UNITED STATES OF AMERICA
DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

In re:	)	
Proposed Waiver and Regulations Governing the Taking of Eastern North Pacific Gray Whales by the Makah Indian Tribe	)	Administrative Law Judge Hon. George J. Jordan Docket No. 19-NMFS-0001

ANIMAL WELFARE INSTITUTE'S
POST-HEARING BRIEF

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ALJ	Administrative Law Judge
APA	Administrative Procedure Act
AWI	Animal Welfare Institute
COSWEIC	Committee on the Status of Endangered Wildlife in Canada
DEIS	Draft Environmental Impact Statement
DSEIS	Draft Supplemental Environmental Impact Statement
ENP	Eastern North Pacific (gray whales)
ESA	Endangered Species Act
GAMMS	Guidelines for Assessing Marine Mammal Stocks
ICRW	International Convention for the Regulation of Whaling
IWC	International Whaling Commission
MMPA	Marine Mammal Protection Act
NEPA	National Environmental Policy Act
NMFS	National Marine Fisheries Service
NOAA	National Oceanic & Atmospheric Administration
OSP	Optimum Sustainable Population
Pacific SRG	Pacific Scientific Review Group
PCFG	Pacific Coast Feeding Group
UME	Unusual Mortality Event
WNP	Western North Pacific (gray whales)

INTRODUCTION

The National Marine Fisheries Service ("NMFS") has proposed a waiver of the take moratorium imposed by the Marine Mammal Protection Act ("MMPA" or "Act"), 16 U.S.C. §§ 1361-1407, and regulations to allow the Makah Tribe ("Tribe")[1] to hunt North Pacific gray whales. Despite being charged with ensuring that man's activities do not threaten the recovery and continued existence of marine mammal populations under the MMPA, NMFS has proposed to waive the take moratorium and issue regulations that will result in the unauthorized take of endangered Western North Pacific ("WNP") gray whales, a result the MMPA strictly forbids. Likewise, NMFS's proposed waiver and regulations refuse to consider the small, genetically distinct population of gray whales that show site fidelity to the west coast of the United States—called the Pacific Coast Feeding Group ("PCFG")—to be a "stock" under the MMPA, resulting in a proposal that ignores the best available science, is contrary to the policies and purposes of the MMPA, and risks disproportionate impacts on this small group that will have long-term impacts on its recovery and survival.

Moreover, NMFS has elected to proceed with the administrative process for issuing a waiver while the North Pacific gray whale populations are undergoing an Unusual Mortality Event ("UME"). Hundreds of whales have stranded along the west coast of North America for unknown reasons. Yet, far from adopting the conservative precautionary approach that the MMPA demands, NMFS insists on barreling ahead with its proposal to increase pressure on these populations while they are in the midst of a mass die-off. This is a result the MMPA does not countenance. Additionally, it serves to reinforce the conclusion that throughout this Waiver Proceeding, NMFS has repeatedly prioritized the interests of the Tribe over those of marine

[1] In this brief, the term "Tribe" or "Tribal" refers to members of the Makah Indian Tribe.

mammals, in direct contravention of Congress's explicit instructions in passing the MMPA. In so doing, NMFS has ignored the substantive mandates of the MMPA.

NMFS has also violated the procedural requirements of the MMPA and Administrative Procedure Act ("APA"), 5 U.S.C. §§ 556, 557. Indeed, despite refusing repeated calls to adopt a conservative approach that would stay the proceeding until the UME is over and its causes and impacts can be fully examined, NMFS announced several months *after* the hearing—and only weeks from the deadline to submit comments, post-hearing briefs, and proposed findings of facts and conclusions of law—that it would prepare a Draft Supplemental Environmental Impact Statement ("DSEIS") under the National Environmental Policy Act ("NEPA") to analyze "*additional relevant information*" regarding the UME and the impacts of the even/odd year hunt proposal on North Pacific gray whales. These analyses are not a part of the record in the Waiver Proceeding, yet are material to the factual and legal issues that will be decided. Accordingly, to the extent that NMFS relies on these new analyses in its final decision to issue (or not issue) a waiver, that decision is procedurally invalid.

For these reasons and those set forth below, NMFS's proposed waiver and regulations are not supported by substantial evidence, and a decision to issue the waiver and regulations would be arbitrary, capricious, not in accordance with law, and in excess of statutory jurisdiction. Accordingly, the Hon. Judge Jordan, the presiding officer in this matter, should recommend that NMFS deny the Tribe's waiver request and decline to promulgate the regulations, or at the very least, recommend that NMFS delay any decision on the waiver until the completion of the DSEIS process.

BACKGROUND

I. STATUTORY BACKGROUND

A. Marine Mammal Protection Act

In 1972, Congress passed the MMPA in response to the public's growing concern over the continued survival of marine mammals. *See* H.R. REP. NO. 92-707, at 12 (1971) (Conf. Rep.), *as reprinted in* 1972 U.S.C.C.A.N. 4144, 4145 ("The Committee was impressed by the wide support for the principle of broader and more adequate protection for marine mammals."). As broadly stated in the House Conference Report, Congress passed the MMPA "to prohibit the harassing, catching and killing of marine mammals by U.S. citizens or within the jurisdiction of the United States, unless taken under the authority of a permit issued by an agency of the Executive Branch." H.R. REP. NO. 92-707, at 12, 1972 U.S.C.C.A.N. at 4144.

To accomplish this ambitious goal, the statute imposes a strict "moratorium" on the taking of marine mammals, with limited exceptions. *See* 16 U.S.C. § 1371(a) (imposing the moratorium); *id.* § 1372(a) (declaring "it unlawful—for any person subject to the jurisdiction of the United States or any vessel or other conveyance subject to the jurisdiction of the United States to take any marine mammal on the high seas"). The Act provides that to "take" a marine mammal means to "harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." 16 U.S.C. § 1362(12); 50 C.F.R. § 216.3 (same). The statute defines "harassment" as:

> [A]ny act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild . . . ; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering.

16 U.S.C. § 1362(18)(A), (C), (D).[2]

The MMPA prohibits the take of any marine mammal without authorization. *See* Tr. vol. 1, 57:24-25 (NMFS expert agreeing that "[u]nauthorized take is prohibited by the [MMPA]"); *accord* 16 U.S.C. § 1372(a) (declaring it "unlawful" for any person "to take any marine mammal in waters or on lands under the jurisdiction of the United States" without prior authorization issued pursuant to one of the MMPA's statutory exceptions to the take moratorium). "Take" can be broadly categorized as "directed" take, or "incidental" take. *See* Tr. vol. 1, 57:6-7. Directed take—also called "intentional" take—occurs where "the activity is a purposeful interaction with the protected animal for a specific purpose that may result in take." NMFS, *Understanding Permits and Authorizations for Protected Species* (June 24, 2017) [hereinafter NMFS, *Understanding Permits*], https://www.fisheries. noaa.gov/insight/understanding-permits-and-authorizations-protected-species; *accord* NMFS, *Recovery Plan for the Cook Inlet Beluga Whale* III-19 (Dec. 2016) [hereinafter NMFS, *Beluga Recovery Plan*] ("'Directed take' occurs when an

[2] "Population stock" or "stock" is the fundamental unit of management under the MMPA, and is defined to mean "a group of marine mammals of the same species or smaller taxa in a common spatial arrangement, that interbreed when mature." 16 U.S.C. § 1362(11). The MMPA requires NMFS to develop Stock Assessment Reports for all marine mammal stocks in waters under the jurisdiction of the United States. *See* Bettridge Decl. Ex. 2-8 at 2. To aid in the identification of stocks, beginning in 1994, NMFS held a series of workshops to develop general guidelines, known as the Guidelines for Assessing Marine Mammal Stocks ("GAMMS"). Bettridge Decl. ¶ 13. The first GAMMS were issued in 1995, and were most recently revised in 2016. *Id.* Under the 2016 GAMMS, "a stock is recognized as being a management unit that identifies a demographically independent biological population." Bettridge Decl. Ex. 2-8 at 4. "Demographic independence" means that "the population dynamics of the affected group is more a consequence of births and deaths within the group (internal dynamics) rather than immigration or emigration (external dynamics)." *Id.* The 2016 GAMMS note that "[m]any types of information can be used to identify stocks of a species (e.g., distribution and movements, population trends, morphology, life history, genetics, acoustic call types, contaminants and natural isotopes, parasites, and oceanographic habitat)." *Id.* Significantly, the "[f]ailure to detect genetic or morphological differences . . . does not necessarily mean that populations are not demographically independent." *Id.*

activity is intentionally harassing or harming the animals, such as occurs when conducting research on those animals."). In other words, directed take occurs where the interaction with the marine mammal was the purpose of the activity. *See* NMFS, *Understanding Permits*, *supra.*[3] In contrast, "incidental" take occurs where "the activity is unrelated to the protected species, but the protected species may still be affected," rendering the take "unintentional." *Id.*; *accord* NMFS, *Beluga Recovery Plan*, *supra*, at III-19 ("'Incidental take' occurs when an activity results in harassment or harm to animals that were not the intended target of an activity, such as may occur when a construction activity introduces loud noises into the water.").[4]

When certain factors are satisfied, the MMPA permits NMFS to waive the moratorium to allow the directed "tak[e] . . . of any marine mammal . . . and to adopt suitable regulations [and] issue permits." 16 U.S.C. § 1371(a)(3)(A). The decision to waive the moratorium must be made "on the basis of the best scientific evidence available and in consultation with the Marine Mammal Commission" and must demonstrate "due regard" for the waiver's effects on the affected stock's "distribution, abundance, breeding habits, and times and lines of migratory movements of such marine mammals." *Id.* § 1371(a)(3)(A); *accord* Tr. vol. 1, 15:11-14. NMFS must also be "assured that the taking . . . is in accord with sound principles of resource protection and conservation," as articulated in the MMPA's purposes and policies. 16 U.S.C. § 1371(a)(3)(A); Tr. vol. 1, 15:14-17. Specifically, NMFS must ensure that the taking will not

[3] Statutory exceptions to the take prohibition that authorize directed take include: "Special Exception" permits for public display, scientific research, and photography, 16 U.S.C. § 1371(a)(1); and permits issued pursuant to a waiver of the moratorium, *id.* § 1371(a)(3).

[4] Statutory exceptions to the take prohibition that authorize incidental take include: permits to incidentally take marine mammals in the course of a specified activity (other than commercial fishing), 16 U.S.C. § 1371(a)(5); and permits and authorizations to incidentally take marine mammals in the course of commercial fishing operations, *id.* § 1371(a)(2).

cause marine mammal stocks to diminish to the point where they "cease to be a significant functioning element in the ecosystem of which they are a part"; cause marine mammal stocks to diminish below their optimum sustainable population" ("OSP"); or affect the health or stability of the marine ecosystem. 16 U.S.C. §§ 1361, 1371(a)(3)(A).[5]

When proposing to waive the take moratorium, NMFS must also propose regulations that are "necessary and appropriate to insure that such taking will not be to the disadvantage of those species and population stocks and will be consistent with the purposes and policies" of the MMPA, as quoted above. 16 U.S.C. § 1373(a). NMFS interprets "'disadvantage' in relation to the impact of take on the stock's OSP." *Regulations Governing the Taking of Marine Mammals*, 84 Fed. Reg. 13,604, 13,605 (Apr. 5, 2019). In prescribing regulations, NMFS must "give full consideration to all factors which may affect the extent to which such animals may be taken," including "existing and future levels of marine mammal species and population stocks"; "existing international treaty and agreement obligations of the United States"; "the marine ecosystem and related environmental considerations"; "the conservation, development, and utilization of fishery resources"; and "the economic and technological feasibility of implementation." 16 U.S.C. § 1373(b). Both the decision to waive the moratorium, and the

[5] OSP is defined to mean, "with respect to any population stock, the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element." 16 U.S.C. § 1362. OSP is further defined by regulation to mean "a population size which falls within a range from the population level of a given species or stock which is the largest supportable within the ecosystem to the population level that results in maximum net productivity." 50 C.F.R. § 216.3. In other words, OSP is "a population size that is within a range from the carrying capacity of the ecosystem (abbreviated as K) down to the number of animals that results in the maximum productivity of the population or the species." *Regulations Governing the Taking of Marine Mammals*, 84 Fed. Reg. 13,604, 13,605 (Apr. 5, 2019). "Maximum net productivity" is defined by regulation to mean "the greatest net annual increment in population numbers or biomass resulting from additions to the population due to reproduction and/or growth less losses due to natural mortality." 50 C.F.R. § 216.3.

regulations to govern the taking, must be made on the record after an opportunity for an agency hearing. *Id.* § 1373(d).

Significantly, the MMPA prohibits the issuance of a permit for the taking of any marine mammal that has been designated as "depleted" during the moratorium, unless the permit is issued for "scientific research purposes, photography for educational or commercial purposes, [] enhancing the survival or recovery of a species or stock," or to allow takings incidental to specified activities other than commercial fishing. *Id.* § 1371(a)(3)(B). A marine mammal stock is designated as "depleted" when NMFS "determines that [the] species or population stock is below its [OSP]" or when "a species or population stock is listed as an endangered species or threatened species under the Endangered Species Act ["ESA"]." *Id.* § 1362.

The MMPA also permits NMFS to issue permits to allow the "incidental, *but not intentional*," taking of marine mammals while engaging in a specified activity. *Id.* § 1371(a)(5) (emphasis added). Although "incidental" is not defined in statute, the term is defined by regulation to mean "an accidental taking." 50 C.F.R. § 216.103. The regulation further explains that "[t]his does not mean that the taking is unexpected, but rather it includes those takings that are infrequent, unavoidable or accidental." *Id.*

"Before any marine mammal may be taken" under any exception, NMFS "must first establish general limitations on the taking, and must issue a permit which would allow that taking." H.R. REP. NO. 92-707, at 18, 1972 U.C.C.C.A.N. at 4145. "The effect of this set of requirements is to insist that the management of the animal populations be carried out with the interests of the animals as the *prime consideration*." *Id.* (emphasis added).

II. FACTUAL BACKGROUND

A. Gray Whale Populations In The North Pacific.

1. *North Pacific Gray Whale Stocks*

"Population stock" ("stock") is the fundamental conservation and management unit under the MMPA. *See* Bettridge Decl. Ex. 2-8 at 4. The Act defines "stock" to mean "a group of marine mammals of the same species or smaller taxa in a common spatial arrangement, that interbreed when mature." 16 U.S.C. § 1362(11). The 2016 Guidelines for Assessing Marine Mammal Stocks ("2016 GAMMS") further explain that a stock is "a management unit that identifies a demographically independent biological population." Bettridge Decl. Ex. 2-8 at 4. "Demographic independence" is defined to mean that "the population dynamics of the affected group is more a consequence of births and deaths within the group (internal dynamics) rather than immigration or emigration (external dynamics)." *Id.* Put differently, to constitute a "stock" under the MMPA, population growth must be due more to "calves born into the group (i.e., internal recruitment)" than to juveniles or adults joining the group (i.e., external recruitment). Weller Decl. Ex. 3-2 at 38.

NMFS recognizes two population stocks of North Pacific gray whales: the Eastern North Pacific ("ENP") stock and the Western North Pacific ("WNP") stock. Weller Decl. ¶ 7. The two stocks exhibit significant differences in both their mitochondrial and nuclear DNA, and are also recognized as different management units by the International Whaling Commission ("IWC") and the International Union for Conservation of Nature. 84 Fed. Reg. at 13,606.

Both stocks were decimated by commercial whaling in the nineteenth and early twentieth centuries. *Id.* Internationally, gray whales were initially protected from whaling under the International Agreement for the Regulation of Whaling, signed in 1937. *See* Regulation of

Whaling art. 4, June 8, 1937, 52 Stat. 1460, 190 L.N.T.S. 80. In the successor agreement, the International Convention for the Regulation of Whaling ("ICRW"), gray whales were again protected from commercial whaling, although aboriginal whaling was permitted. *See* ICRW Schedule, Dec. 2, 1946, 62 Stat. 1716, 196 L.N.T.S. 132. Pursuant to the ICRW, in 1982, the IWC established a global moratorium on the commercial whaling of any species of great whale, which went into effect in 1986. Weller Decl. ¶ 6.

Domestically, in 1972, the MMPA protected North Pacific gray whales from commercial whaling and other forms of harassment and injury. *See* MMPA, Pub. L. No. 92-522, 86 Stat. 1027 (1972). Following the enactment of the ESA in 1973, the entire North Pacific gray whale species (encompassing both the WNP and ENP stocks recognized today) was listed as endangered, and was thus granted the benefit of the heightened protections afforded species listed under the ESA. *See* Weller Decl. ¶ 6; *see also* 16 U.S.C. §§ 1531-1544 (ESA).

As a result of the protection from commercial exploitation, the ENP stock of gray whales recovered, and in 1994 was delisted under the ESA. *See* 59 Fed. Reg. 21,094 (June 16, 1994) (delisting the ENP stock). Today, the ENP stock winters as far south as Baja California, Mexico, and migrates north to its summer feeding grounds as far north as the Chukchi and Beaufort Seas. 84 Fed. Reg. at 13,607. Prior to the 2019 UME, the ENP stock was estimated to consist of approximately 27,000 gray whales, and was considered to be within its OSP range. Yates Decl. ¶ 19; *see also* Tr. vol. 1, 16:23-24 (NMFS expert Chris Yates noting that prior to the UME, the ENP stock's abundance estimate was 26,960 whales).

The WNP stock did not similarly recover from commercial exploitation, and remains listed as endangered. *See* 59 Fed. Reg. at 21,094. As a result, the WNP stock remains listed as "endangered" under the ESA, *see id.*, and thus is considered "depleted" under the MMPA, *see* 16

U.S.C. § 1362(1). Its abundance estimate is a mere 290 whales. Bettridge 2d Decl. Ex. 2-12 at 13. Information regarding the distribution and migration patterns of the WNP stock is "incomplete." Weller Decl. Ex. 3-2 at 17. The stock's main feeding ground is believed to be in the Okhotsk Sea off the northeastern coast of Sakhalin Island, Russia, although some animals also occur off the coast of eastern Kamchatka and in other coastal waters of the northern Okhotsk Sea. *Id.* Its winter breeding grounds are "poorly known." *Id.* The WNP stock has not been determined to be within its OSP range. *See* Yates 3d Decl. ¶ 27 ("NMFS currently does not have sufficient information to calculate carrying capacity or OSP levels for the WNP stock[.]").

