encouraging better practices and policies, and to hold those who harm aquatic animals accountable. ➤

## Endnotes

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### *Sharks... Continued from page 12*

disregard for her sincerity, a group of lawyers have taken on the protection of sharks and folded those cases into the developing jurisprudence regarding states' rights to regulate the sale of products that they consider to be the products of animal cruelty. In that realm, sharks are king, and a few California cases are great examples of the bedrock legal principle that animal cruelty is a local issue, and that Americans get to decide (within certain boundaries) what degree of cruelty they will accept where they live. And that alone is a vital tool in the toolkit of animal protection. But the shark fin cases that made their ways through the California courts also added significantly to the developing precedent that rejects constitutional challenges to statewide animal protection laws. So, our efforts to keep sharks in the ocean have also laid the groundwork for more humane laws for farm animals on land.

### **Sharks in Commerce**

Sharks are caught and killed for their meat, and often killed in response to perceived dangers from shark attacks. However, perhaps the greatest danger to their survival is the practice of "shark finning."<sup>3</sup> This highly profitable but indisputably cruel practice involves the removal with a hot knife of a live shark's fins, after the shark has been caught and hauled onboard a boat. After the fins are hacked off, the sharks are dumped back into the water. Profusely bleeding and sinking, and having lost a vital navigation organ, the sharks either drown or are attacked and killed by predators, given their vulnerable states.

Shark finning is extremely profitable, because fins go for extremely high prices compared to the meat of the rest of the shark. It is estimated that some 73 million sharks are killed each year, and many species are in danger of extinction.<sup>4</sup> In order to decrease the threat, and because of the extreme cruelty involved in shark finning, several states have enacted laws that prohibit the harvesting, possession, and sales of detached shark fins, with limited exceptions.

California's shark fin laws were enacted in 2012 and were based on the legislative finding that sharks are "critical to the health of the ocean ecosystem" and their decline "constitutes a serious threat to the ocean ecosystem and biodiversity."<sup>5</sup> The statutes prohibit the possession, sale, offer for sale, trade, or distribution of a detached shark fin or shark fin product, with limited exceptions.<sup>6</sup>

The California Legislature made specific findings that "[t]he practice of shark finning, where a shark is caught, its fins cut off, and the carcass dumped back into the water, causes tens of millions of sharks to die each year. Sharks starve to death, may be slowly eaten by other fish, or drown because most sharks need to keep moving to force water through their gills for oxygen."<sup>7</sup> The Legislature further



found that the California market's demand for shark fins drives the practice of shark finning worldwide. "By impacting the demand for shark fins, California can help ensure that sharks do not become extinct as a result of shark finning."<sup>8</sup> And the Legislature found that the high amounts of mercury in shark fins is dangerous to consumers' health.<sup>9</sup>

### Sharks in Court

The shark fin laws were attacked by various groups interested in the profit margin on shark fin sales. The federal court challenge to the California shark fin laws generated four opinions, all resoundingly in support of the law. Plaintiffs first claimed the laws constituted illegal discrimination against Chinese Americans, since shark fin is a delicacy often used at Chinese cultural and ritual ceremonies, and that the law would have an illegal and disparate impact on those individuals. The California district court and the Ninth Circuit Court of Appeals summarily dismissed those claims.<sup>10</sup>

The plaintiffs also lost on their argument that the shark fin law was preempted by the Magnuson-Stevens Fishery Conservation and Management Act, which sets forth a framework governing federal fisheries.<sup>11</sup> Plaintiffs claimed that the California law interfered with the federal government's authority to manage ocean fishing off the California coast. However, the courts rejected these arguments because the shark fin laws regulated only within state waters, and the federal law has a specific savings clause allowing for state fisheries laws within state boundaries.<sup>12</sup>

Finally, the shark fin opinions added to the growing set of cases involving laws prohibiting the sale of animal products that could only be created through great cruelty. The shark fin cases set the stage for future rulings in which California laws preventing products of cruelty (like *foie gras* or meat and dairy products from intensively confined hens, cows and pigs) were upheld.<sup>13</sup> Specifically, the shark fin plaintiffs claimed that the laws violated the Dormant Commerce Clause of the federal constitution by discriminating against out-of-state sellers of shark fins and illegally impacting the national shark fin market. The court ruled that because the law affected all sellers of shark fins—both in-state and out-of-state—equally, it did not violate the Commerce Clause. Additionally, because the purpose of the Shark Fin Law is to conserve state resources, prevent animal cruelty and protect wildlife and public health, which are legitimate matters of local concern, the local benefits clearly outweighed any possible incidental effect on the market. Thus, there was no significant interference with interstate commerce.<sup>14</sup>



A separate group of plaintiffs, consisting mainly of San Francisco restaurateurs and suppliers to local restaurants, sued in state court, on roughly the same grounds, and added in a claim that the law violated the Takings Clause of the Fifth Amendment to the federal constitution. The Takings Clause claim was dismissed after a demurrer, and Plaintiffs subsequently voluntarily dismissed the remainder of the case.<sup>15</sup>

### Shark Fin Legacy

The shark fin cases had important effects on animal law. When the laws were drafted, they set up the dialogue and debate that the California courts then took up in order to rule in favor of the laws. The growing body of law in this area has established that, as long as there is careful consideration, laws intended to keep cruelly-created animal products out of a state are valid exercises of states' authority to manage cruelty within their borders. And perhaps just as importantly, the shark fin law cases demonstrate that Americans care about, and have the right to protect, nonhumans in and out of the water. ➤

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*Lungs... Continued from page 13*

2048.<sup>17</sup> Startling as these numbers are, they fail to account for the treatment of the fish that are caught or the impact of anthropogenic activities on those who escape the nets. Similarly, the MMPA and ESA lack the necessary tools to adequately protect aquatic animal populations

## Why Fish Suffering Matters: Scientific Evidence of Fish Sentience

### ***Fish Feel Pain***

Many incorrectly assume that fish do not feel pain. Fish possess central nervous systems and are biologically sophisticated beings. Pain for them, as for all animals, serves an important evolutionary function, allowing them to determine and avoid threats.<sup>18</sup> Multiple studies have demonstrated their sensitivity to pain, and even that they have an emotional response to it.

