UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSHPERIC ADMINISTRATION

In the Matter of: LILO MARIA CREIGHTON, Respondent	Docket No: SW030133

INITIAL DECISION AND ORDER

Issued: April 20, 2005

Issued by:

Hon. Parlen L. McKenna
Administrative Law Judge
Alameda, California

FOR THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

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PRELIMINARY STATEMENT

The National Oceanic and Atmospheric Administration (hereinafter referred to as "Agency" or "NOAA") initiated this administrative action against Respondent Lilo Maria Creighton seeking assessment of a civil penalty in the amount of One Thousand Dollars ($1,000.00). The alleged violation is that Ms. Creighton and a group of other people swam into Children's Pool Beach in La Jolla, California on March 23, 2003, and harassed harbor seals resting on the beach causing the harbor seals to flush into the water. The Agency argues that Ms. Creighton's actions violated the Marine Mammal Protection Act ("MMPA" or "Act") codified at 16 U.S.C. § 1361 et. seq. and its underlying regulations codified at 50 C.F.R. Part 216. An evidentiary hearing was held in San Diego, California on January 22 through 23, 2004, and adjourned for approximately thirty (30) days. The hearing resumed on February 24, 2004 and concluded on February 25, 2004. The parties have both filed post-hearing briefs, including proposed findings of fact and conclusions of law.[1] For the reasons stated herein, the alleged violation of the MMPA is hereby found proved.

In 1931, the State of California conveyed, among other areas, the Children's Pool Beach, by Grant Deed (Grant) to the City and County of San Diego "to forever hold in trust exclusively for public use … for swimming, fishing, parking, playground, recreational purposes, and a bathing pool for children." (See Respondent's Ex. T).[2] The Grant provided that the tidelands shall be used for the establishment, improvement and conduct of harbors and construction of bulkheads or breakwaters for the protection of lands within its boundaries, and the like. In addition, the last subsection of the grant specifically states:

> "(d) There is hereby reserved, however, in the people of the State of California the absolute right to the public use of said tidelands and to fish in the waters thereof, with the right to access said waters over said tidelands for said purposes." (See Respondent's Ex. R, p. 12).

That same year, Ms. Ellen Browning Scripps donated approximately $60,000 for the construction of a cement/stone breakwall to protect the beach for "Citizens of San Diego" and their "children." (See Respondent's Ex. S). The breakwall is four (4) feet wide, three hundred and three feet (303) long and ranges from five (5) to eight (8) plus feet high above the beach. Approximately one hundred and fifty (150) feet of the

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[1] Review of Respondent's post hearing briefs reveal that additional documents (Exhibits BB through GG) were attached and marked as exhibits. Since each of these documents are within a category that official notice can properly be made, the Undersigned now rules on the admissibility of post hearing exhibits received. Respondent's counsel attached computer files for Exhibits DD, FF, and GG. The Undersigned was not able to open these files therefore Exhibits DD, FF, and GG are not admitted. Further, in the absence of objection from Agency counsel, Exhibits BB, CC, and EE are hereby admitted into evidence. See ATTACHMENT A.

[2] See Statutes of California, Chapter 937 and 938 for legal description of land grant.

breakwall extends seawards past the waters edge to form a protective cove. (See Joint Stipulation of the parties dated February 22, 2005).[3]

For the last seventy (70) plus years, the people (including their children) have benefited greatly from "the absolute right" to use the Children's Pool Beach pursuant to the grant from the State of California. Indeed, over the years the City/County of San Diego has constructed a large lifeguard Tower, public restrooms overlooking Children's Pool Beach, and concrete stairs from the street level down to the beach.

To the north of Children's Pool Beach (approximately 400 feet) is Seal Rock. This area consists of "a large rock which is surrounded by other smaller rock formations which are submerged at moderate to high tides… . At low tides, tidepools are exposed in the area immediately east of Seal Rock … . East and northeast of Seal Rock is Shell Beach, a small sandy pocket beach." (See Respondent's Ex. R.- California Coastal Commission Staff Report). The harbor seals have historically used Seal Rock as a haulout or resting area. Seal Rock and the vicinity were the only known regularly used haulout on the mainland south of Point Mague in Santa Barbara along California's coast. Harbor seals require time out of the water every day to warm their bodies and rest. Haulouts for longer period of time are required to give birth and molt (shedding of skin and hair). The pupping season occurs from February through July. The California Coast Commission Staff Report also noted:

> "It has also been reported in the past that seals have used a reef location approximately 50 feet directly west of the breakwater at Children's Pool as a haulout, but to a much lesser degree than Seal Rock itself." (id., p. 6.).

The Children's Pool Beach, aside from being a historical swimming hole for people and their children, has become a significant tourist attraction for San Diego and La Jolla. Indeed, since the mid 1990's, the number of tourists walking on the breakwall to get a close-up view of the harbor seals at Children's Pool Beach has increased dramatically. Today, approximately 98,700 tourists visit the Children's Pool Beach and surrounding area each month.[4] Clearly, such a huge draw of visitors brings in tourist revenue to San Diego County. While many of these visitors do not come to San Diego solely to visit Children's Pool Beach, the beach is one component of a very valuable San Diego tourist attraction. At the hearing in this case, Mr. Clifton Williams, Chief of Staff for City Councilman Scott Peters, stated that Children's Pool Beach is a valuable tourist attraction. (See TR p. 418). Because handrails have been installed on both sides of the breakwall, these visitors can walk all the way to the end of the beach. In doing so, a person can be as close as ten (10) feet from a harbor seal. Indeed, from what I observed during an "in-trial visit", the harbor seals have become so accustomed to people on the wall that they generally do not move from laying directly under groups of people hanging over the handrail. Moreover, people and their children on the Children's Pool Beach

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[3] The Joint Stipulation is hereby admitted into evidence as ALJ Exhibit No. 1.

[4] See Joint Stipulations of Parties dated April 12, 2005, hereby admitted as ALJ Exhibit 2.

have been intermingling with the seals. As such, people pet the seals and lay down next to them to get pictures with the animals. Thus, since the seals apparently did not feel threatened by the joint use of the beach, more and more harbor seals began to frequent Children's Pool Beach as their population increased over the years. (See TR p. 416). Neither the Hudnall Group/"Friends of the Seals", nor the National Marine Fisheries Service (NMFS) approved of this commingling of humans and seals.[5] As for the City and County of San Diego, they are torn between the need to comply with the terms of the grant deed for Children's Pool Beach, on the one hand, and cultivating and expanding one of it's primary revenue generators - - the San Diego area as a world-class tourist destination, on the other hand.

On November 18, 1993, the California Coastal Commission approved a permit application for a temporary marine mammal reserve submitted by the City of San Diego (CDP #6-93-26). Therein, the Commission authorized the establishment of a temporary 1.35 acre marine mammal reserve consisting of open coastal waters (including Seal Rock). Children's Pool Beach was not included in this temporary marine mammal reserve. The reserve expired by its terms on September 16, 1999.

In approximately July, 1999, the City of San Diego erected a barricade at Children's Pool Beach to prevent people (and their children) from using the beach and water. The facial justification for this action was that the water at Children's Pool Beach had become contaminated as a result of seal feces. (Emphasis added). Section 409.5 of the City's Penal Code authorized such action for public safety. Initially, the City stated that it would continue to test the water so that once the contamination abated, the barricade would be removed. A year and a half later, the barricades remained in place. The City acknowledged that the contamination was sporadic. However, the City changed its initial position on the barricades to "as long as the source of the contamination was still in the area (namely, the seals), the site would remain posted indefinitely" … . In other words, even if the weekly water quality samples showed acceptable results, the Children's Pool Beach would remain closed.

As a result of complaints from the public regarding the loss of public access to Children's Pool Beach, the City of San Diego explored alternatives for a shared-use concept of Children's Pool Beach. The City staff consulted experts and considered options to restore the water quality to acceptable levels so Children's Pool Beach could be used by both seals and humans. (See Respondent's Ex. R, page 10). The California Coastal Commission Report went on to state:

> Based on their review, the City believed that the best alternative to address the problem was a proposal to dredge the sand from Children's Pool to restore it to its 1920 conditions. It was hoped that this would result in more tidal flushing of the area which would consequently result in

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[5] Mr. James Hudnall is a concerned citizen with a deep interest in the welfare of the harbor seals. As such, he provides "docent" services at Children's Pool Beach and is a member of a group of individuals that call themselves "Friends of the Seals". (See TR at 260-266, January 23, 2004).

> reducing the high fecal counts and public access to the water would be restored. The City subsequently submitted a costal development permit application (CP # 6-98-22) for this proposal. However, it was at this time that the County informed the City of their position that even if the water quality testing determined that the water was safe for human contact, as long as the seals were in the area, it would still consider the area to be contaminated. The City decided that its plans to attempt to lower the pollution counts to Children's Pool so that people could regain access to the ocean were pointless. Thus, the City withdrew its coastal development permit application for the dredging project.

The County health officials informed the Commission staff that "it was their understanding the barrier at Children's Pool Beach had been installed to keep the people away from the seals and not to keep people out of the contaminated water and that such a barrier was not required by the County Health Department." (Emphasis added). (See Respondent's Ex. R, p. 8). Regardless of the reason for the installation of the barrier, the Commission found that in order to install such a barrier, a coastal development permit was required. Thus, the City was in violation of the Coastal Act which violation the Commission stated would be pursued by a separate enforcement action. Finally, the City informed the Commission that it was unable to incorporate the retention of the barrier on a permanent basis into it's pending application because "it would require City Counsel action." (See Respondent's Ex. R, p. 8). The record does not disclose whether there were sufficient votes on the City Counsel for such a resolution.

On January 3, 2001, the City of San Diego filed a permit application with the California Coastal Commission to establish a permanent "Seal Rock Marine Mammal Reserve" over 1.35 acres of open coastal waters. If approved as proposed, the Commissions' granting of a permit would prohibit human access within the reserve boundaries except for authorized commercial fishing pursuant to a permit, emergency access, and fishing consistent with the MMPA. Significantly, the Hudnall Group/"Friends of the Seals" have been pushing to have Seal rock and Children's Pool Beach each designated within a permanent marine mammal reserve. As stated above, this group also provides the "docent" services at Children's Pool Beach.

In the Commission Staff Report (p.13), the National Marine Fisheries Service Staff stated, "that from a biological perspective, if the area is ever made into a permanent reserve, it would make sense to incorporate both Children's Pool and Seal Rock because the entire area is their habitat area." The Staff Report specifically points out the following very important facts:

1. Harbor seals are thriving at both Seal Rock and Children's Pool Beach (p. 15);
2. Since 1993, the number of seals in both Seal Rock and Children's Pool Beach have increased dramatically (p. 10); and
3. Harbor seals at Seal Rock, Children's Pool Beach and the surrounding area are neither endangered or threatened species.

After a complete review of the matter, the Commission denied the City of San Diego's application for a permit to establish a permanent marine mammal reserve. In so doing, the Commission noted that the City's proposed action (creating a permanent marine mammal reserve which would exclude public access to the water) is inconsistent with the California State Land Grant. Instead, the Commission decided to renew the permit for another temporary five (5) year period. In granting the renewal of an additional five (5) year temporary permit for a marine mammal reserve encompassing 1.35 acres around Seal Rock (which excludes Children's Pool Beach), the Commission report stated that the "city should do everything possible to protect public access in this area and to alleviate the health concerns. However, if the city believes that protecting the seals is a higher public need than public access to the waters, then they should seek a change to the law" (the underlying State Grant) (p. 12). The Commission Staff also found that the Children's Pool Beach barrier was inconsistent with the Grant language if it is not temporary or if it was only erected to separate the humans from the seals (p.12).

The Commission Staff Report further stated:

> Additionally, the project raises concerns with regard to consistency with the legislative land grants cited previously. Upon review of all this information, it appears that making the area into a permanent reserve is inconsistent with the above-cited state tideland grants. As stated in the previous findings, both SLC [California State Land Commission] staff and DFG [California Department of Fish and Game] staff believe that a permanent reserve status for any of the granted tidelands at this location is inconsistent with the grant language. Further, the Commission finds that given the information that is available today, making the area into a permanent reserve is not supportable. If the City conducts additional studies or obtains additional information that would support a change in the land grants, the City always has the option of going before the legislature to seek an amendment to the land grant.

