



ELWHA FISHERIES OFFICE

760 Stratton Rd
Port Angeles, WA 98363

(360) 457-4012
FAX: (360) 452-4848

June 1, 2023

LOWER ELWHA KLALLAM TRIBE Marine Mammal Annual Regulation F23-015

The following regulations are promulgated by the Lower Elwha Klallam Tribe. These regulations apply to the incidental take of marine mammals in treaty fisheries by Lower Elwha Klallam tribal members.

1. **Effective Dates**

June 1, 2023 through May 31, 2024

2. **Affected Species**

California Sea Lion, Steller Sea Lion, Harbor Seal

3. **Areas**

Lower Elwha Klallam Tribe U & A.

4. **Fishery**

Commercial and Ceremonial and Subsistence Fisheries

5. **Purpose.**

This regulation enacted by the Lower Elwha Klallam Tribe (“Tribe”) is intended to implement the Tribe’s right of taking fish under the Treaty of Point No Point, which includes the right to defend fishing gear and catch from interference by marine mammals. Consistent with Congress’s determination that nothing in the 1994 amendments to the Marine Mammal Protection Act (“MMPA”) “alters or is intended to alter any treaty between the United States and one or more Indian tribes,” Pub. L. No. 103-238, § 14, 108 Stat. 532, 558 (1994), this regulation describes those circumstances identified by the Tribe under which the incidental take of marine mammals by tribal members exercising treaty reserved fishing rights and certain identified tribal fisheries enforcement and management professionals is authorized.

This regulation also establishes a framework for government-to-government coordination between the Tribe and the National Oceanic and Atmospheric Administration (“NOAA”) regarding the incidental take of marine mammals in treaty fishing operations. The Tribe and NOAA will share information intended to improve science-based management of marine mammals and facilitate Tribal enforcement of this regulation and NOAA enforcement of the MMPA and its implementing regulations.

6. **Definitions.**

- (a) “Take” means to harass, hunt, capture, collect, or kill, or attempt to harass, hunt, capture, collect, or kill a marine mammal.

(b) “Incidental take” means the unintentional, but not unexpected, taking of a marine mammal in the course of treaty fishing operations (i) because it is directly interfering with fishing operations, (ii) as a consequence of the steps used to secure the fish in connection with fishing operations or (iii) as a measure of self-defense to ensure the safety of the crew or vessel.

(c) “Marine mammal” means any marine mammal that is not depleted (as defined in the MMPA, 16 U.S.C. § 1362(1)) or listed under the federal Endangered Species Act.

(d) “Serious injury” means any injury that will likely result in mortality.

(e) “Tribal fisheries enforcement and management professional” means a person authorized by the Tribe to enforce or manage the Tribe’s treaty right to take fish.

(f) “Tribal treaty fisher” means a person authorized by the Tribe to exercise the Tribe’s treaty fishing rights.

7. Prohibitions.

It is prohibited to take a marine mammal except as otherwise provided by this regulation.

8. Incidental Take Authorized.

A tribal treaty fisher and tribal fisheries enforcement and management professional may incidentally take a marine mammal, under the circumstances specified below, when exercising, enforcing or managing the Tribe’s treaty right to fish. As required by Section 1.1.16 of the Treaty Hunting Ordinance, all lethal take and serious injury of a marine mammal must be recorded on a marine mammal reporting card (available from the Tribal Fisheries Office). These reporting cards must be returned to the Tribal Fisheries Office no later than 48 hours after the event occurs.

9. Incidental Take of a Marine Mammal Interfering with Treaty-Reserved Fishing – Preventing Interference.

(a) Preventing Interference – Non-Lethal Acts.

A tribal treaty fisher or tribal fisheries enforcement and management professional may incidentally take a marine mammal by deterring it from damaging catch or deployed fishing gear, so long as such acts of deterrence are not intended to result in the death of or serious injury to the marine mammal. Potential non-lethal deterrence methods will include those set forth in the most recent NOAA Fisheries Guidance (updated October 2018) attached hereto, or such other measures as may be added to this provision after consultation with NOAA.