In light of its small population size, the WNP stock is particularly vulnerable to extinction, *cf.* 78 Fed. Reg. 73,726, 73,726 (Dec. 9, 2013) ("A population size of several hundred individuals is precariously small for any large whale or large mammal population."), and threats to the stock have only increased. Ocean acidification "could reduce the abundance of shell-forming organisms" that form the basis of gray whales' diet. Bettridge 2d Decl. Ex. 2-12 at 14. With respect to more immediate impacts from human activities, "[n]ear shore industrialization and shipping congestion throughout the migratory corridors of the WNP gray whale stock represent risks by increasing the likelihood of exposure to pollutants and ship strikes as well as a general degradation of the habitat." *Id.* An analysis of anthropogenic scarring on WNP gray whales found that the stock is also "significant[ly] threat[ened]" by incidental catches in coastal net fisheries. *Id.* Additionally, the summer feeding area off of Sakhalin Island is in a region characterized as "rich with offshore oil and gas reserves," placing WNP gray whales at an increased risk of disturbance or injury from extractive activities. *Id.* Indeed, NMFS reports that "[t]wo major offshore oil and gas projects now directly overlap or are in near proximity to this important feeding area, and more development is planned in other parts of the Okhotsk Sea that

include the migratory routes of these whales." *Id.* Oil and gas operations of this nature are major sources of "underwater noise, including seismic surveys, increased shipping traffic, habitat modification, and risks associated with oil spills." *Id.* Accordingly, the WNP gray whale stock faces a multitude of threats and disturbances as a result of human's activities.

Although the WNP and ENP stocks had previously been thought to be geographically isolated from one another, recent studies have shown that some WNP whales migrate along the western coast of the United States, including through the proposed hunt area. Yates Decl. ¶ 22; *see also* Tr. vol. 1, 59:7-8 (NMFS expert Mr. Yates admitting that "yes, we know that [WNP] gray whales migrate through the Makah U&A."). To date, at least fifty-four WNP whales—i.e., approximately 19% of the entire stock, assuming these are unique individuals—have been identified in the ENP range. Schubert 2d Decl. Ex. 36 at 2. NMFS concedes that it is "likely" that not all of the WNP whales that migrate through the ENP range have been identified. Tr. vol. 2, 57:1-4. Accordingly, there may be more WNP whales present in the ENP range and in the proposed hunt area than are currently known. Tr. vol. 2, 57:5-8 (NMFS expert Dr. David Weller conceding that "[i]t's possible" that there are additional WNP whales in the ENP range that have not been positively identified).

In addition to the two recognized stocks, NMFS recognizes a third group of gray whales known as the Pacific Coast Feeding Group ("PCFG"). These whales exhibit seasonal fidelity to feeding grounds off of the west coast of the United States and Canada, and are defined to include whales "that are photo-identified within the region between northern California and northern Vancouver Island during the summer feeding period of June 1 to November 30, in two or more

years." 84 Fed. Reg. at 13,607. The most recent population abundance estimate for PCFG whales is 232 animals. *See* NMFS Ex. 3-101, ALJ Dkt. No. 85.[6]

Site fidelity to this area is learned by offspring from their mothers. Weller Decl. Ex. 3-38 at 7. Studies on the genetics of North Pacific gray whales confirm that PCFG gray whales have significant differences in their mitochondrial DNA markers as compared to the larger ENP population. 84 Fed. Reg. at 13,607. Accordingly, internal recruitment plays a significant role in PCFG population dynamics. *See, e.g.*, Weller Decl. Ex. 3-36 at 8-9. Experts generally agree that the proportion of internal recruitment to external recruitment is 50/50. Tr. vol. 2, 22:16. However, evidence suggests that at least some of the PCFG calves are not detected in their first year and, consequently, are incorrectly identified as "external" recruits when surveyed in subsequent years. Weller Decl. Ex. 3-2 at 27. Additionally, recent studies by gray whale experts have suggested that the proportion of internal recruitment is actually much higher than the already notable previous figure of 50%. *See, e.g.*, Weller Decl. Ex. 3-36 at 8-9 (concluding that significant differences in the mitochondrial DNA between the PCFG and ENP gray whales "suggest that groups of gray whales utilizing different (northern versus southern) feeding regions are demographically independent"); Schubert 2d Decl., Ex. 15 at 2 (citing a study finding that a majority (56%) of calves sighted in the PCFG area "were resighted in a year subsequent to their birth year," and were thus considered to be internal recruits, and concluding that there is "a higher degree of internal recruitment to the PCFG than had been suggested by previous less complete data"); Scordino Decl. Ex. M-0057 at 6-7 (finding that PCFG whales continue to

[6] Citations to the Administrative Law Judge's ("ALJ") electronic docket, available in the Electronic Reading Room at https://www.uscg.mil/Resources/Administrative-Law-Judges/Decisions/ALJ-Decisions-2016/NOAA-Formal-Rulemaking-Makah-Tribe/, are in the following format: "ALJ Dkt. No. XX," where XX is the number assigned to the document in the ALJ's Electronic Reading Room.

associate with one another in mixed-sex groups during both the northbound and southbound migrations, "increas[ing] the potential for breeding with other whales from the same feeding group").

NMFS last held a workshop to consider gray whale stock structure in 2012. Weller Decl. Ex. 3-2 at 9. Despite acknowledging that the PCFG gray whales occupy an ecosystem that differed from their ENP counterparts, *see* Weller Decl. Ex. 3-2 at 43, show a significant level of genetic differentiation in their mitochondrial DNA markers from the ENP stock, *id.* at 46, and likely exhibit rates of external and internal recruitment that are roughly equivalent, *id.* at 44, NMFS ultimately declined to bestow "stock" status on the PCFG because the data were not sufficient to *definitively* resolve all uncertainty surrounding the question, *see id.* at 48. Instead, NMFS considers the PCFG to be a "feeding group" of the larger ENP stock. 84 Fed. Reg. at 13,607.

Management authority over the PCFG is shared with Canada, as the population's range extends into British Columbia. Schubert 2d Decl. Ex. 8 at 21. In 2017, in light of new evidence regarding population structure of North Pacific gray whales, the Committee on the Status of Endangered Wildlife in Canada ("COSEWIC") reconsidered its previous assessment of the ENP stock as a single "designatable unit." *See id.* at xxi. To be considered a "designatable unit," a population must "ha[ve] attributes that make it 'discrete' and evolutionarily 'significant' relative to other populations." *Id.* at 7. To be considered "significant," the population must either "persist[] in an ecological setting unusual or unique to the species, such that it is likely or known to have given rise to local adaptations," or occupy a unique ecosystem such that "its loss would result in an extensive disjunction in the range of the species in Canada that would not be recolonized by natural dispersal." *Id.* at 11.

COSEWIC examined the same recent studies on the PCFG as NMFS, yet reached the opposite conclusion—i.e., that the PCFG is a distinct population of North Pacific gray whale. Citing recent studies finding that the PCFG and ENP stock exhibit statistically significant differences in mitochondrial DNA markers, and that photo-identification data "demonstrat[e] strong maternally directed fidelity to summer feeding grounds," COSEWIC concluded that "it is reasonable to argue that the PCFG is genetically distinct . . . even though the differences . . . between PCFG and other 'eastern' Grey Whales are not large." *Id.* at 10-11. Additionally, COSEWIC noted that while there "are no morphological or life history features that distinguish the two groups . . . a clear behavioural difference exists between them." *Id.* at 11.

COSEWIC also determined that PCFG whales "occupy a unique environmental setting in which there are differences in behaviour, specifically related to their selection of feeding habitat and mode of foraging," that is likely "culturally inherited from mother to calf." *Id.* Accordingly, it is reasonable to infer "that some degree of 'local adaptation' is present." *Id.* at 11-12. Moreover, COSEWIC noted "that that the observed population structuring from maternally directed site fidelity to different feeding grounds . . . is 'common in whales and important for management.'" *Id.* at 13. COSEWIC cited studies warning that because knowledge of some feeding grounds may be present only in certain matrilines, the loss of individual whales could lead to the loss of knowledge of feeding areas and consequently, the "extirpat[ion]" of whales "from a specific feeding ground." *Id.* COSWEIC noted that "[t]his argument could be extended to suggest that if the PCFG were to be extirpated, this would result in a persistent (albeit not very extensive) disjunction in the range of the species in Canada (temporal and possibly also spatial as PCFG whales are more likely than other whales to occur in waters between Vancouver Island and the mainland)." *Id.*

COSEWIC acknowledged that in light of the overlapping ranges of the ENP and PCFG populations, "even if all PCFG whales were to disappear suddenly, recolonization by individuals from the migratory population might occur fairly rapidly." *Id.* Even so, recent studies "indicate[] a higher degree of internal recruitment than had been suggested by previous 'less complete' data." *Id.* Moreover, due to its small size, the PCFG "is vulnerable to stochastic events and threats including contamination from oil spills." *Id.* at xv. Accordingly, COSEWIC determined that a precautionary approach of protecting this unique population as a designatable unit was necessary, and further recommended that the population be designated as endangered. *Id.*

In March 2018, the Pacific Scientific Review Group ("Pacific SRG"), one of the three independent scientific advisory bodies established by the MMPA to advise NMFS on marine mammal science and management issues, 16 U.S.C. § 1386(d), recommended that NMFS "reconsider the characteristics and status of the [PCFG] gray whales and whether it should be recognized and managed as a full stock." Bettridge Decl. Ex. 2-11 at 11. In response, NMFS restated its "belie[f]" that currently available information does not definitively establish that the PCFG as a "full stock" under the MMPA. *Id.*

To support its conclusion, NMFS noted that the two stock structure hypotheses determined to be most plausible do not "conflict[] with NMFS's current characterization . . . of a single Eastern North Pacific (ENP) gray whale stock that includes the PCFG." *Id.*[7] NMFS

[7] The first hypothesis posits that what was known as the western breeding stock of North Pacific gray whales has been extirpated, and the remaining eastern breeding stock consists of three "feeding sub-stocks"—the PCFG; a Northern feeding group, consisting of the whales NMFS identifies as the ENP stock; and the western group, consisting of the whales NMFS identifies as the WNP stock—that each show matrilineal fidelity to feeding grounds. *See* Scordino Decl. Ex. M-0154 at 5, 17. The second hypothesis is the same as the first, except that the western breeding stock is presumed to be extant and mixes with the western feeding group of the ENP stock at Sakhalin. *See id.* at 5, 17-18. Under either hypothesis, the IWC notes that the western feeding group is "demographically independent" of the other two feeding groups. *See id.* at 17.

suggested that the IWC's terminology further supported its refusal to reexamine the PCFG's stock status. *Id.* (noting that "the IWC continues to refer to the PCFG as a feeding 'aggregation' or 'group' within the eastern breeding stock of gray whales").

NMFS also rejected COSEWIC's determination that the PCFG constituted a discrete unit. NMFS stated that "the information supporting [COSEWIC's] decision to split the ENP stock has been reviewed by the NMFS," yet dismissed its counterpart agency's findings by arguing that the "discreteness and significance criteria" for designatable units are "not MMPA requirements." *Id.* at 12. NMFS nevertheless insisted that COSEWIC's conclusions—i.e., that there are "uncertainties in determining whether the PCFG is demographically discrete"; and that "the primary difference between the two 'populations' is largely behavioral (i.e., selection of different feeding areas)," as opposed to genetic distinctness—"are consistent with the NMFS Task Force findings." *Id.*

2. *Unusual Mortality Events*

NMFS declared a UME for the ENP stock in 1999-2000 due to an unusually large number of dead gray whales stranding along the west coast of North America. Yates 4th Decl. ¶ 3. Specifically, the Working Group on Marine Mammal UMEs concluded that the gray whale strandings qualified as a UME because the whales "were stranding throughout their range, stranding rates had increased precipitously, animal behavior and body condition were different (emaciated) from those reported previously, and animals were stranding in areas where such events had not been historically noted (behavioral change)." *Id.* By the time the UME was declared "closed" on December 7, 2001, over 650 gray whales had stranded along the west coast of North America. *Id.* However, due to cryptic mortality—defined as "mortality that you do not see or document." Tr. vol. 1, 63:25-64:1—these 650 whales represent only about 3.9% to 13% of

the whales that actually died, Tr. vol. 1, 65:1-4, meaning that the actual number of deaths could be as high as approximately 5000 whales. The cause of the UME was never determined, although nutritional stress was considered to be the likely dominant factor. Yates 4th Decl. ¶ 4.[8]

In early 2019, sixty dead gray whales stranded in California, Oregon, Washington, and Alaska. Bettridge 3d Decl. ¶ 11. This was well above the eighteen-year average for the five-month period from January to May. *Id.* The stranded whales were observed to be "emaciated with moderate to heavy cyamid (whale lice) loads." *Id.* NMFS requested formal consultation with the Working Group regarding the elevated number of gray whale mortalities. *Id.* ¶ 9. After evaluating the stranding data, the Working Group recommended that the mortalities be declared a UME due to the "marked increase in the magnitude . . . of morbidity mortality or strandings when compared with prior records," and the "similar . . . general physical condition" of the stranded whales." *Id.* ¶¶ 5, 10. Based on this recommendation, on May 29, 2019, NMFS declared a gray whale UME along the West Coast of North America. *Id.* ¶ 10.

At the time of the November 2019 hearing, 214 strandings had been attributed to the UME. Tr. vol. 1, 20:2-5. At least one stranded whale has been positively identified as a member of the PCFG. Tr. vol. 1, 27:19-20. However, due to cryptic mortality, NMFS "presume[s] that somewhere between 1700 and 5500 whales may have died during the [UME] thus far," as of November 2019. Tr. vol. 1, 20:9-15. NMFS has not yet determined the extent of the impacts of

[8] Under the Marine Mammal Health and Stranding Response Act, passed in 1992 as an amendment to the MMPA, the term "stranding" is defined as: (a) "an event in the wild in which a marine mammal is dead" on a beach or shore of the United States, or in waters subject to the jurisdiction of the United States; or (b) "an event in the wild in which a marine mammal is alive" and is on a beach or shore of the United States and unable to return to the water, on a beach or shore of the United States and in need of medical attention, or in the waters subject to the jurisdiction of the United States and is unable to return to its natural habitat without assistance. 16 U.S.C. § 1421h(3).

the UME on the ENP stock. Tr. vol. 1, 20:6-8. In fact, NMFS concedes that it is "premature to speculate as to the potential causes, severity, or duration of the UME." Bettridge 5th Decl. ¶ 4. Nor does NMFS know whether and to what extent the UME has affected the PCFG. Tr. vol. 1, 65:11-13. Although data collected after the 1999/2000 UME suggest that the PCFG increased as a result of the UME, each UME is different. Tr. vol. 1, 97:21 (NMFS Expert noting that "each UME is unique. No two are the same."). Thus, "it's certainly possible" that the UME has affected—and is still affecting—the PCFG. Tr. vol. 1, 64: 17-25. The 2019 UME has not been declared to be over.[9]

B. The Makah Tribe's Recent Attempts To Resume Whaling.

The Makah Indian Tribe ("Tribe"), a federally recognized tribe, resides on the northwestern Olympic Peninsula in Washington State. *See* 84 Fed. Reg. at 13,605, 13,619. In 1855, the Tribe and the United States entered into the Treaty of Neah Bay, whereby the Tribe ceded their land in exchange for "[t]he right of taking fish and of whaling or sealing at usual and accustomed grounds and stations in common with all citizens of the United States." *See Metcalf v. Daley*, 214 F.3d 1135, 1137 (9th Cir. 2000) (quoting Treaty of Neah Bay, 12 Stat. 939, 940 (1855)). The Treaty of Neah Bay was one of several treaties negotiated by Isaac Stevens, the first Governor and First Superintendent of Indian Affairs of the Washington Territory, with the several tribes of the Pacific Northwest between 1854 and 1856. *See Washington v. Wash. State Commercial Passenger Fishing Vessel Ass'n* (*Commercial Passenger*), 443 U.S. 658, 666-668 (1979) (discussing the "Stevens Treaties"); *Makah Indian Tribe v. Quileute Indian Tribe*, 873

[9] In fact, between January 1, 2020 and March 13, 2020, forty-nine gray whales stranded on the coasts of the United States and Mexico. *See* NMFS, *2019-2020 Gray Whale UME Along the West Coast*, https://www.fisheries.noaa.gov/national/marine-life-distress/2019-2020-gray-whale-unusual-mortality-event-along-west-coast (last updated Mar. 13, 2020).

F.3d 1157, 1159 (9th Cir. 2017) (same). These treaties all had similar clauses reserving the right to take fish at usual and accustomed hunting grounds to the signatory tribes. *See Makah Indian Tribe*, 873 F.3d at 1159. Although the Treaty of Neah Bay is the only treaty to explicitly reserve the right to take whales to the Makah Tribe, in at least some of the other Stevens treaties, the broad "right of taking fish" included the right to take marine mammals such as whales and seals. *See id.* at 1167 (examining contemporaneous negotiation notes, subsistence activities, and post-treaty activities to find that the Quileute and Quinault Tribes intended the Treaty of Olympia's provision reserving the "right of taking fish" to include whales and seals).

The Tribe hunted whales until the 1920s, when a variety of factors led to a voluntary cessation of the practice. DEIS at 3-302 to -303.[10] Approximately fifty years later, in 1972, Congress passed the MMPA establishing a moratorium on the taking of marine mammals. *See* 86 Stat. 1027. Then, in 1982, the IWC approved a moratorium on all commercial whaling, which went into effect in 1986. DEIS at 1-19 to -20.

