



Administrative Review filed by the Respondent, which was followed by the Agency's Partial Answer in Support of, and Partial Answer in Opposition to, Respondent's Petition for Administrative Review filed on June 10, 2005.

In the Administrator's Order granting discretionary review, the Administrator requested briefing from the parties on two questions. NOAA's answers to each question, as well as responses to Respondent's Opening Brief on the same questions, are set forth below.

**A. The Administrator has Authority to Adopt Guidance on Setting Enforcement Priorities for NOAA, and NOAA Proposes Specific Guidance on the Issue.**

The first question raised by the Administrator is:

Whether the NOAA Administrator has the authority to interpret the law or adopt a policy to exclude from Level B Harassment (as defined in the Marine Mammal Protection Act) acts having the potential to disturb marine mammals that are part of a population that is in excess of Optimum Sustainable Population and growing. If so, how should such an interpretation or policy affect the decision in this case?

**1. The NOAA Administrator Has the Authority to Adopt Guidance Relating to Enforcement of the MMPA.**

There is no explicit authority in the MMPA that would allow the Administrator to interpret the statute to exclude from Level B Harassment those marine mammal populations in excess of

Optimum Sustainable Population (OSP). Level B Harassment is a form a "take" under the MMPA. 16 USC 1362(13) and (18)(C). The MMPA's take prohibition explicitly applies to "any marine mammal." 16 U.S.C. §1372(a)(2)(A) (emphasis added). While the MMPA provides exceptions to the take prohibition and recognizes the concept of OSP, there is neither an exception to the "take" prohibition related to the population status of a species nor to OSP in particular.<sup>2</sup>

While the MMPA cannot be interpreted to exclude certain populations from Level B Harassment, the MMPA does provide the NOAA Administrator the authority to exercise discretion in how Level B Harassment is enforced. When enacting the MMPA, Congress clearly established NOAA's authority to exercise enforcement discretion by providing that persons who violate the MMPA "may be assessed a civil penalty by the Secretary [of Commerce] of not more than \$10,000." 16 U.S.C. §1375(a)(1) (emphasis added). It is a "common sense principle of statutory construction" that "[t]he word 'may,' when used in a statute, usually implies some degree of discretion." *United States v. Rodgers*, 461 U.S. 677, 706 (1983) (finding exceptions to this principle only when there are indications of legislative

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<sup>2</sup> *Id.*, at (d). See also 16 U.S.C. §1362 (Findings), §1373 (authorizing "necessary and appropriate" takes), and §1386 (stock assessments).

intent or other obvious inferences of mandatory action). In §1375(a)(1), Congress explicitly granted enforcement authority to the Secretary - delegated to the Administrator, and by using the term "may", provided the Secretary with the discretion to determine whether and when it is appropriate to issue a civil penalty.

As such, the Administrator has the authority to set enforcement policy for the Agency, or as will be recommended below, simply provide enforcement guidance to NOAA Fisheries.

Federal caselaw supports the finding that an agency's decision on whether, and how, to prosecute violations of a federal law for which it has authority is a decision generally committed to an agency's absolute discretion. See *Heckler v. Chaney*, 470 U.S. 821, 836 (1985) (Food and Drug Administration decision not to take enforcement actions held not subject to judicial review under the Administrative Procedures Act).<sup>3</sup>

NOAA's authority to set enforcement policy under the MMPA allows the Administrator to adopt guidance to exclude from Level B Harassment acts having the potential to disturb marine mammals

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<sup>3</sup> The Supreme Court in *Heckler*, in establishing a presumption of unreviewability of agency decisions on taking enforcement actions, found that judicial review of such decisions is inappropriate because, *inter alia*, they often involve a complicated balancing of factors solely within agency expertise and the agency is more knowledgeable on the ordering of its priorities. *Heckler*, at 831.

that are part of a population that is in excess of OSP and growing - or for any other factors deemed relevant.

2. NOAA Recommends the Administrator Adopt Enforcement Guidance for Level B Harassment of Certain Pinnipeds in Limited Circumstances.

