

UNITED STATES DEPARTMENT OF COMMERCE  
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION  
WASHINGTON, D.C. 20230

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In the Matter of:	)	
	)	Docket No.
Lilo Maria Creighton,	)	SW030133
	)	
Respondent	)	
	)	
_____	)	

**ORDER MODIFYING INITIAL DECISION**

This matter arises from the appeal by Respondent of an Initial Decision issued April 20, 2005 by an Administrative Law Judge (ALJ) in the above-captioned case. This case involves the issuance July 3, 2003, of a Notice of Violation and Assessment (NOVA) by the National Oceanic and Atmospheric Administration (NOAA) Office of Law Enforcement for an alleged violation of the Marine Mammal Protection Act (“MMPA” or “the Act”), 16 U.S.C. 1361, *et seq.*, and implementing regulations at 50 C.F.R. Part 216. Specifically, the NOVA charged Respondent Lilo Creighton with taking by harassment at least one marine mammal in waters or on lands under the jurisdiction of the United States. NOAA sought a fine of \$1000.

Respondent filed a Request for Hearing contesting the violation and the penalty. After a hearing before an Administrative Law Judge (ALJ), an Initial Decision was issued finding Respondent in violation of the MMPA when she swam to Children’s Pool Beach in La Jolla, California and flushed approximately 35 harbor seals from their haul out on the beach into the water in a manner which had the potential to disturb a marine mammal or marine mammal stock in the wild by disrupting their behavioral patterns in violation of 16 U.S.C. 1372(a)(2)(A) and 50 C.F.R. § 216.3, 216.11(b). The ALJ assessed a civil penalty of \$1,000.

Respondent requested discretionary review from the Administrator of NOAA of the ALJ’s Initial Decision pursuant to 15 C.F.R. § 904.273. On March 7, 2006, the Administrator issued an Order Granting Discretionary Review, In Part, and Denying Discretionary Review, In Part (Order). The parties were directed to brief two issues:

1. 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 affect the decision in this case?

2. 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?

The parties have briefed these two issues. For the reasons explained more fully below, the decision of the ALJ is modified as described in this Order.

### I. FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE ALJ

Following an evidentiary hearing held January 22 and 23, 2004 and February 24 and 25, 2004, on April 20, 2005 the ALJ issued a written opinion and order which made, inter alia, the following findings of fact and conclusions of law:

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 which allows the citizens of San Diego the full enjoyment of the tidal and submerged lands, including for swimming, fishing, parking, playgrounds, recreational purposes and a bathing pool for children. (Finding No. 1). The same year, San Diego built a cement and stone tidal wall on the shores of La Jolla to create a tidal bathing pool for the children and citizens of San Diego, which was Children's Pool Beach. (Finding No. 2). For approximately 70 years, the people of San Diego used Children's Pool Beach for swimming and sunbathing. (Finding No. 5).

During the mid-1990's, harbor seals began regularly hauling out on Children's Pool Beach to rest and nurse their young. (ALJ Initial Decision p. 3). By July, 1999, the level of seal use of Children's Pool Beach was such that local health officials closed the beach to swimming due to contamination from seal feces. (ALJ Initial Decision p. 4). Later, when people were regularly observed approaching the hauled out seals and even touching them, the City erected a rope barrier on the beach intended to keep people and seals separated. Id.

Harbor seals come to shore daily to rest, breed, give birth, and nurse, among other reasons. (Finding No. 6). This behavior, called haul out, is critical behavior for the seals. Id. In Southern California, the breeding season for seals, also known as the pupping season, occurs annually from January to mid-April. (Finding No. 9). Bonding between female seals and their pups, which occurs by sense, sound, and smell, is critical behavior for seals to identify their pups. (Finding No. 11). Disturbances during the nursing period can affect the bonding between seals and their pups, and if the mother perceives a threat to herself or her pup, she will stampede into the water for safety. (Finding No. 12).