The Makah Tribe first sought to resume whaling in 1995, when NMFS agreed to "'work with' the Makah in obtaining an aboriginal subsistence quota from the IWC." *Metcalf*, 214 F.3d at 1138. Twice, NMFS has attempted to authorize a hunt, and twice, the Ninth Circuit has rejected NMFS's decision for failing to comply with the environmental review processes required by law. *See generally Metcalf*, 214 F.3d 1135; *Anderson v. Evans*, 371 F.3d 475 (9th Cir. 2004). In *Anderson*, the Ninth Circuit also held that "the MMPA is applicable to regulate

[10] Citations to the "DEIS" refer to the 2015 Draft Environmental Impact Statement on the Makah Tribe Request to Hunt Gray Whales, entered into the docket as ALJ Exhibit 6.

any whaling proposed by the Tribe," and as such, the Tribe must obtain a permit or waiver under the MMPA to engage in whaling. *Anderson*, 371 F.3d at 501.[11]

In 2005, the Makah Tribe formally requested a waiver of the take moratorium under the MMPA to hunt gray whales. DEIS at 1-2. As required by the court in *Anderson*, 371 F.3d at 494, and "[t]o assist in [NMFS's] MMPA and [Whaling Convention Act] determinations," NMFS prepared a Draft Environmental Impact Statement ("DEIS") under NEPA. *Id.* NMFS published the first DEIS in 2008; however, "several substantive scientific issues arose that required an extended period of consideration for [the] NEPA analysis," including *inter alia*, "genetic evidence of population substructure indicating that PCFG whales may warrant consideration as a separate management unit," and "whale tracking and sampling data indicating that at least some members of the endangered western stock of gray whales migrate across the Pacific and into areas (including the Makah U&A) once thought to be used exclusively by ENP gray whales." DEIS at 1-42. Accordingly, NMFS terminated the 2008 DEIS process. *Id.* at 1-43.

In 2012, NMFS announced its intent to prepare a new DEIS for the proposed hunt. *Id.* In 2015, NMFS issued a second DEIS. *Id.* at 1-2. Over four years later, in April 2019, NMFS issued a Federal Register Notice announcing its proposal to waive the take moratorium under the MMPA to allow the Makah Tribe to hunt ENP gray whales over a period of ten years. *See* 84 Fed. Reg. at 13,605. NMFS also announced that an administrative hearing on the proposed waiver and regulations would be held just over three months later, in August 2019. *Id* at 13,604.

[11] Since 1995, two whales have been hunted and killed by the Tribe. In 1999, a gray whale was legally hunted and landed before a federal court could evaluate the legality of the authorization. DEIS at 1-38. In 2007, a gray whale was killed in an unauthorized and illegal hunt. DEIS at 1-40.

C. The Proposed Waiver And Regulations.

NMFS proposed to waive the take moratorium under the MMPA for a ten-year period to allow the Tribe to hunt ENP gray whales. 84 Fed. Reg. at 13,608. According to NMFS, its proposed waiver and regulations were shaped by two key management goals: first, "[l]imiting the likelihood that [T]ribal hunters would strike or otherwise harm a WNP gray whale"; and second, "ensuring that hunting does not reduce PCFG abundance below recent stable levels." *Id.*[12]

NMFS's proposed regulations define the various hunt activities that would be authorized pursuant to the waiver. The following definitions are particularly relevant to the Waiver Proceeding. "Hunt" is defined as "to pursue, strike, harpoon, shoot, or land a gray whale under a hunt permit . . . or to attempt any such act." 84 Fed. Reg. at 13619. "Hunt" is further defined to exclude the acts of "hunting approaches, training approaches, or training harpoon throws." *Id.* "Strike" is defined to mean "to cause a harpoon, darting gun, or other weapon, or a projectile from a rifle or other weapon, to penetrate a gray whale's skin or an instance in which a gray

[12] Regarding the first management goal, NMFS noted that the MMPA required consideration of "all factors that may affect the allowable level of take," and thus determined that "potential effects of a hunt on WNP whales are a relevant consideration" to the sufficiency of the proposed regulations. 84 Fed. Reg. at 13,608. NMFS acknowledged that "documented occurrences of WNP whales transiting the Makah U&A" presented a risk that WNP whales would be taken as a result of the hunt because "hunters would not be able to visually distinguish WNP whales from ENP whales during a hunt." *Id.* Accordingly, NMFS attempted to design a hunt that "minimize[d] the risk of a WNP whale being struck or harmed over the duration of the waiver." *Id.* Regarding the second management goal, NMFS acknowledged that PCFG whales "exhibit site fidelity during the feeding season to the northern California current ecosystem, a unique area within the range of the ENP gray whale stock," *id.*, and further, might be designated as a stock in the future, Tr. vol. 1, 25:12-14. NMFS noted that the MMPA required that the agency "give due regard to . . . the distribution and times and lines of migratory movements of the stock subject to waiver," and ensure that "a waiver be in accord with the purposes and policies of the MMPA, which include maintaining marine mammals as a functioning element of their ecosystem." 84 Fed. Reg. at 13,608. NMFS purported to fulfill this requirement by "limiting lethal and sub-lethal effects to PCFG whales." *Id.*

whale's skin is penetrated by such a weapon or projectile during hunting." NMFS's Mot. Requesting Revisions to Proposed Regulations, Attach. A at 5, ALJ Dkt. No. 75.[13] "Unsuccessful strike attempt" is defined as "any attempt to strike a gray whale while hunting that does not result in a strike." 84 Fed. Reg. at 13,619. A "training approach" means "to cause, in any manner, a training vessel to be within 100 yards of a gray whale." *Id.* A "training harpoon throw" is defined to mean "an attempt to contact a gray whale with a blunted spear-like device that is incapable of penetrating the skin of a gray whale." *Id.*

The proposed waiver and regulations would authorize alternating hunt seasons in even and odd years, with even-year hunts occurring during the migration season—purportedly to reduce the risk to PCFG whales—and odd-year hunts occurring during the feeding season—purportedly to reduce the risk to WNP whales. *Id.* at 13,608. NMFS proposed limiting the number of "strikes" to three in even-year hunts, and two in odd-year hunts. *Id.* NMFS further proposed limiting the number of strikes of PCFG whales to sixteen for the duration of the ten-year waiver period, and implementing "PCFG abundance triggers," which would require the hunt to cease if PCFG abundance falls below 192 whales, or if the PCFG minimum abundance estimate falls below 171 whales. *Id.* at 13,609. Whether a strike is counted against the PCFG strike limit would depend on the season and whether the subject whale could be identified through photographic or genetic matching. *Id.* at 13,608-09. NMFS proposed to count any whale struck during odd-year hunts as a PCFG whale (unless identified as a WNP whale). *Id.* at 13,609. During odd-year hunts, if the whale could not be positively identified as PCFG, it would be

[13] On October 28, 2019, NMFS submitted a motion requesting certain revisions to its proposed regulations, including the definition of "strike" or "struck." *See* NMFS's Mot. Requesting Revisions to Proposed Regulations, ALJ Dkt. No. 75. The other definitions quoted herein remained unchanged from NMFS's original proposal. *See id.* at 5-6.

counted in proportion to the estimated percentage of PCFG whales in the hunt area during the month of the strike. *Id.*

Acknowledging that approaches and attempted strikes fall within the ambit of the take prohibition, NMFS proposed limits on such "non-lethal" hunt activities. *Id.* at 13,610.[14] The proposed waiver and regulations would also authorize up to 353 approaches of ENP gray whales, "including both hunting and training approaches," each calendar year, of which "no more than 142 could be of PCFG whales." *Id.* NMFS proposed to account for approaches "proportionally in even-year hunts"—i.e., in the same way as strikes—while presuming that approached whales are PCFG whales in odd-year hunts. *Id.* According to NMFS, the "purpose of this provision is to limit the extent to which WNP and PCFG whales may be encountered and possibly disturbed in the hunt area." *Id.* The Tribe would be allowed eighteen unsuccessful strike attempts during even-year hunts, and twelve during odd-year hunts. *Id.* Training harpoon throws would count as unsuccessful strike attempts. *Id.*

The proposed waiver would not authorize the take of an endangered WNP whale. *See* 84 Fed. Reg. at 13,608 (noting that the Tribe has not requested a waiver for WNP gray whales); Yates 3d Decl. ¶ 41 ("The regulations do not authorize strikes on WNP whales and do not include provisions accounting for strikes of WNP whales."). However, because WNP whales are

[14] Indeed, NMFS has long considered approaches to within 100 yards of a marine mammal to constitute a prohibited "take" under the MMPA. *See, e.g.*, 66 Fed. Reg. 29,502, 29,508 (May 31, 2001) (noting that prohibiting all vessels—including kayaks—from approaching humpback whales to within 100 yards "will provide protection from harassment"); 84 Fed. Reg. at 13,610 ("The 100-yard limit is consistent with permit conditions NMFS imposes for research vessels on large cetaceans . . . as well as guidelines for *all motorized and non-motorized vessels*." (emphasis added)); *id.* at 13,612 ("When issuing permits under the MMPA, NMFS generally limits the number of approaches within defined distances (typically 100 yards or less for large cetaceans) because of the *potential* for such approaches within those limits to *affect or disrupt whale behavior*." (emphases added)).

known to migrate through the Makah U&A and because it is impossible to visually distinguish between WNP and ENP whales in a hunt scenario, NMFS determined that there is a risk that WNP whales would be taken by the hunt activities. *See* 84 Fed. Reg. at 13,608 (noting that "there are documented occurrences of WNP whales transiting the Makah U&A, and hunters would not be able to visually distinguish WNP whales from ENP whales during a hunt," and as such, there is a risk that the hunt may impact WNP whales). Accordingly, NMFS conducted a risk assessment to determine the probability of a WNP whale being subjected to an approach, unsuccessful strike attempt, or strike. *See* Moore 2d Decl. Ex. 4-15 at 12. NMFS determined that at least one WNP whale will be subjected to an approach over the ten-year waiver period. *See id.* at 12 (probability of 100%). In fact, the waiver is almost certain (83%) to result in the approach of a WNP whale in any one year of the waiver period. *Id.* NMFS further determined that there is a reasonable chance that a WNP whale will be subjected to an unsuccessful strike attempt (36.7%, with an upper confidence interval of 48.3%), and a non-zero chance that at least one WNP whale will be lethally struck (7.3%) during the ten-year waiver period. *Id.* NMFS viewed the risk of a WNP whale being struck as high enough to require a contingency in the regulations, stating if a WNP whale is killed, "all hunting would cease unless and until . . . measures [are] taken to ensure that no additional WNP gray whales [are] struck during the waiver period." 84 Fed. Reg. at 13,608.

D. Procedural History.

On the same day that NMFS announced the hearing on the proposed waiver and regulations, the agency filed on the ALJ's electronic docket four declarations, including exhibits, to support its factual assertions. *See* ALJ Dkt. Nos. 1-4. Together with the exhibits, NMFS's materials—some of which were not previously publicly available—numbered approximately

4900 pages of information. *See* AWI's Expedited Mot. to Extend Waiver Proceedings Schedule at 1, ALJ Dkt. No. 13. In light of the voluminous record and difficulties securing experts, AWI moved to delay the hearing. *See id.* This motion was denied, *see* ALJ Dkt. No. 22, and a prehearing conference was held on June 17, 2019, *see* 84 Fed. Reg. 37,837, 37,837 (Aug. 2, 2019).

At the prehearing conference, several parties again requested that the hearing date be changed due to issues concerning the availability of witnesses and counsel. *See* 84 Fed. Reg. 30,088, 30,092 (June 26, 2019). Judge Jordan ordered briefing on this issue and determined a continuance was warranted. *Id.* After consulting with the parties during a second prehearing conference on July 23, 2019, Judge Jordan determined that the hearing would begin on November 14, 2019. *Id.* A final hearing agenda setting forth the issues of fact to be addressed at the hearing was issued on June 26, 2019. *See id* at 30,089. The agenda identified a new issue—the 2019 UME—that had not previously been included in the hearing materials. *Id.* at 30, 092.

The hearing began on November 14, 2019, and lasted for six days. On January 29, 2020, NMFS published the full transcript and requested public comment on the proposed waiver and regulations. *See* 85 Fed. Reg. 5196, 5196 (Jan. 29, 2020). Approximately one month later, on February 24, 2020, NMFS emailed the Parties to inform them for the first time that NMFS had decided to prepare an DSEIS "to evaluate information related to the 2019 UME as well as any other appropriate updated information," including information regarding the impacts of the even/odd year hunt proposal on North Pacific gray whale populations. *See* AWI's Expedited Mot. to Stay Proceeding Pending Completion of Suppl. DEIS Attach. A, ALJ Dkt. No. 95. Neither Judge Jordan nor his chambers were included on this email, despite the obvious relevance of the DSEIS to the Waiver Proceeding. *Id.* A Federal Register Notice announcing that

NMFS "is preparing" the DSEIS to assess "additional relevant information" not presented at the hearing was published on February 27, 2020. *See* 85 Fed. Reg. 11,347, 11,347-38 (Feb. 27, 2020).

ARGUMENT

Because the MMPA contains no provision for judicial review, agency decisions under the MMPA are reviewed under the APA. *See* 5 U.S.C. § 704. Under the APA, agency decisions that are found to be "unsupported by substantial evidence," "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or adopted "without observance of procedure required by law" must be held unlawful and set aside. 5 U.S.C. § 706(2).

The "substantial evidence" standard applies to factual findings made by agencies in formal APA adjudications. 5 U.S.C. § 706(2)(E). The Supreme Court has explained that "substantial evidence" means "more than a mere scintilla." *Richardson v. Perales*, 402 U.S. 389, 401 (1971). "It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.*

An agency decision is "arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). To satisfy this standard, a "searching and careful inquiry into the facts underlying the agency's decision" must demonstrate that the agency "has examined the relevant data and has articulated an adequate explanation for its action." *Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 519 (D.C. Cir. 2009) (citations and quotation marks omitted).

The "substantial evidence" standard and the "arbitrary and capricious" standard "require equivalent levels of scrutiny." *Mem'l Hosp./Adair Cnty. Health Ctr., Inc. v. Bowen*, 829 F.2d 111, 117 (D.C. Cir. 1987). Although both standards are deferential, "[d]eference, of course, does not mean blind obedience." *Garvey v. Nat'l Transp. Safety Bd.*, 190 F.3d 571, 580 (D.C. Cir. 1999).

I. THE WAIVER PROCEEDING MUST BE STAYED PENDING NMFS'S COMPLETION OF THE SUPPLEMENTAL DRAFT EIS.

On February 24, 2020, NMFS emailed the Parties to inform them that NMFS had decided to prepare an DSEIS "to evaluate information related to the 2019 UME as well as any other appropriate updated information," including information regarding the impacts of the even/odd year hunt proposal on North Pacific gray whale populations. *See* AWI's Expedited Mot. to Stay Proceeding Pending Completion of Suppl. DEIS at 10, ALJ Dkt. No. 95. Neither Judge Jordan nor his chambers were included on this email, despite the obvious relevance of the DSEIS to the Waiver Proceeding. *See id.* Attach. A. A Federal Register Notice announcing that NMFS "is preparing" the DSEIS to assess "additional relevant information" not presented at the hearing was published on February 27, 2020. *See* 85 Fed. Reg. at 11,347-38. On March 3, 2020, AWI, Sea Shepherd Legal, and Peninsula Citizens for the Protection of Whales (collectively, "Conservation Parties") submitted a Motion to Stay the Waiver Proceeding pending NMFS's completion of the DSEIS process. *See generally* AWI's Expedited Mot. to Stay Proceeding Pending Completion of Suppl. DEIS, ALJ Dkt. No. 95. The Conservation Parties argued that such a stay was necessary to "ensure that the procedural and substantive mandates of the MMPA and the APA are satisfied, and [] promote administrative efficiency and fairness in this decisionmaking process." *See id.* at 10.

AWI hereby renews its objection to proceeding with the waiver process until the completion of the DSEIS process, and incorporates the arguments in its motion by reference herein. *See* 50 C.F.R. § 228.19(b) (providing that if a party "desires the presiding officer to reconsider any objection made by such party to a ruling of the presiding officer, the party shall specifically identify such ruling by reference . . . and shall state their arguments thereon as a part of the brief"). Such a stay is necessary to ensure compliance with the procedural mandates of the APA, 5 U.S.C. §§ 556, 557, and the procedural and substantive mandates of the MMPA and its implementing regulations, 16 U.S.C. § 1371(a)(3)(A); 50 C.F.R. pt. 228.

II. THE TREATY OF NEAH BAY DOES NOT SECURE THE TRIBE THE UNQUALIFIED RIGHT TO TAKE GRAY WHALES.

A. The Treaty of Neah Bay's Reservations Of Rights To Fish And Whale Are Subject To Nondiscriminatory Regulation In The Interest Of Conservation Of The Species.

The Treaty of Neah Bay secured "the right of taking fish and of whaling or sealing . . . *in common with* all citizens of the United States." 12 Stat. 939, 940 (1855) (emphasis added). Although the Makah Tribe suggests that this provision guarantees an unqualified right to fish (or whale), this argument has been squarely foreclosed by the Supreme Court.

In a series of cases examining functionally indistinguishable treaties with Native American Tribes of the Pacific Northwest, the Supreme Court has interpreted the phrase "in common with" to secure to the tribes a right to harvest a share of each fishery that passes through the usual and accustomed fishing grounds. *See, e.g.*, *Commercial Passenger*, 443 U.S. at 678-79. While the right to take fish "'at all usual and accustomed' places may . . . not be qualified by the State . . . the manner of fishing, the size of the take, the restriction of commercial fishing, and the like may be regulated by the State in the interest of conservation," so long as any such regulations "do[] not discriminate" against tribal fishermen. *See Puyallup Tribe v. Dep't of Game*

of Wash. (*Puyallup I*), 391 U.S. 392, 398 (1968). Thus, while the treaties reserved to tribal fishermen the right to "take" their "fairly apportioned share" of the fishery, they did not deprive the State of its ability to adopt "nondiscriminatory measures" to conserve fish resources to ensure their continuing availability to both tribal and non-tribal fishermen. *Id.* at 399; *see also Dep't of Game of Wash. v. Puyallup Tribe* (*Puyallup II*), 414 U.S. 44, 49 (1973) ("The police power of the State is adequate to prevent the steelhead from following the fate of the passenger pigeon; and the Treaty does not give the Indians a federal right to pursue the last living steelhead until it enters their nets."). As the Supreme Court observed, "[i]t is in this sense that treaty and nontreaty fishermen hold 'equal' rights. For neither party may deprive the other of a 'fair share' of the runs." *Commercial Passenger*, 443 U.S. at 684.

