

**Office of
The City Attorney
City of San Diego**

MEMORANDUM

DATE: November 13, 2006

TO: Natural Resources and Culture Committee

FROM: City Attorney's Office

SUBJECT: Early Placement of Rope Barrier at Children's Pool--Change from January 1, 2007 to December 15, 2006.

INTRODUCTION

The Children's Pool beach and the associated Ellen Browning Scripps breakwater in La Jolla was dedicated as a "bathing pool for children" in 1931. However, the beach is also a favorite hauling-out (resting) and pupping (birthing) area for the California Harbor Seals, the only regularly used haul-out site and established rookery for seals along California's coast. For many years, the beach was co-used by the public and seals. Recently, the presence of seal fecal matter in the water causing human health concerns and the harassment of seals by public users of the beach have strained the relationships of the seals and human users of this beach area. There have been numerous public hearings and prior City actions pertaining to this issue.¹

In 2005, the National Oceanic and Atmospheric Agency [NOAA], the enforcement agency for the protection of marine mammals (including the Harbor Seals) under the Marine Mammal Protection Act [MMPA] recommended to the City that the barrier be re-erected to protect the seals during pupping season as the posted signs were not effective deterrents to those harassing the seals. Pursuant to the NOAA recommendation and the recommendation made to the City Council by the Natural Resources and Culture Committee, the San Diego City Council passed resolution number R-301368 on April 19, 2006, which provided for the replacement of the rope barrier to protect the seals during their pupping season from January 1st through May 1st every year from that point forward.² While the January through May dates take into account the actual

¹ In addition, there was a ruling pertaining to the use of the Children's Pool beach made by the Superior Court of California in *O'Sullivan v. COSD*, Case No. GIC 826918; however, that case has been appealed and the order is stayed on appeal, thus it does not alter the analysis contained herein.

² It is unclear at this point whether the previous City Council action was broad enough to include a larger date range to protect the seals under the meaning of "pupping season" or whether further Council action is necessary. More legal research will need to be completed on this issue.

period in which the pups are born, they neglect to protect the mother seals and the unborn pups in the last trimester of pregnancy when the mother seals need to haul-out on the beach to shelter themselves and rest before the birth of the pups. They also neglect to protect the baby seals right after birth, when they may need to remain on the beach to rest and nurse before embarking into the ocean on their own for the first time. Thus, it would also make sense in terms of the NOAA recommendation to the City to extend the erection of the barrier for two weeks after the May 1st deadline, to May 15th.³

QUESTION PRESENTED

Should there be an earlier placement of the rope barrier at Children's Pool every year on December 15th rather than January 1st (starting with December 15, 2006)?

SHORT ANSWER

Yes. The mother seals are in their last trimester of pregnancy in late December, and by erecting the barrier two weeks earlier, it would help the City comply with the recommendations made by NOAA to better protect the seals during their pupping season under the requirements of the MMPA, which are echoed and bolstered by the San Diego Municipal Code [SDMC]. Any barrier erected, even seasonally will have to comply with the appropriate Coastal Development Permit procedures.⁴

ANALYSIS

Marine Mammal Protection Act Makes it Unlawful to Take or Harass the Harbor Seals

The Marine Mammal Protection Act of 1972 [MMPA] makes it illegal, with certain exceptions, to “take” or “harass” marine mammals. The words take and harass are defined broadly under the MMPA and are meant to include “take, hunt, capture, or kill, or attempt to harass, hunt, capture or kill any marine mammal.” 16. U.S.C. § 1362(13). In addition, in 1994, Congress amended the MMPA to expand the definition of “harassment” to include “any act of pursuit, torment, or annoyance” that “has the potential to injure a marine mammal or marine mammal stock in the wild.” 16. U.S.C. § 1362(18). Acts are also prohibited that have “the potential to disturb a marine mammal or marine mammal stock in the wild by causing a disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering.” *Id.* NOAA, the enforcement agency of the MMPA, has recommended that the signs posted at the Children’s Pool are inadequate to protect the seals from disturbances, especially during the pupping season (which is part of their natural breeding and nursing habits). Thus, the

³ Extending the period of erection of the barrier to May 15th every year was not placed on the agenda for this Natural Resources and Culture Committee Meeting; however, it may be put on the agenda for comment and consideration at the next meeting.

⁴ A Coastal Development Permit is required when the erection of the barrier has the ability to affect public access to the beach and water. See Coastal Act §§ 30106, 30211; SDMC § 126.0702(c). To the extent that this process has not yet been started, it is advisable that it be started as soon as possible. Otherwise, the permit may not be in place in time for the pupping season this year.

Harbor Seals need to be better protected during their pupping season including the time immediately prior to the pups' births in which the seals need to haul-out and rest on the beach. This is also a crucial time when the mother seals are "sheltering" themselves and the pups in preparation for giving birth. The erection of the barrier two weeks earlier in December would serve the purposes of the MMPA and the recommendations of NOAA.

San Diego Municipal Code Makes it Unlawful to Disturb the Harbor Seals:

San Diego Municipal Code Section 63.0102(b)(10) makes it illegal to mistreat animals and specifically provides:

It is unlawful to take, kill, wound, disturb, or maltreat any bird or animal, either wild or domesticated, unless the same shall have been declared noxious by the City Manager and a permit issued for the killing of such noxious animals...

Thus, the SDMC echoes and bolsters what the MMPA provides. The seals, even though they are located on a public beach area, must not be disturbed during their pupping season, including the last trimester of their pregnancies, when they are on the beach to haul-out and rest before birth.

CONCLUSION

The erection of the barrier at the Children's Pool two weeks earlier, on December 15th rather than January 1st is advisable. The mother seals are in their last trimester of pregnancy in late December, and by erecting the barrier two weeks earlier, it would help the City comply with the recommendations made by NOAA to better protect the seals during their pupping season under the requirements of the MMPA a requirement that is echoed and bolstered by the SDMC. Any barrier erected, even seasonally will have to comply with the appropriate Coastal Development Permit procedures.

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