

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

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

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**ANIMAL WELFARE INSTITUTE'S  
PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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## LIST OF ACRONYMS

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 Animal Welfare Institute (“AWI”) herein presents its proposed findings of fact and conclusions of law as they pertain to the National Marine Fisheries Service’s (“NMFS”) proposed waiver and regulations that would allow the Makah Tribe<sup>1</sup> to take North Pacific gray whales in the course of a ceremonial hunt. For the convenience of this administrative tribunal, AWI notes that its arguments address several threshold issues, including whether a waiver can issue when NMFS knows that the unauthorized take of an endangered Western North Pacific (“WNP”) gray whale is likely; and whether NMFS has unlawfully refused to consider the best available science, its statutory mandate under the MMPA, and congressional intent in refusing to reexamine whether the Pacific Coast Feeding Group (“PCFG”) gray whale population constitutes a “stock” under the MMPA.<sup>2</sup> Accordingly, although these issues pertain directly to whether the proposed waiver and regulations can be lawfully issued in accordance with the MMPA, AWI’s arguments do not fit neatly under the enumerated waiver criteria.

Thus, in the interest of administrative efficiency and to avoid undue repetition, AWI has organized its proposed conclusions of law by issue, and within each issue, has endeavored to address any threshold matters before addressing the waiver criteria. AWI has also organized its proposed findings of fact to correspond to each major section of its proposed conclusions of law.

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<sup>1</sup> In this document, the term “Tribe” or “Tribal” refers to members of the Makah Indian Tribe.

<sup>2</sup> The International Whaling Commission (“IWC”) uses the term “Pacific Coast Feeding Group” or “PCFG” to refer to those whales that are observed between June 1 and November 30 within the region between northern California and northern Vancouver Island, and photo-identified within this area during two or more years. Thus, AWI uses the term PCFG to refer to those whales only because the term is the common parlance used to describe those whales. AWI does not believe that the gray whales that belong to the PCFG are a feeding aggregation. Rather, as the best available science demonstrates, these whales constitute a “population stock” as that term is defined under the MMPA.

## PROPOSED FINDINGS OF FACT

### **I. FACTS RELEVANT TO AWI'S MOTION TO STAY THE WAIVER PROCEEDING.**

1. 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 Eastern North Pacific (“ENP”) gray whales over a period of ten years. *See Regulations Governing the Taking of Marine Mammals*, 84 Fed. Reg. 13,604, 13,605 (Apr. 5, 2019).

2. 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.

3. An initial prehearing conference was held on June 17, 2019, *see* 84 Fed. Reg. 37,837, 37,837 (Aug. 2, 2019).

4. 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 (June 26, 2019).<sup>3</sup>

5. Judge Jordan ordered briefing on this issue and determined a continuance was warranted. 84 Fed. Reg. at 30,088.

6. 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. 84 Fed. Reg. at 30,088.

7. A final hearing agenda setting forth the issues of fact to be addressed at the hearing was issued on June 26, 2019. *Id.*

8. The agenda identified a new issue—the 2019 Unusual Mortality Event (“UME”)—that had not previously been included in the hearing materials, and set additional deadlines for the submission of written and rebuttal testimony on the 2019 UME. *Id.*

9. As demonstrated by the hearing agenda, the 2019 UME and the impacts of the even/odd year hunt proposals on North Pacific gray whales are issues that are highly relevant to the Waiver Proceeding. *See, e.g., Announcement of Hearing and Final Agenda*, 84 Fed. Reg. 59,360, 59,360-61 (Nov. 4, 2019) (listing the 2019 UME and the impacts of even/odd-year hunts on North Pacific gray whales as issues of fact to be addressed at the hearing).

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<sup>3</sup> AWI had previously requested that the hearing date be moved in light of the voluminous record and difficulties securing experts on such a rapid timeline. *See* AWI’s Expedited Mot. to Extend Waiver Proceedings Schedule at 1, ALJ Dkt. No. 13. This motion was denied. *See* ALJ Dkt. No. 22.

10. The hearing began on November 14, 2019, and lasted for six days. *See* 85 Fed. Reg. 5196, 5196 (Jan. 29, 2020).

11. A great deal of time at the hearing was devoted to cross-examining witnesses on their testimony regarding the 2019 UME and the impacts of the even/odd year hunt proposal on gray whales to ensure “a full and true disclosure of the facts.” *See, e.g.*, Tr. vol. 1 62:10-67:13 (UME); Tr. vol. 2, 150:1-152:12 (even/odd year hunts).

12. On January 29, 2020, NMFS published the full transcript and requested public comments on the proposed waiver and regulations be submitted by March 16, 2020. *See* 85 Fed. Reg. at 5196.

13. 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 a Draft Supplemental Environmental Impact Statement (“DSEIS”) under the National Environmental Policy Act (“NEPA”) “to evaluate information related to the 2019 UME as well as any other appropriate updated information.” AWI’s Expedited Mot. to Stay Proceeding Pending Completion of Suppl. DEIS Attach. A, ALJ Dkt. No. 95.<sup>4</sup>

14. Neither Judge Jordan nor his chambers were included on this email, despite the obvious relevance of the DSEIS to the Waiver Proceeding. *Id.*

15. A Federal Register Notice announcing that NMFS “is preparing” the DSEIS was published on February 27, 2020, which was less than three weeks before the deadline for filing post-hearing briefs, proposed findings of fact and conclusions of law, and comments on the proposed waiver and hearing record. *See* 85 Fed. Reg. 11,347, 11,347-38 (Feb. 27, 2020).

16. The DSEIS will evaluate information concerning the ongoing 2019 UME, and additional information relevant to the agency’s proposal to alternate hunting seasons during even and odd years. *Id.* at 11,348.

17. In the Federal Register Notice, NMFS announced that the DSEIS will assess “additional relevant information” not presented at the hearing, and will “take into consideration the Administrative Law Judge’s recommended decision.” *Id.*

18. NMFS also acknowledged that the DSEIS process will “benefit both the public and agency decision making” with regard to the Waiver Proceeding. *Id.* at 11,347-38.

19. NMFS’s hearing regulations clearly contemplate that the environmental analyses contained in the draft Environmental Impact Statement (“EIS”) will serve as an important factual

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<sup>4</sup> 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.

basis for both the presiding officer and the agency's decision. *See* 50 C.F.R. § 228.16 (providing that at the commencement of the hearing, the presiding officer is to introduce into the record the draft EIS, including public comments and the agency's responses).

20. Indeed, NMFS's Final Rule promulgating the original hearing regulations explicitly state that the EIS "will be considered when the [agency] determines the issues of fact published in the [initial] notice of hearing." 40 Fed. Reg. 10,182, 10,183 (Mar. 5, 1975), *withdrawn by* 60 Fed. Reg. 39,271 (Aug. 2, 1995), *reinstated in full by* 65 Fed. Reg. 39,560 (June 27, 2000).

21. 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* AWI's Expedited Mot. to Stay Proceeding Pending Completion of Suppl. DEIS, ALJ Dkt. No. 95.

22. On March 15, 2020, Sea Shepherd Legal emailed Judge Jordan, copying all parties, and requested an extension of time to submit post-hearing briefs and proposed findings of fact and conclusions of law due to schedule disruptions related to the global outbreak of the novel coronavirus and COVID-19 pandemic. *See* Order Granting Unopposed Request for Extension of Time (Mar. 17, 2020).

23. Judge Jordan granted Sea Shepherd Legal's unopposed request for an extension of time, and gave all parties until March 20, 2020 to submit their post-hearing briefs and proposed findings of fact and conclusions of law. *Id.*

## **II. FACTS RELEVANT TO WHETHER NMFS MAY REGULATE THE TRIBE'S TREATY RIGHT.**

24. 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.

25. 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." *See Metcalf v. Daley*, 214 F.3d 1135, 1137 (9th Cir. 2000) (quoting Treaty of Neah Bay, 12 Stat. 939, 940 (1855)).

26. The Treaty of Neah Bay was one of several treaties negotiated by Isaac Stevens ("Stevens Treaties"), 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 F.3d 1157, 1159 (9th Cir. 2017) (same).

27. The Stevens 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 1159-60.

28. 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).

29. 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.<sup>5</sup>

30. Approximately fifty years later, in 1972, Congress passed the MMPA establishing a moratorium on the taking of marine mammals by persons subject to the jurisdiction of the United States on the high seas, and on land and in waters subject to the jurisdiction of the United States. *See* Pub. L. No. 92-522, 86 Stat. 1027 (1972).

31. Then, in 1982, the International Whaling Commission (“IWC”), the international body responsible for regulating the conservation and utilization of whale resources, approved a moratorium on all commercial whaling. DEIS at 1-19 to -20.

32. The United States was a party to the 1937 international agreement that first banned the commercial whaling of gray whales, and remains opposed to commercial whaling. DEIS at 1-20 to -21.

33. 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.

34. 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).

35. In *Anderson*, the Ninth Circuit also held that “the MMPA is applicable to regulate 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.<sup>6</sup>

36. In 2005, the Makah Tribe formally requested a waiver of the take moratorium under the MMPA to hunt gray whales. DEIS at 1-2.

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<sup>5</sup> “DEIS” refers to the 2015 Draft Environmental Impact Statement on the Makah Tribe Request to Hunt Gray Whales, entered into the docket as ALJ Exhibit 6.

<sup>6</sup> 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 by Tribal hunters in an unauthorized and illegal hunt. DEIS at 1-40.



37. 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. DEIS at 1-2.

38. 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.” *Id.* at 1-42.

39. On the basis of this new information, NMFS terminated the 2008 DEIS process. *Id.* at 1-43.

40. In 2012, NMFS announced its intent to prepare a new DEIS for the proposed hunt. *Id.* In 2015, NMFS issued a second DEIS for public review and comment. *Id.* at 1-2.

41. 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.

### **III. FACTS RELEVANT TO WHETHER THE PROPOSED WAIVER AND REGULATIONS WILL RESULT IN THE UNLAWFUL TAKE OF AT LEAST ONE WNP WHALE.**

42. NMFS recognizes two “population stocks” or “stocks” of North Pacific gray whales: the ENP gray whale stock and the WNP gray whale stock. Weller Decl. ¶ 7.

43. “Population stock” (“stock”) is the fundamental conservation and management unit under the MMPA, *see* Bettridge Decl. Ex. 2-8 at 4, and is defined by statute 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).

44. The ENP and WNP stocks of North Pacific gray whales exhibit significant differences in both their mitochondrial and nuclear DNA, and are also recognized as different management units by the IWC, and as different subpopulations by the International Union for Conservation of Nature. 84 Fed. Reg. at 13,606.

45. Both stocks were decimated by commercial whaling in the nineteenth and early twentieth centuries. *Id.*

46. 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.

47. 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* International Convention for the Regulation of Whaling Schedule, Dec. 2, 1946, 62 Stat. 1716, 196 L.N.T.S. 132.

48. Pursuant to the ICRW, in 1982, the IWC instituted a global moratorium on the commercial whaling of any species of great whale, which went into effect in 1986. Weller Decl. ¶ 6.

49. Domestically, in 1972, North Pacific gray whales were protected from commercial whaling and other forms of harassment and injury by the MMPA. 86 Stat. 1027.

50. 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).

51. The ENP stock of gray whales recovered from commercial exploitation, and in 1994 was delisted under the ESA. *See* 59 Fed. Reg. 21,094 (June 16, 1994).

52. Today, the ENP population winters as far south as Baja California, Mexico, and migrates to its summer feeding grounds as far north as the Chukchi and Beaufort Seas. 84 Fed. Reg. at 13,607.