### ***Fish Have Emotions.***

Fish have emotions; some species of fish even serve as animal models for anti-depressants.<sup>19</sup> Researchers have conducted studies on zebrafish through the “novel tank test.”<sup>20</sup> The test involves dropping zebrafish into a tank for approximately five minutes. If the fish sinks, it is depressed. If it swims along the top, it is not.<sup>21</sup> The length of time the fish lingers at the bottom serves as a barometer for the severity of its depression.<sup>22</sup>

### ***Moral Considerations.***

If fish can feel pain and anguish, we must consider the moral obligations implicated by that distress. Deliberately inflicted suffering has moral relevance that crosses species barriers. There is no logical reason that that relevance should stop at the water’s edge. The global community must decide whether and how to acknowledge the suffering that current fishing practices cause, that climate change exacerbates that suffering, and that mitigation measures exist.

## Current Fishing Practices

Domestic fishing practices vary depending on the venue and purpose of the catch. Although this article focuses on wild-caught fish in commercial fisheries, the treatment of farmed fish is equally relevant. This is particularly true given that fish-farming will likely supplant wild-caught fish as the principal source of aquatic food by 2021.<sup>23</sup>







Fish slaughter involves a two-step process.<sup>24</sup> First the fish is stunned, then subsequently it is killed. The gap between these two actions is known as the stun-to-kill time. Ideally, that time is kept as short as possible.<sup>25</sup> Various techniques are then employed to kill the fish including: asphyxiation, live chilling, carbon dioxide stunning, gill cutting, and percussive and electrical stunning.

Unlike with livestock, no humane slaughter requirements exist for wild-caught fish. Generally, they are captured in nets and dumped on board to suffocate.<sup>26</sup> Longline fishing uses thousands of hooks on lines that can stretch 50–100 kilometers.<sup>27</sup> Fish often get dragged for hours before the line is hauled in.<sup>28</sup> Gillnets are flat nets suspended vertically, creating an invisible netting wall that snares aquatic animals.<sup>29</sup> Gillnets are designed so the head of a fish can fit through, but not the body.<sup>30</sup> Fish may remain trapped for hours before the nets are pulled in, resulting in gill constriction and slow suffocation.<sup>31</sup> Gillnets also generate unwanted bycatch,<sup>32</sup> which represents over 40% of marine catch worldwide,<sup>33</sup> as well as killing many small marine mammals.<sup>34</sup>

## **Effects of Climate Change & Ocean Acidification**

### ***Ocean Acidification***

When oceans absorb airborne carbon, the carbon combines with saltwater to produce carbonic acid, which increases the acidity of the water.<sup>35</sup> This reaction binds carbonate ions, reducing their bioavailability. As a result, many marine organisms cannot build calcium carbonate shells.<sup>36</sup> Their populations diminish and—in the case of corals—their habitats are destroyed.<sup>37</sup> Over the past 250 years, CO<sub>2</sub> levels in the environment have increased by over 40%,<sup>38</sup> causing a 30% increase in the ocean's acidity.<sup>39</sup>

### ***Change in Weather Patterns***

Some species only thrive in certain habitats.<sup>40</sup> As the oceans warm, many aquatic species find their habitats compromised.<sup>41</sup> Unpredictable extreme weather with storms and heavy rainfall damage coastal ecosystems, communities, and coral reefs.<sup>42</sup> Rising sea levels cover wetlands and other low-lying habitats where fish reproduce, and destroy mangroves, which serve as nurseries for many species.<sup>43</sup> Moreover, coral reefs and sea grass can only photosynthesize in shallow water; they drown in rising tides.<sup>44</sup>

## **Current Barriers to Fish Harm Contemplation and Incorporation**

Several barriers exist to incorporating fish pain and suffering into fisheries management. The first is a lack of motivation. Humans often disregard the needs



of other species. This anthropocentric orientation underlies much environmental degradation worldwide.<sup>45</sup> A second barrier is charismatic megafauna—large species with widespread appeal.<sup>46</sup> Some argue that using charismatic megafauna for research has an “umbrella effect” and results in the preservation of less-glamorous species.<sup>47</sup> However, studies have concluded that the “umbrella effect” does not actually protect biodiversity.<sup>48</sup> Furthermore, few aquatic animals qualify as charismatic megafauna, those majestic or cuddly (think orcas and koalas) which capture the human imagination.

A final barrier to mitigating fish suffering is the attention paid to stock numbers. Commercial fisheries remain heavily focused on the quantity of fish caught rather than the morality of the methods of capture. This quantity over quality approach precludes adequate consideration of the pain and suffering caused by the fishing methods.

### **Strategies to Overcome Moral Inadequacies**

First among many potential regulatory reforms would be limiting stun-to-kill time. Scientific research as well as casual observation reveal that fish exhibit extensive stress signals within seconds of being stunned.<sup>49</sup> Furthermore, if not stunned properly, they can suffer for upwards of 14 minutes after their removal from water.<sup>50</sup>

A second proposed reform involves modifying gillnets. Although a gillnet ban would be most preferable, that seems unlikely in the short term. In the interim, they can be redesigned to reduce the harmful effects of bycatch and entrapment.<sup>51</sup> On a global scale, gillnet size and mesh configuration could be standardized by international agreement to allow targeted catch to swim into the nets, while releasing bycatch.

A third reform is increased enforcement. In the case of commercial fisheries, increased patrol of high traffic areas, as well as increased monitoring at busy ports can ensure that commercial fisherman comply with revised slaughter and fishing practices. This enforcement should include mandatory inspections and reporting requirements as well as heavy fines for violators.<sup>52</sup>

The 1995 Agreement<sup>53</sup> established a framework to protect the world’s fish. The General Principles in Article V could be amended to include language limiting stun-to-kill time, redesigning gillnets, and creating enforcement mechanisms for regulations. The U.S. should also reform the MSA to incorporate more humane fishing practices. Specifically, the MSA should mirror the relevant provisions in the U.S. Humane Methods of Slaughter Act.<sup>54</sup>

The need for fisheries reform does not stem just from a moral imperative to limit human-inflicted suffering. It also finds justification in the Public Trust Doctrine (PTD).



