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May 23, 2014

Via Electronic Mail

Mr. Michael Liddel
Information Act Quality Coordinator
National Marine Fisheries Service
1315 East-West Highway
#12624
Silver Spring, MD 20910

Re: ***Comments on Peer Review Agenda (Peer Review Agenda ID 261)***
for the Proposed Rule to Include the Captive Killer Whale Lolita in the
Endangered Species Act Listing of the Wild Southern Resident Killer
Whale Population, NOAA-NMFS-2013-0056, Docket No. 130321272-
4020-01, 79 Fed.Reg. 4313 (Jan. 27, 2014).

Dear Mr. Liddel:

Miami Seaquarium, owner and caretaker of the killer whale Lolita since 1970, provides the following comments on the Peer Review Plan posted by the National Marine Fisheries Service ("NMFS") on April 24, 2014 regarding its proposed rule to include Lolita within the Southern Resident Killer Whales Distinct Population Segment ("SRKW DPS") listing under the Endangered Species Act, 16 U.S.C. § 1531, et seq. ("ESA"). A copy of these comments is also being provided to Branch Chief Lynne Barre in the Northwest Office, who is leading the NMFS team that is considering the proposed rule and that drafted the "Charge statement" in the Plan.

I. INTRODUCTION

The "Charge statement" attached to the Plan Review Plan asks the reviewers to review NMFS's proposed conclusion that the genetic and acoustics evidence demonstrates that Lolita originated from the SRKW. See NMFS Peer Review Plan ID 261 (posted to the peer review agenda on April 24, 2014); *Proposed Amendment to the Endangered Species Act Listing of the Southern Resident Killer Whales Distinct Population Segment*, 79 Fed. Reg. 4313, 4318 (Jan. 27, 2014). The Plan finds the proposed conclusion that Lolita originated from the SRKW is Influential Scientific Information ("ISI") subject to peer review under the Information Quality Act, P.L. 106-554. NMFS also explains that its proposed conclusion is also being peer reviewed under the NMFS Policy Statement requiring peer review of scientific data underlying decisions in ESA listing matters, 79 Fed.Reg. at 4318 (citing 59 Fed.Reg. 34270 (July 1, 1994)).

In accordance with the NMFS peer review procedures implementing the Information Quality Act, and as invited by NMFS in the April 14 2014 email from Ms. Barre, Miami Seaquarium now provides comments on adequacy of the posted Peer Review Plan ("Plan").¹

NMFS's attorney Kirsten Erickson has confirmed that, as requested by Miami Seaquarium, NMFS is providing the peer reviewers with copies of the comments on the proposed rule to include Lolita within the SRKW DPS that Miami Seaquarium filed on March 28, 2014, as well as the comments that Magdalena Rodriguez, D.V.M. (Lolita's current veterinarian), filed that day. Both sets of comments address the genetics and acoustic issues being considered by the Peer Reviewers. Because NMFS is providing those substantive comments to the Reviewers, their content is not repeated in these comments on the adequacy of the Peer Review Plan.²

II. HOELZEL AND EMMONS PERSONAL COMMUNICATIONS

Subsequently, on May 6, 2014, and in response to a Freedom of Information Act ("FOIA") request, NMFS produced to Miami Seaquarium copies of the personal communications from Dr. A.R. Hoelzel and Candice Emmons cited and relied upon by NMFS in the Proposed Rule and in the Charge to Reviewers. This new information is highly relevant to the Peer Review, so those communications are discussed in depth below. The Hoelzel personal communication is an email to Dr. Mike Ford of NMFS dated June 13, 2013 and discusses Lolita's genetic heritage. It is Exhibit A to this letter. The Emmons personal communication is an email to Dr. Ford dated June 10, 2013 and discusses acoustical information allegedly regarding Lolita. It is Exhibit B to this letter.

III. SPECIFIC COMMENTS ON PEER REVIEW PLAN

A. The Plan Asks the Reviewers to Consider Only One Paper Regarding Killer Whale Genetics (Hoelzel, 2007), When that Paper Does not Expressly Discuss Lolita's Genetic Information and Another Available Paper (Pilot, 2009) Does.

