

House Subcommittee on Water, Power and Oceans
John Fleming, Chairman
Hearing Memo

July 21, 2015

To: House Subcommittee on Water, Power and Oceans

From: Water, Power and Oceans Subcommittee Republican Staff (x58331)

Subject: Legislative Hearing on H.R. 564 (Herrera Beutler, R-WA), a bill the
“*Endangered Salmon and Fisheries Predation Prevention Act of 2015*”

Hearing Overview:

On July 23, 2015 at 10:00 am in 1334 Longworth, the House Water, Power and Oceans Subcommittee will hold a legislative hearing on H.R. 564 (Herrera Beutler), the “*Endangered Salmon and Fisheries Predation Prevention Act of 2015*,” a bipartisan bill aimed at reducing California sea lion predation on Endangered Species Act-listed salmon and steelhead in the Columbia River watershed. This one-panel hearing will include two other bills.

Bill Summary:

To assist the recovery of Endangered Species Act (ESA) listed salmon in the Columbia River watershed and to protect tribal ceremonial, subsistence and commercial fisheries, H.R. 564 authorizes the U.S. Secretary of Commerce to issue expedited permits authorizing states and tribes to lethally take California sea lions and non-ESA listed Steller sea lions (hereinafter referred to as “sea lions”) under certain conditions. The bill is identical to a bill passed by the House Natural Resources Committee in the last Congress.¹

Cosponsors:

Reps. Kurt Schrader (D-OR), Dan Newhouse (R-WA), Cathy McMorris Rodgers (R-WA), and Michael Simpson (R-ID).

Background:

The Lower Columbia River is home to multiple species of salmon listed under the ESA, including the Lower Columbia River chinook, steelhead, coho, and chum salmon.² A 2013 ESA recovery plan for these species released by the National Oceanic and Atmospheric Administration (NOAA) cited marine mammal predation, specifically by sea lions, as a factor in the initial species listings and a hurdle to their recovery.³

¹<http://thomas.loc.gov/cgi-bin/bdquery/D?d113:1::/temp/~bdpIqn:@@L&summ2=m&/home/LegislativeData.php?n=BSS:c=113>

² [National Oceanic and Atmospheric Administration – Lower Columbia River Salmon and Steelhead ESA Recovery Plan Executive Summary. June 2013.](#)

³ [Id.](#)

Testimony submitted by a NOAA official to the Committee on Natural Resources during the 113th Congress stated: “[S]ea lion species continue to prey on fish stocks in the Columbia River basin including ESA protected salmon...”⁴

Mr. Guy Norman, regional director of the Washington Department of Fish and Wildlife, testified in the same hearing that: “The U.S. Army Corps of Engineers estimates that over 42,000 salmon and steelhead have been consumed by sea lions within ¼ mile of the (Bonneville) dam in the past twelve years.”⁵ Testimony from the Columbia River Inter-Tribal Fish Commission affirmed that slightly over 30% of spring salmon passing through Bonneville Dam’s fish ladder have suffered some form of injury caused by marine mammals.⁶

The Marine Mammal Protection Act (MMPA), enacted in 1972, prohibits, with certain exceptions, the lethal take of any marine mammal in United States waters and by United States citizens on the high seas.⁷ NOAA, the agency that implements and enforces MMPA, defines a “marine mammal” as any species of dolphin, porpoises, whales, seals, and sea lions.⁸ Mr. Norman discussed how the MMPA increased sea lion populations and the effects of the population increases:

*“The effects of certain natural predators of salmon in the [Lower Columbia River] basin has increased dramatically from historic levels...due to increased numbers of predators due to various protection measures, including the Marine Mammal Protection Act...The U.S. California sea lion population has rebounded since the MMPA was enacted and is now estimated at nearly 310,000 animals.... Male California sea lions have learned a new behavior, with many of the animals swimming 145 miles up the Columbia River in the winter and spring to prey on threatened adult salmon...”*⁹

Currently, Section 120 of MMPA allows States to apply to the Secretary of Commerce for intentional lethal taking of specific “individually identifiable” predator seals and sea lions that are having a significant negative impact on ESA listed salmon stocks.¹⁰ NOAA authorized the States of Oregon, Washington and Idaho to permanently remove sea lions in 2008.¹¹ While 73 sea lions have been removed under this authority