### The Role of the Public Trust Doctrine

The PTD migrated from Roman law, to the laws of medieval England, then across the sea to the United States and other countries.<sup>55</sup> Under the PTD the state is the designated trustee of natural resources held in trust for the benefit of the public.<sup>56</sup>

#### *The PTD Applies to Fisheries*

In U.S. common law, killing or mortally wounding an animal established occupancy and ownership.<sup>57</sup> This right to take wild animals led to widespread extinction. Extinctions led progressives to sue to protect wildlife, arguing that as successors to British sovereignty, states owned wildlife and were obligated to protect it.<sup>58</sup> In later years, states “republicanized” this idea of sovereign ownership,<sup>59</sup> allowing the state to act as the guardian of natural resources and wildlife.<sup>60</sup> The original U.S. PTD cases involved aquatic water life, but did not explicitly include fish in the corpus of the trust.<sup>61</sup> Both logic and the trend in precedent suggest that fish should also be subjects of the PTD.

#### *There is a Federal Public Trust and it Applies to Fish*

When the United States gained its independence, fear of centralized authority led to the Articles of Confederation establishing a weak federal government.<sup>62</sup> This led to domestic instability and eventually the Constitutional Convention of 1787.<sup>63</sup> The Constitution represented a compromise between a strong central authority and state autonomy, ensuring that the federal government would only have specifically enumerated powers.<sup>64</sup> The unique circumstances arising from the American Revolution meant that the states actually existed before the nation.<sup>65</sup> The Constitution makes clear (via the 10th Amendment) that the states were the ones ceding power to the federal government rather than the other way around. Since the states were subject to the PTD (having derived their power from the British Crown, which was itself subject to the PTD), the federal government, as beneficiary of power ceded by the states, should also be subject to the PTD.

In *Illinois Central v. State of Illinois*, the U.S. Supreme Court invalidated a sale of valuable submerged lands by the state of Illinois to the Illinois Central Railroad.<sup>66</sup> The sale was rescinded because the conveyance of valuable shore lands represented an abdication of the state’s police power and its authority over navigation and was thus illegal.<sup>67</sup> The Court did not ground its decision in state law. Indeed, in conveying the land, the legislature had not violated any state law. Rather, the Court determined that the legislature had failed to act in accordance with the Court’s own vision of the state’s public trust responsibilities. This suggests federal authority over state public trust doctrines, which indicates that there is a federal PTD as well. And, since the PTD incorporates wildlife, and fish are wildlife, then it stands to reason that the PTD extends to fish as well.



### The PTD Internationally

The scope of the PTD continues to expand internationally as well. For example, in *MC Mehta v. Kamal Nath*, the Indian Supreme Court established the PTD as a foundational principle of Indian law.<sup>68</sup> In later cases, the Court found further basis for the PTD in the Indian Constitution.<sup>69</sup> The Filipino Constitution declares that the state has a duty to “protect and advance the right of the people to a balanced and healthful ecology”<sup>70</sup> and in *Oposa v. Factoran*, Filipino Courts held that the PTD included fisheries.<sup>71</sup> Ecuador, Brazil, and Bolivia recognize a constitutional right to a healthy environment. Ecuador’s Constitution includes a right to healthy marine ecosystems,<sup>72</sup> and the list continues.

### Conclusion

Although fish are sentient, their suffering remains irrelevant as a matter of law and policy. Fishery management practices have yet to implement policies to address human-inflicted harm. To be sustainable, fisheries management systems must account for the effects of climate change, ocean acidification, and depletion of fish stocks while also reforming the methods by which fish are caught and killed. In reexamining current practices, regulators would do well to consider that cruelty is both a moral and environmental issue. It involves *unnecessary* infliction of harm. Perhaps a hard look at the way we treat marine animals could lead to a reexamination of the nature of harm as well as what we consider necessary. ➤

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9 Fiona Harvey, *Tuna and Mackerel Populations Suffer Catastrophic 74% Decline*, *Research Shows*, *GUARDIAN* (Sept. 16, 2015), <https://www.theguardian.com/environment/2015/sep/15/tuna-and-mackerel-populations-suffer-catastrophic-74-decline-research-shows>.

10 See NOAA, *supra* note 7.

11 Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C.A. § 1801 (West 1976).