In seeking this Administrative Review, NOAA stated that it had "both the expertise and the discretion to consider all of the information and implications" necessary for making policy determinations on the issue of human-marine mammal interactions in the wild. Agency's Partial Answer, p. 13. Since the filing of its Partial Answer, NOAA has brought together regional and headquarters personnel from its Office of Protected Resources, Office for Law Enforcement, and Office of General Counsel to consider these important issues. Based on those discussions, the Agency now recommends that the Administrator use his inherent discretion through the Administrative Review process to set guidance on how Level B Harassment matters should be prioritized by the Agency for certain populations of marine mammals in limited situations. Specifically, NMFS proposes guidance for prioritization of Level B Harassment enforcement for areas of human interaction with three specific populations of pinnipeds - California sea lions, Pacific harbor seals (California and Oregon/Washington stocks only) and northern

elephant seals. A proposed Order detailing this guidance is provided in Attachment "A" to this Brief.

In developing this proposed guidance, NOAA affirmed that incidents involving human-pinniped interactions which resulted in pinnipeds flushing from haulouts were acts of annoyance<sup>4</sup> which had the potential to disturb marine mammals by causing significant disruption of biologically important behavioral patterns. Therefore, such incidents constitute take by Level B Harassment, and can be prosecuted by NOAA under the strict liability standard of the MMPA. See generally, Initial Decision.

Given the broad reach of the MMPA take prohibition, NMFS also recognized several other important factors: 1) NMFS has limited enforcement resources to investigate all potential MMPA violations from areas of human-pinniped interactions; 2) NMFS has other high priority missions critical to protecting important species - including marine mammals - for which enforcement resources must be focused; 3) Level B harassment investigations/prosecutions are resource intensive, and; 4) NOAA has discretion to determine which violations to pursue with penalty actions.

Further, in developing guidance, NMFS determined to focus

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<sup>4</sup> "Annoyance" is defined as "any human stimuli which bothers and/or irritates a marine mammal". I.D., p. 14.

on specific pinniped species in certain areas as described below. In particular, the relevant areas of human-pinniped interaction will only be those where the pinnipeds occupying the area are Pacific harbor seals, California sea lions, and northern elephant seals, and the area is either man-made or has historically been subject to frequent and extensive use by the public.

NMFS chose these three populations of pinnipeds because recent stock assessment studies show that the overall populations are increasing or stabilizing, and are either approaching or within OSP.<sup>5</sup> Importantly, none of these species has been identified as depleted under the MMPA, or are listed as threatened or endangered under the Endangered Species Act. Quite simply, these three populations are doing well, and therefore NMFS believes that enforcement resources are better spent on other missions that may benefit more from protection through application of enforcement resources.

NMFS also determined that focusing on increasing and stabilizing pinniped populations was preferable to the "in excess of OSP standard" raised by both the Administrative Law

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<sup>5</sup> 2005 Stock Assessment Report population estimates: Pacific harbor seals (CA/OR/WA stocks) - 73,577; California sea lions - 237,000 to 244,000, and; northern elephant seals - 101,000.

Judge (I.D., p. 20) and the Administrator because the latter standard is overly restrictive to the rare situation where the population is above its carrying capacity - a situation that, in biological terms, cannot remain for long. OSP is a range of populations, with the upper limit being the maximum number supportable within an ecosystem, and a lower limit of the maximum net productivity level. See 50 C.F.R. 216.3. Accordingly, a population may still be "healthy" even when the lower limit of OSP has yet to be reached. In addition, OSP determinations involve a specific finding under the MMPA, while identifying the pinniped populations for this proposed guidance allowed NMFS to use a more flexible assessment of population studies.

Lastly, NMFS determined that consideration should be given to the public's interest in accessing human-pinniped interaction areas for purposes other than disturbing pinnipeds. For purposes of this guidance, NMFS chose to focus on man-made areas, and areas that have historically been used frequently and extensively by the public. These specific human-pinniped interaction areas, hereinafter referred to as "HPI Areas," include Children's Pool Beach (La Jolla, CA), beaches with significant human traffic, and docks.