In 1972, Congress enacted the MMPA based upon a finding that certain species and population stocks of marine mammals were in danger of extinction or depletion as a result of man's activities. See 16 U.S.C. § 1361(1). The Act thus requires that "such species and population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part, and, consistent with this major objective, they should not be permitted to diminish below their optimum sustainable population." Id. at 1361(2). Finally, the Act mandates that "efforts should be made to protect essential habitats, including the rookeries, mating grounds, and areas of similar significance for each species of marine mammal from the adverse effects of man's actions." See 16 U.S.C. § 1361(2).[6] One action specifically prohibited by the MMPA is the "taking" of a species or population

[6] The MMPA is one piece of a comprehensive environmental protection legislative package enacted by Congress. See also, e. g., the Endangered Species Act, 16 U.S.C. § 1531 et, seq.; and Lacey Act, 16 U.S.C. § 701 et. seq.

stock protected therein. See 16 U.S.C. § 1372(a)(1). The term "'take' means to harass, hunt, capture, or kill, or attempt to harass, hunt capture or kill any marine mammal." See 16 U.S.C. § 1362(13).

Importantly, the determination as to the facts of the violation and/or any assessed civil penalty is totally inconsequential to the "land use" conflict that exists between the La Jolla Swimmers/divers/beach goers and the Hudnall Group/"Friends of the Seals". The real importance therefore is the ramifications that flow from any decision issued herein, not the proposed $1,000.00 civil penalty. Indeed, a decision finding that any swimmer could be assessed a civil penalty for violating the MMPA just by using the Children's Pool Beach where a harbor seal(s) alters it's/their behavior for debatable reasons, would effectively force humans to abandon this beach in contravention of the State Land Grant. The Hudnall Group/"Friends of the Seals" and the NMFS believe that the Children's Pool Beach should be converted to a marine mammal reserve because the man-made breakwater creates an ideally protected beach for the seals to use as a haulout and rookery. The fact that the Children's Pool Beach was deeded to the City of San Diego on June 15, 1931 by the State of California "exclusively" as a "public park" and "bathing pool for people and their children" does not seem to bother the Hudnall Group/"Friends of the Seals". (See Respondent's Ex. 20). Further, the fact that the $60,000 for the construction of the man-made breakwater that created the protective cove that the seals find so attractive would not have been donated by the Scripps family but for its use and pleasure by the "children" and "citizens of San Diego" similarly does not seem relevant to their calculus. (See Respondent's Ex. 19). Finally, the record discloses that the Hudnall Group/"Friends of the Seals" are exacerbating the problem by making repeated calls to NMFS to complain about people using the Children's Pool Beach. When the frustrated swimmers/beach goers decided to swim from La Jolla Cove to the Children's Pool Beach, the Hudnall Group/"Friends of the Seals" called both federal and state agencies in order to fan the fires of controversy. Indeed, when the swimmers came from the water onto Children's Pool Beach, people were yelling "you deserve to die" and "shame on you". (See Respondent's Ex. C, page 3 – a letter from Dr. Nira Standish Clark, Professor of Biology to Agency Counsel Paul Ortiz in defense of her participation as one of the swimmers on March 23, 2003 at Children's Pool Beach).[7]

Thus, the City/County of San Diego, and the Hudnall Group/"Friends of the Seals" are attempting to achieve indirectly what they could not or did not accomplish through the governmental process. In this regard, it cannot be overstated that the local San Diego government created this problem by failing to resolve this festering dispute. Indeed, the local government should have petitioned the State of California to amend the Grant Deed or filed with the NMFS for an incidental "take" permit under the MMPA (See 16 U.S.C. § 1371(a)(5)(A) and 50 C.F.R., Subpart I).[8] As a result of this inaction, the City/County of San Diego have been hanging its citizenry out to dry. The lack of

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[7] Dr. Clark notes in her letter to Mr. Ortiz that the proposed "$1000 fine is too high. The fee for "unauthorized, non-knowing taking of a endangered or threatened fish' is only $450. Harbor seals are neither endangered nor threatened and I did not kill one."

[8] See ATTACHMENT C.

clarity regarding the legality surrounding this issue is such that a reasonable person would believe that his or her state and local government has granted a right in perpetuity to use the Children's Pool Beach as a swimming beach for them and their children. Moreover, since the issue is very confusing to an ordinary citizen as to when, and under what circumstances a "take" occurs, the problem is compounded exponentially. One only has to read the history surrounding the definition as to what constitutes a "take" to see that this is a complex matter not easily understood by lay citizens. Regardless thereof, the problem must go back to the City/County of San Diego, and as to it, the failure of governance is striking. The facts of this case are as follows:

FINDINGS OF FACT

Background Concerning Children's Pool Beach

1. In 1931, the State of California granted certain tide and submerged lands to the City and County of San Diego near the shores of La Jolla, California to forever hold in trust exclusively for public use and purpose which allows the citizens of San Diego the full enjoyment of such tide and submerged lands. (See Resp. Ex. T). Public use of said lands included swimming, fishing, parking, playground, recreational purposes, and a bathing pool for children. (Id.).

2. That same year, the City of San Diego constructed a cement/stone tidal wall costing approximately $60,000.00 on the shores of La Jolla to create a tidal bathing pool for the children and citizens of San Diego. (See Resp. Ex. S). The tidal bathing pool is commonly known as Children's Pool Beach. (See Resp. Ex. Y). The creation of the breakwall resulted from one of many generous donations to the community from Miss Ellen Browning Scripps. (Feb. 25 Tr. 413-14; Resp. Ex. S).

3. The breakwall is four (4) feet wide, three hundred and three (303) feet long and ranges from five (5) to eight (8) plus feet high above the beach. Approximately one hundred and fifty (150) feet of the breakwall extends seawards past the waters edge to form a protective cove. (See Joint Stipulation of the parties dated February 22, 2005). (See ALJ Ex. No. 1).

4. Children's Pool Beach created a safe swimming environment for children and adults in the community. The breakwall protected the natural swimming hole at Children's Pool Beach, and further protected the swimmers and sandy beach area from high surf. Subsequent to the construction of the breakwall, the City/County of San Diego erected a large lifeguard station above Children's Pool Beach. In addition, permanent bathroom facilities were built along with cement stairs from the street level down to the breakwall and beach. (Jan. 23 Tr. 279; Resp. Ex. Y).

5. For the last seventy (70) plus years, the people (including their children) have benefited greatly from "the absolute right" to use the Children's Pool Beach pursuant to the grant from the State of California.

Information Concerning Harbor Seals

6. Harbor seals, like other pinnipeds, come to shore almost daily to rest, breed, give birth, nurse, and during the molt season to accelerate hair growth. This critical behavior is called haulout. (Feb. 24 Tr. 13-14).

7. Haulout occurs at terrestrial sites such as beaches, rocks, or man-made structures. Further, these sites are usually historical and have been used by seals for long periods of time. (Feb. 24 Tr. 14-15).

8. Seal haulout is seasonal and seals are less inclined to haulout in the winter months. In comparison, female seals haulout daily during the breeding season. (Feb. 24 Tr. 13).

9. The breeding season (also referred to as pupping season) for harbor seals in Southern California occurs annually beginning in January to mid April. (Feb. 24 Tr. 17, Feb. 25 Tr. 223).

10. Female seals with pups spend more time hauling out to nurse than other seals. Generally, the transfer of nutrients during nursing lasts about 30 days and occurs numerous times throughout a day. (Feb. 24 Tr. 13-16).

11. After the birth of a seal pup, the mother develops a relationship and bond with the pup by sense, sound, and smell. This bonding behavior is critical for the female seal to identify her pup. (Feb. 24 Tr. 17-18).

12. Disturbances during the nursing period can also effect the bonding between the mother and pup. If the mother perceives a threat to herself or her pup, she will stampeded into the water for safety. (Feb. 24 Tr. 17-19; 33-36).

Seal Rock (and Not Children's Pool Beach) is the Historical Haulout for Harbor Seals

13. Approximently 400 feet to the north of Children's Pool Beach is Seal Rock. This area consists of a large rock surrounded by other smaller rock formations which are submerged at moderate to high tides. At low tides, tidepools are exposed in the area immediately east of Seal Rock. East and northeast of Seal Rock is Shell Beach, a small sandy pocket beach. (See Respondent's Ex. R, Report of the California Coastal Commission).

14. The harbor seals have historically used Seal Rock as a haulout or resting area. Seal Rock and the vicinity were the only known regularly used haulout on the mainland south of Point Mague in Santa Barbara along the California Coast. (See Respondent's Ex. R).

15. While there is some testimonial (See Feb. 25, TR. 226, 376-9) and documentary evidence (See Respondent's Ex. R) that Children's Pool Beach was sporadically used as a seal haulout, historically such use was limited and not significant when

compared to Seal Rock prior to environmentalist and governmental action restricting human use of Children's Pool Beach. (See Respondent's Ex. R).

The Establishment of A Marine Mammal Reserve

16. On November 18, 1993, the California Coastal Commission approved a permit application (CDP No. 6-93-26) creating a temporary 1.35-acre marine mammal reserve consisting of open coastal waters (including Seal Rock). Children's Pool Beach was not included in the application and was not included in the permit. (See Respondent's Ex. R).

17. The temporary marine mammal reserve expired by it's own terms on September 16, 1996. (See Respondent's Ex. R).

18. On January 3, 2001, the City of San Diego filed a permit application with the California Coastal Commission to establish a permanent "Seal Rock Marine Mammal Reserve over the previously approved 1.35 acres. The Hudnall Group/"Friends of the Seals" pushed to have the proposed reserve expanded to include Children's Pool Beach. (See Respondent's Ex. R).

19. The National Marine Fisheries Service staff supported the inclusion of Children's Pool Beach in any permanent marine mammal reserve. (See Respondent's Ex. R, page 13).

20. After a complete review of the matter, the Commission denied the application for a permanent reserve because such action would violate the State of California Land Grant by denying public access to the water. Instead, the Commission decided to renew the temporary reserve permit for another five (5) year period.

21. By that action, the Commission specifically found that (1) harbor seals are thriving at both Seal Rock and Children's Pool Beach; (2) since 1993, the number of seals at both locations have increased drastically; and (3) harbor seal populations at these locations are growing and are not endangered or threatened. (See Respondent's Ex. R).

The Actions of the City/County of San Diego Violated the Terms of the California State Land Grant by Encouraging a Seal Invasion of Children's Pool Beach

22. The City/County of San Diego is a world-class tourist destination. Since the City/County of San Diego installed a protective rail system on both sides of the breakwall, tourists have been able to walk on the breakwall for an up-close view of the harbor seals (sometimes as close as then (10) feet).

23. Mr. Clifton Williams, Chief of Staff for City Councilman Scott Peters stated that Children's Pool Beach is a valuable tourist attraction. (See TR. pg. 418). As such, the City/County of San Diego would naturally not like to see any action taken that reduces/minimizes the value of it's tourist assets.

24. The actions of the City/County of San Diego in erecting a barricade at Children's Pool Beach violated the California Coastal Commission regulations. That barrier prevented people from accessing the Children's Pool as well as the beach. Such action violated the terms of the California Land Grant since it remained up even when the water samples were not contaminated.

25. The City/County of San Diego had an affirmative duty to go back to the State to amend the Land Grant before or concurrent with it's application to establish a marine mammal reserve.

26. The Hudnall Group/"Friends of the Seals" violated the terms of the California Land Grant by preventing the pubic from gaining access to Children's Pool Beach. Since this group provides docent services, their actions of limiting access to the Children's Pool and/or beach were conducted under color of authority of NMFS and the City/County of San Diego.

27. As a direct and proximate result of the aforesaid actions and the dramatic population increase, the harbor seals have moved from their historic haulout site at Seal rock and invaded Children's Pool and it's beach.

Organized Swim March 23, 2003

28. Respondent, a resident of La Jolla, California for approximately thirty-four (34) years, is an avid swimmer. (Feb. 25 Tr. 386-387; Resp. Ex. A).

29. For the past twenty (20) years, Respondent swam with a group of people on an average four or five times a week at La Jolla Cove toward the direction of Children's Pool Beach but the group does not land on Children's Pool Beach. (Feb. 25 Tr. 387-388; Resp. Ex. A).

30. On March 23, 2003, Respondent participated in a group swim organized by Tom Sauer; the swim began in La Jolla Cove and ended at the Children's Pool Beach. (Jan. 22 Tr. 159).