- 12 See NOAA, *supra* note 7. The regional councils include: North Pacific, Pacific, Western Pacific, Gulf of Mexico, Caribbean, South Atlantic, MidAtlantic, and New-England.
- 13 Marine Mammal Protection Act, 16 U.S.C.A. § 1361 (a)(6) (West 1972) [hereinafter MMPA] ("marine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic, and it is the sense of the Congress that they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem. Whenever consistent with this primary objective, it should be the goal to obtain an optimum sustainable population keeping in mind the carrying capacity of the habitat").
- 14 See *id.* § 1372 (noting prohibitions regarding interactions with protected marine species).
- 15 Endangered Species Act, 16 U.S.C.A. § 1531, 1538 (1973) (West) [hereinafter ESA].
- 16 *Ocean Threats*, NAT'L GEOGRAPHIC (Jan. 21, 2020), [www.nationalgeographic.com/environment/habitats/ocean-threats/](http://www.nationalgeographic.com/environment/habitats/ocean-threats/).
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- 20 *Id.*
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- 26 Mark Schroepe, *Fishing Trawlers Have Double the Reach*, NATURE (Mar. 7, 2008), [www.nature.com/news/2008/080307/full/news.2008.658.html](http://www.nature.com/news/2008/080307/full/news.2008.658.html).
- 27 *Industrial Tuna Longlining*, Food & Agric. Org. of the U.N., [www.fao.org/fishery/fishtech/1010/en](http://www.fao.org/fishery/fishtech/1010/en) (last visited Feb. 18, 2020).
- 28 *Id.*
- 29 *Fishing Gear: Gillnets*, NAT'L OCEANIC & ATMOSPHERIC ADMIN. (Feb. 12, 2019), [www.fisheries.noaa.gov/national/bycatch/fishing-gear-gillnets](http://www.fisheries.noaa.gov/national/bycatch/fishing-gear-gillnets).
- 30 Elizabeth Brown, *Fishing Gear 101: Gillnets*, SAFINA CENT. (June 6, 2016), [www.safinacenter.org/2015/03/fishing-gear-101-gillnetsentanglers/](http://www.safinacenter.org/2015/03/fishing-gear-101-gillnetsentanglers/).
- 31 *Id.*
- 32 Andrew J. Read et al., *Fine-scale Behavior of Bottlenose Dolphins Around Gillnets*, 270 PROC. ROYAL SOC'Y B: BIOLOGICAL SCI. 90 (2003) (discussing the factors leading to the entanglement of dolphins and other species in gillnets).
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- 37 O. Hoegh-Guldberg et al., *Coral Reefs Under Rapid Climate Change and Ocean Acidification*, 318 SCI. 1737, 1737-38 (Dec. 14, 2007).
- 38 Adam, David, *World carbon dioxide levels highest for 650,000 years, says US report*, GUARDIAN (May 13, 2008), [www.theguardian.com/environment/2008/may/13/carbonemissions.climatechange](http://www.theguardian.com/environment/2008/may/13/carbonemissions.climatechange) (citing study conducted at the Mauna Loa observatory in Hawaii which found that CO<sub>2</sub> levels in the atmosphere have reached 387 parts per million); see also Hoegh-Gulberg, *supra* note 37, at 1737.
- 39 Nicola Jones, *How Growing Sea Plants Can Help Slow Ocean Acidification*, YALE ENV'T 360 (July 12, 2016), [https://e360.yale.edu/features/kelp\\_seagrass\\_slow\\_ocean\\_acidification\\_retards](https://e360.yale.edu/features/kelp_seagrass_slow_ocean_acidification_retards).
- 40 *About aquatic habitats*, NEW SOUTH WALES GOV'T DEP'T OF PRIMARY INDUSTRIES, [www.dpi.nsw.gov.au/fishing/habitat/aquatic-habitats/about-aquatic-habitats](http://www.dpi.nsw.gov.au/fishing/habitat/aquatic-habitats/about-aquatic-habitats) (last visited Feb. 18, 2020) (discussing the differences in water flow, water quality, and water temperature for fish species).
- 41 See generally Lise Comte & Julian D. Olden, *Climatic Vulnerability of the World's Freshwater and Marine Fishes*, 7 NAT. CLIMATE CHANGE 718 (2017).
- 42 Hoegh-Guldberg, *supra* note 37, at 1742 (discussing loss of coastal barriers and concluding the "devastating ramifications" that climate change will/has caused for coral reefs).
- 43 *Id.* at 1742 ("[W]e can anticipate that decreasing rates of reef accretion, increasing rates of bioerosion, rising sea levels, and intensifying storms may combine to jeopardize a wide range of coastal barriers. People, infrastructure, and lagoon and estuarine ecosystems, including mangroves, seagrass meadows, and salt marshes, will become increasingly vulnerable to growing wave and storm impacts.").
- 44 See generally A. Arias-Ortiz et al., *A Marine Heatwave Drives Massive Losses From The World's Largest Seagrass Carbon Stocks*, 8 NAT. CLIMATE CHANGE 33 (2017) (discussing the degradation of seagrass in the face of climate change).
- 45 "Anthropogenic" is defined as "resulting from the influence of human beings on nature." MERRIAM-WEBSTER DICTIONARY 53 (11th ed. 2007). It is often used to refer the human degradation to the planet resulting from climate change, pollution, etc.
- 46 Jeffrey C. Skibins et al., *Charisma and Conservation: Charismatic Megafauna's Influence on Safari and Zoo Tourists' Pro-conservation Behaviors*, 22 BIODIVERSITY & CONSERVATION 959, 963 (2013) (discussing the connection between tourism and flagship species).
- 47 See James M. Dietz et al., *The Effective Use of Flagship Species for Conservation of Biodiversity: The Example of Lion Tamarins in Brazil*, in CREATIVE CONSERVATION: INTERACTIVE MANAGEMENT OF WILD AND CAPTIVE ANIMALS (Peter J.S. Olney et al., eds., 1994); see also Farid Belbachir et al., *Monitoring Rarity: The Critically Endangered Saharan Cheetah as a Flagship Species for a Threatened Ecosystem*, 1 PUB. LIBR. OF SCI. ONE 1, 11 (Jan. 28, 2015).
- 48 See Robin Meadows, *No Link Between Flagship Species and Other Biodiversity in Belize*, CONSERVATION MAG. (July 29, 2008), <https://www.conservationmagazine.org/2008/07/no-link-between-flagship-species-and-other-biodiversity-in-belize/>.
- 49 See *supra*, note 18-22 (Why Fish Suffering Matters: Scientific Evidence of Fish Sentience).
- 50 Jeff A. Lines et al., *Electric Stunning: A Humane Slaughter Method For Trout*, 28 AQUACULTURAL ENGINEERING 141, 143 (Aug. 2003).
- 51 Gillnets could indeed be eliminated if there were international will. But to date, there have been no indications that it is on any international or domestic agenda.
- 52 Compliance is always an issue with respect to fishing practices. See generally Jonas Hentati-Sundberg et al., *Does Fisheries Management Incentivize Noncompliance? Estimated Misreporting in the Swedish Baltic Sea Pelagic Fishery Based on Commercial Fishing Effort*, 71 INT'L COUNCIL EXPLORATION OF SEA J. OF MARINE SCI. 1846 (2014). However, oversight has improved in recent years and further improvement remains possible.