In light of these factors and population considerations,

NOAA proposes that the Administrator issue the following specific guidance directing NOAA to:

- a. Focus its limited resources, when available, on educational and outreach efforts at HPI areas to ensure that the general public is notified of viewing guidelines for pinnipeds.
- b. Assign a higher priority to incidents at HPI Areas where there appears to be intent to specifically interfere with or disrupt the pinnipeds, or where there are other aggravating factors related to the incident. Accordingly, alleged takes incidental to otherwise lawful use of HPI Areas will not likely be investigated/prosecuted, particularly where an individual clearly makes an effort to avoid the pinnipeds to the extent possible.
- c. Assign a higher priority to incidents that occur during pupping season, or other particularly sensitive times, for the pinnipeds involved.
- d. Assign a lower priority to incidents occurring at man-made HPI Areas.
- e. Assign a lower priority to enforcement actions for incidental harassment of pinnipeds at HPI Areas where a local government has determined that a taking is necessary under 16 USC § 109(h) for the protection/welfare of the pinnipeds, the protection of public health/welfare, or because the pinnipeds are a nuisance.

NMFS is confident that implementation of this enforcement guidance will improve the NOAA Office for Law Enforcement's response effectiveness for priority NOAA missions. NMFS believes that in most cases, education and outreach are effective tools in achieving compliance with environmental regulations. Further, education and outreach have proved to be

particularly well-suited to situations like HPI areas, where there is a large turnover of people on a daily basis - the majority of whom have a positive view of the need for protection of marine mammals but are not aware of the regulations protecting them. If ordered by the Administrator to implement this guidance, NMFS will monitor the implementation to ensure that the three marine mammal populations are not significantly adversely affected by incidents of annoyance that have the potential to disturb pinnipeds through significant disruption of important behavioral patterns.

3. The Outcome of the Initial Decision Should Not be Affected by the Implementation of Enforcement Guidance.

If the Administrator chooses to implement the enforcement guidance recommended in this brief, the question from the Administrator's Order remains as to how this new guidance should affect the outcome<sup>6</sup> of this particular case. NOAA asserts that the guidance should have no effect on the outcome of the case.

The proposed guidance on Level B Harassment enforcement states that NOAA retains the authority to issue sanctions for any incident where the law has been violated. Further, the guidance provides that a higher enforcement priority will be placed on violations that occur during pupping season, or where

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<sup>6</sup> The Respondent was found liable for violating the take prohibition of the MMPA as charged by NOAA, and ordered to pay a civil penalty of \$1,000.00. See I.D., p. 30.

there are other aggravating factors. The facts of the case show that imposition of the civil penalty remains appropriate in this case.

First, Lilo Creighton's violation occurred on March 23, 2003, in the midst of pupping season.<sup>7</sup> Indeed, the ALJ determined that Ms. Creighton had disrupted nursing behavior between mother and pup harbor seals. I.D., p. 15. Second, Respondent failed to make any effort to avoid the seals upon exiting the water, and participated in a group swim event whose purpose was to show that humans and harbor seals could share the CPB. I.D., p. 12 and 15. These aggravating factors alone are sufficient basis to determine that the outcome set forth in the Initial Decision should not be disturbed.<sup>8</sup>

The NOAA Administrator has the authority to issue guidance on the prioritization of enforcement resources applied to Level B Harassment. The guidance recommended by NMFS is a recognition that the populations of certain pinnipeds are at a point where a shift in NMFS's prioritization of enforcement resources is

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<sup>7</sup> Pupping season for harbor seals in Southern California occurs annually between January and mid-April. I.D., p. 10.

<sup>8</sup> Similarly, Respondent argues in her brief that the outcome of the Initial Decision should be changed to have the Agency compromise the case and remit the fine. Respondent's Opening Brief, p. 3. For the same reasons stated above, such a change in the outcome is not warranted.

appropriate.

B. Neither the Land Grant Nor the Actions of the State/Local Governments Preclude Enforcement of the MMPA in this Case.

The second question raised by the Administrator is:

Whether the California Land Grant of Children's Pool Beach to the County and City of San Diego to maintain forever as a place for public swimming and recreation, and the City, County and State actions regarding Children's Pool Beach subsequent to that land grant, preclude the enforcement of the MMPA in this case.

NOAA believes that this question raises issues implicating the rights and powers of the federal and State governments under the U.S. Constitution. In that light, both the Commerce Clause and Supremacy Clause of the U.S. Constitution amply support NOAA's authority to enforce the MMPA at CPB.