31. The purpose of the swim was to demonstrate that the waters around Children's Pool Beach were open and humans and harbor seals could share the water and beach area at Children's Pool Beach. (Jan. 22 Tr. 160; Gov't Ex. 4, 10, 11, 12, 13, 14).

32. Prior to the swim, organizers contacted the media and the San Diego Union-Tribune published a story about the swim on March 21, 2003. (Gov't Ex. 19).

33. The swim on March 23, 2003, occurred during pupping season for harbor seals. (Feb. 24 Tr. 17, Feb. 25 Tr. 223).

34. Mother-pup pairs were present on Children's Pool Beach on March 23, 2003, the day of the swim. (Feb. 24 Tr. 21; Gov't Ex. 6).

35. Prior to the organized swim, Mr. Sauer contacted the National Marine Fisheries Service (NMFS) and sought advice from Joseph Cordero, coordinator of the California Marine Mammal Stranding Network in the Protected Resource Management Division of NOAA. (Jan. 22 Tr. 210).

36. Mr. Sauer first inquired how the group should behave at the Children's Pool Beach so a taking under the MMPA would not occur. (Jan. 23 Tr. 235: Gov't Ex. 22). Mr. Cordero explained a taking occurs when an individual causes a change in the natural behavior of the mammal. Further, Mr. Cordero advised swimmers to maintain a distance far enough away that a change in mammal behavior did not occur. Mr. Cordero provided that a natural change in mammal behavior included lifting its head in response to a perceived threat or a mammal moving from the beach to the water because of a perceived threat. (Jan. 22 Tr. 235; Gov't Ex. 22). Mr. Sauer sent a second e-mail inquiry to Mr. Cordero seeking further advice on how the swimmers could meet conditions set forth by Mr. Cordero. (Jan. 22 Tr. 236; Gov't Ex. 22). Mr. Cordero responded to the second inquiry by stating, "simply staying away from the seals." (Jan. 22 Tr. 236; Gov't Ex. 22).

37. Mr. Cordero recommended a 25 to 50 feet buffer zone between swimmers and seals; however, he noted that the swim would occur during pupping season and indicated that the suggested range of 25 to 50 feet may not be adequate. (Jan. 22 Tr. 238; Gov't Ex. 22).

38. James Hudnall is an environmentalist and adviser to La Jolla "Friends of the Seals". (Jan. 23 Tr. 259). Mr. Hudnall made phone calls to various state and federal officials complaining about the proposed Children's Pool Beach swim.

39. On March 23, 2003, the morning of the organized swim, Mr. Hudnall began videotaping events at Children's Pool Beach at 3:20 a.m. from an area on the sidewalk above Children's Pool Beach and near the stairs that connects the beach and sidewalk. (Jan. 23 Tr. 265-66; Gov't Ex. 6).

40. On March 23, 2003, Respondent joined approximately twenty-five (25) people around 9:30 a.m. at La Jolla Cove for a swim to Children's Pool Beach. (Feb. 25 Tr. 386, 401; by Gov't Ex. 18).

41. Prior to the swim, Mr. Sauer instructed swimmers not to harass the seals and to exit on the north or east side of the beach by sea wall. (Feb. 25 Tr. 391).

42. At approximately 9:47 a.m., Respondent, trailed by two other swimmers, entered the Children's Pool Beach area. At that time, several seals took notice of the swimmers by raising their heads and looking in the direction of the oncoming swimmers. (Feb. 24 Tr. 30-31; Gov't Ex. 6, 18).

43. At approximately 9:48 a.m., Respondent was the first swimmer to land in the middle of Children's Pool Beach and approximately 6 seals flushed into the water. (Gov't Ex. 6, 18).

44. Respondent proceeded to walk onto the beach and approximately 29 seals flushed around her into the water (Gov't Ex. 6).

45. According to the lifeguard logbook, the seals returned to Children's Pool Beach at 4:15 p.m. (Resp. Ex. Z).

Definitions

46. "Pursuit" is defined as "to follow, overtake or capture".

47. "Annoyance" is defined as "any human stimuli which bothers and/or irritates a marine mammal".

48. "Torment" is defined as "any act(s) which has the affect of agitating or upsetting greatly". While the definition of "torment" is not at issue in this proceeding, the agency head should define the term so as to better inform the public.

49. Level B harassment under 16 U.S.C. § 1362 (18)(A)(ii) should be conditioned as to exclude actions of "pursuit", "torment" and/or "annoyance" for marine mammal populations that are (1) in excess of Optimal Sustainable Population levels (OSP) and (2) the population level is growing.

ULTIMATE FINDINGS OF FACT AND CONCLUSION OF LAW

1. Respondent Lilo Maria Creighton is a person subject to the jurisdiction of the United States under 16 U.S.C. § 1362 (10)(A) of the Marine Mammal Protection Act.

2. Harbor seals are protected marine mammals under the MMPA. 16 U.S.C. § 1362(6).

3. The waters and land of the Children's Pool Beach in La Jolla California are under the jurisdiction of the United States and the MMPA. 16 U.S.C. § 1379(a).

4. The Secretary of Department of Commerce has not transferred conservation and management of Children's Pool Beach from the Federal Government to the State of California. 16 U.S.C. § 1379.

5. The MMPA prohibits the taking of marine mammals by harassment. 16 U.S.C. § 1372.

6. The term "take" means to harass, hunt, capture or kill. 16 U.S.C. § 1362(13).

7. The term "harass" means any act of pursuit, torment or annoyance. The MMPA further distinguishes between Level A Harassment: harassment which has the potential to injure a marine mammal or stock in the wild; or Level B Harassment which occurs when: harassment has the potential to disturb a marine mammal or

stock by causing disruption of behavioral patterns such as migrating, breathing, nursing, feeding, breeding or sheltering. 16 U.S.C. § 1362(18)(a).

8. On the morning of March 23, 2003, harbor seals hauled out on Children's Pool Beach. The seals on Children's Pool Beach were resting, breathing, nursing, and feeding - - all of which are critical behavior of harbor seals. (Feb. 24 Tr. 14-15).

9. On the morning of March 23, 2003, Respondent Lilo Maria Creighton violated 16 U.S.C. § 1372 by disturbing the harbor seal's behavior when she swam into the middle of the Children's Pool Beach and came ashore causing the seals to flush into the water.

10. The disturbance created by Respondent amounted to Level B harassment. 16 U.S.C. § 1362(18)(A)(ii).

11. NOAA has proved by a preponderance of reliable, probative, substantial and credible evidence that Respondent Lilo Maria Creighton committed an unlawful take by harassing harbor seals in the waters and lands of the Children's Pool Beach in violation of the MMPA.

DISCUSSION

1. JURISDICTION

The MMPA prohibits the "take" of any marine mammal that is, "in waters or on lands under the jurisdiction of the United States." 16 U.S.C. § 1372(a)(2)(A). The MMPA defines the waters under the jurisdiction of the United States as "the territorial sea of the United States [and] the waters included within a zone, contiguous to the territorial sea of the United States, of which the inner boundary is a line coterminous with the seaward boundary of each coastal state, and the other boundary is a line drawn in such manner that each point on it is 200 nautical miles from the baseline from which the territorial sea is measured." 16 U.S.C.§ 1362(15).

The MMPA specifically prohibits the enforcement of state laws or regulations without a transfer of authority to the state by the Secretary. Title 16 U.S.C. § 1379(a) provides, "[n]o State may enforce, or attempt to enforce, any state laws or regulation relating to the taking of any species of marine mammal within the State unless the Secretary has transferred authority for the conservation and management of the species to the state . . .."

Here, Respondent argues that the City of San Diego retains jurisdiction to manage marine mammals on San Diego beaches and waters. To support this position, Respondent provided photographs of signs posted in Children's Pool Beach referencing the City of San Diego. The signs warned the public to refrain from disturbing or approaching the seals. (See Resp. Ex. V and W). Further, City Council and California

Coastal Commission meeting notes were admitted into evidence asserting that the City of San Diego and the State of California manage seals, Children's Pool Beach, and the Seal Rock area. (See Resp. Ex. I, J, Q, and R).

Although the State of California deeded the Children's Pool Beach and surrounding area to the City of San Diego "to forever hold in trust exclusively for public use … "for swimming, fishing, parking, playground, recreational purposes, and a bathing pool for children", the authority to manage marine mammals indisputably remains under the jurisdiction of the United States Federal Government. (See Resp. Ex. S and T). The record does not contain any evidence transferring marine mammal management authority from the Secretary of Commerce to the State of California or the City of San Diego as required by statute.[9] (See Resp. Ex. T). Furthermore, inspection of the signs posted at the Children's Pool Beach warning the public to refrain from approaching or disturbing marine mammals mirrors the language in the MMPA, which describes the act of a "taking" and a "taking by harassment" of the harbor seals.

While there can be no legitimate argument as to federal supremacy concerning the Agency's regulation of marine mammals under the MMPA, the Agency must ensure that any final decision rendered herein does not violate the Ninth[10] and Tenth Amendments of the United States Constitution. Indeed, under the Tenth Amendment, each state has the right to order its own affairs and govern its own people. See U.S. CONST. Amend. X (providing that the powers not delegated to the federal government are reserved to the States or to the people). Thus, the Agency must coordinate with the State of California and it's political subdivisions to ensure that it's final decision does not unlawfully impinge upon "States Rights" not expressly or by fair implication withdrawn by the Federal Constitution.

The State of California, by Grant Deed, gave the Children's Pool Beach and surrounding area to the City/County of San Diego "to forever hold in trust exclusively for public use … for swimming, fishing, parking, playground, recreational purposes, and a bathing pool for children". If the State does not wish to change the Grant Deed, the question arises whether Agency staff, the City/County of San Diego, and the Hudnall Group/ "Friends of the Seal" have unlawfully impinged upon the sovereignty of the State of California by the de facto conversion of the Children's Pool Beach and surrounding area to a marine mammal reserve. Regardless of the eventual disposition of the Children's Pool Beach, the government (both federal, State and local) owes a duty to its citizens to resolve this issue and to do so in an expeditious, decisive and clear manner.

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[9] The Secretary of the Department of Commerce is the "Secretary" referenced in the MMPA. See 16 U.S.C. § 1362(12)(A)(i)

[10] The Ninth Amendment to the United States Constitution provides that the enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

2. BURDEN OF PROOF

The Administrative Procedures Act (APA), provides that the burden of proof is on the Agency as the proponent of a rule or order. 5 U.S.C. § 556. Although the APA does not define the term burden of proof, the Supreme Court concluded that burden of proof is defined as the burden of persuasion. See Dept. of Labor v. Greenwich Collieries, 512 U.S. 267, 276 (1994). The burden of persuasion is satisfied when, upon consideration of the record as a whole, the charges are supported by reliable, probative, and substantial evidence. 5 U.S.C. § 556(d); Steadman v. Securities and Exchange Commission, 450 U.S. 91, 98 (1981). This standard of proof is generally referred to as a preponderance of evidence and requires the trier of fact to believe the existence of a fact is more probable than its nonexistence. Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California, 508 U.S. 602, 622 (1993). Therefore, NOAA bears the burden of proving the charges by a preponderance of reliable, probative, and substantial evidence that Respondent more likely than not committed the violations alleged in the Notice of Violation and Assessment (NOVA).

3. THE MARINE MAMMAL PROTECTION ACT

In 1972, Congress found certain species and population stocks of marine mammals were in danger of extinction or depletion as a result of man's activities; thus in an effort to protect those mammals, the MMPA was enacted. 16 U.S.C. § 1361(1); NRDC v. Evans, 279 F.Supp 2d 1129, 1142 (N.D. CA 2003). The MMPA requires that "such species and population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part, and, consistent with this major objective, they should not be permitted to diminish below their optimum sustainable population." 16 U.S.C. § 1361(2). See also Evans, 279 F.Supp 2d at 1142. Additionally, the Congress stated that "efforts should be made to protect essential habitats, including the rookeries, mating grounds, and areas of similar significance for each species of marine mammal from the adverse effect of man's actions." 16 U.S.C. § 1361(2).[11]

One act prohibited by the MMPA is the "taking" of a species or population stock protected by the Act. 16 U.S.C. § 1372(2)(A); 50 C.F.R. § 216.11(b). "The term 'take' means to harass, hunt, capture, or kill, or attempt to harass, hunt capture or kill any marine mammal." 16 U.S.C. § 1362(13). See also 50 C.F.R. § 216.1 (purpose of regulation, among other things, is to prevent the taking of marine mammals). In this case, NOAA accused Respondent of "taking" a marine mammal by harassment. The MMPA differentiates between two types of harassment. Level A harassment occurs when any act of pursuit, torment, or annoyance has the potential to "injure" a marine

[11] Ironically, if the fecal matter in Children's Pool is unsafe for humans, could it be that it is unhealthy for seals and their newborn pups? Because the breakwall at the pool and the silt problems are man-made, is there a violation of the MMPA by the City/County of San Diego's failure to "protect essential habitats, including rookeries, mating grounds, and areas of similar significance for each species of marine mammal from the adverse effects of man's actions"?

mammal stock in the wild. 16 U.S.C. § 1362(18)(A)(i). Level B harassment occurs when any act of pursuit, torment, or annoyance has the potential to "disturb" a marine mammal stock by disrupting its behavioral patterns such as migration, breathing, nursing, breeding, feeding or sheltering. 16 U.S.C. § 1362 (18)(A)(i) and (ii). See also Evans, 279 F.Supp. 2d at 1142.