On March 23, 2003, Respondent participated in a group swim which began in La Jolla Cove and ended at Children's Pool Beach. (Finding No. 30). The purpose of the swim was to demonstrate that the waters around the Children's Pool Beach were open, and humans and seals could share the water and beach area there. (Finding No. 31). Prior to the swim, organizers contacted the media, and the local newspaper published a story about the swim on March 21, 2003, two days

prior to the event. (Finding No. 32). The event occurred during the pupping season for harbor seals, and mother-pup pairs were present on Children's Pool Beach on the day of the event. (Findings No. 33, 34). Organizers also contacted the National Marine Fisheries Service (NMFS) before the event and sought advice on how the swimmers should behave to avoid a taking under the MMPA. (Findings No. 35, 36). The NMFS representative recommended a 25-50 foot buffer zone between swimmers and seals, but noted that because the swim was occurring during pupping season, the 25-50 foot buffer may not be adequate. (Finding No. 37).

On the morning of the swim and before it began, Respondent joined approximately 25 people at 9:30 am at La Jolla Cove for the swim to Children's Pool Beach. (Finding No. 40) Prior to the swim, the event organizer instructed swimmers, including Respondent, not to harass the seals and to exit on the north or east side of the beach by the sea wall. (Finding No. 41). Nonetheless, the ALJ found that Respondent did not know the purpose of the swim. (ALJ Initial Decision pp. 22-23). At 9:47 am, Respondent and others swam into the Children's Pool Beach area and several seals took notice of the swimmers by raising their heads and looking in the direction of the oncoming swimmers. (Finding No. 42). At 9:48 am, Respondent was the first swimmer to land in the middle of Children's Pool Beach and approximately six seals flushed into the water. (Finding No. 43). Respondent did not exit the water where she had been told because she was attempting to avoid being pushed toward rocks. (ALJ Initial Decision p. 23 n. 14). Respondent then walked onto the beach and approximately 29 more seals flushed around her into the water. (Finding No. 44). The seals returned to Children's Pool Beach at 4:15 pm the same day. (Finding No. 45).

The ALJ concluded that on the morning of March 23, 2003, Respondent harassed the harbor seals and violated the MMPA when she swam onto Children's Pool Beach and came ashore, by disturbing the harbor seals' critical behavior patterns. (Ultimate Findings and Conclusions of Law No 9, 11). Moreover, the ALJ concluded that Respondent's actions constituted Level B harassment under the MMPA.<sup>1</sup> (Ultimate Findings and Conclusions of Law No 10).

In addition to the findings of fact and conclusions of law referenced in this Section I, the ALJ made other findings of fact and conclusions of law regarding facts and circumstances raised by Respondent in her defense but which were not directly relevant to the violation charged. For example, the ALJ made numerous factual findings regarding the historical ownership and use of Children's Pool Beach, and efforts to establish a marine mammal reserve at the beach. The ALJ's decision also included discussions of enforcement policy and opinions regarding the constitutionality of some provisions of the MMPA which, given the ALJ's findings of fact with respect to the NOVA, were not relevant to the violation charged. Only those findings of fact and conclusions of law referenced in this Section I of this decision are included within and a part of NOAA's final decision in this matter.

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1/ Level B harassment under the MMPA means "any act of pursuit, torment, or annoyance which . . . 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)(C).

## II. DISCUSSION

The Respondent sought discretionary review on diverse issues. This discretionary appeal has been granted with respect to the two issues identified in the Introduction section above. The parties have briefed these issues and I will address each one in turn.

- 1. 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 affect the decision in this case?**

### Respondent's Position

The Respondent asserts the Administrator has the legal authority to find the Level B harassment provisions do not apply to marine mammals from a population that is in excess of Optimum Sustainable Population (OSP) and growing. However, she provides no legal support for this position. As for how such an interpretation or policy should affect the decision in this case, Respondent argues it would be reasonable for the Agency to “compromise” her case and “remit” the fine assessed by the ALJ. She asserts she is “a member of the regulated public and thereby has an interest in being free from MMPA regulation,” and her “interest in being free from government regulation outweighs the interest of the Agency using the level B Harassment provisions to protect marine mammals that are part of a population that is in excess of OSP and growing.”

Respondent also argues the MMPA personal safety exemption precludes enforcing the MMPA in this case.<sup>2</sup> The MMPA provides the take provisions of the Act “shall not apply to the use of measures . . . by any person, to deter a marine mammal from endangering personal safety . . . so long as such measures do not result in the death or serious injury of the marine mammal.” 16 U.S.C. § 1371(a)(4)(A).

