



**UNITED STATES DEPARTMENT OF COMMERCE**  
**National Oceanic and Atmospheric Administration**  
NATIONAL MARINE FISHERIES SERVICE

Southwest Region  
501 West Ocean Boulevard, Suite 4200  
Long Beach, California 90802-4213

OCT 17 2005

In response refer to:  
151422SWR2005PR20267:CEC

April Penera  
City Manager's Office  
City of San Diego  
202 "C" Street  
San Diego, California 92101

Dear Ms. Penera:

I am sending this letter in response to the September 26, 2005, letter from Shannon Thomas, Deputy City Attorney of the City of San Diego, notifying the National Marine Fisheries Service (NMFS) that the City of San Diego intends to exercise its authority under section 109(h) of the Marine Mammal Protection Act (MMPA), 16 U.S.C. § 1379(h), to intentionally harass harbor seals at Children's Pool Beach in La Jolla, CA.

Section 109(h) of the MMPA authorizes Federal, State or local governments to intentionally take marine mammals, if the taking is done in a humane manner and is for: (a) the protection or welfare of the mammal; (b) the protection of the public health and welfare; and (c) the nonlethal removal of nuisance animals. This authority is limited to Federal, State or local government officials or employees taking marine mammals in the course of their duties as an official, employee, or designee.

My understanding based on our meeting with you on September 16, 2005, is that the City of San Diego intends to excavate sand from Children's Pool Beach in order to restore the beach for exclusive human use and that the City will be taking further actions as necessary to permanently exclude marine mammals from Children's Pool Beach in order to ensure the beach is safe for human use. NMFS agrees that the MMPA allows the City to restore the beach for exclusive human use provided the City determines one or more of the above provisions of section 109(h) apply and can document the decision. No formal approval or permit is needed in order for the City to take action under section 109(h).

The City will be required to report every six months to the Secretary of Commerce regarding any take of marine mammals carried out under authority of section 109(h). Generally, the report must include a description of: 1) the animal(s) involved; 2) the circumstances surrounding the taking; 3) the method of taking; 4) the name and official position of the official or employee involved; 5) the disposition of the animal, including in cases where the animal has been retained in captivity, a description of the place and means of confinement and the measures taken for its maintenance and care; and 5) such other information that the Secretary may require. See 50 CFR 216.22(b).



If the sand removal operations are expected to occur during harbor seal pupping season (January through April), then NMFS recommends the City consider removing the animals (in compliance with section 109(h)) from the area by November 2005 to ensure they have left the area before the beginning of pupping season.

NMFS appreciates the opportunity to provide guidance regarding the City's responsibility and authority under the MMPA and looks forward to providing technical assistance as the City moves forward with this project.

Sincerely,



Rodney R. McInnis  
Regional Administrator

cc: Shannon Thomas, Office of the City Attorney