February 22, 2010
San Diego Council of Divers
PO Box 84778
San Diego, CA 92138-4778

San Diego City Council
220 C Street,
San Diego, CA 920101

Dear Council members,

Since 1 January 2010, a Trust amendment has safeguarded the seal colony at Children's Pool. Our attached recommendations were driven by the deliberated wishes of the City Council on 2/17/09, written law, and minimal legal risk to San Diego resources.

We suggest the City safeguard its options and carefully consider its needs, and all other parties, based on its own investigations. What is "common knowledge" about the situation is often crafted by special interest groups, and we ask the City get expert analyses of its new role and responsibilities.

Divers have affection for, and special knowledge of seals and their unassuming friendly ways. We are also concerned about future miss-steps costing our City any more litigation or loss of citizen ocean access there and on other public beaches. The City has a trust in place that supports Joint Use.

The San Diego Council of Divers has represented divers in San Diego through their clubs for over 50 years. Through the dive clubs we hear from thousands of divers. We found divers overwhelmingly support the City Policy of Joint Use at Children's Pool.

Please see attached Beach Management Proposal, which was drafted with input from the various San Diego Dive Clubs.

Scott R Anderson

San Diego Council of Divers
Scott Anderson, President

Proposal 1 - Management of La Jolla Beaches – Looking to the Future

San Diego divers wish to see safeguards against undesired loss of public beach in the future. We are concerned by past seal incursions into South Casa Beach, and about future marine mammal colonizations of beaches in La Jolla and all of San Diego. Our fondness for these animals notwithstanding, the City needs a policy and management plan to deal with future colonizations of more public beaches including how to get wayward seals back to Children's Pool.

We urge the City to preserve its shared use policy at Children's Pool, and take steps to assure public access to all beaches on the San Diego coastline. The City can declare seals and sea lions on public beaches other than Children's Pool to be subject to removal under MMPA 109(h) so that quick action can be taken when needed. This can be modeled after the volunteer plan made in Pacific Grove when seals threatened their most valuable tourist beach. (Exhibit I)

San Diego has a history of maintaining open beaches for its citizens and tourists to share and enjoy access to its oceans for swimming, surfing, diving, sunbathing, and fishing per the State Constitution and the Coastal Act. Maintaining that policy will allow enjoyment of the beaches by locals and tourists to continue and avoid confrontations by special interest groups or law suits. San Diego is a major world class dive destination, with beautiful beaches, sunken wrecks and a wide range of businesses serving the industry.

Divers have worked with the City of San Diego for 50 years. None advocate harm to seals, who are our dive buddies in the wild. We just want to be assured the public can respectfully and lawfully go on public land to access the ocean, per various laws.

Derived by consensus of Dive Club delegates from all over San Diego, 1/28/2010, and 2/09/2010.

Proposal 2 - Management of Children's Pool - Effective Planning

Representatives of the dive clubs in San Diego share a concern over the future of Children's Pool. Divers are happy to have the seal colony there, but see unintended consequences without judicious steps taken. We would propose the City craft a long range plan to administer that public park to preclude new liability, contention or expense.

Our proposal requests a total City plan validated by a panel of scientists appointed by Scripps Institute of Oceanography working with California Department of Fish and Game Commission, NOAA law office, La Jolla Community Planning Association and the California Coastal Commission.

That panel can formulate ways to protect San Diego beaches for all its citizens and stay within all the terms of the amended trust and the Coastal Act and the State Constitution. Violating any one could start more protracted loss of City resources. We just got free of 5 years of litigation.

We further propose the City enforce its Public Right of Way codes (**§127.0304(b)(1), §129.0802, §142.1206, §33.1406, §54.0105**) pertaining to vendors' tables and signs drawing crowds in the public's right of way and creating an attractive nuisance, even obstructing public, emergency and handicapped access. The City has done an outstanding job of providing clear signage in the area. Other signs by special interest groups create confusion, cause contention and should be removed per City Codes. We urge the City to enforce its signage codes (Art 2, div 12 and Art 9, div 8; **§121.0504; §121.0505**) to eliminate private party or special interest group signs.

The San Diego Dive Community agrees with the City of San Diego's Joint Use policy at Children's Pool, as was formulated by a Children's Pool Technical Advisory Committee on July 29, 2003. This policy was cited repeatedly to defend the City against the O'Sullivan suit. (Superior Court, Aug 2006) It makes more sense than ever.

Derived by consensus of Dive Club delegates from all over San Diego, 1/28/2010, and 2/09/2010.

