

Calendar No. 702

115TH CONGRESS }
2d Session }

SENATE

{ REPORT
115-400 }

ENDANGERED SALMON PREDATION
PREVENTION ACT

R E P O R T

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND
TRANSPORTATION

ON

S. 3119



NOVEMBER 29, 2018.—Ordered to be printed

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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED FIFTEENTH CONGRESS

SECOND SESSION

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ENDANGERED SALMON PREDATION PREVENTION ACT

NOVEMBER 29, 2018.—Ordered to be printed

Mr. THUNE, from the Committee on Commerce, Science, and
Transportation, submitted the following

R E P O R T

[To accompany S. 3119]

[Including cost estimate of the Congressional Budget Office]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 3119) to allow for the taking of sea lions on the Columbia River and its tributaries to protect endangered and threatened species of salmon and other nonlisted fish species, having considered the same, reports favorably thereon with an amendment (in the nature of a substitute) and recommends that the bill (as amended) do pass.

PURPOSE OF THE BILL

The purpose of this legislation is to allow the Secretary of Commerce to issue a permit for the intentional lethal taking of individually identifiable sea lions by the State of Washington, Oregon, or Idaho, or by a tribal entity for the purpose of protecting endangered anadromous fish such as salmon or lamprey, and to define all sea lions found above mile 112 of the Columbia River as individually identifiable.

BACKGROUND AND NEEDS

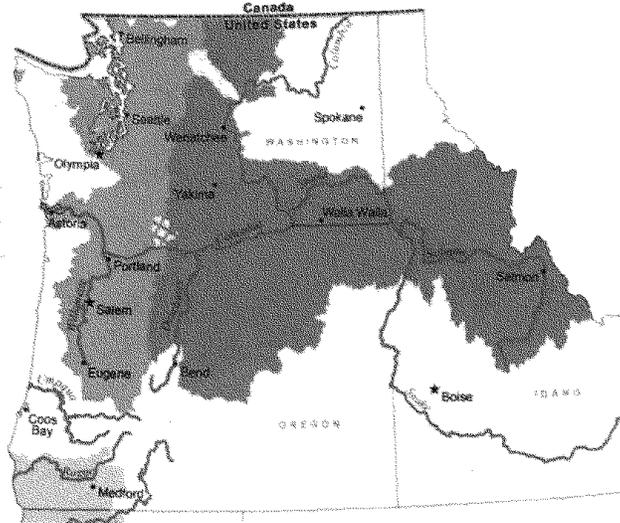
Pacific salmon are an important U.S. fishery, generating approximately \$4.95 billion in revenue between 2006 and 2015.¹ Twenty-eight species of salmon are currently listed as threatened or endan-

¹U.S. Department of Commerce. 2015. Fisheries Economics of the United States, 2015 (<https://repository.library.noaa.gov/view/noaa/16121>) (accessed July 19, 2018).

gered under the Endangered Species Act (ESA),² 13 of which migrate through the Lower Columbia River and on to parts of Washington, Oregon, and Idaho. These species include the Lower Columbia River chinook, steelhead, coho, and chum salmon (Figure 1). In addition, steelhead trout, eulachon, lamprey, and sturgeon also migrate through this corridor. These fish also play an important and traditional role for the Tribes of the Columbia River Basin. The National Oceanic and Atmospheric Administration's (NOAA) most recent recovery plan for Lower Columbia River coho, chinook, and chum salmon and steelhead lists predation, specifically by California sea lions, as a significant factor in the initial species listings and a hurdle to their recovery. As many as 80 sea lions have been observed congregating at the Bonneville Dam and the most recent estimates indicate that sea lions consumed an estimated 4.7 percent of salmon and 9 percent of steelhead for the observed summer and winter runs.³

² 16 U.S.C. §1531 et seq.

³ U.S. Army Corps of Engineers. 2017. Evaluation of pinniped predation on adult salmonids and other fish in the Bonneville Dam tailrace, 2017. (<http://pweb.crohms.org/tmt/documents/pinniped/2017/2017-USACE-pinniped-monitoring-report.pdf>) (accessed July 24, 2018).