- 53 *Supra* note 5.
- 54 HSA, *supra* note 2.
- 55 Michael C. Blumm, *The Public Trust Doctrine and Private Property: The Accommodation Principle*, 27 Pace Envtl. L. Rev. 649, 655–56 (2010).
- 56 See Mary Christina Wood, *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part I): Ecological Realism and the Need for A Paradigm Shift*, 39 Envtl. L. 43, 45 (2009); *Advancing the Sovereign Trust of Government to Safeguard the Environment for Present and Future Generations (Part II): Ecological Realism and the Need for a Paradigm Shift*, 39 Envtl. L. 43, 45 (2009) (“At the core of the doctrine is the antecedent principle that every sovereign government holds vital natural resources in ‘trust’ for the public—present and future generations of citizen beneficiaries.”); see generally Melissa K. Scanlan, *Implementing the Public Trust Doctrine: A Lakeside View into the Trustees’ World*, 39 Ecology L.Q. 123 (2012).
- 57 See *Pierson v. Post*, 3 Cai. R. 175 (N.Y.S. 1805).
- 58 MICHAEL C. BLUMM & MARY C. WOOD, PUB. TRUST DOCTRINE IN ENVT’L & NAT. RESOURCES L. 2d (2015). This formulation and much of the ensuing discussion of the PTD and wildlife draws heavily on the outstanding work of Professors Blumm and Wood, especially at pp. 217–56.
- 59 See Dale D. Goble, *Three Cases / Four Tales: Commons, Capture, the Public Trust, and Property in Land*, 35 Envtl. L. 807, 831 (2005). See also *Magner v. People*, 97 Ill. 320, 333 (1881); *State v. Rodman*, 58 Minn. 393, 59 N.W. 1098 (1894).
- 60 See *Toomer v. Witsell*, 334 U.S. 385, 68 S. Ct. 1156, 92 L. Ed. 1460 (1948).
- 61 *Arnold v. Mundy*, 6 N.J.L. 1 (1821); *Martin v. Waddell’s Lessee*, 41 U.S. 367, 10 L. Ed. 997 (1842).
- 62 See *Articles of Confederation, 1777-1781*, U.S. OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1776-1783/articles> (last visited Feb. 26, 2020).
- 63 See *Constitutional Convention and Ratification, 1787-1789*, U.S. OFFICE OF THE HISTORIAN, <https://history.state.gov/milestones/1784-1800/convention-and-ratification> (last visited Feb. 18, 2020).
- 64 U.S. CONST. art. I, § 8.
- 65 U.S. CONST. amend. X.
- 66 *Illinois Cent. R. Co. v. State of Illinois*, 146 U.S. 387, 13 S. Ct. 110, 36 L. Ed. 1018 (1892).
- 67 *Id.*
- 68 M.C. Mehta v Kamal Nath, (1997) 1 SCC 388 (India), in 1 U.N. ENV’T PROJECT COMPENDIUM OF JUD. DECISIONS IN MATTERS RELATED TO THE ENV’T, NAT’L DECISIONS 259 (1998).
- 69 M.I. Builders Private Ltd. v. Radhey Shayam Sahu (1999) 6 SCC 464 at 466 (India); see also *Formento Resorts & Hotels v. Minguel Martins*, (2009) *Cal. Ins. Code* § 100 (India) (West).
- 70 Philippine *Cal. Const. art. II, § 16*.
- 71 *Oposa v. Factoran*, [1993] 224 SCRA 792 (Philippines).
- 72 See CONST. ECUADOR, art. 395, sec. 1.



*Furthering... Continued from page 14*

## Recommendations

### **Words Matter: The Marine Mammal Database**

The MMPA and the agencies refer to the required informational database as a marine mammal “inventory.” However, an alternative term, such as “database” is a better word that recognizes that fact that individual marine mammals are living and breathing beings, and not mere objects.<sup>14</sup>

### **Updated education and conservation: Furthering the spirit of the MMPA law regarding education and conservation**

**Updated standards for education and conservation programs should be published.**

It has been more than a quarter of a century since publication of representative professionally accepted standards.<sup>15</sup> Over this period, scientific knowledge about marine mammals, their environments, conservation, and welfare has expanded. Moreover, professionally accepted education and conservation program standards have similarly evolved.<sup>16</sup> Although some updated information on current standards is accessible online,<sup>17</sup> it should formally be made “of record” and then regularly updated to demonstrate ongoing actions in furtherance of the MMPA’s requirements. This will also be reflective of the community’s research and expanding scientific knowledge base.

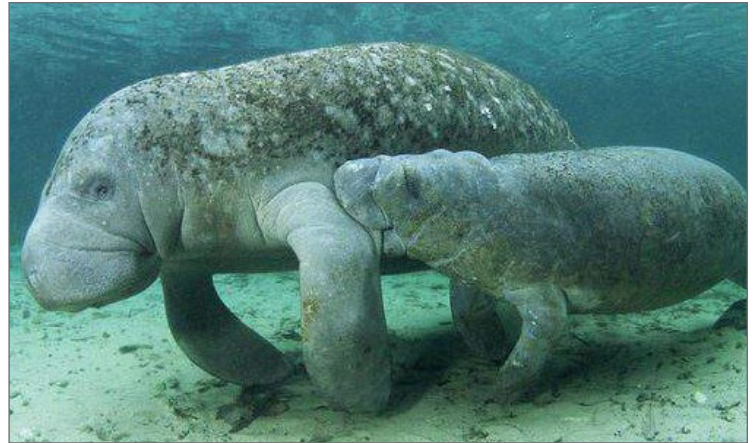
**These standards should include both education and conservation programs.**

The MMPA statutory language speaks of education *or* conservation programs<sup>18</sup>, but the legislative history mentions both “education and conservation programs”.<sup>19</sup> Publication of updated standards in both areas more fully fulfills the MMPA’s important conservation mission. Though education promotes conservation, conservation activities themselves should also be formalized and documented.

### **Animal Welfare**

#### **Exceeding and maintaining ongoing AWA compliance**

The MMPA requires an “AWA license or registration” to lawfully possess and maintain marine mammals.<sup>20</sup> A review of the House Report accompanying the 1994 MMPA reauthorization suggests that AWA compliance must be maintained,





allowing for minor items reasonably likely to be rectified in the near future.<sup>21</sup> To fulfill the spirit of the AWA and MMPA, any AWA noncompliances should be avoided or corrected immediately, or then be subject to a promptly developed and implemented improvement plan. Upon correction of any such noncompliances, the agency should be notified, and the organization should consider submission and self-posting of a self-certified compliance report.<sup>22</sup>

It is strongly recommended that AWA and other standards serve as a starting point, rather than an ending point, and that enlightened and responsible organizations strive to continuously improve animal welfare.

**Marine mammal mortalities should teach us even more about how to improve care and welfare and illuminate potential conservation measures and stranding care enhancements.**

The AWA requires necropsies for all marine mammals.<sup>23</sup> The MMPA database requires the date and cause of death (when determined) of a marine mammal.<sup>24</sup> These are straightforward recordkeeping and information requirements.