Issues at hand

1. **Divers and swimmers request very little.**
   We wish to go lawfully and respectfully on public land to reach the ocean. Sharing was never a problem. San Diego is a world famous diving destination. Activists have made Children's Pool so unpleasant to visit that almost all go elsewhere, despairing of City protection of their ability to go lawfully on a public beach. We request San Diego to actively manage its beaches, for the greater good, by rule of law.
2. **Seals will eventually spread to other beaches.**
   They already have, choosing South Casa Beach in past years, and activists immediately acted to illegally close that beach. The seals left on their own, but the lesson should be clear.
3. **The City has all the authority it needs to control its beaches**
   The City has been advised by NOAA more than once it can deter seals (and sea lions) off public land without asking permission and the City, or a designate, can use all manner of non-injurious methods of deterrence. But the City has to protect itself with an acceptable plan in place ahead of time. (Exhibit I)
4. **Diving is a large part of reasons people come to San Diego**
   a) San Diego is a famous diving destination. It was home to the first dive club in America. The Council of Divers has worked with the City for over 50 years.
   b) Dive shops and dive equipment manufacturers have thrived in San Diego. People come from all over to explore the reefs, wrecks and underwater canyons in San Diego. Diving brings a lot of commerce to San Diego.
   c) San Diego derives its shore diving appeal from relatively few access points. Of 11 beaches listed on the City lifeguard website, less than half access dive sites and only 3, La Jolla Shores, La Jolla Cove, and Children's Pool offer protection from direct swells and rip currents. Denial of access to Children's Pool is loss of 1 of 3 of the best dive access points in San Diego.
   d) Divers can provide insight as to the nature of seals and what can be expected of them. We like seals as much as anybody, and have a reputation for knowing how to get to the water without bothering them. They play with us in the water and find us amusing.
   e) San Diego Council of Divers is the only volunteer organization to sponsor beach cleanups at Children's Pool and South Casa Beach, for which it has been recognized by the Coastal Commission.

f) The current rope barrier is being used as a tool to lend color of authority to zealots driving the public off the beach. There is no California Coastal Permit in place and pending appeals before the CCC point out conflicts between the Coastal Commission and San Diego's rope barrier.

g) The Council of Divers saw no alternative but to join others in appealing this year's California Coastal Permit for a perpetual rope barrier as unnecessary, unwarranted, ill conceived, illegal, and anti-access. It was a regrettable last means to be heard.

h) The Council of Divers and others would happily participate in improved carefully considered educational efforts to improve respect for seal right of way and safeguard Joint Use.

The City has at its disposal groups like the Council of Divers that would help the City form an advisory task force to craft a workable policy. The need is to manage the beach as a tourist friendly and seal friendly Joint Use public beach and steer clear of complications, legal problems and unforeseen consequences and expenses. We should be working together.

The City should meet with NOAA Habitat Conservation Division and its Southwest Regional Counsel office to evaluate commitment of federal resources, legal help, or grants to be available within San Diego's Joint Use plan.

a) The fastest growth in the Children's Pool colony was during the years Joint Use was in full effect and no restrictions on public access were in place.

b) We found no documented case of a harbor seal being aggressive at Children's Pool, or anywhere else. They are prey animals. They flee and come back later. A legless animal does not pick a fight on land. The City needs only signs saying ***"The City of San Diego assumes no responsibility……"***

c) When seals choose to give birth on a metropolitan public beach within yards of staring tourists, they have evaluated humans as non-predatory. They trust people here more than anywhere else on earth. Had they reason to fear us humans they would be elsewhere.

Questions, choices and imperatives

The City of San Diego has choices to make about Children's Pool that can affect all its beaches for decades to come. Over the last 5 years San Diego has struggled to maintain its options at Children's Pool, and should avoid any limiting moves. San Diego needs some answers from non-partisan experts and permitting agencies brought together for a study group before taking any actions.

The following are some issues we have researched. A panel such as we suggested could provide more authoritative answers.

1. **Does San Diego have to declare Children's Pool to either be all people or all seals?**
   No. The trust does not say that. Nothing says that. There are no pending court actions. The seals are there to stay, with Joint Use still honored in the trust.
2. **What does the Amended Trust say?**
   The Trust says the beach, stairs and sidewalk shall be devoted exclusively to a public park, a marine mammal park, a bathing pool for children, playground, recreational purposes, with convenient access to fish there. (Exhibit B) As trustee, San Diego is responsible for fulfilling all the Trust terms.
3. **What does the City have to change to live up to the Trust?**
   Nothing. The seals are guaranteed their place. The City's Joint Use policy meets the other requirements. The Coastal Act guarantees public access. Suggestions the City abandon Joint Use or commit some other trust violation are not in the City's best interest.
4. **What other laws would apply?**
   The Coastal Act and the Public Trust Doctrine primarily. Both require public access the ocean. The Marine Mammal Protection Act also could apply, were the City to cause unreasonable harm to seals. Various other agencies have say on trusted land.
5. **Must the City enforce a federal 50' distance between people and seals?**
   There is no such limit, or any legal distance. (Exhibit G) Luckily, or the City would have to close half the sea wall. San Diego must obey the Marine Mammal Protection Act, but is forbidden to enforce it. (Exhibit E) A municipal entity seeing a likely MMPA violation is only able to report it to a federal officer. (Exhibit H)
6. **What discretion was requested for pubic access and seals in the trust amendment?**
   The City Council requested complete discretion. What was requested in writing was replaced with an additional trust stipulation and no discretion. (Exhibit B)

7. **Can the City again lose control of Children's Pool?**
   Not as long as the City does not violate the amended Trust or the Coastal Act.

8. **Didn't NOAA require beach closure at one time?**
   One NOAA officer sent 3 letters to the City "strongly recommending" the City close the beach in the winter. The letter had no backing from an administrator. That officer had recommended the City violate the trust, and the Coastal Act for him, but the City stood its ground with an advisory rope and continued Joint Use.

