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MAY 18 2010

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City of San Diego

## MEMORANDUM

**DATE:** May 18, 2010  
**TO:** Honorable Mayor Jerry Sanders  
**FROM:** Councilmember Donna Frye *Donna Frye*  
**SUBJECT:** Letter from NOAA's National Marine Fisheries Service regarding Children's Pool

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Attached is a letter I received today from NOAA's National Marine Fisheries Services regarding the management of Children's Pool and their support of the actions taken by the Natural Resources and Culture Committee.

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**CC:** Honorable Councilmembers  
Independent Budget Analyst Andrea Tevlin  
Honorable City Attorney Jan Goldsmith  
Stacey LoMedico, Director of the Park and Recreation Department  
Kelly Broughton, Director of Development Services



**UNITED STATES DEPARTMENT OF COMMERCE**  
**National Oceanic and Atmospheric Administration**  
NATIONAL MARINE FISHERIES SERVICE

Southwest Region  
501 West Ocean Boulevard, Suite 4200  
Long Beach, California 90802- 4213

COUNCIL MEMBER  
DONNA FRYE

MAY 18 2010

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May 14, 2010

Donna Frye  
Chair, Natural Resources & Culture Committee  
San Diego City Council  
202 C St. #10  
San Diego, California 92101-3860

Dear Councilwoman Frye:

Thank you for contacting NOAA's National Marine Fisheries Service (NMFS), Southwest Regional Office, regarding the San Diego City Council's next steps concerning Children's Pool Beach (CPB), located in La Jolla, California. Following a conference call with my staff in the Protected Resources Division on April 28, 2010, your staff sent, via electronic mail, a copy of your draft report to be presented to the San Diego City Council identifying management options for CPB. Per your request, this letter provides our comments and recommendations regarding the proposed management options. In order to provide some context for these comments, we have added some background (Appendix 1) on the Marine Mammal Protection Act (MMPA), harbor seal biology and life history, and the historical and current use of CPB by harbor seals.

The presence of a harbor seal colony at CPB has been the focus of several lawsuits in the recent past. In 2009, the California State Legislature passed Senate Bill 428, which amended the conditions of the 1931 State trust granting the CPB area tidelands to the City of San Diego. Effective January 1, 2010, the trust was amended to allow for an additional use of the tidelands: a "marine mammal park for the enjoyment and educational benefit of children." While, there is ~~no definition or recognition of the term "marine mammal park" under the MMPA and NMFS'~~ implementing regulations, this amendment of the trust provides the City of San Diego with greater latitude in implementing management actions regarding the harbor seal colony at CPB.

#### COMMENTS AND RECOMMENDATIONS

My staff and I have reviewed the actions that were proposed by the San Diego City Council Natural Resources and Culture Committee, of which you are the Chair, and offer the following comments and recommendations.

1. **Direction to seek a Local Coastal Program amendment to prohibit the public from entering the beach during pupping season, 24 hours a day from December 15 through May 15.**



Harbor seals (*Phoca vitulina richardii*) at CPB are subject to many potential daily urban disturbances— traffic noise, car alarms, slamming doors, people shouting and laughing. Any of these disturbances may provoke a reaction from a harbor seal on the beach. This may include raising their head, looking around, or moving. The most disruptive of human interactions are those that lead to animals flushing into the water, causing animals to expend energy and prevent them from gaining the benefits of hauling out (e.g., rest or thermoregulation). When pups are on the beach, they can be injured or even killed by stampeding adult seals. Biologists have observed that the presence of people on the beach near the hauled out seals, or at the water's edge typically results in large numbers of seals flushing (Hanan 2004). By preventing the public from entering the beach, flushing can (in most cases) be prevented. Therefore, NMFS supports prohibiting the public from entering the beach.

For the harbor seals hauled out at CPB, the most critical time for protection from disturbance and harassment are during the last months of pregnancy and through pup weaning. The first full-term harbor seal pups are usually born at CPB in January. Based on these dates, implantation occurs no later than August. Therefore, adult females hauled out at CPB after August are likely pregnant. NMFS has received documented reports of abortions and premature parturition occurring in CPB harbor seals in November and December. Therefore, NMFS recommends treating December 1 as the beginning of the pupping season. This date is a conservative start date for pupping season and provides protection from human interference for late term pregnant females hauled out at CPB, and likely reduces the risk of abortion and premature parturition. After birth, pups nurse and are dependent on their mothers for approximately 4-6 weeks until weaning. The last pups of the season (typically born in April) may not wean until the end of May. Therefore, NMFS recommends treating May 30 as the end of the pupping season, as this date ensures that the majority of pups will be weaned.

NMFS has one comment regarding this restriction. The City Council might consider exempting certain categories of people from the general prohibition. For example SeaWorld personnel may need to access CPB if an entangled animal is observed on the beach. We recommend that the City Council consider a mechanism that will allow access in this, or other appropriate situations.