53. 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 Optimum Sustainable Population (“OSP”) range. Yates Decl. ¶ 19; *see also* Tr. vol. 1, 16:23-24 (NMFS expert noting that prior to the UME, the ENP stock’s abundance estimate was 26,960 whales); Bettridge 2d Decl. Ex. 2-12 at 4 (2019 ENP Stock Assessment Report noting same).

54. 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.

55. 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.

56. 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.” 84 Fed. Reg. at 13,605.

57. “Maximum net productivity” means “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.

58. The WNP population did not similarly recover from commercial exploitation, and remains listed as endangered. 59 Fed. Reg. at 21,094 *accord* 84 Fed. Reg. at 13,606-07.

59. The abundance estimate for the WNP gray whale stock is a mere 290 whales. Bettridge 2d Decl. Ex. 2-12 at 13.

60. “A population size of several hundred individuals is precariously small for any large whale or large mammal population.” *See* 78 Fed. Reg. 73,726, 73,726 (Dec. 9, 2013).

61. With respect to large whales, population sizes of 300 whales are “too small to sustain *any type* of directed take.” *See* NMFS, *Recovery Plan for the North Atlantic Right Whale (Eubalaena glacialis)* v, IVB-40 (Aug. 2004).

62. As a result of its listing as “endangered” under the ESA, 59 Fed. Reg. at 21,094, the WNP stock is considered “depleted” under the MMPA. 16 U.S.C. § 1362.

63. The WNP gray whale stock has not been determined to be within its OSP range. Yates 3d Decl. ¶ 27 (“NMFS currently does not have sufficient information to calculate carrying capacity or OSP levels for the WNP stock and it is not necessary for this proceeding, because NMFS is not proposing to waive the MMPA take moratorium with respect to WNP whales.”).

64. Information regarding the distribution and migration patterns of the WNP population is “incomplete.” Weller Decl. Ex. 3-2 at 17.

65. The WNP 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.*

66. In light of its small population size, the WNP population is particularly vulnerable to extinction, and threats to the stock have only increased. *See* 78 Fed. Reg. 73,726, 73,726 (Dec. 9, 2013); Bettridge 2d Decl. Ex. 2-12 at 14.

67. 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.

68. Likewise, “[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.*

69. Additionally, the summer feeding area off of Sakhalin Island is in a region characterized as “rich with offshore oil and gas reserves,” which places WNP whales at greater risk of adverse impacts from “underwater noise, including seismic surveys, increased shipping traffic, habitat modification, and risks associated with oil spills.” *Id.*

70. 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.*

71. An analysis of anthropogenic scarring on WNP gray whales found that the stock is also “significant[ly] threat[ened]” by coastal net fisheries. *Id.*

72. Accordingly, the WNP gray whale stock faces a multitude of threats and disturbances as a result of man’s activities *Id.*

73. With such small population size, the loss of even a few individuals could have devastating impacts on the WNP gray whale stock’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”); Tr. vol. 2, 189:15-17 (Makah Tribe expert acknowledging 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”); *accord* 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”).

74. 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. 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”); Bettridge 2d Decl. Ex. 2-12 at 14 (discussing the multiple threats to WNP gray whales posed by underwater noise and habitat degradation).

75. Accordingly, short-term harassment can have detrimental impacts to an individual whale’s survival or essential biological functions 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”).

76. 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).

77. In other situations, whales may become habituated to human activity, making them more susceptible to physical injury from vessel strikes. *Id.* at 62,014.

78. 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 corridors of the WNP whale stock represent risks by increasing the likelihood of . . . ship strikes”).

79. Thus, 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, e.g.*, 81. Fed. Reg. at 62,013-14; Tr. vol 5, 153:8-13; Bettridge 2d Decl. Ex. 2-12 at 7, 14; Villegas-Amtmann Decl. ¶¶ 9-10; Villegas-Amtmann Decl. Ex. 3 at 1; Villegas-Amtmann Decl. Ex. 4 at 1.

80. Cumulative impacts from multiple individual encounters and abandonment of preferred feeding areas are of particular concern 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.

81. NMFS has recognized that to conserve this “depleted” stock and achieve the MMPA’s objectives, NMFS must ensure “that all anthropogenic activities be reduced to an absolute minimum.” Weller Decl. Ex. 3-48 at 5.

82. Although the WNP and ENP stocks had previously been thought to be geographically isolated from one another, 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.

83. 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.

84. 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.

85. NMFS proposes 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.

86. 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.*

87. 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. *Id.*

88. 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.*

89. In light of its small population size, “[t]he loss of a single [WNP] whale, particularly if it were a reproductive female, would be a conservation concern for this small stock.” DEIS at 3-93 to 3-94.

90. 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, e.g.*, 83 Fed. Reg. 19,711, 19,722-23 (May 4, 2018) (discussing marine mammal behavioral responses to underwater sound, including vessel noise); 81 Fed. Reg. at 62,013-14 (discussing how repeated vessel approaches can cause “abandonment of [] preferred feeding areas,” or “habituat[ion] to human activity,” which in turn, can “mak[e] whales more susceptible to physical injury from vessel strikes”).

91. The Tribe is proposing to take marine mammals by hunting or by attempting to hunt. Tr. vol. 1, 56:24-25 to 57:1.

92. 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.”).

93. NMFS’s proposed regulations define the various hunt activities that would be authorized pursuant to the waiver. 84 Fed. Reg. at 13,619.

94. The following definitions are particularly relevant to the Waiver Proceeding:

- a. “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 whale’s skin is penetrated by such a weapon or projectile during hunting.” NMFS’s Mot. Requesting Revisions to Proposed Regulations, ALJ Dkt. No. 75 Attach. A at 5.<sup>7</sup>
- b. “Unsuccessful strike attempt” is defined as “any attempt to strike a gray whale while hunting that does not result in a strike.” 84 Fed.

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<sup>7</sup> 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.

Reg. at 13,619.

- c. A “training approach” means “to cause, in any manner, a training vessel to be within 100 yards of a gray whale.” *Id.*
- d. 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.*

95. The proposed waiver and regulations would authorize alternating hunt seasons in even and odd years, with even-year hunts occurring during the gray whale 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. 84 Fed. Reg. at 13,619.

96. NMFS proposes to limit the number of “strikes” to three in even-year hunts, and two in odd-year hunts. *Id.* at 13,608.

97. Acknowledging that approaches and attempted strikes fall within the ambit of the take prohibition, NMFS proposes limits on such “non-lethal” hunt activities. *Id.* at 13,610.

98. 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.*

99. NMFS proposes to account for approaches “proportionally in even-year hunts,” in the same way it will account for strikes, and will presume that approached whales are PCFG whales in odd-year hunts. *Id.*

100. 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.*

101. The Tribe would be allowed eighteen unsuccessful strike attempts during even-year hunts, and twelve during odd-year hunts. *Id.*

102. Training harpoon throws would count as unsuccessful strike attempts. *Id.*

103. The proposed waiver and regulations 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.”).

104. However, because WNP whales are 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. 84 Fed. Reg. at 13,608.

105. NMFS conducted a risk assessment to determine the probability of a WNP whale being subjected to hunt activities, including, e.g., an approach, unsuccessful strike attempt, or strike. *See* Moore 2d Decl. Ex. 4-15.

106. NMFS determined that at least one WNP whale will be subjected to an approach over the ten-year waiver period. Moore 2d Decl. Ex. 4-15 at 12 (probability of 100%).

107. 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. Moore 2d Decl. Ex. 4-15 at 12.

108. 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. 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.*” (emphasis added)).

109. NMFS has previously 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).

110. NMFS has long held 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” from take. *See* 66 Fed. Reg. at 29,505.

111. The Makah Tribe proposes to make the initial approach on a target gray whale with a traditional canoe, which is approximately 36 feet long and more than 5 feet wide. DEIS at 3-361.

112. The traditional canoe is far larger, and holds far more people than a recreational kayak, *see* DEIS at 3-361, which NMFS maintains may not approach a whale within 100 yards without running afoul of the MMPA’s take prohibition, *see* 66 Fed. Reg. at 29,505.

113. Moreover, the Makah’s hunting canoe will be accompanied by one or more motorized chase boats, compounding the noise and disturbance to the marine environment. *See* DEIS at 2-12, 3-361.

114. Approaches of gray whales (even for much more benign purposes such as research or photography) have been demonstrated to disturb gray whales by disrupting gray whale behaviors, such as migration, breathing, or feeding. *See, e.g.*, Tr. vol. 2, 10:10-12 (NMFS



witness Dr. David Weller admitting that in his “decades” of experience approaching gray whales for research purposes, he has observed “highly variable” behavioral responses to vessel approaches ranging from little to no response to a “middling” response to a “more direct[]” response); Weller Decl. ¶ 46 (NMFS witness 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”).

115. When asked to describe gray whales’ reaction to being approached by research vessels, NMFS witness Dr. David 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.

116. 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, which would involve approaching the targeted whales to within a few yards (i.e., far closer than the 100 yards recommended to avoid take by harassment), would react strongly. *Cf.* Tr. vol. 2, 10:10-14.

117. NMFS also 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 struck (7.3%) over the course of the ten-year waiver period. Moore 2d Decl. Ex. 4-15 at 12.

118. Even though the hunt could be designed to eliminate all risk to WNP whales, the regulations as proposed 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 (conceding that it is “possible that even with the[] [protective] measures, a WNP whale could be struck by hunters”).

119. NMFS viewed the risk of a WNP whale being struck as high enough to require a contingency in the regulations, Tr. vol. 1, 28:24-29:5, 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.

120. The act of throwing harpoons or training spears at gray whales has the potential to disrupt gray whale behaviors, such as migration, breathing, or feeding. *See* Tr. vol. 1, 55:14-17; *see also* Tr. vol. 2, 14:6-17 (NMFS expert Dr. Weller providing his professional opinion that gray whales will “likely” exhibit behavioral responses when subjected to an unsuccessful strike attempt or training harpoon throw).

121. It is impossible to distinguish ENP gray whales from WNP gray whales in a hunt scenario. Tr. vol. 1, 59:18-20 (NMFS expert Dr. Weller conceding that members of the WNP stock are not “readily distinguishable” from members of the ENP stock); 84 Fed. Reg. at 13,608 (same).

122. “[E]very effort would be made to take photographs [of the targeted whale] during the hunt, but not necessarily during training approaches or other related [activities].” Tr. vol. 2,

108:21-22.

123. 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. *See* Yates 3d Decl. ¶ 38; 84 Fed. Reg. at 13,614; Tr. vol. 2, 108:25-109:5.

124. Because photo-identification and genetic matching are the only methods 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”).

125. The identification of whales taken over the course of the 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 genetic material is obtained from the whale that is able to be positively matched to an individual in the WNP or PCFG catalogs, *see* Yates 3d Decl. ¶ 38; 84 Fed. Reg. at 13,614; Tr. vol. 2, 108:25-109:5.

126. 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.*

#### **IV. FACTS RELEVANT TO WHETHER NMFS HAS SATISFIED THE WAIVER CRITERIA REGARDING THE PCFG GRAY WHALES.**

127. 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.” 84 Fed. Reg. at 13,608.

128. 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, 25:6-14.

129. 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.

130. NMFS purported to fulfill this requirement by “limiting lethal and sub-lethal effects to PCFG whales.” *Id.*

131. “Population stock” (“stock”) is the fundamental conservation and management unit under the MMPA. 16 U.S.C. § 1362(11) (defining “stock” to mean “a group of marine mammals of the same species or smaller taxa in a common spatial arrangement, that interbreed when mature”).