9. **What of Law and Order?**
   Police and Fire have been called to Children's excessively to intimidate citizens to believe anti-access activists have the law on their side. The City could request a tally of police action and its costs at CP and who is involved.
   The circus on the sidewalk should end with enforcement of existing City ordinances on signs, selling and solicitation. The City has no funds to hire security guards for the sidewalk as in past years. Without anti-access incitement, the City could again show the world a tranquil vacation spot.

10. **Do seals bite?**
    We can find no documented case of a harbor seal being aggressive at Children's Pool, or anywhere. They are prey animals with a flock culture. Given any choice, they flee confrontation to come back later. A legless animal does not pick a fight on land. Anyway, the City only needs signs saying **- "The City of San Diego assumes no responsibility for anyone too close to a seal".**

11. **Will people on the beach cause seals to abandon their pups?**
    No animal reacts to annoyance by abandoning its young.
    Mother seals must leave small pups somewhere while they forage, or they both will starve. Our seals trust people so much they will leave pups waiting on Children's Pool beach instead of stashing them like they do in the wild. Seals are not born afraid of people, they learn it in the wild from elders. Our pups are born into a people tolerant culture.

12. **Do seals get used to people?**
    They did in the 90's, they do today and will tomorrow. They are smart and don't spend time reacting to things that do not hurt them. At one time the City had posted a guideline of 20' because the seals had gotten used to that.

Harbor seals are doing well. From NOAA surveys of California stocks.
http://www.nmfs.noaa.gov/pr/pdfs/sars/po2005sehr-ca.pdf
Best population estimate in 2005 was 34,233. Factor in 3.5% population grow and the estimated population today would be about 40,000.

factor was based on the fraction of seals hauled out over an entire 24-hour day (correction factors for aerial counts should be based on the fraction of seals hauled out at the time of the survey). Hanan (pers. comm.) revised his haul-out correction factor to 1.3 by using only those seals hauled out between 0800 and 1700 hrs which better corresponds to the timing of his surveys. Based on the most recent harbor seal counts (26,333 in May-July 2004; Lowry et al. 2005) and Hanan's revised correction factor, the harbor seal population in California is estimated to number 34,233.

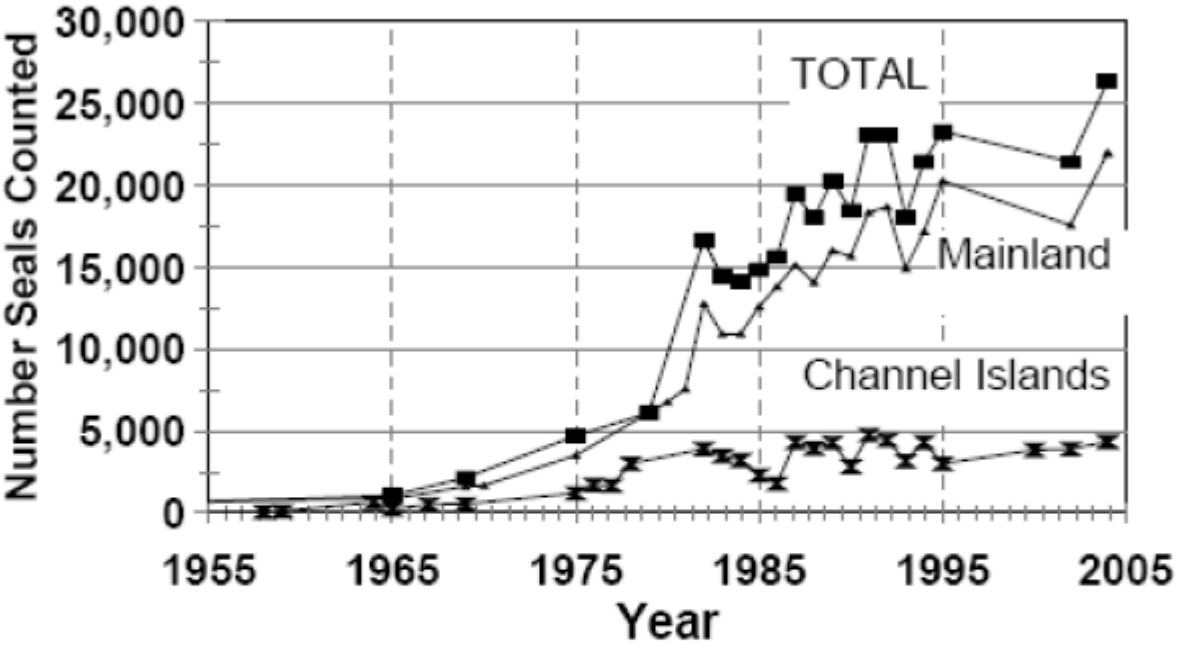


Figure 2. Harbor seal haulout counts in California during May/June (Hanan 1996; R. Read, CDFG unpubl. data; NMFS unpubl. data from 2002 and 2004 surveys).