Other federal courts interpreting fishing rights secured by tribal treaty "in common with" all other persons have reached the same conclusion. Indeed, the Ninth Circuit has held that the phrase "in common with" establishes a relationship "analogous to a cotenancy," in which both parties have the right to full enjoyment of the property, but neither party may "permit the subject matter of [the treaty] to be destroyed." *United States v. Washington* (*Washington*), 520 F.2d 676, 685 (9th Cir. 1975). Accordingly, the "state may interfere with the [Tribe's] right to fish when necessary to prevent the destruction of a . . . particular species." *Id.* at 685. This interference may even extend to a total ban on fishing—tribal and non-tribal—if such drastic measures are necessary to preserve the relevant species. *See United States v. Oregon* (*Oregon*), 657 F.2d 1009, 1016–1017 (9th Cir. 1981) (affirming a total ban on tribal harvest of spring chinook salmon).

The notion that the Treaty of Neah Bay reserves an "an untrammeled right to take as many of the [fish] as it chose" has been "unequivocally rejected." *Commercial Passenger*, 443 U.S. at 683-84 (discussing the Court's opinion in *Puyallup*); *see also Puyallup II*, 414 U.S. at 49.

Rather, rights—even those guaranteed by treaty—"can be controlled by the need to conserve a species." *Id.*

B. The Restriction On Taking Gray Whales Is Necessary To Preserve The Species.

Restrictions on tribal fishing rights secured by treaty are permissible where such restrictions are: (1) non-discriminatory and (2) necessary to achieve the restriction's conservation purpose. *See, e.g.*, *Antoine v. Washington*, 420 U.S. 194, 207 (1975); *United States v. Fryberg*, 622 F.3d 1010, 1015 (9th Cir. 1980); *Makah Indian Tribe v. Schoettler*, 192 F.2d 224, 226 (9th Cir. 1951).

As to the first prong of the test, the MMPA extends to "any person subject to the jurisdiction of the United States," 16 U.S.C. § 1372(a)(1), and prohibits all persons with the exception of certain Native Alaskans from taking marine mammals without prior authorization, *id.* § 1371(a). Thus, the MMPA cannot be said to discriminate between treaty and non-treaty persons because members of the Makah Tribe—or indeed, any tribe—are not being singled out any more than non-treaty people in the lower forty-eight states.

As to the second prong, the restriction of whaling is indisputably necessary for the MMPA to achieve the its conservation purpose. Recognizing that "certain species and populations stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man's activities," Congress enacted the MMPA in an effort to prevent such stocks from "diminish[ing] beyond the point at which they cease to be a significant functioning element of the ecosystem[.]" 16 U.S.C. § 1361. To carry out this objective, the MMPA imposed a sweeping moratorium to prohibit the taking of marine mammals without prior authorization. *Id.* §§ 1371, 1372. In granting authorizations, Congress admonished NMFS to bear in mind that the "primary objective of [marine mammal] management should be to maintain the health and stability of the

marine ecosystem" by ensuring that marine mammal populations and stocks recover to their OSP "keeping in mind the carrying capacity of the habitat." *Id.* § 1361. Accordingly, Congress established stringent review requirements for take authorizations to ensure that any waiver is consistent with "sound principles of resource conservation." *Id.* § 1371(a)(3)(A).

"One need only review Congress's carefully selected language to realize that Congress's concern was not merely with survival of marine mammals, though that is of inestimable importance, but more broadly with ensuring that these mammals maintain an '[OSP]' and remain 'significant functioning elements in the ecosystem.'" *Anderson*, 371 F.3d at 498. Thus, the MMPA is not simply aimed at species preservation, but also at ensuring the stability of the marine ecosystem by maintaining the role of marine mammals as functioning elements therein. *Id.* at 499. To effectuate these purposes, the MMPA requires that NMFS make "informed, proactive decisions regarding the effect of marine mammal takes." *Id.* at 499-500. Indeed, as the Ninth Circuit observed, unless the Tribe's whaling request is subjected to the MMPA review process, "there is no assurance that the takes . . . of gray whales, including both those killed and those harassed without success, will not threaten the role of the gray whales as functioning elements of the marine ecosystem, and thus no assurance that the purpose of the MMPA will be effectuated." *Id.* at 498. Accordingly, "the MMPA's application is necessary to effectuate the conservation purpose of the statute." *Id.* at 501. By extension, if NMFS cannot demonstrate that the proposed waiver meets the MMPA's exacting criteria, the waiver cannot be issued. *Cf. Oregon*, 657 F.2d at 1016–1017 (affirming a total ban on tribal harvest of spring chinook salmon).

III. NMFS HAS NOT MET THE WAIVER CRITERIA BECAUSE THE PROPOSED HUNT WILL RESULT IN THE UNLAWFUL TAKE OF AT LEAST ONE WNP WHALE.

NMFS's own risk analysis determined that there is a ***100% chance*** of at least one WNP whale being approached over the course of the waiver. Moore 2d Decl. Ex. 4-15 at 12. Thus, the take of a WNP whale "is not merely a remote possibility but a certainty," and NMFS may not permit the take of the ENP stock unless the take of WNP whales can also be authorized. *Kokechik Fishermen's Ass'n v. Sec'y of Commerce*, 839 F.2d 795, 801 (D.C. Cir. 1988). Because NMFS cannot authorize the directed take of a WNP whale without running afoul of the MMPA—i.e., because the take of a whale from the "depleted" WNP stock cannot be authorized by waiver, nor by incidental take authorization—the agency cannot issue the requested waiver or proposed regulations.

A. NMFS Cannot Escape The Fact That The Waiver Unlawfully Authorizes The Hunting Of WNP Whales.

The MMPA prohibits NMFS from waiving the moratorium for the directed take of marine mammals designated as depleted, except for photography, research, or enhancement purposes. 16 U.S.C. § 1371(a)(3)(B). It is indisputable that the WNP stock is "depleted" under the MMPA because of its "endangered" listing under the ESA. *Id.* § 1362(1)(C); *see also* Yates Decl. ¶ 21. Accordingly, NMFS could not issue a waiver to allow the hunting of WNP whales because hunting, by definition, does not consist of photography, research, or enhancement activities. 16 U.S.C. § 1371(a)(3)(B). Despite the fact that the proposed hunt will result in the take of WNP whales, Moore 2d Decl. Ex. 4-15 at 12, NMFS insists that it is only authorizing the "hunting" of ENP gray whales, *see* Yates 3d Decl. ¶ 41. According to NMFS, WNP gray whales are only likely to be subjected to "non-lethal hunt activities," which under the proposed regulations, do not constitute "hunting." *See* 84 Fed. Reg. at 13,619 (defining "hunt" and

"hunting" to exclude hunting and training approaches, as well as training harpoon throws). NMFS's attempt to circumvent the MMPA's heightened protections for depleted species by parsing the definition of "hunt" is disingenuous and flunks any common-sense interpretation of the MMPA's provisions.

The MMPA defines "take" to mean "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." 16 U.S.C. § 1362(13). Congress thus prohibited both the "hunt[ing]" and the "kill[ing]" (as well as the attempted "hunt[ing]" and "kill[ing]") of marine mammals. Neither term is defined in statute. Giving both terms their "ordinary, contemporary, common meaning," *FTC v. Tarriff*, 584 F.3d 1088, 1090 (D.C. Cir. 2009), "hunt" is defined as "to pursue for food or in sport," Webster's New Collegiate Dictionary 405 (7th ed. 1971), while "kill" means "to deprive of life," *id.* at 465. Significantly, the "hunt[ing]" of marine mammals need not result in the target's death to be strictly prohibited by the MMPA. Otherwise, "hunt[ing]" would be synonymous with "kill[ing]," rendering Congress's inclusion of both terms in its list of prohibited acts superfluous. Such a reading that "does not give effect to all of the words used by Congress" must be avoided. *Nevada v. Watkins*, 939 F.2d 710, 715 (9th Cir. 1991); *see also TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (noting that it is "a cardinal principle of statutory construction" that a statute should be construed, if possible, so that "no clause, sentence, or word shall be superfluous, void, or insignificant" (internal quotation marks and citation omitted)). Instead, where, as here, terms are connected by the disjunctive "or," they must be given separate meanings. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (noting that under principles of statutory construction, "terms connected by a disjunctive [should] be given separate meanings" (citation omitted)); *In re Espy*, 80 F.3d 501, 505 (D.C. Cir.

1996) (per curiam) ("[A] statute written in the disjunctive is generally construed as 'setting out separate and distinct alternatives.'" (citation omitted)).

NMFS's proposed definition of "hunt" flouts Congress's clear intent by breaking the term "hunt" down into its constituent "lethal" and "non-lethal" parts—i.e., "kill," "approach," and "strike"—and carving out an exception for the so-called "non-lethal hunt activities" that does not exist in statute. In other words, NMFS defines "non-lethal hunt activities" out of the term "hunt" such that "hunt" only encompasses the killing of the whale. In so doing, NMFS's proposed regulations unlawfully render "hunt" synonymous with "kill," thereby stripping "hunt" from its independent utility and ordinary meaning. Properly interpreted, "hunt" necessarily encompasses lethal and non-lethal elements, including the pursuit, approach, and striking of the target animal. Congress clearly viewed the ultimate success of the hunt—i.e., whether the hunt resulted in a kill—as legally irrelevant to whether the hunter's actions constituted "hunt[ing]," which the MMPA strictly prohibits. Accordingly, when the Tribal hunters pursue, approach, or strike, or attempt to pursue, approach, or strike, a whale that they are "pursu[ing] for food or [for] sport," that whale is being "hunted" within the meaning of the "take" prohibition, even if the whale is not actually killed and even if these activities are merely sporting or "training" exercises to prepare for later pursuing whales for food. *See* 16 U.S.C. § 1362(12) (defining "take" to include the *attempt* to hunt). Because NMFS does not have the "power to revise clear statutory terms," *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 327 (2014) (citing *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002)), its definition of "hunt" must fail under basic canons of statutory construction and common sense.

Interpreting "hunt" consistent with the statutory language to include both "lethal" and "non-lethal" hunt activities has enormous legal consequence. NMFS concedes that hunting is not

an "accidental" act. Tr. vol 1, 56:16-18 ("I would posit not. I wouldn't anticipate that hunting would be an accidental act."). Thus, if "non-lethal hunt activities" are encompassed within the term "hunt," they cannot be authorized pursuant to an incidental take authorization for any reason whatsoever. They have to be authorized, if at all, pursuant to a waiver of the moratorium. However, NMFS cannot waive the moratorium to permit the hunting of WNP gray whales because, once again, the WNP gray whale stock is designated as "depleted" under the MMPA due to its listing as endangered under the ESA. *See* 16 U.S.C. §§ 1362(1)(C), 1371(a)(3)(B); *see also* Tr. vol. 1, 52:8-10 (NMFS expert acknowledging that "[i]t would not" be possible for NMFS to issue a waiver for the WNP gray whale stock). Consequently, if the activities that will be authorized pursuant to the waiver will likely result in the "hunting" of even a single WNP gray whale, the MMPA precludes NMFS from issuing the waiver.

NMFS's own risk analysis concluded that it is *certain* (i.e., a 100% probability) that at least one WNP whale will be approached by the Tribe if the waiver, as currently contemplated, is issued. Moore 2d Decl. Ex. 4-15 at 12. Accordingly, NMFS's waiver, as currently proposed, will indisputably result in the "hunt[ing]" of WNP whales in violation of the MMPA, contrary to Congress's clear intent in prohibiting all take (hunting or otherwise) of depleted species. Moreover, NMFS concedes that it is impossible to visually distinguish between WNP, ENP, and PCFG whales in a hunt scenario. Tr. vol. 1, 59:18-20 (conceding that members of the WNP stock are not "readily distinguishable" from members of the ENP stock); Tr. vol. 3, 121:8-9 (Makah expert Dr. Jonathan Scordino conceding that the Tribal hunters will not be able to tell the difference between ENP, WNP, and PCFG whales by sight). This fact, which could lead to even more takes of WNP whales, further underscores why NMFS cannot issue a waiver for the directed take of ENP gray whales when it knows that the waiver will *also* result in the

unauthorized hunting of WNP gray whales. *See Kokechik Fishermen's Ass'n*, 839 F.2d at 801 (holding that NMFS may not issue a permit for one marine mammal stock when the unauthorized take of another marine mammal stock is likely to occur as a consequence of the permitted activity). Accordingly, the MMPA expressly precludes NMFS from issuing the requested waiver and regulations in their currently proposed form. For this reason alone, the waiver and regulations must fail.

B. NMFS Cannot Issue A Waiver For The ENP Stock When It Knows That The Hunt Activities Will Also Result In The "Take" Of At Least One WNP Whale.

1. *At The Very Least, The Take Of A WNP Whale By Harassment Is A Certainty.*

Even if NMFS's illusory and insupportable distinction between "lethal" and "non-lethal hunt activities" is accepted, the "non-lethal hunt activities" still constitute take by harassment. "Harassment" is defined as "*any act* of pursuit, torment, or annoyance which (i) has the *potential* to injure a marine mammal . . . or (ii) has the *potential* to disturb a marine mammal . . . by causing disruption of behavioral patterns, including but not limited to, migration, breathing, nursing, . . . [or] feeding." 16 U.S.C. § 1362(18)(A), (C), (D). Giving the undefined statutory terms their "ordinary, contemporary, common meaning," *Tarriff*, 584 F.3d at 1090, "pursue" means "to follow in order to overtake, capture, kill, or defeat," Webster's New Collegiate Dictionary at 694 (7th ed. 1971), "torment" means "to cause worry or vexation to," *id.* at 933, and "annoy" means to "irritate esp[ecially] by repeated acts," *id.* at 36.

NMFS proposes to allow Tribal hunters to pursue and approach gray whales, and strike or attempt to strike them. Thus, Tribal hunters will (or will attempt to) "follow" gray whales "in order to catch or attack them," and will "cause vexation to" and "irritate" gray whales by approaching or throwing objects at them. NMFS concedes that these activities have at the very

least the potential to disrupt gray whale behavior, such as migration, breathing, or feeding. *See* Tr. vol. 1, 55:8-17; *see also* Tr. vol. 2, 14:3-17 (providing that in Dr. Weller's professional opinion, gray whales will "likely" exhibit behavioral responses when subjected to an unsuccessful strike attempt or training harpoon throw); Tr. vol. 2, 10:7-12 (admitting that in his "decades" of experience approaching gray whales for research purposes, Dr. Weller observed "highly variable" responses ranging from little to no response to a "middling" response to a "more direct[]" response).[15]

Indeed, vessel approaches to within 100 yards are known to have the potential to cause behavioral disturbances and thus have long been formally considered by NMFS to constitute harassment. *See, e.g.*, 66 Fed. Reg. at 29,508 (noting that prohibiting all vessels—including kayaks—from approaching humpback whales to within 100 yards "will provide protection from harassment"); 84 Fed. Reg. at 13,610 ("The 100-yard limit is consistent with permit conditions NMFS imposes for research vessels on large cetaceans . . . as well as guidelines for *all motorized and non-motorized vessels*." (emphasis added)); *id.* at 13,612 ("When issuing permits under the MMPA, NMFS generally limits the number of approaches within defined distances (typically 100 yards or less for large cetaceans) because of the *potential* for such approaches within those

[15] Indeed, when asked to describe gray whales' reaction to being approached by research vessels, Dr. Weller admitted not only that many whales do in fact react, but that such reaction "is often related to the behavior of the boat and how it is operated." Tr. vol. 2, 10:10-14. Thus, it stands to reason that a gray whale that has been targeted by Tribal hunters and subjected to an approach and pursuit in a hunt scenario would react quite strongly. But even so, all that is required for an act to constitute "harassment"—and therefore a "take"—under the MMPA is for the act to have the "*potential* to disturb" a marine mammal. 16 U.S.C. § 1362(18)(A) (emphasis added). As Dr. Weller conceded, approaches of gray whales (even for much more benign purposes such as research or photography) have been demonstrated to disturb gray whales, and as such, constitute take by harassment and are prohibited without prior legal authorization. *See* Weller Decl. ¶ 46 (conceding that "[i]ndividual vessel approaches are likely to elicit a range of reactions from whales, from showing no response to whales diving, exhaling underwater and exposing only their blowholes, fluke slapping, or changing direction and speed").

limits to *affect or disrupt whale behavior*." (emphases added)). Accordingly, these acts indisputably fall within the expansive definition of "harassment." *Cf. Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008) ("[R]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)).[16]

2. *NMFS Cannot Lawfully Issue A Waiver That Only Exempts One Species That Will Be Taken.*

NMFS insists that issuing the waiver to only authorize the take of ENP whales is sufficient to fulfill its obligations under the MMPA. *See* Tr. vol. 1, 15:11-14 (NMFS expert Mr. Yates suggesting that NMFS must only examine whether the waiver criteria are met for "the stock upon which [NMFS] is proposing to waive the moratorium"). However, it is well-

