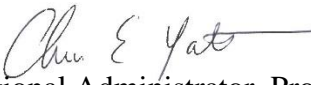




UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
West Coast Region
501 West Ocean Boulevard, Suite 4200
Long Beach, CA 90802

June 4, 2019

MEMORANDUM FOR: Barry A. Thom
Regional Administrator

FROM: Chris Yates 
Assistant Regional Administrator, Protected Resources

SUBJECT: Procedures to Coordinate Issuance of Section 120, subsection (f)
Permits of the Marine Mammal Protection Act – **DECISION
MEMORANDUM**

I request your concurrence with my recommendation to approve these procedures pursuant to section 120(f)(2)(C) of the Marine Mammal Protection Act (MMPA).

Public Law 115-329, the Endangered Salmon Predation Prevention Act of 2018, amended Public Law 103-238, the MMPA Amendments of 1994, by replacing section 120, subsection (f) of the MMPA with a new subsection (f): *Temporary Marine Mammal Removal Authority on the Waters of the Columbia River or its Tributaries*. This new subsection requires the Secretary to establish procedures to coordinate issuance of permits [authorizations] pursuant to section 120(f).

This memorandum was developed in response to the requirements in Public Law 115-329 amending section 120(f) where it required the Secretary, and by delegation, the National Marine Fisheries Service (NMFS) to establish procedures to coordinate issuance of authorizations under section 120(f)(2)(C). This memorandum establishes those procedures for eligible entities regarding application requirements and program implementation procedures for prospective and approved authorizations issued to an eligible entity under section 120(f).

MMPA SECTION 120(f)(2)(C) - COORDINATION

The Secretary shall establish procedures to coordinate issuance of permits [authorizations] under this subsection, including application procedures and timelines, delegation and revocation of permits to and between eligible entities, monitoring, periodic review, and geographic, seasonal take, and species-specific considerations.

Background

Section 120(b)(2) specifies the requirements for an application submitted under section 120(b)(1), and any application submitted under section 120(b) must produce sufficient evidence to warrant establishing a Pinniped-Fishery Interaction Task Force (Task Force) as called for in



section 120(c)(1) to address the problem interaction described in the application. Furthermore, in considering whether to approve or deny an application, the Task Force and the Secretary are required to consider the information included in the application, the public comments¹ on the application, and the information specified in section 120(d). In making its recommendation to the Secretary to approve or deny an application, the Task Force is also required to provide the Secretary:

A description of the specific individual or individuals, the proposed location, time, and method of such taking, criteria for evaluating the success of the actions; and the duration of the intentional lethal taking authority²; and suggest nonlethal alternatives, if available and practicable, including a course of action.

Thus any application submitted under section 120 must include the above-mentioned information in order for the Task Force to make its recommendation and for the Secretary to make a decision to approve or deny an application.

Application Procedures and Timelines

Section 120(f) does not specify the information required to be included in an application, but it does stipulate that the timelines and procedures described in section 120(c) shall apply in the same manner such timelines apply under section 120(b). Therefore, it is our interpretation that there is no functional or procedural distinction regarding the information requirements that need to be included in an application submitted by a state under section 120(b) or by an eligible entity under section 120(f) since the procedures for approval or denial of an application were not amended.

Exception

Section 120(b)(1) establishes the criteria whereby a state may apply to the Secretary requesting authorization for the intentional lethal taking of individually identifiable pinnipeds which are having a significant negative impact on the decline or recovery of salmonid fishery stocks. Section 120(b)(2) requires that an application ... *shall include a means of identifying the individual pinniped or pinnipeds and expected benefits of the taking*. Public Law 115-329 superseded these requirements with paragraphs (7) and (8) under section 120(f). Therefore, for the purpose of section 120(f) applications and by statutory exception, Congress has defined the criteria regarding *individually identifiable* and *significant negative impact*. As such, and even though an application submitted under section 120(f) is still required to provide a detailed description of the problem interaction (or future potential interaction), an applicant is not

¹ In determining whether an application has produced sufficient evidence to warrant establishing a Task Force, the Secretary is required to publish a notice in the *Federal Register* requesting public comment on the application (MMPA section 120(c)(1)).