Interior Columbia Recovery Domain			
Middle Columbia River Steelhead	T	3/25/1999 1/5/2006	9/2/2005
Snake River Fall-run Chinook Salmon	T	4/22/1992	12/28/1993
Snake River Spring / Summer-run Chinook Salmon	T	4/22/1992	10/25/1999
Snake River Sockeye Salmon	E	11/20/1991	12/28/1993
Snake River Steelhead	T	8/18/1997 1/5/2006	9/2/2005
Upper Columbia River Spring-run Chinook Salmon	E	3/24/1999	9/2/2005
Upper Columbia River Steelhead	T	8/18/1997 1/5/2006	9/2/2005
Willamette / Lower Columbia Recovery Domain			
Columbia River Chum Salmon	T	3/25/1999	9/2/2005
Lower Columbia River Chinook Salmon	T	3/24/1999	9/2/2005
Lower Columbia River Coho Salmon	T	6/28/2005	2/24/2016
Lower Columbia River Steelhead	T	3/19/1998 1/5/2006	9/2/2005
Upper Willamette River Chinook Salmon	T	3/24/1999	9/2/2005
Upper Willamette River Steelhead	T	3/25/1999 1/5/2006	9/2/2005

Figure 1. Columbia River Salmon Critical habitat and ESA designations.⁴

California sea lions are managed by NOAA under the Marine Mammal Protection Act of 1972 (MMPA).⁵ The MMPA prohibits, with certain exceptions, the lethal taking of any marine mammal in United States waters and by U.S. citizens on the high seas. Under current law, section 120 of the MMPA allows States to apply

⁴ Adapted from the NOAA Status of ESA Listings and Critical Habitat Designations for West Coast Salmon and Steelhead (http://www.westcoast.fisheries.noaa.gov/publications/gis_maps/maps/salmon_steelhead/critical_habitat/wcr_salmonid_ch_esa_july2016.pdf) (accessed July 19, 2018).

⁵ 16 U.S.C. §1361 et seq.

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.⁶ NOAA authorized the States of Oregon, Washington, and Idaho to permanently remove sea lions in 2008. This authority was reauthorized by NOAA in 2016. Trapping, followed by relocation and release, has been largely ineffective since the same individual sea lions often return within a period of days to weeks. For example, the Oregon Department of Fish and Wildlife spent 5 weeks in 2018 moving 10 sea lions to a new location 210 miles away, only to see the same animals return to the area within 4 to 6 days. One animal was moved and returned twice.⁷

Although they were once exploited for their fur and negatively impacted by the chemical DDT, the population of California sea lions has tripled since the 1970s⁸ (Figure 2) and they are currently listed with a status of least concern by the International Union for Conservation of Nature.⁹ The California sea lion population has been determined to be at the optimal sustainable population.¹⁰

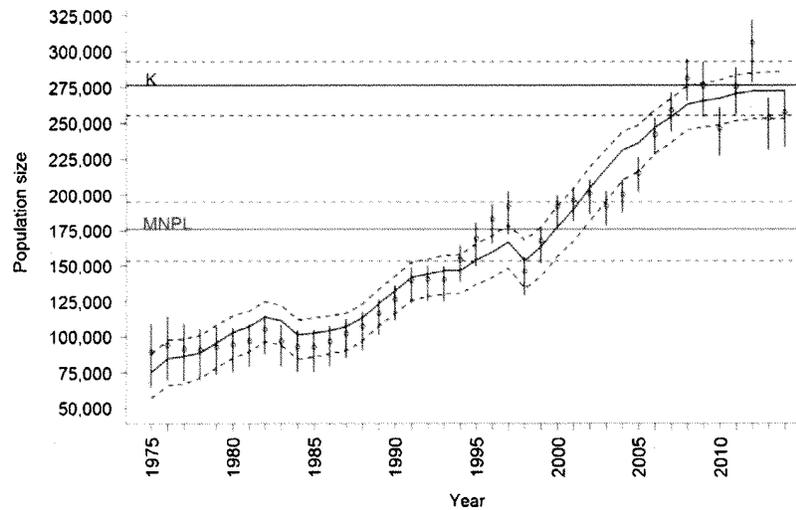


Figure 2. Reconstructed California sea lion annual population sizes in the United States, 1975–2014. The solid black line represents a fitted logistic growth curve for seal populations and the dashed line represents 95 percent bootstrap intervals for the estimated population size. Vertical black lines show the 95 percent bootstrap confidence intervals for reconstructed annual population sizes. The solid blue line represents the estimated carrying capacity and the red line represents maximum net productivity level with 95 percent confidence intervals shown in dashed lines. From Laake et al (2018).¹¹

⁶ 16 U.S.C. §1389.