[16] Any argument that a non-motorized canoe could approach a whale to within 100 yards without causing a disturbance is belied by NMFS's own regulations and guidance. Indeed, in the Final Rule promulgating regulations to govern the approach of humpback whales in Alaska, NMFS rejected requests to exempt small, non-motorized vessels—in that case, kayaks—from the 100 yard prohibition, stating that "[w]hile kayaks, because they are small and virtually silent, could possibly approach whales closer than 100 yards [] without causing a disturbance, *empirical data does not exist to support such a conclusion*." 66 Fed. Reg. at 29,505 (emphasis added). Accordingly, "NMFS believes that a conservative approach of requiring all whale watch vessels (including kayaks) to adhere to the 100 yard [] approach restriction provides the appropriate degree of protection." *Id.* The Makah Tribe proposes to make the initial approach with a traditional canoe, which is approximately 36 feet long and more than 5 feet wide. DEIS at 3-361. The traditional canoe is far larger, and holds far more people than a recreational kayak, which NMFS maintains may not approach a whale within 100 yards without running afoul of the MMPA's take prohibition. Moreover, the canoe will be accompanied by at least one motorized chase boat, compounding the noise and disturbance. *See id.* Additional chase boats, media boats, and protest boats may also be in the area of the hunt. *See* DEIS at 2-12. NMFS has not explained why maneuvering a kayak to within 100 yards is necessary to protect whales from harassment, *see* 66 Fed. Reg. at 29,505, 29,508, yet maneuvering far larger (and noisier) hunting canoes and chase boats to within 100 yards of a whale *and even attempting to strike that whale* "may or may not constitute a 'take,'" Yates 3d Decl. ¶ 29. "[A]n unacknowledged and unexplained inconsistency" such as this "is the hallmark of arbitrary and capricious decision-making." *Bauer v. DeVos*, 325 F. Supp. 3d 74, 109 (D.D.C. 2018) (citing cases); *see also FCC .v Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) ("[T]he requirement that an agency provide reasoned explanation for its action . . . demand[s] that it display awareness that it is changing position.").

established that NMFS cannot issue an MMPA authorization that only covers *some* of the species that are likely to be taken. In *Kokechik Fishermen's Ass'n*—the seminal case on this issue—the D.C. Circuit resolved the question of whether NMFS "may legally issue a permit allowing [] taking of one protected marine mammal species knowing that other protected marine mammal species will be taken as well." 839 F.2d at 801. At issue was NMFS's decision to issue an authorization to take a specified quota of Dall's porpoises incidental to salmon fishing, despite the fact that the agency could not make the determinations required to authorize the taking of northern fur seals that NMFS also expected be taken by the fishing operations. *Id.* Soundly rejecting NMFS's position, the court definitively held that to issue an authorization that only covers some (but not all) affected species would allow applicants "to take protected marine mammals for a price"—i.e., the civil penalties imposed for unauthorized takings—"a result that the MMPA does not countenance." *Id.*

So too here, NMFS cannot issue a waiver that only exempts *some* of the species likely to be taken by an activity. *See id.* The limited exceptions to the moratorium "clearly evidence [Congress's] concern with the relationship between the activity engaged in and its effect on marine mammals and their ecosystem." *Id.* Accordingly, the MMPA requires NMFS to take a "systemic view of the activity's effect" on *all* of the marine mammals that are likely to be affected by the activities authorized pursuant to the proposed waiver and regulations. *Id.* at 802. To authorize the take of only some of the marine mammal species or stocks that will be taken by an activity would "allow—subject to the civil penalty price—illegal takings of other protected marine mammals," thereby sanctioning likely (or, in this case, *certain*) violations of federal law. *Id.* Because NMFS "has no authority, by regulation or any other action, to issue a permit that

allows conduct prohibited by th[e] [MMPA],” the agency may not issue a waiver that covers some—but not all—species that are likely to be taken by an activity. *Id.*

It is beyond dispute that the waiver is likely to (and *will*) result in the “taking” of at least one WNP gray whale, whether by harassment, hunting, or killing. *See supra* at 32-38; Moore 2d Decl. Ex. 4-15 at 12 (reporting that at least one WNP whale will be subjected to an approach over the course of the waiver, and that there is an 83% chance that a WNP whale will be approached in any given year). NMFS concedes as much, admitting that the proposed regulations do not eliminate the risk that WNP whales will be subjected to hunt activities. Tr. vol. 1, 60:21-23; *accord* Tr. vol. 1, 29:6-8 (NMFS expert Mr. Yates conceding that it is “possible that even with the[] [protective] measures, a WNP whale could be struck by hunters”). In fact, NMFS believes the risk of striking and landing a WNP whale to be sufficiently likely to require a contingency built into the regulations. Tr. vol. 1, 28:24-29:5. NMFS has previously acknowledged that “[a] population size of several hundred individuals is precariously small for any large whale or large mammal population.” *See* 78 Fed. Reg. at 73,726. Thus, if a WNP whale is struck and landed, NMFS will stop the hunt until it is “able to contemplate a hunt that would have no potential of striking [WNP] animals.” Tr. vol. 1, 29:2-5.[17]

[17] For this reason, NMFS’s regulations also fail to ensure that the waiver will not “disadvantage” the WNP stock. *See* 16 U.S.C. § 1373. The WNP stock is depleted. As NMFS acknowledged in the 2015 DEIS for the proposed hunt, “[t]he loss of a single whale, particularly if it were a reproductive female, would be a conservation concern for this small stock.” DEIS at 3-93 to 3-94. Non-lethal take, including by approach and vessel noise, can displace marine mammals from important feeding or breeding areas, causing “significant” impacts on individuals and populations. *See* 83 Fed. Reg. 19,711, 19,722-23 (May 4, 2018) (discussing marine mammal behavioral responses to underwater sound, including vessel noise); *see also* sources cited *supra* note 16 and *infra* note 21. Additionally, non-lethal take can impose significant energetic losses, impeding the ability of WNP females to successfully produce and wean a calf. *See* Villegas-Amtmann Decl. at Ex. 3 at 1 (finding that “[a]n annual energetic loss of 4% during the year in which she is pregnant, would prevent a female from successfully producing/weaning a calf”).

As an initial matter, the conservative bias built into the MMPA, *see* H.R. REP. NO. 92-707, at 15, 1972 U.C.C.C.A.N. at 4148, as well as its command that "the management of the animal populations be carried out with the interests of the animals as the prime consideration," H.R. REP. NO. 97-707 at 18, 1972 U.C.C.C.A.N. at 4151, together demand that NMFS's goal from the outset should have been to contemplate a hunt that would have no potential for striking a depleted species. However, setting this aside, the MMPA still demands NMFS take a "systemic view" of the proposed hunt. *See Kokechik Fishermen's Ass'n*, 839 F.2d at 802. Taking such a view, because both ENP and WNP gray whales are likely to be taken by the activities authorized by the waiver, it is clear that NMFS must determine whether it can legally issue waiver for *both* stocks. If a waiver cannot lawfully be issued for both affected stocks, the waiver as proposed must be denied.[18]

To waive the MMPA's moratorium and issue regulations to allow the taking of a marine mammal species or stock, NMFS must determine that the proposed taking is consistent with the policies and purposes of the Act, and will not be to the disadvantage of the affected species. 16 U.S.C. §§ 1371(a)(3)(A), 1373. NMFS interprets "'disadvantage' in relation to the impact of take on the stock's OSP." 84 Fed. Reg. at 13,605. By definition, depleted stocks are not within their OSP range, and therefore, "[a] take of a depleted stock would be to the disadvantage of that stock." Tr. vol. 1, 53:10-11. NMFS concedes that except for scientific research, photography, or

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Accordingly, the regulations must be rejected for this reason as well—i.e., for their failure to ensure that the proposed waiver does not disadvantage the affected stock.

[18] Although NMFS *could* propose regulations that eliminate all risk to WNP whales that would avoid this legal dilemma entirely, the agency has declined to do so. Rather than attempt to harmonize the waiver and proposed regulations with the MMPA's strict prohibition against taking a depleted species (here, the WNP stock)—an outcome that most certainly could be achieved—NMFS has instead prioritized the Tribe's interests over conservation of WNP whales.

enhancement purposes, "the agency is prohibited from issuing a permit for the [directed] take of a species that has been designated as depleted under the Act." Tr. vol. 1, 51:19-20.[19]

The WNP gray whale stock is listed as endangered under the ESA, and is therefore also designated as "depleted" under the MMPA. Yates Decl. ¶ 7. Accordingly, by statute, NMFS is precluded from issuing a waiver for the directed take of a WNP whale. 16 U.S.C. § 1371(a)(3)(B). With the MMPA, Congress weighed the interests of marine mammals and the interests of those who would exploit marine mammals for various reasons, and came down in favor of the animals. *See Kokechik Fishermen's Ass'n*, 839 F.2d at 802 ("The MMPA does not allow for a Solomonic balancing of the animals' and fisheries' . . . . The interest in maintaining healthy populations of marine mammals comes first."); *Comm. for Humane Legislation, Inc. v. Richardson*, 540 F.2d 1141, 1148 (D.C. Cir. 1976) ("The [MMPA] was to be administered for the benefit of the protected species rather than for the benefit of [] exploitation."). Thus, in "balancing protections for WNP whales"—a species designated as depleted and no longer meeting the MMPA objectives of maintaining OSP or performing its ecosystem functions, *see* Tr. vol. 1, 60:24-61:5—NMFS's proposed waiver places the interests of the Tribe over those of the WNP whales, in direct contravention of the MMPA's clear command. The risk to WNP

[19] Mr. Yates observed that "[t]aking of a stock that has been designated as depleted may not be to the disadvantage of the stock . . . *depending on the type of take being considered*." Tr. vol. 1, 85:5-8. Indeed, the MMPA provides that the moratorium can be waived and a permit issued for the taking of marine mammals from depleted stocks "for scientific research purposes, photography for educational or commercial purposes, or enhancing the survival or recovery of a species or stock." 16 U.S.C. § 1371(a)(3)(B). However, the MMPA expressly prohibits the waiver of the moratorium for the directed take of marine mammals from depleted stocks for all other purposes.

whales, contrary to NMFS's protestations, is not "small," Tr. vol. 1, 61:4-5, as the unauthorized take of a WNP whale is a certainty.[20] This is a result the MMPA does not countenance.

Far from attempting to "balance" the risks to depleted species, the MMPA demands that NMFS refuse to allow the directed take of any marine mammals unless it can be assured that such take will not disadvantage any marine mammal stock. "If that burden is not carried —*and it is by no means a light burden*—the permit may not be issued." H. R. Rep. No. 92–707, at 18, 1972 U.C.C.C.A.N. at 4145 (emphases added). NMFS cannot demonstrate that the intentional, directed take of a WNP whale in the course of a hunt is in the interests of a depleted stock.[21] To

[20] In fact, given that it is "likely" that not all of the WNP whales that migrate through the ENP range have been identified, Tr. vol. 2, 57:1-4, the risk to WNP whales may be far greater than accounted for in risk assessments based on available data. If there are more WNP whales in the ENP range than were accounted for in NMFS risk assessment (which is likely the case), and/or if the migration of WNP whales through the Makah U&A was delayed for any reason, then the probability that a WNP whale will be subjected to hunt activities up to and including lethal take increases proportionally.

[21] WNP whales are listed as endangered and number just 290 individuals. Bettridge 2d Decl. Ex. 2-12 at 13. With such small population size, the loss of even a few individuals could have devastating impacts on the population's viability and recovery. *See* DEIS at 3-93 to 3-94 (noting that "[t]he loss of a single [WNP] whale, particularly if it were a reproductive female, would be a conservation concern for this small stock"); 78 Fed. Reg. at 73,726 (noting that "[a] population size of several hundred individuals is precariously small for any large whale or large mammal population"). The conservation concerns are not limited to lethal take. Indeed, with respect to non-lethal take, the record demonstrates that even seemingly minor disturbances that interrupt biologically significant behaviors can result in cascading impacts that negatively affect a whale's energy reserves and reproductive fitness. *See, e.g.*, Villegas-Amtmann Decl. ¶¶ 9-10; Villegas-Amtmann Decl. at Ex. 3 at 1 (finding that "[a]n annual energetic loss of 4% during the year in which she is pregnant, would prevent a female from successfully producing/weaning a calf"); Villegas-Amtmann Decl. Ex. 4 at 1 (noting that long-term yearly energy loss of less than 30% "would reduce population growth due to lower reproductive rates"). Indeed, evidence suggests that whales that are subjected to multiple approaches by vessels may result in the abandonment of preferred feeding areas. *See* 81 Fed. Reg. 62,010, 62,013 (Sept. 8, 2016). In other situations, whales may become habituated to human activity, making them more susceptible to physical injury from vessel strikes. *Id.* at 62,014. An increase in vulnerability to vessel strikes is a concern for both ENP and WNP whales, which frequent waters with high vessel traffic. Bettridge 2d Decl. Ex. 2-12 at 7 ("Ship strikes are a source of mortality and serious injury for [ENP and PCFG] gray whales."); *id.* at 14 (noting that "shipping congestion throughout the migratory

the contrary, it is clear that the take of WNP whales benefits only those who seek to exploit the species. This alone is sufficient to defeat the waiver request, as currently proposed.

C. NMFS's Strained Attempt To Expand The Scope Of Incidental Take To Include Intentional Acts Does Not Hold Water.

The take of at least one WNP gray whale will occur, whether by harassment—including pursuit, torment, and/or annoyance—hunting, killing, or the attempt to engage in such acts. Because NMFS "has no authority, by regulation or any other action, to issue a permit that allows conduct prohibited by th[e] [MMPA]," *Kokechik Fishermen's Ass'n*, 839 F.2d at 802, such take must be authorized if not by waiver, then by another statutory authorization. NMFS concedes as much in its testimony, insisting that the take of WNP gray whales could be authorized pursuant to an incidental take authorization. Yates 3d Decl. ¶ 29. According to NMFS, because the Tribal hunter would not *intend* to take a WNP whale, any take of a WNP whale would be incidental to the waiver. *See* Tr. vol. 1, 58:14-18. NMFS's construction of the incidental take exception is fatally flawed.

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corridors of the WNP whale stock represent risks by increasing the likelihood of . . . ship strikes"). Accordingly, even short-term harassment can have detrimental impacts to an individual whale's survival if the harassment causes the whale to abandon the foraging area. *Cf.* Tr. vol 5, 153:8-13 (reporting that although occasional foraging outside of feeding grounds occurs, it is not "substantial enough to be able to sustain the energetic needs of the whales to be able to accomplish all of the phases of their reproductive cycle"). When additional stressors such as the impacts of climate change and other anthropogenic disturbances such as seismic surveys and vessel noise, the threat to individual gray whales posed by even "short-term" disturbances is laid plain. This is particularly true for WNP whales, which have higher energetic needs than ENP whales due to longer migration distances between foraging and breeding grounds, *see* Villegas-Amtmann Decl. Ex. 4 at 1, and a smaller population size, meaning that "[r]egardless of the cause, the loss of even a few whales (especially reproductive females) . . . will greatly hinder population growth and ultimately prevent its recovery." Weller Decl. Ex. 3-48 at 5. Thus, to conserve this "depleted" stock and achieve the MMPA's objectives, NMFS must ensure "that all anthropogenic activities be reduced to an absolute minimum." *Id.*

1. *The Deliberate Acts NMFS Proposes To Authorize Clearly Fall Outside The Definition Of Incidental Take.*

The MMPA speaks in categorical terms, imposing a blanket moratorium on the taking of marine mammals. The safe harbor for "incidental" take exempts only a narrow slice of the takes that are otherwise proscribed, i.e., those that are "incidental, *but not intentional*" while engaging in a specified activity. *See* 16 U.S.C. § 1371(a)(5); *cf. Pac. Ranger, LLC v. Pritzker*, 211 F. Supp. 3d 196, 214 (D.D.C. 2016) (noting that the MMPA exceptions for "incidental" takes are narrowly construed). Although "incidental" is not defined in statute, the term is defined by regulation as "an accidental taking." 50 C.F.R. § 216.103. The regulation further explains that "[t]his does not mean that the taking is unexpected, but rather it includes those takings that are infrequent, unavoidable or accidental." *Id.*

It is axiomatic "that words of statutes or regulations must be given their 'ordinary, contemporary, common meaning.'" *Tarriff*, 584 F.3d at 1090 (quoting *Williams v. Taylor*, 529 U.S. 420, 431 (2000)). Black's Law Dictionary defines accidental to mean "[n]ot having occurred as a result of anyone's purposeful act[,]" while "intentional" means "[d]one with the aim of carrying out the act." Black's Law Dictionary 18, 932 (10th ed. 2014). These definitions conform to the common meaning of "incidental," defined as "'occurring merely by chance or without intention or calculation.'" Webster's New Collegiate Dictionary 423 (7th ed. 1971).