⁴ [Submitted testimony of Rear Admiral Gerd Glang, Director of Office and Coast Survey for the National Oceanic and Atmospheric Administration, to the House Committee on Natural Resources, 113th Cong. Legislative Hearing on H.R. 1308, June 13, 2013.](#)

⁵ [Submitted testimony of Mr. Guy Norman, Regional Director - Washington Department of Fish and Wildlife, to the House Committee on Natural Resources, 113th Cong. Legislative Hearing on H.R. 1308, June 13, 2013.](#)

⁶ [Testimony of The Honorable Virgil Lewis, Sr. on behalf of the Yakama Nation and CRITFC to the House Committee on Natural Resources on H.R. 946, June 14, 2011.](#)

⁷ <http://www.nmfs.noaa.gov/pr/laws/mmpa/>

⁸ <http://www.nmfs.noaa.gov/pr/species/mammals/>

⁹ [Submitted testimony of Mr. Guy Norman, Regional Director - Washington Department of Fish and Wildlife, to the House Committee on Natural Resources, 113th Cong. Legislative Hearing on H.R. 1308, June 13, 2013.](#)

¹⁰ [16 U.S.C. 1389](#)

¹¹ [Submitted testimony of Rear Admiral Gerd Glang, Director of Office and Coast Survey for the National Oceanic and Atmospheric Administration, to the House Committee on Natural Resources, 113th Cong. Legislative Hearing on H.R. 1308, June 13, 2013., at 2.](#)

since last year,¹² predation rates of adult salmon still run in the thousands and it is too early to assess the long-term effectiveness of those efforts.¹³ However, some – including the States and Columbia River tribes -- believe that the current federal application process needs an update.

The history of seemingly endless litigation challenges by certain groups surrounding issuance of these permits¹⁴ and the permit requirement are some reasons cited for H.R. 564's introduction. As Mr. Norman indicated: "[T]he conditions associated with the current requirements of Section 120 of the Marine Mammal Protection Act (MMPA) are challenging and expensive to implement, limited in scope, and legal challenges have slowed the progress in reducing impacts to salmon."¹⁵ In addition, tribal requests to be eligible entities under Section 120 of the MMPA are further reasons for the bill.¹⁶

H.R. 564 would clarify the authority and streamline the process afforded to the Secretary of Commerce under Section 120 of the MMPA to allow for lethal take of sea lion populations that are decimating ESA- listed salmon, steelhead and other non-listed species, such as white sturgeon, in the Lower Columbia River. The goal of the bipartisan legislation is to provide ESA- listed salmon in the Lower Columbia River a habitat where they can recover while controlling the stocks of sea lions on a limited basis. Some have criticized the National Environmental Policy Act (NEPA) exemption.¹⁷ However, a Columbia River Inter-Tribal Fish Commission witness testified that "the [NEPA] exemption is necessary to give the fishery managers the ability to respond swiftly to avoid extraordinary delay that puts the species, our investments, and our livelihood at risk."¹⁸

The Columbia River Inter-Tribal Fish Commission, the Coastal Conservation Association of Oregon, the Washington State Department of Fish and Wildlife, the Oregon State Department of Fish and Wildlife, the Idaho Department of Fish and Game, and the Northwest RiverPartners, a coalition of 40,000 farmers, electric utility customers, ports and other businesses are among the bill's supporters.

Major Provisions/Analysis of H.R. 564:

Section 3 of H.R. 564 amends Section 120 of the MMPA (16 U.S.C. 1389) to authorize the Secretary of Commerce to issue permits to eligible entities authorizing the intentional lethal take of sea lions on the waters of the Columbia River and its tributaries as long as the sea lions

¹² <http://www.dfw.state.or.us/fish/SeaLion/>

¹³ [Id.](#)

¹⁴ http://www.humanesociety.org/news/press_releases/2012/03/HSUS_file_suit_sea_lion_031912.html

¹⁵ Submitted testimony of Mr. Guy Norman, Regional Director - Washington Department of Fish and Wildlife, to the House Committee on Natural Resources, 113th Cong. Legislative Hearing on H.R. 1308, June 13, 2013.