## **2. Prohibit dogs on the Children's Pool Beach year round, 24 hours a day**

~~NMFS supports this action. Dogs may harass seals and cause them to flush into the water. There is also a risk of disease transmission between canines and pinnipeds. Therefore, prohibiting dogs from the beach is protective of the seals and dogs by reducing potential disturbance and preventing potential health issues.~~

## **3. Seek private funding for a Park Ranger or Lifeguard full-time position with expert qualifications whose primary duty is to patrol the Children's Pool. Authorize the Park and Recreation Department or Lifeguard Services to create a Volunteer Docent Program led by this Park Ranger or Lifeguard**

NMFS supports this action. NMFS recognizes that at least some percentage of harassment of marine mammals is caused by well-meaning members of the public who do not understand the

impact their behavior may have on the animals or lack knowledge of applicable laws. La Jolla's CPB is a destination area for many tourists who may have no experience with wild marine mammals. Once informed, most people tend to maintain a greater distance and limit potentially disruptive behaviors. Therefore, the combination of enforcement and education should greatly help this situation.

While NMFS appreciates the efforts of the private organizations that have provided educational materials at CPB, we believe that the programs would be more organized and messages more consistent if they were maintained by a central group operating under the purview of the local government, such as the program envisioned by this proposal. NMFS would look forward to coordinating closely and assisting with such a program. Additionally, having a dedicated employee with enforcement authority would likely help prevent violation of city ordinances that are protective of seals or limit conflict, including purposeful violation of those city ordinances.

While NMFS has enforcement authority under the MMPA, limited staffing creates a challenge. NMFS has a toll-free hotline (1-800-853-1964) to report violations of marine laws (including the MMPA). In 2009, this number received a total of 154 calls regarding CPB. Although only three of the 154 calls resulted in a full investigation, all of the calls represent a significant investment for the local NMFS enforcement agent.

Under MMPA Section 109(a), no State may enforce a State law or regulation relating to the taking of the species of marine mammal without a transfer of management authority from the Secretary of Commerce. This has not occurred in California. However, States and local governments are free to implement and enforce ordinances, such as the closure of a beach, which may have a side benefit of preventing the harassment of a marine mammal.

#### **4. Seek an emergency amendment to the existing Coastal Development Permit to keep the guideline rope up year round**

NMFS supports this action with some reservations, as maintenance of the guideline rope does not ensure that harbor seals will not be harassed. For example, if a harbor seal hauls out on the "human" side of the rope, harassment of that seal may still be considered a violation of the MMPA, even if one is on the "correct" side of the rope. NMFS recommends that the public maintain a distance from any seal, regardless of where they are regarding the guideline rope. For most harbor seal haulout sites along the West Coast of the U.S., NMFS recommends a distance of 100 feet. However, with the relatively small area at CPB, NMFS has recommended that the public maintain a distance of at least 50 feet from any seal, while standing on CPB (as opposed to standing on the breakwater). As this is a viewing guideline and not codified in the regulations, NMFS has the flexibility to modify it to meet the individual circumstances of the geographic area and the natural history of the species. Because viewing distances are guidelines, they do not have the force of law, but harassment is a violation of the MMPA regardless of the distance from which it occurs.

Therefore, NMFS supports establishing the guideline rope year-round, as it would allow at least some measure of public awareness and protection to the harbor seals hauled out on the sand. However, we note that merely abiding by the guideline rope (standing on the "human" side) does

not guarantee that a person will not violate the MMPA. For example, humans approaching CPB from the water while harbor seals are on the beach may present more of a threat to the seals than humans on the beach, which may result in flushing en masse into the water.

#### CONCLUSION

Thank you for the opportunity to provide input on the proposed actions sent before the City Council of San Diego. We hope that our comments and recommendations will help inform your discussions. If you have any further questions, please do not hesitate to contact Sarah Wilkin at [Sarah.Wilkin@noaa.gov](mailto:Sarah.Wilkin@noaa.gov) or 562-980-3230 or Christina Fahy at [Christina.Fahy@noaa.gov](mailto:Christina.Fahy@noaa.gov) or 562-980-4023.

Sincerely,



for Rodney R. McInnis  
Regional Administrator

cc: Copy to File: 151422SWR2005PR2267

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## Appendix 1.

## BACKGROUND:

*Marine Mammal Protection Act*

Under the Marine Mammal Protection Act (MMPA), NMFS (exercising the authority of the Secretary of Commerce) is the resource trustee agency for cetaceans and pinnipeds (excluding walrus) in the United States and is responsible for implementing and enforcing the law. The stated goal of the MMPA is to ensure that marine mammal species and stocks do not “diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part” (16 U.S.C. §1361(2)). To implement this goal, the MMPA imposes a general moratorium on the “take” of a marine mammal in U.S. waters. It defines take to mean “to harass, hunt, capture, or kill or attempt to harass, hunt, capture or kill any marine mammal” (16 U.S.C. §1361(13)).