⁷ Oregon Department of Fish and Wildlife. 2018 “Relocation of Sea Lions not enough to protect Willamette fish runs.”

⁸ NOAA Fisheries. California Sea Lion Population Rebounded to New Heights. (<https://www.fisheries.noaa.gov/feature-story/california-sea-lion-population-rebounded-new-heights>) (accessed July 19, 2018).

⁹ <http://www.iucnredlist.org/details/41666/0> (accessed July 19, 2018).

¹⁰ Laake, Jeffrey L., Lowrey, Mark S., DeLong, Robert L., and Caretta, James V. 2018. Population Growth and Status of California Sea Lions. *The Journal of Wildlife Management* 82 (583–595) (<https://onlinelibrary.wiley.com/doi/pdf/10.1002/jwmg.21405>) (accessed July 19, 2018).

SUMMARY OF PROVISIONS

If enacted, S. 3119 would do the following:

- Allow the Secretary of Commerce to issue a permit for the intentional lethal taking of individually identifiable sea lions by the State of Washington, Oregon, or Idaho, or to a tribal entity for the purpose of protecting endangered anadromous¹² fish such as salmon or lamprey.
- Define all sea lions found above mile 112 of the Colombia River as individually identifiable.

LEGISLATIVE HISTORY

S. 3119 was introduced on June 21, 2018, by Senator Risch (for himself and Senator Cantwell) and was referred to the Committee on Commerce, Science, and Transportation of the Senate. On August 1, 2018, the Committee met in open Executive Session and by voice vote ordered S. 3119 to be reported favorably with an amendment (in the nature of a substitute).

It has a companion bill in the House of Representatives, H.R. 1707, introduced by Representative Herrera Beutler (R-WA) and cosponsored by Representatives McMorris Rodgers (R-WA), Newhouse (R-WA), Young (R-AK), and Schrader (D-OR). H.R. 1707 was passed by the House of Representatives on June 26, 2018. A similar bill with the same name (S. 1702) was introduced by Senator Risch on August 2, 2017, and referred to the Committee on Commerce, Science, and Transportation of the Senate. S. 3119 is an updated version of this earlier bill.

On April 25, 2018, the Committee held a hearing entitled “Enhancing the Marine Mammal Protection Act.” At that hearing, Mr. Chris Oliver, Assistant Administrator for Fisheries at NOAA’s National Marine Fisheries Service, and Mr. Guy Norman, of the Northwest Power and Conservation Council, testified regarding concerns about the impact sea lions are having on ESA-listed salmon and steelhead throughout the west coast.¹³ The Washington, Oregon, and Idaho Departments of Fish and Game, the Colombia River Inter-Tribal Fish Commission, the American Sportfishing Association, the Oregon State Sheriff’s Association, the Northwest Power and Conservation Council, and over 120 Pacific Northwest businesses and trade associations, including restaurants, fishing tackle shops, and fishermen, have submitted letters in support of S. 3119.

ESTIMATED COSTS

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget

¹¹ Laake, Jeffrey L., Lowrey, Mark S., DeLong, Robert L., and Caretta, James V. 2018. Population Growth and Status of California Sea Lions. *The Journal of Wildlife Management* 82 (583–595).

¹² Anadromous species are those which spawn in fresh or estuarine waters and migrate to ocean waters.

¹³ Oliver, Chris. 2018 Testimony on the Marine Mammal Protection Act Before the Committee on Commerce, Science, and Transportation Subcommittee on Oceans, Atmosphere, Fisheries, and Coast Guard (<https://www.commerce.senate.gov/public/cache/files/1a25f948-cb58-4c10-b939-22fe8f6cbb68/EFAED859B316EC707BF200116BCF66F3.4.25.18-oliver-testimony.pdf>) (accessed July 26, 2018).

Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

S. 3119—Endangered Salmon Predation Prevention Act

S. 3119 would amend the Marine Mammal Protection Act of 1972 to authorize the National Oceanic and Atmospheric Administration (NOAA) to issue permits that would allow states and tribal entities in the Northwest United States to kill sea lions that threaten species of salmon and other fish listed as endangered or threatened under the Endangered Species Act in the Columbia River and its tributaries. NOAA would be required to ensure that the permitted entities kill no more than a combined total of 10 percent of the maximum number of sea lions that NOAA estimates could be killed (not including natural mortality) while still allowing each sea lion group to reach or maintain its optimum sustainable population. The bill also would direct NOAA to complete a report on the effectiveness of the permitting program in helping endangered salmon stocks recover.

Under current law, NOAA has the authority to issue permits to kill certain marine mammals that threaten other species. Using information from the agency, CBO estimates that giving NOAA the authority to issue such permits would have no significant effect on the federal budget. Enacting S. 3119 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply.

CBO estimates that enacting that legislation would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2029.

S. 3119 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act.

On August 10, 2017, CBO transmitted a cost estimate for H.R. 2083, the Endangered Salmon and Fisheries Predation Prevention Act, as ordered reported by the House Committee on Natural Resources on July 26, 2017. The two pieces of legislation are similar and CBO's estimates of their costs are the same.

The CBO staff contact for this estimate is Robert Reese. The estimate was reviewed by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported:

NUMBER OF PERSONS COVERED

This measure, as reported, would not create any new programs or impose any new significant regulatory requirements. Therefore, it would not subject any individuals or businesses to new significant regulations.

ECONOMIC IMPACT

Enactment of this legislation is not expected to have any significant adverse impacts on the Nation's economy.

PRIVACY

S. 3119 would not have any adverse impact on the privacy of individuals.

PAPERWORK

S. 3119 would not impose a substantial paperwork burden on individuals or businesses.

CONGRESSIONALLY DIRECTED SPENDING

In compliance with paragraph 4(b) of rule XLIV of the Standing Rules of the Senate, the Committee provides that no provisions contained in the bill, as reported, meet the definition of congressionally directed spending items under the rule.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title; table of contents.

This section would provide that the bill may be cited as the “Endangered Salmon Predation Prevention Act.”

Section 2. Sense of Congress.

This section would state the following: that it is the sense of Congress that preventing predation by sea lions, recovery of listed salmonid stocks, and preventing future listings of fish stocks in the Columbia River is a vital priority; and that the Federal Government should continue to fund lethal and nonlethal removal and deterrence measures for preventing this predation.

Section 3. Taking of sea lions on the Columbia River and its tributaries to protect endangered and threatened species of salmon and other nonlisted fish species.

This section would authorize the Secretary of Commerce to issue and revoke a permit to eligible entities to authorize the lethal taking of individually identifiable sea lions that are not categorized as depleted or strategic under the MMPA. These permits would be issued for the purpose of protecting endangered or threatened salmon. This section would define the permit process and limit permits to 5 years. It would limit the cumulative number of sea lions taken per year and require lethal takes to be done humanely by qualified individuals, and to comply with standards by an institutional animal care and use committee. It would allow the Secretary to suspend permitting if it is determined that it is no longer necessary. This section also would define entities eligible for the permit and allow an eligible entity to delegate its authority. It would deem as individually identifiable any sea lion upstream of mile 112 of the Columbia River or in any tributary to the Columbia River that includes spawning habitat of threatened or endangered salmon or steelhead.

The Committee notes that the intent of this section and this bill for the Willamette River and Oregon tributaries is to ensure the opportunity of the Tribes **authorized** by this legislation to participate in the management of sea lions. The Confederated Tribes of Siletz Indians and the Confederated Tribes of Grand Ronde both claim interest in the removal area or portions thereof pursuant to

treaties signed with the United States that ceded these areas to the Federal Government. The Confederated Tribes of the Umatilla Indian Reservation and the Confederated Tribes of Warm Springs claim the removal area or portions thereof as usual and accustomed fishing areas reserved in their treaties with the United States. In authorizing participation of these Tribes in sea lion management, the Committee does not intend to give credit, to discredit or prioritize any Tribe's claims within the removal area. It is intended that this legislation not be used for any interest other than to authorize these Tribes to participate in sea lion management.

Section 4. Treaty rights of federally recognized Indian Tribes.

This section would specify that nothing in this Act should be construed to affect or modify any treaty or right of an Indian Tribe.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

MARINE MAMMAL PROTECTION ACT OF 1972

[16 U.S.C. 1361 et seq.]