² To assist the Task Force with its deliberations, recommendation, and alternatives, applications must include a description of sea lion predation or consumption estimates on at-risk fish stocks, a detailed description of where and when sea lion removals will occur, including prospective removals, and a detailed description of the equipment and methods to be used regarding how sea lions will be removed, e.g., number of floating traps, use of anesthesia administered remotely via established wildlife darting techniques, in-water retrieval, captured, handled, held, restrained, transferred, killed, and disposed of; and a comprehensive analysis on the range of expected benefits of the taking of sea lions on at-risk fish stocks.

required to include in their application a means of identifying the individual sea lion or sea lions, or demonstrate that the sea lion predation impacts on at-risk fish stocks is having a significant negative impact on the decline or recovery of at-risk anadromous fish such as salmon and steelhead.

Furthermore, we interpret that the information provided in an application describing the location of the pinniped-fishery interactions, how and when the interactions occur, how many individual sea lions are involved, and the impact sea lion predation is having on at-risk fish stocks could be met by more broadly describing the locations and times where sea lions are currently abundant, and locations where they are less abundant but presence has been documented. For areas where predation impacts on at-risk fish stocks has not been documented, but is likely to occur in the future within the geographic area defined in paragraphs (7) and (8) of section 120(f), an application may use the above-mentioned sea lion predation impact analysis as a proxy to estimate the impact on at-risk fish stocks in those areas in the absence of the removal action.

Section 120(f)(2)(C), requires the Secretary to establish procedures to coordinate issuance of permits [authorizations] under this subsection, including application procedures and timelines, delegation and revocation of permits to and between eligible entities, monitoring, periodic review, and geographic, seasonal take, and species-specific considerations. Therefore, in establishing the procedures set forth in section 120(f)(2)(C), we will continue to rely on existing timelines, procedures, considerations and information requirements in section 120 to assist the Task Force with its deliberations and recommendation, and for the Secretary to make a decision to approve or deny an application. Additional application or procedural requirements set forth in section 120(f)(2)(C), not covered by existing section 120 procedures, considerations, and information requirements are highlighted in the following sections. Taken together, we consider these procedures to fulfill the information requirements for an application submitted under section 120(f).

Revocation of Permits (Authorizations) to and between Eligible Entities

As with previous section 120 authorizations, section 120(f) authorizations may be revoked by NMFS at any time with 72 hours' notice to an eligible entity.

Monitoring

In addition to any recommendations from the Task Force that are adopted, an eligible entity that is authorized to remove sea lions under section 120(f) shall develop and implement a monitoring plan to evaluate: (1) the impacts of sea lion predation on at-risk fish stocks, and (2) the effectiveness of permanent removal of predatory sea lions as a method to reduce mortality on at-risk fish stocks. Furthermore, an eligible entity shall:

- a) monitor and report on the number of sea lions observed in the action area;
- b) report the number of sea lions removed in the action area;
- c) monitor and report on the number of prey observed³ to have been taken by sea lions in the action area; and

³ When predation impacts cannot be observed, an eligible entity shall use a bioenergetics model or equivalent method.

- d) monitor and report on key population parameters for at-risk fish stocks so that the effectiveness of permanent removal of predatory sea lions as a method to reduce or eliminate mortality on at-risk fish stocks can be evaluated as required in section 120(c)(5).

Periodic Review

The process and procedures described in section 120(c)(5) regarding the effectiveness of an authorized lethal removal program shall apply to all section 120(f) authorizations.

Geographic Considerations

In addition to any recommendations from the Task Force that are adopted, based on our interpretation of section 120(f), we interpret the geographic scope of the sea lion removal authority under section 120(f) to apply to: (1) the mainstem of the Columbia River, from river mile 112 to river mile 292; and (2) any tributary within the state of Washington and Oregon that includes spawning habitat for species of salmon or steelhead listed as threatened or endangered under the ESA and discharges into the Columbia River below river mile 292.

Seasonal Take Considerations

In addition to any recommendations from the Task Force that are adopted, seasonal take, i.e., annual removals, will be based on the evidence provided in an application regarding the magnitude of the problem interaction and the need to effectively reduce/eliminate the problem interaction, and the best available science, e.g., marine mammal stock assessment reports and potential biological removal level (PBR) calculations for the subject species.

