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MEMORANDUM FOR: Chris Oliver
Assistant Administrator

FROM: Donna S. Wieting 
Director, Office of Protected Resources

SUBJECT: Issuance of a Waiver of Requirements Under Sections 101(a) and 102(a) of the Marine Mammal Protection Act for the Mid-Barataria Bay Sediment Diversion, the Mid-Breton Sound Sediment Diversion, and Calcasieu Ship Channel Salinity Control Measures Projects –
DECISION MEMORANDUM

On February 9, 2018, Congress passed the Bipartisan Budget Act of 2018 (Budget Act), Public Law 115-123, which included a requirement that the Secretary of Commerce, as delegated to the Assistant Administrator of the National Marine Fisheries Service (NMFS), issue a waiver of the Marine Mammal Protection Act (MMPA or Act) moratorium and prohibitions for three specific Louisiana wetland restoration projects. Specifically, title II, section 20201(a) of the Budget Act provides:

In recognition of the consistency of the Mid-Barataria Sediment Diversion, Mid-Breton Sound Sediment Diversion, and Calcasieu Ship Channel Salinity Control Measures projects, as selected by the 2017 Louisiana Comprehensive Master Plan for a Sustainable Coast, with the findings and policy declarations in section 2(6) of the Marine Mammal Protection Act (16 U.S.C. 1361 et seq., as amended) regarding maintaining the health and stability of the marine ecosystem, within 120 days of the enactment of this section, the Secretary of Commerce shall issue a waiver pursuant to section 101(a)(3)(A) and this section to section 101(a) and section 102(a) of the Act, for such projects that will remain in effect for the duration of the construction, operations and maintenance of the projects. No rulemaking, permit, determination, or other condition or limitation shall be required when issuing a waiver pursuant to this section.

Where Congress did not itself waive compliance with the MMPA moratorium, prohibitions, and associated requirements as applied to the three named projects, but instead directed NMFS to issue a waiver consistent with both MMPA section 101(a)(3)(A) and the terms of section 20201, this memorandum explains NMFS's interpretation and implementation of Congress's direction under section 20201 of the Budget Act.

MMPA section 101(a)(3)(A) (16 U.S.C. section 1371(a)(3)(A)) allows NMFS to waive the moratorium on taking marine mammals based on the best scientific evidence available after considering certain factors and making specific findings. These include considering distribution,



abundance, breeding habits, and migratory movements of affected marine mammal species or stocks and finding that any taking would be in accord with sound principles of resource protection and conservation as provided in the purposes and policies of the MMPA. Overall, the agency must determine whether it is compatible with the MMPA to grant such as waiver.

In addition to the considerations identified in section 101(a)(3)(A), the MMPA waiver provision requires NMFS to “make determinations in accordance with” section 103.¹ Thus, requests to waive the moratorium under section 101(a)(3)(A) are implemented through the rulemaking process outlined in MMPA section 103, which requires consideration of additional factors and development of certain statements and findings. Any proposed regulations must consider all factors that may affect the extent to which affected marine mammals may be taken, including the effect of the regulations on existing and future levels of marine mammals species and stocks; existing international treaty and agreement obligations; the marine ecosystem and related environmental considerations; conservation, development, and utilization of fishery resources; and economic and technological feasibility of implementation. The agency must also provide statements on the estimated levels of affected species or stocks, the expected impact of the proposed regulations on optimum sustainable population levels (OSP), the evidence supporting the proposed regulations, and any studies or recommendations by or for the agency or the Marine Mammal Commission (MMC). Overall, under section 103(a) the agency must find, based on the best scientific evidence available, that the allowed taking will not be to the disadvantage of the affected species and stocks and will be consistent with the purposes and policies in section 2 of the MMPA.