CURRENT AND MAXIMUM NET PRODUCTIVITY RATES

A realized rate of increase was calculated for the 1982-1995 period (when annual counts were available) by linear regression of the natural logarithm of total count versus year. The slope of this regression line was 0.035 (s.e.=0.007) which gives an annualized growth rate estimate of 3.5%. The current rate of net production is greater than this observed growth rate because fishery mortality takes a fraction of the net production. Annual gillnet mortality may have been as high as 5-10% of the California harbor seal population in the mid-1980s; a kill this large would have depressed population growth rates

Is Children's Pool a Rookery?

In 2001, Children's was designated a rookery according to NOAA. That status was apparently later rescinded.

In May 2008, a seal caught in netting stayed on the beach for days but NOAA would not authorize a rescue in a rookery. If NOAA designates an area a rookery, it no longer will allow rescues of sick or abandoned animals, but is enjoined to "let nature take its course". Only if an animal needs rescue because of unnatural events (human misdeeds) can NOAA authorize a rescue.

Activists blasted NOAA officers on their website, and were notified they could cost Children's Pool its rookery status. (Exhibit A) Since then, NOAA did give permission to the City to disperse the seal colony and has initiated rescues at Children's Pool, so clearly Children's Pool did lose its rookery status, due to activist zealotry.

That seal was freed by two out of town citizens, triggering more targeted vitriol against NOAA policies. NOAA released a statement that the two could be prosecuted for that action. It was a San Diego diver who advised NOAA that it had overlooked section 109(d) of the Marine Mammal Protection act which specifically exempted them, and the matter vanished.

The City has neither responsibility nor authority concerning protection of any seals on State tideland, unless invoking MMPA section 109(h) to remove seals from a beach. Otherwise, as trustee of State land, San Diego is forbidden from enforcing any law concerning protection of seals by MMPA section 109(a)) (Exhibit E)

Exhibit A

10News.com

NOAA E-Mail To Pro-Seal Activist

The following is an e-mail from Joe Cordaro of the National Oceanic and Atmospheric Administration to local pro-seal activist Cindy Benner:

You might also want to point out to all the pro-seal people that I'm starting to get a little tired of their fixation on individual animals. If they cannot understand the concept of the good of the entire colony over the good of an individual animal, then they do not deserve having a seal colony in their midst. They can't have it both ways. If I continue to get negative comments from the pro-seal people regarding my management decisions at Children's Pool, I will soon make the following statement in the local media:

"The National Marine Fisheries Service (NMFS) has been managing Children's Pool as a harbor seal rookery since February 2001. Due to negative publicity regarding recent management decisions at Children's Pool, the NMFS has decided that the general public will no longer allow us to manage the site as a rookery. Therefore, we are discontinuing our current management policy at Children's Pool and will treat Children's Pool as just another mainland beach. This will allow SeaWorld to rescue any sick or injured marine mammals at Children's Pool, irregardless as to whether the cause is natural or human-caused. This also means that the City of San Diego can forcibly prevent healthy seals from hauling out at this site by designating them as a threat to the public welfare or as nuisance animals under Section 109(h) of the Marine Mammal Protection Act."

Obviously, this is not a road I want to go down. During the last incident, I received heat from the pro-seal folks, the general public, and from within my own agency. It's just not worth all the aggravation.

Exhibit B

How the trust was amended

On Feb 17th 2009 the City Council heard a proposal by the City Attorney to ask Senator Kehoe to introduce SB428 to amend the Children's Pool Trust. The stated intent was to preclude a standing court order to restore Children's Pool to its original granted condition. After public comment, the City Council members formulated a response. This can be found on City video archives.

Deliberation began with a statement by Donna Frye - "It is very important that divers continue to have access". Carl DeMaio joined her in concern the amendment contain City discretion to ensure public use could continue. They worked out the wording and the City Attorney was asked to contribute to make it just right. The result is found in the minutes of that meeting.

MOTION BY FRYE TO ADOPT AS AMENDED TO APPROVE THE CITY ATTORNEY'S RECOMMENDATION AS FOLLOWS: "BE IT RESOLVED BY THE COUNCIL OF THE CITY OF SAN DIEGO THAT THE COUNCIL SUPPORTS AMENDMENT OF THE 1931 TIDELANDS TRUST BY THE CALIFORNIA LEGISLATURE TO AFFORD THE CITY DISCRETION TO PERMIT MARINE MAMMALS TO INHABIT THE CHILDREN'S POOL AND DISCRETION TO PRESERVE THE MARINE MAMMALS' HABITAT AT THE CHILDREN'S POOL WHILE MAINTAINING DISCRETION TO ALLOW USES ALREADY SET FORTH IN THE 1931 TRUST AND ANY JOINT USE THEREOF." Second by Gloria. Passed by the following vote: Lightner-nay, Faulconer-yea, Gloria-yea, Young-yea, DeMaio-yea, Frye-yea, Emerald-yea, Hueso-yea.

The City Attorney said he would take that to Sacramento and work with our City lobbyists there to assign urgency to the bill.
Ten days later, Kehoe introduced the bill, with the wording it now contains.

21 (a) That said lands shall be devoted exclusively to public park,
22 *marine mammal park for the enjoyment and educational benefit*
23 *of children,* bathing pool for children, parkway, highway,
24 playground and recreational purposes, and to such other uses as
25 may be incident to, or convenient for the full enjoyment of such
26 purposes~~;~~.
27 (b) The absolute right to fish in the waters of the Pacific ~~ocean~~
28 *Ocean* over said tidelands or submerged lands, with the right of
29 convenient access to said waters over said lands for said purpose
30 is hereby reserved to the people of the State of California.

