

COUNCIL OF THE COUNTY OF MAUI
**HUMAN SERVICES AND
ECONOMIC DEVELOPMENT COMMITTEE**

November 15, 2002

Committee
Report No. 02-171

Honorable Chair and Members
of the County Council
County of Maui
Wailuku, Maui, Hawaii

Chair and Members:

Your Human Services and Economic Development Committee, having met on September 20, 2001, September 25, 2001, and October 31, 2002, makes reference to County Communication No. 01-232, from Councilmember Jo Anne Johnson, transmitting a draft bill entitled "A BILL FOR AN ORDINANCE RELATING TO THE PROTECTION OF CETACEANS".

The purpose of the draft bill is to prohibit the exhibition of captive cetaceans.

Your Committee notes that from August 21, 2001 through October 31, 2002, your Committee received correspondence from 294 members of the public expressing support of the draft bill, and 2 members of the public in opposition to the draft bill.

Your Committee further notes that it is in receipt of petitions with signatures from 11,513 individuals opposed to holding cetaceans in captivity and in support of the draft bill.

By correspondence dated August 24, 2001, your Committee Chair requested that the Department of the Corporation Counsel review and approve the draft bill entitled "A BILL FOR AN ORDINANCE RELATING TO THE PROTECTION OF CETACEANS" as to form and legality.

By correspondence dated September 12, 2001, Councilmember Johnson transmitted correspondence dated September 6, 2001, from Rob Lafferty, identifying the countries that have banned dolphinariums or dolphin imports.

By correspondence dated September 13, 2001, Councilmember Johnson transmitted informational documents relative to the subject matter.

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By correspondence dated September 13, 2001, the Department of the Corporation Counsel transmitted a revised draft bill entitled "A BILL FOR AN ORDINANCE AMENDING TITLE 6, MAUI COUNTY CODE, PERTAINING TO PROTECTION OF CETACEANS. The Department stated that the bill has not been approved as to form and legality because the Department is researching whether State and/or Federal preemption issues may exist.

By correspondence dated September 18, 2001, your Committee Chair transmitted documents from Rob Lafferty for consideration during the panel review at your Committee's meeting on September 20, 2001.

By correspondence dated September 19, 2001, your Committee Chair encouraged the review of correspondence in the Land Use Committee's Item 21, relating to the Maui Nui Park, in preparation for the September 20, 2001 Committee meeting.

At its meeting of September 20, 2001, your Committee met with a Deputy Corporation Counsel; Dr. Paul Nachtigall, Interim Director of the Hawaii Institute of Marine Biology and Director of Marine Mammal Research Program; Billy Hurley, Director of Animal Management and General Manager of Dolphin Quest-Oahu; Dr. Elizabeth Lyons, Veterinarian, United States Department of Agriculture (USDA); Hannah Bernard, Director of Education of the Maui Ocean Center; and Rob Lafferty, Free Dolphin Maui Coalition.

Your Committee received presentations from five technical resource personnel representing the various perspectives on the proposed bill. Two panelists were opposed to captive cetaceans on exhibit, two panelists noted the benefit of cetaceans in the care of man, and one panelist presented Federal guidelines on the care of captive cetaceans.

The first panelist, Dr. Paul Nachtigall, informed your Committee that he is a researcher who studies marine mammals. He stated that it is important to learn about cetaceans by studying them in both the wild and in captivity. He stated that a ban on the holding of cetaceans in captivity for public display deprives good people who care about animals the opportunity to help the animals in stranding situations. He further stated that the proposed bill may conflict with the Federal Marine Mammal Protection Act.

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The second panelist, Hannah Bernard, informed your Committee that she wears two hats, one as the Director of Education at the Maui Ocean Center and the other as a person who has been involved in dolphin research, education and conservation for over 20 years. She stated that the Maui Ocean Center (Center) has a policy against keeping dolphins in captivity for display. She noted that the Center is aware of the financial advantages in keeping dolphins for display, but believe that the risks and discomfort to the dolphins outweigh the benefits to humans. She stated that the Center does not house marine mammals except for short-term, rehabilitative purposes such as strandings. She further stated that captive-based research has not enhanced the understanding of the dolphins in the wild. In contrast, research in the wild is needed to better understand and protect dolphins' habitats.