Comment: The peer review plan asks the peer reviewers to review just one published paper regarding killer whale genetics, Hoelzel (2007), even though that paper does not mention Lolita.³ As discussed below, Hoelzel (2007) contains unlabeled data regarding Lolita that cannot be identified as relating to Lolita unless and until the reader obtains the clarifying personal communication from Dr. Hoelzel and an enlarged version of figure 3 in the paper. Meanwhile, the Plan does not refer to the one available published paper that does expressly

¹ See NMFS Instruction 04-108-04 on the OMB Peer Review Bulleting Guidance, p. 6 ("Once the peer review plan is developed and on an agency's peer review agenda, the public will have the opportunity to comment on the adequacy of the peer review plan. The agency must consider comments on the peer review plan per Section V.3 of the PRB [Peer Review Bulletin]").

² These peer review comments also do not address the separate issue of whether any relationship Lolita might have had with the Southern Residents in 1970 has long since been sundered by her 43 years in human care at the Miami Seaquarium. That issue, which is not part of the Charge to Reviewers, is addressed in the comments on the proposed rule Miami Seaquarium filed on March 28, 2014.

³ The Charge quotes a paragraph from the 2013 Status Review that cites only one paper regarding genetics, Hoelzel (2007), and then explains: "We are requesting your review of this specific paragraph and the papers cited as they pertain to Lolita's heritage and our conclusion that Lolita originated from the Southern Residents." Charge at 1. Because Hoelzel (2007) is the only genetics paper cited, the Charge Statement tells the Reviewers that that paper is the only genetics paper they need to consider.

discuss Lolita's genetic heritage, Pilot (2009). Unless the Plan is revised to encourage the Reviewers to also consider Pilot (2009), they may easily overlook the most relevant science.

The Pilot (2009) paper is significant. As explained in Miami Seaquarium's March 28, 2014 comments on the proposed rule, three of four tests that Pilot et al. ran did not find a close kinship relationship between Lolita and any of the approximately 19 known Southern Residents to which the author's compared a genetic sample from Lolita (abbreviated as "LOL" on supplemental appendix S2.) As clarified in a February 26, 2014 personal communication from Dr. Pilot to Dr. Rodriguez, because the majority of the tests run showed no close kinship relationship, Pilot concluded Lolita was not closely related to any of those Southern Residents. Copies of Pilot (2009) and the Pilot personal communication are Exhibits C and D to this letter. The lack of kinship is important because the Southern Resident population consists of pods that are assemblages of animals with kinship ties. The lack of kinship with known Southern Residents indicates that Lolita may not have be a Southern Resident.

Proposed Solution: *The Plan should be revised by asking the Reviewers to also consider Pilot (2009), and also the February 26, 2014 explanatory personal communication from Dr. Pilot attached to these peer review comments, and not just Hoelzel (2007).*

B. The Plan Should Point Reviewers to the Data Regarding Lolita's Genetic Heritage in Figure 3 of Hoelzel (2007) that is Obscured by Lack of Labeling and Small Print.

Comment: The Plan cites a personal communication from Dr. Hoelzel as support for NMFS's proposed finding that Lolita is a Southern Resident, but does not provide that personal communication to the Reviewers. The personal communication is an unpublished email from Dr. Hoelzel to Mike Ford of NMFS dated June 13, 2013. In this email, Dr. Hoelzel states that Lolita is the fourth whale in the "structure plot" in Hoelzel (2007). The structure plot is figure 3 in that paper. Figure 3 is a 203 column-wide PowerPoint file that provides one column of genetic information for each of 203 killer whales sampled, but does not identify the whales being reviewed. The Hoelzel (2007) paper never expressly mentions Lolita. Thus the Reviewer could not detect any discussion regarding Lolita in the Hoelzel (2007) paper cited by NMFS, unless the reader also reads the Hoelzel personal communication that points to the data in figure 3.

The "structure plot" printed as figure 3 in Hoelzel (2007) is also difficult to read, because the 203 columns in it are spread across the width of one printed page. However, easier-to-read enlargeable electronic versions of figure 3 are separately available if one goes to the publisher and selects the "supplementary materials" tab on the publisher's website and downloads the black-and-white and color versions of the figure. As the figure is color coded using seven colors to correspond to seven killer whale populations, the color version is best. For convenience, copies of Hoelzel (2007) and the color and black-and-white enlarged versions of figure 3 are supplied as Exhibits E, F1 and F2 to this letter.

