

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

**MEMORANDUM
MS 59**

(619) 533-5800

DATE: January 24, 2017

TO: Herman Parker, Director, Park and Recreation Department

FROM: City Attorney

SUBJECT: Assignment of City Authority to Take California Sea Lions Under the Marine Mammal Protection Act

INTRODUCTION

In June 2016, the City of San Diego's Park and Recreation Department (Department) hired a consultant to observe California sea lions (sea lions) in La Jolla Cove. The consultant recently issued a report concluding that the sea lion population is expanding and occupying new territory.¹ Doyle A. Hanan, Hanan & Associates, Inc., California Sea Lion Observations at La Jolla Cove Initial Investigation of Abundance and Behavior with Recommendations/Options (June 28, 2016) (Hanan Report). The expanding population of sea lions has caused an increase in the interaction of sea lions with people and property. *Id.* The Hanan Report contained several recommendations to "help temporarily move [sea lions] that are blocking pathways, stairs, or move them off sidewalks and park areas," including the use of deterrence methods at the beach and "problem interaction sites." *Id.*

Community members have asked the City to authorize a nonprofit organization and its volunteers to undertake certain deterrence methods under the Marine Mammal Protection Act of 1972 (MMPA). It is not clear from the request received by the Department whether the nonprofit organization intends to deter nuisance animals to prevent property damage and interactions with people, or undertake broader harassment authority in an effort to deter the sea lions from La Jolla Cove altogether. Therefore, both scenarios will be evaluated.

¹ The Hanan Report indicates that the sea lion population is increasing approximately five to six percent per year.

QUESTION PRESENTED

Does the MMPA allow the City to transfer its authority to a nonprofit organization to deter sea lions at La Jolla Cove without approval from the National Oceanic and Atmospheric Administration (NOAA)?

SHORT ANSWER

No. The MMPA does not authorize the City to transfer its authority to deter sea lions at La Jolla Cove to a nonprofit organization without prior approval from NOAA.

ANALYSIS

I. THE PLAIN LANGUAGE OF THE MMPA ALLOWS THE CITY TO DETER SEA LIONS AT LA JOLLA COVE UNDER CERTAIN CIRCUMSTANCES WITHOUT FIRST OBTAINING A PERMIT FROM NOAA

The Department has asked whether the City may allow a nonprofit corporation to take² sea lions at La Jolla Cove. Unless an exception or other statutory authority applies, no government official or private citizen may harass or deter a sea lion at La Jolla Cove without first obtaining a permit from NOAA.³ 16 U.S.C. §§ 1371, 1372, 1374. To determine what authority City officials and employees have under the MMPA and whether that authority may be assigned to a nonprofit organization, we first look to the language of the MMPA. See *Kingdomware Technologies, Inc. v. U.S.*, 136 S.Ct. 1969, 1976 (2016). “If the statutory language is unambiguous and ‘the statutory scheme is coherent and consistent’ . . . [t]he inquiry ceases.” *Id.* (quoting *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002)).

As a local government, the City may engage in certain actions that could result in a taking under the MMPA without a permit. The first exception from the MMPA’s broad prohibition on taking marine mammals allows individuals to deter a marine mammal to protect their personal safety or private property. 16 U.S.C. § 1371(a)(4). This exception contains similar authority for government employees to deter marine mammals to protect public property. *Id.* The relevant section of the MMPA states:

(4)(A) Except as provided in subparagraphs (B) and (C), the provisions of this chapter shall not apply to the use of measures—

² The MMPA defines “take” as “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.” 16 U.S.C. § 1362(13). A take includes “harassment,” which is broadly defined and includes any act of annoyance that “has the potential to disturb a marine mammal . . . by causing disruption of behavioral patterns.” 16 U.S.C. § 1362(18)(A). The Code of Federal Regulations clarifies a “take” as including “the restraint or detention of a marine mammal, no matter how temporary” and “the doing of *any other* negligent or intentional *act which results in disturbing* or molesting a marine mammal.” 50 C.F.R. § 216.3 (emphasis added).

³ Enforcement and administration of the MMPA with respect to sea lions is granted to the Secretary of Commerce and delegated to NOAA. 16 U.S.C. §§ 1374, 1362(12)(A)(i) (defining Secretary); *La Jolla Friends of the Seals v. Nat’l Oceanic & Atmospheric Admin.*, 630 F. Supp. 2d 1222, 1228 (2009).

- (i) by the owner of fishing gear or catch, or an employee or agent of such owner, to deter a marine mammal from damaging the gear or catch;
- (ii) *by the owner of other private property, or an agent, bailee, or employee of such owner, to deter a marine mammal from damaging private property;*
- (iii) by any person, to deter a marine mammal from endangering personal safety; or
- (iv) *by a government employee, to deter a marine mammal from damaging public property,*

so long as such measures do not result in the death or serious injury of a marine mammal.

