



United States Department of Agriculture



OFFICE OF INSPECTOR GENERAL



APHIS: Animal Welfare Act—Marine Mammals (Cetaceans)

Audit Report 33601-0001-31

OBJECTIVE

We reviewed APHIS' monitoring and oversight of captive cetacean marine mammals to determine (1) if exhibitors met AWA regulations; (2) if APHIS established an adequate system to monitor compliance; and (3) if care and maintenance regulations are consistent with current science.

REVIEWED

We visited APHIS' headquarters and two field offices to review documents and interview personnel about exhibitor activities monitored since October 2013. We observed APHIS inspections at seven licensed exhibitors, where we also interviewed veterinarians and observed the animals and their enclosures.

RECOMMENDS

APHIS should develop uniform procedures for inspections and reports and ensure that all observations are recorded in the databases as well as clarify regulations for space determinations, appropriate barriers, and shade provisions to ensure consistent implementation. Also, APHIS should follow the agreement with NOAA, or revise as appropriate.

OIG reviewed APHIS' procedures for monitoring facilities that display captive marine mammals under the Animal Welfare Act.

WHAT OIG FOUND

Animal and Plant Health Inspection Service's (APHIS) Animal Care program enforces the Animal Welfare Act (AWA) for captive marine mammals. However, we found that APHIS could make improvements in enforcement and inspection to ensure compliance with the AWA. We identified an orca enclosure that may not meet minimum horizontal dimension space requirements due to the unique configuration of the pool. Inspections are not always uniformly completed or adequately documented because of insufficient guidance; this reduces assurance that those exhibitors are in compliance with the AWA.

Through an agreement, APHIS is to notify the National Oceanic and Atmospheric Administration (NOAA) of discrepancies in the inventory of captive marine mammals. However, APHIS did not compare the NOAA inventory with the current inventory to identify discrepancies. As a result, NOAA cannot use the APHIS inspection process as an additional method to validate its inventory of captive marine mammals.

APHIS regulations do not describe detailed requirements for barriers and shade or supply guidance for enforcement of requirements. Inspectors may use their own discretion to interpret the regulations. Such ambiguity causes inconsistent inspections and could lead to health and safety issues for the animals and the public.

APHIS generally agreed with our recommendations and we accepted management decision for all recommendations.



United States Department of Agriculture
Office of Inspector General
Washington, D.C. 20250



DATE: May 30, 2017

AUDIT
NUMBER: 33601-0001-31

TO: Kevin Shea
Administrator
Animal and Plant Health Inspection Service

ATTN: Bernadette Juarez
Deputy Administrator
Animal Care

FROM: Gil H. Harden
Assistant Inspector General for Audit

SUBJECT: APHIS: Animal Welfare Act – Marine Mammals (Cetaceans)

This report presents the results of the subject audit. Your written response to the official draft report, dated April 21, 2017, is included, in its entirety, at the end of this report. Your response and the Office of Inspector General's position are incorporated into the relevant sections of the report. Based on your written response, we are accepting your management decision for all audit recommendations in the report, and no further response to this office is necessary.

In accordance with Departmental Regulation 1720-1, final action needs to be taken within 1 year of each management decision to prevent being listed in the Department's annual Agency Financial Report. Please follow your internal agency procedures in forwarding final action correspondence to the Office of the Chief Financial Officer.

We appreciate the courtesies and cooperation extended to us by members of your staff during our audit fieldwork and subsequent discussions. This report contains publicly available information and will be posted in its entirety to our website (<http://www.usda.gov/oig>) in the near future.

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Background and Objectives

Background

The Animal Welfare Act (AWA), passed by Congress in 1966, set Federal standards for care and treatment of certain warm-blooded animals bred for commercial sale, used in research, transported commercially, or exhibited to the public.¹ Facilities which fall into these categories must provide their animals with adequate care and treatment in the areas of housing, handling, sanitation, nutrition, water, veterinary care, and protection from extreme weather and temperatures. Although Federal requirements establish basic standards, regulated businesses are encouraged to exceed these standards.

The Department of Agriculture (USDA) delegates responsibility for upholding the AWA to the Animal and Plant Health Inspection Service (APHIS).² APHIS' Animal Care (AC) program officials are charged with developing and implementing regulations to support the AWA. These regulations require the licensing of animal dealers, exhibitors, and operators of animal auction sales where animals are sold under AWA regulations.³ Before APHIS will issue a license, the applicant must be in compliance with all standards and regulations under AWA. To ensure that all licensed and registered facilities continue to comply with AWA, APHIS inspectors regularly make unannounced inspections. If an inspection reveals deficiencies in meeting AWA standards and regulations, the inspector documents the deficiencies and instructs the facility to correct the problems within a given timeframe. If deficiencies remain uncorrected at subsequent inspections, APHIS considers legal action.⁴

Amendments to the AWA in 1970 gave USDA the authority to publish regulations and to set standards for the humane handling, care, treatment, and transportation of captive marine mammals by dealers, research facilities, exhibitors, and operators of auction sales.⁵ In 1979, after collecting sufficient information to set minimum standards appropriate to those species, APHIS issued its final rule and began enforcement of the AWA for marine mammals.⁶

¹ 7 United States Code (U.S.C.) §§ 2131-2159. The AWA was originally enacted by Congress in 1966 and strengthened through amendments in 1970, 1976, 1985, 1990, 2002, 2007, and 2008.

² 7 Code of Federal Regulations (C.F.R.) § 2.22(a)(2)(vi); 7 C.F.R. § 2.80(a)(6).

³ APHIS also searches for unlicensed or unregistered facilities.

⁴ Legal actions can include temporary license suspension, civil penalties, and/or criminal penalties. 7 U.S.C. § 2149.

⁵ Animal Welfare Act of 1970, Public Law Number 91-579, 84 Statute 1560.

⁶ *Marine Mammals; Humane Handling, Care, Treatment, and Transportation*, 44 Federal Register (Fed. Reg.) 36,868 (June 22, 1979).

Marine mammals are covered under Subpart E of Part 3 of the Animal Welfare Regulations.⁷ These regulations were promulgated initially in 1979 and have been updated periodically as needed. The regulations cover facilities (both indoor and outdoor), space requirements, feed, water quality, sanitation, separation, veterinary care, and swim-with-the-dolphin programs.⁸

Marine mammals are defined in the Marine Mammal Protection Act⁹ (MMPA) as any mammal which:

- is morphologically adapted to the marine environment (including sea otters and members of the order Sirenia [manatees and dugongs], Pinnipedia [seals], and Cetacea [whales, dolphins, and porpoise]), or
- primarily inhabits the marine environment (such as the polar bear); and, for the purposes of [the MMPA], includes any part of any such marine mammal, including its raw, dressed, or dyed fur or skin.¹⁰

To accomplish its mission, AC relies on a database, Animal Care Inspection System (ACIS), to document, collect, analyze, maintain, and report information gathered during their inspections. ACIS provides field inspectors with access to the address, inspections conducted in the last three years, animal inventory, and contact phone number of the facilities being inspected. ACIS provides the AC inspectors with the capability to enter and retrieve licensing and registration data while in the field. In addition to its field capabilities, the system provides a public search tool where the public can search for licensing data, inspection data, and information contained in the annual reports submitted by USDA registered facilities.