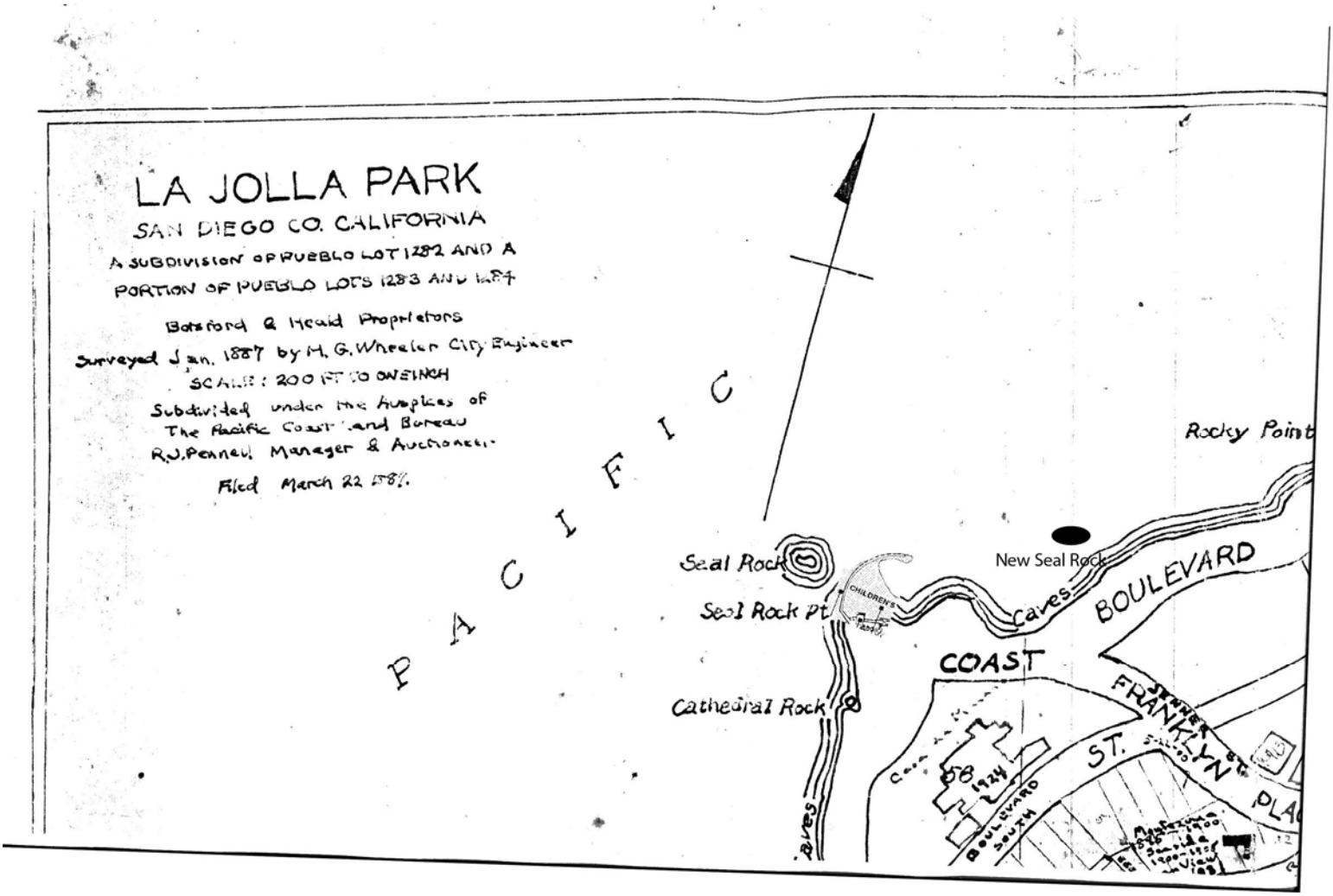
Discretion is not found in the trust, but what the City wanted is there, because none of the guarantees of public access were removed.

Exhibit C

The Myth of Old Seal Rock

To illustrate the difficulty separating truth from urban myth at Children's Pool, we cite the claim that the Children's Pool sea wall was built over an ancient seal habitat called "Seal Rock" and the seals have come home from their diaspora. Below is the 1887 geodetic map from the La Jolla Historical Society museum, with an insert from a 1989 City map. Note when the sea wall is shown to scale, this old Seal Rock is way outside the Children's Pool, but where was it?

Divers know – the end of the reef behind the sea wall is high at its westmost point, and anyone can see surf break out there at low tide. 100 years ago it was above the surface.



Back then it was mentioned the locals could hear seals barking all the way to shore. Harbor seals don't bark. Those were sea lions.

Exhibit D
2 Pages

How a Seal Colony was Built

When San Diego was successfully sued to restore Children's Pool, certain points were pivotal in the decision. One fact that caused the court to rule against San Diego was the purposeful release of human imprinted, hand fed harbor seals in La Jolla, and the subsequent rope barriers the City installed (Exhibit F) that encouraged seals to believe they had an abandoned beach for their own.