Proposed Solution: *NMFS should provide the peer reviewers with (1) the Hoelzel personal communication that reveals that Lolita is the fourth whale in the "structure" plot printed as figure 3 in Hoelzel (2007) and (2) the full-sized readable color and black-and-white versions of that figure. Taking these steps will make this important Lolita-specific data available to the Reviewers, who would otherwise have no apparent means of finding this data. See NOAA Information Quality Guidelines, Part II (the "Utility" principle calls for information to be "more accessible or easier to read, see, understand, obtain, or use.")*

C. The Plan Should Ask the Reviewers to Analyze the Impact of the Information in Column 4 of Figure 3 of Hoelzel (2007) that Assigns Lolita's Genome in Greater Proportions to Other Killer Whale Populations than to the Southern Residents.

Comment: The Peer Review Plan paraphrases conclusions drawn by Dr. Hoelzel but does not inform the peer reviewers of the availability of raw data regarding Lolita in figure 3 of Hoelzel (2007). As a result, the peer reviewers may not know of the opportunity to consider the raw data and draw their own conclusions from it. Per Information Quality Act guidelines, the peer reviewers should be given that opportunity. NMFS should consider the raw data as well.

The raw data in figure 3 is startling, but some background information is necessary to understand it. The data compares: (1) the population in which the killer whale was present at time of sampling or was captured from before sampling, i.e. the locational population assignment, with (2) the populations to which the killer whale bears the most and least genetic similarity, i.e. the genetic population assignment.⁴ Information on each of the 203 killer whales tested is provided in a single column in the 203 column figure. Moving from left to right along the horizontal axis, groups of columns review killer whales locationally assigned to the Southern Residents (SR), then to the Southeast Alaska Residents (AR), then to the Southeast Alaska Transients (AT), then to the California Transients (CT), then to the Icelandic whales (IC), then to Off Shore Killer Whales (OS), then to Russian Killer Whales (RU), and finally to the Bering Strait (BS) killer whales. The Northern Residents, the Southern Residents neighbors, were not tested.

The genetic assignment information is presented along the vertical axis by dividing each killer whale's column into seven segments, each colored to correspond to a population. The greater the proportional genetic assignment to a particular population, the longer (taller) the segment for that population. While the figure does not provide precise percentages, it does provide a percentage scale, so one can approximate percentage assignments to each population. As one would expect, for the majority of whales, the locationally assigned population is also the predominant genetically assigned population. For example, the killer whale whose data is presented in the first (leftmost) of the 203 columns is locationally assigned to SR and is genetically assigned 75% to SR, 10% to AR, 10% to CT, with the remaining 5% split among the four other populations.

Lolita is among the minority of whales whose genetic population assignment is significantly different from the locational population assignment determined by the authors (SR). Per the Hoelzel personal communication, her data is in the fourth column. That data genetically assigns Lolita only approximately 20% to the SR, while assigning her about 45% to AT (Southeast Alaska Transients), about 12% to the CT (California Transients), and perhaps 8% to AR, 8% to the RU, 5% to OS, and 2% to the Icelandic population.⁵

Thus, according to the underlying data in Hoelzel (2007) figure 3, one transient population (AT) is Lolita's single largest genetic assignment (45%) and two transient populations together (AT and CT) account for the majority of her genetic assignment (approximately 57%). This data indicates that Lolita is predominantly NOT a Southern Resident. This in turn raises

⁴ Figure 3 is entitled: "Proportional assignment to one of 7 putative populations (in 7 different colors) for each of the 203 individual whales in the study."

⁵ These are approximations, as the figure provides a percentage scale but not exact numbers.

significant questions as to why Dr. Hoelzel in his personal communication with Dr. Ford, remarks that, among the populations tested, Lolita “falls in best with SR.”⁶ Under NOAA Information Quality Act Guidelines, Dr. Hoelzel’s remarks in the non-public email are “Third-party Information” and an “Interpreted Product. Those Guidelines therefore require that the underlying raw data in column 4 of figure 3 that reveals Lolita is actually assigned predominantly to other non-SR populations be considered by NMFS and the Reviewers in reviewing the accuracy of the interpretation made by Dr. Hoelzel in his email to Dr. Ford cited by NMFS.⁷

Proposed Solution: *In addition to giving the Reviewers the personal communication that shows where to find the data regarding Lolita in Hoelzel (2007), the Plan should ask the Reviewers to consider the impact of that data, as it indicates that Lolita is genetically assigned predominantly to Transient killer whale populations, rather than to the Southern Residents. The Reviewers should also be given the June 13, 2013 email from Dr. Ford to Dr. Hoelzel that prompted the personal communication from Dr. Hoelzel. The manner in which Dr. Ford framed his question to Dr. Hoelzel may have influenced the response from Dr. Hoelzel.*⁸

D. The Reviewers Need to Know that the “SR mtDNA Haplotype” is Present in Many Killer Whale Populations and is not Unique to the Southern Residents.