More comprehensive and systematic review and analysis of marine mammal mortalities could be undertaken. A good starting point would involve stakeholder support for voluntarily making available necropsy reports for confidential, third-party review and analysis. Annually, a summary of overall lessons learned and potential care and welfare, conservation or research measures could be made publicly available. To encourage greater voluntarily participation, perhaps veterinary pathologists appointed by the marine mammal community<sup>25</sup> could be granted an opportunity to review the report prior to submission to the agencies. This would also allow the ability to develop and advance new initiatives and improvements in conjunction with the report.

***Annual Reporting: Driving conservation, welfare, and other advances through annual reports***

Annually report on education, conservation, and welfare enhancements. This information would go beyond MMPA (and AWA) requirements and give greater meaning to these important activities in a manner that demonstrates to the public the importance of marine mammal interests, protection, and welfare via education, conservation, and other actions. This information could be submitted to the relevant agencies and self-posted on organization/association websites. Over time, dramatic advances could be documented and areas for further attention could be identified and addressed. This would add transparency and accountability, which are essential to maintaining the public trust.



***Responsible Governance and Oversight: Organizations caring for and/or advocating for marine mammals should have appropriate board-level training to enhance board members' effectiveness in fulfilling their duties.***

The AWA provides that a regulated entity is vicariously liable for the “act, omission or failure of any person acting for or employed by” that organization.<sup>26</sup> The AWA “general handling” regulation states that “[a]ll **licensees** who maintain wild or exotic animals must demonstrate adequate experience and knowledge of the species they maintain.”<sup>27</sup> Marine mammal facilities must have “adequately trained employees or attendants, **responsible to management** . . .”<sup>28</sup>

Given these responsibilities for the animals entrusted to an organization’s care, leadership, including both management and the board of directors—should have AWA and animal welfare-specific training. A number of board members should also have extensive understanding of education and conservation, given the important MMPA requirements in those areas.<sup>29</sup>

***Responsible and ethical organization board governance requires appropriate oversight.***

Thus, groups with responsibility for the well-being of the animals in their care (as well as for education and conservation) should have a designated representative (e.g. board liaison) or a subgroup (board level Animal Welfare Committee or substantial representation or organizational Animal Welfare Committee) responsible for these critical areas. Given public consciousness regarding marine mammals and their well-being, such direct board oversight is essential to responsible leadership.

### Potential Applications to Other Species

The ideas set forth herein should be considered and voluntarily extended to other animals/species maintained by the zoological community and as a form of furthering the public trust, even in the absence of the types of marine mammal-specific laws and regulations under discussion here. Such ideas include: i) annual or periodic reports on educational and conservation activities, including any advances in and/or impacts of such activities; ii) summaries of knowledge gained from necropsy results (for at least some species) as it relates to conservation and welfare enhancements; and iii) more proactive and well-informed board engagement and oversight of animal welfare, education, and conservation.



## Conclusion

Existing laws like the MMPA and the AWA have recognized the importance of marine mammals, their interests, protection, and welfare for nearly fifty years. Over the last half century, these laws and associated regulations have been occasionally updated, but do not appear to have kept pace with the public's evolving consciousness about marine mammals. As with much else in life, we can do better in advancing marine mammal interests, protection, and welfare. The preceding ideas are provided in hopes of promoting constructive, voluntary, universally supported action to achieve a better world for marine mammals. ➤

## Endnotes

1 See Marine Mammal Protection Act, 16 U.S.C.A. § 1361 (West), et seq. (2018).

2 See Animal Welfare Act, 7 U.S.C.A. § 2131-2159 (2018) (West).

3. Marine Mammal Protection Act, 16 U.S.C.A. § 1361, et seq.

4 The MMPA is jointly administered by the U.S. Department of the Interior Fish & Wildlife Service (FWS) (responsible for manatees, walrus, sea otters, polar bears) and the U.S. Department of Commerce National Oceanic and Atmospheric Administration Fisheries (NOAA Fisheries) (for dolphins, whales, seals and sea lions). The only longstanding animal-oriented federal advisory agency, the Marine Mammal Commission (MMC), also has a role in marine mammal policy. 16 U.S.C.A. § 1401 - 1407 (West); Marine Mammal Commission, <https://www.mmc.gov/>; see also U.S. Department of the Interior Fish & Wildlife Service, <https://www.fws.gov/>; U.S. Department of Commerce National Oceanic and Atmospheric Administration Fisheries, <https://www.fisheries.noaa.gov/>.

5 The U.S. Department of Agriculture ("USDA") Animal and Plant Health Inspection Service ("APHIS") Animal Care (AC) administers the AWA. USDA APHIS, <https://www.aphis.usda.gov/aphis/home/>; Animal Care, <https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/usda-animal-care-overview>.

6 9 C.F.R. § 3.100-3.118 (2020).

7 Marine Mammals; Regulations for Humane Handling, Care, Treatment, and Transportation, 44 Fed Reg. 36874 (June 22, 1979).

8 See 16 U.S.C.A. § 1374 (c)(2)(A) (West), which provides that an admission fee may be charged for public access.

9 NOAA Fisheries, *National Inventory of Marine Mammals*, <https://www.fisheries.noaa.gov/national/marine-mammal-protection/national-inventory-marine-mammals>.

10 59 Fed. Reg. 50900 at 98 (Oct. 6, 1994), <https://www.govinfo.gov/content/pkg/FR-1994-10-06/pdf/FR-1994-10-06.pdf>.

11 See Alliance of Marine Mammal Parks and Aquariums, [www.ammppa.org](http://www.ammppa.org).

12 See Assoc. of Zoos and Aquariums, [www.aza.org](http://www.aza.org).

13 See 16 U.S.C.A. § 1374 (c)(2)(A).

14 See James F. Gesualdi, *Getting Better All the Time Columns, Supporting the cause of animal protection: words from the heart*, SAN DIEGO ZOO GLOBAL ACADEMY E-NEWSLETTER (Nov. 2019), <https://sdzglobalacademy.org/newsletter/2019-11/academyHeader.jpg> (suggesting "that the term 'inventory' (though contained in the MMPA itself) be replaced by something like 'National Register of Marine Mammals' or 'National Database of Marine Mammals,' so as to recognize that the listed animals are other living beings rather than mere commodities").

