

MARINE MAMMAL COMMISSION
4340 EAST-WEST HIGHWAY, ROOM 905
BETHESDA, MD 20814

3 November 2005

Ms. April Penera
City Manager's Office
City of San Diego
202 C Street
San Diego, CA 92101

Dear Ms. Penera:

The Marine Mammal Commission is an independent federal agency created under the Marine Mammal Protection Act. Among other things, the Commission is responsible for recommending to the National Marine Fisheries Service and other agencies steps that it deems necessary for the protection and conservation of marine mammals and other actions needed to further the policies of the Act. In carrying out these responsibilities, the Commission has sent the enclosed letter to Rodney McInnis, the Southwest Regional Director of the Fisheries Service, concerning San Diego's plans to take marine mammals at Children's Pool in La Jolla. The letter expresses concerns as to whether all of the activities proposed by the City fit within the authority of 109(h) of the Marine Mammal Protection Act.

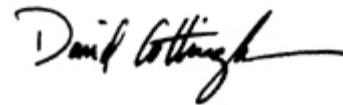
We agree with the Service's conclusion that, if the proposed taking fits within the scope of section 109(h), no further authorization is needed. However, we believe that determining whether section 109(h) applies to all aspects of the City's proposal involves technical questions of statutory interpretation and has the potential to set a precedent as to how this provision is applied in other settings. As such, we believe that it is the Service—as the resource agency responsible for implementing the Marine Mammal Protection Act—rather than the City Attorney of San Diego, that properly should be making these determinations.

The Commission recognizes that Mr. McInnis, in his 17 October 2005 letter to you, indicated that responsibility for making these determinations rests with the City. Nevertheless, we encourage the City to renew its consultations with the Service to resolve the issues raised in our letter. If the City chooses to act independently to determine whether section 109(h) applies to all taking of marine mammals that may occur as a result of the planned activities at Children's Pool, we also encourage the City to address the full scope of issues raised in our letter to Mr. McInnis. In this regard, we note that the Service indicated that the City will need to document the basis for its decision. The Commission respectfully requests that the City advise the Commission as to any determination the City makes concerning the applicability of section 109(h) to its proposed activities at Children's Pool and provide the Commission with any documentation regarding such a determination.

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Please do not hesitate to give me a call if you would like to discuss any of the points raised in this letter or in the enclosed letter to Mr. McInnis.

Sincerely,

A handwritten signature in black ink that reads "David Cottingham". The signature is written in a cursive style with a long horizontal flourish extending to the right.

David Cottingham
Executive Director

Enclosure

cc: Mr. James H. Lecky
Mr. Rodney R. McInnis

MARINE MAMMAL COMMISSION
4340 EAST-WEST HIGHWAY, ROOM 905
BETHESDA, MD 20814

3 November 2005

Mr. Rodney R. McInnis
Administrator, Southwest Region
National Marine Fisheries Service
501 West Ocean Boulevard, Suite 4200
Long Beach, CA 90802-4213

Dear Mr. McInnis:

The National Marine Fisheries Service's Office of Protected Resources recently provided the Commission with a copy of your 17 October 2005 letter to April Pendera concerning the applicability of section 109(h) of the Marine Mammal Protection Act to the taking of harbor seals at Children's Pool Beach in La Jolla, California, by the City of San Diego. This letter was sent in response to a 26 September 2005 letter from the San Diego City Attorney's Office seeking the Service's views as to whether section 109(h) provides authority to disturb seals that may be on the beach at the time of proposed sand removal. That letter further suggests that the City may seek to use the authority of section 109(h) to "remove" seals from the area "based on the need to protect the public health and welfare, as well as the seals being a nuisance animal."

The proposed actions would be carried out to comply with a California Superior Court ruling (*O'Sullivan v. San Diego*) issued on 25 August 2005 that directed the City "to employ all reasonable means to restore the [Children's] Pool to its 1941 condition by removing the sand build-up and further to reduce the level of water contamination in the Pool to levels certified by the County of San Diego as being safe for humans." The court noted, however, that nothing in its order was to be construed as requiring the City to violate any other applicable law, including the Marine Mammal Protection Act. The question of whether the court-ordered displacement of seals and/or modification of habitat at Children's Pool is appropriate is purely a question of state law and not something on which the Commission intends to comment. In contrast, it is appropriate for the Commission to provide advice to the Service and the City designed to ensure that any taking of marine mammals that may occur while complying with the court's order is conducted in full compliance with the provisions of the Marine Mammal Protection Act. It is toward this end that we send this letter.

Your letter to Ms. Pendera suggests that section 109(h) provides the necessary authority for the proposed taking of harbor seals at Children's Pool Beach. Upon closer examination, however, your letter does not address the City's central questions. Rather, it merely provides a restatement of the applicable law—"NMFS agrees that the MMPA allows the City to restore the beach for exclusive human use provided the City determines one or more of the...provisions of section 109(h) apply and can document the decision" (emphasis added)—without indicating whether the Service believes that the proposed activities fit within the scope of section 109(h).

The Commission believes that guidance on interpreting this provision of the Marine Mammal Protection Act is properly within the purview of the Service and should not be deferred to local jurisdictions to make independent determinations as to whether certain activities fit within the scope the section 109(h) taking authority. This is particularly true in this case, which raises several novel issues of statutory construction and which has the potential to set a precedent concerning how human-marine mammal interactions are dealt with elsewhere. The Commission therefore recommends that the Service and/or NOAA's Office of the General Counsel provide a much more rigorous analysis of the applicability of section 109(h) to each aspect of the proposed taking to determine if other types of taking authorization (e.g., an incidental taking authorization under section 101(a) (5) of the Act) might also be needed.