The MMPA contains both civil and criminal penalties. 16 U.S.C. § 1375. In order to be assessed a criminal penalty, a person must knowingly violate any provision of this subchapter or any permit or regulation issued under this subchapter. 16 U.S.C. § 1375(b); United States v. Hayashi 22 F.3d 859, 864 (9th Cir. 1993). In contrast, the civil penalty sections of the "Marine Mammal Protection Act is a strict liability statute, and no specific intent is required." In the Matter of Alfredo D. Cordell, 1994 NOAA LEXIS, 15 (NOAA, April 11, 1994). Whether a respondent appreciates the consequences of his or her actions is irrelevant since voluntary actions are sufficient to constitute a violation of the MMPA. In the Matter of Newman, 7 O.R.W. 198 (NOAA, June 10, 1993).

In 1994, Congress amended the MMPA and included a definition for harassment. Moreover, in 2002, NOAA published its Final Rule, which further clarified Harassment and explained factors and scenarios that constituted a significant disruption. See 67 FR 46712 (July 16, 2002). Therefore, the definition of harassment, as provided by the MMPA and its underlying regulation, must apply to this proceeding.

Level B Harassment defined by the MMPA includes any act of pursuit, torment or annoyance which has the potential to disturb a marine mammal in the wild by causing disruption of behavior patterns such as nursing, breeding, resting, feeding, breathing or sheltering. 16 U.S.C. § 1362(18)(A)(ii). Specifically, NOAA alleges Respondent pursued and/or annoyed the harbor seals at Children's Pool Beach. The MMPA does not provide definitions for the terms pursuit, and/or annoy. However, fundamental statutory construction rules provide guidance. Generally, a court must consider the plain meaning of a term; however, the meaning of a word is not determined from isolation but drawn from context in which it is used. Deal v. United States, 508 U.S. 129, 132 (1993); Davis v. Michigan Dept. of Treasury, 489 U.S. 803, 809 (1989).

A. Overview of Public Policy Considerations that Need to be addressed by Agency Head

Let there be no mistake, the Agency has been designated by Congress to administer the MMPA. In Chevron v. National Resources Defense Counsel, 467, U.S. 837 (1984), the Court created a new two-step test to be applied in all attempts by agencies to give meaning to the statutes they administer:

> When a court reviews an agency's construction of the statute it administers, it is confronted with two questions. First, always, is the question of whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

> If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id. at 842-843

Importantly, in this case the statute is silent as to the definition of "pursuit" and "annoyance" and the Agency has not imposed an administrative interpretation. Thus, this proceeding provides the Agency with the first opportunity to define these terms.[12] Congress has not, however, delegated to the Agency the power to make policy decisions through letters, manuals, guidelines and briefs. It is therefore not precedential when the Agency publishes on it's website:

> Share the Shoreline:
>
> > If you see a seal on the beach, give it room. The NMFS marine mammal viewing guidelines recommend a minimum approach distance of 100 yards. The approach limitation will minimize the potential for disturbing resting animal and/or reduce stress for an animal that may be recovering from illness or injury.
>
> (See Northwest Regional Office, NOAA, Sharing the Shore with Harbor Seal Pups in the Pacific Northwest, *at* http://www.nwr.noaa.gov/mmammals/pinnipeds/harbor.htm) (last visited Apr. 18, 2005).

Similarly, until the Agency speaks through case precedent (final agency action) or rulemaking, statements of agency lawyers in briefs and oral statements are not considered reliable evidence of an agency's policy, "given the powerful incentive for lawyers to take any position that is likely to further their clients interests in a case and the uneven level of supervision of the work product of agency lawyers". (See Administrative Law Treatise, Davis and Pierce, Third Edition, Vol. 1, pages 119-20). Accordingly, the undersigned has endeavored in this Initial Decision and Order to create a full and complete record so that an informed policy decision may be developed which is legally sustainable.

In this case, the interests of the NMFS staff, the local governments, and the environmental groups seem to be in alignment - - on the side of the seals taking over Children's Pool Beach. Only the swimmers/divers/beach goers want to maintain their

[12] While Congress amended the MMPA in 1994 to add the words "pursuit, torment and annoyance" to the definition of "harassment", the Agency has chosen not to use it's rulemaking authority to define these terms over the last eleven (11) years.

"absolute" right of "exclusive public use"- - What if the venue of this dispute was at a different location? What if the harbor seals took over a 300-foot stretch of the Malibu beach in front of multi-million dollar homes? How about a privately owned boat marina in Sausalito, California. What if the Monk Seal population in Hawaii recovers, its population increases well above OSP, and they take up residence along a 300-foot stretch of beach in front of the Royal Hawaiian Hotel. Such examples are not far fetched especially given the growth of the harbor seal population in California. Thus, as a policy matter, the Agency head must evaluate the options that are available:

1. Adopt a variation of the definitions proposed by the Respondent and agency counsel for the term "Annoyance" - -"Annoyance is defined as to bother or irritate; find that Respondent violated the MMPA; and impose the appropriate fine.

2. Adopt an objective standard for inclusion within the definition of "Annoyance"; "Annoyance" is defined as to bother or irritate. Any person who comes within 100 yards of a marine mammal is deemed to have bothered and/or irritated a marine mammal.

3. Adopt a condition precedent for the triggering of Level B harassment as to "pursuit", "torment", or "annoyance" to <u>exclude</u> marine mammal populations that are (1) in excess of OSP and (2) growing. NMFS would continue to make its annual population estimates to determine if conditions 1 and 2 still exist (<u>See</u> 16 U.S.C. § 1373(f)).

4. Adopt 1 or 2, above and work with the City/County of San Diego to petition the State of California to amend the Grant Deed to create a marine mammal reserve that includes Seal Rock and Children's Pool Beach.[13]

The undersigned does not recommend that the Agency head adopt option 1 because it clearly faces significant legal challenges. (See discussion under Constitutional and Other Legal Issues). Based upon that analysis, an appeal by Respondent to either the Ninth Circuit or the Supreme Court could easily result in an adverse ruling.

The second option attempts to cure the legal infirmities contained in Option 1. While the issue of vagueness, "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible narrative standard, but rather in the sense that no standard of conduct is specified at all" is probably remedied by the 100-yard no-enter zone. "Men [and women] of common intelligence" do not have to guess at the meaning of 100 yards. Indeed, they know how far away they need to be from a marine mammal. <u>See</u> <u>Coates v. City of Cincinnati</u>, 402 U.S. 611 (1971). While the <u>Lionhart v. Foster</u>, 100 F. Supp.2d 383 (E.D. La. 1999) case is problematic, it does not appear to

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[13] A recommendation to remove most of the seals from Children's Pool Beach to restore the <u>status quo ante</u> is not being proffered even though such action is clearly warranted given the fact that governmental/human intervention created the problem. However, if the harbor seal population continues to increase, that option may be forced upon the Agency and other governmental entities.

preclude a 100-yard no-enter zone. (See discussion under Constitutional and Other Legal Issues).

Conversely, the second option is not recommended because everyone losses except the environmental interests. The City/County of San Diego would be forced to stop all swimmers, divers, and beach goers from using Children's Pool and its beach. Moreover, because of the 100-yard no-entry zone, tourists would no longer be allowed access to walk along the 300-foot breakwall to have a close-up view of the harbor seals. Finally, such a decision would violate the terms of the California Grant Deed by a de facto prohibition on the citizens and their children from using the Children's Pool Beach and surrounding area.

The third option is deemed preferable. Government regulation should only be forced on it's citizenry when the public interest so requires. Moreover, once the underling basis for the regulation cease to exist, so should the heavy hand of the government. In this case, the parties should work together to resolve this problem. The City/County of San Diego needs to re-submit it's application to the California Coastal Commission to dredge the Children's Pool to restore it to pre-1920 condition. This will not be unduly expensive and will improve the water quality for both seals and humans.

In addition, the beach could be divided down the middle - - the breakwall side of the beach could be roped-off to exclude humans with the other side reserved for swimmers, divers and beach goers. The docents could monitor the beach to prevent humans/seal interaction. Because Level B harassment would not trigger, the docents or lifeguards could gently coach the seals to stay out of the people side of the beach. The City/County of San Diego should approve of this outcome since it enhances a valuable tourist attraction while improving the utility of its tourist resources for swimming, diving and beach-going. The Agency should like this outcome because it eliminates a significant regulatory burden on the Agency staff to respond to Level B harassment at Children's Pool Beach. While some may argue that this proposal will never work because the seal attendance will over-run the beach, that conclusion pre-supposes a significant population increase in harbor seals and the inability of the docents/lifeguards to regulate seal attendance. If this postulation materialized, the population problem at numerous places along the coast would disrupt the balance of Commercial and private property interests and force the Agency to deal with a much broader problem than Children's Pool Beach.

Finally, the Agency head could adopt options 1 or 2, above, and work with the City/County of San Diego to change the State of California Grant Deed so that a marine mammal reserve could be created at Seal Rock and Children's Pool Beach. This option is not recommended because the City/County of San Diego would loose a valuable tourist attraction since people would not be allowed in the marine mammal reserve. The Swimmers/divers/beach-goers would lose because the beach and pool would be unaccessible. While some Agency staff and environmentalists might like this option, there is likely to be too much political opposition. Accordingly, the following subsections will analyze whether the Respondent "pursued" and/or "annoyed" the seals as charged by the Agency.

B. Respondent Did Not Pursue the Harbor Seals at Children's Pool Beach

As agency counsel correctly points out, the starting point in "interpreting statutes and rules is always the plain words themselves". (See Agency post-hearing brief, p. 27). The Agency goes on to cite Sutherland on Statutory Construction § 46.07, p. 110 (4th ed. 1984):

> Ergo, the undefined terms must make sense in relation to the goal of the statutory section, in this case the statutory definition of harassment, in which they are placed. The terms cannot be interpreted in a way in which they have no meaning at all, or in a way that creates absurd results.

Recognizing the lack of definition for pursuit, the undersigned directed the parties to provide proposed definitions. (See Resp. Ex. U and Agency's Post Hearing Brief, pp 26-30). Both parties proposed definitions for the plain meaning of pursuit. Respondent proposed "overtake, capture, kill or defeat". Agency counsel proposed "to follow, to overtake or capture; and to proceed along the course of." (See Houghton – Miffln's The American Heritage Dictionary of the English Language, New College Edition (1981) (hereinafter A.H. Dictionary).

Using these definitions, agency counsel first argues that the trier of fact must determine whether the Respondent's actions were an act of "pursuit." Then, if the answer is in the affirmative, it must be determined "whether that act(s) was significant enough to have had the potential to disturb the marine mammals". (See Agency Post Hearing Brief, p. 26).

Importantly, agency counsel argues that:

> This latter finding requires an in-depth review of the effect on the animals of the Respondent's actions, as well as a review of the scientific basis for the determination that the response represents a disruption of an important behavioral pattern of the animals. This second, more focused, finding ensures both that an act of pursuit, torment, or annoyance must be of sufficient seriousness to qualify as a take violation, and that not every marine mammal behavioral response to human stimuli is harassment.
> Id., page 26.