SEC. 120. PACIFIC COAST TASK FORCE; GULF OF MAINE.

[16 U.S.C. 1389]

(a) PINNIPED REMOVAL AUTHORITY.—Notwithstanding any other provision of this title, the Secretary may permit the intentional lethal taking of pinnipeds in accordance with this section.

* * * * *

[(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.

[(1) 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 sub-

mitted, 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 308(c) of the Interjurisdictional Fisheries Act of 1986 (16 U.S.C. 4107(c)) 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 to authorize the intentional lethal taking on the waters of the Columbia River and its tributaries of individually identifiable sea lions that are part of a population or stock that is not categorized under this Act as depleted or strategic for the purpose of protecting—*

(A) *species of salmon, steelhead, or eulachon that are listed as endangered species or threatened species under the Endangered Species Act of 1973 (16 U.S.C. 1531 et seq.); and*

(B) *species of lamprey or sturgeon that are not so listed as endangered or threatened but are listed as a species of concern.*

(2) *PERMIT PROCESS.*—

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

(B) *TIMELINES AND PROCEDURES OF APPLICATION.*—*The timelines and procedures described in subsection (c) shall apply to applications for permits under this subsection in the same manner such timelines apply to applications under subsection (b).*

(C) *COORDINATION.*—*The Secretary shall establish procedures to coordinate issuance of permits 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.*

(D) *DURATION OF PERMIT.*—*A permit under this subsection shall be effective for a period of not more than 5 years, and may be renewed by the Secretary.*

(E) *COORDINATION WITH OTHER TRIBES.*—*To the extent practicable, and prior to issuing a permit under this section, the Secretary shall consult with all Indian tribes with legal or historic interests in the protection of salmonid species in the area of the Columbia River and its tributaries described in paragraph (8).*

(3) *LIMITATIONS ON ANNUAL TAKINGS.*—The Secretary shall apply the process for determining limitations on annual take of sea lions under subsection (c) to determinations on limitations under this subsection, and the cumulative number of sea lions authorized to be taken each year under all permits in effect under this subsection shall not exceed 10 percent of the annual potential biological removal level for sea lions.

(4) *QUALIFIED INDIVIDUALS.*—Intentional lethal takings under this subsection shall—

(A) be humane within the meaning of such term under section 3(4);

(B) require that capture, husbandry, transportation, and euthanasia protocols are based on standards propagated by an Institutional Animal Care and Use Committee and that primary euthanasia be limited to humane chemical methods; and

(C) be implemented by agencies or qualified individuals described in subsection (c)(4), or by individuals employed by the eligible entities described in paragraph (6).

(5) *SUSPENSION OF PERMITTING AUTHORITY.*—If, 5 years after the date of the enactment of the Endangered Salmon Predation Prevention Act, 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, the Secretary shall suspend the issuance of permits under this subsection.

(6) *ELIGIBLE ENTITY DEFINED.*—

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

(i) with respect to removal in the mainstem of the Columbia River and its tributaries, the State of Washington, the State of Oregon, and the State of Idaho;

(ii) with respect to removal in the mainstem Columbia River and its tributaries, 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 mainstem Columbia River and its tributaries, the Columbia River Intertribal Fish Commission.

(B) *DELEGATION AUTHORITY.*—The Secretary may allow an eligible entity described in clause (i) to delegate its authority under a permit under this subsection to any entity described in subclause (ii) or (iii).

(7) *INDIVIDUAL EXCEPTION.*—For purposes of this subsection, any sea lion located upstream of river mile 112, or in any tributary to the Columbia River that includes spawning habitat of threatened or endangered salmon or steelhead is deemed to be individually identifiable.

(8) *SIGNIFICANT NEGATIVE IMPACT EXCEPTION.*—For purposes of this subsection, any sea lion located in the mainstem of the Columbia River upstream of river mile 112, or in any tributary to the Columbia River that includes spawning habitat of threatened or endangered salmon or steelhead is deemed to be having

a significant negative impact, within the meaning of subsection (b)(1).

(9) *DEFINITION.—In this subsection, the term “Indian tribe” has the meaning given such term in section 4 of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 5304).*

(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).

(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 the date of enactment of this section, 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 117 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 118 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 118(f)(5)(A), but in no case may such modification extend the date of compliance beyond April 1, 1997.