*Pacific harbor seals – general biology/life history*

Pacific harbor seals (*Phoca vitulina richardii*) are widely distributed throughout the North Pacific. Haulout sites are widely distributed throughout the California mainland and on offshore islands, including beaches, rocky shores, and intertidal sandbars. This subspecies inhabits near-shore coastal and estuarine areas from Baja California, Mexico to Alaska. Their migrations are limited to 300-500 kilometers, occasionally traveling these distances to find food or suitable breeding areas. The timing of harbor seal pupping occurs sequentially along the west coast of North America, with the earlier pupping seasons occurring in Baja California and southern California, and later seasons occurring in the Pacific Northwest and British Columbia, Canada. After birth, pups nurse and are dependent on their mothers for approximately 4-6 weeks until weaning. Harbor seals breed shortly after weaning their pups. Delayed implantation of the fertilized blastocyst occurs 1.5 to 3 months following mating. The gestation period is approximately 9 months.

For any individual or group of individuals in a breeding colony, there are two time periods in a given year when non-lethal disturbance or harassment would be the most harmful to harbor seals. ~~The first is any interference with pregnant females that might result in the loss of young prior to birth (either through abortion of a fetus that cannot survive outside of the womb or the premature birth of a pup that lives a short time before dying).~~ This type of reproductive failure can be harmful to the health of that female and, over time, may result in the collapse of the harbor seal colony. The second critical time period is immediately following birth, when mothers and their pups bond, so they can recognize each other if they become separated. Disruption of the bonding process usually leads to abandonment of the pup and eventual death without human intervention.

### *Harbor seals at Children's Pool Beach*

There have been limited studies focusing on the harbor seals in La Jolla, but the animals likely colonized CPB because it provided suitable habitat. Genetic analyses have not been conducted to determine population structure or the origins of the founding animals for this rookery; however, one reasonable assumption is that they may have originated from some of the offshore islands (e.g., San Clemente Island) in southern California. In addition, there is no evidence that human intervention (via the release of rehabilitated seals) created this colony. Prior to colonization of CPB, some rehabilitated harbor seals were released from multiple La Jolla beaches located near known offshore haulout sites (rocks). However, these releases represent a small number of animals and there is no evidence that those released harbor seals were more likely to haul out on the mainland beaches versus offshore rocks following release. Currently, all harbor seals rehabilitated in San Diego County are released off Point Loma.

Currently, Pacific harbor seals use CPB to haul out year-round, and to give birth and nurse their pups. Harbor seals historically occupied the offshore rocks near La Jolla, but were not consistently observed on the mainland at CPB until the early 1990's. By 1995, harbor seals were using CPB daily (Yochem and Stewart 1998). This time period coincides with an observed increase in the harbor seal population off California. During this time, individual animals could be observed hauling out in areas containing suitable habitat (Hanan 1996), sometimes leading to the establishment of a haulout site or re-colonization of an historical haulout site. With a sloping, sandy beach that is north-facing and generally protected from tidal influence and high wave action, CPB provides suitable habitat for harbor seals.

The first observed pups confirmed born on CPB occurred in the late 1990's. NMFS conducts a statewide harbor seal census survey every few years and includes the animals at CPB. More frequent observations by volunteer groups and project monitoring reports indicate that the number of pups born annually appears to have stabilized at CPB, now averaging between 40-50 pups. Harbor seals, including those at CPB, display site fidelity, with female harbor seals often remaining close to the area they gave birth.

The term "rookery" is not defined in either the MMPA or through its implementing regulations. ~~The American Heritage Science Dictionary (2002) defines a rookery as: "A place where certain~~ birds or animals, such as crows, penguins, and seals, gather to breed." Harbor seals have been observed giving birth at CPB for approximately 10 years, and the timing and numbers of pups born are generally predictable from year to year. Therefore, NMFS considers CPB to be a harbor seal rookery and year-round haulout site.

## LITERATURE CITED

Hanan, D. 1996. Dynamics of abundance and distribution in the Pacific harbor seal, *Phoca vitulina richardsi*, on the coast of California. Doctor of Philosophy dissertation. University of California, Los Angeles. 173 pages.

Hanan, D. 2004. Biological letter report and recommendations for construction regarding pinniped surveys at Children's Pool, La Jolla, California. Report submitted to City of San Diego, Public Building and Parks Division, Engineering and Capital Projects Department, Architectural Engineering and Contracts Division. In partial fulfillment of Fixed Fee Agreement C-12438.

Yochem, P. and B. Stewart. 1998. Behavioral ecology and demography of seals and sea lions at Seal Rock Marine Mammal Reserve. HSWRI Technical Report No. 98-282. Submitted to City of San Diego, Seal Rock Marine Mammal Reserve Ad Hoc Committee.

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