Comment: In the Charge Statement, NMFS quotes its 2013 SRKW status review and cites Hoelzel (2007) and the Hoelzel personal communication for the conclusion that:

“An additional captive animal originating from the SRKW population **and with a genotype consistent with a southern resident origin** (Hoelzel et al. 2007; Hoelzel pers. com.), ‘Lolita,’ has resided at the Miami Seaquarium since her capture in August of 1970 (Hoyt, 1981).” (Emphasis added).

As noted above, the Hoelzel (2007) paper does not expressly discuss Lolita. In concluding that Lolita has “a genotype consistent with a southern resident origin,” NMFS is therefore citing the personal communication, in which Hoelzel states that Lolita “has the SR mtDNA haplotype.”

A reviewer who does not dig deeper might incorrectly conclude that the presence of the “SR mtDNA haplotype” in Lolita means that Lolita possesses a genetic characteristic unique to

⁶ The populations tested did not include Northern Residents, who are the immediate neighbors of the Southern Residents, and swim off the coast of British Columbia, sometimes entering Southern Resident waters.

⁷ NOAA Information Quality Guidelines, Part I provides: “When [Third-Party Information] is used, any limitations, assumptions, collection methods, or uncertainties regarding it will be taken into account and disclosed.” Part II.D provides that review of “Interpreted Products” shall include examining “reliable supporting product” [i.e. underlying data] and that “[a]dditional information that demonstrates the quality and limitations of the interpreted product” be considered in assessing its accuracy.

⁸ In the June 13, 2013 email that prompted the June 13, 2013 personal communication from Dr. Hoelzel relied upon by NMFS (both supplied as Exhibit A to this letter), Dr. Ford states that “it is clear from the capture records that Lolita originated from the Southern Residents” and then asks Dr. Hoelzel if he any genetic-based information regarding Lolita “and if so whether there is any reason to believe she is not from the SR population.” By framing the question that way, Dr. Ford effectively asked Dr. Hoelzel to assume that Lolita was a Southern Resident unless there was evidence to the contrary, rather than asking Dr. Hoelzel to examine whether there was evidence that Lolita was a Southern Resident. Dr. Hoelzel’s reply later the same day matched the format of Dr. Hoelzel’s question: “... I never had any reason to believe that sample may not fit with the SR population.”

the Southern Residents, when in fact that haplotype is widely shared among many killer whale populations. Dr. Hoelzel himself explains this in a report to the NMFS Biological Review Team (BRT) that the BRT used in preparing the 2004 SRKW Status Report:

“The southern resident haplotype (ENPSR) has now been identified from animals sampled in Russia, the Aleutians, Puget Sound, off Newfoundland, and off the coast of England. It is the most widely distributed mtDNA haplotype so far recorded for the killer whale. There was no correlation between phylogenetic lineages and foraging ecotype (mammal vs fish predation), and only limited consistency with geographic populations.”

Hoelzel, R. 2004. Report on killer whale population genetics for the BRT review on the status of the southern resident population. Unpublished report submitted to the NWFSC, Seattle, WA. Miami Seaquarium’s veterinarian Dr. Magdalena Rodriguez noted in her comments on the proposed rule filed on March 28, 2014 that “the Alaskan and Bering Strait residents ... share a haplotype with the southern residents.”⁹ In short the presence of the SR mtDNA haplotype in Lolita does not suggest that Lolita is a Southern Resident, because so many other killer whale populations share the same genotype.

Solution: *The Plan should refer the Reviewers to Dr. Hoelzel’s findings in his 2004 Report to the Biological Review Team that the “SR mtDNA haplotype” is widely distributed among many killer whale populations and so is not at all unique to the Southern Residents.*¹⁰

E. The Reviewers should be told that NMFS does not have in its possession the “new genetic analysis” that it relies on in the Proposed Rule and Charge to Reviewers.