(b) Preventing Interference – Lethal Acts.

A tribal treaty fisher or tribal fisheries enforcement and management professional, after attempting non-lethal steps to deter a California sea lion, Steller sea lion, or harbor seal from damaging catch or deployed fishing gear, may incidentally take the California sea lion, Steller sea lion, or harbor seal by lethal means consistent with the public safety requirements of Section 9(c) below.

(c) Public Safety.

Tribal treaty fishers and tribal fisheries enforcement and management professionals shall ensure that any methods used to prevent a marine mammal from interfering with their fishing operations will not create an

imminent risk to public safety. Discharging of firearms from a vessel under power (in gear) creates an imminent risk to public safety and is a violation of this regulation.

10. Incidental Take of a Marine Mammal as a Consequence of Steps Used to Secure Fish.

A tribal treaty fisher may incidentally take a marine mammal as a consequence of the steps used to secure fish in connection with treaty fishing operations. Such incidental take includes but is not limited to entanglement of a marine mammal in fishing gear.

11. Self-Defense.

A tribal treaty fisher or a tribal fisheries enforcement and management professional may incidentally take by non-lethal or lethal means a marine mammal if such take is imminently necessary in self-defense or a life-threatening situation.

12. Information Sharing.

- (a) For purposes of information sharing under this section only, “marine mammal” means any seal, sea lion, whale, dolphin, porpoise or sea otter.
- (b) A tribal treaty fisher or tribal fisheries enforcement and management professional shall report any incidental take resulting in mortality or serious injury of a marine mammal to the Tribe’s Fisheries Department within 48 hours of landing, or as soon as reasonably possible.
- (c) The Tribe’s Fisheries Department shall provide on an annual basis by January 15 a summary report to the Northwest Indian Fisheries Commission (“NWIFC”), regarding aggregate incidental takes resulting in mortality or serious injury of marine mammals by tribal treaty fishers or tribal fisheries enforcement and management professionals, including number of marine mammals taken, approximate date, species, location (*e.g.* catch area), fishery gear type and target species (*e.g.* salmon troll, salmon drift gillnet, groundfish trawl), and disposition (mortality or serious injury). The NWIFC shall aggregate the information received into a single report and provide it to NOAA Fisheries. Individual tribe, fisher, and vessel anonymity shall be maintained. In lieu of the process above, any tribe can report directly to NOAA Fisheries.
- (d) To facilitate Tribal enforcement of this regulation and NOAA enforcement of the MMPA and its implementing regulations, the Tribe shall coordinate with NOAA Office of Law Enforcement and share information relevant to such enforcement, including Tribal fishing regulations establishing open seasons and areas, this marine mammal regulation and contact information for the Tribe’s Fisheries Department and Fisheries Enforcement Office. Upon request, the Tribe shall share with NOAA Office of Law Enforcement relevant information it has obtained from any reports submitted pursuant to Section 8(b) above regarding the incidental take of a marine mammal by a tribal treaty fisher or tribal fisheries enforcement and management professional. The Tribe shall also share information regarding and the disposition of any incident involving incidental take referred to the Tribe for investigation, including the outcome of any prosecution arising from the incident.

13. Disposition of Carcass.

The carcass of any marine mammal incidentally taken and killed under this regulation may be returned to the sea. If the carcass is retained, it must be made available to the Tribe’s Fisheries Department for biological sampling, after which it shall be provided for ceremonial and subsistence use within the tribal community consistent with Tribal law and custom.

14. Penalties.

Failure to observe and comply with any provision of this regulation shall be punishable by civil and/or criminal penalties as follows or as specified in Section 1.12 of the Tribe's Fishing Ordinance.

15. Reservation of Rights.

By adopting this regulation as Tribal law, the Tribe is not waiving any right, claim, defense or other legal entitlement regarding the Tribe's treaty fishing right or other rights held by the Tribe, nor is it intending to define or interpret the scope of its treaty right to take marine mammals.

16. Authority.

This regulation is promulgated by the Lower Elwha Klallam Fisheries Manager under authority specified by the Lower Elwha Klallam Fishing Ordinance Third Edition (as amended through Res. No. 40-22, dated May 17, 2022).