¹⁶ [Testimony of The Honorable Virgil Lewis, Sr. on behalf of the Yakama Nation and CRITFC to the House Committee on Natural Resources on H.R. 946, June 14, 2011.](#)

¹⁷ [Dissenting views on H.R. 1308;](#)

http://thomas.loc.gov/cgi-bin/cpquery/?&dbname=cp113&sid=cp113b23IJ&refer=&r_n=hr330.113&item=&&sel=TOC_20726&

¹⁸ [Testimony of The Honorable Virgil Lewis, Sr. on behalf of the Yakama Nation and CRITFC to the House Committee on Natural Resources on H.R. 946, June 14, 2011.](#)

are part of a non- listed ESA population. This section defines “eligible entities” as the States of Washington, Oregon, and Idaho, as well as the four Columbia River tribes (the Nez Perce Tribe, the Confederated Tribes of the Umatilla Indian Reservation, the Confederate Tribes of the Warm Springs Reservation of Oregon, the Confederated Tribes and Bands of the Yakama Nation), and the Columbia River Inter-Tribal Fish Commission. Each permit issued is active for one year from the date of issuance and authorizes the take of up to ten sea lions. Permits may be renewed for an additional year at the discretion of the Secretary. This section also sets an annual cumulative limit for lethal takes of sea lions to “one percent of the annual potential biological removal level.”

It also directs the Secretary to approve or deny an application for a permit not later than 30 days after receiving the application. The section also states that NEPA does not apply with respect to the issuance of any permit under the authority of the bill during the five year period beginning on the date of the enactment. Permitting can expire five years after enactment if the Secretary determines that lethal removal authority is no longer necessary to protect salmonid and other fish species from sea lion predation.

Cost:

The Congressional Budget Office (CBO) has not completed a cost estimate of H.R. 564. However, in the 113th Congress, CBO indicated that an identical bill (H.R. 1308) “would have a negligible impact on the federal budget. ...”¹⁹

Administration Position:

Unknown. However, in testimony submitted to the House Natural Resources Committee in the 113th Congress on an identical bill (H.R. 1308), the Administration did not support or oppose the legislation. The testimony stated that “several aspects of H.R. 1308 are consistent with the agency’s (NOAA) 1999 Report to Congress entitled ‘Impacts of California Sea Lions and Pacific Harbor Seals on Salmonids and West Coast Ecosystems’ while voicing concern over the NEPA provision”²⁰

Witnesses:

The Honorable Leotis McCormack – Nez Perce Tribe (Lapwai, Idaho)
Commissioner, Columbia River Inter-Tribal Fish Commission
Portland, Oregon

Mr. Barry Thom
Deputy Regional Administrator for the West Coast Region
National Marine Fisheries Service
Department of Commerce
Portland, Oregon

¹⁹ [Congressional Budget Office cost estimate of H.R. 1308, November 22, 2013.](#)

²⁰ [Submitted Testimony of Rear Admiral Gerd Glang, Director of Office and Coast Survey for the National Oceanic and Atmospheric Administration, to the House Committee on Natural Resources, 113th Cong. Legislative Hearing on H.R. 1308, June 13, 2013.](#)

Ramsever:

**Showing Section 120 of the Marine Mammal Protection Act of 1972
(16 U.S.C 1389)**

As amended by H.R. 564

[text to be struck bracketed and in gray; new text in yellow]

§1389. Pacific Coast Task Force; Gulf of Maine

(a) Pinniped removal authority

Notwithstanding any other provision of this subchapter, the Secretary may permit the intentional lethal taking of pinnipeds in accordance with this section.

(b) Application

(1) A State may apply to the Secretary to authorize the intentional lethal taking of individually identifiable pinnipeds which are having a significant negative impact on the decline or recovery of salmonid fishery stocks which-

(A) have been listed as threatened species or endangered species under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.);

(B) the Secretary finds are approaching threatened species or endangered species status (as those terms are defined in that Act); or

(C) migrate through the Ballard Locks at Seattle, Washington.

(2) Any such application shall include a means of identifying the individual pinniped or pinnipeds, and shall include a detailed description of the problem interaction and expected benefits of the taking.

(c) Actions in response to application

(1) Within 15 days of receiving an application, the Secretary shall determine whether the application has produced sufficient evidence to warrant establishing a Pinniped-Fishery Interaction Task Force to address the situation described in the application. If the Secretary determines sufficient evidence has been provided, the Secretary shall establish a Pinniped-Fishery Interaction Task Force and publish a notice in the Federal Register requesting public comment on the application.

