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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

LA JOLLA FRIENDS OF THE SEALS, a
nonprofit organization; and JAMES H.N.
HUDNALL, JR., an individual,

Plaintiffs,

vs.

NATIONAL OCEANIC AND
ATMOSPHERIC ADMINISTRATION
NATIONAL MARINE FISHERIES
SERVICE (“NMFS”), an agency of the U.S.
Dept. of Commerce; CARLOS M.
GÚTIERREZ, Secretary of Commerce;
JAMES W. BALSIGER, Acting Director of
NMFS; RODNEY MCINNIS, Acting
Regional Administrator of NMFS; JAMES
LECKY, Director of Office of Protected
Resources at NMFS; City of San Diego; and
Does 1 to 100,

Defendants.

CASE NO. 08cv1847 WQH (POR)
ORDER

HAYES, Judge:

The matter before the Court is Defendant City of San Diego’s motion to confirm the continuation of the Court’s order prohibiting harassment or dispersal of the seal colony at the Children’s Pool (Doc. # 56).

On October 9, 2008, Plaintiffs filed a Complaint against the Defendant City of San Diego, and Defendants National Oceanic and Atmospheric Administration National Fisheries Service (NOAA) and other federal officials (“Federal Defendants”). The Complaint asserts jurisdiction over this action pursuant to 28 U.S.C. § 1331 and alleges the following two claims

1 for relief: 1) writ of mandate against Defendant City of San Diego requiring resolution of a
2 substantial question of federal law; and 2) judicial review of agency action under 5 USC § 702
3 to prevent NOAA from ceding its authority to the City to interpret and apply the Marine
4 Mammal Protection Act.

5 On October 22, 2008, this Court entered an order ruling upon “Plaintiff’s motion for a
6 temporary restraining order requiring the Defendant City of San Diego to maintain the status
7 quo regarding the colony of harbor seals at Children’s Pool until the date set for the hearing
8 on Plaintiff’s motion for a preliminary injunction. (Doc # 3).” (Doc. # 11). This Court stated:
9 “[S]erious questions going to the merits are raised and the balance of hardships tips sharply
10 in favor of the moving party. This Court will enter an order to preserve the status quo and
11 prevent irreparable harm before a preliminary injunction hearing may be held.” *Id.* The Order
12 stated:

13 IT IS HEREBY ORDERED that the Defendant City of San Diego, its agents,
14 servants, employees, and representatives, and all persons acting in concert or
15 participating with them, are hereby enjoined and restrained through the hearing
16 date of November 25, 2008 from engaging in, committing, or performing,
17 directly or indirectly, any and all of the following acts: harassing or dispersing
18 the colony of harbor seals at Children’s Pool Beach in La Jolla, California.

17 IT IS FURTHER ORDERED that Defendants, and each of them, shall appear
18 in Courtroom 4 of this Court, located at 940 Front Street, San Diego, California,
19 on November 25, 2008 at 9:30 a.m., to show cause, if any, why this order should
20 not maintain in effect during the pendency of this action.

19 (Doc. # 11 at 2).

20 On November 13, 2008, Plaintiffs and Defendant City of San Diego jointly moved this
21 Court to continue the hearing on Plaintiffs’ motion for preliminary injunction and the Federal
22 Defendant’s motion to dismiss in order “to allow the parties to explore the possibility of
23 settlement before expending additional resources in litigating this case.” (Doc. # 25 at 2). The
24 joint motion signed by counsel for all parties in this litigation stated that “Plaintiffs and the
25 City are in agreement that this Court’s temporary restraining order . . . of October 22, 2008
26 should remain in effect until the postponed hearing on the [Plaintiffs’ motion for preliminary
27 injunction and the Federal Defendant’s motion to dismiss].” *Id.*

28 On April 28, 2009, this Court entered an order granting the motion to dismiss filed by

1 the Federal Defendants on the grounds that this federal court lacked subject matter jurisdiction.
2 The Court further ordered Plaintiffs and Defendant City of San Diego “to file briefs addressing
3 the jurisdiction of this Court to proceed on the merits of the first claim within 30 days of the
4 date of this order.” (Doc. # 53 at 14).

5 On May 14, 2009, Defendant City of San Diego filed the motion before this Court to
6 clarify “whether this Court’s order forbidding seal harassment and dispersal remains in effect.”
7 (Doc. # 56-2 at 5). Defendant City of San Diego contends that the temporary restraining order
8 entered on October 22, 2008 remains in effect by agreement of the Defendant until this Court
9 considers the Plaintiffs’ pending motion for a preliminary injunction. Plaintiffs state that they
10 “have no opposition to the Defendant City’s Motion to Confirm the Continuation of the
11 Court’s Order Prohibiting Harassment or Dispersal of the Seal Colony at the Children’s Pool.”
12 (Doc. # 63).

13 On May 26, 2009, Defendant City of San Diego requested an extension of time and will
14 file supplemental briefing in support of continued jurisdiction addressing the first claim for
15 relief on June 9, 2009. This Court ordered that no further extensions of time will be granted.
16 On May 28, 2009, Plaintiffs filed supplemental briefing in support of continued jurisdiction
17 addressing the first claim for relief against the Defendant City of San Diego.


18 **RULING OF THE COURT**

19 Consent to extend a temporary restraining order until hearing upon the motion for
20 preliminary injunction is authorized by Rule 65(b)(2) of the Federal Rules of Civil Procedure.
21 The joint motion signed by counsel for all parties in this litigation stated that “Plaintiffs and
22 the City are in agreement that this Court’s temporary restraining order . . . of October 22, 2008
23 should remain in effect until the postponed hearing on the [Plaintiff’s motion for preliminary
24 injunction and the Federal Defendant’s motion to dismiss].” (Doc. # 25 at 2). Defendant City
25 of San Diego has agreed that the temporary restraining order of October 22, 2008 remains in
26 effect until the motion for preliminary injunction is resolved. Plaintiff’s motion for
27 preliminary injunction against Defendant City of San Diego remains pending before this Court.
28 This Court has ordered the parties to brief the issue of jurisdiction over the first claim for relief

1 in this federal court. The issue of jurisdiction must be decided prior to any determination on
2 the merits of Plaintiff's motion for preliminary injunction. The temporary restraining order
3 of October 22, 2008 remains in effect until further order of this Court.

4 IT IS HEREBY ORDERED that Defendant City of San Diego's motion to confirm the
5 continuation of the Court's order prohibiting harassment or dispersal of the seal colony at the
6 Children's Pool (Doc. # 56) is granted.

7 DATED: June 1, 2009

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9 **WILLIAM Q. HAYES**
United States District Judge

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