A previous audit found that neither the regulations nor APHIS guidance for evaluating the adequacy of an exhibitor's animal enclosure areas and public barriers listed specific criteria, such as required dimensions for enclosure walls or moats.¹¹ Instead, APHIS used performance-based criteria that gave wide discretion to individual AC inspectors. In the prior audit, the Office of Inspector General (OIG) concluded that APHIS needed to issue clear regulations and guidance that defined what constitutes a sufficient public barrier. In 2012, APHIS submitted a regulatory work plan to add definitions for barriers and potentially dangerous animals to the regulations in order to clarify what constitutes an adequate barrier for enclosures for potentially dangerous animals regulated under the AWA. As described in Finding 4 of this report, we determined that APHIS has not clarified the barrier and distance requirements in the regulations.

⁷ 9 C.F.R. §§ 3.100-.118.

⁸ Effective April 2, 1999, APHIS suspended the enforcement of those provisions of the regulations and standards that dealt with swim-with-the-dolphin programs due to concerns and confusion surrounding the swim-with-the-dolphin rule. See *Animal Welfare; Marine Mammals; Swim-with-the-Dolphin Programs*, 64 Fed. Reg. 15,918 (April 2, 1999).

⁹ 16 U.S.C. §§ 1361-1423h.

¹⁰ 16 U.S.C. § 1362(6).

¹¹ Audit 33601-10-CH, *Controls Over APHIS Licensing of Animal Exhibitors*, June 2010.

Objectives

Our overall objective was to review APHIS' monitoring and oversight of captive cetacean marine mammals to determine (1) whether exhibitor facilities meet AWA regulations; (2) whether APHIS has established an adequate system to monitor compliance; and (3) whether regulations need to be updated to reflect current scientific care and maintenance guidelines.

Section 1: Compliance with AWA Regulations

Finding 1: APHIS Needs to Clarify Regulations Related to Space Requirements

We determined that APHIS has allowed an orca (*Orcinus orca*) to be kept in an enclosure which may not meet all space requirements defined by the agency's AWA regulations. During our observation of an inspection, we identified a primary enclosure housing an orca for which it was unclear whether minimum horizontal dimension (MHD) requirements were met. This occurred as the Animal Welfare Regulations are not clear on how to calculate MHD. The design of the enclosure may deny the resident orca sufficient space for adequate freedom of movement.

According to the AWA regulations, marine mammals must be housed in primary enclosures that comply with the minimum space requirements. "Any enclosure that does not meet the minimum space requirement for primary enclosures . . . may not be used for permanent housing purposes."¹² In determining the minimum space required in a pool holding cetaceans, four factors must be satisfied:¹³ depth, volume, surface area, and MHD.¹⁴ These space requirements are based on the average adult length of each species of cetacean. The regulations require a MHD of 48 feet for an orca. The regulations also state that those parts of the primary enclosure which do not meet the minimum depth requirement cannot be included when calculating space requirements for cetaceans.¹⁵

According to APHIS, the enclosure meets all space requirements. APHIS provided us with detailed calculations of the space requirements and how they exceeded the minimum requirements. Out of the four space requirements, we agree that the enclosure meets depth, volume, and surface area requirements. We question whether this enclosure meets the MHD requirements due to the ambiguity in the regulations.

APHIS stated that the MHD of the enclosure is 60 feet, which would exceed the minimum requirements for an orca. However, in order for the MHD to be considered 60 feet, APHIS does not consider a solid obstruction called the "work island" (see Image 1) and account for minimum depth requirements not being met (see Image 3).

¹² 9 C.F.R. § 3.104(a).

¹³ 9 C.F.R. § 3.104(b).

¹⁴ MHD is defined as the diameter of a circular pool of water, or in the case of a square, rectangle, oblong, or other shape pool, the diameter of the largest circle that can be inserted within the confines of such a pool of water. 9 C.F.R. § 1.1.

¹⁵ 9 C.F.R. § 3.104(b)(2).

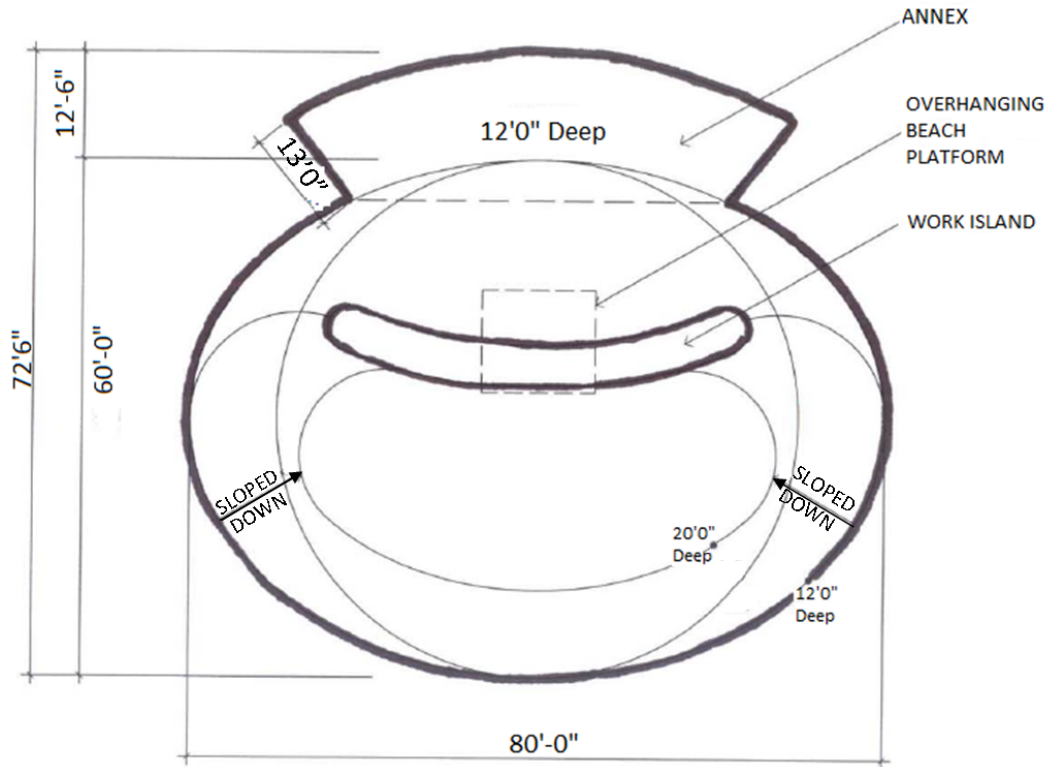


Image 1: Diagram from 2011 provided by APHIS of primary enclosure holding an orca. The larger circle measures 60 feet in diameter.