132. NMFS designates marine mammal stocks according to the 2016 Guidelines for Assessing Marine Mammal Stocks (“2016 GAMMS”). Bettridge Decl. Ex. 2-8 at 4.

133. The 2016 GAMMS further explain that a stock is “a management unit that identifies a demographically independent biological population.” *Id.*

134. The GAMMS define “demographic independence” 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.*

135. To constitute a “stock” under the MMPA, population growth must be due more to “calves born into the group (i.e., internal recruitment)” than juveniles or adults joining the group (i.e., external recruitment). Weller Decl. Ex. 3-2 at 38.

136. 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. Thus, 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.*

137. DNA differentiation is not a requirement for stock delineation. *Id.*

138. The 2016 GAMMS provide that “stocks 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. *Id.*

139. Consistent with these objectives, since 1995, NMFS has recognized that “a risk-averse strategy” for identifying stocks should be used, i.e., one that *begins* with “a definition of stocks based on small groupings” and requires “compelling evidence” to “lump[]” stocks together. *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.*].

140. In the GAMMS III Workshop Report, NMFS recognized that “[m]any stocks defined in the [Stock Assessment] Reports are geographically large, making it likely that the current implementation is failing to meet the MMPA objective” of ensuring that “population stocks [are] not permitted to diminish beyond the point at which they cease to be a functioning element in the ecosystem of which they are a part, and, consistent with this major objective, they [are] not permitted to diminish below their [OSP].” *GAMMS III Workshop Rep., supra* at 17.

141. In addition to the two recognized stocks of North Pacific gray whales, NMFS recognizes a third group of North Pacific gray whales known as the Pacific Coast Feeding Group (“PCFG”). *See* 84 Fed. Reg. at 13,607.

142. PCFG 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.

143. The most recent population abundance estimate for PCFG whales is 232 animals. *See* NMFS Ex. 3-101, ALJ Dkt. No. 85.

144. NMFS has not made a determination that the PCFG stock is within OSP. Yates 3d Decl. ¶ 8.

145. Site fidelity to the feeding grounds off of the west coast of the United States and Canada is passed from PCFG gray whale mothers to their calves. Weller Decl. Ex. 3-38 at 7.

146. Because site fidelity to the area “is passed on from mothers to offspring,” “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 matriline specifically.” Weller Decl. Ex. 3-38 at 7.

147. Potential impacts from the disproportionate loss of PCFG whales “could include the loss of knowledge of these feeding areas from this population, and localized extirpation.” Weller Decl. Ex. 3-38 at 7.

148. Studies on the genetics of North Pacific gray whales confirm that PCFG gray whales have significant differences in their mitochondrial DNA from the sequences observed in the larger ENP population. 84 Fed. Reg. at 13,607.

149. The significant differences in the mitochondrial DNA of the PCFG and ENP gray whale populations indicates that internal recruitment plays a significant role in PCFG population dynamics. *See, e.g.,* Weller Decl. Ex. 3-36 at 8-9.

150. NMFS last held a workshop to consider gray whale stock structure in 2012. Weller Decl. Ex. 3-2 at 9.

151. Participants in the 2012 Gray Whale Stock Identification Workshop (“2012 Workshop”) acknowledged that the PCFG gray whales occupy an ecosystem that differed from their ENP counterparts. *Id.* at 43.

152. Participants in the 2012 Workshop acknowledged that PCFG gray whales show a significant level of genetic differentiation in their mitochondrial DNA markers from the ENP population. *Id.* at 46.

153. Participants in the 2012 Workshop acknowledged that PCFG gray whales likely exhibit rates of external and internal recruitment that are roughly equivalent. *Id.* at 44; Tr. vol. 2, 22:16.

154. Participants in the 2012 Workshop acknowledged that evidence suggested 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.

155. In such case, the level of external recruitment would be artificially inflated, suggesting that the level of internal recruitment may be higher than that of external recruitment. *Id.* at 27.

156. Due to uncertainties in the data series, the 2012 Workshop participants could not offer “definitive advice” as to whether the PCFG is a population stock under the MMPA. *Id.* at 48.

157. Participants in the 2012 Workshop concluded that uncertainties in the data regarding the ratio of internal recruitment to external recruitment in the PCFG “prevent[ed] th[e] question” of whether the PCFG should be designated as a “stock” from being fully resolved.” *Id.* at 47.

158. As a result of the 2012 Workshop, NMFS declined to bestow “stock” status on the PCFG. *See id.* at 48.

159. NMFS considers the PCFG to be a “feeding group” of the larger ENP population. 84 Fed. Reg. at 13,607.

160. Studies post-dating the 2012 Workshop by gray whale experts have suggested that the proportion of internal recruitment to external recruitment in the PCFG is actually much higher than the previously recognized 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”).

161. A recent study of the genetic structure between the PCFG and ENP populations confirmed that significant differences in the mitochondrial DNA between the two groups indicate 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”).

162. Another recent study “document[ed] 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 year,” and were thus considered to be internal recruits to the PCFG. Schubert 2d Decl. Ex. 15 at 2. This study thus concluded that there is “a higher degree of internal recruitment to the PCFG than had been suggested by previous less complete data.” *Id.*

163. Yet another recent study 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.*

164. 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.

165. In 2017, in light of new evidence regarding the 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 population as a single “designatable unit.” Schubert 2d Decl. Ex. 8 at xxi.

166. 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.

167. 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.

168. Citing recent studies finding that the PCFG and ENP population 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.

169. 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.*

170. It is reasonable to infer “that some degree of ‘local adaptation’ is present” in the PCFG gray whales. *Id.* at 11-12.

171. COSEWIC noted “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.

172. COSEWIC cited studies warning that because knowledge of some feeding grounds may be present only in certain matriline, 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.*

173. 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.*

174. 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.*

175. Even so, COSEWIC noted that recent studies “indicate[] a higher degree of internal recruitment than had been suggested by previous ‘less complete’ data.” *Id.*

176. COSEWIC noted that due to its small size, the PCFG “is vulnerable to stochastic events and threats including contamination from oil spills.” *Id.* at xv.

177. 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.* at xv.

178. In March 2018, the Pacific Scientific Review Group (“Pacific SRG”), recommended that NMFS “reconsider the characteristics and status of the [PCFG] gray whales and whether [the PCFG] should be recognized and managed as a full stock.” Bettridge Decl. Ex. 2-11 at 11.

179. The Pacific SRG is 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).

180. The Pacific SRG is an advisory body of experts with expertise in stock designation. *Id.*

181. In response to the Pacific SRG's recommendation, NMFS restated its "belie[f]" that currently available information does not definitively establish that the PCFG as a "full stock" under the MMPA. Bettridge Decl. Ex. 2-11 at 11.

182. To support its conclusion, NMFS noted that the two stock structure hypotheses that the IWC 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.*<sup>8</sup>

183. NMFS 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").

184. However, the IWC's criteria for identifying and managing stocks "are not the same as those used by NMFS under the MMPA." Weller Decl. ¶ 8.

185. 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 permanent external recruitment. *Id.*

186. 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." *See Scordino Decl. Ex. M-0152 at 7; id. Ex. M-0154 at 16.*

187. 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

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<sup>8</sup> 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.*



preclude stock status. Bettridge Decl. Ex. 2-8 at 4.

188. In fact, the IWC considers “the hypothesis of a *demographically distinct* PCFG [to be] plausible.” Weller Decl. Ex. 3-34 at 18.

189. In reaching its conclusion that new evidence did not merit reexamination of the PCFG stock issue, NMFS examined the same recent studies on the PCFG as COSEWIC. Schubert 2d Decl. Ex. 8 at 10-11.

190. NMFS stated that “the information supporting [COSEWIC’s] decision to split the ENP population has been reviewed by the NMFS,” yet dismissed COSEWIC’s findings by arguing that the “discreteness and significance criteria” for designatable units are “not MMPA requirements.” Bettridge Decl. Ex. 2-11 at 12.

191. 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.*

**V. FACTS RELEVANT TO WHETHER ISSUING A WAIVER FOR A SPECIES UNDERGOING AN UNUSUAL MORTALITY EVENT WOULD CONTRAVENE THE PRECAUTIONARY PRINCIPLE BUILT INTO THE MMPA.**

192. Under the Marine Mammal Health and Stranding Response Act, passed in 1992 as an amendment to the MMPA, UME is defined as a stranding event that “is unexpected; involves a significant die-off of any marine mammal population; and demands immediate response.” 16 U.S.C. § 1421h(6).

193. A UME is thus a clear indication that the ecosystem is, by definition, *not* in balance.

194. 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).

195. “Cryptic mortality” is defined as “mortality that you do not see or document.” Tr. vol. 1, 63:25-64:1.

196. Prior to the 2019 UME, NMFS last 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.

197. 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.*

198. By the time that the UME was declared “closed” on December 7, 2001, over 650 gray whales had stranded along the west coast of North America. *Id.*

199. However, due to cryptic mortality, these 650 whales represent only about 3.9% to 13% of the whales that actually died, meaning that the actual number of deaths could be as high as approximately 4,676 whales. Tr. vol. 1, 65:1-4.

200. The cause of the 1999-2000 UME was never determined, although nutritional stress was considered to be the likely dominant factor. Yates 4th Decl. ¶ 4.

201. In early 2019, sixty dead gray whales stranded in California, Oregon, Washington, and Alaska. Bettridge 3d Decl. ¶ 11.

202. 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.*

203. NMFS requested formal consultation with the Working Group regarding the elevated number of gray whale mortalities. *Id.* ¶ 9.

204. 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.

205. Based on this recommendation, on May 29, 2019, NMFS declared a gray whale UME along the West Coast of North America. *Id.* ¶ 10.

206. At the time of the November 2018 hearing, 214 strandings had been attributed to the UME. Tr. vol. 1, 20:2-5.

207. At least one stranded whale has been positively identified as a member of the PCFG. Tr. vol. 1, 27:7-8.

208. 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.

209. NMFS has not yet determined the extent of the impacts of the current UME on the ENP population. Tr. vol. 1, 20:6-8.

210. 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.

211. Nor does NMFS know whether and to what extent the current UME has affected the PCFG. Tr. vol. 1, 64:14-19 (NMFS expert Chris Yates agreeing that NMFS does not know whether or how the UME has affected the PCFG).

212. Although data from the 1999-2000 UME suggest that the PCFG increased during the event, each UME is different. Tr. vol. 1, 97:21 (NMFS Expert Dr. Weller noting that “each UME is unique. No two are the same.”).

213. UMEs “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.

214. The causes of the two events “absolutely” could be different and thus have disparate impacts on individual whales, as well as on populations and the broader ecosystem. Tr. vol. 1, 65:3-5.

215. “[I]t’s certainly possible” that the UME has affected—and is still affecting—the PCFG. Tr. vol. 1, 64: 17-25.

216. NMFS does not know whether the UME will push the population below the low abundance hunting triggers. *See* Tr. vol. 1, 112:6.

217. 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.

218. With such a small population, each individual is important to the survival of the PCFG gray whales. *See, e.g.*, 78 Fed. Reg. 73,726, 73,726 (Dec. 9, 2013) (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”).

219. The conservation concerns related to the UME’s impacts on a small population are amplified where 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. *See, e.g.*, Weller Decl. Ex. 3-38 at 7 (finding that site fidelity to the area “is passed on from [PCFG] 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 matriline specifically.”).