Applied to the "take" context, the term "accidental" plainly does not describe the deliberate acts that NMFS proposes to authorize pursuant to the waiver, including harassing, hunting, approaching, pursuing, and striking whales, or the attempt to engage in such activities. NMFS concedes—as it must—that the Tribe is proposing to take marine mammals by hunting or by attempting to hunt. Tr. vol. 1, 56:24-57:1. NMFS further concedes that hunting is not an "accidental" act. Tr. vol 1, 56:16-18 ("I would posit not. I wouldn't anticipate that hunting would

be an accidental act."). Rather, hunting and its constituent acts—e.g., the pursuit of a whale over the course of a hunt, the approach and harassment of whales during hunting or training activities, and the throwing of harpoons at whales—are purposeful and deliberate acts "[d]one with the aim of carrying out the act" of pursuing and killing a whale for food or sport. In other words, such acts are *intentional*. Accordingly, such acts fall outside the scope of "incidental, *but not intentional*" take, and cannot be excused or authorized under Section 1371(a)(5) or any other provision of the MMPA. *Accord* Tr. vol. 1, 57:17-58:6 (agreeing that intentional harassment, pursuit, and hunting fall outside of the scope of "incidental").[22]

2. *NMFS Cannot Rely On The Subjective Intent Of The Tribal Hunters To Transform Deliberate Take Into Incidental.*

NMFS's self-serving rationale for avoiding this inevitable result—i.e., that the purpose of the hunt is to take ENP whales and not WNP whales—is legally groundless. "[B]ecause the [MMPA's] statutory take prohibition makes no reference to any required *mens rea*, it is in the nature of a strict-liability provision." *Pac. Ranger*, 211 F. Supp. 3d at 214; *see also id.* ("The prohibited act of taking a marine mammal is a strict-liability offense that is broadly defined."). Accordingly, as NMFS has long construed the MMPA in its own enforcement cases, "[w]hether a respondent appreciates the consequences of his or her actions is irrelevant since voluntary

[22] NMFS's current position that the take of WNP whales could be authorized as incidental take is further belied by its own guidance on MMPA authorizations. As defined by NMFS, a "take" is "incidental" if "the activity is unrelated to the protected species, but the protected species may still be affected," rendering the take "unintentional." NMFS, *Understanding Permits*, *supra*. Examples include commercial fishing operations, oil and gas development, seismic surveys, and construction projects. *Id.* In contrast, "directed take" occurs where "the activity is a purposeful interaction with the protected animal for a specific purpose that may result in take." *Id.* Examples include invasive scientific research on marine mammals, photography and filming of marine mammals, and treatment of sick and injured marine mammals. *Id.* Thus, where, as here, marine mammals are the object at which the act is directed—which is no different (albeit likely more harmful) than photographing or filming a marine mammal—the take is not incidental.

actions are sufficient to constitute a violation of the MMPA" *Creighton*, No. SW030133, 2005 WL 1125361 (NOAA Apr. 20, 2005). Because "it is the doing of the act that results in culpability," *id.*, "the motivations behind [a] Respondent['s] actions are irrelevant" to a finding that a take occurred, *Kai Paloa, LLC*, No. PI 1402055, 2017 WL 6268521, at *16 (NOAA Nov. 22, 2017). Thus, contrary to NMFS's newly articulated position, the subjective intent of the Tribal hunters is irrelevant to whether an act can be immunized as "incidental." *See id.* at *21 ("[I]ntentions are irrelevant given the strict liability nature of the MMPA.").

Rather, the relevant touchstone is whether the Tribal hunters' actions taken pursuant to the waiver fall within the definition of "incidental." *Accord Pac. Ranger*, 211 F. Supp. 3d at 217 (holding that the term "incidental" as used in the incidental take exception for commercial fisheries "has a clear meaning that does not excuse deliberate, knowing conduct"). In light of the fact that the Tribe's explicit purpose for seeking the waiver is to *intentionally* pursue, hunt, and kill whales—especially where everyone agrees that WNP whales will likely be taken and it is impossible to visually differentiate between WNP and ENP whales—there is no legal or logical basis for characterizing any of these deliberate acts as non-intentional or incidental.

In fact, in the preamble to the rules governing incidental takes under Section 1371(a)(5), NMFS *specifically rejected* a definition of "incidental" that would include deliberate acts, even where such acts would prevent mortality. *See Regulations Governing Small Takes of Marine Mammals Incidental to Specified Activities*, 47 Fed. Reg. 21,248, 21,250 (May 18, 1982). In response to comments on the proposed regulations suggesting that "the definition of incidental taking include activities such as directed harassment to accommodate situations where directed harassment could prevent accidental mortality," NMFS noted that the House Report accompanying the MMPA amendments specified "that the phrase 'incidental, but not intentional'

is intended to mean *accidental taking*." *Id.* Accordingly, as demonstrated by NMFS's contemporaneous understanding of its regulations, directed take—even to prevent injury or death—is not permissible under this exception. *See Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988) (holding that an agency's interpretation of its own regulations is owed no deference if that interpretation is inconsistent with the agency's "intent at the time of the regulation's promulgation"); *Wy. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999) (noting that "the preamble to a regulation is evidence of an agency's contemporaneous understanding of its proposed rules").

Moreover, an interpretation that would deem all takes 'incidental' except those that are purposeful must be rejected because it effectively renders the first part of the definition of "incidental"—i.e., whether the taking was "accidental"—a nullity. Hence, if NMFS could excuse *any* taking—even those that result from deliberate and intentional actions—so long as the taking was not the purpose of the activity and instead was a mere consequence of the otherwise lawful activity, the only relevant question would be the second half of the incidental definition—whether the take was "infrequent, unavoidable or accidental." 50 C.F.R. § 216.103. The threshold question of the first part of the definition—i.e., whether the take was "accidental"—would be functionally excised and would have no practical utility in the regulatory scheme. It is well established that statutory or regulatory interpretations that produce surplusage are disfavored, *see, e.g.*, *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 668–69 (2007) (applying canon against surplusage in interpretation of regulation); *Nat'l Wildlife Fed'n v. NMFS*, 524 F.3d 917, 932 (9th Cir. 2008) ("As a general rule applicable to both statutes and regulations, textual interpretations that give no significance to portions of the text are disfavored."); *Oceana, Inc. v. Pritzker*, 75 F. Supp. 3d 469, 484 (D.D.C. 2014) ("It is a basic rule

of textual construction that each word should be given meaning." (citation omitted)), particularly "when the term occupies so pivotal a place in the [regulatory] scheme." *Duncan v. Walker*, 533 U.S. 167, 174 (2001). NMFS has not—nor can it—explain why the agency specified that to be incidental, the take must be accidental if the only relevant inquiry is whether the take can be authorized as infrequent or unavoidable. NMFS cannot escape the broad reach of the take prohibition by engaging in artful interpretation, especially where this new construction conflicts with decades of agency practice, enforcement proceedings, regulatory interpretations, and common sense.

As a practical matter—and as NMFS itself has argued in analogous cases—"there is an obvious distinction between" engaging in an otherwise lawful activity "with the mere *expectation* that doing so could incidentally harass marine mammals . . . and *intentionally*" engaging in acts that harass marine mammals, "which is prohibited." *See* Defs.' Combined Opp'n to Pls.' Mot. for Summ. J. & Mem. in Supp. of Cross-Mot. for Summ. J., 21, *Pac. Ranger*, 211 F. Supp. 3d 196. [23] Here, the Tribal hunters' intent is to pursue, hunt, and kill a whale. It is impossible to distinguish ENP gray whales from WNP gray whales in a hunt scenario. Tr. vol. 1, 59:18-20 (conceding that members of the WNP stock are not "readily distinguishable" from members of the ENP stock).[24] Thus, the identification of whales taken over the course of the

[23] Although this case involved the incidental take exception for commercial fisheries, the definition of "incidental" under that exception is functionally identical to the one here at issue. *Compare* 50 C.F.R. § 216.103, *with* 50 C.F.R. § 229.2. Indeed, as explained in the preamble to the proposed regulations implementing the incidental take exception for commercial fisheries, "[t]he phrase 'incidental, but not intentional' is intended to mean *accidental taking*." 60 Fed. Reg. 31,666, 31,675 (June 16, 1995). Likewise, in the preamble to the regulations governing incidental take authorizations for specified activities, NMFS reported "that the phrase 'incidental, but not intentional' is intended to mean *accidental taking*." 47 Fed. Reg. at 21,250.

[24] Even worse, NMFS admitted that "every effort would be made to take photographs during the hunt, but not necessarily during training approaches or other related [activities]." Tr. vol. 2,

waiver will occur only *after* the taking has occurred, and then only *if* photographs of the whale subjected to the taking are of sufficient quality to positively identify the individual, Tr. vol. 1, 60:1-16, or if sufficient tissue is obtained from the harpoon head for genetic matching, *see* Yates 3d Decl. ¶ 38 (noting that genetic samples will not be obtained from every whale subjected to an unsuccessful strike attempt). Accordingly, when the Tribal hunters engage in hunting or training activities on a particular gray whale, they will be deliberately *and intentionally* targeting *that whale* by "harass[ing], hunt[ing], captur[ing], or kill[ing]" it, or "attempt[ing]" to do so. To argue that a case of mistaken identity somehow brings this conduct under the umbrella of "incidental, *but not intentional*" take defies logic and reason. As the Supreme Court observed in an analogous context, "[n]o one could seriously request an 'incidental' take permit to avert [] liability for direct, deliberate action against a member of [a protected] species." *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 700-01 (1995); *see also Pac. Ranger*, 211 F. Supp. 3d at 217 (holding that the term "incidental" as used in the MMPA "has a clear meaning

108:21-22. Nor will genetic material be obtained from every whale subjected to an approach or unsuccessful strike attempt. *See* Tr. vol. 2, 108:25-109:5 (NMFS expert Dr. Weller noting that efforts to secure genetic samples from targeted whales for genetic matching with WNP and PCFG gray whales catalogs would be made only for those whales that are struck and lost (if skin or blubber can be recovered from the harpoon) or those killed and landed). Because photo-identification and genetic matching are the only method of differentiating between WNP, ENP, and PCFG whales, this means that takes of a WNP whale will go undetected over the course of "training approaches or other related [activities]." Tr. vol. 2, 108:18-20; *accord* Yates 3d Decl. ¶ 38 (acknowledging that "[i]t may be difficult in a hunt situation to obtain photographs of sufficient quality for identifying whales"). Accordingly, NMFS will not definitively know whether or to what extent the hunt has resulted in the take of a WNP whale, and as such, cannot ensure that the waiver will not "disadvantage" the WNP stock. The inability to positively identify *every single whale* that will be subjected to take by hunting, harassment, capture, or the attempt to hunt, harass, or capture raises serious questions about NMFS's ability to ensure that the waiver is in accord with the MMPA's sound principles of conservation and management.

that does not excuse deliberate, knowing conduct"). Yet, that is precisely what NMFS is proposing to allow the Tribe to do here.[25]

NMFS's attempt to radically transform take that results from deliberate, intentional acts into "incidental take" by relying on the subjective intent of the actor flies in the face of statutory design. The MMPA reflected Congress's profound concern with the impact of "man's activities" on marine mammal populations. H.R. REP. NO. 92-707, at 12, 1972 U.S.C.C.A.N. at 4145 (declaring that the MMPA "takes the strong position that marine mammals and the marine ecosystems upon which they depend for survival require additional protection from man's activities"). The primary purpose of the MMPA is to ensure that *all* marine mammals are "protected and encouraged to develop to the greatest extent feasible." 16 U.S.C. § 1361(6). That is why, as correctly construed by NMFS in its own enforcement cases, "[t]he prohibited act of taking a marine mammal is a strict-liability offense that is broadly defined." *Pac. Ranger*, 211 F. Supp. 3d at 214; *see also Cordel*, 1994 WL 1246349, at *2 (NOAA Apr. 11, 1994) ("The [MMPA] is a strict liability statute, and no specific intent is required."). The MMPA thus provides all those "subject to the jurisdiction of the United States" with a legal incentive to avoid actions that may harm or harass marine mammals. *See Pac. Ranger*, 211 F. Supp. 3d at 226 (explaining that the "strict-liability [MMPA provision] prohibits 'takes' (broadly defined)" to "place the onus" on those subject to its jurisdiction "to adjust their behavior when they encounter protected species"). Imposing a *mens rea* requirement that does not exist in statute would remove this incentive and, in so doing, subvert the express purposes of the MMPA. Indeed, by limiting

[25] Again, because NMFS will not definitively know whether or to what extent the hunt has resulted in the take of a WNP whale, the proposed waiver and regulations do not ensure that the taking is consistent with the policies and principles of the MMPA, or that the waiver will not disadvantage the WNP stock. *See* 16 U.S.C. §§ 1371(a)(3)(A), 1373.

liability to only those who target specific marine mammals (and excusing take of all other marine mammals that look identical to those targeted by the actor), NMFS's construction "would effectively transform the incidental-take authorization into a blanket of immunity" for any person "who would rather not be bothered with the wellbeing of marine mammals" while engaging in disruptive marine activities, "and thereby perversely shifts the significant costs of risky [] behavior . . . onto the animals themselves." *Pac. Ranger*, 211 F. Supp. 3d at 216.

It is particularly telling that NMFS has twice successfully *defeated* in federal district court the very position that it now seeks to adopt for the first time in this waiver proceeding.[26] In *Black* and *Pacific Ranger*, alleged violators of the MMPA argued in enforcement cases that the incidental take exception authorized the take of marine mammals "even where the taking is a virtual certainty, and even intentional" as long as the purpose of the activity was to engage in some other lawful activity and not to take marine mammals—i.e., in other words, the phrase "incidental, but not intentional" immunizes anyone who deliberately conducts activities that result in a take, unless taking the marine mammals is his subjective goal. *Black v. Pritzker*, 121 F. Supp. 3d 63, 88-89 (D.D.C. 2015); *see also Pac. Ranger,* 211 F. Supp. 3d at 217-18 (reporting respondents' position to be that the incidental-take authorization immunizes anyone who knowingly conducts activities that result in a take—there, setting a purse seine set on a school of fish intermixed with whales—unless bothering the whales is his subjective goal). In both cases, NMFS vigorously (and successfully) disputed this interpretation—which is functionally identical to the interpretation it now seeks to adopt in this proceeding—relying on Congress's intent in passing the MMPA and the plain language of the statute and regulation to argue that the

[26] As discussed above, the definition of "incidental" under the take exception for commercial fisheries is functionally identical to the definition at issue here. *See supra* note 23.

regulatory definition of "incidental" is limited to non-intentional or accidental acts.[27] Both courts upheld NMFS's interpretation, squarely rejecting respondents' position that the phrase "incidental, but not intentional" could include deliberate acts. NMFS cannot now advance the very interpretation that the agency itself has repeatedly rejected before other tribunals and upon which those tribunals have made binding adjudicatory determinations. *Cf. Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."); *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (noting that "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position").

Not only would NMFS's sudden reversal violate the basic tenants of administrative law, *see, e.g.*, *Fox Television Studios, Inc.*, 556 U.S. at 515 (requiring that agencies at least "display awareness that it is changing position" and "show that there are good reasons for the new policy"), it would also raise serious questions regarding the legitimacy and fundamental fairness of the law. NMFS has successfully argued that the term "incidental" as defined in regulation satisfies due process because it "plainly requires that the act to be excused must be 'non-

[27] In *Pacific Ranger*, NMFS strenuously argued that, "consistent with common sense – the regulatory scheme leaves no doubt that intentionally setting a purse seine net around a whale does not qualify as a permissible, incidental taking." Defs.' Combined Opp'n to Pls.' Mot. for Summ. J. & Mem. in Supp. of Cross-Mot. for Summ. J., 20, *Pac. Ranger*, 211 F. Supp. 3d 196. Likewise, in *Black*, NMFS cited to the plain meaning of "incidental" as "occurring merely by chance or *without intention or calculation*" to argue that its "regulatory definition of 'incidental' as limited to a non-intentional or accidental act is consistent with the ordinary meaning of the term and should be upheld on that basis alone." Defs.' Combined Opp'n to Pls.' Mot. for Summ. J. & Mem. in Supp. of Cross-Mot. for Summ. J., 50, *Black*, 121 F. Supp. 3d 63 (emphasis in original). Thus, in a highly analogous context, NMFS insisted, "consistent with common sense" and the "plain meaning" of "incidental," that the exception cannot encompass intentional, deliberate acts. NMFS cannot now change its tune because it finds the clear statutory terms inconvenient.

intentional' or 'accidental[,]' 50 C.F.R. § 229.2, which means that deliberate/knowing takes . . . are unquestionably outside the safe harbor." *Pac. Ranger*, 211 F. Supp. 3d at 218 (relying on the fact that its definition of "incidental" "states a rule that is more than sufficient to provide such actors with fair notice of the expected conduct"). Accordingly, NMFS has imposed substantial civil penalties on parties for takes resulting from deliberate acts, even though such takes were not the subjective purpose of the conduct. Now, when it serves the agency, NMFS proposes to adopt the exact opposite interpretation—which it strenuously argued against when defending its enforcement actions—without any explanation. "A long line of precedent has established that an agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently." *Cnty. of L.A. v. Shalala*, 192 F.3d 1005, 1022 (D.C. Cir. 1999); *see also Nat'l Cable & Telecommc'ns Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (holding that "[u]nexplained inconsistency" in agency policy is "a reason for holding an interpretation to be an arbitrary and capricious change from agency practice"). Accordingly, for this reason as well, NMFS's newly minted position cannot be sustained.

In sum, NMFS's position that an *incidental* take permit can cover the *direct* and deliberate take of WNP whales completely distorts the incidental take provision, reaches an absurd result, and flouts Congressional intent. Accordingly, it must be rejected. Consequently, the inevitable take of WNP whales over the course of the waiver cannot be authorized—either by waiver or by incidental take authorization. Because the waiver will result in the unauthorized take of at least one WNP whale—a point that is *not* in dispute—the MMPA forecloses the issuance of this waiver. Thus, it is clear that Judge Jordan must recommend that the NOAA Administrator deny the waiver request as currently formulated.

D. There Is No De Minimis Exception To The Take Prohibition.

Perhaps recognizing that the unauthorized take of WNP whales threatens to derail the waiver process, NMFS attempts to minimize any potential impacts to whales that are approached, pursued, or subjected to training harpoon throws by insisting that "[u]nsuccessful strike attempts and approaches may or may not constitute a 'take,' depending on the nature of the event and whether it causes a disruption of the subject whale's behavior." Yates 3d Decl. ¶ 29. NMFS suggests that because some whales may not react to the disturbance, or may exhibit an "ephemeral" response, such acts might not constitute "take." *See id.*; Tr. vol. 1, 60:17-20; Tr. vol. 2, 13:14-17. NMFS's attempt to carve out a *de minimis* exception to the take prohibition is contrary to the plain language of the MMPA and its strict liability scheme, and therefore cannot withstand scrutiny.