Work Island

When APHIS originally developed regulations for housing captive marine mammals, the supplementary information stated, “The minimum horizontal dimension (MHD) of the pool, which is proposed as two times the length of the longest cetacean contained therein, has been recommended as giving adequate space to the cetacean for freedom of horizontal movement, which would allow the cetacean to turn about and swim without touching any limiting lateral structure.”¹⁶

Therefore, if the enclosure has a 60-foot MHD, the solid work island must be excluded from consideration as an obstruction. In a 1995 review of the enclosure, an APHIS inspector noted that unless the work island was waived, the MHD of the pool was only 35 feet (see Image 2). Although the APHIS inspector referenced a waiver granted in 1988, APHIS officials told us that there was not a waiver for this enclosure.

¹⁶ *Proposed Standards and Regulations for Humane Handling, Care, Treatment, and Transportation of Marine Mammals*, 42 Fed. Reg. 42,044, 42,046 (Aug. 19, 1977). The 1977 version of the proposed rule was never issued as a final rule. Instead, in 1978, based upon comments received from the public and, in particular, the Marine Mammal Commission in response to the 1977 proposed rule, USDA decided to redraft the original proposal and to republish the regulations and standards as a proposed rulemaking. 43 Fed. Reg. 42,200 (Sept. 19, 1978).

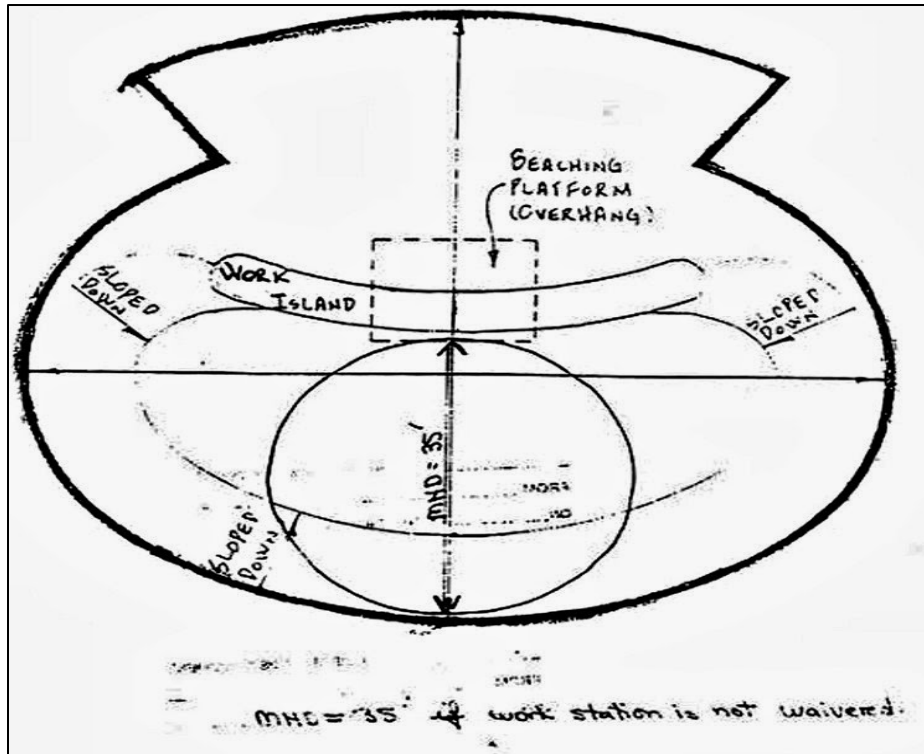


Image 2: An APHIS inspector’s drawing of the enclosure, showing the MHD of 35 feet if the work island is not waived.

APHIS officials stated the regulations do not prohibit the presence of such an object and we agree. However, with respect to determining MHD, the regulations state that areas not meeting minimum depth requirements cannot be used in determining whether space requirements for cetaceans are met. If obstructions within primary pools are not considered when determining MHD, a large structure could be in the middle of an enclosure, as long as minimum requirements for depth, volume and surface area are met.

Minimum Depth

As stated in the regulations, any part of the primary enclosure that does not meet minimum depth cannot be included in the calculation of space requirements. However, APHIS includes areas that do not meet the minimum depth in its calculation of a 60-foot MHD for this enclosure. The enclosure has two distinct areas: a small space labeled “annex” (see Image 1), and a larger space in front of the work island. There is a channel on either side of the work island that the orca can use to move between the two areas. These channels include permanent gate structures that reduce the depth to 7’8” on one side and 8’8” on the other side, which is below the minimum required depth for orcas.¹⁷ These two areas combined with the work island previously discussed create a continuous

¹⁷ 9 C.F.R. § 3.104. Table I requires a minimum depth of 12 feet for marine mammals that have an average adult length of 24 feet. Table III shows that an orca has an average adult length of 24 feet.

line across the entire primary enclosure that does not meet minimum depth requirements (see Image 3).

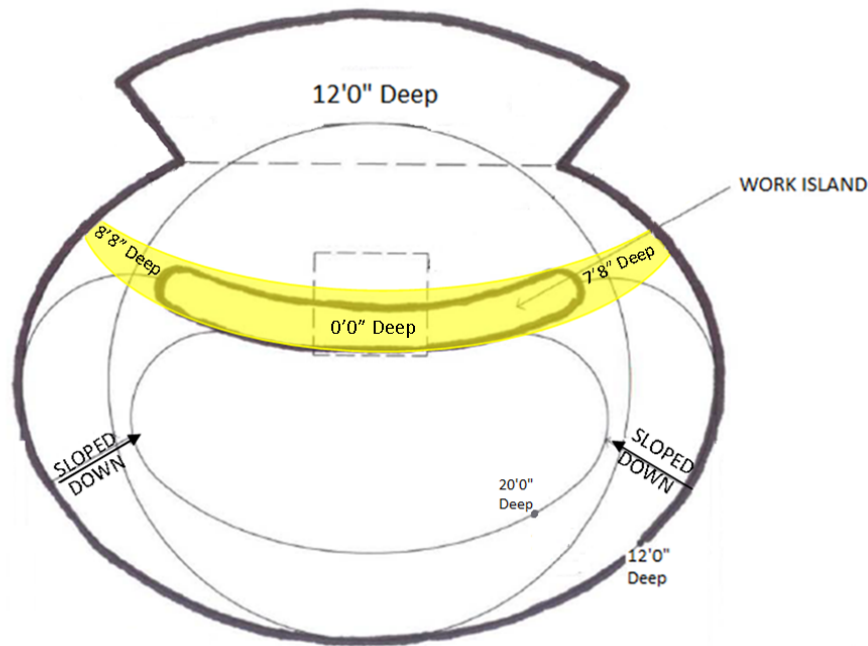


Image 3: Diagram from 2011 provided by APHIS of primary enclosure holding an orca. The yellow highlight was added to emphasize the area in the primary enclosure that does not meet minimum depth requirements.