Through section 20201, Congress removed NMFS’s discretion and the requirements to consider the statutory factors, provide the required statements, make the required findings, and determine whether issuance of a waiver meets the statutory standards under sections 101(a)(3)(A) and 103. Through the Budget Act, Congress directed that NMFS “shall issue a waiver.” This eliminated the agency’s discretion to consider the best available scientific evidence, factors relevant to determining impacts on affected species or stocks, and whether issuance of a waiver and associated takings would be compatible with the MMPA, not to the disadvantage of the affected species and stocks, and consistent with the purposes and policies of the Act. Congress also found that the three named projects² are “consisten[t] . . . with the findings and policy declarations in section 2(6) of the [MMPA] . . . regarding maintaining the health and stability of the marine ecosystem.” Thus, Congress substituted its finding and decision that a waiver must be issued for the considerations, findings, and determinations that otherwise would have been made by the agency.

¹ Not relevant here, section 101(a)(3)(A) also calls for making determinations and issuing regulations under section 102 (importation of certain animals), section 104 (issuance of permits), and section 111 (regulation of commercial fisheries gear).

² The waiver applies only to the Mid-Barataria Sediment Diversion, Mid-Breton Sound Sediment Diversion, and Calcasieu Ship Channel Salinity Control Measures projects. Absent additional Congressional action, standard MMPA provisions would apply to other projects under the 2017 Louisiana Comprehensive Master Plan for a Sustainable Coast.

Additional language in section 20201(a) confirms Congress's removal of agency discretion to consider the statutory factors and standards, and make the MMPA determinations. The Budget Act states not only that NMFS "shall issue" the waiver but further provides that "no . . . determination . . . shall be required when issuing a waiver pursuant to this section." Thus, Congress expressly precluded the agency from making any of the determinations called for under sections 101(a)(3)(A) and 103. With no discretion on whether to issue the waiver and no ability to make the determinations under sections 101(a)(3)(A) or 103, any consideration of the remaining statutory elements, such as evaluation of the section 101(a)(3)(A) and 103(b) factors or issuance of the section 103(d) statements would be superfluous.

In addition, through section 20201 Congress substituted the procedure in the Budget Act for the procedures NMFS otherwise would follow in issuing a waiver under section 101(a)(3)(A). For waivers not associated with commercial fishing, MMPA section 101(a)(3)(A) requires the agency to "adopt suitable regulations, issue permits, and make determinations in accordance with sections 102, 103, [and] 104." It is this provision that would typically require NMFS to waive the moratorium through the formal rulemaking procedures of section 103. Along with requiring that the waiver be developed through formal rulemaking on the record and after opportunity for an agency hearing, the standard MMPA process would require publication of the statements on population levels and OSP discussed above. However, section 20201(a) specifies, "No rulemaking [or] permit . . . shall be required when issuing a waiver pursuant to this section." Thus, the rulemaking requirements called for under sections 101(a)(3)(A) and 103 do not apply to NMFS's issuance of the waiver. In addition, because Congress directed in broad terms that no rulemaking or permitting procedures apply to issuance of the waiver and did not limit itself to MMPA procedural requirements, procedures potentially applicable under other laws such as the Administrative Procedure Act (APA) do not apply. Congress's direction to issue the waiver without any form of rulemaking or issuance of permits along with no determinations or other conditions or limitations takes precedence over the section 103 formal rulemaking called for under section 101(a)(3)(A).

The fact that Congress intended the waiver to be issued without following the procedures under MMPA section 103 or the APA is confirmed by the fact that section 20201 directs the waiver to be issued within 120 days of enactment of the Budget Act. The rulemaking procedures called for under section 103 and described in agency regulations at 50 CFR part 228 require publication of notice of a hearing in the Federal Register along with the agency's proposed determination to waive the moratorium. The presiding officer is then appointed, interested parties submit written direct testimony, and the presiding officer determines the issues of fact to be addressed at the hearing and holds of a prehearing conference. This is followed by publication in the *Federal Register* of a final agenda of issues to be addressed at the hearing along with the list of witnesses who may appear at the hearing, conduct of the hearing, transmission of the presiding officer's recommended decision to the agency, publication of notice of the recommended decision in the *Federal Register* with opportunity for public comment, and the agency's final decision on the proposed regulations and waiver. It is not possible, and Congress must have known when considering enactment of section 20201 that it is not possible, to complete this process within 120 days.