220. Over fourteen years have passed since the Tribe first applied for a waiver of the MMPA. DEIS at 1-2.

221. The UME has not been declared to be over. *See* NMFS, *2019-2020 Gray Whale Unusual Mortality Event 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 Feb. 8, 2020).

## **PROPOSED CONCLUSIONS OF LAW**

### **I. APPLICABLE LEGAL STANDARDS**

#### **A. The Marine Mammal Protection Act**

1. 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.

2. 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.

3. 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).

4. The MMPA imposes a strict “moratorium” on the taking of marine mammals, with limited exceptions. *See* 16 U.S.C. §§ 1371(a), 1372(a).

5. “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).

6. The MMPA defines “take” to mean to “harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.” *Id.* § 1362(12); 50 C.F.R. § 216.3 (same).

7. The MMPA defines “harassment” to mean “any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [i.e., Level A Harassment]; 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 [i.e., Level B Harassment].” 16 U.S.C. § 1362(18)(A), (C), (D).

8. The MMPA prohibits the take of any marine mammal without authorization. *See* 16 U.S.C. § 1372; *see also* Tr. vol. 1, 57:54-25.

9. “Take” can be broadly categorized as “directed” take, or “incidental” take. *See* Tr. vol. 1, 57:6-7.

10. According to NMFS, directed take—also called “intentional” take, *see, e.g.*, 78 Fed. Reg. 35,363, 35,413 (June 12, 2013) (noting that “directed take” is synonymous with “intentional take” under the MMPA)—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), <https://www.fisheries.noaa.gov/insight/understanding-permits-and-authorizations-protected-species>. In other words, directed take occurs where the interaction with the marine mammal was the purpose of the activity. *Accord* NMFS, *Recovery Plan for the Cook Inlet Beluga Whale* III-19 (Dec. 2016) (“‘Directed take’ occurs when an activity is intentionally harassing or harming the animals, such as occurs when conducting research on those animals.”).

11. 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).

12. According to NMFS, “incidental” take occurs where “the activity is unrelated to the protected species, but the protected species may still be affected,” rendering the take “unintentional.” NMFS, *Understanding Permits and Authorizations for Protected Species* (June 24, 2017), <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) (“‘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.”).

13. 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).

14. 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).

15. 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.” 16 U.S.C. § 1371(a)(3)(A); *accord* Tr. vol. 1, 15:11-14.

16. 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). Specifically, NMFS must ensure that the taking will not 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 [OSP]; or affect the health or stability of the marine ecosystem. *Id.* §§ 1361, 1371(a)(3)(A).

17. 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.

18. 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. *Id.* § 1373(a).

19. NMFS interprets “‘disadvantage’ in relation to the impact of take on the stock’s OSP.” 84 Fed. Reg. at 13,605.

20. In prescribing such 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).

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

22. 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. *Id.* § 1371(a)(3)(B).

23. 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.” *Id.* § 1362.

24. 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).

25. Although “incidental” is not defined in statute, the term is defined by regulation to mean “an accidental taking.” 50 C.F.R. § 216.103.

26. 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.*

27. As provided by Congress, “[b]efore 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. Congress imposed this set of requirements “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).

28. Under the Marine Mammal Health and Stranding Response Act, passed in 1992 as an amendment to the MMPA, a UME is defined as a stranding event that “is unexpected; involves a significant die-off of any marine mammal population; and demands immediate response.” 16 U.S.C. § 1421h(6).

29. 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).

## **B. The Administrative Procedure Act**

30. Because the MMPA contains no provision for judicial review, agency decisions under the MMPA are reviewed under the Administrative Procedure Act (“APA”). *See* 5 U.S.C. § 704.

31. 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).

32. The “substantial evidence” standard applies to factual findings made by agencies in formal APA adjudications. 5 U.S.C. § 706(2)(E).

33. The Supreme Court has explained that “substantial evidence” means “more than a mere scintilla.” *Richardson v. Perales*, 402 U.S. 389, 401 (1971). Rather, “[i]t means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Id.*

34. A 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).

35. To satisfy the “arbitrary and capricious” 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).

36. 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).

37. 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).

38. With respect to formal rulemaking, the APA provides that “[a] party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.” 5 U.S.C. § 556(d).

39. Pursuant to the APA, presiding officers in formal rulemaking proceedings have broad discretion to “regulate the course of the hearing.” 5 U.S.C. § 556(c)(5).

40. NMFS’s hearing regulations afford the presiding officer broad discretion to determine the “time and place” of the hearing, “rule upon motions,” “modify or waive any rule . . . when determining that no party will be prejudiced,” and “do all acts and take all measures . . . for the maintenance of order at and the efficient conduct of the proceeding.” 50 C.F.R. § 228.6.

41. Accordingly, Judge Jordan has broad powers regarding procedural matters. 5 U.S.C. § 556; 50 C.F.R. § 228.6.

42. A stay of a formal rulemaking under the MMPA may be proper when it would promote the “efficient conduct of the proceeding,” and would not prejudice any party. 50 C.F.R. § 228.6.



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

43. The 2019 UME and the impacts of the even/odd year hunt proposals on North Pacific gray whales are issues that directly pertain to the statutory criteria NMFS must satisfy in order to issue a waiver and regulations. *See, e.g.*, 84 Fed. Reg. at 59,360-61 (listing the 2019 UME and the impacts of even/odd-year hunts on North Pacific gray whales as issues of fact to be addressed at the hearing).

44. Because the new information NMFS purports to analyze in the pending SDEIS bears directly on factual matters that are at issue in the Waiver Proceeding, *see* 84 Fed. Reg. at 59,360-61 (listing the 2019 UME and the impacts of even/odd-year hunts on North Pacific gray whales as issues of fact to be addressed at the hearing), further development of these factual matters would only enable Judge Jordan to better assess whether NMFS: has demonstrated “due regard” for the “distribution, abundance, breeding habits, and times and lines of migratory movements” of the gray whales; has properly ensured that the waiver will not disadvantage the stock; and has been assured that the waiver and regulations are consistent with the sound principles of resource protection and conservation as articulated in the MMPA’s policies and purposes. *See* 16 U.S.C. §§ 1371(a)(3)(A); 1373(a), (b).

45. Because the DSEIS contains “additional relevant information” regarding the 2019 UME and the impacts of the even/odd year hunt proposal on North Pacific gray whales that NMFS acknowledges “will benefit both the public and agency decision making,” yet will be issued only after Judge Jordan makes his recommended decision, 85 Fed. Reg. at 11,348, the Parties will not have an opportunity “to submit rebuttal evidence” or “conduct such cross examination as may be required,” and will thus be deprived of their procedural right to ensure “a full and true disclosure of the facts.” 5 U.S.C. § 556(d).

46. Such a result is highly prejudicial, and contravenes the clear intent of the APA to provide for fair and impartial agency decisionmaking. *Cf. Kisor v. Wilkie*, 139 S. Ct. 2400, 2421 (2019) (noting that “the ideas of fairness and informed decisionmaking” are “the core of the APA”).

47. A stay is necessary to ensure that Judge Jordan’s recommended decision is based on a fully developed factual record, and thus complies with the basic strictures of the APA. *See* 5 U.S.C. § 556(d) (requiring that rules only issue “on consideration of the whole record . . . and supported by . . . substantial evidence).

48. Because NMFS acknowledged that significant new information bearing on the agency’s decision requires additional analysis, *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 effectively conceded that the record as it exists before Judge Jordan does not represent the best available science.

49. Because the MMPA requires that a decision to waive the moratorium be based on the best available science, 16 U.S.C. § 1371(a)(3)(A), a stay is necessary to ensure that the record—and any decision based upon it—meets this statutory command. 16 U.S.C. § 1371(a)(3)(A).

50. Because NMFS's hearing regulations clearly contemplate that the environmental analyses contained in the draft EIS will serve as an important factual basis for the agency's decision, the draft EIS and its environmental analyses must be completed prior to the hearing so that they may inform the presiding officer's recommended decision. *See* 50 C.F.R. §§ 228.16(a), .20(a) (directing the presiding officer to make a recommended decision based on the record—which includes the draft EIS—and transmit the decision to NMFS).

51. NMFS's concession that new information pertaining to the 2019 UME requires additional analysis is in direct conflict with the agency's position throughout the waiver process that it had already evaluated the possibility of a UME in its Draft EIS, and accordingly, no additional analysis was necessary. *See* Tr. vol. 1, 34:10-35:7 (NMFS witness Dr. Yates relying on the agency's analysis in the Draft EIS to insist that NMFS adequately considered the possibility of a UME in developing the waiver).

52. Because the information and analyses in the DSEIS bear directly on the facts at issue in the Waiver Proceeding, there is a significant risk that Judge Jordan's findings of fact and conclusions of law will be superseded in whole or in part by NMFS's imminent new decision and the facts and analysis contained therein, at which point the entire hearing process would have been a pointless expenditure of administrative resources.

53. To promote administrative efficiency and ensure both the integrity of the decisionmaking process and compliance with the MMPA and APA, a stay must be issued pending NMFS's completion of the additional analyses and evaluation of the relevant new information.

54. Because briefly halting the proceedings to allow for a more fully developed factual record benefits NMFS's interests in issuing a procedurally and substantively defensible decision, granting a stay will in no way damage NMFS's interest in its ongoing administrative process.

55. For similar reasons, because briefly halting the proceedings will allow for a more fully developed and complete factual record, a stay will not harm—and may in fact benefit—the Marine Mammal Commission's interests in ensuring that the eventual waiver decision is based on the best available science and complies with the procedural and substantive mandates of the MMPA.

56. Because NMFS has already determined that it will prepare and issue an DSEIS, a stay is not the reason for any delay in the agency's final decision.

57. Because the true cause of any delay is NMFS’s decision to conduct additional analyses, a stay will not harm the Makah Tribe, or cause any additional hardship or inequity.

58. In contrast, because AWI will be deprived of the opportunity to rebut the agency’s evidence or cross-examine its witnesses on the matters analyzed in the DSEIS, and will be further deprived of its procedural right to have its testimony and evidence considered by an impartial adjudicator, on the basis of a full and complete factual and scientific record, AWI is highly prejudiced by the denial of the request for a stay.

59. Because formal rulemaking under the APA offers procedural rights and protections that are not afforded to commenters during the NEPA process, the opportunity for public comment under NEPA cannot substitute for the formal rulemaking process that the MMPA requires. *Compare* 5 U.S.C. § 556 (APA provision providing a procedural right to submit rebuttal testimony and cross examine witnesses), *with* 40 C.F.R. § 1503.4 (NEPA regulation requiring only that the agency respond to comments on the draft EIS).

60. Because NMFS’s DSEIS will necessarily affect the facts at issue in this proceeding, a limited stay is appropriate so that the Parties—and the presiding officer—may evaluate the impacts of those new facts and related analyses on the issues at stake in this matter. Such a stay will not cause significant harm or prejudice to any Party, will ensure that the procedural and substantive mandates of the MMPA and the APA are satisfied, and will promote administrative efficiency and fairness in this decisionmaking process. 5 U.S.C. §§ 556, 557; 16 U.S.C. § 1371(a)(3)(A); 50 C.F.R. pt. 228.

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

61. Although the Treaty of Neah Bay explicitly reserves 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 Makah Indian Tribe*, 873 F.3d 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).

62. In a series of cases examining functionally indistinguishable treaties with Native American Tribes of the Pacific Northwest, the Supreme Court interpreted the phrase “in common with” to secure to the tribes a right to harvest a share of each fishery that passes through the tribe’s usual and accustomed fishing grounds. *See, e.g., Commercial Passenger*, 443 U.S. at 678-79.