The 1931 California Land Grant gave to the City of San Diego all rights in the CPB area in trust for use as, *inter alia*, a bathing pool for children and to "such other uses as may be incident to, or convenient for the full enjoyment of, such purposes." Respondent's Exh. T. Implementation of the terms of the Land Grant is a valid exercise of state sovereignty.

However, to the extent those terms interfere with enforcement of the MMPA, the Land Grant cannot supersede federal law.

Accordingly, neither the Land Grant itself nor the actions of the State or local governments that stem from the Grant preclude

the enforcement of the MMPA.

1. Enforcement of the MMPA is a Valid Exercise of Congress' Commerce Clause Power.

In enacting the MMPA, Congress made an express finding that marine mammals either move in interstate commerce or "affect the balance of marine ecosystems in a manner which is important to other animals and animal products which move in interstate commerce." 16 U.S.C. 1361(2)(5). The legislative history for this finding states that, "Congress has a legitimate interest in acting in this area since the animals are highly significant to interstate commerce." 1972 U.S.C.C.A.N. 4144, 4154.

The broad sweep of MMPA authority under the Commerce Clause of the U.S. Constitution (U.S. Const. Art. I, §8, cl. 3) has been recognized in NOAA caselaw:

The MMPA is a valid legislative exercise by virtue of Congress' constitutionally enumerated power to regulate commerce. The Constitution expressly states that "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." It is clear that Congress has power to regulate commerce, e.g. marine mammals, . . . . : *In the Matter of Stanley Ferris, Wilfred Ferris*, 2 O.R.W. 260, 266 (NOAA 1980).

There is also a series of federal cases finding take provisions in the Endangered Species Act and Bald Eagle Protection Act valid exercises of Commerce Clause power.<sup>9</sup>

Upon review of the statutory finding of Congress, the legislative history, and caselaw, there is no question that the regulation of takings under the MMPA, through enforcement of the statute, is a permissible exercise of federal regulation under the Commerce Clause of the U.S. Constitution.

2. The Supremacy Clause Mandates that A Valid Exercise of Commerce Clause Power Trumps State/Local Actions.

"The Supremacy Clause of the Constitution, Art. VI, cl.2, invalidates state laws that 'interfere with, or are contrary to,' federal law." *National Audubon Society, Inc. v. Davis*, 307 F.3d 835, 851 (9<sup>th</sup> Cir. 2002) (Endangered Species Act preempts state laws that interfere with federal agency mission), citing *Hillsborough County, Fla. v. Automated Med. Labs., Inc.*, 471 U.S. 707 (1985). Through the MMPA, Congress has expressly preempted state law with respect to taking of marine mammals. *UFO Chuting v. Young*, 380 F. Supp. 2d. 1166, 1171 (D. HI 2005). Federal preemption with respect to the regulation of taking of marine mammals is explicit, direct evidence of Congressional intent to

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<sup>9</sup> See e.g., *United States v. Bramble*, 103 F.3d 1475, 1480-82 (9th Cir. 1996); *National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997), cert. denied, 524 U.S. 937 (1998).

apply the prohibitions under the MMPA throughout the geographic United States.<sup>10</sup> The Supremacy Clause of the U.S. Constitution makes clear that the MMPA would trump the statutory Land Grant by the State for use of the CPB solely for certain human activities.

The MMPA is the supreme law of the land, and the terms of the Land Grant cannot interfere with the enforcement of it.

3. Neither the Tenth nor Ninth Amendment Limit the Commerce Clause Power of Congress to Enforce the MMPA at CPB in this Case.

The Tenth Amendment states that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it

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<sup>10</sup> The U.S. Justice Department shared this interpretation at the time of the Act's inception:

This bill [H.R. 10420] would protect specified species of marine mammals by prohibiting their taking except as authorized under permit . . . . The prohibition would apply to all persons and vessels subject to the jurisdiction of the United States on the high seas and to anyone in waters under the jurisdiction of the United States or land appurtenant thereto.