(2) A Pinniped-Fishery Interaction Task Force established under paragraph (1) shall consist of designated employees of the Department of Commerce, scientists who are knowledgeable about the pinniped interaction that the application addresses, representatives of affected conservation and fishing community organizations, Indian Treaty tribes, the States, and such other organizations as the Secretary deems appropriate.

(3) Within 60 days after establishment, and after reviewing public comments in response to the Federal Register notice under paragraph (1), the Pinniped-Fishery Interaction Task Force shall-

(A) recommend to the Secretary whether to approve or deny the proposed intentional lethal taking of the pinniped or pinnipeds, including along with the recommendation a description of the specific

pinniped individual or individuals, the proposed location, time, and method of such taking, criteria for evaluating the success of the action, and the duration of the intentional lethal taking authority; and

(B) suggest nonlethal alternatives, if available and practicable, including a recommended course of action.

(4) Within 30 days after receipt of recommendations from the Pinniped-Fishery Interaction Task Force, the Secretary shall either approve or deny the application. If such application is approved, the Secretary shall immediately take steps to implement the intentional lethal taking, which shall be performed by Federal or State agencies, or qualified individuals under contract to such agencies.

(5) After implementation of an approved application, the Pinniped-Fishery Interaction Task Force shall evaluate the effectiveness of the permitted intentional lethal taking or alternative actions implemented. If implementation was ineffective in eliminating the problem interaction, the Task Force shall recommend additional actions. If the implementation was effective, the Task Force shall so advise the Secretary, and the Secretary shall disband the Task Force.

(d) Considerations

In considering whether an application should be approved or denied, the Pinniped-Fishery Interaction Task Force and the Secretary shall consider-

(1) population trends, feeding habits, the location of the pinniped interaction, how and when the interaction occurs, and how many individual pinnipeds are involved;

(2) past efforts to nonlethally deter such pinnipeds, and whether the applicant has demonstrated that no feasible and prudent alternatives exist and that the applicant has taken all reasonable nonlethal steps without success;

(3) the extent to which such pinnipeds are causing undue injury or impact to, or imbalance with, other species in the ecosystem, including fish populations; and

(4) the extent to which such pinnipeds are exhibiting behavior that presents an ongoing threat to public safety.

(e) Limitation

The Secretary shall not approve the intentional lethal taking of any pinniped from a species or stock that is-

(1) listed as a threatened species or endangered species under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.);

(2) depleted under this chapter; or

(3) a strategic stock.

[(f) California sea lions and Pacific harbor seals; investigation and report

(1) The Secretary shall engage in a scientific investigation to determine whether California sea lions and Pacific harbor seals-

(A) are having a significant negative impact on the recovery of salmonid fishery stocks which have been listed as endangered species or threatened species under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), or which the Secretary finds are approaching such endangered species or threatened species status; or

(B) are having broader impacts on the coastal ecosystems of Washington, Oregon, and California.

The Secretary shall conclude this investigation and prepare a report on its results no later than October 1, 1995.

(2) Upon completion of the scientific investigation required under paragraph (1), the Secretary shall enter into discussions with the Pacific States Marine Fisheries Commission, on behalf of the States of Washington, Oregon, and California, for the purpose of addressing any issues or problems identified as a result of the scientific investigation, and to develop recommendations to address such issues or problems. Any recommendations resulting from such discussions shall be submitted, along with the report, to the Committee on Merchant Marine and Fisheries of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate.

(3) The Secretary shall make the report and the recommendations submitted under paragraph (2) available to the public for review and comment for a period of 90 days.

(4) There are authorized to be appropriated to the Secretary such sums as are necessary to carry out the provisions of this subsection.

(5) The amounts appropriated under section 4107(c) of this title and allocated to the Pacific States Marine Fisheries Commission may be used by the Commission to participate in discussions with the Secretary under paragraph (2).]

(f) Temporary Marine Mammal Removal Authority on the Waters of the Columbia River or Its Tributaries.

(1) REMOVAL AUTHORITY- Notwithstanding any other provision of this Act, the Secretary may issue a permit to an eligible entity authorizing the intentional lethal taking on the waters of the Columbia River and its tributaries of sea lions that are part of a healthy population that is not listed as an endangered species or threatened species under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.), to protect endangered and threatened species of salmon and other nonlisted fish species.

(2) PERMIT PROCESS-

(A) IN GENERAL- An eligible entity may apply to the Secretary for a permit under this subsection.