As a practical matter, it is readily apparent that to absolve one of liability, a permit is required *prior* to engaging in otherwise unlawful activity. *Cf.* H.R. REP. NO. 92-707, at 12, 1972 U.S.C.C.A.N. at 4144 (reporting that the MMPA is intended to prohibit the "harassing, catching and killing of marine mammals . . . *unless taken under the authority of a permit issued by an agency of the Executive Branch*" (emphasis added)). Thus, to engage in acts that have the potential to disturb a marine mammal without incurring liability under the MMPA, one must obtain the appropriate permit. The Tribe cannot approach or strike a whale and then apply for a permit after the act has taken place. Rather, the Tribe and NMFS must look at the proposed activity and its impacts on marine mammals holistically to determine whether the activity has the potential to disturb marine mammals. If so, prior authorization is required. Indeed, it is particularly telling that each witness that described the disturbances to gray whales that resulted from approaching and tagging whales—activities NMFS insists are analogous to the proposed

hunt activities—conceded that those activities could *only* be conducted pursuant to a duly authorized research permit issued under the MMPA's take exception for research activities. Tr. vol. 2, 59:7-13 (conceding that a research permit is necessary "even if in the course of [the] research no whale actually reacts to [the scientist's] approach"). Thus, NMFS effectively concedes that the approach and striking of whales requires prior authorization regardless of whether the activities result in actual disturbance, based on the *possibility* that such activities could result in disturbance since each whale reacts differently to stimuli.[28]

As a legal matter, the plain language and legislative history make clear that to constitute "harassment" (and therefore, "take") under the MMPA, an act must only have the "*potential*" to injure a marine mammal or disrupt behavioral patterns. *See O'Barry*, No. SE960112FM/V, 1999 WL 1417459 (NOAA June 8, 1999) ("[U]nder the MMPA, liability attaches upon a showing that an act caused injury *or had the potential* to cause injury to a marine mammal."); *accord* Tr. vol. 1, 55:3-7 (NMFS expert conceding that harassment "encompasses such acts that have the potential to disrupt behavioral patterns"). Whether the whale is actually disturbed by the activity is irrelevant to whether a permit is required prior to engaging in acts that have the *potential* to disturb marine mammals. Indeed, as NMFS recognizes in its own enforcement actions, proof of actual disturbance or injury is only an aggravating factor in the take inquiry, which if shown can serve as a basis for a longer sentence and/or higher fines. *See, e.g.*, *Ferris*, 2 O.R.W. 260 (NOAA 1980) (holding that even though the body of a sea lion believed killed by respondents' shots was

[28] NMFS's attempts to equate approaches conducted pursuant to scientific research permits with those unlawfully conducted by whale watching operations are unavailing. However, the approach of whales by whale watching vessels is illegal. *See* 61 Fed. Reg. 21,926, 21,927 (May 10, 1996) ("With regard to whale watching, there is no statutory exception provided for observational cruise activities, however, such activities can be conducted carefully without harassing marine mammals. Therefore, NMFS will continue to inform prospective vessel operators of guidelines to follow in an effort to avoid harassment.")

not recovered, proof of actual killing of a marine mammal is only an aggravating factor because shooting at sea lions is itself a "taking" within the broad definition of the term as included in the MMPA and its implementing regulations); *Patterson*, 2 O.R.W. 249 (NOAA 1980) (holding that whether respondent actually killed or injured a harbor seal with shotgun shots is academic to a charge of "taking" under the MMPA). "[E]ven where the injury is minimal, it is insufficient to absolve one of liability under the MMPA." *See O'Barry*, 1999 WL 1417459 (rejecting respondent's argument that he was not liable under the MMPA because his actions resulted in injuries to dolphins that were "not serious" because "under the MMPA, liability attaches upon a showing that an act caused an injury or had the potential to cause an injury to a marine mammal"; the severity of the injury is only relevant to determining the size of the penalty).

Moreover, the extent or scope of the disturbance to a specific marine mammal is not relevant to determining whether a take has occurred. A review of NMFS's administrative cases and actions demonstrates that consistent with Congress's intent to protect marine mammals and their habitat, NMFS has applied the definition of "take" to broadly prohibit acts that have the potential to cause even minimal behavioral disturbance. *See, e.g.*, 83 Fed. Reg. 8841, 8846 (Mar. 1, 2018) (noting that take by harassment occurs when an act causes a pinniped to move as little as two body lengths along a beach, or if already moving, to change direction greater than ninety degrees). Likewise, ALJs presiding over MMPA enforcement actions have consistently found that an act constituted a prohibited "take" where the behavioral disturbance was minimal or fleeting. *See, e.g.*, *Creighton*, 2005 WL 1125361 (finding a violation of the MMPA where Respondent walked onto beach where seals were hauled out, causing twenty-nine seals to flush into the water, despite the fact that seals returned to the beach approximately six and a half hours later). Accordingly, it is well established that even where marine mammals are not permanently

displaced from an area—and even where they return soon after a disturbance—these activities nevertheless constitute prohibited take in the absence of lawful authorization.

NMFS concedes that the activities that it proposes to authorize pursuant to the waiver and regulations—including, e.g., pursuit, approach, and throwing objects such as harpoons and training spears at gray whales—have, at the very least, the potential to disturb marine mammals by causing disruption of behavioral patterns. *See* Tr. vol. 1, 55:3-17; *cf.* Tr. vol. 2, 10:10-12 (admitting that in his "decades" of experience approaching gray whales for research purposes, NMFS expert Dr. Weller observed "highly variable" responses ranging from little to no response to a "middling" response to a "more direct[]" response). As a result, such acts constitute take and are strictly prohibited without a permit. Whether the Tribal hunters' acts in fact cause a behavioral disturbance is "academic" and legally irrelevant to whether such acts are prohibited without prior authorization. *See Patterson*, 2 O.R.W. 249 (NOAA 1980).

This reading is consistent with the legislative history of this provision. *Cf. NLRB v. United Food & Commercial Workers Union, Local 23, AFL-CIO*, 484 U.S. 112, 123 (1987) (looking to legislative history to determine congressional intent). As originally enacted, the MMPA defined "take" to include "harassment"; however, the term "harassment" was not defined in statute or in regulation. In 1993, the Ninth Circuit interpreted the term to require "a direct and significant intrusion" upon a marine mammal's natural state. *See United States v. Hayashi*, 22 F.3d 859, 864 (9th Cir. 1993). The very next year, Congress amended the MMPA to define "harassment" in a much broader manner to encompass "any act" that has the mere "potential" to injure or disturb a marine mammal, thereby signaling an extremely low threshold for establishing harassment under the MMPA. *See City of Sausalito v. O'Neill*, 386 F.3d 1186, 1224 (9th Cir. 2004) (recognizing that the 1994 amendments abrogated *Hayashi*). Congress "is presumed to be

aware of an administrative or judicial interpretation" when amending a statute, *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 239-40 (2009), and "may override judicial interpretation of statutes as long as it changes underlying law," *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1568 (9th Cir. 1993). By significantly expanding the definition of "harassment," Congress clearly expressed its intent that the MMPA's take prohibition be broadly construed to prohibit not only those acts that cause "direct and significant intrusion[s]," but also those acts that may cause minor or seemingly insignificant disturbances to these protected animals.

Congress reaffirmed the broad application and intent of this statutory term nine years later when it expressly rejected NMFS's effort to effectively rewrite the definition of "harassment" to require that the MMPA cause actual and significant disturbance to constitute "take." In response to an application by the U.S. Navy to take marine mammals incidental to operation of low-frequency sonar, NMFS proposed defining "harassment" to require that the act "actually cause[] a significant behavioral change or significant behavioral response in a biologically important behavior or activity." *NRDC, Inc. v. Evans*, 279 F. Supp. 2d 1129, 1154 (N.D. Cal. 2003). A federal district court found NMFS's heightened standard arbitrarily and capriciously ignored Congress's express definition of "harassment," "which considers an act to be harassing if it 'has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns,' even if the disruption does not actually occur." *Id.* In response to this decision, Congress amended the MMPA to "provid[e] a new definition of 'harassment' applicable only to military readiness activities . . . and scientific research activities by or on behalf of the Federal Government." H.R. REP. NO. 108-354, at 668-69 (2003) (Conf. Rep.), *reprinted in* 2003 U.S.C.C.A.N. 1407, 1446-47. Thus, in the case of military or federal scientific research activities, "harassment" requires that the act "injure[] or

ha[ve] the significant potential to injure" a marine mammal, or "disturb[] or [be] likely to disturb a marine mammal . . . to a point where [] behavioral patterns are abandoned or significantly altered." National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 319, 117 Stat. 1392, 1443 (2003) (amending 16 U.S.C. § 1362(18)). However, importantly, in *all other cases*, "harassment" continues to require only that the act have "the potential to disturb"—i.e., a much lower standard.[29]

"When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." *Pierce County v. Guillen*, 537 U.S. 129, 145 (2003). Congress clearly understood the implications of its decision to amend the MMPA to carve out a narrow exception for military and federal scientific activities, while leaving the broader prohibition applicable to all other activities intact. *Cf. Gross v. FBL Financial Servs., Inc.*, 557 U.S. 167, 175 (2009) ("When Congress amends one statutory provision but not another, it is presumed to have acted intentionally."). Moreover, comparing the definition of the term "harassment" under the MMPA to that contained in other wildlife protection statutes demonstrates that if Congress wanted "harassment" under the MMPA require a showing of likelihood of injury, it knew how to do so. *Ctr. for Biological Diversity v. Salazar*, 695 F.3d 893, 909 (9th Cir. 2012) (contrasting the MMPA's definition of "harass" with the ESA's definition, which requires a "*likelihood* of injury to [a listed species]" (citing 50 C.F.R. § 17.3 (ESA regulations); 16 U.S.C. § 1362(18)(A)(i)-(ii) (MMPA)) (emphasis in original) (alterations in original)); *Erlenbaugh v. United States*, 409 U.S. 239, 244 (1972) (providing that courts must "necessarily assume[] that whenever Congress passes a new statute, it acts aware of all previous statutes on the same subject" (citation

[29] For this reason, NMFS's comparison of the "non-lethal hunt activities" to permitted federal research activities is seriously misplaced.

omitted)). Congress's decision to bestow a broad meaning on "harassment" under the MMPA must be given its full and clear effect. *Stenberg v. Carhart*, 530 U.S. 914, 942 (2000) ("When a statute includes an explicit definition, we must follow that definition, even if it varies from that term's ordinary meaning.").

Thus, NMFS's attempts to discount the impacts of the "non-lethal hunt activities" by characterizing the disturbance as "ephemeral and short-term in nature," *see* Tr. vol. 2, 13:16-17, must be rejected as contrary to the MMPA's plain language. It is well-established that agencies cannot create a *de minimis* exception to a clear statutory command "where application of the literal terms would 'provide benefits, in the sense of furthering the regulatory objectives, but the agency concludes that the acknowledged benefits are exceeded by the costs.'" *Waterkeeper All. v. EPA*, 853 F.3d 527, 535 (D.C. Cir. 2017). The record is replete with examples of how protecting individual marine mammals from even minor intrusions clearly furthers the MMPA's statutory and regulatory objectives.[30] Additionally, as discussed extensively above, Congress has been "extraordinarily rigid" in reaffirming its commitment to protecting marine mammals from

[30] The Tribe concedes that "inadvertent takes of WNP or PCFG whales could have significant conservation implications depending on the number of takes and the status of these populations." Tr. vol. 2, 189:15-17. With the MMPA, Congress recognized that marine mammals were "in danger of extinction or depletion as a result of man's activities," and thus sought to minimize the effects of those activities on marine mammals and marine mammal stocks. In keeping with this overarching objective, Congress bestowed broad protection from "harassment" not just to marine mammal stocks, but to individual marine mammals. *See* 16 U.S.C. § 1362(18) (defining "harassment" to include acts directed at a single marine mammal). Individual encounters with "small" impacts on the fitness of individual gray whales, *see* Tr. vol. 2, 14:23-25 (insisting that any impact on gray whales from "non-lethal hunt activities" will be small), may combine with other impacts that cumulatively, will have a ripple effect on that individual whale's ability to perform its important ecosystem functions. *See* sources cited *supra* notes 16, 21. This is the precise situation that the MMPA was intended to address. *Cf.* H.R. REP. NO. 97-707, at 15, 1972 U.C.C.C.A.N. at 4147-48 (finding that the MMPA is required to protect marine mammals at the federal level because "[m]an's taking alone, without these factors"—including, e.g., harassment by boat—"might be tolerated by animal species or populations, [but] in conjunction with them, it could well prove to be the proverbial straw added to the camel's back").

any act that has the potential to disturb their behavior, no matter how "ephemeral and short-term" the response. *See Ala. Power Co. v. Costle*, 636 F.2d 323, 360-61 (D.C. Cir. 1979) (providing that an agency may be able to imply *de minimis* authority to provide exception "[u]nless Congress has been extraordinarily rigid" in its command). NMFS cannot ignore the clear directions of Congress, nor can it "rewrite clear statutory terms to suit its own sense of how the statute should operate." *Utility Air Regulatory Grp.*, 573 U.S. at 328.

In sum, take is take, regardless of whether actual or significant disturbance occurs. Accordingly, the approach, pursuit, and striking of whales—acts that NMFS *concede* have, at the very least, the *potential* to disturb gray whales—clearly constitute take irrespective of whether the targeted whale reacts, and can only be conducted pursuant to a lawfully issued waiver or take authorization. However, as explained above, there is no mechanism by which NMFS can permit the direct and deliberate take—by harassment or otherwise—of WNP whales. Because the activities conducted pursuant to the waiver will result in the unauthorized directed take of at least one WNP whale, NMFS cannot lawfully issue the waiver. Accordingly, Judge Jordan should recommend that NMFS deny the Tribe's waiver request.

IV. ISSUANCE OF THE PROPOSED WAIVER WOULD VIOLATE THE MMPA.

As described above, to obtain authorization to take a marine mammal, the applicant must demonstrate that such taking "is in accordance with sound principles of resource protection and conservation as provided in the purposes and policies of th[e] [MMPA]." 16 U.S.C. § 1371(a)(3)(A). These guiding principles require NMFS to determine that the proposed taking will not cause marine mammal "species and population stocks . . . to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part," "diminish below their [OSP]," or "affect the health or stability of the marine ecosystem."

Id. § 1361. NMFS must additionally ensure that the applicant has carried its burden of proving that the authorization sought does not disadvantage the species involved and is consistent with the MMPA's policies and purposes. 16 U.S.C. § 1373(a). If NMFS cannot make these required findings, or if such findings are not supportable on the basis of the best available scientific evidence, the agency cannot lawfully issue the requested authorization.

A. NMFS Has Not Met Its Burden To Demonstrate That The Waiver Criteria Are Satisfied With Respect To The PCFG Gray Whales.

Although both NMFS and the Tribe's experts concede that the PCFG gray whales exhibit unique characteristics that merit conservation, NMFS and the Tribe nevertheless insist that the group does not constitute a "stock" as that term is defined under the MMPA. Consequently, the proposed waiver and regulations only consider whether these criteria are satisfied with respect to the larger ENP stock. *See* 84 Fed. Reg. at 13,607. However, the record demonstrates that NMFS's conclusion regarding the PCFG's stock status rests on a highly selective reading of the available literature that runs counter to the sound principles of resource protection and conservation that must inform all management decisions under the MMPA, and ignores new evidence that has emerged since the last Gray Whale Stock Identification Workshop ("2012 Workshop") was held nearly eight years ago. As a result, NMFS has failed to consider the best available science with respect to whether the PCFG should be considered a stock, and consequently, has failed to demonstrate that the waiver criteria are satisfied with respect to PCFG whales.

"[S]tocks must be identified in a manner that is consistent with the[] goals" of the MMPA, which include restoring and maintaining stocks within their OSP level and ensuring that marine mammals remain a significant functioning element in the ecosystem. Bettridge Decl. Ex. 2-8 at 4. Consistent with these objectives, since 1995, NMFS has recognized that "a risk-averse

strategy" that *begins* with "a definition of stocks based on small groupings" should be used. *See* NMFS, *Guidelines for Assessing Marine Mammal Stocks: Report of the GAMMS III Workshop*, NMFS-OPR-47, at 17 (ed. Jeffrey E. Moore & Richard Merrick 2011), *available at* https://repository.library.noaa.gov/view/noaa/4022 [hereinafter *GAMMS III Workshop Rep.*]. However, in the 2012 Workshop, NMFS flipped this guidance on its head, framing the question as whether existing data were "sufficient to advise that the PCFG be recognized as a population stock." Weller Decl. Ex. 3-2, at 5. In other words, instead of beginning with smaller, geographically discrete stocks and requiring "compelling evidence" to "lump[]" stocks together, *see GAMMS III Workshop Rep.* at 17—an appropriately "risk-averse" stock identification approach that ensures marine mammal management achieves the goals of the MMPA, *see id.*—NMFS started with the amalgamated stock and required "compelling evidence" to break the large-scale grouping apart. *See* Weller Decl. Ex. 3-2 at 48 (noting that because the 2012 Workshop did not provide "definitive advice" as to whether the PCFG gray whale population qualifies as a stock, NMFS will continue to recognize the PCFG as part of the larger ENP gray whale stock); Weller Decl. ¶ 20 (same). Thus, the 2012 Workshop implemented a stock identification strategy that NMFS's own experts have explained "fail[s] to meet the MMPA objective[s]." *GAMMS III Workshop Rep.* at 17; *cf.* Weller Decl. Ex. 3-38 at 7 ("[T]he recognition of such seasonal subpopulations [PCFG] as separate management units is recommended, and common, for baleen whales." (citing A. E. Dizon, et al., *Rep. of the Workshop on the Analysis of Genetic Data to Address Problems of Stock Identity as Related to Management of Marine Mammals*, 1997 Soc'y for Marine Mammalogy 3)).

It is clear from the plain language and legislative history of the MMPA that "[t]he Act was to be administered for the benefit of the protected species rather than for the benefit of []

exploitation." *Comm. for Humane Legislation*, 540 F.2d at 1148. Accordingly, consistent with the conservative bias that is built into the MMPA, H.R. REP. NO. 92-707, at 15, 1972 U.C.C.C.A.N. at 4148, when identifying stocks, the "interest in maintaining healthy populations of marine mammals" must "come[] first," *Kokechik Fishermen's Ass'n*, 839 F.2d at 802 (footnote omitted). Despite this clear instruction, NMFS's result-oriented approach to delineating gray whale stock structure ensured that all uncertainties were resolved in favor of exploitative interests, and contrary to marine mammal conservation.