Letter from Deputy Attorney General Richard G. Kleindienst to Hon. Edward A. Garmatz, Chairman, Committee on Merchant Marine and Fisheries, House of Representatives, reprinted in 1972 U.S. Code Cong. & Admin. News 4176).

to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X. It is clear from a long line of federal caselaw that Congress has the authority under a valid exercise of the Commerce Clause to regulate areas which may infringe on state rights despite the reservation of rights of the Tenth Amendment. However, in the case at hand, the Tenth Amendment reservation of powers to the States is not implicated because, as stated previously, the MMPA is a valid exercise of Congress' Commerce Clause power. Therefore, the MMPA is a power delegated to the United States by the Constitution as referred to in the Tenth Amendment. "[I]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States . . . ." *New York v. United States*, 505 U.S. 144, 156 (1992); accord *Hodel v. Virginia Surface Mining and Recl. Assn.*, 452 U.S. 264, 291 (1981).

Because Congress' regulation of marine mammals is squarely within its Commerce Clause power, it does not violate the Tenth Amendment.

Concerning the Ninth Amendment as a potential source of conflict in this case,<sup>11</sup> federal courts have noted that the Ninth

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<sup>11</sup> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people". U.S. Const. amend. IX. Ninth Amendment arguments

Amendment "has not been interpreted as independently securing any constitutional rights for purposes of making out a constitutional violation." *Schowengerdt v. United States*, 944 F.2d 483, 490 (9th Cir. 1991) (rejecting Navy civilian engineer's Ninth Amendment claim arising out of allegedly improper investigation and discharge), cert. denied, 503 U.S. 951 (1992). See also *San Diego County Gun Rights Committee, et al., v. Janet Reno*, 98 F.3d 1121 (9th Cir. 1996).<sup>12</sup>

As such, the Ninth Amendment does not create a reviewable right. Further, as stated above, any Tenth Amendment support for how the Land Grant or the state/local government actions affect enforcement of the MMPA in this case are trumped by the Commerce Clause.

There is nothing in the Land Grant or the actions by the State and local governments that preclude NOAA from enforcing the MMPA at CPB.

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were raised by both the ALJ and Respondent's counsel. See I.D., p. 16; Respondent's Opening Brief in Response to Administrator Order, p. 3.

<sup>12</sup> "It is a common error, but an error nonetheless, to talk of 'ninth amendment rights.' The ninth amendment is not a source of rights as such; it is simply a rule about how to read the Constitution." *Id.*, citing Laurence H. Tribe, *American Constitutional Law*, 776 n. 14 (2ed. 1988).

B. Respondent's Remaining Arguments Are Not Responsive to the Administrator's Order.

In addition to answering several of Respondent's arguments in the above Sections, Respondent has raised several other arguments in her Opening Brief (hereinafter "ROB") which require a response here.

NOAA agrees with Respondent that a factual finding can be made that the pinnipeds at CPB are part of the Southern California population of harbor seals. ROB, p. 3. However, NOAA disagrees with Respondent's argument that a legal finding can be made that the Southern California harbor seal population is in excess of OSP. See ROB, p. 3. There is simply nothing in the record that supports such a finding.

Respondent raises three additional arguments which the Agency asserts are not germane to the specific requests of the Administrator's Order: 1) Enforcement of the MMPA interfered with her First Amendment right to access the CPB as free speech; 2) She is entitled to a MMPA exception to the take prohibition to deter marine mammals endangering public safety, and; 3) The Agency should withdraw a request to the City for placement of a rope barrier. ROB, p. 3-4. Because these arguments are not responsive to the two questions raised by the Administrator, NOAA will not respond to them in this brief. To the extent that

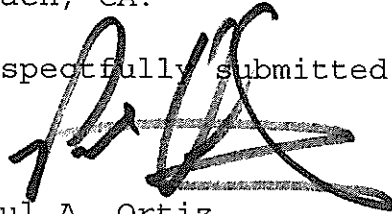
the Administrator is interested in responses to these arguments, NOAA requests the opportunity for additional briefing on these issues.

**D. CONCLUSION**

The Administrator should affirm the findings of the Initial Decision and direct NMFS to implement the proposed guidance on enforcement prioritization of Level B Harassment for certain pinnipeds in limited HPI Areas.

Dated: June 16, 2006, Long Beach, CA.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE  
WITH WORD LIMIT

In accordance with the NOAA Administrator's Order Granting Discretionary Review, In Part, and Denying Discretionary Review, In Part, dated March 7, 2006, undersigned counsel hereby certifies that this brief contains 3,920 words, including footnotes, as measured by "Microsoft Word 2002," the computer program used to prepare the brief.