63. However, 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).

64. 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. *Puyallup I*, 391 U.S. 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.”).

65. 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.

66. 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).

67. 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*, 657 F.2d 1009, 1016–1017 (1981) (affirming a total ban on tribal harvest of spring chinook salmon).

68. The notion that the Treaty of Neah Bay reserves to the Makah Tribe an “an untrammled 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.” *Puyallup II*, 414 U.S. at 49.

69. 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).

70. 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, 1372. Thus, the MMPA does not discriminate between treaty and non-treaty persons because members of the Makah Tribe are not being singled out any more than non-treaty people in the lower forty-eight states.

71. As to the second prong, with the MMPA, 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).

72. “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 ‘optimum sustainable population’ and remain ‘significant functioning elements in the ecosystem.’” *Anderson*, 371 F.3d at 498.

73. 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.

74. To effectuate its purposes, the MMPA requires that NMFS make “informed, proactive decisions regarding the effect of marine mammal takes.” *Id.* at 499-500.

75. 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.

76. “[T]he MMPA’s application is necessary to effectuate the conservation purpose of the statute.” *Id.* at 501.

77. By extension, if NMFS cannot demonstrate that the proposed waiver meets the MMPA’s exacting criteria, the waiver cannot be issued. *See Oregon*, 657 F.2d at 1016–1017 (affirming a total ban on tribal harvest of spring chinook salmon).

#### **IV. THE PROPOSED WAIVER AND REGULATIONS WILL RESULT IN THE UNLAWFUL TAKE OF AT LEAST ONE WNP WHALE.**

##### **A. The Proposed Waiver and Regulations Will Result In The Unlawful Hunting Of WNP Whales.**

78. Proposed Conclusions 1-14 are incorporated here by reference.

79. By defining “take” to mean “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal,” Congress prohibited both the “hunt[ing]” and the “kill[ing]” (as well as the attempted “hunt[ing]” and “kill[ing]”) of marine mammals. *See* 16 U.S.C. § 1362(13).

80. Neither “hunt,” nor “kill” are defined in statute, so both terms are given their “ordinary, contemporary, common meaning.” *FTC v. Tarriff*, 584 F.3d 1088, 1090 (D.C. Cir.

2009).

81. Readings of statutory provisions that fail to “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) (internal quotation marks omitted) (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” (quoting *Duncan v. Walker*, 533 U.S. 167 (2001))).

82. Likewise, terms that are connected by the disjunctive “or” 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)).

83. “[H]unt” and “kill” as used in the MMPA’s definition of “take” must be given separate meanings. *See Watkins*, 939 F.2d at 715; *Reiter*, 442 U.S. at 339.

84. “Hunt” should be defined as “to pursue for food or in sport.” Webster’s New Collegiate Dictionary 405 (7th ed. 1971).

85. “Kill” should be defined as “to deprive of life.” Webster’s New Collegiate Dictionary 465 (7th ed. 1971).

86. Because “hunt” must be given separate meaning from “kill” to ensure that Congress’s inclusion of both terms in its list of prohibited acts is not superfluous, *see TRW Inc.*, 534 U.S. at 31, the ultimate success of the hunt—i.e., whether the hunt resulted in a kill—is legally irrelevant to whether the hunter’s actions constituted “hunt[ing],” which the MMPA strictly prohibits, *see* 16 U.S.C. § 1362(13).

87. By breaking the common, ordinary meaning of “hunt” down to its constituent “lethal” and “non-lethal” parts and defining the term to exclude “non-lethal hunt activities,” *see* 84 Fed. Reg. at 13,619 (defining “hunt” to exclude “hunting approaches, training approaches, or training harpoon throws”), NMFS’s proposed regulations unlawfully render “hunt” synonymous with “kill,” and thereby strip “hunt” from its independent utility and ordinary meaning, *see TRW Inc.*, 534 U.S. at 31; *Watkins*, 939 F.2d at 715.

88. 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.

89. Properly interpreted, “hunt” must be defined to encompass “non-lethal hunt activities,” including any act that involves the “pursu[it]” of any whale “for food or [for] sport.”

See Webster's New Collegiate Dictionary 405 (7th ed. 1971).

90. "[H]unt" necessarily encompasses lethal and non-lethal elements, including pursuit, approach, and striking of the target animal. See Webster's New Collegiate Dictionary 405 (7th ed. 1971).

91. 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 "training" exercises to prepare for later pursuing whales for food. See 16 U.S.C. § 1362(13); *id.* § 1362(12) (defining "take" to include the *attempt* to hunt); Webster's New Collegiate Dictionary 405 (7th ed. 1971).

92. Because 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, and because 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 conceding that the Tribal hunters will not be able to tell the difference between ENP, WNP, and PCFG whales by sight), NMFS's waiver and regulations, as currently proposed, will indisputably result in the "hunt[ing]" of WNP whales, See 16 U.S.C. § 1362(13); *id.* § 1362(12) (defining "take" to include the *attempt* to hunt); Webster's New Collegiate Dictionary 405 (7th ed. 1971).

93. 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.").

94. Hunting is a deliberate, intentional act, and thus constitutes directed take. See Tr. vol 1, 56:16-18.

95. Only Alaskan Natives that reside in Alaska and "dwell on the coast of the North Pacific Ocean or the Arctic Ocean" are exempt from the MMPA's take prohibition, provided the taking complies with certain requirements. 16 U.S.C. § 1371(b).

96. Because hunting constitutes directed take, hunting by persons other than Alaskan Natives must be authorized, if at all, pursuant to a waiver of the take moratorium. 16 U.S.C. § 1371(a)(3)(A).

97. To waive the MMPA's moratorium to allow the taking of a marine mammal species or stock, NMFS must demonstrate "due regard" for the affected stocks' "distribution, abundance, breeding habits, and times and lines of migration," and must also determine that the proposed taking is consistent with the policies and purposes of the Act. 16 U.S.C. § 1371(a)(3)(A). Those policies and purposes require that NMFS ensure that the taking will not cause 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 stocks to diminish below their optimum sustainable population" ("OSP"); or affect the health or stability of the marine ecosystem. *Id.*

§ 1361.

98. By definition, depleted stocks are not within their OSP range. *Id.* § 1362(1).

99. 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.” *Id.* § 1371(a)(3)(B).

100. The MMPA expressly prohibits the waiver of the moratorium for the directed take of marine mammals from depleted stocks for all other purposes. *Id.* § 1371(a)(3)(B); Tr. vol. 1, 51:19-20.

101. By definition, hunting does not constitute “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).

102. Because the WNP gray whale stock is listed as endangered under the ESA, and is therefore also designated as “depleted” under the MMPA, 16 U.S.C. § 1362(1); Yates Decl. ¶ 7, the MMPA precludes NMFS from issuing a waiver to allow the hunting of a WNP whale, 16 U.S.C. § 1371(a)(3)(B).

103. Because the proposed waiver and regulations allow the directed take of a WNP whale by hunting, it cannot be issued.

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

**1. The Proposed Waiver And Regulations Will Result In The Take Of At Least One WNP Whale By Harassment.**

104. Proposed Conclusions 6-7 (providing the statutory definitions for “take” and “harassment” are incorporated here by reference.

105. 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).

106. Because “pursuit,” “torment,” and “annoyance” are not defined by the statute, the terms are given their “ordinary, contemporary, common meaning.” *Tarriff*, 584 F.3d at 1090.

107. “Pursue” means “to follow in order to overtake, capture, kill, or defeat.” Webster’s New Collegiate Dictionary 694 (7th ed. 1971).



108. “Torment” means “to cause worry or vexation to.” *Id.* at 933.

109. “Annoy” means to “irritate esp[ecially] by repeated acts.” *Id.* at 36.

110. By approaching a gray whale to distances well within 100 yards in the course of a hunt or training exercise, Tribal hunters will “follow” gray whales “in order to overtake . . . [or] kill” them. *See id.* at 694. Thus, NMFS’s proposed waiver and regulations authorize acts of pursuit of gray whales. *Id.*

111. By approaching and pursuing gray whales in the manner proposed by the waiver and regulations, Tribal hunters will “cause worry or vexation to” and “irritate” those whales. *See id.* at 36, 933. Thus, NMFS’s proposed waiver and regulations authorize acts of torment and annoyance. *Id.*

112. By throwing harpoons or training harpoons (i.e., blunted spear-like devices that mimic harpoons) at gray whales in the manner proposed by the waiver and regulations, Tribal hunters will “cause worry or vexation to” and “irritate” those whales. *See id.* Thus, NMFS’s proposed waiver and regulations authorize acts of torment and annoyance. *Id.*

113. Because the act of approaching gray whales to within 100 yards has the potential to disrupt gray whale behaviors, such as migration, breathing, or feeding, *see* Tr. vol. 2, 10:10-12 (NMFS expert Dr. Weller admitting that in his “decades” of experience approaching gray whales for research purposes, he observed “highly variable” responses ranging from little to no response to a “middling” response to a “more direct[]” response); *see also* Tr. vol. 2, 14:6-17 (providing that in NMFS expert 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. 1, 55:8-13, 55:24-56:3 (NMFS expert Mr. Yates conceding that acts of approach and pursuit have the potential to disturb marine mammals within the meaning of the definition of “harassment”), and because the act of approaching gray whales constitutes an act of pursuit, torment or annoyance, the acts of approaching gray whales to within 100 yards that are authorized by the waiver and regulations 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))).

114. Because the act of throwing objects such as harpoons or training harpoons at gray whales has the potential to disrupt gray whale behaviors, such as migration, breathing, or feeding. *See* Tr. vol. 1, 55:8-17, 55:24-56:3; *see also* Tr. vol. 2, 14:6-17 (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), and because the act of throwing such objects at gray whales constitutes an act of torment or annoyance, the acts of throwing harpoons or training harpoons at gray whales that are authorized by the waiver and regulations 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)).

115. Because NMFS’s proposed waiver and regulations will result in at least one WNP whale being approached to within 100 yards by the Tribe, Moore 2d Decl. Ex. 4-15 at 12, at least one WNP whale will be “follow[ed] in order to overtake . . . [or] kill” by Tribal hunters, and thus will be subjected to an act of “pursuit,” Webster’s New Collegiate Dictionary 694 (7th ed. 1971).

116. Because NMFS’s proposed waiver and regulations will result in at least one WNP whale being approached to within 100 yards by the Tribe, Moore 2d Decl. Ex. 4-15 at 12, at least one WNP whale will be “vex[xed]” by Tribal hunters, and thus will be subjected to an act of “torment,” Webster’s New Collegiate Dictionary 933 (7th ed. 1971).

117. Because NMFS’s proposed waiver and regulations will result in at least one WNP whale being approached to within 100 yards by the Tribe, Moore 2d Decl. Ex. 4-15 at 12, at least one WNP whale will be “irritate[d]” by Tribal hunters, and thus will be subjected to an act of “annoyance,” Webster’s New Collegiate Dictionary 36 (7th ed. 1971).

118. Because the proposed waiver and regulations will result in at least one WNP whale being subjected to an approach to within 100 yards, and because such an approach constitutes an act of pursuit, torment, and/or annoyance, *see* Webster’s New Collegiate Dictionary 36, 694, 933 (7th ed. 1971), that has been demonstrated to disturb gray whales by disrupting their behavior, *see, e.g.*, Tr. vol. 1, 55:8-56:3; Tr. vol. 2, 10:10-12, 14:6-17, the proposed waiver and regulations will result in at least one WNP whale being “taken” by “harassment,” 16 U.S.C. § 1362(13), (18).