Comment: In the Proposed Rule, NMFS states that “a new genetic analysis, available since the 2005 listing ... indicates that Lolita has a genotype consistent with Southern Resident origin.” *Proposed Rule*, 79 Fed.Reg. 4313, 4316 (Jan. 27, 2014) (citing Hoelzel (2007) and Hoelzel personal communication). In addition to the genotype being equally consistent with origin from many other killer whale populations, NMFS does not have in its possession a copy of the “new genetic analysis” that it cites and relies upon. This prevents NMFS from reviewing the analysis and so impacts NMFS’s proposed conclusion in reliance on the analysis that Lolita originated from the Southern Residents. Miami Seaquarium requested the analysis in an April 6, 2014 FOIA request to NMFS. NMFS replied that it cannot located the analysis in its records.¹¹

⁹ Dr. Rodriguez also notes that, as a morphological matter, Lolita’s saddle patch resembles Alaskan and Bering Strait saddle patches more than the typical Southern Resident saddle patch. Rodriguez Comments, p. 3 (filed March 28, 2014 in the public comment docket for the Proposed Rule).

¹⁰ Dr. Hoelzel’s report to NMFS is available at: www.nwfsc.noaa.gov/research/divisions/cb/ecosystem/marinemammal/documents/hoelzel_population_genetics.pdf

¹¹ On April 8, 2014, Miami Seaquarium submitted a FOIA request seeking a copy of this “new genetic analysis,” quoting and citing the Federal Register in which NMFS cited the analysis. 79 Fed.Reg. 4313, 4316. On May 6, 2014, NMFS sent a letter providing an initial response to the FOIA request, stating that the genetic analysis has not yet been located, and that NMFS would continue to look and respond on May 20, 2014. On May 21, 2014, the undersigned called NOAA’s FOIA office and was told that NMFS was unable to locate the analysis and would be confirming that in a final response expected momentarily. Copies of the FOIA request and NMFS’s May 6, 2014 response letter are Exhibits G and H to this letter.

When “Third-Party-Information” such as this genetic analysis by Dr. Hoelzel is used to make a decision, such information “must be of known quality and consistent with NOAA’s information quality guidelines. When such information is used, any limitations, assumptions, collection methods, or uncertainties concerning it will be taken into account and disclosed.” NOAA Info. Quality Guidelines, Part II. Because NMFS does not have the analysis in its possession, NMFS and the Reviewers are unable to evaluate whether the analysis meets the quality requirements of NOAA’s Info. Quality Guidelines, and unable to probe limitations, assumptions, or uncertainties regarding how the analysis was conducted. Further, the Reviewers may be unaware that the analysis is not in NMFS’s possession, and so may incorrectly assume that NMFS Staff have looked at the analysis and vetted it.

Solution: *The Reviewers should be told that NMFS does not have in its possession the new genetic analysis on which NMFS relies for its proposed finding that Lolita originated from the Southern Residents, that evaluation of whether the analysis meets Information Quality guidelines is therefore impossible, and that the Reviewers should consider those circumstances in evaluating NMFS’s proposed conclusion regarding Lolita’s origins.*

F. The Plan Should Not Ask the Reviewers to Assume that Lolita was “Captured from the Southern Residents”

Comment: The Charge statement in the Plan begins by stating that “Lolita is a female killer whale captured from the Southern Resident population in 1970, who currently resides at the Miami Seaquarium in Miami, Florida.” Charge at 1.

The Charge statement in the Plan asks the reviewers to evaluate the accuracy of NMFS’s proposed conclusion that Lolita is genetically and acoustically a Southern Resident, but the Plan does not ask the Reviewers to evaluate the accuracy of the conclusion that Lolita was captured from the Southern Residents in 1970. The Plan thus effectively tells the Reviewers that they can take it as a given that Lolita was captured from the Southern Residents. This pre-disposes the Reviewers to find she originated from that population.

The facts are not clear enough to justify taking it as a given that Lolita was captured from the Southern Residents. Lolita was captured as part of a mass-capture event in August, 1970. The number of killer whales who were captured in that event (80 whales) was so large as to approach, equal, or exceed the estimated size of the entire Southern Resident population at the time (between 65 and 89 whales), and some known Southern Residents were not observed in the capture nets and may have not been captured.¹² Therefore, some of the 80 whales that were captured were likely from other populations. Most were immediately released, making it difficult to determine after-the-fact the populations to which each of those whales belonged.