Species-specific Considerations

In addition to any recommendations from the Task Force that are adopted, annual removals for each population of sea lion will be based on the stated need to effectively reduce/eliminate the problem interaction taking into account the status of each sea lion population and its respective PBR level.

ELIGIBLE ENTITY DEFINED

Section 120(f)(6)(A)

(A) *DEFINITION.* — *In this subsection, the term "eligible entity" means-*

(i) *with respect to removal in the mainstem of the Columbia River, from river mile 112 to the McNary Dam and its tributaries in the State of Washington, and its tributaries in the State of Oregon above Bonneville Dam, the State of Washington, the State of Oregon, and the State of Idaho;*

(ii) *with respect to removal in the mainstem Columbia River from river mile 112 to the McNary Dam and its tributaries within the State of Washington and in any of its tributaries above Bonneville Dam within the State of Oregon, the Nez Perce Tribe, the Confederated Tribes of the Umatilla Indian Reservation, the*

Confederated Tribes of the Warm Springs Reservation of Oregon, and the Confederated Tribes and Bands of the Yakama Nation; and

(iii) with respect to removal in the Willamette River and other tributaries of the Columbia River within the State of Oregon below Bonneville Dam, a committee recognized by the Secretary under subparagraph (D).

Section 120(f)(6)(A)(i) Interpretation

We interpret “with respect to removal in the mainstem of the Columbia River, from river mile 112 to the McNary Dam and its tributaries in the State of Washington, and its tributaries in the State of Oregon above Bonneville Dam” to mean that the states of Washington, Oregon, and Idaho may apply to the Secretary requesting removal authority of sea lions in the mainstem of the Columbia River from river mile 112 to the McNary Dam (river mile 292), any tributary within the state of Washington that discharges into the Columbia River below river mile 292, and any tributary within the state of Oregon above Bonneville Dam (river mile 146) that discharges into the Columbia River from river mile 146 to river mile 292.

Section 120(f)(6)(A)(ii) Interpretation

We interpret “with respect to removal in the mainstem Columbia River from river mile 112 to the McNary Dam and its tributaries within the State of Washington and in any of its tributaries above Bonneville Dam within the State of Oregon” to mean that the Nez Perce Tribe, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation of Oregon, and the Confederated Tribes and Bands of the Yakama Nation may apply to the Secretary requesting removal authority of sea lions in the mainstem of the Columbia River from river mile 112 to river mile 292, any tributary within the state of Washington that discharges into the Columbia River below river mile 292, and any tributary within the state of Oregon that discharges into the Columbia River from river mile 146 to river mile 292.

Section 120(f)(6)(A)(iii) Interpretation

Refer to section 120(f)(6)(D) - Committee requirements.

DELEGATION OF PERMITS TO AND BETWEEN ELIGIBLE ENTITIES

Section 120(f)(6)(B)

(B) DELEGATION AUTHORITY— The Secretary may allow eligible entities described in clause (i) or (ii) of subparagraph (A) to delegate their authority under a permit under this subsection to the Columbia River Intertribal Fish Commission for removal in the mainstem of the Columbia River above river mile 112 and below McNary Dam, in the Columbia River tributaries within the State of Washington, or in tributaries within the State of Oregon above Bonneville Dam and below McNary Dam.

Section 120(f)(6)(B) Interpretation

We interpret “*the Secretary may allow eligible entities described in clause (i) or (ii) of subparagraph (A) to delegate their authority under a permit under this subsection to the Columbia River Intertribal Fish Commission for removal in the mainstem of the Columbia River above river mile 112 and below McNary Dam, in the Columbia River tributaries in the State of Washington, or in tributaries within the State of Oregon above Bonneville Dam and below McNary Dam*” to mean that the Secretary may allow eligible entities described herein to delegate their removal authority of sea lions in the mainstem of the Columbia River from river mile 112 to river mile 292, any tributary within the state of Washington that discharges into the Columbia River below river mile 292, or any tributary within the state of Oregon that discharges into the Columbia River from river mile 146 to river mile 292 to the Columbia River Intertribal Fish Commission.