Subpoenaed testimony revealed that the Sea World Marine Mammal Rescue program had altered its release protocol in 1993 to divert their rehabilitated harbor seals to be released off La Jolla. In 1994, very friendly seals appeared at Children's Pool. Officials expressed bewilderment at the time. The City later funded a study of the seals in the "Seal Rock Reserve" which included release of tagged seals around Seal Rock and Children's Pool to affirm that harbor seals are homebodies and seldom migrate from familiar surroundings. It had worked.

The "seal planting" continued for 11 years, several years after the Seal Rock reserve expired, but stopped after it was revealed. We obtained NOAA records on Sea World seal releases and compiled a release map of the time period. (Exhibit D, Next Page)

One of the citations of this diversion, from the Superior court decision read:

Plaintiff cites to the fact that since at least 1997, Hubbs-SeaWorld has been engaged in a rescue, rehabilitation and release program under the aegis of the National Oceanographic and Atmospheric Administration or its sub-agency, NMFS, [Exh. 245.] That program consists of retrieving injured or diseased animals, rehabilitating them at SeaWorld in San Diego, and, upon return to health, and after tagging, releasing them in Pacific waters. The release of harbor seals is accomplished generally in the kelp beds immediately outside the Children's Pool. Tagged harbor seals are routinely observed hauling-out at the Children's Pool. Once it was determined that the released seals were impacting the use of the Children's Pool, the City took no steps to protect the Pool from becoming a haul-out for such seals.

Many seals have been born there in the subsequent 16 years (4 generations) and wild seals have joined our local people-acclimated tribe to adopt their ways.

Del Mar
Sorrento Valley
Miramar
Children's Pool
University of California San Diego
Golden Triangle
58 DIVERTED RELEASES
SEA WORLD
HARBOR SEAL REHAB
RELEASES FROM
DEC 93 TO JULY O5
EACH DOT IS A SEAL FROM
NOAA RECORDS
Sea World
San Diego
Point Loma
Downtown San Diego
10 miles
Coronado
National C
14 NORMAL RELEASES
Imperial Beach

Exhibit E

Federal Cooperation With States

16 U.S.C. 1379

Sec. 109. (a) [STATE ENFORCEMENT OF STATE LAWS OR REGULATIONS PROHIBITED WITHOUT TRANSFER TO STATE OF MANAGEMENT AUTHORITY BY SECRETARY.] — No State may enforce, or attempt to enforce, any State law or regulation relating to the taking of any species (which term for purposes of this section includes any population stock) of marine mammal within the State unless the Secretary has transferred authority for the conservation and management of that species (hereinafter referred to in this section as "management authority") to the State under subsection (b)(1).

(b) [FINDINGS PREREQUISITE TO TRANSFER OF AUTHORITY; STATE PROGRAM; IMPLEMENTATION.] —

(1) Subject to paragraph (2) and subsection (f), the Secretary shall transfer management authority for a species of marine mammal to a State if the Secretary finds, after notice and opportunity for public comment, that the State has developed and will implement a program for the conservation and management of the species that—

(A) is consistent with the purposes, policies, and goals of this Act and with international treaty obligations;

(B) requires that all taking of the species be humane;

(C) does not permit the taking of the species unless and until—

(i) the State has determined, under a process consistent with the standards set forth in subsection (c)—

(I) that the species is at its optimum sustainable population (hereinafter in this section referred to as "OSP"), and

(II) the maximum number of animals of that species that may be taken without reducing the species below its OSP, and

(ii) the determination required under clause (i) is final and implemented under State law, and, if a cooperative allocation agreement for the species is required under subsection (d)(1), such an agreement is implemented;

(D) does not permit the taking of a number of animals of the species that exceeds the maximum number determined pursuant to subparagraph (C)(i)(II), and, in the case of taking for subsistence uses (as defined in subsection (f)(2)), does not permit the taking of a number of animals that would be inconsistent with the maintenance of the species at its OSP;

(E) does not permit the taking of the species for scientific research, public display, or enhancing the survival or recovery of a species or stock, except for taking for such purposes that is undertaken by, or on behalf of, the State;

(F) provides procedures for acquiring data, and evaluating such data and other new evidence, relating to the OSP of the species, and the maximum take that would maintain the species at that level, and, if required on the basis of such evaluation, for amending determinations under subparagraph (C)(i);

(G) provides procedures for the resolution of differences between the State and the Secretary that might arise during the development of a cooperative allocation agreement under subsection (d)(1); and

(H) provides for the submission of an annual report to the Secretary regarding the administration of the program during the reporting period.

Exhibit F

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF SAN DIEGO
HALL OF JUSTICE
TENTATIVE RULINGS - January 03,2008

EVENT DATE: 01/04/2008 EVENT TIME: 10:30:00 AM DEPT.: C-60

JUDICIAL OFFICER: Yuri Hofmann

CASE NO.: GIC826918

CASE TITLE: O'SULLIVAN VS CITY OF SAN DIEGO

CASE CATEGORY: Civil - Unlimited CASE TYPE: Misc Complaints - Other

EVENT TYPE: Motion Hearing (Civil)
CAUSAL DOCUMENT /DATE FILED: Motion - Other, 12/12/2007

Defendant City of San Diego's "Motion to Clarify the Court's Injunction" is DENIED.