15 See 16 U.S.C.A. § 1374 (c)(2)(A).

16 Examples include the Alliance's INTERNATIONAL CODE OF BEST PRACTICES FOR DOLPHIN FACILITIES (2013) which has some elements for dolphin-related information and the AZA's THE ACCREDITATION STANDARDS AND RELATED POLICIES 21-24 (2020) education and conservation standards. See <https://assets.speakcdn.com/assets/2332/aza-accreditation-standards.pdf>.

17 *Id.*

18 16 U.S.C.A. § 1374 (c)(2)(A)(i).

19 *Marine Mammal Protection Act Amendments of 1994*, H.R. REP. 103-349, 32 (Mar. 21, 1994).

20 See 16 U.S.C.A. § 1374 (c)(2)(A).

21 H.R. REP. 103-349, *supra* note 19, at 32. The House Report states:

"In those cases where a person possessing a marine mammal is not meeting the requirements of [the AWA] and is not likely to do so in the near future, the Secretary may seize an animal, arrange for appropriate disposition, and recover expenses resulting from the seizure from the person possessing the marine mammal.

The Committee intends that the phrase 'is not reasonably likely to meet those requirements in the near future' should not be interpreted as meaning a minor violation of the requirements of subparagraph (A). For example, if a Department of Agriculture inspector notes a violation of the Animal Welfare Act that is easily correctable, such as a broken water pump that is awaiting parts, or a tool or cleaning fluid that has been left out, then the violator should be considered as being reasonably likely to correct the violation."

22 The AWA regulations grant the agency broad authority to request information in conjunction with enforcement. 9 C.F.R. § 2.125; see James F. Gesualdi, *Constructive Tools for Greater Transparency to Drive Continuous Improvement in Animal Protection and Welfare*, AMERICAN BAR ASSOCIATION, TORT TRIAL AND INSURANCE PRACTICE SECTION ANIMAL LAW COMMITTEE NEWS, Fall 2019, at 17, 30; see also JAMES F. GESUALDI, EXCELLENCE BEYOND COMPLIANCE: ENHANCING ANIMAL WELFARE THROUGH THE CONSTRUCTIVE USE OF THE ANIMAL WELFARE ACT, 4, 48-49 (Maurice Bassett, 2014). Practicing the Excellence Beyond Compliance® approach can accelerate advances in animal welfare and protection.

23 9 C.F.R. § 3.110(g) (1) and (2).

24 16 U.S.C.A. § 1361. A recent article and related litigation suggest there may be more to this (and previously issued MMPA permit conditions) regarding potential necropsy (and perhaps even health record) disclosure. See, Heather D. Rally, Donald C. Baur, Matthew McFeeley, *Looking Behind the Curtain: Achieving Disclosure of Medical and Scientific Information for Cetaceans in Captivity Through Voluntary Compliance and Federal Enforcement*, 24 ANIMAL L. 303 (2018). The Confidential Third Party Review proposed here seeks to meet or exceed the marine mammal welfare and conservation objectives.

25 E.g., accrediting associations like the Alliance and AZA.

26 7 U.S.C.A. § 2139 (West).

27 9 C.F.R. § 2.131(a).

28 9 C.F.R. § 3.108(a) and (b) (Emphasis added).

29 See, e.g., James F. Gesualdi, *Animal Welfare Act: Good Practices to Advance Animal Interests and Well-Being*, AMERICAN BAR ASSOCIATION, TORT TRIAL AND INSURANCE PRACTICE SECTION ANIMAL LAW COMMITTEE NEWS, Fall 2017, at 20, [https://www.americanbar.org/content/dam/aba/publications/tort\\_trial\\_insurance\\_practice\\_newsletters/animal\\_law\\_committee/animal\\_law\\_fall\\_2017.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/publications/tort_trial_insurance_practice_newsletters/animal_law_committee/animal_law_fall_2017.authcheckdam.pdf).





*Driftnets... Continued from page 15*

further depletion of the species.<sup>10</sup> This is particularly important as consumers have begun to seek out “wild caught” fish, with seemingly little knowledge of the inhumane driftnet fishing techniques.<sup>11</sup>

While regulations have been put in place to avoid the over capture of salmon, salmon is a commercial species, and driftnets have a large negative impact on species that are not used commercially.<sup>12</sup> Due to driftnets operating generally near the surface of the water they are more likely to catch air breathing mammals than other forms of fishing equipment.<sup>13</sup> Some of these species who are caught in driftnets are slow-growing and population vulnerable.<sup>14</sup>



Since driftnets are non-selective, the vast number of non-target animal mortality is “bycatch,” which is the unwanted fish and other marine creatures caught during commercial fishing for a different species. Bycatch can include everything from various species of seaweed, to air breathing sea mammals such as whales, sea lions and seals. It can take several days for driftnets to be retrieved from where they have been dropped. By the time they are pulled up it is often too late for air breathing mammals that have been caught in the nets.<sup>15</sup> Many species that are caught and die in the nets are considered threatened or endangered.<sup>16</sup>

Bycatch from driftnets is prevalent in all areas of the world where driftnets are used and for all intended species, including swordfish, tuna, and salmon.<sup>17</sup> When unintended animals get caught in driftnets, they can die through drowning and being unable to breathe if trapped in the nets for long enough. Or in some cases, boat crew workers mutilate the animals in order to avoid having them trapped in their nets.<sup>18</sup> Undercover investigations have resulted in evidence of crew members pulling the animals up on grapple hooks and then slicing off their fins and tails before throwing them back into the ocean to slowly die.<sup>19</sup>