APHIS recently performed a review of the enclosure, after we asked questions about minimum depth and whether MHD could be calculated when depth is not met. APHIS did not address how MHD calculations were impacted by areas of the pool not meeting minimum depth requirements. We then specifically asked how the exclusionary language in 7 C.F.R. § 3.104(b)(2)¹⁸ would impact the MHD calculations for this pool. Again, APHIS did not mention how their calculation of MHD might be impacted by areas not meeting minimum depth requirements even though they did make adjustments to their calculations of both pool volume and pool surface area to account for those areas not meeting minimum depth requirements. APHIS' summary of the review referred to this enclosure as two pools connected by channels. We would agree that this enclosure is essentially two pools. In this scenario, the largest pool would only have an MHD of 35 feet (see Image 2); this falls short of the minimum requirements for an orca.

In total, this enclosure with its unique shape and features has more than 7,000 square feet of surface area and a volume of about 49,000 cubic feet. A circular tank with the minimum 48-foot

¹⁸ This regulation states, "Those parts of the primary enclosure pool which do not meet the minimum depth requirement cannot be included when calculating space requirements for cetaceans."

MHD would only have about 1,800 square feet of surface area and a volume of about 22,000 cubic feet. However, based upon current regulatory requirements, it is unclear whether the enclosure meets minimum MHD space requirements.

Recommendation 1

Clarify the Animal Welfare Regulations to allow for unique circumstances, such as enclosures that do not fit well within the process for determining whether minimum space requirements are met.

Agency Response

In its April 21, 2017 response, APHIS stated the following:

APHIS agrees with the intent of this recommendation. On June 22, 1979, APHIS published a final rule in the Federal Register that, among other things, established minimum space requirements for Animal Welfare Act (AWA) covered marine mammals and explained in the "Supplementary Information" section how those requirements apply to pools with unique configurations. 44 Fed. Reg. 36,868-36,883. APHIS will post a link to this final rule on its website by May 31, 2017, to ensure public access to this clarifying information. APHIS will also issue written guidance to Animal Care inspectors for assessing compliance with the regulations related to space requirements for marine mammals by December 31, 2017.

OIG Position

We accept management decision for this recommendation.

Section 2: APHIS' Compliance Process

Finding 2: APHIS Needs to Improve Procedures and Documentation for Inspections

We found that APHIS' process for documenting inspections could be improved. Certain elements of the inspections conducted at exhibitor facilities are not always uniform, and documentation is not consistently generated to describe what was reviewed during an inspection. This occurred because the inspection guide does not provide sufficient detail of what the inspection process should entail, or how to adequately document what was observed, other than noncompliant items (NCI). Without uniform inspections and documentation of what was reviewed, APHIS may not be able to provide assurance that those exhibitors subject to inspection are in compliance with all requirements of AWA.

The Office of Management and Budget's (OMB) Circular A-123 states that it is management's responsibility to develop and maintain effective internal controls. In addition, management is responsible for establishing and integrating internal control into its operations in a risk-based and cost beneficial manner in order to provide reasonable assurance that the entity's internal control over operations, reporting, and compliance is operating effectively.¹⁹ Government Accountability Office (GAO) standards require that management design control activities to achieve objectives and respond to risks.^{20,21}

APHIS developed the Animal Welfare Inspection Guide²² to provide an aid for AC personnel (i.e., inspectors) when inspecting USDA licensed and registered facilities. The inspection guide serves as one of many tools used to establish and improve the quality and uniformity of inspections, documentation, and enforcement of the AC program.

The guide covers the basic steps for preparing for a facility inspection, including the review of previous inspection reports, teachable moments,²³ and animal inventories. It explains what to do when an NCI is identified and how to cite the NCI on the inspection report. It also discusses the basic steps that should be performed during the inspection, but does not discuss exactly what an inspector should review while performing the inspection. The inspector's professional judgment, driven by animal welfare, influences what is inspected or reviewed. The documentation required to be maintained is the inspection report, teachable moments form, and pictures (if necessary). The inspection guide also requires the inspection report and teachable moments to be uploaded into the Animal Care Information System (ACIS).

¹⁹ OMB, *Management's Responsibility for Enterprise Risk Management and Internal Control*, Circular A-123 (July 15, 2016).

²⁰ Control activities are the policies, procedures, techniques, and mechanisms that enforce management's directives to achieve the entity's objectives and address related risks.

²¹ GAO, *Standards for Internal Control in the Federal Government*, GAO-14-704G, § 10.01-.02 (Sep. 2014).

²² APHIS, *Animal Welfare Inspection Guide* (1st edition, Sept. 2013, revised Aug. 2015).

²³ Teachable moments are minor NCIs identified during an inspection that, if they meet certain criteria, are not cited on an inspection report.

Because APHIS did not require comprehensive documentation of the actual inspection (aside from the required documents), the public is not able to determine what was specifically inspected. APHIS needs to establish an adequate system of controls within its inspection guide to ensure that the inspections are uniform across exhibitors, and all aspects of AWA requirements are inspected.

Inspection Documentation

The inspection report is the official documentation of an inspection and is available to the public through the ACIS search tool located on APHIS' website. The inspection report specifies the exhibitor identity, the type of inspection, the inspection date, and the NCIs identified during the inspection. If no NCIs were identified during the inspection, the report states that no NCIs were identified during this inspection. The other inspection documentation uploaded into the public side of ACIS is an animal inventory and pictures (if they meet defined criteria). Inspectors are not required to document what they looked at or reviewed during the inspection of the facility.

We found that inspections are not always performed consistently. For example, while the inspection will include an inventory of the animals, this does not necessarily mean that all animals were actually observed. Some inspectors are thorough and will look at every animal and record;²⁴ other inspectors perform a brief look at a few of the animals and look at even fewer records. Uniformity in the inspection process across the country is not assured.

While observing inspections, we noted that one inspector did not use a consistent approach in the performance of their inspections. We identified that the inspector did not always verify items such as inventory count and freezer temperatures at each facility. Inspectors did not verify all regulatory requirements applicable to the licensee, and those requirements that were verified were not documented.