The Court is wary of ruling on the instant Motion, as it appears to seek something akin to an advisory opinion before the controverted issue is ripe. On the other hand, the City appears to be asking the Court to re-analyze an issue which has already been addressed and determined by this Court and the Court of Appeal. Specifically, the "rope issue" was discussed in both this Court's and the Court of Appeal's final rulings in favor of Plaintiff and against the City. Ultimately, both Courts found that the placement of a "rope barrier cutting off public access to the Pool," along with other various restrictions, "served to deter the public, beneficiaries of the trust grant, from using the beach," which resulted in the City's breach of its obligations as trustee under the subject Trust. (See Court of Appeal Ruling, pp. 12-13, quoting portions of the Trial Court's Statement of Decision.) More specifically, the Trial Court stated in its lengthy Statement of Decision:

The next biggest cause of actual or constructive closure of the Children's Pool was the City's decision to erect a rope barrier cutting off public access to the Pool. On March 29, 1999, the City Council . . . voted to rope off the Pool. *In doing so, the City breached its obligations under the Trust, as trustee of the* Children's Pool. Instead of returning the Pool to its original and safer configuration and also rectifying the unhealthy condition of the water and sand at the Pool, the City barred the use of the Children's Pool as a "public park, bathing pool for children, . . . and [use for] playground and recreational purposes," as expressly required by the 1931 Trust. The rope remained up from March 1999 until September 17, 2004.

(8/26/05 Statement of Decision, p. 24, ls. 3-14, emphasis added.)

In the instant Motion, the City asks the Court to reconsider the rope issue in the context of new evidence not proffered at trial. The Court declines to do so. As noted above, the relevant issue has been considered and decided, and the Court's directives to the City are clear and unambiguous.

Exhibit G

Subject: Re: Where is the "NOAA Official Policy of 50'?
From: Jim Lecky <Jim.Lecky@noaa.gov>
Date: Tue, 05 Jan 2010 14:27:26 -0500
To: John Leek <jleek001@san.rr.com>
CC: Chris Yates <Chris.Yates@noaa.gov>

John, I recommend you work with the Regional Office in Long Beach on this. Clearly the statement in the materials you attached to your e-mail that 50 ft. is mandated by the MMPA is wrong. The only prohibition in the statute is the prohibition on "take" which includes harassment. As you pointed out there are a number of guidelines on our web site, and there are number of guidelines published by other entities. Guide lines do not carry the force of law, they are merely meant to assist the public in observing animals without running afoul of the prohibition on take by harassment. The variability in guideline is a result of the variability in sensitivity of species to disturbance and variability in the circumstances under which different species might be observed. While there is no reference to 50 ft in our published or posted materials, I am not aware of ongoing discussions among the City, local interests, and NMFS Regional Office that might be focusing on such a distance. I am copying Chris Yates, Assistant Regional Administrator for Protected Resources in case he has any more current information he can provide. jl

John Leek wrote:

> The La Jolla Seal Display advocates are about to present a big plan to the San Diego City Council to make a marine mammal park at Children's Pool along their own desires. Part of their documentation is reference to an official 50' viewing distance per NMFS policy and guidelines, and ready cooperation from NMFS to help implement that and other new restrictions to public access.
>
> I have been searching for such a 50' distance in NOAA websites for a year, since they started telling tourists and beachgoers that to discourage beach use.
> I still cannot find it. I asked our local NOAA OLA officer, but she could not find it. Why would NOAA have an unpublished guideline? Who is speaking for NOAA in assuring these people there is such a guideline and telling them in writing that NMFS is willing to put up signs to that effect? How much authority does he have? Is it you?

Jim Lecky

Exhibit H
1 page

San Diego Police Department
Northern Division

Children's Pool

The San Diego Police Department respects the fundamental right of all people to peacefully express their views regarding the past, present and future use of the Children's Pool. The Department's Northern Division has a written protocol in place to respond to disturbances and allegations of criminal conduct at the Children's Pool.

The goal of the San Diego Police Department is to minimize the potential for confrontational behavior by maintaining peace and order during human-human and human-animal contact on and around the beach.

To this end, the San Diego Police Department:

- places no greater value than on the protection of human life
- will not tolerate acts of violence perpetrated against human beings or animals
- will respond to all requests for police assistance
- considers water safety the primary role of lifeguard personnel
- considers the National Oceanographic and Atmospheric Administration (NOAA) to have primary jurisdiction and to be the primary enforcement agency for any crimes alleged to have been perpetrated against any marine mammal or other animal that is classified within the scope of NOAA's jurisdiction
- will evaluate all allegations of criminal conduct perpetrated against human beings or any marine mammal or other animal that is classified within the scope of NOAA's jurisdiction, utilizing existing state and municipal statutes
- will confer with NOAA anytime criminal conduct perpetrated against any marine mammal or other animal that is classified within the scope of NOAA's jurisdiction is alleged
- encourages all people to respect and to not inhibit in any way the right and freedom for all to legally and peacefully occupy the Children's Pool and adjacent lands and to speak freely, openly and without intimidation

Posted April 30, 2007

The Pacific Grove resolution in 2007

Exhibit I

In 2007, Pacific Grove foresaw a problem with harbor seals. A resolution of policy was establish on Dec 19th, 2007.

