

UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
WASHINGTON, D.C. 20230

In the Matter of:)
)
Lilo Maria Creighton,)
)
Respondent)
)
)
_____)

Docket No.
SW030133

ORDER GRANTING DISCRETIONARY REVIEW, IN PART, AND DENYING
DISCRETIONARY REVIEW, IN PART

FACTS:

On July 2, 2003, the National Oceanic and Atmospheric Administration (NOAA or the Agency) issued a Notice of Violation and Assessment (NOVA) to Respondent Lilo Creighton, who was charged with violating the Marine Mammal Protection Act (MMPA, 16 U.S.C. 1361 *et seq.*) and Agency regulations concerning the taking of marine mammals by harassment (50 C.F.R. 216.3, 216.11(b)). Specifically, the Agency charged Respondent with unlawfully taking harbor seals by harassment by swimming into Children's Pool Beach in La Jolla, California, and by walking up the beach causing a number of harbor seals to flee into the water from their hauled out positions on the beach, and assessed a civil penalty of \$1000.

A hearing was held before an Administrative Law Judge (ALJ) on January 22-23, 2004, and February 24-25, 2004. On April 20, 2005, the ALJ issued his Initial Decision, in which the Respondent was found liable for violating the MMPA and Agency regulations at 50 C.F.R. 216.11(b).

Pursuant to 15 C.F.R. Sec. 904.273, the Respondent filed a Petition for Administrative Review on May 10, 2005, requesting discretionary review by the Administrator of the Initial Decision. On June 10, 2005, the Agency filed a Partial Answer in Support of, and Partial Answer in Opposition to, Respondent's Petition for Administrative Review of Decision.

ORDERED:

Based on the Administrative Record in this matter, I hereby grant review on one of the grounds Respondent raised in her Petition, as re-phrased below. In addition, I hereby direct the parties to address a second issue I wish to review on my own initiative. Accordingly, I hereby direct the parties to submit briefs addressing the following two issues:

1. Whether the NOAA Administrator has the authority to interpret the law or adopt a policy to exclude from Level B Harassment (as defined in the Marine Mammal Protection Act) acts having the potential to disturb marine mammals that are part of a population that is in excess of Optimum Sustainable Population and growing. If so, how should such an interpretation or policy affect the decision in this case?
2. Whether the California Land Grant of Children's Pool Beach to the County and City of San Diego to maintain forever as a place for public swimming and recreation, and the City, County and State actions regarding Children's Pool Beach subsequent to that land grant, preclude the enforcement of the MMPA in this case.

The Parties' briefs shall be submitted on the following schedule and with the following word limits:

Respondent's opening brief shall be no longer than 4,000 words and shall be served within 40 days after the date of this order.

The Agency's brief shall be no longer than 4,000 words and shall be served within 30 days after the date on which Respondent's opening brief is due.

Respondent's reply brief, if the Respondent chooses to file one, shall be no longer than 2,000 words and served within 20 days after the date on which the Agency's brief is due.

Each brief shall include a certificate of word limit compliance signed by the party or counsel and stating the number of words in the brief has been counted by the word-processing system on which the brief was prepared and that the brief complies with the word limit set by this order.

All briefs shall cite and rely on documents from the record only and shall include an appendix containing copies of any documents cited or relied upon in the brief. These documents do not count against the word limit for the brief. Copies of portions of the United States Code, the federal regulations, case law or the Initial Decision do not need to be included in the appendix.

All briefs and supporting papers must be served on the Administrator at the following address: Administrator, National Oceanic and Atmospheric Administration, Department of Commerce, Room 5128, 14th Street and Constitution Avenue NW, Washington, D.C. 20230.

Copies of all briefs and supporting papers must be served upon (1) the other party's counsel (or the party, if that party is proceeding pro se), and (2) the NOAA Assistant General Counsel - Headquarters at the following address:

Assistant General Counsel-Headquarters, National Oceanic and Atmospheric Administration, Herbert Clark Hoover Building, 1401 Constitution Avenue, N.W., Room 5814-A, Washington, D.C. 20230.

Each party shall serve its briefs so they are received by the Administrator and the other parties on or before the date on which they are due.

Following the submission of the briefs, I will issue a written decision on this matter which will be transmitted to the parties in accordance with the requirements of 15 C.F.R. 904.273(i).



Conrad C. Lautenbacher, Jr.
Vice Admiral, U.S. Navy (Ret.)
Under Secretary of Commerce for
Oceans and Atmosphere

CERTIFICATE OF SERVICE

I hereby certify that on this day, **March 7, 2006**, I have sent the attached "ORDER GRANTING DISCRETIONARY REVIEW, IN PART, AND DENYING DISCRETIONARY REVIEW, IN PART" by first class mail, to the following persons:

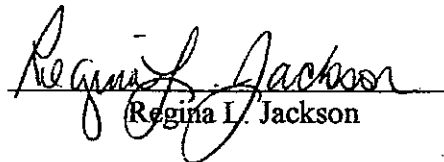
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Done and Dated: March 7, 2006


Regina L. Jackson