The MMPA is a strict liability statute and thus "intent" is not an element of the offense. Agency counsel argues that the goal of the group swim was to proceed to the Children's Pool Beach; that the Children's Pool Beach was chosen by the swimmers to focus attention on the effect of the seal's presence on human access to the beach; that Respondent proceeded along a course to a known seal haulout; and that knowing that it was a seal haulout, Respondent's purpose was to enter the Children's Pool and access it's beach. Importantly, agency counsel admits that there is a lack of proof in the record that the Respondent knew of the purpose of the swim before the event. (See Agency brief

dated May 7, 2004, pg 21). In this regard, I specifically find Respondent's testimony to be credible. It is clear all of the swimmers had a vested interest in not intentionally disturbing the harbor seals at Children's Pool Beach. To conclude otherwise would defeat the purpose for which the swim was initiated.[14]

Under the law of strict liability, it is the doing of the act that results in culpability. In this case, agency counsel argues that the "Act" was Respondents entering the Children's Pool and then walking up the center of the beach. I disagree. If Respondent had "followed, overtaken or captured" one or more harbor seals, her actions would have constituted a "pursuit". She did not. Agency counsel also argues that Respondent "proceeded along the course of" and therefore committed and act of "pursuit". While it is true Respondent (and her group) swam from La Jolla Cove to Children's Pool Beach it is a reductio ad absurdum to assert that Respondent's actions equate to "proceeded along the course of " and therefore "pursued" the harbor seals on the beach.[15] Under agency counsel postulation, any time a person walks from their car to the beach or accesses the beach after swimming and a harbor seal(s) flushes, an act of "pursuit" occurs and a "serious violation of federal law" arises if the person knew harbor seals may be in the area. As agency counsel so correctly notes, the "terms cannot be interpreted in a way in which they…create absurd results". Speaking of absurd results, I would venture to guess that a large number of citizens in La Jolla cannot understand how a group of animals that are neither threatened nor endangered can invade their governmentally deeded beach and successfully have the local government and an environmental group evict them utilizing the legal apparatus subsumed under the MMPA.

Accordingly, "Pursuit" is defined as "to follow, overtake or capture". Since the Respondent's actions did not fall within this definition, I find that the Respondent did not "take" a marine mammal by means of Level B "harassment" through an act of "pursuit".

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[14] Respondent testified that prior to the group swim, she did hear Mr. Sauer instruct swimmers not to harass the seals and the swimmers were to exit out of the water towards the seal wall. (Feb. 25 Tr. 391). Respondent explained that, "As I approached the Children's Pool, I needed to concentrate on staying in the small channel to avoid being pushed onto the rocks. I swam faster in my attempt to reach the beach without being hurt". (Feb. Tr. 382; Resp. Ex. A). Joe Barnett, a former lifeguard at the Children's Pool Beach, reviewed the videotape of the swim and testified that it appeared the participants were avoiding the neck of a rip current near the rocks on the left side of the beach. Further, oncoming swells ushered the participants, including Respondent, into the deepest part of Children's Pool Beach. (Feb. 25 Tr. 373-375). I specifically find that Respondent's explanation for not exiting on the side of the beach is credible.

[15] On March 21, 1994, the United States House of Representatives took up H.R. 2760 to re-authorize the Marine Mammal Protection Act for a period of six years. This bill was referred favorable out of the Committee on Merchant Marine and Fisheries which included the definition of "Harassment"as any act of approach, pursuit, torment, or annoyance … . (Emphasis added). However, in passing H.R. 2760, the word "approach" was deleted from the definition (See House Report No. 103-439, March 21, 1994; and Exhibit BB attached to Respondent's May 7, 2004 brief).

C. Utilizing the Analysis Proffered By Agency Counsel, Respondent's Actions Constituted an Act of "Annoyance"

NOAA and Respondent also submitted definitions for the term "annoyance". NOAA proposed the definition from the root word "annoy" which means to bother or irritate; disturb slightly. See A.H. Dictionary. Respondent proposes "to disturb or irritate especially by repeated acts; to harass especially by quick brief attacks". See Merriam – Webster's Collegiate Dictionary, Eleventh Edition (2003); and (See Respondent's Ex. U). After fully considering the proposed definitions of the parties, the following definition of "annoyance" is hereby adopted:

> Annoyance is defined as any human stimuli which bothers and/or irritates a marine mammal.

The problem with the 1994 amendment to the MMPA is that the inclusion of the words "pursuit" and "annoyance" for the definition of "harassment" lend little or no clarification. All three words are general terms that do little to inform an ordinary citizen of what he can and cannot do. See Hayashi, 22 F.3d 859. Moreover, if Congress or the Agency wanted to prohibit swimmers/divers/beach-goers from causing seals to flush, they could have easily done so by explicit statutory language or through formal rulemaking after notice and comment. See United States v. Tepley, 908 F.Supp. 708 (N.D. Cal.1995); Id. Thus, while Agency counsel is correct that this judge does not have jurisdictional authority to rule on Constitutional issues, I do have authority to make a full and complete record so that the agency head can render an informed decision as to what action is legally sustainable.

Before reaching a conclusion as to whether the Respondent violated the MMPA by "take" of a marine mammal, a determination must be made whether her "annoyance" was significant enough to have the potential to "disturb a marine mammal stock by disrupting its behavioral patterns such as migration, breathing, nursing breading, feeding, or sheltering. Expert witness Dr. Allen testified, that based upon her education, experience, and research previously conducted, Respondent's act of swimming into Children's Pool Beach caused the seals to alter their behavior by stampeding into the water. (Feb. 24 Tr. 107; Gov't Ex. 24). Dr. Allen explained that haulouts are an important and critical behavior for harbor seals for the purpose of sleep, to off load lactic acid that has built up, nurse, feed, breed, accelerate hair growth and give birth. (Feb. 24 Tr. 14-15). When Respondent reached Children's Pool Beach and walked onto the shore, about half of the seals flushed into the water, which disrupted their haulout behavior such as resting and nursing. (Feb. 24 Tr. 108-109). While a finding is made that the "annoyance" was significant enough to have the potential to disturb a marine mammal stock by disrupting its behavioral patterns, the Agency head should exclude Level B harassment for harbor seals utilizing option 3, above.

Respondent argues that the seals were disturbed from the noise generated from spectators cheering and clapping which caused the seals to flush into the water and not

from Respondent swimming into and landing on Children's Pool Beach. I disagree. Dr. Allen testified that seals habituate (or anthropomorphizing) to disturbance sources that are determined not to be a threat. (Feb. 24 Tr. 111-112). Here, the agency expert testified that Respondent along with the other swimmers approached the seals from the water. This fact is significant because water is the place seals flush when they perceive a threat; but here the threat came from the water- - the place seals escape when confronted by danger.[16] (Feb. 24 Tr. 33-36). Respondent did not call an expert to rebut Dr. Allen's testimony. Thus, the undersigned must accept the proposition that Respondent's actions had the "potential to disturb".

NOAA's proposal to also include the words "disturb slightly" is rejected. It would be nonsensical to have a definition of annoyance as "to disturb slightly which has the potential to 'disturb' a marine mammal stock." Similarly, the Respondent's proffer of "to harass especially by quick brief attacks" is rejected for Level B harassment. The word "attacks" connotes injury which could only apply to Level A harassment. Accordingly, employing the definition proposed by agency counsel, Respondent did harass the seals by annoyance as described in 16 U.S.C. § 1362(18)(A)(ii). While a "harassment" finding is made, serious questions of law arise therefrom.

D. Constitutional and Other Legal Issues

Respondent argues that the "take" provision of the MMPA is unconstitutionally vague and overbroad; that the Fifth Amendment of the Constitution prohibits the federal government from taking property from a person unless the person is accorded due process; that the due process guarantee includes the requirement that the government give fair notice concerning what conduct is forbidden by law (Citing United States v. Handakas, 286 F.3d 92, 104 (2nd Cir. 2002); that the statutory language cannot have such a standardless sweep that policemen, prosecutors, and juris are allowed to follow their personal predilections; that on May 6, 2003, Dr. William Hogarth, Assistant Administrator for Fisheries, National Marine Fisheries Service, testified before Congress and stated, among other things:

> "The current definition of harassment is both broad and ambiguous and, therefore, it fails to create a clear threshold for acts that do and do not constitute harassment… . We are also concerned that the existing definition could result in unnecessary administrative burdens on the regulated community. Once could argue, for instance, that any activity has the potential to disturb a marine mammal by causing disruption of behavioral patterns, from humans walking along a pier near a group of sea lions causing them to stop feeding and raise their heads, to driving a ship that causes a wake that dolphins choose to swim in. As interpreted by some courts, the current definition does not distinguish biologically

[16] Dr. Allen explained it is normal behavior for seals to take flight into the water when they have not been conditioned or habituated to a threat. (Feb. 24 Tr. 36).

significant, harmful events from activities that result in de minimus impacts on marine mammals.

(See Respondent's Ex. H, Page 2).

Respondent also argues that by NMFS' management, enforcement policies, and failure to follow the rulemaking requirements provided for in the Administrative Procedure Act (5 U.S.C. § 554 et seq.), it has created a de facto marine mammal preserve at Children's Pool Beach.

Finally, Respondent argues the legal standard established by the Ninth Circuit for taking by harassment under the MMPA occurs when significant disruption of a marine mammal's natural state occurs. United States v. Hayashi, 22 F.3d 859, 864 (9th Cir. 1994) (*criminal proceeding* wherein the court found Respondent not liable for act of shooting a rifle shots in the water behind porpoises to deter them from eating fish off a fisherman's wire) (emphasis added). Respondent cites to a similar civil enforcement action, violation of the MMPA concerning a taking by harassment, wherein the district court applied the Hayahsi standard of serious disruption of a mammal's natural state. United States v. Tepley, 908 F.Supp. 708 (N.D. Cal.1995). The court's rationale for applying the Hayashi standard to the civil enforcement action was the lack of definition for the term "harassment" and a stipulation reached by both plaintiff and defendant. Id. at 710. Respondent requests this judge to apply the standard established by Hayashi to this proceeding. For the reasons set forth below, the Hayahsi standard is hereby rejected.

Agency counsel argues that it is not appropriate for this judge to rule on the Constitutionality of statutory provisions in an administrative hearing; that such challenges are reserved for Article III courts citing In the Matter of : Dennis D. O'Neil, 1995 WL 1311365 (NOAA) (June 14, 1995); In the Matter of Brownsville Shrimp Cases, 3 O.R.W. 828, 843-44 (NOAA) (1984); 15 C.F.R. § 904.200(b); In the Matter of: Peter M. Fadden, Catherine F. Lobster Co., Inc., 2002 WL 414181 (NOAA) (Feb. 21, 2002); and unless the agency's interpretation is plainly erroneous or inconsistent with the Act, "it is of controlling weight". (citing In the Matter of Darcy Lynn Shawver, et al., 2 O.R.W. 301, 311-12 (NOAA, which is charged with the administration of the MMPA, must be accorded first opportunity to interpret the meaning of statutory or regulatory terms).

The issue before the undersigned is whether Respondent committed a prohibited "taking" by "harassing" harbor seals at Children's Pool Beach on March 23, 2003. It is well established that constitutional arguments attacking statutory or regulatory language are not appropriate for administrative review. See 15 C.F.R. § 904.200(b); In the Matter of Lobster Co., Inc. et al. 2002 NOAA LEXIS 2 (NOAA February 21, 2002); In the Matter of: Dennis D. O'Neil, 1995 NOAA LEXIS 20 (NOAA June 14, 1995). As such, the Administrative Law Judge does not have authority to rule on constitutional issues raised by parties. Id. Thus, Respondent's Constitutional arguments are hereby noted and reserved for appeal by a court of competent jurisdiction. While this judge does not have jurisdiction over Respondent's constitutional objections, ATTACHMENT D is included to aid the Agency head in making a reasoned Final Decision herein.

PENALTY ASSESSMENT

The Agency proposes a $1,000 civil penalty for Respondent's violation of the MMPA. In support of it's proposed assessment, NOAA argues that Respondent did "take" by harassment approximately thirty-five (35) harbor seals; that the incident occurred at the height of the pupping season - - the most critical time for the survival of the nursing pups; that many of the animals harassed by Respondent were newborn nursing pups and their mothers; that the potential for stress and other harms were greatly increased; that Respondent participated in a pre-meditated swim event, inter alia, to draw attention to what the swimmers perceived as the issue of people and seals coexisting at the Children's Pool Beach; that Respondent disregarded the instructions on how to access the Children's Pool Beach in a way to minimize said disruption; that the current maximum civil monetary penalty that may be assessed under the MMPA is $12,000 per violation; that the NOAA civil penalty schedule for violations of the MMPA in effect at the time of the violation provides a monetary range of $500 - $8,000 for a non-commercial taking of a marine mammal by harassment; that under the MMPA, a civil penalty may only be remitted or mitigated upon a showing of good cause; and that while a judge is not bound by the Agency's proposed penalty, it is a reasonable starting point.[17] See 15 C.F.R. § 904.204(l); 16 U.S.C. 1375(a)(1); see also In the Matter of: Richard O' Barry, et. al., 1999 WL 1417459 (NOAA June 8, 1999); See In the Matter of: AGA Fishing Corp., 2001 NOAA Lexis 1, at *6 (NOAA App. Mar. 17, 2001); In the Matter of: Jody Domingo and Elden Domingo, 2000 NOAA Lexis 1, at 9 (NOAA App. Mar. 29, 2000).