119. NMFS has long considered approaches of whales to within 100 yards by non-motorized vessels—e.g., kayaks—to have the potential to disturb marine mammals by disrupting their behaviors, and thus, to constitute harassment. *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)).

120. Because NMFS has failed to explain why a rule prohibiting kayaks from approaching whales to within 100 yards is necessary to prevent the take of whales by harassment, *see* 66 Fed. Reg. at 29,505, 29,508, yet a waiver and regulations allowing the maneuvering of 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, its conclusion that the approach of a WNP whale may not constitute a “take” must be rejected as “an unacknowledged and unexplained inconsistency” that “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.”).

121. Because NMFS’s proposed waiver and regulations may result in at least one WNP whale being subjected to a training throw, strike, or attempted training throw or strike, Moore 2d Decl. Ex. 4-15 at 12, there is a non-zero chance that WNP whales will “vex[xed]” and “irritated” by tribal hunters, and thus will be subjected to acts of “torment” and “annoyance,” Webster’s New Collegiate Dictionary 36, 933 (7th ed. 1971).

122. Because the proposed waiver and regulations may result in at least one WNP whale being subjected to an act of torment and/or annoyance, *see* Webster’s New Collegiate Dictionary 36, 933 (7th ed. 1971), that has been demonstrated to disturb gray whales by disrupting their behavior, *see, e.g.*, Tr. vol. 1, 55:8-56:3; Tr. vol. 2, 14:6-17, the proposed waiver and regulations may result in at least one WNP whale being “taken” by “harassment” by a training throw or strike as well, 16 U.S.C. § 1362(13), (18).

123. Because the waiver and regulations will result in the take of at least one WNP gray whale, 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), whether such take is by “hunting” or by “harassment,” Tribal hunters are prohibited from engaging in such acts without prior legal authorization to take a WNP whale, *see* Tr. vol. 1, 57:24-25 (NMFS expert stating that “[u]nauthorized take of marine mammals is prohibited by the [MMPA]”); 16 U.S.C. § 1371(a).

## **2. NMFS Cannot Lawfully Issue A Waiver And Regulations That Only Exempt One Species That Will Be Taken.**

124. 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. *Kokechik Fishermen’s Ass’n v. Secretary of Commerce*, 839 F.2d 795, 802 (D.C. Cir. 1988).

125. 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 violations of federal law. *Id.* at 802. Accordingly, 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.*

126. Because the MMPA demands NMFS take a “systemic view” of the proposed hunt, *id.*, and because both ENP and WNP gray whales will be taken by the activities authorized by the waiver, 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 must determine whether a waiver can issue for *both* stocks.

127. If a waiver cannot lawfully be issued for both affected stocks—here, the ENP and WNP gray whale stocks—the waiver as proposed must be denied. *Kokechik Fishermen’s Ass’n*, 839 F.2d at 802.

i. *NMFS Has Not—And Cannot—Meet The Waiver Criteria For The WNP Stock.*

128. Proposed Conclusions 14-23 (providing the statutory criteria for a waiver of the take moratorium) are incorporated here by reference.

129. 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.” *Id.* § 1371(a)(3)(B). However, the MMPA expressly prohibits the waiver of the moratorium for the directed (i.e., intentional) take of marine mammals from depleted stocks for all other purposes. *Id.*

130. The activities the waiver proposes to authorize, including hunting and its constituent acts—i.e., approaching, pursuing, and throwing harpoons or training harpoons at gray whales—do not fall within the categories of scientific research purposes, photography for educational or commercial purpose, or enhancing the survival or recovery of a species or stock. *Id.* § 1371(a)(3)(B).

131. At least one WNP gray whale will be subjected to an approach as a result of the activities authorized by the waiver. 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).

132. Proposed Conclusions 78-103 are incorporated here by reference. Accordingly, at least one WNP whale will be subjected to a directed take by hunting.

133. Proposed conclusions 104-122 are incorporated here by reference. Accordingly, at the very least, at least one WNP whale will be subjected to a directed take by harassment.

134. Because at least one WNP whale will be taken by the activities authorized by the proposed waiver, any proposed waiver must also cover the take of WNP whales. *See Kokechik Fishermen’s Ass’n*, 839 F.2d at 802.

135. Because 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, the MMPA precludes NMFS from issuing a waiver for the directed (i.e., intentional) take of a WNP whale except for “scientific research purposes, photography for educational or commercial purpose, or enhancing the survival or recovery of a species or stock.” 16 U.S.C. § 1371(a)(3)(B).

136. A waiver cannot be issued to allow the directed take of WNP whales by hunting or by harassment. *Id.* § 1371(a)(3)(B).

137. NMFS did not propose to issue a waiver for the WNP whales. *See* Yates 3d Decl. ¶ 27; Tr. vol. 1, 54:6-7.

138. Because a waiver cannot be issued to allow the directed take of WNP whales by hunting or harassment, the proposed waiver will not cover all of the affected stocks. Moore 2d Decl. Ex. 4-15 at 12.

139. Because the waiver cannot cover all affected stocks, it cannot be issued. *Kokechik Fishermen's Ass'n*, 839 F.2d at 802.

140. Because NMFS expressly did not propose a waiver of the take moratorium for the WNP stock despite the fact that the WNP stock will be affected by the activities authorized pursuant to the waiver, Yates 3d Decl. ¶ 27, its decision fails to demonstrate “due regard” for the “distribution, abundance, breeding habits, and times and lines of migration” for the affected stocks. 16 U.S.C. § 1371(a)(3)(A).

141. Because NMFS expressly did not propose a waiver of the take moratorium for the WNP stock despite the fact that the WNP stock will be affected by the activities authorized pursuant to the waiver, Yates 3d Decl. ¶ 27, it failed to determine that the proposed taking is “in accord with the sound principles of resource protection and conservation” as provided in the policies and purposes of the MMPA. 16 U.S.C. § 1371(a)(3)(A).

ii. *The Proposed Regulations “Disadvantage” The WNP Stock.*

142. Proposed Conclusions 18-20 (providing the requirements for proposed regulations under the MMPA) are incorporated here by reference.

143. By definition, depleted stocks are not within their OSP range. 16 U.S.C. § 1362(1).

144. Except for scientific research, photography, or enhancement purposes, the “take of a depleted stock would be to the disadvantage of that stock.” Tr. vol. 1, 53:10-11, Tr. vol. 1, 85:5-8.

145. Because the WNP stock is not within its OSP range and because “[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, the lethal take of a WNP whale would be to the disadvantage of the species.

146. Because the WNP stock is not within its OSP range and because 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), the non-lethal take of a WNP whale by the activities authorized by the regulations would disadvantage the species.

147. Proposed conclusions 78-122 are incorporated here by reference. Accordingly, at least one WNP whale will be taken by the activities authorized pursuant to the waiver and regulations. Moore 2d Decl. Ex. 4-15 at 12.

148. Because the proposed regulations authorize activities that will result in the take of a WNP whale, Moore 2d Decl. Ex. 4-15 at 12, and because such take will be to the disadvantage of the stock, the proposed regulations do not ensure that the proposed taking will not be to the disadvantage of the WNP stock. 16 U.S.C. § 1373.

149. Because photos sufficient to differentiate between WNP, ENP, and PCFG whales will not be obtained for every whale subjected to an approach or other related activity, Tr. vol. 2, 108:21-22, takes of a WNP whale will go undetected over the course of “training approaches or other related [activities].” Tr. vol. 1, 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”).

150. Because genetic samples will not be obtained from every whale subjected to an unsuccessful strike attempt, Yates 3d Decl. ¶ 38, takes of a WNP whale may go undetected over the course of the hunt, particularly if a whale is struck and lost.

151. 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. *See* 16 U.S.C. § 1373.

152. Regulations to allow the taking of a marine mammal pursuant to a waiver of the moratorium must also ensure that the waiver “is consistent with the policies and purposes” of the MMPA, 16 U.S.C. § 1361, because they ensure that the waiver will not: cause 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 stocks to diminish below their [OSP]; or affect the health or stability of the marine ecosystem. 16 U.S.C. § 1373.

153. Because NMFS will not be able to positively identify *every single whale* that will be subjected to take by hunting, harassment, capture, or the attempt to hunt, harass, or capture, the proposed regulations fail to ensure that the waiver is in accord with the MMPA’s sound principles of conservation and management. 16 U.S.C. §§ 1361, 1373.

154. 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 Solomonian 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.”).

155. 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.

156. 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. Because NMFS’s proposed waiver and regulations “balance[e] 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 and regulations place the interests of the Tribe over those of the WNP whales, in direct contravention of the MMPA’s clear command, *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.”), and Congress’s intent, *see* H.R. REP. NO. 92-707, at 15, 18, 1972 U.C.C.C.A.N. at 4148, 4151.

157. The risk to WNP 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, *see* Moore 2d Decl. Ex. 4-15 at 12.

158. 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), then the probability that a WNP whale will be subjected to hunt activities up to and including lethal take increases proportionally.

159. 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. *See* 16 U.S.C. § 1373; *accord Kokechik Fishermen’s Ass’n*, 839 F.2d at 802; *Comm. for Humane Legislation*, 540 F.2d at 1148. “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 (emphases added).

160. Because 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, NMFS cannot issue the waiver and regulations as proposed.

**C. NMFS Cannot Authorize The Take Of WNP Whales Under The Incidental Take Exception.**

161. Because 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 and 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, *see* Tr. vol. 1, 57:54-25 (NMFS expert stating that “[u]nauthorized take of marine mammals is prohibited by the [MMPA]”).

162. NMFS insists that the take of a WNP whale by the activities authorized pursuant to the waiver and regulations may be authorized under an incidental take authorization issued pursuant to Section 1371(a)(5) of the MMPA because the Tribal hunters would not intend to hunt a WNP whale. *See* Yates 3d Decl. ¶ 29; Tr. vol. 1, 59:11-16.

163. 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).

164. 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.*

**1. The Subjective Intent Of The Tribal Hunters Cannot Transform Directed Take Into Incidental Take.**

165. “[B]ecause the [MMPA’s] statutory take prohibition makes no reference to any required *mens rea*,” “[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 (“The [MMPA] is a strict liability statute, and no specific intent is required.”).

166. Because the take prohibition is in the nature of strict liability, “[w]hether a respondent appreciates the consequences of his or her actions is irrelevant since voluntary actions are sufficient to constitute a violation of the MMPA” *Creighton*, No. SW030133, 2005 WL 1125361 (N.O.A.A. Apr. 20, 2005).

167. Because “it is the doing of the act that results in culpability” under the MMPA, *Creighton*, 2005 WL 1125361, “the motivations behind [a] Respondent[’s] actions are irrelevant” to a finding that a take occurred, *Kai Paloa, LLC, et al.*, No. PI 1402055, 2017 WL 6268521, at \*16 (N.O.A.A. Nov. 22, 2017).



168. 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”).

169. Because the MMPA’s take prohibition is in the nature of strict liability, the subjective intent of the Tribal hunters is irrelevant to whether an act can be immunized as “incidental.” *See Kai Paloa, LLC, et al.*, 2017 WL 6268521, at \*21 (“[I]ntentions are irrelevant given the strict liability nature of the MMPA.”).

170. The relevant touchstone for whether take resulting from the hunt activities can be authorized pursuant to the incidental take exception 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”).