Similar questions about the scope of section 109(h) arose 15 years ago when the Service was contemplating adopting a policy to allow government officials to take marine mammals to protect other public natural resources (e.g., fish) from predation and damage under the public welfare provision of section 109(h)(1)(B). This prompted the Commission to send the enclosed 25 May 1990 letter to the head of the Service, which examined the legislative history of section 109(h) and its precursor provisions. The Commission believes that this review would provide a good starting point for the type of analysis the Commission recommends be undertaken with respect to the applicability of section 109(h) to the situation at Children's Pool.

The Commission recognizes that, in contrast to the proposed removal of pinnipeds to protect fish stocks, the proposed response at Children's Pool is based, at least in part, on public health concerns. As such, the taking proposed by San Diego more closely comports with the legislative intent behind section 109(h). Nevertheless, several other issues need to be considered before the City proceeds with the proposed taking. The key issues are summarized below.

- (1) As noted in the legislative history of section 109(h) and discussed in the Commission's 1990 letter, this provision originally was enacted primarily to allow government officials to respond to emergency situations when public health or safety, or the welfare of a marine mammal, is in jeopardy. Is it an appropriate use of this provision to allow taking in response to situations that, although presenting a public health or safety concern, cannot appropriately be classified as emergencies?
- (2) Your letter characterizes the proposed action by San Diego as the intentional harassment of seals. Despite this characterization, apparently most of what the City intends to do is to take seals incidental to the removal of sand at Children's Pool (i.e., the City indicates that "[t]he sand removal proposal has the potential to disturb any seals that may be on the beach at the time of sand removal"). As noted in the first sentence of the second paragraph of your letter, section 109(h) authorizes government officials to take marine mammals "intentionally" in certain instances. It is not clear that taking incidental to habitat modification of the type being proposed by San Diego fits within the scope of that provision, even if the underlying purpose relates to public health or safety. Can the proposed removal of sand at Children's Pool properly be characterized as an intentional, directed take? If not, does section 109(h) authorize the incidental taking of marine mammals?

- (3) If the Service determines that incidental taking is authorized under section 109(h), additional guidance is needed. Certain activities for which incidental take authorizations are currently sought under section 101(a)(5) of the Marine Mammal Protection Act arguably pertain to public health and safety (e.g., seismic retrofitting of bridges and dredging of harbors). Would the taking of marine mammals incidental to such activities be authorized by government officials under section 109(h)? If not, what distinguishes the situation at Children's Pool?
- (4) Apart from section 109(h)(1)(B), which authorizes taking to protect public health and welfare, section 109(h)(1)(3) authorizes the nonlethal removal of nuisance animals. Although this provision was added to the statute in 1981, the Service has never defined what constitutes a "nuisance" marine mammal. The Commission has advocated a definition that requires more than mere inconvenience or interference with competing human activities. Rather, for an animal to constitute a nuisance, it should be acting in an abnormal way or responding to some unnatural stimulus. For example, a sea lion that eats fish that fishermen would like to catch does not, per se, constitute a nuisance. However, if that same animal targets fish that are concentrated by a man-made barrier that impedes their movements or that have already been caught by fishermen, it could appropriately be characterized as a nuisance animal. Similarly, marine mammals that merely haul out or congregate in areas of natural habitat should not be considered to be nuisance animals, even if people would like to make other use of such areas. If, however, the marine mammals are attracted to an area because of non-natural changes to such areas, (e.g., the construction of boat floats on which animals may haul out), such animals could be considered nuisance animals. Do seals at Children's Pool, by merely hauling out on the beach, constitute a nuisance? What if the seals make similar use of a nearby area that has not been altered by the construction of a breakwater? Should the analysis of what constitutes a nuisance change depending on whether the use of an area by humans precedes the conflicting use by marine mammals? If so, how would such a policy account for the fact that marine mammals may have been excluded from certain areas that were historically inhabited by the species?
- (5) From the exchange of letters provided to the Commission, it is not clear whether the proposed sand removal and/or directed taking of seals by harassment at Children's Pool would be carried out by City employees or by contractors. Section 109(h) is quite explicit that taking under that provision be conducted by government officials or employees in the course of their official duties. Although others may be designated to take marine mammals under the authority of section 109(h), they must be designated by the Secretary in accordance with section 112(c) of the Act. That is, the City may not designate someone other than a City official or employee to take marine mammals on its behalf. Does the City intend to use city employees or contractors to carry out the proposed activities? If the latter, have they been or can they be authorized to take marine mammals in accordance with section 109(h)?

Mr. Rodney R. McInnis
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This list of questions is not intended to be exhaustive and is provided primarily to illustrate that additional analysis of the applicability of section 109(h) to the proposed taking of seals by San Diego is needed. We look forward to resolution of these and related questions. Toward this end, please feel free to contact the Commission staff if we can be of help in conducting the recommended review.

Sincerely,

A handwritten signature in black ink that reads "David Cottingham". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

David Cottingham
Executive Director

cc: William T. Hogarth, Ph.D.
Mr. James H. Lecky
Ms. April Penner
Mr. Samuel D. Rauch, III