Respondent argues that the NOAA Southwest Region Summary Settlement Schedule (Summary Settlement Schedule) is routinely followed in seal flushing cases; that if the Summary Settlement Schedule were followed in the instant case, a $100 penalty amount is listed for either Level A or B harassment; and that Respondent's behavior was less serious than the behavior described in the Summary Settlement Schedule for Level A harassment, such as "kicking, hitting, tail grabbing, and actions intended to provoke a fleeing response". (citing Government Ex. 28). Respondent also disputes Agency's counsel's alleged aggravating factor that she disregarded instructions to minimize disruption of the seals by proceeding up the middle of the beach.

Title 50 of the Code of Federal Regulations Part 216, established the Summary Settlement Schedule. As the Agency notes:

> This summary settlement schedule is being implemented as a pilot project within the Southwest Region to determine if a moderate

[17] Agency counsel states that "Respondent did not raise the issue of an inability to pay the penalty". (See Agency Post-Hearing brief, pg. 40). Under the MMPA, unlike various marine environmental protection statutes, the agency is not required to consider Respondent's ability to pay. See In the Matter of Terry V. S. Disney, 1995 WL 1311363 (N.O.A.A. 1995); see also In the Matter of: Richard O' Barry, et. al., 1999 WL 1417459 (NOAA June 8, 1999). Thus, the fact of whether Respondent raised the issue of ability to pay is irrelevant.

> enforcement scheme, in conjunction with efforts to educate the public, can reduce the number and severity of interactions between humans and the burgeoning marine population on the California Coast. (Emphasis added).

The Summary Settlement Schedule "is to be applied to violations of the statutory and regulatory prohibitions against Level A and Level B harassment … ". The "authorized officers are instructed to focus the issuance of summary violations of taking by the following - -

> Level A Harassment including, but not limited to: Direct contact of marine mammals by humans (kicking or hitting, tail grabbing, tossing rocks or other objects); …
>
> Level B Harassment including, but not limited to:
>
> > Significant actions or movement that is intended to illicit an aggression or fleeing response from a marine mammal, 4. If a violation does not factually belong under the Level A/B Harassment category, the violation has been deemed unsuitable for summary settlement and is to be handled using the Penalty Schedule for the Marine Mammal Protection Act of 1972 (MMPA).

Finally, paragraph 5 provides:

> Do not use this summary settlement schedule for cases where you have reasonable cause to believe that the violation involves aggravating circumstances (i.e., intentional animal cruelty), or for MMPA "takes" other than harassment.

In this case, it is clear that Respondent's actions fall within the direct language for inclusion within Level B Harassment. Indeed, as Respondent points out, her conduct was significally less egregious than that included under Level A Harassment, yet the Agency staff excluded her from the option to accept a $100 penalty amount. Moreover, the Agency staff's reliance on paragraph 5 as a basis for exclusion from the Summary Settlement Schedule because of aggravating circumstances such as "intentional animal cruelty" or for "takes other than harassment" (e.g., killing and/or injury) is not appropriate. That being said, the Undersigned recognizes that the Agency has prosecutorial discretion to utilize the Summary Settlement Schedule ($100 penalty amount) or the MMPA Penalty Schedule ($500- $8,000 range). Accordingly, my consideration of a penalty for the taking violation committed by Respondent is limited to the legal strictures of the MMPA Penalty Schedule.

In NOAA administrative proceedings, a rebuttable presumption exists that the amount of the proposed civil penalty proffered by the Agency is reasonable and appropriate. In the Matter of William C. Hauck, et al., 2003 NOAA LEXIS 16 (NOAA September 11, 2003). Further, a judge is not bound by the amount assessed by NOAA and can assess a penalty *de novo* if he/she provides good cause for any upward or downward departure. 15 C.F.R. § 904.204(l).

Respondent, trailed by a number of other swimmers, entered Children's Pool Beach first and caused the flushing of approximately thirty-five (35) seals into the water during the height of pupping season. (Feb. 24 Tr. 30-31; Gov't Ex. 6, 18). By approaching the seals from the water, Respondent's action might be viewed by the seals as cutting off their escape route into the water. This is an important fact to consider because the water is the place where seals flush when they perceive a threat. (Feb. 24 Tr. 33-36).[18] Here, NOAA requested a $1,000 penalty under the MMPA Penalty Schedule, which is at the lower end of the range of $500 to $8,000. Because I am legally bound to limit my consideration of a civil penalty to the MMPA Penalty Schedule, I find that the proposed civil penalty recommended by NOAA is supported by the evidence of record. This finding, however, does not prevent the Agency head from reviewing this issue and rendering a decision that employs the Southwest Summary Settlement Schedule.

CONCLUSION

Based on a review of all the facts, record created at the hearing, and review of legal authority, I find that NOAA established by a preponderance of reliable and credible evidence that Respondent violated the Marine Mammal Protection Act, 16 U.S.C. § 1361 et seq., and Agency Regulations promulgated thereunder at 50 C.F.R. § 216.11 et seq. Specifically, on March 23, 2003, Respondent committed Level B Harassment wherein her action disturbed harbor seals in the wild and disrupted their behavioral patterns. The evidence also shows that the Respondent did annoy harbor seals by entering Children's Pool Beach and flushing numerous seals into the water.

ORDER

WHEREFORE,

IT IS HEREBY ORDERED that a civil penalty in the amount of **ONE THOUSAND DOLLARS ($1,000.00)** is assessed against Respondent Lilo Maria Creighton.

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[18] Dr. Allen explained it is normal behavior for seals to take flight into the water when they have not been conditioned or habituated to a threat. (Feb. 24 Tr. 36).

PLEASE BE ADVISED that a failure to pay the penalty within thirty (30) days from the date on which this decision becomes final Agency action will result in interest being charged at the rate specified by the United States Treasury regulations and an assessment of charges to cover the cost of processing and handling the delinquent penalty. Further, in the event the penalty or any portion thereof becomes more than ninety (90) days past due, an additional penalty charge not to exceed six (6) percent per annum may be assessed.

PLEASE BE FURTHER ADVISED that any petition for review must be filed within thirty (30) days of the date of this Initial Decision with the Administrator of the National Oceanic and Atmospheric Administration as provided in 15 C.F.R. § 904.273. Copies of the Petition for Review should also be sent to the ALJ Docket Center, NOAA Counsel and the Undersigned Judge. A copy of 15 C.F.R. § 904.273 is attached to this order. If neither party seeks administrative review within thirty (30) days after issuance of this order, this Initial Decision will become the final decision of the Agency.

____

HON. PARLEN L. MCKENNA
Administrative Law Judge
United States Coast Guard

Done and dated: April 20, 2005
Alameda, California

ATTACHMENT A
LIST OF WITNESSES AND EXHIBITS

LIST OF WITNESSES

AGENCY'S WITNESSES

1. Special Agent Michelle Zetwo
2. James Hudnall
3. Dr. Sarah Allen
4. Joseph Cordero
5. Special Agent Brett Schneider

RESPONDENT'S WITNESSES

1. Mark Brown
2. Joe Barnett
3. Lilo Creighton
4. Cliff Williams

LIST OF EXHIBITS

AGENCY'S EXHIBITS

1. None
2. None
3. Statement of Jane Bradford
4. Offense Investigation Report dated 4/22/03
5. Agent Zetwo Recollection Notes
6. Video Tape of CPB Event, Videographer James Hudnall, March 23, 2003
7. Photographs from Jim Hudnall's video on March 23, 2003
8. Memorandum of Interview with Valerie O'Sullivan, April 2, 2003
9. Memorandum of Interview with John Otis Benton, April 4, 2003
10. Memorandum of Interview with Michael Clark, April 4, 2003
11. Memorandum of Interview with Bruce Beach, April 7, 2003
12. Memorandum of Interview with Nira Clark, April 7, 2003
13. Memorandum of Interview with Christine Holmes, April 10, 2003
14. Memorandum of Interview with Mark Holmes, April 10, 2003
15. Memorandum of Interview with United States Fish and Wildlife Service Special Agent Lisa Nichols, March 23, 2003
16. Memorandum of Interview with Lilo Creighton, March 23, 2003
17. Memorandum of Interview with DSAC Brett Schneider, March 23, 2003
18. Videographer Steven Docksteder CPB Event March 23, 2003
19. Terry Rodgers, *Swimmers plan a course past La Jolla harbor seals*, The San Diego Union- Tribune, March 21, 2003, at B3
20. (a) Barbara Whitaker, *LaJolla Beach Battle: Not Exactly 'Jaws' but Seals*, The New York Times National, March 30, 2003
    (b) Michael Burge, *Bid to share the sea with seals fails; man clawed*, The San Diego Union- Tribune, March 24, 2003 www.SignOnSanDiego.com/news/metro.
    (c) Tanya Kurland, *Council dives back into Seal Reserve discussion*, LaJolla Village News, March 26, 2003, at page 5
    (d) Dave Schwab, *Swimmers, seals clash at Children's Pool Beach*, La Jolla Light, March 27, 2003, at page 3
21. Excerpt of CPB Event, Videographer James Hudnall, March 23, 2003 (9:46 a.m.m0 10:02 a.m.), with television news coverage
22. E-mail dated April 7, 2003, from Joe Cordaro to Tom Sauer
23. Birth of Harbor Seal, March 22, 2003 (3:49:23 – 4:11:07), Videographer James Hudnall
24. Curriculum Vitae of Sara Gardner Allen, Ph.D.
25. Notes regarding Hudnall video and Docksteder video transcribed bu Sara Gardner Allen, Ph.D.
26. (A) Photograph: M. Holmes being attached by seal, March 23, 2003
    (B) Photograph: C. Holmes being attacked by seal, March 23, 2003
    (C) Photograph: L. Creighton, M. and C. Holmes exit water at Children's Pool Beach, March 23, 2003

(D) Photograph: M. and N. Clark exit water at a Children's Poll Beach, March 23, 2003
(E) Photograph: V. O'Sullivan exits water at Children's Pool Beach, March 23, 2003

27. 16 U.S.C. § 1362 (annotated)
28. Southwest Region Summary Settlement Schedule

RESPONDENT'S EXHIBITS

A. Personal Statement of Lilo Creighton, January 21, 2004
B. Michael B. Clark letter, July 21, 2003
C. Nira Standish Clark letter, July 17, 2003
D. Department of commerce news, July 14, 2003
E. Letter to Mr. Ortiz, June 23, 2003
F. Enforcement Action Report
G. Letter to Councilman Peters, June 9, 2003
H. Testimony William Hogarth, May 6, 2003
I. Minutes of the Council, April 1, 2003
J. Manager's Report, March 26, 2003
K. Message, Jack Miller, March 21, 2003
L. Sauer letter, March 20, 2003
M. Sauer letter, Mach 12, 2003
N. Sauer letter, March 11, 2003
O. Sauer letter to Venegas, March 10, 2003
P. Sauer letter to Owens, March 10, 2003
Q. Council minutes March 29, 2003
R. Regular Calendar Staff report January 3, 2001
S. Resolution June 11, 1931
T. Chapter 987, June 15, 1931
U. Merriam-Webster's Collegiate Dictionary, Eleventh Edition (2003) definitions
V. Photo "Warning" and "Seal Rock" signs
W. Three photos "Danger" and "Do not Approach" X2
X. Photo Point La Jolla
Y. Photo children's Pool Beach
Z. Lifeguard log
AA. Jack Miller letter March 21, 2003
BB. House Report No. 103-439 (March 21, 1994)
CC. San Diego Municipal Code Chapter 6: Public Works and Property, Public Improvement and Assessment Proceedings
DD. Not admitted
EE. Terry Rodgers, *Despite fines, swimmers still dip into Children's Pool: Some say humans are scaring seals:* The San Diego Union- Tribune, March 8, 2004, at B2
FF. Not admitted
GG. Not admitted

ATTACHMENT B

RULINGS ON AGENCY'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW[19]

PROPOSED FINDINGS OF FACT

After careful review of the entire record of this proceeding, including the testimony of witnesses and exhibits, the ruling on the Agency's Proposed Findings of Facts are as follows:

1. The Children's Pool Beach area of La Jolla, CA, and the harbor seals that now haulout there, are a well known tourist attraction in San Diego, with approximately 87,000 visitors arriving at the Children's Pool Beach each month. Jan. 22 TR pg. 103.