To fulfill the delegation of authority requirement, an eligible entity described in clause (i) or (ii) of subparagraph (A) shall submit a letter to the Secretary requesting delegation of authority to the Columbia River Intertribal Fish Commission. Upon receipt, the Secretary will respond in writing to either approve or deny the request by an eligible entity to delegate their authority to the Columbia River Intertribal Fish Commission.

Section 120(f)(6)(C)

(C) ADDITIONAL DELEGATION AUTHORITY — The Secretary may allow an eligible entity described in subparagraph (A)(i) to delegate its authority under a permit under this subsection to any entity described in subclause (i) or (ii) of subparagraph (A) with respect to removal in the mainstem of the Columbia River above river mile 112 and below McNary Dam, in the Columbia River tributaries in the State of Washington, or in tributaries in the State of Oregon above Bonneville Dam and below McNary Dam.

Section 120(f)(6)(C) Interpretation

We interpret “*the Secretary may allow an eligible entity described in subparagraph (A)(i) to delegate its authority under a permit under this subsection to any entity described in subclause (i) or (ii) of subparagraph (A) with respect to removal in the mainstem of the Columbia River above river mile 112 and below McNary Dam, in the Columbia River tributaries in the State of Washington, or in tributaries in the State of Oregon above Bonneville Dam and below McNary Dam*” to mean that the states of Washington, Oregon, and Idaho may delegate their removal authority of sea lions in the mainstem of the Columbia River from river mile 112 to river mile 292, any tributary within the state of Washington that discharges into the Columbia River from river mile 112 and river mile 292, or any tributary within the state of Oregon that discharges into the Columbia River from river mile 146 to river mile 292 to another state listed in subparagraph (A)(i), or an eligible entity listed in subparagraph (A)(ii).

To fulfill the delegation of authority requirement, an eligible entity described in clause (i) or (ii)⁴ of subparagraph (A) shall submit a letter to the Secretary requesting delegation of authority to an entity listed in clause (i) or (ii). Upon receipt, the Secretary will respond in writing to either approve or deny the request by an eligible entity to delegate their authority to an entity listed in clause (i) or (ii).

Section 120(f)(6)(D)

(D) COMMITTEE REQUIREMENTS. —

(i) IN GENERAL. — The Secretary shall recognize a committee established in accordance with this subparagraph as being eligible for a permit under this subsection, for purposes of subparagraph (A)(iii).

(ii) MEMBERSHIP. — A committee established under this subparagraph shall consist of the State of Oregon and each of the following:

(I) The Confederated Tribes of Siletz Indians or the Confederated Tribes of the Grand Ronde Community, or both.

(II) The Confederated Tribes of the Warm Springs or the Confederated Tribes of the Umatilla Reservation, or both.

(iii) MAJORITY AGREEMENT REQUIRED. — A committee established under this subparagraph may take action with respect to a permit application and removal under this subsection only with majority agreement by the committee members.

(iv) NONAPPLICABILITY OF FACCA. — The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to a committee established under this subparagraph.

Section 120(f)(6)(C) Interpretation


We interpret “*the Secretary shall recognize a committee established in accordance with this subparagraph as being eligible for a permit under this subsection, for purposes of subparagraph (A)(iii)*” to mean that a Committee established in accordance with section 120(f)(6)(D) shall be recognized by the Secretary.

To fulfill this requirement, the Committee shall submit a letter to the Secretary regarding establishment of a Committee as described in section 120(f)(6)(D). Upon receipt, the Secretary will recognize the establishment of a Committee, and that members of the Committee are eligible entities as described in subsection 6 (A)(iii), by means of written concurrence to the Committee.

⁴ Section 120(f)(6)(B) refers to Section 120(f)(6)(A)(i) and (ii) as “clauses”, while Section 120(f)(6)(C) refers to the same as “subclauses”. With the exception of quotation of Section 120(f)(6)(C), herein we refer to them as “clauses”.

Recommendation

Based on the requirement in Public Law 115-329 to establish procedures for the issuance of authorizations pursuant to section 120(f) of the MMPA, I have determined that this document meets that requirement. I therefore, recommend that you concur with my determination that these procedures fulfill that statutory requirement.