For example, with respect to the recruitment issue, strong evidence weighed in favor of bestowing stock status on the PCFG. *See* Weller Decl. Ex. 3-2 at 45. The majority of experts concluded that the ratio of internal recruitment to external recruitment was at least roughly equivalent. *Id.* Evidence suggests that at least some of the PCFG calves are not detected in their first year and consequently, are incorrectly identified as "external" recruits when surveyed in subsequent years. *Id.* at 27. Thus, it is reasonable to infer that internal recruitment is somewhat higher than external recruitment. Moreover, site fidelity to the area "is passed on from mothers to offspring," meaning that "detrimental impacts (e.g., 'takes') to these whales will not have a 'random' impact on the population at large, but will instead primarily impact these matrilines specifically." Weller Decl. Ex. 3-38 at 7. "Potential impacts could include the loss of knowledge of these feeding areas from this population, and localized extirpation." *Id.* Given that NMFS acknowledges that PCFG whales occupy a different ecosystem than their ENP counterparts, Weller Decl. Ex. 3-2 at 48, it is clear that the removal of even a few PCFG whales could impact the stability of the ecosystem, a result the MMPA flatly forbids. Accordingly, although the uncertainty "prevent[ed] th[e] question from being fully resolved," *id.* at 27, in light of the

protective purpose of the MMPA, the scales should have tipped in favor of protecting the PCFG using the most conservative management approach.

Since the 2012 Workshop, additional evidence has only strengthened the case for identifying the PCFG as a stock. Additional studies assessing the genetics of PCFG and ENP gray whale populations have continued to find significant differences in the mitochondrial DNA between the two groups, indicating that "matrilineal fidelity to the area does occur and is important in influencing population structure on the feeding grounds utilized by ENP gray whales." Weller Decl. Ex. 3-36 at 8. Thus, although "low-level external recruitment" to the population may be occurring, "the significant differences in [mitochondrial] DNA haplotype frequencies . . . suggest that groups of gray whales utilizing different (northern versus southern) feeding regions are demographically independent." Weller Decl. Ex. 3-36 at 8-9; *accord* Scordino Decl. Ex. M-0174 at 16-17 (reporting results of genetic analysis of PCFG gray whales and finding that "it is plausible that the PCFG represents a demographically independent group and suggest that caution should be used when evaluating the potential impacts of the proposed Makah harvest").[31]

These observations have been corroborated by studies "document[ing] the occurrence of mothers and calves in the PCFG area over a more than 20-year period" and found that a majority (56%) of calves sighted in the PCFG area "were resighted in a year subsequent to their birth

[31] The Tribe's experts make much of the lack of differentiation in the nuclear DNA between the PCFG and ENP gray whale populations. However, the 2016 GAMMS are clear that "[m]any types of information can be used to identify stocks of a species (e.g., distribution and movements, population trends, morphology, life history, genetics, acoustic call types, contaminants and natural isotopes, parasites, and oceanographic habitat)." Bettridge Decl. Ex. 2-8 at 4. While "[e]vidence of . . . genetic differences in animals from different geographic regions indicates that these populations are demographically independent," the "[f]ailure to detect genetic . . . differences [] does not necessarily mean that populations are not demographically independent." *Id.*

year," and were thus considered to be internal recruits to the PCFG. Schubert 2d Decl. Ex. 15 at 2. The study concluded that there is "a higher degree of internal recruitment to the PCFG than had been suggested by previous less complete data." *Id.* Moreover, studies have found that PCFG whales continue to associate with one another in mixed-sex groups during both the northbound and southbound migrations. Scordino Decl. Ex. M-0057 at 6-7. Given that the majority of gray whales breed early during the southbound migration, the association of PCFG whales during this period "increase[s] the potential for breeding with other whales from the same feeding group." *Id.* This lends further support to the hypothesis that PCFG whales satisfy the 2016 GAMMS criteria for "demographic independence," and as such, should be considered a "stock."

Taken together, the new evidence concerning the PCFG's status under the MMPA led the Pacific SRG, NMFS's advisory group with direct expertise in delineating marine mammal stocks, to recommend that NMFS convene another workshop to reexamine whether the PCFG merits stock designation. *See* Bettridge Decl. Ex. 2-11 at 11. In response, NMFS stated simply that the new information "does not . . . change the conclusion of the task force." Tr. vol. 2, 56:6-7; *see also* Bettridge Decl. Ex. 2-11 at 11-12. NMFS acknowledged that COSEWIC, the Canadian entity with jurisdiction over these same whales, reviewed the *exact same evidence*, yet reached the *exact opposite conclusion*, i.e., that a conservative approach demanded that the PCFG be managed as a distinct population in light of the genetic and behavioral differences exhibited by the population, and its small size. NMFS relied on purported differences in management criteria to explain the discrepancy. Yet, paradoxically, NMFS justified its refusal to reexamine the PCFG stock issue in part by relying on the IWC's use of the term "feeding aggregation"—as opposed to "breeding stock"—to describe the PCFG, *see* Bettridge Decl. Ex.

2-11 at 11-12, despite the fact that the IWC's criteria for identifying and managing stocks "are not the same as those used by NMFS under the MMPA," Weller Decl. ¶ 8.

For example, the IWC's model "considers two populations or 'breeding stocks'" of gray whales and assumes that "there is no interchange between breeding populations." Scordino Decl. Ex. M-0151 at 7. Accordingly, to be designated a "breeding stock," there can be no external recruitment. In contrast, to be considered a "stock" under the MMPA, internal recruitment must be *higher* than external recruitment; the fact that external recruitment occurs does not preclude stock status. Likewise, the IWC model subdivides each "breeding stock" into "feeding sub-stocks" or "feeding aggregations"—both terms are used interchangeably—which are defined as "part of a single breeding stock and may be associated with several sub-areas with respect to feeding and migration." Scordino Decl. Ex. M-0152 at 7. Thus, the IWC's categorization of the PCFG as a "feeding sub-stock" or "feeding aggregation" was not based on whether "the population dynamics . . . [were] more a consequence of births and deaths within the group (internal dynamics) rather than immigration or emigration (external dynamics)." *Compare id.*, *with* Bettridge Decl. Ex. 2-8 at 4. Rather, the IWC's classification is based on the fact that there is at least *some* interchange between the PCFG and the larger ENP stock. *See* Scordino Decl. Ex. M-0150 at 14 (concluding that from a conservation standpoint, the PCFG should be considered a "separate feeding sub-stock"; however, the PCFG should not be considered a separate breeding stock in light of some interbreeding between PCFG whales and those from other feeding areas). In fact, the IWC considers "the hypothesis of a *demographically distinct* PCFG [to be] plausible." Weller Decl. Ex. 3-34 at 18.

Thus, it is clear that NMFS's reliance on the IWC rangewide review to support its decision not to revisit the PCFG stock issue is seriously misplaced. As a practical matter, the

material differences between the IWC and MMPA's use of terms renders the IWC's terminology irrelevant to NMFS's compliance with the MMPA. As a legal matter, by relying on IWC management terminology to dismiss the new evidence related to PCFC stock status under the MMPA, NMFS failed to "consider[] the relevant factors," "examine the relevant data," and "articulate a satisfactory explanation for its action." *State Farm*, 463 U.S. at 43.

It is important to note that the task force did not explicitly conclude that the PCFG does not warrant designation as a stock. Rather, the task force "was unable to provide definitive advice as to whether the PCFG is a population stock under the MMPA." Weller Decl. Ex. 3-2 at 47. Indeed, the experts "ranged in their opinions from strongly agreeing to strongly disagreeing," with at least some experts remaining "neutral." Weller Decl. Ex. 3-2 at 45, 47-48. For NMFS to now portray the 2012 Workshop's conclusion as an absolute finding that the PCFG should not be a stock under the MMPA is disingenuous and a clear overstatement of the group's conclusions. It also renders NMFS's refusal to convene another workshop to review the newly developed data even more arbitrary. *See State Farm*, 463 U.S. at 43.

Although agency judgments within its area of expertise merit deference, *see League of Wilderness Defs.-Blue Mountains Biodiversity Proj. v. Allen*, 615 F.3d 1122, 1131 (9th Cir. 2010), reviewing courts must be mindful to not "rubber-stamp . . . administrative decisions that [are] . . . inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute," *Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 859 (9th Cir. 2005) (alterations in original) (citation omitted). The agency decision here conflicts with the statutory mandate requiring that the interests of the whales come first. An agency conclusion that is in "direct conflict with the conclusion of its own experts,"—here, the agency's refusal to reexamine the PCFG stock issue against the recommendations of its subject matter experts—is

arbitrary and capricious. *W. Watersheds Proj. v. Kraayenbrink*, 632 F.3d 472, 492 (9th Cir. 2011). In addition, in the context of a precautionary and protectionist statute such as the MMPA, it is arbitrary to refuse adopting a conservative approach to protecting at-risk species and to further refuse even to revisit the newest scientific evidence calling into serious question the ongoing failure to protect such species. *Cf.* H.R. REP. NO. 92-707, at 15, 1972 U.C.C.C.A.N. at 4148 (finding that in light of the "certain knowledge that [marine mammals] are almost all threatened in some way, it seems elementary common sense . . . that legislation should be adopted to require that we act conservatively—that no steps should be taken regarding these animals that might prove to be adverse or even irreversible in their effects until more is known."); *id.* ("As far as could be done, we have endeavored to build such a conservative bias into the [MMPA]."); *Comm. for Humane Legislation v. Richardson*, 414 F. Supp. 297, 314 (D.D.C. 1976) ("[T]he people of this country, speaking through their Congress, declared that porpoise[s] and other marine mammals must be protected from the harmful and possibly irreversible effects of man's activities."), *aff'd* 540 F.2d 1141 (D.C. Cir.).

B. Issuing A Waiver For A Species Undergoing An Unusual Mortality Event Would Contravene The Precautionary Principle Built Into The MMPA.

The MMPA reflected Congress's concern that marine mammals "are, or may be, in danger of extinction or depletion as a result of man's activities." 16 U.S.C. § 1361(1). In the House Conference Report accompanying the legislation, Congress observed that "when to these hazards," including environmental contamination and degradation, overfishing, and harassment by boats, "there is added the additional stress of deliberate taking, it becomes clear that many marine mammals may indeed be in urgent need of protection." H.R. REP. NO. 92-707, at 15, 1972 U.C.C.C.A.N. at 4147-48. Although "[m]an's taking alone, without these factors, might be tolerated by animal species or populations, [] in conjunction with them, it could well prove to be

the proverbial straw added to the camel's back." H.R. REP. NO. 92-707, at 15, 1972 U.C.C.C.A.N. at 4148. Thus, it would violate the spirit and intent of the MMPA to permit the deliberate taking of members of a stock that is currently undergoing a UME.

It is clear from the plain language and legislative history of the MMPA that "[t]he Act was to be administered for the benefit of the protected species rather than for the benefit of [] exploitation." *Comm. for Humane Legislation*, 540 F.2d at 1148. NMFS's attempt to issue a waiver of the moratorium for a species that is currently undergoing an indefinite and potentially devastating UME turns this command on its head. At least one stranded whale has been positively identified as a member of the PCFG. *See* Tr. vol. 1, 27:7-8. However, NMFS does not yet know to what extent the UME is affecting the PCFG or WNP population. Tr. vol. 1, 64:14-19 (NMFS expert Mr. Yates agreeing that NMFS does not know whether or how the UME has affected the PCFG). Accordingly, it does not know whether the UME will push the population below the low abundance hunting triggers. In fact, NMFS acknowledges that it is "possible" that the 192 low abundance trigger to stop the hunt has been reached. *See* Tr. vol. 1, 112:6. With such a small population, each individual is important to the survival of the species. *See, e.g.*, 78 Fed. Reg. at 73,726 (noting that "[a] population size of several hundred individuals is precariously small for any large whale or large mammal population"); Schubert 2d Decl. Ex. 8 at iii (citing the small population size to declare the PCFG "endangered" in Canada); Tr. vol. 2, 189:15-18 (Tribal expert conceding that "inadvertent takes of WNP or PCFG whales could have significant conservation implications depending on the number of takes and the status of these populations"); Weller Decl. Ex. 3-48 at 5 (acknowledging that the loss of even a few whales from a small population—particularly if the lost whales are breeding females—"will greatly hinder population growth and ultimately prevent its recovery"). This is particularly so when

evidence suggests, as it does with the PCFG, that site fidelity is passed down through the mothers and thus the loss of even one or two individuals can significantly diminish the transfer of this crucially important information.

Moreover, permitting the directed take of gray whales in the midst of a UME clearly flouts the "primary objective of [marine mammal] management," which is "to maintain the health and stability of the marine ecosystem." 16 U.S.C. § 1361(6). However, a UME is a clear indication that the ecosystem is, by definition, *not* in balance. A UME is "a stranding event that is [of] unusual magnitude" that involves an "[un]usual number of animals." Tr. vol. 1, 95:18-20. It is simply not in accordance with this objective to issue a waiver for the directed take of marine mammals while that population is undergoing a UME. Over fourteen years have passed since the Tribe first applied for a waiver of the MMPA. DEIS at 1-2. Delaying a final determination pending the conclusion of the UME would constitute only a modest delay of the overall process, and would allow NMFS to gather new information that bears directly on whether the proposed hunt satisfies the waiver criteria. However, when asked about this delay, NMFS responded that "modest is in the eye of the beholder." Tr. vol. 1, 66:13-14. In a sense, NMFS is correct. Focusing, as we must, on the interests of the marine mammals, a modest delay would allow for a fully informed decision made on the basis of new information that supersedes the now outdated population information that pre-dated the UME. Accordingly, NMFS is precluded from issuing a waiver during the UME since Congress long ago mandated that the whales' interests are paramount and cannot be trumped by the private interests of the Tribe or anyone else.[32]

[32] For this reason, Mr. Yates's statement in his Third Declaration that "taking too many [whales] for a few years would not [be a problem]" must be rejected as contrary to Congress's clear intent in passing the MMPA. Yates 3d Decl. ¶ 23. "[T]he people of this country, speaking through their Congress, declared that porpoise[s] and other marine mammals must be protected from the harmful and possibly irreversible effects of man's activities." *Comm. for Humane Legislation*,

NMFS's insistence that it evaluated the risk of a UME in its analysis of the hunt is unavailing. First, as explained above, NMFS's statements are directly contradicted by its decision—several months after the hearing and only weeks from the deadline to submit comments, post-hearing briefs, and proposed findings of facts and conclusions of law—to prepare a DSEIS that will analyze "*additional relevant information*" regarding the 2019 UME and its impacts on North Pacific gray whales. 85 Fed. Reg. at 11,348 (emphasis added). By acknowledging that significant new information bearing on the agency's decision requires additional analysis in a DSEIS, *cf.* 40 C.F.R. § 1502.9 (requiring the preparation of a supplemental EIS when there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts"), NMFS has conceded that the record as it exists before Judge Jordan does not represent the best available science, 16 U.S.C. §§ 1371(a)(3)(A), 1373. Accordingly, for all the reasons explained in AWI's Expedited Motion to Stay the Waiver Proceeding and incorporated herein, the MMPA, APA, and basic administrative law principles preclude NMFS from issuing the waiver unless and until the Parties are afforded the opportunity "to submit rebuttal evidence" or "conduct such cross examination as may be required" regarding NMFS's forthcoming analyses.

Second, once again, Congress has already weighed the interests of marine mammals against the interests of those who would exploit marine mammals for various reasons, and decided squarely in favor of prioritizing the animals. To that end, Congress built into the MMPA a conservative bias that was intended to prevent the taking of any "steps . . . regarding these

414 F. Supp. at 314, *aff'd* 540 F.2d 1141 (D.C. Cir.). NMFS "may not 'avoid the Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy.'" *Friends of Earth, Inc. v. EPA*, 446 F.3d 140, 145 (D.C. Cir. 2006) (quoting *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996)).

animals that might prove to be adverse or even irreversible in their effects until more is known" regarding the causes of mortality and other threats. H.R. REP. NO. 92-707 at 15, 1972 U.C.C.C.A.N. at 4148. When considered against this backdrop, it is apparent that the fact that NMFS does not yet know "the full extent of this UME," Tr. vol. 1, 64:8-13, including "whether and how the UME has affected the PCFG population," Tr. vol. 1, 64:14-16, is fatal to the waiver in its current design. Nor can NMFS rely on comparisons to the 1999/2000 UME because, as NMFS concedes, "each UME is unique. No two are the same." Tr. vol. 1, 96:17. "They vary in terms of the duration, in terms of the cause and in terms of the species that are affected." Tr. vol. 1, 109:19-21. Accordingly, the causes of the two events "absolutely" could be different and thus have disparate impacts on individual whales as well as populations and the broader ecosystem. Tr. vol. 1, 65:3-5.

The MMPA demands that marine mammal management decisions be made with caution and only after all of the relevant information has been gathered and analyzed to ensure that the removal of individuals will not have unintended or detrimental consequences. Considering that the causes and duration of the UME are unknown, and the ultimate level of harm to the species uncertain, NMFS's dismissal of the potential significance of the UME to gray whales is misplaced and premature. NMFS cannot blindly authorize the deliberate lethal take of marine mammals simply because the applicant is frustrated by the length of the administrative process that was put in place specifically to prevent uninformed and careless action that may be the "proverbial straw in the camel's back" for marine mammal species and stocks. *See* H.R. REP. NO. 92-707, at 15, 1972 U.C.C.C.A.N. at 4148. At the very least, in accordance with the precautionary principle embodied by the MMPA's take authorization requirements, Judge Jordan should recommend that NMFS delay a decision on the waiver request until the UME concludes

and the full extent of the UME's impacts on the ENP and PCFG populations are fully understood through post-UME research, and can be thoroughly examined by the Parties in accordance with the formal rulemaking procedures required by the APA. *See* 5 U.S.C. §§ 556, 557.

CONCLUSION

For all these reasons, Judge Jordan should recommend that NMFS deny the waiver request. At bare minimum, Judge Jordan should recommend that NMFS defer acting on the waiver request until the UME has concluded and its effects are fully understood and the evidence is presented to the parties and Judge Jordan in accordance with the requirements of the MMPA and the APA.

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Respectfully submitted,

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