Nonetheless, NMFS consulted with the MMC prior to issuing the waiver. The MMPA requires the agency to issue waivers under section 101(a)(3)(A) “in consultation with” the MMC. The Budget Act states that NMFS shall issue the waiver pursuant to both section 101(a)(3)(A) and section 20201, and nothing in the Budget Act precludes the consultation requirement under section 101(a)(3)(A). That said, with no discretion on whether to issue the waiver and the substantive standards and procedural requirements limited as described above, consultation was limited to whether NMFS is properly implementing the waiver provision under section 20201.

Because NMFS has no discretion whether to issue the waiver under section 20201, consultation under section 7 of the Endangered Species Act (ESA) is not required. Joint NMFS/FWS regulations at 50 CFR 402.03 state that section 7 of the ESA and the regulatory consultation requirements apply to agency actions “in which there is discretionary Federal involvement or control.” Because NMFS has no discretion or control over whether or not to issue the waiver, issuance of the waiver is not subject to section 7 consultation.

In addition, issuance of the waiver is not subject to analysis under the National Environmental Policy Act (NEPA). Section 102(c) of NEPA requires all agencies of the United States “to the fullest extent possible” to “include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment” an environmental impact statement [EIS] analyzing the consequences of, and alternatives to, the proposed action. “Section 102 recognizes, however, that where a clear and unavoidable conflict in statutory authority exists, NEPA must give way.” *Flint Ridge Dev. Co. v. Scenic Rivers Ass'n of Oklahoma*, 426 U.S. 776, 788, 96 S. Ct. 2430, 2438, 49 L. Ed. 2d 205 (1976). Because NMFS does not have discretion to affect the outcome of its actions, the information that NEPA would provide can have no effect on the agency’s actions, and therefore NEPA is inapplicable. *Citizens Against Rails-To-Trails v. Surface Transportation Board*, 267 F.3d 1144, 1151 (D.C. Cir. 2001); see also NOAA’s Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities: Companion Manual to NOAA Administrative Order 216-6A (NEPA applies to actions where the proposed action and effects are subject to NOAA control and responsibility). Here, NMFS has no discretion whether to issue the waiver, no discretion to decide what is included in the waiver, no alternatives to issuing the waiver, and issuing the waiver is not subject to the agency’s control.

Finally, for some of the reasons discussed earlier, and the same reasons that consultation is not required under section 7 of the ESA and environmental impact analysis is not required under NEPA, no analysis of economic effects is required under the Regulatory Flexibility Act or E.O. 12866. Issuance of the waiver under section 20201 is not a regulatory action or a rulemaking, and the agency has no discretion not to issue the waiver.

Section 20201 provides that it shall operate as “a waiver . . . to section 101(a) and section 102(a) of the [MMPA].” Thus, the legal effect of the section 20201 waiver is to waive the MMPA section 101(a) moratorium for any take of any marine mammal species caused by the construction, operation, or maintenance of the three named projects. The waiver also exempts any take caused by the three named projects from the prohibitions under MMPA section 102(a). The waiver applies without additional agency action for the duration of construction, operation,

and maintenance of the three projects. As directed by Congress, the waiver does not include any “condition or limitation.”

Nonetheless, separate from issuance of the waiver, Congress directed the State of Louisiana to minimize impacts on marine mammal species and stocks and to monitor and evaluate any impacts of the projects. Specifically, section 20201(b) of the Act provides:

Upon issuance of a waiver pursuant to this section, the State of Louisiana shall, in consultation with the Secretary of Commerce:

- (1) To the extent practicable and consistent with the purposes of the projects, minimize impacts on marine mammal species and population stocks; and*
- (2) Monitor and evaluate the impacts of the projects on such species and populations stocks.*

NMFS looks forward to consulting with the State on ways to minimize impacts on the affected species and stocks and on measures to monitor and evaluate the impacts of the three projects on the affected species and stocks.