16 U.S.C. § 1371(a)(4)(A) (emphasis added).

Section 109(h) of the MMPA [16 U.S.C. § 1379(h)] contains another exception to the prohibition on taking marine mammals. It allows government officials and employees to take marine mammals in the course of their official duties for certain purposes, and states:

- (h)(1) Nothing in this subchapter or subchapter V of this chapter shall prevent a Federal, State, or *local government official or employee* or a person designated under section 112(c) [16 U.S.C. § 1382(c)] from taking, *in the course of his or her duties as an official, employee, or designee*, a marine mammal in a humane manner (including euthanasia) if such taking is for –
 - (A) the protection or welfare of the mammal,
 - (B) the protection of the public health and welfare, or
 - (C) the nonlethal removal of nuisance animals.

16 U.S.C. § 1379(h)(1) (emphasis added).

II. THE LANGUAGE OF THE MMPA DOES NOT SUPPORT A TRANSFER OF THE CITY'S AUTHORITY TO TAKE SEA LIONS TO A NONPROFIT ORGANIZATION WITHOUT NOAA'S APPROVAL

Courts strictly construe exceptions to the general provisions of a statute. *U.S. v. State of California*, 504 F.2d 750, 754 (Temp. Emer. Ct. App. 1974). "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Andrus v. Glover Const. Co.*, 446 U.S. 608, 616-17 (1980). The MMPA's general provisions prohibit the taking of marine mammals without a permit. 16 U.S.C. §§ 1371, 1372, 1374. The exceptions to the MMPA's

broad prohibition on taking marine mammals would likely be narrowly construed in accordance with their plain language. *Kingdomware Technologies, Inc.*, 136 S.Ct. at 1976.

The first exception above allows a private citizen and the citizen's "agent, bailee, or employee" to deter sea lions for their personal safety and to prevent damage to their property. 16 U.S.C. § 1371(a)(4)(A). City employees may do the same to prevent damage to City property.⁴ *Id.* Based on the plain language of the statute and a narrow reading of this exception, a court would likely conclude that the MMPA exclusively grants the ability to deter sea lions from damaging public property to City employees and does not permit the City to assign that authority to a nonprofit organization without approval from NOAA.

Section 109(h) allows City officials or employees, in the course of their official duties, to take sea lions to protect the welfare of the animal or the public or to deter a nuisance animal. No permit from NOAA is required if the taking is accomplished in a humane manner and "[i]ncludes steps designed to insure return of such mammal . . . to its natural habitat."⁵ 50 C.F.R. § 216.22.

Additionally, section 109(h) authorizes "person[s] designated under section 112(c)" of the MMPA to take marine mammals "in the course of his or her duties as . . . [a] designee," but this exception is not likely applicable to a nonprofit organization seeking permission to take sea lions from the City. Section 112(c) refers to NOAA's authority to contract with designees to carry out the purpose of the MMPA.⁶ Construing this exception narrowly, NOAA may grant authority under section 109(h) to its contractors or designees, but the plain language of the statute would not support a determination that the City has the same authority without obtaining approval from NOAA. Based on the plain language and a narrow reading of this exception, a court would likely conclude that section 109(h) only applies to City officials, acting in the course of their official duties, and does not authorize the City to allow a nonprofit organization to take sea lions at La Jolla Cove without seeking approval from NOAA.

⁴ The MMPA states that NOAA is responsible for publishing guidelines "for use in safely deterring marine mammals" when an individual or government official is acting under the authority in this exception. 16 U.S.C. § 1371(a)(4)(B) and (C). Formal guidelines have not yet been published, but NOAA has issued articles on its website with guidance to address problem sea lions. *See* NOAA Fisheries, *Deterring Problem Seals, California Sea Lions & Steller Sea Lions* (Aug. 2014) http://www.westcoast.fisheries.noaa.gov/protected_species/marine_mammals/deterring_qa.html.

⁵ The City must also report each taking under section 109(h) in a written report submitted to NOAA. 50 C.F.R. § 216.22.

⁶ Section 112(c) states: "[t]he Secretary may enter into such contracts, leases, cooperative agreements, or other transactions as may be necessary to carry out the purposes of this subchapter or subchapter V of this chapter and on such terms as he deems appropriate with any Federal or State agency, public or private institution, or other person." 16 U.S.C. § 1382(c).

Herman Parker, Director
Park and Recreation Department
January 24, 2017
Page 5

CONCLUSION

The MMPA allows City officials, in the course of their official duties, to take sea lions at La Jolla Cove under certain circumstances; however, based on the plain language of the MMPA and narrow construction of exceptions to its broad prohibition on taking marine mammals, the language of the statute does not support the City allowing a nonprofit organization to engage in the same takings without approval from NOAA.

MARA W. ELLIOTT, CITY ATTORNEY

By /s/ Heather M. Ferbert
Heather M. Ferbert
Deputy City Attorney

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cc: David Graham, Deputy Chief Operating Officer