The capture was in the waters utilized by the Southern Residents, but those waters are shared from time to time by other killer whale populations, including both Transients and Northern Residents. In a 1976 unpublished report, supplied as Exhibit I to this letter, Michael Bigg discusses the counting of killer whales in the region of “Georgia Strait – Juan de Fuca Strait – Puget Sound.” Bigg explains: “About 115 whales occur here of which 65-70 whales are residents and the remainder transients. During 1962-75, 60 whales were probably cropped [through captures] from this stock, 45 of them during 1967-70.” Bigg (1976), pp. 18-19. Lolita was captured in this area (specifically, in Penn Cove) in August, 1970.

¹² Bigg (1982) p. 660 (“a reduction in total abundance [from] 89 to 65 ... occurred from 1967 to 1973.”) Bigg attributes this reduction to capture events. See also, Bigg (1976), p. 12

In the same 1976 report, Bigg also reports that August was (by far) the month of the year in which Transients were most often seen off southern or eastern Vancouver Island (near or in Southern Resident waters) in the years 1967 to 1974.¹³ Thus, Transients appeared frequently near Southern Residents in the late summer at the time of Lolita's capture from Southern resident waters August, 1970. As noted above, the Hoelzel (2007) data genetically assigns Lolita predominantly to the Transient populations.

A table in Bigg (1982) recites that the August, 1970 captures were from the Southern Residents, based on the observed presence of some Southern Residents in the nets, but there is no statement that each one of the killer whales captured that day was from the Southern Residents. Bigg (1982) does not address the spikes of sightings of Transients each August and acknowledged that J pod (one of the three SR pods) was not identified in the capture nets.¹⁴ Bigg also did not discuss what could have caused so many killer whales (80 whales) to be present at one place. In that regard, it is well established that vessel traffic, particularly military vessels utilizing sonar, have from time to time disrupted normal killer whale movements, and also that killer whales from different populations sometimes assemble in locations away from their normal grounds. Krahn (2004) pp. 7, 33, 35 (2004 SRKW Status Review). Interestingly, military sonar operations in Arctic waters containing various killer whale populations were particularly active in July and August, 1970, shortly before and during the capture incident.¹⁵

In sum, the peer reviewers should not be told to take it as a given that Lolita was captured from the Southern Residents, and should instead review that proposed conclusion, like any other proposed conclusion, consistent with the NOAA Information Quality Guidelines.

Solution: *NMFS should revise its Plan so that the Peer Reviewers may review the proposed conclusion that Lolita was with the Southern Residents at the time of her capture, i.e., was captured from the Southern Residents.*

G. The Acoustical Information Cited by NMFS Turns Out to Be Anonymous Hearsay That Should Not Be the Basis for Any Scientific Findings

Comment: In the charge to reviewers, NMFS quotes its 2013 Status Review, which on acoustics relies entirely on Ford (1987) and a personal communication from Candice Emmons:

"Lolita's original pod is not known with certainty, but her acoustic calls are typical of L pod (Ford 1987; Candice Emmons personal communication)."

Charge to Reviews, p. 1 (quoting NMFS 2013 Status Review). As Miami Seaquarium explained in its March 28, 2014 comments on the proposed rule, the only cited paper, Ford (1987), does not mention Lolita. That paper instead analyzes acoustical calls from three other captive whales: Namu, Shamu, and Moby Doll. Ford, p. 7 (1987).

¹³ Bigg (1976), Table 2 (sightings of Transients in August were an order of magnitude higher than sightings in other months). A copy of this unpublished report is provided as Exhibit I to this letter.

¹⁴ Bigg (1982) p. 660, Table 2 (noting that J pod was not identified at the capture site).

¹⁵ See http://www.nytimes.com/2008/03/18/science/18arctic.html?pagewanted=all&_r=0 (describing Queenfish sonar mapping project).