Issue:
Seals now crowd the west beach of Hopkins Marine Station. In 2006 a few mother seals used the next beach west at 5th Street to bear their pups. The result is that the beach was closed and temporary fences were erected to protect the seals from the public. More harbor seals used the 5th Street beach for pupping in 2007. The concern that prompted our discussion is that seals may continue to migrate westward if crowding continues. The next beach west is Lovers Point, a popular human destination for thousands who sunbathe, swim, surf, scuba dive, and kayak.

6. **The strong recommendation by NOAA law enforcement and the representative of the National Marine Fisheries Service was that the City of Pacific Grove establish a plan to try to prevent the establishment of seals on Lovers Point.**
7. San Diego now encounters great controversy as a result of seals on a beach called Children's Pool. Part of the difficulty is that San Diego did not have a clear plan and intent for management of the situation on that beach. The conflicts now play out in court.

Action Plan

1. In preparation for the possibility of seals on Lovers Point, the city will
    a. Designate the "first responders", who may be city employees, and provide training in advance of need, so that the city can execute the plan quickly if required.
    b. Prepare the reporting forms and process, so that there would be no delay if action is necessary
    c. Notify interested agencies and organizations of the plan, explaining the reasons and rationale, so any activation will not be a surprise.
2. If seals are discovered on Lovers Point, the first response is to take direct action to encourage them to go elsewhere.
    a. Apply selected permissible techniques as suggested by NOAA:
        i. Use human presence and activity, acoustic devices acceptable to NOAA, and manual noise makers such as clanging of pots and pans.
        ii. The BNRC recommends against
            1. Barriers and exclusion, which are likely to be unworkable and ineffective for our beaches
            2. Other listed visual repellants
            3. Excessive and continuous noise, which would be disruptive to residents and visitors
            4. Direct physical contact with seals
    b. Solicit and train additional volunteers to maintain continual diligence. Potential volunteers may come from regular users of the beach, such as surfers, dive shops, and kayaking operators.

Debbie Beacham
Suggested Management Plan for Children's Pool
March 10 2010

A City Management Plan of the Children's Pool should take **both sides of the stakeholder groups** *into consideration.*

One idea would be to divide the use of the beach like this:

Recognize that there are two distinct seasons described as:

"Seal Priority Season" or Pupping season that would give protection to the Seals and pups.(suggested dates: Jan 1-May 31)

The dates would follow pupping season dates -- decided with a consensus by Marine biologists that are familiar with this area's seal populations and pupping history. (Note: Different latitudes have different pupping seasons due to weather and access to haul-out spots.)

Closure of beach to humans during pupping season.
City Ordinance that would define the closure to humans for pupping season (Seal Priority) and define the open season (Human Priority) during the non-pupping season.

Lifeguards and City personnel will be able to access the beach area as necessary or anyone in lifesaving danger.

and

"Human Priority Season" with use of the beach/ocean by humans. (suggested dates: **June 1-Dec 31)**

Human access to the beach and ocean June 1-Dec 31.

Human/Pinniped Interaction Area (HPI) June 15-Labor Day /Peak Summer Dates
NOAA to create an HPI at the CP that will direct MMPA harassment enforcement to be strict during puppng season and tolerant during Human priority season-peak summer dates. This allows NOAA to enforce the MMPA with a discretion that recognizes there are two distinct uses occurring at this beach.

No Rope barriers will be up during the daytime during the Peak Summer Dates.
(June 15-Labor Day) Lifeguards could take the rope down when they exit the beach in the evening and put them back up when they arrive in the morning. July 4th no nighttime rope because of the use of the beach to watch fireworks.

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Suggested Management Plan for Children's Pool
March 10 2010

Rope barrier would be a guideline at all times. No obstruction to access to the beach during human priority,

No merchandising booths situated at the stairwell access point (this would minimize the verbal animosity that occurs there now).

City of San Diego will pick up the seal feces during the human priority period. Initial removal to begin June 1. The methods for turning the sand and removing the seal feces need to be looked at by water quality experts and sand experts and then advise the City on best ways to clean sand.

Signage from City of San Diego to notify that use of the beach is open to the public and direct the seasonal uses of the beach. All signs that are not made by the City of San Diego will be removed from entry ways at all times.

Traffic Control and parking
A traffic and parking study to be implemented to understand how to accommodate excessive visitors to the area because of the increase in public viewing. Bus parking , garage parking shuttles etc. By utilizing seasonal priorities, Seal and Human, there would be a lessening of summer traffic to the Children's Pool which would help mitigate the parking and traffic issues in the already crowded area during the summer.

A Ranger to be utilized during June 15-Labor Day. (The Ranger's job would be to direct onlookers from getting too close to seals that have hauled out during the Human priority time period.) Possibly funded by a City SD merchandising kiosk that would fund the Ranger and other docent needs.

1st Ammendment location would be established away from the entryway to the beach. All merchandising would be located at this area. This could be during the dates of the **Human/Piniped Interaction area dates: June 15-Labor Day.**