### The Enforcement Official's Position

The Enforcement Official<sup>3</sup> asserts the Administrator does not have authority to interpret the law

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2/ Respondent did not assert the personal safety defense during the proceedings below, nor did the ALJ consider its applicability in the Initial Decision. “Issues of fact or law not argued before the [ALJ] may not be raised on review unless they were raised for the first time in the initial decision, or could not reasonably have been foreseen and raised by the parties during the hearing. The Administrator will not consider new or additional evidence that is not a part of the record before the [ALJ].” 15 C.F.R. § 904.273(d).

3/ The Enforcement Official is represented by enforcement attorneys within the NOAA General Counsel's Office. Other attorneys in NOAA headquarters advise the Administrator with respect to Respondent's request for discretionary review. The enforcement attorneys representing the Enforcement Official are barred from involvement in advising the Administrator and from discussing the matter with the attorneys advising the Administrator.

to exclude from Level B harassment acts affecting marine mammals that are part of a population that is in excess of OSP and growing. In support of this position, the Enforcement Official relies on the statutory language of the MMPA which affords no different level of protection to marine mammal populations that are at OSP from those that are below OSP. The take prohibitions of 16 U.S.C. § 1372(a)(2)(A) explicitly apply to “any marine mammal” (emphasis added).

Nonetheless, the Enforcement Official notes the Administrator does have the discretion to use NOAA’s limited enforcement resources to most effectively and efficiently carry out its responsibilities under the MMPA. The Enforcement Official relies on the statutory language itself, which states that persons who violate the MMPA “may be assessed a civil penalty...,” 16 U.S.C. § 1375(a)(1) (emphasis added), and notes “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). Thus, the Enforcement Official asserts, the Administrator has statutory authority to set enforcement policy under the MMPA that would not include enforcement of Level B Harassment acts having the potential to disturb marine mammals that are part of a population that is in excess of OSP and growing.<sup>4</sup> However, the Enforcement Official believes that any future policy should not affect the outcome of this case. The Enforcement Official believes the facts of this case, particularly that Respondent made no attempt to avoid the seals and that her violation occurred during pupping season, would warrant prosecution under any enforcement policy.

#### Decision On Issue #1

Having considered the parties’ arguments, citations to the administrative record, and legal authorities, I conclude the Administrator does not have authority to interpret the MMPA to exclude all marine mammal stocks at or above OSP from the Level B “take” prohibitions of the statute. The statutory protection of the MMPA against a taking applies to “any marine mammal.” 16 U.S.C. § 1372(a)(emphasis added). Had Congress intended categorically to eliminate protection of marine mammals from Level B harassment based upon their conservation status, it could have so provided. It did not.

However, the Administrator has the discretion to set the enforcement priorities for NOAA, including priorities regarding which marine mammal species and populations, and which human activities, warrant expenditure of the Agency’s limited management and enforcement resources. Section 1375(a)(1) of the MMPA provides that “any person who violates any provision of this subchapter . . . may be assessed a civil penalty by the Secretary” and “any such civil penalty may be remitted or mitigated by the Secretary for good cause shown.” In contrast, with respect to

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4/ The Enforcement Official submitted a draft of guidance for prioritization of enforcement of Level B Harassment violations for certain West Coast pinniped species. I decline to adopt such guidance in the context of this administrative review. Through various delegations of authority since NOAA was established in 1970 by Reorganization Plan No. 4, the Administrator has delegated all authority for administering the MMPA to the Assistant Administrator for Fisheries. Such guidance, if it is to be adopted, should be issued by NMFS through its normal procedures.

criminal enforcement, section 1375(b) provides “any person who knowingly violates any provision of this subchapter . . . shall, upon conviction, be fined . . . .” The use of the term “may” with regard to the imposition of civil penalties indicates that the Administrator has discretion in such matters. Accordingly, I conclude the Administrator also has the authority to adopt a policy not to prosecute certain acts otherwise constituting Level B harassment, as defined in the Marine Mammal Protection Act, for marine mammals that are part of a population that is in excess of OSP and growing.

Despite the fact the Administrator has the authority to adopt such a policy, I decline to do so at this time or for this case. The ALJ’s findings of fact set forth in Section I above establish Respondent engaged in activities which constitute Level B harassment of marine mammals. Respondent has provided no basis on which to challenge the relevant findings. Respondent’s claim she did not intend to harass the harbor seals at Children’s Pool Beach is not a defense, because liability under the MMPA does not depend on the Respondent’s intent.