The third panelist, Billy Hurley, informed your Committee that he works for Dolphin Quest and has been involved with captive marine mammals in both shows and exhibitions for educational purposes. He stated that the Alliance of Marine Parks and Aquariums is dedicated to the conservation of marine mammals and their environments through public display, education and research. He noted that the word "captivity" brings with it a negative reaction, but that working with mammals in captivity provides valuable information that can be used to care for stranded mammals.

The fourth panelist, Rob Lafferty, informed your Committee that he represents the Free Dolphin Maui Coalition. He stated that there are conflicting opinions from the scientific community regarding the value of cetacean research. He reviewed some of the economic impacts, both beneficial and detrimental. In addition, he addressed the ethical and moral issue of captive mammals. He stated that dolphins should not be viewed as property, but as other beings with wants and needs.

The fifth panelist, Dr. Elizabeth Lyons, informed your Committee that as a veterinarian with the USDA she inspects facilities that either exhibit animals or use animals for research purposes to ensure that they comply with Federal regulations. She provided your Committee with an overview of the comprehensive regulations, which include facilities, emergency contingency

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plans, temperature, ventilation, lighting, maintenance, feeding, water quality, transport, and research.

Following a question and answer session, your Committee received testimony from 25 members of the public expressing support of the draft bill.

Your Committee received the following documents at its meeting:

1. Written testimony from nine people in support of the draft bill;
2. Presentation handouts from the panelists, Dr. Paul Nachtigall, Ms. Hannah Bernard, and Dr. Elizabeth Lyons; and
3. Correspondence dated September 19, 2001 from Councilmember Jo Anne Johnson, transmitting a variety of related correspondence.

By correspondence dated September 24, 2001, Councilmember Johnson transmitted a copy of correspondence dated September 10, 2001, from Robert M. Gibbens, D.V.M., Director - Animal Care, Western Region to Cathy Goeggel, Animal Rights Hawaii, relating to USDA animal welfare inspection reports, and correspondence for the Kewalo Basin Marine Mammal Laboratory and the Dolphin Institute.

Your Committee recessed its meeting to September 25, 2001.

At its reconvened meeting of September 25, 2001, your Committee met with a Deputy Corporation Counsel.

Your Committee received testimony from 11 members of the public in support of the draft bill and 2 members in opposition to the draft bill.

Your Committee received correspondence dated September 25, 2001, from the Department of the Corporation Counsel, advising against action on the draft bill until legal and prosecutorial aspects are resolved.

The Deputy Corporation Counsel informed your Committee that the Department had three concerns with the draft bill. First, the Department advised

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your Committee that it needs to review the scientific evidence to support some of the statements in the purpose and intent section of the bill. Second, the Department issued a preliminary opinion that the proposed bill may be preempted by Section 711-1109, Hawaii Revised Statutes (HRS), entitled "Cruelty to animals". Third, the Department recommended that the Department of the Prosecuting Attorney should have the opportunity to review and comment on the draft bill.

Your Committee deferred the matter pending further discussion.

By correspondence dated September 27, 2001, your Committee Chair requested that the Department of the Corporation Counsel conduct further research regarding the three areas of concern expressed in the Department's response dated September 25, 2001, and revise the bill to include definitions for "captive," "cetaceans," and "exhibit."

By correspondence dated October 25, 2001, the Department of the Corporation Counsel transmitted a revised draft bill entitled "A BILL FOR AN ORDINANCE AMENDING TITLE 6, MAUI COUNTY CODE, PERTAINING TO EXHIBITION OF CETACEANS". The purpose of the revised draft bill is to prohibit the exhibition of captive cetaceans and to include a section on definitions. Your Committee notes that the title of the bill was revised to replace "Protection" with "Exhibition", that the bill was not approved as to form and legality, and that an opinion regarding the draft bill was being finalized.