(B) DEADLINE FOR CONSIDERATION OF APPLICATION- The Secretary shall approve or deny an application for a permit under this subsection by not later than 30 days after receiving the application.

(C) DURATION OF PERMIT- A permit under this subsection shall be effective for no more than one year after the date it is issued, but may be renewed by the Secretary.

(3) LIMITATIONS-

(A) LIMITATION ON PERMIT AUTHORITY- Subject to subparagraph (B), a permit issued under this subsection shall not

authorize the lethal taking of more than 10 sea lions during the duration of the permit.

(B) LIMITATION ON ANNUAL TAKINGS- The cumulative number of sea lions authorized to be taken each year under all permits in effect under this subsection shall not exceed one percent of the annual potential biological removal level.

(4) DELEGATION OF PERMIT AUTHORITY- Any eligible entity may delegate to any other eligible entity the authority to administer its permit authority under this subsection.

(5) NEPA- Section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)) shall not apply with respect to this subsection and the issuance of any permit under this subsection during the 5-year period beginning on the date of the enactment of this subsection.

(6) SUSPENSION OF PERMITTING AUTHORITY- If, 5 years after enactment, the Secretary, after consulting with State and tribal fishery managers, determines that lethal removal authority is no longer necessary to protect salmonid and other fish species from sea lion predation, may suspend the issuance of permits under this subsection.

(7) ELIGIBLE ENTITY DEFINED- In this subsection, the term “eligible entity” means each of the State of Washington, the State of Oregon, the State of Idaho, the Nez Perce Tribe, the Confederated Tribes of the Umatilla Indian Reservation, the Confederated Tribes of the Warm Springs Reservation of Oregon, the Confederated Tribes and Bands of the Yakama Nation, and the Columbia River Inter-Tribal Fish Commission.

(g) Regionwide pinniped-fishery interaction study

(1) The Secretary may conduct a study, of not less than three high predation areas in anadromous fish migration corridors within the Northwest Region of the National Marine Fisheries Service, on the interaction between fish and pinnipeds. In conducting the study, the Secretary shall consult with other State and Federal agencies with expertise in pinniped-fishery interaction. The study shall evaluate-

(A) fish behavior in the presence of predators generally;

(B) holding times and passage rates of anadromous fish stocks in areas where such fish are vulnerable to predation;

(C) whether additional facilities exist, or could be reasonably developed, that could improve escapement for anadromous fish; and

(D) other issues the Secretary considers relevant.

(2) Subject to the availability of appropriations, the Secretary may, not later than 18 months after the commencement of the study under this subsection, transmit a report on the results of the study to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives.

(3) The study conducted under this subsection may not be used by the Secretary as a reason for delaying or deferring a determination or consideration under subsection (c) or (d) of this section.

(h) Gulf of Maine Task Force

The Secretary shall establish a Pinniped-Fishery Interaction Task Force to advise the Secretary on issues or problems regarding pinnipeds interacting in a dangerous or damaging manner with aquaculture resources in the Gulf of Maine. No later than 2 years from April 30, 1994, the Secretary shall after notice and opportunity for public comment submit to the Committee on Merchant Marine and Fisheries of the House of Representatives and the Committee on Commerce, Science, and Transportation of the Senate a report containing recommended available alternatives to mitigate such interactions.

(i) Requirements applicable to task forces

(1) Any task force established under this section-

(A) shall to the maximum extent practicable, consist of an equitable balance among representatives of resource user interests and nonuser interests; and

(B) shall not be subject to the Federal Advisory Committee Act (5 App. U.S.C.).

(2) Meetings of any task force established under this section shall be open to the public, and prior notice of those meetings shall be given to the public by the task force in a timely fashion.

(j) Gulf of Maine harbor porpoise

(1) Nothing in section 1386 of this title shall prevent the Secretary from publishing a stock assessment for Gulf of Maine harbor porpoise in an expedited fashion.

(2) In developing and implementing a take reduction plan under section 1387 of this title for Gulf of Maine harbor porpoise, the Secretary shall consider all actions already taken to reduce incidental mortality and serious injury of such stock, and may, based on the recommendations of the take reduction team for such stock, modify the time period required for compliance with section 1387(f)(5)(A) of this title, but in no case may such modification extend the date of compliance beyond April 1, 1997.

(Pub. L. 92-522, title I, §120, as added Pub. L. 103-238, §23, Apr. 30, 1994, 108 Stat. 562 .)