

## SPLASH ZONE DRIES UP IN 2017 – SEAWORLD TO END SHAMU SHOW AND BUILD A DESTINATION RESORT INSTEAD (IF COASTAL COMMISSION AGREES)

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By 2017, SeaWorld Entertainment will have a new orca experience in a more natural setting to focus on its conservation efforts. As a result of this decision, SeaWorld will not be pursuing the \$100 million project to double the size of the whale tanks and the splash zone. The announcement made on November 9, 2015, follows a recent ruling by the California Coastal Commission to preclude SeaWorld from breeding orcas as a condition of moving forward with its requested tank expansion. SeaWorld has indicated it will appeal the Coastal Commission's decision.

The California Coastal Commission's decision echoes legislative efforts. U.S. Representative Adam Schiff, D-Burbank plans to introduce federal legislation that would prohibit the breeding of captive orcas, end the capture of wild orcas, and stop the import and export of the killer whales. People for the Ethical Treatment of Animals also has called for an end to the breeding of orcas in captivity and urged SeaWorld to build sea sanctuaries for the marine mammals.

Orcas are species of special biological significance because they are apex predators, and operate in documented social and familial groups. Orcas are toothed whales and the largest members of the oceanic dolphin family. They are found in oceans all over the world, from the Arctic to Antarctica, and many reside in or migrate through the waters off California's coast. Wherever they are found, orcas are a top predator and play the important roles that many predators play in their respective ecosystems, such as keeping populations of their prey healthy by weeding out the sick or infirm, and by keeping the population of their prey in check, maintaining the carrying capacity of the habitat area and protecting organisms further down the food chain from over-predation.

The Coastal Commission reviewed SeaWorld's application to expand the orca facilities under Section 30230 of the Coastal Act, which protects marine resources and species of special significance, ruling that SeaWorld may:

- replace and expand existing orca facility with a new 43 ft. by 75 ft., 450,000 gallon pool and a 250 ft. by 350 ft. 5.2 million gallon pool),
- demolish an existing 5,500 sq. ft. bathroom and food facility and construct a new 2,900 sq. ft. bathroom facility,
- not house any orcas taken from the wild after February 12, 2014,
- not utilize genetic material taken from orcas taken from the wild after February 12, 2014, and
- not increase the orca population in the facility, except as may occur incrementally through sustainable population growth pursuant to accredited reproductive guidelines, with the exception of rescued orcas at the request of one or more governmental agencies.

The ruling by the Coastal Commission prevents the possibility that approval of this facility could contribute to demand for capturing orcas that frequent California's coastal waters.

It is anticipated that SeaWorld will challenge the Coastal Commission's on the grounds that the Commission does not have the jurisdiction to impose special conditions relating to breeding and transfer. The Coastal Commission is charged with preserving and protecting coastal values and resources, which may not be deemed relevant to breeding and transfer restrictions. SeaWorld will argue that the ecological health of the coastal zone is not impacted by the breeding and transfer of marine mammals in captivity. Courts tend to broadly interpret Coastal Commission permits and defer to the agency, however, so this argument will be an uphill battle for SeaWorld. SeaWorld may also argue that Coastal Commission is federally pre-empted by the Marine Mammal Protection Act (MMPA). However, the MMPA, as amended in 1994, deals only with the take of marine mammals and does not regulate or issue permits for the care of animals in captivity or the distribution or sale of marine mammal parts. Similarly, the express terms of the federal Coastal Zone Management Act, specifically authorizes the California Coastal Commission to regulate coastal and marine resources, which requires that marine resources shall be maintained, enhanced and where feasible, restored and that special protection shall be given to species of special biological significance, both as species and as individuals and without regard to wild or captive status since there is nothing that expressly differentiates them.

With respect to state law, the California Department of Fish and Wildlife does not regulate marine mammals. According to state Law, "the Coastal Commission shall not establish or impose any controls with respect thereto that duplicate or exceed regulatory controls established by these agencies (CDFW and Fish & Game Commission." CDWF regulates the importation, transportation, breeding, possession and use of animals classified by CDFW as "restricted." However, animals of the family Delphinidae are not listed as restricted by CDFW which means the Commission is free to regulate marine mammals.

Finally, under the California Coastal Act, Section 30230 gives the Coastal Commission jurisdiction: Marine resources shall be maintained, enhanced, and where feasible, restored. Special protection shall be given to areas and species of special biological or economic significance. Uses of the marine environment shall be carried out in a manner that will sustain the biological productivity of coastal waters and that will maintain healthy populations of all species of marine organisms adequate for long-term commercial, recreational, scientific, and educational purposes. The context and language of Section 30230 concerns animals in the wild and all the other provisions of section 30230 address protection of resources in the marine environment.

While SeaWorld waits for its challenge to proceed through the courts, it will simultaneously pursue a new application before the Coastal Commission for the proposed resort project. SeaWorld is now transforming its theme park in San Diego into a resort destination with a SeaWorld-branded hotel on existing land already leased from the city of San Diego. This refocus may trigger new Coastal Commission review of impacts on marine resources include potential adverse impacts to public access from traffic and construction siting impacts, public views from the encroachment of development into the view shed, water quality from water use by the new facilities and runoff from related landscaping and pedestrian areas. These issues were evaluated in the recent Coastal Commission application by SeaWorld requesting to expand the orca facility, but the application did not include the new resort destination development.