Respondent also argues that she is entitled to the benefit of the MMPA personal safety exemption which provides the Act “shall not apply to the use of measures . . . by any person, to deter a marine mammal from endangering personal safety . . . so long as such measures do not result in the death or serious injury of the marine mammal.” 16 U.S.C. § 1371(a)(4)(A). Respondent did not assert this defense during the proceedings below, and therefore she may not raise it for the first time in this appeal. However, even if she had raised the personal safety exemption before the ALJ, it would not apply under the facts of this case. Respondent presented no evidence she took any measures to deter seals from endangering her personal safety and there is no evidence in the record Respondent’s personal safety was threatened by the seals. Instead, Respondent’s participation in the swim, and her effort to negotiate the water currents during the swim, placed her in a position on the beach near the seals which she had been warned in advance to avoid. Even after Respondent safely reached the beach and caused six seals to flush into the water, she continued up onto the beach without regard to the seals nearby, causing 29 more seals to flush into the water. The personal safety exemption provided by 16 U.S.C. § 1371(a)(4)(A) does not apply under these facts.

Accordingly, I will affirm the ALJ’s finding that Respondent committed an unlawful take by harassing harbor seals in the waters and lands of Children’s Pool Beach in violation of the MMPA. I will, however, reduce the fine imposed on Respondent. The Enforcement Official sought, and the ALJ imposed, a fine upon Respondent in the amount of \$1000. In assessing the fine, the ALJ concluded he was limited to imposing a fine within the range of \$500 to \$8,000. Even though the ALJ noted a fine of \$1000 was at the low end of the applicable range and was supported by the evidence, he also suggested he would have imposed a smaller fine if he had greater discretion.

The Administrator has discretion to reduce penalties imposed for infractions of the MMPA. 16 U.S.C. § 1375 (“Any such civil penalty may be remitted or mitigated by the Secretary for good cause shown”). Based on the ALJ’s specific findings that Respondent credibly testified she was not aware of the purpose of the swim event in which she participated and that she exited the

water where she did to avoid getting pushed toward rocks, I am reducing Respondent's fine to \$200. A fine of \$200 is sufficient to vindicate the purposes of the MMPA under these facts.

**2. 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?**

*Respondent's Position*

The Respondent asserts that enforcement of the MMPA in this case infringes upon her constitutional rights. Respondent claims that, because the California Land Grant of Children's Pool Beach to San Diego required that it be maintained forever as a place for public swimming and recreation, she had a constitutional right to swim into Children's Pool Beach and walk up the beach "in order to protest the City's action, erecting a rope barrier at Children's Pool Beach in 1999; and to protest the County's action, maintaining [a] "Closure" sign at Children's Pool from July 1999, through March 20, 2003" See Respondent's Opening Brief, at 3-4. She cites to the First and Ninth Amendment in support of her claim of constitutional protection.

*The Enforcement Official's Position*

The Enforcement Official asserts neither the California Land Grant nor the actions of the San Diego County or City governments preclude enforcement of the MMPA in this case. The Enforcement Official acknowledges the 1931 Land Grant, and the subsequent implementation of its terms by creating Children's Pool Beach for swimming and recreation, was a valid exercise of state sovereignty. However, the Enforcement Official argues the Land Grant cannot supersede federal law or preclude enforcement of the MMPA. The Enforcement Official argues Congress enacted the MMPA using its "Commerce Clause" power to regulate interstate commerce and preempt state laws regarding the taking of marine mammals within the state. Moreover, the Enforcement Official asserts "the Supremacy Clause of the Constitution, Art. VI, cl. 2, invalidates state laws that 'interfere with, or are contrary to, federal law.'"

The Enforcement Official also argues Respondent's Ninth Amendment argument is meritless. The Ninth Amendment provides: "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. The Enforcement Official refutes Respondent's argument by citing case law which holds the Ninth Amendment does not independently secure any constitutional rights for purposes of making out a constitutional violation. As such, according to the Enforcement Official, the Ninth Amendment does not create a reviewable right.