171. Because NMFS’s construction of the incidental take exception relies on the subjective intent of the Tribal hunters to determine whether the take of a WNP whale was incidental, NMFS imposes a *mens rea* requirement that does not exist in statute. *Pac. Ranger*, 211 F. Supp. 3d at 214; *see also Cordel*, 1994 WL 1246349, at \*2 (“The [MMPA] is a strict liability statute, and no specific intent is required.”).

172. NMFS’s attempt to rely on the subjective intent of the Tribal hunters to excuse the taking of a WNP whale as “incidental”—and thereby remove the take from the realm of “directed” take and the strict requirements that must be met to authorize it—must be rejected as contrary to the plain language of the MMPA. *Pac. Ranger*, 211 F. Supp. 3d at 214; *see also Cordel*, 1994 WL 1246349, at \*2 (“The [MMPA] is a strict liability statute, and no specific intent is required.”); 16 U.S.C. § 1371.

173. By imposing a *mens rea* requirement that does not exist in statute and limiting 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 removes the legal incentive to avoid actions that may harm or harass marine mammals, “effectively transform[ing] 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, and thereby subverts the express purposes of the MMPA.

**2. *The Plain Meaning Of “Incidental” Does Not Encompass Deliberate Acts.***

174. Proposed Conclusions 8-13 (describing “directed” and “incidental” take) are incorporated here by reference.

175. 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).

176. For take to be immunized as “incidental,” the actions taken pursuant to the incidental take authorization must 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”); 50 C.F.R. § 216.103.

177. 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.*

178. 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)).

179. Black’s Law Dictionary defines “accidental” to mean “[n]ot having occurred as a result of anyone’s purposeful act[.]” Black’s Law Dictionary 18 (10th ed. 2014).

180. Black’s Law Dictionary defines “intentional” to mean “[d]one with the aim of carrying out the act.” Black’s Law Dictionary 932 (10th ed. 2014).

181. 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).

182. The activities that will be authorized pursuant to the waiver and regulations, namely 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,” Black’s Law Dictionary 932 (10th ed. 2014) (defining “intentional”), of pursuing and killing a whale for food or sport, *see* Webster’s New Collegiate Dictionary 405 (7th ed. 1971) (defining “hunt”).

183. The activities that will be authorized pursuant to the waiver and regulations, namely 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 intentional. Black’s Law Dictionary 932 (10th ed. 2014).

184. Because the activities that will be authorized pursuant to the waiver and regulations, namely 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 intentional, such activities are not “accidental.” Black’s Law Dictionary 18 (10th ed. 2014).

185. Because the activities that will be authorized pursuant to the waiver and regulations, namely 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 intentional, they do not “occur[] merely by chance or without intention or calculation,” and are thus not “incidental.” Webster’s New Collegiate Dictionary 423 (7th ed. 1971).

186. Because the acts that NMFS proposes to authorize with the waiver and regulations are intentional and are not accidental, such acts fall outside the scope of “incidental, *but not intentional*” take and cannot be excused or authorized under Section 1371(a)(5). Webster’s New Collegiate Dictionary 423 (7th ed. 1971); *accord* Tr. vol. 1, 57:17-58:6 (agreeing that intentional harassment, pursuit, and hunting fall outside of the scope of “incidental”).

### **3. NMFS’s Proposed Interpretation Of Incidental To Excuse Deliberate Acts Is Contrary To Its Own Regulations.**

187. 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. Nat’l Marine Fisheries Serv.*, 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)); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (holding that each word must be given separate meaning, particularly “when the term occupies [a] pivotal [] place in the [regulatory] scheme”).

188. “Incidental” 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.*

189. NMFS has not explained 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. 50 C.F.R. § 216.103.

190. 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 “incidental” definition—i.e., whether the take was “accidental”—a nullity. *Nat’l Wildlife Fed’n*, 524 F.3d at 932.

191. NMFS’s contemporaneous understanding of its regulations implementing the statutory incidental take exception, *see Regulations Governing Small Takes of Marine Mammals Incidental to Specified Activities*, 47 Fed. Reg. 21,248, 21,250 (May 18, 1982) (rejecting a definition of “incidental” that would include deliberate acts, even where such acts would prevent mortality), further demonstrates that 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”).

#### 4. **NMFS’s Proposed Interpretation Of “Incidental” Must Fail As A Practical Matter.**

192. 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.<sup>9</sup>

193. Because the Tribe is proposing to take marine mammals by hunting or by attempting to hunt, Tr. vol. 1, 56:24-57:1, the Tribal hunters’ intent is to pursue, hunt, and kill a whale.

194. Because the Tribal hunters’ intent is to pursue, hunt, and kill a whale, and because 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), 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. 16 U.S.C.

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<sup>9</sup> Although this case involved the incidental take exception for commercial fisheries, the definition of “incidental” is functionally identical. *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. 21,248, 21,250 (May 18, 1982).

§ 1362(13) (defining “take”).

195. Because “[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 Cmty. 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 that does not excuse deliberate, knowing conduct”), NMFS’s position that a case of mistaken identity somehow brings this conduct under the umbrella of “incidental, *but not intentional*” take defies logic and reason.

**5. NMFS’s Proposed Interpretation Of “Incidental” Must Be Rejected As An Unexplained Departure From Prior Policy.**

196. 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).

197. The term “incidental” in the context of the MMPA’s exception for incidental take in the course of commercial fishing operations is defined to mean “a non-intentional or accidental act that results from, but is not the purpose of, carrying out an otherwise lawful action.” 50 C.F.R. § 229.2. 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).

198. The term “incidental” in the context of the MMPA’s exception for incidental take in the course of specified activities is defined to mean “an accidental taking.” 50 C.F.R. § 216.103. As explained 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. 21,248, 21,250 (May 18, 1982).

199. The term “incidental” as used in both the exception for commercial fishing and the exception for specified activities encompasses only those acts that are accidental or not intentional. *Compare id.*, with 50 C.F.R. 216.103 (defining the phrase “incidental, but not intentional” to mean “accidental”).

200. Because the definition of the term “incidental” as used in both the exception for commercial fishing and the exception for specified activities encompasses only those acts that

are accidental or not intentional, the definitions of “incidental” as used in the two exceptions are functionally identical. *Compare* 50 C.F.R. § 216.103, *with* 50 C.F.R. § 229.2.

201. The interpretation of “incidental” advocated by the alleged violators in *Black* and *Pacific Ranger*—i.e., that 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, *see Black*, 121 F. Supp. 3d at 88-89; *Pac. Ranger*, 211 F. Supp. 3d at 217-18—is functionally the same as the position NMFS argues here—i.e., that the phrase “incidental, but not intentional” immunizes the Tribal hunters’ deliberate activities that may result in the take of a WNP whale because the take of the WNP whale was not their subjective goal.

202. In both *Black* and *Pacific Ranger*, 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 regulatory definition of “incidental” is limited to non-intentional or accidental acts. *see* 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 (NMFS arguing 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., 50, *Black*, 121 F. Supp. 3d 63 (emphasis in original) (NMFS citing 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”).

203. 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. *See* 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; 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.

204. Because 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”).

205. “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 & Telecomm’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”).

206. Because 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-intentional’ or ‘accidental[,]’ which means that deliberate/known 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”), and 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, NMFS cannot now adopt the exact opposite interpretation—which it strenuously argued against when defending its enforcement actions—without any explanation. *See, e.g., Cnty. of L.A.*, 192 F.3d at 1022; *Nat’l Cable & Telecommc’ns Ass’n*, 545 U.S. at 981; *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”).

207. Because NMFS has not offered any explanation for its sudden reversal of its long-held position that “incidental” take does not encompass deliberate acts—let alone sought to formally revise its position on this key interpretation of the MMPA—its position that the incidental take exception may be used to authorize the directed take of WNP whales by Tribal hunters violates 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”).

208. Proposed conclusion 182 is incorporated here by reference. Accordingly, the inevitable take of a WNP whale by the activities authorized pursuant to the waiver and regulations falls outside the scope of the incidental take exception.

209. Because the activities that NMFS proposes to authorize pursuant to the waiver and regulations fall outside the scope of the incidental take exception, NMFS cannot authorize the take of a WNP whale pursuant to Section 1371(a)(5).

210. Proposed conclusion 160 is incorporated here by reference. Accordingly, because NMFS cannot authorize the directed take of a WNP whale by hunting and its constituent acts, and because such take would be to the disadvantage of a WNP whale, NMFS cannot authorize the take of a WNP whale pursuant to the waiver of the moratorium.

211. Because NMFS cannot authorize the directed take of a WNP whale that will occur as a result of the activities authorized by the waiver and regulations under an incidental take authorization, and because such take cannot be authorized pursuant to a waiver of the take moratorium in light of the WNP stock’s “depleted” status, the proposed waiver and regulations will result in the unlawful take of a WNP whale.

212. Because the proposed waiver and regulations will result in the unlawful take of a WNP whale, NMFS cannot issue the waiver and regulations as proposed. *See Kokechik*

*Fishermen's Ass'n*, 839 F.2d at 802.

**D. NMFS's Attempt To Minimize Potential Impacts To WNP Gray Whales Must Be Rejected.**

213. 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.

214. 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, e.g.*, Yates 3d Decl. ¶ 29; Tr. vol. 1, 60:17-20; Tr. vol. 2, 13:14-17.

**1. NMFS's Suggestion That A Permit For Non-Lethal Hunt Activities May Not Be Required Must Be Rejected As A Practical Matter.**

215. 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. *See* 16 U.S.C. § 1372 (prohibiting the take of marine mammals without authorization from NMFS). 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. *Id.*

216. If after looking holistically at the activities that will be authorized by the waiver and regulations and their impacts on marine mammals, the Tribe and NMFS determine that activities have the potential to disturb marine mammals, the Tribe must obtain legal authorization for those activities prior to engaging in them. *See* 16 U.S.C. § 1372. Tribal hunters cannot approach or strike a whale and then apply for a permit after the act has taken place.

217. 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 because such activities have the potential to disturb whales within the meaning of the MMPA’s definition of “harassment.” *See, e.g.*, 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”).

218. Since each whale reacts differently to stimuli, there is a *possibility* that the approach and striking of whales as proposed by the waiver and regulations could result in disturbance.

219. Activities that have the possibility of causing disturbance to a gray whale require prior authorization regardless of whether the activities result in actual disturbance. *See* 16 U.S.C. § 1362(13), (18); *id.* § 1371; *O’Barry*, No. SE960112FM/V, 1999 WL 1417459 (N.O.A.A. June 8, 1999).



220. NMFS's attempts to equate approaches conducted pursuant to scientific research permits with those unlawfully conducted by whale watching operations are unavailing because the approach of whales by whale watching vessels is illegal. 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.").

**2. The Plain Language Of The MMPA Requires Only That An Act Have The Potential To Disturb To Constitute Take By Harassment.**

221. The plain language of the MMPA makes clear that to constitute "harassment" (and therefore, "take"), 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 (N.O.A.A. 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").

222. 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. See 16 U.S.C. § 1362; *O'Barry*, 1999 WL 1417459.

223. "[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).

224. 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 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).

225. The extent or scope of the disturbance to a specific marine mammal is not relevant to determining whether a take has occurred. See, e.g., *Creighton*, NOAA Docket No. SW030133, 2005 WL 1125361 (ALJ, Apr. 20, 2005) (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).

226. 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. *See, e.g., Creighton*, 2005 WL 1125361; 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).

227. The activities NMFS proposes to authorize pursuant to the waiver and regulations—including, e.g., pursuit, approach, and throwing objects such as harpoons and training harpoons 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. *Cf.* Tr. vol. 3, 132:8-10 (Makah Tribe expert Dr. Scordino admitting that he has a federal research permit under the MMPA for his research on gray whales).