The inspection report utilized by APHIS documents noncompliance of the regulatory requirements reviewed during the inspection. The inspection report does not go into detail on what regulatory requirements were reviewed or not reviewed. Inspectors do not utilize any form to document that they verified the exhibitor was in compliance with all regulations. We recommend that APHIS develop a uniform method to document the inspection and upload this documentation to ACIS to assure adequate inspections are occurring.

Teachable Moments

“Teachable moments” is a term used by APHIS to describe their method of documenting minor NCIs²⁵ identified during an inspection that meet certain criteria. These instances of non-compliance are not disclosed on the inspection report and therefore not included

²⁴ Records include veterinary care, water quality, training, etc.

²⁵ Minor NCIs are noncompliant items that do not impact the health or well-being of an animal.

in the calculation of inspection frequency for exhibitor facilities using APHIS' Risk Based Inspection System (RBIS). For example, APHIS uses teachable moments to document NCIs that do not impact the health of animals, such as excessive algae colonies growing in nets between pools, or the need for a variance for a perimeter fence if the facility is not recognized as having been previously cited for noncompliance with the relevant provision. Teachable moments are not documented on inspection reports and are not currently searchable through the ACIS search tool.

The Animal Welfare Inspection Guide requires that any NCI identified be reported in the inspection report narrative. However, the inspection guide also allows for the use of teachable moments²⁶ as long as the NCI meets the following criteria: (1) it is a minor NCI that is not impacting animal welfare; (2) it is not a "direct"²⁷ or "critical" item; (3) it is not likely to soon become a serious, direct, or repeat NCI; (4) the facility is willing and able to correct the issue quickly; and (5) it was not previously listed as a teachable moment or previously cited at the facility.

APHIS uses RBIS to determine the frequency of inspections. RBIS takes into account several factors to determine frequency of inspections, including the number and type of NCIs. Because teachable moments are not included on the inspection report, they are not considered when determining the frequency of inspections. A teachable moment that has not been fixed by the next inspection period would then be included on the inspection report. However, they are not considered repeat noncompliances, since they were never included on a previous inspection report. Among other factors considered, repeat noncompliances carry more weight than first time noncompliances when determining the frequency of inspections.

Teachable moments are required to be uploaded into ACIS so inspectors can view them prior to the next inspection. However, this is not always happening. Five of the site visits observed for this audit had teachable moments identified during their inspections, but documentation for four of the sites was not uploaded into ACIS.

Additionally, we noted that teachable moments were used inconsistently during our observations of inspections. In one instance, a facility had five teachable moments and no NCIs documented on the inspection report. In another instance, a facility with an NCI similar to one reported as a teachable moment at another facility was documented on the inspection report. This occurred because the use of teachable moments is left up to the discretion of each inspector. Without consistent documentation of NCIs, it may appear to the public that some facilities are consistently in compliance, while other facilities are not.

²⁶ Chapter 2 of the Animal Welfare Inspection Guide was updated in August 2015 to include teachable moments.

²⁷ A "direct" noncompliance is a noncompliance that is currently (at the time of inspection) having a serious or severe adverse effect on the health and well-being of the animal, or has the high potential to have that effect in the immediate future. See APHIS, *Animal Welfare Inspection Guide*, page 2-7 (Aug. 2015).

Therefore, APHIS needs to ensure that all NCIs are reported accurately and consistently. In addition, APHIS needs to develop a methodology to ensure risk factors associated with teachable moments are accounted for within their RBIS determination of inspection frequency. We recommend that APHIS document teachable moments in ACIS, utilize them to determine inspection frequency, and consider them repeat noncompliances if they are still present at future inspections.

Recommendation 2

Clarify in the Inspection Guide the areas of a facility an inspector must review during routine compliance inspections and develop a uniform method of documentation to assure adequate inspections are occurring.

Agency Response

In its April 21, 2017 response, APHIS stated the following:

APHIS agrees with this recommendation. APHIS will revise the *AC Inspection Guide* to identify areas of a facility the inspector must review during a routine inspection. The revised sections of the *AC Inspection Guide* will establish a uniform method of documentation to promote consistent inspections and compliance. APHIS will distribute the revised sections of the *AC Inspection Guide* by July 31, 2017.

OIG Position

We accept management decision for this recommendation.

Recommendation 3

Ensure teachable moments are consistently determined, documented, and uploaded to the Animal Care Information System (ACIS). Additionally, monitor the use of teachable moments during compliance reviews to determine the need for including in the Risk Based Inspection System (RBIS) calculation.

Agency Response

In its April 21, 2017 response, APHIS stated the following:

APHIS agrees with the intent of this recommendation. APHIS enhanced ACIS to permit the uploading and tracking of teachable moments, and, in September 2016, trained its inspectors on entering teachable moments directly into ACIS. Animal Care continues to monitor the consistency and use of teachable moments through supervisory review, and by July 31, 2017, will initiate an interactive exercise using teachable moments to promote consistency and identify challenge areas that may require refinement. Animal Care will

analyze the results of the exercise and will initiate additional training or guidance, if needed.

OIG Position

We accept management decision for this recommendation.

Finding 3: APHIS Needs to Update NOAA with Discrepancies in the Inventory of Captive Marine Mammals

The National Oceanic and Atmospheric Administration (NOAA) is required to maintain an inventory of captive marine mammals. APHIS and NOAA have an agreement through which APHIS assists NOAA in maintaining an accurate inventory.²⁸ APHIS inspectors did not compare current inventories with NOAA's inventory during inspections, so NOAA was not able to use APHIS' inspection process as a method to identify possible discrepancies. This occurred because APHIS did not provide guidance requiring inspectors to obtain the NOAA inventory and verify its accuracy while conducting inspections. As a result, NOAA cannot use the APHIS inspection process as an additional method to validate its inventory of captive marine mammals.

MMPA requires that NOAA establish and maintain an inventory of marine mammals pursuant to a permit for public display.²⁹ The AWA holds USDA responsible for monitoring the welfare of these animals, and this is accomplished by the performance of marine mammal facility inspections. In accordance with the 1998 agreement, APHIS agreed to notify NOAA if it detects discrepancies between NOAA's marine mammal inventory and the facility's inventory (including, but not limited to, species, number, and sex of animals) when "appropriate information" is available to APHIS regional offices and field inspectors.³⁰

Based on our observations, APHIS does not verify NOAA's marine mammal inventory is accurate, and does not always verify if the exhibitor's inventory matches previous APHIS inventory records. We observed inspections at seven marine mammal facilities and identified discrepancies between NOAA's inventory and the facility's inventory at four of these facilities. Only three facilities' inventories matched the information contained in NOAA's inventory. We observed that APHIS did not use a copy of NOAA's inventory while conducting its inspections and, therefore, did not identify any discrepancies between the inventories.