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CERTIFICATE OF SERVICE

I hereby certify that I have sent the attached documents by first class mail and/or electronic mail to the following persons:

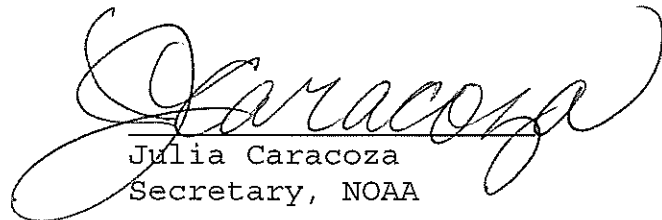
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Dated: June 16, 2006

  
Julia Caracoza  
Secretary, NOAA

**NOAA  
ATTACHMENT  
“A”**



Secretary, through OLE and NOAA Office of General Counsel for Enforcement and Litigation (GCEL), with discretion in pursuing penalty actions for violations.

In light of this balancing of factors, NMFS sets forth the following guidance on the exercise of enforcement of the Level B Harassment prohibition of the MMPA at certain human-pinniped interaction areas described below.

- 1) NMFS is aware that there are a wide variety of human pinniped interaction areas throughout the United States. This guidance shall be applied only at human-pinniped interaction areas with the following characteristics, which are referred to below as "HPI Areas":
  - a. The affected pinnipeds are California sea lions, Pacific harbor seals, or northern elephant seals; and,
  - b. The HPI Area has been created - at least in part - for use by the public, or has historically been used frequently and extensively by the public. Exclusion of the public from utilizing areas used by humans in favor of a limited number of pinnipeds in a population presents a concern over the public's interest in accessing such areas.
- 2) The prohibition of "take" by Level B Harassment under the MMPA is a strict liability offense; therefore, NOAA need not prove the intent of a respondent in an enforcement action. OLE/GCEL can proceed with investigation and prosecution of any incident where NOAA believes that the MMPA has been violated. NOAA believes when a person conducts an act of annoyance, as defined in *In the Matter of Lilo Creighton*, 2005 NOAA Lexis 2, which has the potential to disturb a marine mammal by causing significant disruption of a biologically important behavioral pattern, that person has taken a marine mammal by Level B harassment.
- 3) The populations of California sea lions, Pacific harbor seals (CA and OR/WA stocks only), and northern elephant seals, are such that lower prioritization of certain Level B harassment incidents will not have a significant adverse effect on the status of those populations.

- 4) The majority of potential Level B harassment incidents at individual HPI Areas is likely to have negligible impact on individual, or colonies of, California sea lions, Pacific harbor seals, and northern elephant seals, and thus, is not expected to have a negative effect on NMFS's stewardship responsibilities under the MMPA. As such, NMFS will:
- a. Focus its limited resources, when available, on educational and outreach efforts at HPI Areas to ensure that the general public is notified of viewing guidelines for pinnipeds.
  - b. Assign a higher priority to incidents at HPI Areas where there appears to be intent to interfere with or disrupt the pinnipeds, or where there are other aggravating factors related to the incident. Accordingly, alleged takes incidental to otherwise lawful use of HPI Areas will not likely be investigated/prosecuted, particularly where an individual clearly makes an effort to avoid the pinnipeds to the extent possible.
  - c. Assign a higher priority to incidents that occur during pupping season, or other particularly sensitive times, for the pinnipeds involved.
  - d. Assign a lower priority to incidents that occur at man-made HPI Areas.
  - e. Assign a lower priority to enforcement actions for incidental harassment of pinnipeds at HPI Areas where a local government has determined that a taking is necessary under 16 USC § 109(h) for the protection/welfare of the pinnipeds, the protection of public health/welfare, or because the pinnipeds are a nuisance.

Nothing in this guidance should be construed as limiting OLE/GCEL's full investigative and prosecutorial discretion, or as enforcement guidance on marine mammal species/populations other than California sea lions, Pacific harbor seals, and northern elephant seals. NMFS

will review the implementation of this enforcement guideline on a regular basis to ensure that the Agency's mission is being fulfilled.

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