Samantha Rae
Harvest Manager
Lower Elwha Klallam Tribe



Potential Methods for Deterring Pacific Harbor Seals, California Sea Lions, Northern Fur Seals, Eastern U.S. Stock of Steller Sea Lions, & Northern Elephant Seals

Updated October 2018

GENERAL INFORMATION:

- The Marine Mammal Protection Act (MMPA) generally prohibits the harassment, hunting, capturing, or killing of marine mammals, or any attempt to engage in such activities. However, Section 101(a)(4) of the MMPA allows for the non-lethal deterrence of nuisance animals under certain circumstances. For more information, see [101\(a\)\(4\)](#).
- When attempting to deter these animals, you are **not allowed** to seriously injure or kill them (*e.g.* no open wounds, avoid impact to the animals' eyes and face, avoid blunt force trauma and aiming pyrotechnics directly at animals, *etc.*)
- These **"Potential Methods"** are **not** "approved" deterrence methods by NOAA Fisheries. They are examples of methods that are known to have been effective at deterring pinnipeds in the past.

Methods to Avoid:

The following methods/devices have an increased likelihood of causing injury or death and **should be avoided**.

- **No** Firearms with "live" (lethal) ammunition (including metallic, glass, or sharp projectiles: *e.g.* BBs, marbles)
- **No** Devices with Injurious Projectiles (*e.g.*, archery gear, crossbows, spear guns, bangsticks)
- **No** Sharp/Pointed Objects (*e.g.*, harpoons, spears, gaffs, nail studded bats/poles/clubs/docks)
- **No** Entangling Devices (*e.g.*, loose webbing, snares, concertina wire)
- **No** Aggressive Tactile Methods (*e.g.*, striking animals with bats, hammers, *etc.*; impact with vehicles or boats)
- **No** Tainted Baits or Poisons
- **No** Guard Dogs

Potential Methods for *Private Property Owners*:

Barriers & Exclusion Devices:

- fencing (*e.g.*, plastic construction/snow fence, chain link), closely spaced posts
 - bull rails
 - electric livestock fencing
 - netting
 - swim step protector
- #### **Noise Makers:**
- horns, whistles, bells
 - music
 - clapping, banging pots, pans, drums; empty aluminum cans on a string banging together
 - electronic acoustic devices (Acoustic Harassment Devices)
 - starter pistols
 - pyrotechnics (*e.g.*, bird screamers, bangers, firecrackers, propane canons) (*there are municipal and state ordinances managing the use and possession of these products*)

Visual Repellents:

- flags, pinwheels, or streamers
- flashing lights or strobes
- human attendants/monitors

Physical Contact:

- high or low pressure water hoses
- sprinklers, sprayers
- crowder boards
- bull poles (blunt tip), brooms
- cattle prod (these products produce only a mild electric shock designed for handling livestock and are in no way related to "stun guns" designed for self-defense)
- toy water guns (*e.g.*, "Super Soaker[®]")
- non-toxic and water soluble paint ball or air soft guns (no metallic/glass/sharp projectiles)
- slingshot (no metallic/glass/sharp projectiles)
- chemical irritants (*e.g.*, non-toxic pepper spray, mace) used for animal control (note: *there are municipal and state ordinances managing the use and possession of these irritants*)

Additional Potential Methods for *Fisherman*:

Visual Repellents/Noise Makers:

- boat hazing, circling
- pounding on hull
- horns, bells, whistles
- pyrotechnics (*e.g.*, bird screamers, bangers, underwater firecrackers, cracker shells)

Physical Contact:

- Slingshots (no metallic/glass/sharp projectiles)
- non-toxic and water soluble paint ball guns
- non-lethal ammunition (*e.g.*, rubber bullets)

If you have questions about protecting your property and/or fishing gear and catch from nuisance pinnipeds, please contact our marine mammal specialists located in Seattle, WA (Lynne Barre, 206-526-4745); in Portland, OR (Robert Anderson, 503-231-2226); and in Long Beach, CA (Penny Ruvelas, 562-980-4197).