A review of APHIS' Animal Welfare Inspection Guide revealed there is no guidance or discussion on verifying NOAA's inventory. The guide only discusses adding animal inventory into ACIS along with the completed inspection report; it does not go into detail about what inventory to add or if the inventory needs to be reconciled with past inventory numbers.

Therefore, we recommend that APHIS develop a process for reporting to NOAA discrepancies APHIS may detect in the inventory of marine mammals observed during its inspections. For example, a simple option could have APHIS inspectors provide NOAA with a copy of the inventory of marine mammals upon completion of a facility inspection. APHIS must take action to ensure it follows the agreement or seek revisions to the agreement.

²⁸ Agreement among the National Marine Fisheries Service, NOAA, U.S. Department of Commerce; Fish and Wildlife Service, U.S. Department of the Interior; and APHIS, USDA (July 21, 1998).

²⁹ 16 U.S.C. § 1374(c) (10).

³⁰ 1998 agreement, article IV, ¶ 4.d.

Recommendation 4

Follow the agreement with the National Oceanic and Atmospheric Administration (NOAA) or revise, as appropriate.

Agency Response

In its April 21, 2017 response, APHIS stated the following:

APHIS agrees with the recommendation to follow the agreement with NOAA. In 2017, NOAA intends to activate an online inventory system that will allow inspectors direct access to NOAA's inventory for each facility with marine mammals. When this occurs, APHIS will issue guidance to inspectors on accessing NOAA's inventory system and reporting inventory information to the appropriate NOAA official when discrepancies are identified, consistent with the agreement with NOAA. Following the implementation of the guidance, APHIS will make conforming changes to the *AC Inspection Guide* and will distribute the revised sections during its next routine update. APHIS will update the *AC Inspection Guide* by December 31, 2017.

OIG Position

We accept management decision for this recommendation.

Section 3: Update to APHIS' Regulations

Finding 4: APHIS Needs to Clarify AWA Regulations on Barriers and Shade

We found that APHIS' regulations for safety features for marine mammal enclosures lack specificity. The regulations do not describe in detail the requirements for safety barriers and access to shade, nor do the regulations supply guidance for enforcement of these requirements. Instead, inspectors use their judgment when interpreting the regulations, and if questions arise, they may consult with a veterinary medical officer in Animal Care with expertise in marine mammals. Because the regulations do not provide detailed standards, facilities use enclosures that may place the animals and the viewing public in harm's way and create possible health consequences for the exhibited animals. This also creates the potential for inconsistent inspections of facilities.

AWA regulations state that during public exhibition, there must be sufficient distance and/or barriers between the animal and the general viewing public to ensure the safety of animals and the public.³¹ This may be accomplished through the use of a sufficient number of uniformed or readily identifiable employees or attendants to supervise the viewing public, or by physical barriers, such as fences, walls, glass partitions, or distance, or any combination of these.³² Marine mammal regulations also require that natural or artificial shelter "which is appropriate for the species concerned, when the local climatic conditions are taken into consideration, shall be provided for all marine mammals kept outdoors to afford them protection from the weather or from direct sunlight."³³

When conducting our audit, we observed conditions at some enclosures that may not satisfy regulations or, at a minimum, are inconsistent applications of the regulations.

Barriers between the enclosures and the public

During our observation of an inspection, we identified an enclosure with insufficient distance and barriers to keep the marine mammals and the general public safe. The existing methods used by the exhibitor do not prevent the public from standing next to the tank and extending arms or objects over the water. This proximity introduces the possibility of injury to the exhibited animals and to the public. Foreign objects could be dropped into the enclosure, or one of the animals could injure a spectator.

The facility uses a stadium during shows involving marine mammals. The enclosure wall in the stadium area is approximately four feet high, and there is no physical barrier that prevents the public from walking up to the wall. Instead, a yellow line is painted on the ground approximately one foot from the wall (see Image 4). This line and minimal facility staff is used to keep the public back from the wall. According to an APHIS

³¹ 9 C.F.R. § 2.131(c)(1).

³² 9 C.F.R. § 3.101(a)(2).

³³ 9 C.F.R. § 3.103(b).

official who had recently observed a show, the distance between the wall and the public was sufficient because of the methods used to control the crowd.



Image 4: The marine mammal enclosure wall is approximately four feet high, with a yellow line painted on the ground about one foot from the wall. APHIS considers this barrier method to be compliant with the current regulations.

Due to the timing of our visit, we were unable to observe a show at this facility in person. However, we observed a video of the show. In the video, an employee attempted to direct the viewing public away from the enclosure wall after a show, but as the employee moved forward into the crowd, visitors moved into the empty space behind the employee against the wall and held their phones over the pool. We did not observe any other security measures taken by employees to keep people away from the pool wall.

According to APHIS officials, as long as the facility has employees available to keep the public away from the edge of the pool, the exhibitor is in compliance with the intent of the regulation. The regulation is a performance-based standard, and the facility has never experienced an incident. However, APHIS agreed to have AC officials visit the facility for another inspection. Based on that inspection, AC officials determined the enclosure's barrier system meets the AWA's minimum standard. They also met with facility representatives and discussed the potential risks associated with the current public barrier around the tank and methods that could be used to bolster it.

A 2010 OIG audit of APHIS' licensing of animal exhibitors found that APHIS used performance-based criteria that gave wide discretion to individual AC inspectors when evaluating the adequacy of an exhibitor's animal enclosure areas and public barriers.³⁴ Neither the AWA regulations nor APHIS guidance listed specific criteria for evaluating the adequacy of animal enclosure areas or public barriers. OIG concluded that APHIS

³⁴ Audit 33601-10-CH, *Controls Over APHIS Licensing of Animal Exhibitors*, June 2010.

needed to issue clear regulations and guidance that define what constitutes a sufficient public barrier and require exhibitors to report all escapes and attacks involving dangerous animals to APHIS AC inspectors. In 2012, APHIS submitted a regulatory work plan to add definitions for barriers and potentially dangerous animals to the regulations to clarify what constitutes an adequate barrier for enclosures for potentially dangerous animals regulated under the AWA.

Our review determined these changes have not been implemented. However, on June 24, 2016, APHIS solicited public comments on the AWA regulations, including those specific to barriers for enclosures and methods needed to prevent entry of the public into an enclosure.³⁵ Once this process is complete, we recommend that APHIS clarify the barrier and distance requirements in the regulations and supply guidance to inspectors to facilitate compliance.

