

MARINE MAMMAL COMMISSION
4340 East-West Highway, Room 700
Bethesda, MD 20814-4447

6 February 2008

Mr. P. Michael Payne, Chief
Permits, Conservation and Education Division
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

Re: Request for Renewal/Amendment of Permit No. 116-1697-00
(new file No. 14186) (SeaWorld, Inc.)

Dear Mr. Payne:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the above-referenced permit amendment request with regard to the goals, policies, and requirements of the Marine Mammal Protection Act. On 18 February 2004 the National Marine Fisheries Service issued to SeaWorld, Inc., Permit No. 116-1697-00 authorizing the maintenance of one non-releasable, rehabilitated male Guadalupe fur seal for scientific research and enhancement purposes. The permit was issued under both the Marine Mammal Protection Act and the Endangered Species Act and expires at the end of February 2009. SeaWorld is requesting that the permit be renewed for an additional five years and amended to authorize the permanent maintenance of a second non-releasable Guadalupe fur seal that it is currently maintaining. In addition, SeaWorld is requesting authorization to maintain up to six non-releasable Guadalupe fur seals in the future, should such animals need placement.

RECOMMENDATIONS

Consistent with our letter of 7 July 2003 (enclosed and incorporated herein by reference) commenting on the permit-holder's original application, the Marine Mammal Commission recommends that the National Marine Fisheries Service—

- issue an enhancement permit under the Endangered Species Act to authorize the requested activities, provided that the Service, in consultation with the Animal and Plant Health Inspection Service, is satisfied that the applicant's facilities for maintenance of the requested animals are adequate to provide for their health and well-being;
- deny the requested enhancement permit under the Marine Mammal Protection Act and instead authorize the maintenance of the subject animals under sections 109(h) and 112(c) of the Act; and
- authorize the public display of the animals incidental to their care and maintenance at the facility, provided that any such display is not detrimental to the well-being of the animals.

RATIONALE

As discussed in our 7 July 2003 letter, section 104(c)(4) of the Marine Mammal Protection Act, which governs the issuance of enhancement permits, is more narrowly drawn than is the counterpart provision of the Endangered Species Act (section 10(a)(1)(A)). Section 104(c)(4) requires that the Service determine that the proposed taking or importation (1) is likely to contribute significantly to maintaining or increasing distribution or numbers necessary to ensure the survival or recovery of the species or stock, and (2) is consistent with any conservation or recovery plan adopted for the species or stock or, if there is no such plan, with the Service's evaluation of actions needed to enhance the survival or recovery of the species. Section 104(c)(4) further requires the Service to determine that captive maintenance of a marine mammal from a depleted species or stock is likely to contribute to the survival or recovery of the species by "maintaining a viable gene pool, increasing productivity, providing biological information, or establishing animal reserves."

The Commission has written extensively in recent years on the genesis and scope of the Marine Mammal Protection Act's enhancement permit provision. Attached are two letters sent to the Permits Branch of the Fish and Wildlife Service concerning this provision. The first letter, dated 7 March 2008, is particularly germane and concerns an enhancement permit application involving the captive maintenance of southern sea otters. The second letter, dated 16 December 2008, addresses an application for an enhancement permit under the Marine Mammal Protection Act to authorize the importation of polar bear trophies from the Canadian sport hunt. These letters review and explain in detail the Commission's interpretation of the Marine Mammal Protection Act's enhancement permit provision.

Consistent with the analysis set forth in those letters, the Commission does not believe that the care and maintenance of unreleasable marine mammals, by themselves, constitute enhancement activities for purposes of section 104(c)(4) of the Marine Mammal Protection Act. The applicant must demonstrate how such maintenance will contribute significantly to maintaining or increasing the distribution or numbers of animals in the wild and will help achieve the recovery goals that are or would be set forth in a conservation or recovery plan. General benefits, such as public education programs that raise public awareness of the species, fall short of this mark.

For some species, a captive breeding program designed to supplement the wild population might satisfy the requirements for obtaining an enhancement permit under the Marine Mammal Protection Act. In this instance, the applicant has not indicated that it intends to establish such a program and, if so, whether or how progeny would be released to the wild. In addition, although the Guadalupe fur seal is listed as a threatened species, the most recent stock assessment prepared by the Service (2000) indicates that the population is growing by more than 13 percent per year. Thus, it seems unlikely that a captive breeding program or other activity that calls for maintenance of the species in captivity would be identified in a recovery plan as necessary for the conservation of the species.

The Commission recognizes that the maintenance of unreleasable marine mammals can be a worthwhile endeavor and should not be discouraged. All the Commission is saying is that such

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maintenance does not meet the narrowly drawn requirements of section 104(c)(4). Rather, the Service should authorize rescue, rehabilitation, and long-term maintenance of unreleasable animals under sections 109(h) and 112(c) of the Act.

The Endangered Species Act contains no provision comparable to section 109(h) of the Marine Mammal Protection Act. As such, the oversight agencies have routinely used enhancement permits to authorize rescue and rehabilitation activities. This appears to be consistent with the more general permit provision of the Endangered Species Act and reflects long-standing agency practice. The Marine Mammal Commission recommends that the National Marine Fisheries Service issue an enhancement permit under the Endangered Species Act to authorize the requested activities, provided that the Service, in consultation with the Animal and Plant Health Inspection Service, is satisfied that the applicant's facilities for maintenance of the requested animals are adequate to provide for their health and well-being.

The Marine Mammal Commission further recommends that the Service deny the requested enhancement permit under the Marine Mammal Protection Act. Instead, the Marine Mammal Commission recommends that the maintenance of the subject animals be authorized under sections 109(h) and 112(c) of the Act. The Marine Mammal Commission also recommends that the Service authorize the public display of the animals incidental to their care and maintenance, provided that any such display is not detrimental to the well-being of the animals.

Please contact me if you have any questions concerning these comments and recommendations.

Sincerely,



Timothy J. Ragen, Ph.D.
Executive Director

Enclosures (3)

Cc: Barbara Kohn, D.V.M.