As a result, any information regarding Lolita's vocalizations must have come from the non-public Candice Emmons personal communications NMFS cites. Miami Seaquarium obtained the Candice Emmons personal communication on May 6, 2014 through a Freedom of Information Request. The personal communication reveals that Ms. Emmons did not herself make any recordings of Lolita's vocalizations, and that she did not know who had made any records, or under what circumstances or conditions that unknown person made any such recordings. Ms. Emmons' email states:

"While I was at CWR [Center for Whale Research] **somebody** got a record of Lolita vocalizing. I know it had S22 (and either S18 or S19 – **this was over 10 years ago**) calls, all of which are diagnostic of the main group of L pod at the time called the L25 sub-pod ... This is the only reason I think they [petitioners] claim L25 to be her mother, and if that is the case it is a very tenuous guess."

Candice Emmons of NOAA to Mike Ford of NOAA, email dated June 10, 2013 (emphasis added). Because Ms. Emmons does not claim any knowledge regarding how and when (if at all) recordings of Lolita's vocalizations was made, the claim that the recordings were of Lolita is anonymous hearsay that is at least ten years old. Because nobody knows who is the "somebody" who supposedly made the recordings, or under what circumstances the "somebody" made the recordings, the claim that Lolita's vocalizations are those of L pod killer whales is unreliable and must be disregarded. The NOAA Info. Quality Act guidelines calls for use of "transparent" data obtained by "quality" methods. Guidelines, Parts I and II.

Miami Seaquarium has confirmed that NMFS does not have any recordings of Lolita's vocalizations in its possession. It requested copies of the recordings in its April 8, 2014 FOIA request to NMFS, and NMFS has replied that it cannot locate any such recordings.¹⁶

Solution: *The Reviews should be supplied with a copy of the Emmons personal communication (Exhibit B to this letter), so they can see that the report of Lolita's vocalizations being similar to that of L pod whales is from an anonymous unknown source, and that Ms. Emmons is merely relaying the report from that unknown source. The Reviewers should also be told that NMFS does not have any recordings of Lolita's vocalizations in its possession, and so NMFS is unable to evaluate the anonymous claims regarding their content. Finally, the Reviewers should be provided a copy the Ford (1988) cited by NMFS in the Proposed Rule and Charge to Reviewers. That twenty-five year old paper is hard to locate on the Internet, and review of it confirms the paper contains no analysis of any recordings of Lolita.*

IV. Administrative Record for Proposed Rule

Miami Seaquarium requests that this letter and its exhibits be placed in the administrative record for the Proposed Rule. The Proposed Rule provides that the current Peer Review will be part of the process for making a decision on whether to adopt, modify, or cancel the Proposed Rule, and the Part IV of the OMB Peer Review Bulletin provides that the public

¹⁶ Miami Seaquarium April 8, 2014 FOIA request sought a copy of any recordings or note regarding "Lolita's acoustical calls," citing the Federal Register Notice in which NMFS cited the recordings, 79 Fed.Reg. 4313, 4316. On May 6, 2014, NMFS sent a letter providing an initial response to the FOIA request, stating that the recordings had not been located, and that NMFS would continue to look and respond on May 20, 2014. On May 21, 2014, the undersigned called NOAA's FOIA office and was told that NMFS was unable to locate any recordings and would be confirming that in a final response expected momentarily. See Exhibits G and H to this letter (FOIA request and NMFS response).

may comment on posted Peer Review Plans and that such comments shall be considered by the agency. 79 Fed.Reg. 4313, 4318; NMFS Instruction 04-108-04 (adopting Bulletin). Thus these comments on the Peer Review Plan are properly part of the administrative record.

V. Conclusion

Miami Seaquarium appreciates the opportunity to submit these comments on the Peer Review Plan and respectfully requests that NMFS provide these comments to the Peer Reviewers and amend the Peer Review Plan to fix the deficiencies noted above. For convenience, we have attached as Exhibits A through I copies of several documents referred to in these comments. This includes documents that should be provided to the Reviewers, such as the Hoelzel and Emmons personal communications.

Sincerely yours,

Marine Exhibition Corp., d/b/a Miami Seaquarium,
by its attorneys,

BIRCH, HORTON, BITTNER
AND CHEROT, P.C.

/s/ James H. Lister
James H. Lister

cc: Lyne Barre (NMFS)
Angela Somma (NMFS)
Kirsten Erickson (NMFS)
Miami Seaquarium
William P. Horn (BHBC)

List of References

Bigg, MacAskie and Ellis, *Abundance and movements of killer whales off eastern and southern Vancouver Island, with comments on management*: Unpub. Rep., Artic Biol. Stn., Ste. Anne de Bellevue, Quebec (1976).

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