Shade and Shelter for Captive Marine Mammals

We found that the AWA regulations for natural or artificial shelter for marine mammals are not consistently enforced by APHIS inspectors. Current regulations require exhibitors using outdoor enclosures to protect marine mammals from adverse weather or direct sunlight by providing species- and climate-appropriate shelter.³⁶ Through document reviews and interviews, we learned that one facility has been repeatedly cited for not providing or having adequate shade. Conversely, another facility has not been cited for lack of shade even though APHIS' marine mammal expert has questioned the amount of shade provided at the facility (see Image 5). When asked about the current shade requirements, one APHIS inspector stated that if there is any shade, the inspectors cannot say the facility is noncompliant.

³⁵ *Petition to Amend Animal Welfare Act Regulations to Prohibit Public Contact with Big Cats, Bears, and Nonhuman Primates*, 81 Fed. Reg. 41,257, 41,258 (June 24, 2016) (question 8).

³⁶ 9 C.F.R. § 3.103(b).



Image 5: A marine mammal enclosure with minimal shade as determined by APHIS officials. APHIS considers this enclosure compliant with the current regulations for shelter.

During the course of our audit, APHIS released a proposed regulation for public comment. It states that an enclosure's shade must be accessible by the animal. Also, the shade must cover an area sufficient to afford all the marine mammals within the enclosure protection from direct sunlight while not limiting their ability to move or maintain personal space. It clarifies that the shaded areas need not be contiguous. Finally, feeding and training of marine mammals must be performed so that the mammals are not required to look directly into the sun.³⁷

We acknowledge that APHIS has taken steps to clarify shade requirements. However, the current regulation leaves the interpretation of what constitutes appropriate shade up to the inspector's discretion. As seen by the different results between the two cited inspections, inadequate guidance for shade requirements creates inconsistent inspection standards for exhibitors and the potential exists for health consequences for the exhibited marine mammals. Therefore, we recommend that APHIS issue clear regulations and guidance that define what constitutes sufficient shade for marine mammals to afford them protection from the weather or from direct sunlight.

While both problems are specific to individual exhibitors, the existence of these problems indicates that the AWA regulations and guidance need improvement. Clarification of barrier and shade requirements for marine mammal enclosures will help facilitate consistent inspections and ensure the welfare and safety of the animals and the public.

³⁷ 81 Fed. Reg. at 5,635.

Recommendation 5

Clarify regulations that define what constitutes the barrier and distance requirements for marine mammal enclosures and develop guidance to ensure consistent implementation.

Agency Response

In its April 21, 2017 response, APHIS stated the following:

APHIS agrees with the intent of this recommendation. On June 24, 2016, APHIS solicited public comments on the AWA regulations, including those specific to barriers for enclosures and methods needed to prevent entry of the public into an enclosure. APHIS received over 6,100 comments. After carefully reviewing and evaluating all of those comments, APHIS will determine what changes, if any, should be made to the regulations and will develop a proposal for Department officials to consider on any potential regulatory changes. In addition, APHIS will be making refinements to the *AC Inspection Guide* clarifying the barrier and distance requirements in the current regulations, and will distribute the revised sections to regulated facilities, the public, and its inspectors by December 31, 2017.

OIG Position

We accept management decision for this recommendation.

Recommendation 6

Clarify regulations to define what constitutes sufficient shade for marine mammals to afford them protection from the weather or direct sunlight and develop guidance to ensure consistent implementation.

Agency Response

In its April 21, 2017 response, APHIS stated the following:

APHIS agrees with the intent of this recommendation. On February 3, 2016, APHIS published in the Federal Register a proposed rule to update the regulations regarding the welfare of marine mammals. The comment period closed on April 4, 2016. Among other changes, we proposed the following change to section 3.103(b) - Shelter. "Natural or artificial shelter that is appropriate for the species concerned, when the local climatic conditions are taken into consideration, must be provided for all marine mammals kept outdoors to afford them protection from the weather. Shade must be provided to protect marine mammals from direct sunlight, including during feeding and training sessions. Shade must be accessible and cover sufficient area to afford all animals within the

enclosure protection. Shaded areas need not be contiguous and shade structures may be permanent or temporary for easy movement or deployment.”

We explain in the preamble of the proposed rule: “Because marine mammals are susceptible to overheating and sunburn and/or eye damage from direct and/or reflected sunlight, and UV light reflections can cause or exacerbate damage to marine mammal eyes. We are proposing to amend § 3.103(b) by adding that the shade must be accessible and must cover sufficient area to afford all the animals within the enclosure protection from direct sunlight while not limiting their ability to move or not be too close to another animal. The shaded areas need not be contiguous. In addition, feeding and training of animals must be performed so that the animals are not required to look directly into the sun. Shade requirements are compatible with published AZA standards. Shade structures may be permanent or temporary (easily moved or deployed). We believe the performance-based standard we are proposing will allow facilities to provide the required amount of shade according to the unique conditions of each enclosure. This standard expands the requirement in current § 3.103(b) that natural and artificial shelter must be provided to afford protection from direct sunlight.” APHIS received 5,342 comments on this proposed rule. After carefully reviewing and evaluating all of those comments, APHIS will determine what changes, if any, should be made to the regulations and will develop a proposal for Department officials to consider on any potential regulatory changes. APHIS will complete the review and evaluation by September 30, 2017.

In addition, APHIS will be making refinements to the *AC Inspection Guide* to clarify what constitutes sufficient shade and/or other structures to afford marine mammals protection from the weather or direct sunlight and will distribute the revised sections to regulated facilities, the public, and its inspectors by December 31, 2017.

OIG Position

We accept management decision for this recommendation.

Scope and Methodology

Our overall objective was to review APHIS' monitoring and oversight of captive cetacean marine mammals. Specifically, we examined:

- whether exhibitor facilities meet AWA regulations;
- whether APHIS has established an adequate system to monitor compliance; and
- whether regulations need to be updated to be in agreement with current scientific care and maintenance guidelines.

We conducted our audit at APHIS Headquarters in Riverdale, Maryland, and at its field offices located in Fort Collins, Colorado, and Raleigh, North Carolina. We non-statistically selected 7 of the 30 licensed cetacean marine mammal facilities to observe APHIS inspections. The locations were selected based on the type of marine mammals exhibited, planned APHIS inspections, and the location of the exhibitor. These exhibitors were located in San Diego, California; Vallejo, California; Duck Key, Florida; Grassy Key, Florida; Key Largo, Florida; Miami, Florida; and San Antonio, Texas. We conducted our fieldwork between October 2015 and August 2016 and focused on exhibitor activities monitored by APHIS since October 2013.