By correspondence dated May 28, 2002, Councilmember Jo Anne Johnson transmitted a copy of a *Star Bulletin* article entitled "Maui dolphin show ban faces uncertain future".

By correspondence dated June 12, 2002, to Wayne T. Gilchrist, Chairman of the Subcommittee on Fisheries Conservation, Wildlife & Oceans, United States House of Representatives, your Committee Chair transmitted testimony in support of the reauthorization of the Marine Mammal Protection Act.

By correspondence dated June 24, 2002, Councilmember Jo Anne Johnson requested that a meeting be scheduled to review the original draft bill

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entitled "A BILL FOR AN ORDINANCE RELATING TO THE PROTECTION OF CETACEANS".

By correspondence dated August 9, 2002, the Department of the Corporation Counsel provided a supplementary opinion regarding the draft bill, stating that the draft bill would not be preempted by Section 711-1109, HRS. However, the Department opined that the draft bill prohibiting exhibition of cetaceans would be preempted by the Federal Marine Mammal Protection Act, 16 U.S.C. 1361, et seq. ("MMPA"), which establishes a comprehensive Federal program covering marine mammals in the wild, as well as in captivity. The opinion stated that prohibiting the mere public exhibition of marine mammals, whether or not admission is charged, would not withstand a Federal constitutional challenge and would be preempted by the Federal MMPA.

Your Committee is in receipt of a copy of correspondence dated September 24, 2002 to the Department of the Corporation Counsel from Councilmember Jo Anne Johnson, requesting reconsideration of the Department's prior opinion and questioning the relevance of the opinion to the draft bill relating to the protection of captive cetaceans.

At its meeting of October 31, 2002, your Committee met with a Deputy Corporation Counsel.

Your Committee received testimony from six members of the public in support of the draft bill.

Your Committee received the following documents at its meeting:

1. Written testimony from two people in support of the draft bill.
2. Correspondence read by Merrill Kaufman from Nicole G. Paquette, General Counsel and Monica Engebretson, Program Coordinator of the Animal Protection Institute in support of the draft bill.
3. A copy of correspondence dated October 31, 2002, to Councilmember Jo Anne Johnson, from the Department of the Corporation Counsel, stating that while there are no reported cases

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that have directly addressed the preemption issues raised by the draft bill or the South Carolina law upon which it is modeled, "state laws that purport to prohibit public display of marine mammals remain preempted by the MMPA", according to an opinion dated October 1994, issued by the Office of the General Counsel for the National Oceanic and Atmospheric Administration, United States Department of Commerce.

Your Committee further notes that the Department of the Corporation Counsel stated that there is no legal requirement that the Department approve and sign the draft bill as to "form and legality".

The Deputy Corporation Counsel concurred that the Department would not be approving and signing the bill as to form and legality because the Department still has concerns regarding Federal preemption laws.

After a brief discussion, your Committee voted to recommend that the draft bill entitled "A BILL FOR AN ORDINANCE RELATING TO THE PROTECTION OF CETACEANS" include a section on definitions for "captive," "cetaceans," and "exhibit".

Your Committee further voted to recommend passage on first reading of the revised draft bill entitled "A BILL FOR AN ORDINANCE RELATING TO THE PROTECTION OF CETACEANS" and filing of the communication.

Your Committee is in receipt of a revised draft bill incorporating your Committee's recommendation to include a section on definitions.

Your Human Services and Economic Development Committee RECOMMENDS the following:

1. That Bill No. _____ (2002), as revised herein and attached hereto, entitled "A BILL FOR AN ORDINANCE RELATING TO THE PROTECTION OF CETACEANS" be PASSED ON FIRST READING and be ORDERED TO PRINT; and
2. That County Communication No. 01-232 be FILED.

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Adoption of this report is respectfully requested.

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