*Decision on Issue #2*

Having considered the arguments of the parties, citations to the administrative record and legal

authorities, I conclude the 1931 California Land Grant and subsequent County and State actions regarding Children's Pool Beach do not preclude enforcement of the MMPA in this case. Relevant case law upholds the constitutionality of similar statutes protecting other species, thus indicating the MMPA is a valid exercise of Congress' Commerce Clause power. United States v. Bramble, 103 F.3d 1475, 1480-82 (9<sup>th</sup> Cir. 1996)(Eagle Protection Act was valid exercise of Commerce Power); National Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1046 (D.C. Cir. 1997), cert. denied, 524 U.S. 937 (1998)(application of "taking" provision of Endangered Species Act with respect to a fly found only in California was a valid exercise of Commerce Clause power); see also Matter of Stanley Ferris, Wilfred Ferris, 2 O.R.W. 260, 266 (NOAA 1980).

Additionally, Respondent has not shown the federal government's enforcement of the MMPA prohibited her from exercising rights she may have to swim at Children's Pool Beach, to walk on the beach, or to protest state or local government actions regarding the beach. However, even if enforcement of the MMPA necessarily had impaired her rights to use the beach, state law must yield to federal law pursuant to the Supremacy Clause of the U.S. Constitution, to the extent it interferes with 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. Laboratories, Inc., 471 U.S. 707 (1985)). Thus, Respondent's assertion of violations of her First and Ninth Amendment rights are without merit.<sup>5</sup>

Finally, I note the MMPA provides an exception to the taking of marine mammals for "the use of measures . . . 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)(iv). If the presence of harbor seals at Children's Pool Beach resulted in damage to the beach such that local government officials felt compelled to close the beach to human use, the responsible local officials had a mechanism under the MMPA to take measures to deter such damage in order to keep the beach open.

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5/ Respondent's constitutional arguments are unavailing for other reasons as well. The Ninth Amendment does not, by itself, create any reviewable rights. Schowengerdt v. United States, 944 F.2d 483, 490 (9<sup>th</sup> Cir. 1991), cert. denied, 503 U.S. 951 (1992); San Diego County Gun rights Committee v. Janet Reno, 98 F.3d 1121 (9<sup>th</sup> Cir. 1996).

Moreover, Respondent never raised a First Amendment argument at the hearing before the ALJ, and she may not raise it for the first time in this appeal. However, even if she had raised the argument below, it would have been inconsistent with her sworn testimony about the events that took place on March 23, 2003. Respondent now argues that on that day she was exercising her First Amendment right to swim into Children's Pool Beach and walk up the beach to protest the City's actions in erecting a rope barrier at the beach in 1999 and to protest the County's maintaining a closure sign at the beach from 1999 to 2003. However, at the hearing Respondent testified that she did not know the purpose of the swim, that she was just going for a swim with her friends, and that the only reason she went onto Children's Pool Beach where she did was because the current kept her from accessing the stairs at the far end of the beach, where the swimmers were instructed to exit the water. The ALJ credited Respondent's testimony on these points, which is inconsistent with her assertion now that her activities were a protest. Accordingly, the evidence before the ALJ did not support a First Amendment argument.

## ORDER

Accordingly, for all the reasons set forth above, I affirm the ALJ's decision that Respondent violated 16 U.S.C. 1372(a)(2)(A) and 50 C.F.R. § 216.3, 216.11(b) of the MMPA when she swam to Children's Pool Beach in La Jolla, California and flushed approximately 35 harbor seals from their haul out on the beach into the water in a manner which had the potential to disturb a marine mammal or marine mammal stock in the wild by disrupting their behavioral patterns. The ALJ's decision to assess a civil penalty of \$1,000 is hereby modified, and the penalty is hereby reduced to \$200.

This Order constitutes the final administrative action of NOAA and becomes effective for the purpose of judicial review on the date of service.

Dated \_\_\_\_\_

\_\_\_\_\_  
Conrad C. Lautenbacher, Jr.  
Vice Admiral, U.S. Navy (Ret.)  
Under Secretary of Commerce for Oceans  
and Atmosphere, and Administrator of the  
National Oceanic and Atmospheric

Administration

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing ORDER MODIFYING INITIAL DECISION was mailed this \_\_\_\_\_ day of \_\_\_\_\_, 2006, by first class, postage prepaid, to the following:

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