To accomplish our objectives, we performed the following procedures:

- We interviewed APHIS headquarter and field officials and analyzed pertinent documents, which included public laws, procedures, and policies relating to marine mammals. We also interviewed APHIS' AC expert on marine mammals.
- We reviewed the Association of Zoos and Aquariums accreditation policies and requirements for the accreditation of exhibitors.
- We reviewed the Alliance of Marine Mammal Parks and Aquariums standards and guidelines for the accreditation of their members.
- We obtained access to APHIS' ACIS to review documentation of inspections and exhibitor licensing. Through observation of inspections and review of ACIS, we identified that the system does not contain a complete record of the inspection results (see Finding 2).
- We interviewed marine mammal experts to obtain their views on the AWA regulations and what they believe the current requirements should be for captive marine mammals.
- We interviewed a NOAA official to determine if NOAA had any concerns with the handling of captive marine mammals.
- We accompanied APHIS inspectors on inspections at seven marine mammal exhibitors to determine whether the exhibitors complied with AWA and to evaluate the effectiveness of APHIS' inspection and enforcement activities. During our visits, we observed APHIS inspectors perform unannounced annual inspections of the exhibitors.
- We conducted interviews with licensees and facility veterinarians.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions

based on our audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective.

Abbreviations

AC	Animal Care
ACIS	Animal Care Information System
APHIS	Animal and Plant Health Inspection Service
AWA	Animal Welfare Act
C.F.R.	Code of Federal Regulations
Fed. Reg.	Federal Register
GAO	Government Accountability Office
MHD	Minimum Horizontal Dimension
MMPA	Marine Mammal Protection Act
NCI	Noncompliant Item
NOAA	National Oceanic and Atmospheric Administration
OIG	Office of Inspector General
OMB	Office of Management and Budget
RBIS	Risk Based Inspection System
U.S.C.	United States Code
USDA	Department of Agriculture

**USDA'S
ANIMAL AND PLANT HEALTH INSPECTION
SERVICE
RESPONSE TO AUDIT REPORT**



Marketing and
Regulatory
Programs

TO: Gil H. Harden
Assistant Inspector General
for Audit

Animal and Plant
Health
Inspection
Service

FROM: Kevin Shea /S/ April 21, 2017
Administrator

Office of the
Administrator

SUBJECT: APHIS Response and Request for Management Decisions on the
Office of Inspector General (OIG) Draft Report "APHIS: Animal
Welfare Act- Marine Mammals (Cetaceans)" (33601-01-31)

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Thank you for the opportunity for the Animal and Plant Health Inspection Service (APHIS) to comment on this draft report. We have restated each Recommendation and have provided information on our planned corrective actions.

Recommendation 1: Clarify the Animal Welfare Regulations to allow for unique circumstances, such as enclosures that do not fit well within the process for determining whether minimum space requirements are met.

APHIS Response: APHIS agrees with the intent of this recommendation. On June 22, 1979, APHIS published a final rule in the Federal Register that, among other things, established minimum space requirements for Animal Welfare Act (AWA)-covered marine mammals and explained in the "Supplementary Information" section how those requirements apply to pools with unique configurations. 44 Fed. Reg. 36,868-36,883. APHIS will post a link to this final rule on its website by May 31, 2017, to ensure public access to this clarifying information. APHIS will also issue written guidance to Animal Care inspectors for assessing compliance with the regulations related to space requirements for marine mammals by December 31, 2017.

Recommendation 2: Clarify in the Inspection Guide the areas of a facility an inspector must review during routine compliance inspections and develop a uniform method of documentation to assure adequate inspections are occurring.

APHIS Response: APHIS agrees with this recommendation. APHIS will revise the *AC Inspection Guide* to identify areas of a facility the inspector must review during a routine inspection. The revised sections of the *AC Inspection Guide* will establish a uniform method of documentation to promote consistent inspections and compliance. APHIS will distribute the revised sections of the *AC Inspection Guide* by July 31, 2017.

Recommendation 3: Ensure teachable moments are consistently determined, documented, and uploaded to the Animal Care Information System (ACIS). Additionally, monitor the use of teachable moments during compliance reviews to determine the need for including in the risk Based Inspection System (RBIS) calculation.

APHIS Response: APHIS agrees with the intent of this recommendation. APHIS enhanced ACIS to permit the uploading and tracking of teachable moments, and, in September 2016, trained its inspectors on entering teachable moments directly into ACIS. Animal Care continues to monitor the consistency and use of teachable moments through supervisory review, and by July 31, 2017, will initiate an interactive exercise using teachable moments to promote consistency and identify challenge areas that may require refinement. Animal Care will analyze the results of the exercise and will initiate additional training or guidance, if needed.

Recommendation 4: Follow the agreement with the National Oceanic and Atmospheric Administration (NOAA) or revise, as appropriate.

APHIS Response: APHIS agrees with the recommendation to follow the agreement with NOAA. In 2017, NOAA intends to activate an online inventory system that will allow inspectors direct access to NOAA's inventory for each facility with marine mammals. When this occurs, APHIS will issue guidance to inspectors on accessing NOAA's inventory system and reporting inventory information to the appropriate NOAA official when discrepancies are identified, consistent with the agreement with NOAA. Following the implementation of the guidance, APHIS will make conforming changes to the *AC Inspection Guide* and will distribute the revised sections during its next routine update. APHIS will update the AC Inspection Guide by December 31, 2017.

Recommendation 5: Clarify regulations that define what constitutes the barrier and distance requirements for marine mammal enclosures, and develop guidance to ensure consistent implementation.

APHIS Response: APHIS agrees with the intent of this recommendation. On June 24, 2016, APHIS solicited public comments on the AWA regulations, including those specific to barriers for enclosures and methods needed to prevent entry of the public into an enclosure. APHIS received over 6,100 comments. After carefully reviewing and evaluating all of those comments, APHIS will determine what changes, if any, should be made to the regulations and will develop a proposal for Department officials to consider on any potential regulatory changes. In addition, APHIS will be making refinements to the *AC Inspection Guide* clarifying the barrier and distance requirements in the current regulations, and will distribute the revised sections to regulated facilities, the public, and its inspectors by December 31, 2017.

Recommendation 6: Clarify regulations that define what constitutes sufficient shade for marine mammals to afford them protection from the weather or direct sunlight, and develop guidance to ensure consistent implementation.

APHIS Response: APHIS agrees with the intent of this recommendation. On February 3, 2016, APHIS published in the Federal Register a proposed rule to update the regulations regarding the welfare of marine mammals. The comment period closed on April 4, 2016. Among other changes, we proposed the following change to section 3.103(b) - Shelter. "Natural or artificial shelter that is appropriate for the species concerned, when the local climatic conditions are taken into consideration, must be

provided for all marine mammals kept outdoors to afford them protection from the weather. Shade must be provided to protect marine mammals from direct sunlight, including during feeding and training sessions. Shade must be accessible and cover sufficient area to afford all animals within the enclosure protection. Shaded areas need not be contiguous and shade structures may be permanent or temporary for easy movement or deployment.”

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In closing, thank you for your review of APHIS’ response on marine mammals. If you have any questions or if there is any further information we can provide, please let us know.

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