ACCEPTED AND INCORPORATED AS MODIFIED HEREIN

2. Harbor seals (*phoca vitulina*) have been hauling out in the Children's Pool Beach area (including the former Seal Rock and the current Seal Rock area) on and off for over 100 years - with a well known presence in the 1960's and a steady presence since approximately 1995. Jan. 23 TR pg. 263, Feb. 25 TR pg. 226, 376-379.

REJECTED FOR THE REASONS STATED HEREIN

3. The harbor seals now haulout at Children's Pool Beach year round, with the population varying from season to season. Jan. 23 TR pg. 277.

ACCEPTED AND INCORPORATED AS MODIFIED HEREIN

4. In 1999 or 2000, the first births at Children's Pool Beach were documented. Feb. 25 TR 228-229.

ACCEPTED AND INCORPORATED AS MODIFIED HEREIN

5. Pupping season for the harbor seals in Southern California runs from January through April of each year. Feb. 24 TR pg. 17, Feb. 25 TR 223.

ACCEPTED AND INCORPORATED HEREIN

6. During the pupping season of 2003 sixteen pups were born at Children's Pool Beach. Gov't Exh. 3.

ACCEPTED AND INCORPORATED AS MODIFIED HEREIN

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[19] Only the Agency provided enumerated Proposed Findings of Fact which are ruled on herein.

7. Mother-pup pairs were present on the beach on the day of the violation. Gov't Exh. 6, Feb. 24 TR pg. 21.

ACCEPTED AND INCORPORATED AS MODIFIED HEREIN

8. In order to bring attention to the fact that the Children's Pool Beach was open to swimmers and that harbor seals and swimmers at Children's Pool Beach could coexist, in mid-March 2003 several people organized a group ocean swim that would leave from La Jolla Cove and end at the Children's Pool Beach. Gov't Exh. 4, pg. 11.

ACCEPTED AND INCORPORATED AS MODIFIED HEREIN

9. The swim organizers contacted media outlets prior to the swim, and on March 21, 2003, the San Diego Union-Tribune ran a story about the upcoming swim. Gov't Exh. 19.

ACCEPTED AND INCORPORATED HEREIN

10. On March 22, 2003, one of the swimmers, Ms. Chris Holmes, asked Respondent Lilo Creighton to participate in the group swim. Feb. 25 TR pg. 382.

ACCEPTED AND INCORPORATED HEREIN

11. Ms. Holmes' understanding was that the goal of the swim was to show that people and seals could co-existence at Children's Pool Beach. Gov't Exh. 13.

ACCEPTED AND INCORPORATED AS MODIFIED HEREIN

12. Respondent Lilo Creighton did not recall whether she knew the goal of the swim prior to participating in it. Feb. 25 TR pg. 401.

ACCEPTED AND INCORPORATED AS MODIFIED HEREIN

13. Mr. Hudnall visually monitored, and videotaped, the harbor seals at the Children's Pool Beach between 3:20 a.m. and 10:42 a.m. on March 23, 2003. Jan. 23 TR pg. 266.

ACCEPTED AND INCORPORATED AS MODIFIED HEREIN

14. In the six hours prior to the arrival of the Respondent, Mr. Hudnall observed approximately 50 harbor seals, including several mother-pup pairs, hauled out and resting from one end of the Children's Pool Beach to the other. Id., and Gov't Exhs. 6 and 7.

ACCEPTED AND INCORPORATED AS MODIFIED HEREIN

15. During the six hours prior to the arrival of Respondent, Mr. Hudnall saw no disturbance of the harbor seals, with only a few animals leisurely exiting and entering the water. Id.

ACCEPTED AND INCORPORATED AS MODIFIED HEREIN

16. On March 23, 2003, at 9:22 a.m., and again at 9:30 a.m. a mother-pup pair on the beach engaged in nursing behavior at Children's Pool Beach. Gov't Exh. 6 and Feb. 24 TR pg. 22-24.

ACCEPTED AND INCORPORATED AS MODIFIED HEREIN

17. On March 23, 2003, at 9:31 a.m., approximately twenty-five swimmers, including Respondent, entered the water at La Jolla Cove to begin the swim. Gov't Exh. 18.

ACCEPTED AND INCORPORATED HEREIN

18. As the first swimmers neared the entrance to the Children's Pool Beach area, swim participant Mark Brown, took up a position just outside the entrance and began instructing the swimmers on the best route to enter the Children's Pool Beach in order to avoid harassment of the harbor seals. Feb. 25 TR pg. 359-361.

ACCEPTED AND INCORPORATED HEREIN

19. At approximately 9:47 a.m., the first swimmers, with Respondent Creighton in the lead, arrived at the entrance to the Children's Pool Beach. Id., and Gov't Exh. 6.

ACCEPTED AND INCORPORATED AS MODIFIED HEREIN

20. As the swimmers approached the entrance to the Children's Pool, several of the harbor seals raised their heads and looked out towards the entrance of the Children's Pool, taking notice of the oncoming swimmers. Gov't Exhs. 6 and 18, and Feb. 24 TR pg. 30-31.

ACCEPTED AND INCORPORATED AS MODIFIED HEREIN

21. At approximately 9:48 a.m., Respondent arrived inside the entrance to Children's Pool, while approximately 6 seals simultaneously flushed into the water around her. Gov't Exh. 6.

ACCEPTED AND INCORPORATED AS MODIFIED HEREIN

22. Respondent was the first swimmer to arrive on the beach.

ACCEPTED AND INCORPORATED HEREIN

23. As Respondent walked on to the beach, approximately 29 more harbor seals flushed into the water on both sides of Respondent. Feb. 24 TR pg. 51.

ACCEPTED AND INCORPORATED AS MODIFIED HEREIN

24. Approximately thirty-five harbor seals flushed into the water in the period between Respondent's arrival at the entrance of the Children's Pool Beach and the time she had reached the rope barrier. Gov't Exh. 6.

ACCEPTED AND INCORPORATED AS MODIFIED HEREIN

25. At 9:49 a.m., Respondent had left the beach area and was immediately contacted by federal law enforcement officials. Gov't Exh. 6.

ACCEPTED AND INCORPORATED AS MODIFIED HEREIN

26. The last of the nine swimmers to exit the water at Childen's Pool Beach did so at 10:00 a.m. Gov't. Exh. 6.

ACCEPTED AND INCORPORATED AS MODIFIED HEREIN

27. Approximately sixteen other group swim participants who had remained outside the entrance to the Children's Pool Beach during the flushing of the harbor seals swam back to La Jolla Cove, or utilized other exit points, instead of exiting the water at the Children's Pool Beach. Feb. 25 TR pg. 365.

ACCEPTED AND INCORPORATED AS MODIFIED HEREIN

28. Videographer James Hudnall continued to videotape the Children's Pool Beach haulout until 10:42 a.m.

ACCEPTED AND INCORPORATED AS MODIFIED HEREIN

29. In the period after the last swimmer exited the water at Children's Pool Beach (10:00 a.m.) and when Mr. Hudnall stopped his videotape (10:42 a.m.), apparently none of the harbor seals that had flushed earlier returned to the beach. Gov't Exh. 6.

ACCEPTED AND INCORPORATED AS MODIFIED HEREIN

30. At 4:15 p.m., lifeguards at the Children's Pool Beach wrote an entry into the tower logbook that the seals had returned to the beach. Respondent's Exh. X

ACCEPTED AND INCORPORATED AS MODIFIED HEREIN

31. Respondent Lilo Creighton is a resident of La Jolla, California, and has been for approximately thirty-four years. Feb. 25 TR pg. 386.

ACCEPTED AND INCORPORATED HEREIN

32. Respondent has swum in the Pacific Ocean off of La Jolla for approximately thirty-four years, and was a regular user of the Children's Pool Beach area for the first ten years of that period. Id. at 387.

ACCEPTED AND INCORPORATED AS MODIFIED HEREIN

33. Resting/Hauling Out is a biologically important behavioral pattern for harbor seals.

ACCEPTED AND INCORPORATED AS MODIFIED HEREIN

34. Nursing is a biologically important behavioral pattern for harbor seals.

ACCEPTED AND INCORPORATED AS MODIFIED HEREIN

35. Bonding between a mother and pup is a biologically important behavioral pattern for harbor seals.

ACCEPTED AND INCORPORATED AS MODIFIED HEREIN

CONCLUSIONS OF LAW

SUBMITTED BY NOAA

1. Respondent, Lilo Creighton, is a person subject to the jurisdiction of the United States under the Marine Mammal Protection Act. 16 U.S.C. § 1362(10).

ACCEPTED AND INCORPORATED HEREIN

2. The Marine Mammal Protection Act makes it unlawful to take a marine mammal in waters or on land under the jurisdiction of the United States. 16 U.S.C. § 1372(a)

ACCEPTED AND INCORPORATED HEREIN

3. "Take" is defined in the Marine Mammal Protection Act to mean "harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." 16 U.S.C. § 1262(13)

ACCEPTED AND INCORPORATED HEREIN

4. Level B harassment is defined as “any act of pursuit, torment, or annoyance which ...(ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering.” 16 U.S.C. § 1362(18)

ACCEPTED AND INCORPORATED HEREIN

5. The Marine Mammal Protection Act is a strict liability statute.

ACCEPTED AND INCORPORATED HEREIN

6. Harbor seals are marine mammals protected under the Marine Mammal Protection Act. 16 U.S.C. § 1362(6).

ACCEPTED AND INCORPORATED AS MODIFIED HEREIN

7. On March 23, 2003, Respondent Lilo Creighton took at least one harbor seal by harassment at the Children’s Pool Beach.

ACCEPTED AND INCORPORATED AS MODIFIED HEREIN

8. By swimming from La Jolla Cove to the center of the CPB, and exiting the CPB, Respondent conducted an act of pursuit under the MMPA.

REJECTED FOR THE REASONS STATED IN THIS DECISION

9. By approaching the Children’s Pool Beach from the ocean, swimming up to the beach, and exiting the Children’s Pool Beach in the center of the hauled out animals, Respondent conducted an act of annoyance.

ACCEPTED AND INCORPORATED AS MODIFIED HEREIN

10. Respondent’s actions (annoyance) had the potential to disturb the behavioral patterns of marine mammals in the wild, or actually did disturb the behavioral patterns of marine mammals in the wild.

ACCEPTED AND INCORPORATED AS MODIFIED HEREIN

11. The harbor seals at Children’s Pool Beach are in the wild for purposes of the MMPA.

ACCEPTED AND INCORPORATED AS MODIFIED HEREIN

12. Resting is a biologically important behavioral pattern for the Harbor Seals.

ACCEPTED AND INCORPORATED AS MODIFIED HEREIN

13. Nursing is a biologically important behavioral pattern for Harbor Seals.

ACCEPTED AND INCORPORATED AS MODIFIED HEREIN

14. Bonding is a biologically important behavioral pattern for Harbor Seals.

ACCEPTED AND INCORPORATED AS MODIFIED HEREIN

15. Respondent's actions caused a disruption of biologically important behavioral patterns.

ACCEPTED AND INCORPORATED AS MODIFIED HEREIN

16. Respondent's actions caused either actual or potential behavioral change or response in a biologically important behavior or activity of one or more marine mammals.

ACCEPTED AND INCORPORATED AS MODIFIED HEREIN

17. Respondent's actions on March 23, 2003, at Children's Pool Beach in La Jolla, California, constituted Level B harassment under the Marine Mammal Protection Act.

ACCEPTED AND INCORPORATED HEREIN

18. Respondent's actions on March 23, 2003, at Children's Pool Beach in La Jolla, California, constituted a take in violation of the Marine Mammal Protection Act.

ACCEPTED AND INCORPORATED HEREIN

<u>SUBMITTED BY RESPONDENT</u>

1. There is insufficient evidence that respondent committed a "take;"

   REJECTED FOR THE REASONS STATED IN THIS DECISION.