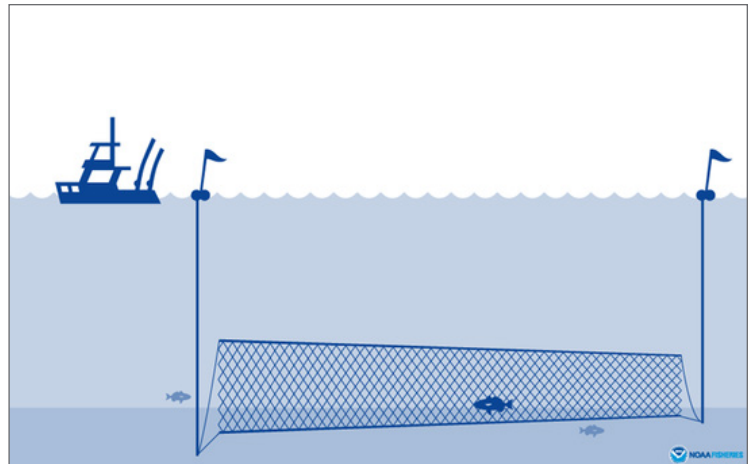
Driftnets are sometimes abandoned by fishing boats, thereby becoming “ghost nets.”<sup>20</sup> These nets are either intentionally abandoned or lost as a result of fishermen being unable to locate the nets when they return to retrieve them. These “ghost nets” linger in the environment and trap marine life for months to years after they have been abandoned due to the strong material they are made of.<sup>21</sup> The large amount of drift nets lost at sea combined with other fishing equipment that has been abandoned drive the marine mortality rates up.<sup>22</sup>

In 2001, the National Oceanographic and Atmospheric Agency (NOAA) created the Pacific Leatherback Conservation Area, where it is prohibited to driftnet fish for part



of the year in the waters off of Monterey, California through the mid-Oregon coast.<sup>23</sup> The prohibition helped to prevent the harm of driftnets on leatherback sea turtles, as well as a number of other marine species.<sup>24</sup> Although this protection has existed since 2001, the National Marine Fisheries Service has considered providing exemptions that would weaken the protective measures.<sup>25</sup>

There has been public acknowledgment of fear surrounding driftnets for decades now. An article written in the New York Times in 1989 discusses how the “new driftnet technology could seriously deplete stocks of fish, mammals, and birds,” as well as “possibly threaten the food chain in the deep ocean.”<sup>26</sup> Nevertheless, driftnet fishing remains prevalent.



## Current US legislation regarding driftnets

In September 2018, California passed a law that phases out driftnets in the state of California via a transition program and incentivizes the surrender of existing gill net licenses.<sup>27</sup> The ban will go into effect in January of 2023.

In addition, there is currently federal legislation pending before Congress that is less ambitious than the protections signed into law in the state of California, but that charges the Secretary of Commerce with conducting a transition program that facilitates the phase out of large-scale driftnet fishing.<sup>28</sup>

Consistent with the UN resolution passed in 1991, neither the California law nor the federal bill provides for an enforcement mechanism of the driftnet phase out. Until stronger policies, complete with remedies to ensure compliance, are passed, it is likely that the cruel and environmentally harmful practice of driftnet fishing will continue. Those who are concerned about this inhumane practice are encouraged to contact their representatives and urge them to consider sponsoring protective legislation, and to “vote with their dollars” by opting for a plant-based diet. ➤

## Endnotes

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- 2 *Id.* § 1.1.
- 3 *Id.*
- 4 U.N. *Adopts Global Drift-Net Ban*, L.A. TIMES (DEC. 1, 1991), <https://www.latimes.com/archives/la-xpm-1991-12-21-mn-624-story.html>.
- 5 NORTHRIDGE, *supra* note 1, § 1.1
- 6 *Id.*
- 7 *Id.*
- 8 *Id.*
- 9 *Id.* § 1.2.2.



10 *Id.*

11 *Wild-Caught*, ANIMAL WELFARE INST., <https://awionline.org/content/wild-caught> (last visited Feb. 14, 2020).

12 See *Laws & Policies*, NOAA FISHERIES, <https://www.fisheries.noaa.gov/topic/laws-policies> (last visited Feb. 14, 2020).

13 See NORTHIDGE, *supra* note 1, § 1.2.2.

14 *Id.*

15 See *Wild-Caught*, *supra* note 11.

16 *Id.*

17 *Id.*

18 Darryl Fears, *Grisly new undercover footage shows the toll of 'death nets,' activists say*, WASH. POST (Apr. 12, 2018, 3:00 AM), <https://www.washingtonpost.com/news/animalia/wp/2018/04/12/grisly-new-undercover-footage-shows-the-toll-of-death-nets-activists-say/>.

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25 See Miranda Fox, *Unraveling Protections for the Pacific Leatherback*, EARTHJUSTICE (Apr. 18, 2016), <https://earthjustice.org/blog/2016-april/unraveling-protections-for-the-pacific-leatherback>.

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27 Gov. Brown Approves California Ban on Controversial Fishing Gear Known as 'Drift Gillnets', NBA BAY AREA (Sept. 27, 2018), <https://www.nbcbayarea.com/news/local/ca-bans-controversial-fishing-gear/63479/>.

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July 29- Aug 4, 2020	<b>ABA Annual Meeting</b> Contact: Juel Jones – 312/988-5597	TBD Chicago, IL
September 2020	<b>Cannabis Conference</b> Contact: Janet Hummons – 312/988-5656 Danielle Daly – 312/988-5708	TBD Location
October 7-12, 2020	<b>TIPS Fall Leadership Meeting</b> Contact: Janet Hummons – 312-988-5656 Juel Jones: 312-988-5597	Omni Resort Montelucia Scottsdale, AZ
October 29-30, 2020	<b>Aviation Litigation</b> Contact: Danielle Daly – 312/988-5708	Ritz-Carlton Washington, DC
November 4-5, 2020	<b>Fidelity &amp; Surety Law Fall Conference</b> Contact: Juel Jones – 312/988-5597	Ritz-Carlton Philadelphia, PA
January 14-16, 2021	<b>Life Health &amp; Disability</b> Contact: Danielle Daly – 312/988-5708	TBD Location – TBD
February 3-5, 2021	<b>Fidelity &amp; Surety Law Midwinter Conference</b> Contact: Juel Jones – 312/988-5597	JW Marriott Washington, DC
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March 10-12, 2021	<b>Transportation Mega Conference XV</b> Contact: Janet Hummons – 312/988-5656 Danielle Daly – 312/988-5708	Sheraton New Orleans New Orleans, LA
March 12-13, 2021	<b>Admiralty Maritime Law Conference</b> Contact: Juel Jones – 312/988-5597	Sheraton New Orleans New Orleans, LA
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