I concur.  Date June 3, 2019

I do not concur. _____ Date _____

cc: Administrative File: 151416WCR2019PR00086

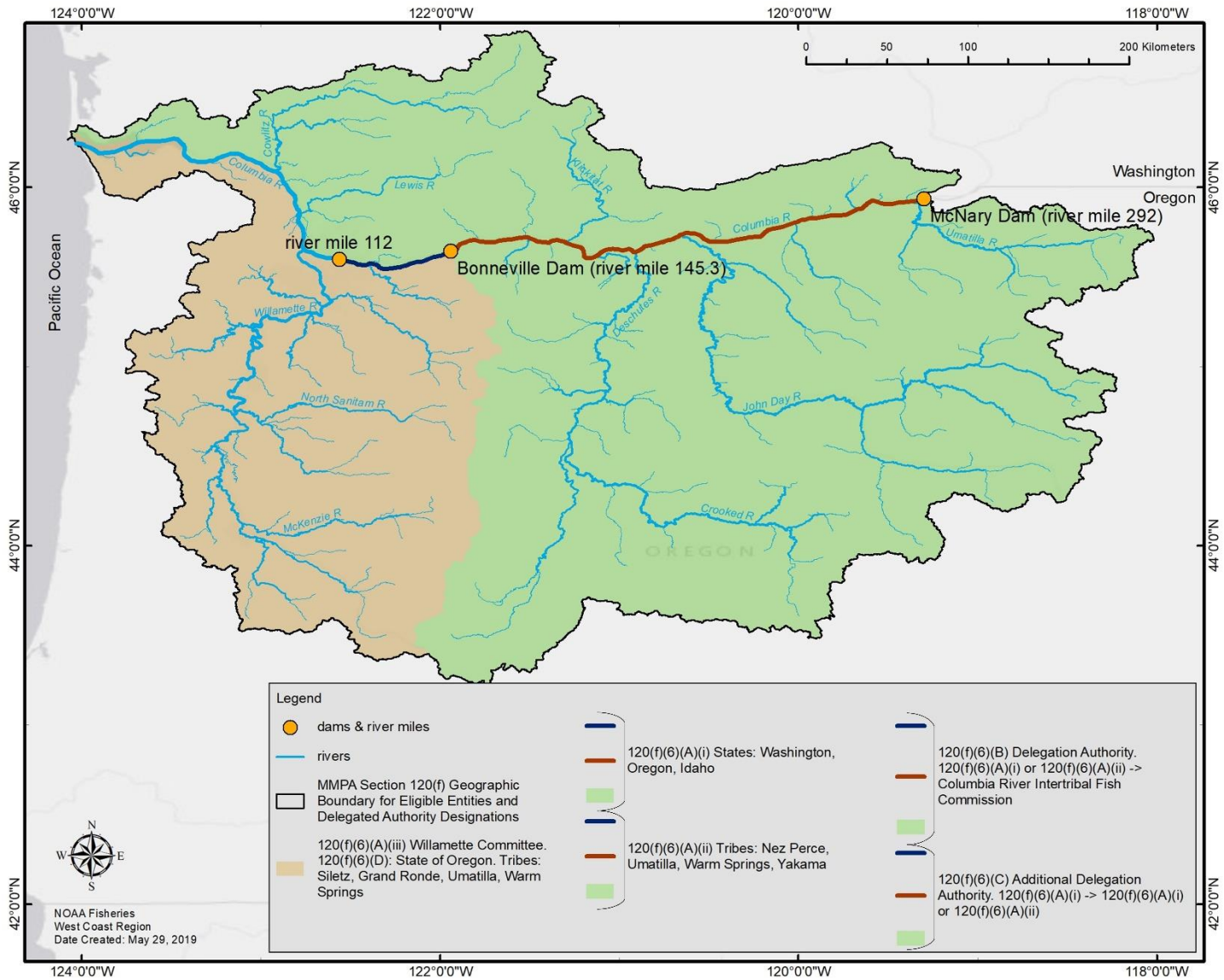


Figure 1. Section 120(f) - Geographic Boundary for Eligible Entities and Delegated Authority Designations