2. The government is asking for an excessive fine;

   REJECTED FOR THE REASONS STATED IN THIS DECISION.

3. The "harassment" provisions of the MMPA violate the U.S. Constitution; and

   DULY NOTED AND RESERVED FOR APPEAL.

4. The government has failed to prove jurisdiction.

REJECTED. The MMPA prohibits the take of any marine mammal that is in waters or on lands under the jurisdiction of the United States. 16 U.S.C. § 1372(a)(2)(A). Further, no state may enforce or attempt to enforce state law or regulations to the taking of marine mammals unless the Secretary has transferred authority for conservation or management of the species to the state. 16 U.S.C. § 1379(a). The authority to conserve and manage harbors seals at Children's Pool Beach remained with the Federal government. The record is devoid of any evidence transferring management authority from the Department of Commerce Secretary to the States of California or the County/City of San Diego.

ATTACHMENT C

The Marine Mammal Protection Act and it's implementing regulations provide a mechanism for allowing, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographic region (See 16 U.S.C. § 1371 (a)(5)(A) and 50 C.F.R. § 216.104(a). In order to obtain such an authorization by NMFS, the requesting party must submit a written request to the Assistant Administrator detailing, among other things:

(1) A detailed description of the specific activity or class of activities that can be expected to result in incidental taking of marine mammals;

(2) The dates(s) and duration of such activity and the specific geographical region where it will occur;

(3) The species and numbers of marine mammals likely to be found within the activity area;

(4) A description of the status, distribution, and seasonal distribution (when applicable) of the affected species or stocks of marine mammals likely to be affected by such activities;

(5) The type of incidental taking authorization that is being requested (i.e., takes by harassment only; takes by harassment, injury and/or death) and the method of incidental taking;

(6) By age, sex, and reproductive condition (if possible), the number of marine mammals (by species) that may be taken by each type of taking identified in paragraph (a)(5) of this section, and the number of times such takings by each type of taking are likely to occur;

(7) The anticipated impact of the activity upon the species or stock of marine mammal.

Once the Assistant Administrator receives a written request, the regulations (50 C.F.R. § 216.104(b)(2)) require that notice be given in the Federal Register, newspapers of general circulation, and appropriate electronic media in the coastal areas that may be affected by such activity. If, after completion of the regulatory process, NMFS determines that the requested "incidental taking" should be authorized, regulations will be promulgated under 50 C.F.R. § 216.105 and a Letter of Authorization issued under 50 C.F.R. § 216.106.

Presumably, the filing of this application could be made by the City/County of San Diego in a parens patriae role as the trustee under the Grant Deed from the State of California. The application could also be filed by the impacted swimmers. Interestingly, the record does not indicate whether or not this approach was explored or utilized.

ATTACHMENT D

Importantly, while no ruling as to Constitutional issues will be rendered herein, the Respondent has made several arguments that should be addressed to aid the Agency head in resolving any appeals as a result of this Decision and Order.

The Marine Mammal Protection Act, was enacted approximately thirty four (34) years ago.[20] At that time, Congress lacked definitive scientific information about marine mammals to guide them in drafting the law. In the report of the House Merchant Marine and Fisheries Committee concerning the 1971 proposed bill, the Committee noted:

> In the teeth of this lack of knowledge of specific causes, and of the certain knowledge that these animals are almost all threatened in some way, it seems elementary common sense to the Committee that legislation should be adopted to required that we act conservatively – that no steps should be taken regarding these animals that might prove to be adverse or even irreversible in their effects until more is known. As far as could be done, we have endeavored to build such a conservation bias into the legislation here presented (U.S. House 1971 b).

As Congressman John Dingell aptly stated when he opened the floor on September 9, 1971, “Once destroyed, biological capital cannot be recreated”.

Accordingly, three important features were incorporated into the MMPA - - (1) a conservative bias in favor of the species; (2) all significant human marine mammal interaction fall within the penumbra of “take” thus requiring governmental approval prior to engaging in such activity; (3) placing the burden of proof on any party seeking to “take” a marine mammal to demonstrate that such activity is consistent with the overall goals of the Act and will not disadvantage the species or stock involved. In other words, the MMPA’s goal provides that all marine mammals should be brought to and maintained at their optimum sustainable population (OSP) level provided that efforts to do so are consistent with maintaining the overall health and stability of the marine environment.

Quoting Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972), the Supreme Court in Village of Hoffman Estates stated the standards for determining vagueness: “Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic

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[20] For a detailed history of the MMPA, see “The Laws Governing Marine Mammal Conservation in the United States” by Donald C. Baur, Michael J. Bean, and Michael L. Gosliner (now General Counsel of the Marine Mammal Commission).

policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory applications." Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 at 498 (1982).

A statute violates due process if it either forbids or requires the doing of an act in terms so vague that persons of common intelligence must guess at its meaning and differ as to its application. Big Bear Supermarket No. 3 v. Immigration and Naturalization Service, 913 F.2d 754, 757 (9th Cir. 1990). The degree of vagueness that is permissible varies according to the nature of the statute, and the need for fair notice or protection from unequal enforcement. Jones v. City of Lubbock, 727 F.2d 364, 373 (5th Cir. 1984) (citing Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99 (1982)). Statutes that threaten or inhibit Constitutionally protected rights face a more stringent test for vagueness, and criminal statutes face a higher vagueness test than civil statutes. Pinnock v. International House of Pancakes Franchisee, 844 F.Supp. 574, 581 (Ca. S.D.1993). Thus, Respondent's reliance on Handakas is not directly on point although it's underlying rational still is germane.

A civil statute will only violate due process if it is "so vague and indefinite as really to be no rule or standard at all" or was substantially incomprehensible. Jones v. City of Lubbock, 727 F.2d 364, 373 (5th Cir. 1984) (citing A.B. Small Co. v. America Sugar Refining Co., 267 U.S. 233, 239 (1925)); See also Botosan v. Paul McNally Realty, 216 F.3d 827, 836 (9th Cir. 2000) ("A statute is vague not when it prohibits conduct according to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all."); Ferm v. Aetna Insurance Company, 163 F.3d 605 (9th Cir. 1998) ("Nev.Rev.Stat. § 230.030 is not 'so vague and indefinite as really to be no rule or standard at all.'"); Al Ventimiglia v. Watter, 121 F.3d 719 (9th Cir. 1997) ("Cal.Elec.Code § 9238 is not so vague and indefinite as really to be no rule or standard at all."). However, civil statutes may be considered "quasi-criminal" and subject to stricter test for vagueness if their penalties are penal in character even though they may be described as civil. Advance Pharmaceutical, Inc. v. United States, 391 F.3d 377, 396 (2nd Cir. 2004). A "quasi-criminal" statute is impermissibly vague if it does not "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly" or does not provide explicit standards for those who apply the statutes. Id. The Supreme Court allows a less strict vagueness review when no constitutional rights are implicated and a statute regulates only economic activity. Advance Pharmaceutical, Inc. v. United States, 391 F.3d 377, 397 (2nd Cir. 2004).

In evaluating vagueness, courts consider the words of the statute, interpretations of analogous statutes, and the interpretation of the statute given by those charged with enforcing it. Pinnock v. International House of Pancakes Franchisee, 844 F.Supp. 574, 581 (Ca. S.D. 1993) (citing Grayned v. City of Rockford, 408 U.S. 104, 110 (1972)). Additionally administrative regulations and interpretations may sufficiently clarify a statute that might otherwise be deemed vague. Pinnock v. International House of Pancakes Franchisee, 844 F.Supp. 574, 581 (Ca. S.D. 1993) (citing Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489 at n.5 (1982); Ward v. Rock Against Racism, 491 U.S. 781, 795 (1989); United States v. Scheiderman, 968 F.2d 1564,

1564 (2nd Cir. 1992); Flemming v. USDA , 713 F.2d 179, 184 (6th Cir. 1983)). Also, "statutes need not be unambiguous in every application to be constitutional. Many words acquire meaning through judicial and administrative construction over the years, and this evolutionary process is constitutional." Coleman v. Commissioner of Internal Revenue, 791 F.2d 68, 71 (7th Cir. 1986).

In analyzing whether section 1372(a)(2)(A) presents any questions of vagueness that may have to be addressed by an Article III court on appeal or through an administrative construction in this proceeding, the Supreme Court's decision in Coates v. City of Cincinnati, 402 U.S. 611 (1971) is instructive. In Coates, the Supreme Court struck down a city ordinance making it a criminal misdomeanor for three or more persons to assemble on any of the sidewalks and conduct themselves in a manner annoying to passersby. The Court ultimately struck down the ordinance, because it subjected the right of assembly to an unascertainable standard and authorized the punishment of Constitutionally protected conduct. In reaching this conclusion, the court noted that:

> "Conduct that annoys some people does not annoy others. Thus, the statute is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all. As a result, 'men of common intelligence must necessarily guess at its meaning.'" Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971)

Additionally, the Court noted that the municipal ordinance is broad enough to encompass many types of conduct that were within the city's power to prohibit. However, the city can do so through ordinances directed with reasonable specificity toward the conduct to be prohibited, and it may not do so through the enactment of an ordinance whose violation may depend on whether a policeman is annoyed. Id. The Court's holding in Coates has some application to the statute at hand, because even though section 1372(a)(2)(A) is a civil statute, as applied, it appears to infringe on one's Constitutional right because liability under this section, at least to some degree, depends on whether a person's conduct could be sufficiently annoying to a marine mammal as to disrupt their behavioral patterns. Just as conduct may be annoying to some people but not others, acts may be annoying and potentially disrupt the activities of some marine mammals but not others. Since the Coates decision struck down an ordinance that depended on whether someone was annoyed, this raises the question of whether section 1372(a)(2)(A) of the MMPA has articulated any standard of conduct at all.

Applying Coates, the court in Lionhart v. Foster, 100 F. Supp.2d 383 (E.D. La. 1999), held that a city ordinance that prohibited the production of sound in excess of fifty-five decibels within ten feet of hospitals and houses of religious worship in a manner that is likely to disturb, inconvenience, or annoy a person of ordinary sensibilities was unconstitutional, because the phrase "in a manner likely to annoy" was unconstitutionally vague. Although the court noted that the ordinance determined what is annoying based on a person of ordinary sensibilities, the court in Lionhart reasoned that there was no

objective way to determine when a sound at the fifty-five decibel level that is ordinarily not annoying becomes criminally annoying.[21] Although Lionhart involved a criminal statute and was therefore subject to a stricter test for vagueness, the phrase "likely to annoy" is similar to MMPA's creation of liability for acts that potentially disturb marine mammal behavior patterns. Similarly, an argument could be raised that section 1372(a)(2)(A) of the MMPA violates due process values announced in Grayned by leading to arbitrary enforcement and application of the statute, because the MMPA does not provide objective guidelines and the Agency has not promulgated regulations establishing objective guidelines for what acts of annoyance may potentially disturb the behavior patterns of marine mammals.

Considering the Ninth Circuit Court of Appeals' noted concerns for vagueness in the absence of a restrictive construction of the previous definition of harassment in the criminal context, the Ninth Circuit may be inclined to find the statute without a limiting interpretation does not specify any standard of conduct at all and/or will cause arbitrary enforcement.[22] United States v. Hayashi, 22 F.3d 859, 865 n14(9th Cir. 1993).

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[21] The court in Lionhart observed that the Supreme Court criticized the ordinance in Coates, because it did not specify whose sensitivity a violation depends – the sensitivity of a judge, a jury, an arresting officer's, or a hypothetical reasonable man.

[22] Although the degree of permissible vagueness varies depending on the need for fair notice or protection from unequal enforcement, I note, a court may determine the phrase, "an act of annoyance that has the potential to disturb a marine mammal" requires a greater degree of specificity than would otherwise be required for a civil statute subject to administrative interpretation. Considering the penalty assessed by the Agency is presumed reasonable and cannot be modified by a Judge without good cause, a court may determine there is a greater need for fair notice and protection from arbitrary enforcement than there would be without the presumption. See In the Matter of: Terry V.S. Disney, 1995 WL 1311363 (NOAA 1995).

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Initial Decision and Order on the following parties (or designated representatives) in this proceeding by electronic mail and Certified Mail, Return Receipt Requested as follows:

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I hereby certify that I have served the foregoing Initial Decision and Order on the Respondent in this proceeding and NOAA Representative by Certified Mail, Return Receipt Requested as follows:

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Done and Dated: April 20, 2005

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