228. 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).

**3. *The Legislative History Of The “Harassment” Prohibition Confirms That Even Short-Term Disturbances Constitute Take By Harassment.***

229. 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).

230. This reading of the MMPA’s prohibition of harassment 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).

231. As originally enacted, the MMPA defined “take” to include “harassment”; however, the term “harassment” was not defined in statute or in regulation. Pub. L. No. 92-522, 86 Stat. 1027 (1972).

232. In 1993, the Ninth Circuit interpreted the term “harassment” 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).

233. 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*).

234. 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).

235. 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. *See City of Sausalito*, 386 F.3d at 1224 (recognizing abrogation of *Hayashi*).

236. 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).

237. 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.*

238. 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)).

239. 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. *See* 16 U.S.C. § 1362(18).

240. By expressly rejecting NMFS’s effort to effectively rewrite the definition of “harassment” to require that the MMPA cause actual and significant disturbance to constitute “take,” Congress thus reaffirmed the broad application and intent of this statutory term. *See* H.R. REP. NO. 108-354, at 668-69 (2003) (Conf. Rep.), *reprinted in* 2003 U.S.C.C.A.N. 1407, 1446-47.

241. “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.”).

242. Comparing the definition of the term “harassment” under the MMPA to that contained in other wildlife protection statutes demonstrates that if Congress wanted to require that “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]”<sup>A</sup> (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 omitted)).

243. 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.”).

244. 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.

245. 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).

246. Additionally, as discussed extensively above, Congress has been “extraordinarily rigid” in reaffirming its commitment to protecting marine mammals from 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).

247. 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. 16 U.S.C. § 1361.

248. 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).

249. Congress recognized that the protection of marine mammals at the federal level was necessary because while “[m]an’s taking alone, without these factors”—including, e.g., harassment by boat—“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.” *See* H.R. REP. NO. 97-707, at 15, 1972 U.C.C.C.A.N. at 4147-48.

250. Because 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, protecting individual marine mammals from even minor intrusions clearly furthers the MMPA’s statutory and regulatory objectives.

251. Takings that result in even “short-term” disturbances must be rigorously examined and authorized, if at all, under the MMPA’s strict provisions. *Cf.* H. R. Rep. No. 92–707, at 18 (requiring applicants for take authorizations to carry the burden of demonstrating that the take complies with the strict requirements of the MMPA, and admonishing NMFS that “[i]f that burden is not carried—and it is by no means a light burden—the permit may not be issued”).

252. 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.

253. 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. 16 U.S.C. § 1362.

254. However, there is no mechanism by which NMFS can permit the direct and deliberate take—by harassment or otherwise—of WNP whales unless the take is “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).

255. The activities NMFS proposes to authorize pursuant to the waiver do not constitute “scientific research purposes, photography for educational or commercial purposes, or enhancing the survival or recovery of a species or stock,” and thus cannot be authorized pursuant to a waiver. 16 U.S.C. § 1371(a)(3)(B).

256. 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. *Kokechik Fishermen’s Ass’n*, 839 F.2d at 801-02.

**V. NMFS HAS NOT MET ITS BURDEN TO DEMONSTRATE THAT THE WAIVER CRITERIA ARE SATISFIED WITH RESPECT TO THE PCFG GRAY WHALES.**

257. Proposed Conclusions 14-23 (providing the statutory criteria for a waiver of the take moratorium) are incorporated here by reference.

258. 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).

259. 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. *Id.* § 1371(a)(3)(A).

**A. The Threshold Issue Of Whether The PCFG Is A “Stock” Under The MMPA Has Not Been Adequately Satisfied.**

260. Because stocks are the fundamental unit of management under the MMPA, the “waiver process applies at the level of the ENP gray whale stock as a whole (which includes whales in the PCFG).” 84 Fed. Reg. at 13,607.

261. If the PCFG were a stock, NMFS would have to determine whether the waiver criteria are satisfied as to the PCFG stock, as opposed to the larger ENP stock. *See id.* (noting that management decisions are made at the stock level).

262. The issue of whether the PCFG constitutes a “stock” under the MMPA is a threshold issue in this waiver proceeding. *See id.* (noting that management decisions are made at the stock level).

**1. NMFS's Conclusion That The PCFG Is Not A “Stock” Contravenes The MMPA's Mandate And Congressional Intent.**

263. 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.

264. 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, and 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, 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).

265. In light of 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*

*GAMMS III Workshop Rep.* at 17.

266. In the 2012 Workshop, NMFS flipped the guidance from the workshop on its head. Weller Decl. Ex. 3-2, at 5 (framing the question as whether existing data were “sufficient to advise that the PCFG be recognized as a population stock”). Instead of beginning with smaller, geographically discrete stocks and requiring “compelling evidence” to “lump[]” stocks together—an appropriately “risk-averse” stock identification approach that ensures marine mammal management achieves the goals of the MMPA—NMFS started with the amalgamated stock and required “compelling evidence” to break the large-scale grouping apart. *See id.* 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).

267. 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; *see also* 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)).

268. Because strong evidence weighed in favor of bestowing stock status on the PCFG, *see* Weller Decl. Ex. 3-2 at 45-46, because definitive evidence did not demonstrate that the level of external recruitment was higher than that of internal recruitment, *id.* at 48, and in light of the protective purpose of the MMPA, *see* H.R. REP. NO. 92-707, at 15, 1972 U.C.C.C.A.N. at 4148, the scales should have tipped in favor of protecting the PCFG using the most conservative management approach.

269. The task force did not explicitly conclude that the PCFG does not warrant designation as a stock, but rather “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. 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 a clear overstatement of the group’s conclusions and renders NMFS’s refusal to convene another workshop to review the newly developed data an arbitrary failure to examine the relevant data.

**2. NMFS’s Refusal To Reexamine The PCFG Stock Issue In Light Of New Evidence Is Arbitrary And Ignores The Best Available Science.**

270. The PCFG fulfill many of the 2016 GAMMS criteria for stock designation, *see* Bettridge Decl. Ex. 2-8 at 4 (listing the information used to identify stocks, including distribution and movements, population trends, genetics, and oceanographic habitat), including significant differences in their mitochondrial DNA when compared to the larger ENP stock, behavioral differences in their migratory routes (i.e., site fidelity to the west coast of the United States and Canada, Weller Decl. Ex. 3-2 at 45, ranging from northern California to Vancouver Island), *id.* at 45-46, behavioral differences in their feeding behavior, *see id.* at 19 (noting that “[a] unique

characteristic of PCFG whales is an apparent flexibility in their feeding habits), and differences in their oceanographic habitat, *see id.* at 45 (noting that within the North Pacific ocean basin, “the PCFG is the only feeding group that does not rely on the dynamics of a sub-arctic ecosystem”).

271. If the level of internal recruitment is higher than that of external recruitment in the PCFG, the population’s dynamics are “more a consequence of births and deaths within the group (internal dynamics) rather than immigration or emigration (external dynamics).” Bettridge Decl. Ex. 2-8 at 4.

272. In such a case, the PCFG falls under the definition of “stock” as that term is defined under the MMPA. Weller Decl. Ex. 3-2 at 38.

273. New evidence suggesting that the level of internal recruitment is higher than the previously accepted figure of 50% (and thus outpaces any external recruitment that may be occurring), lends further support to the hypothesis that PCFG whales satisfy the GAMMS criteria for “demographic independence,” and as such, should be considered a “stock.” *See, e.g.,* Weller Decl. Ex. 3-36 at 8-9; Schubert 2d Decl. Ex. 15 at 2; Scordino Decl. Ex. M-0174; *id.* Ex. M-0057 at 6-7.

274. “[A]dministrative decisions that [are] . . . inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute” are arbitrary, *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 859 (9th Cir. 2005) (alterations in original) (citation omitted).

275. NMFS’s decision to refuse to reexamine the PCFG stock issue conflicts with the statutory mandate requiring that the interests of the whales come first. *Kokechik Fishermen’s Ass’n*, 839 F.2d at 802 (“The MMPA does not allow for a Solomonian balancing of the animals’ and fisheries’ . . . . The interest in maintaining healthy populations of marine mammals comes first.”).

276. NMFS’s decision likewise conflicts with the explicit precautionary and protectionist purpose of the MMPA. *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 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.).

277. Because NMFS’s refusal to adopt a conservative approach to protecting at-risk species and to revisit the newest scientific evidence conflicts with the MMPA’s statutory mandate, precautionary approach, and protectionist purpose, and because “administrative



decisions that [are] . . . inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute” are arbitrary, *Ocean Advocates v. U.S. Army Corps of Engineers*, 402 F.3d 846, 859 (9th Cir. 2005) (alterations in original) (citation omitted), NMFS’s refusal to reexamine the PCFG stock issue must be rejected as arbitrary.

278. Because NMFS rejected the Pacific SRG’s recommendation to convene a new workshop to reexamine the PCFG stock issue in light of new evidence, NMFS’s conclusion is in “direct conflict with the conclusion of its own experts,” and therefore, is arbitrary and capricious. *W. Watersheds Proj. v. Kraayenbrink*, 632 F.3d 472, 492 (9th Cir. 2011).

279. In rejecting the Pacific SRG’s recommendation, NMFS relied on purported differences in management criteria to explain the discrepancy between its conclusion that the PCFG does not constitute a stock and COSEWIC’s conclusion—made in reliance on the exact same evidence—that a conservative approach to marine mammal management demanded that the PCFG be managed as a distinct population stock in light of the genetic and behavioral differences exhibited by the population, and its small size, yet paradoxically justified its refusal to reexamine the PCFG stock issue by relying on the IWC’s use of terminology despite the acknowledged differences in the IWC and MMPA’s management criteria. *See* Bettridge Decl. Ex. 2-11 at 11-12.

280. NMFS’s failure to explain why differences between COSEWIC’s criteria and the MMPA’s criteria rendered COSEWIC’s decision inapposite, but material differences in the IWC’s terminology and the MMPA’s terminology somehow justified NMFS’s refusal to reexamine the PCFG stock issue in light of new evidence is arbitrary. *See, e.g., Cnty. of L.A. v. Shalala*, 192 F.3d 1005, 1022 (D.C. Cir. 1999) (“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.”).

281. Because 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),” but rather on the fact that there is at least *some* interchange between the PCFG and the larger ENP population, *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), the IWC’s use of the term “feeding aggregation” to describe the PCFG is legally irrelevant to whether the PCFG constitutes a “stock” as that term is defined under the MMPA and 2016 GAMMS.

282. By relying on IWC management terminology to dismiss the new evidence related to PCFG stock status under the MMPA and refuse to convene a workshop to reexamine the issue, NMFS failed to “consider[] the relevant factors,” “examine the relevant data,” and “articulate a satisfactory explanation for its action.” *Motor Vehicle Mfrs. Assn. of U.S., Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

283. Because NMFS arbitrarily ignored highly relevant evidence to whether the PCFG is a “stock” as that term is defined under the MMPA, its conclusion that the PCFG is not a “stock” was not based on the best available science.

284. Because NMFS arbitrarily ignored highly relevant evidence to whether the PCFG is a “stock” as that term is defined under the MMPA, its conclusion that the PCFG is not a “stock” runs counter to the sound principles of resource protection and conservation that must inform all management decisions under the MMPA.

285. Because NMFS failed to consider highly relevant evidence to whether the PCFG is a “stock” as that term is defined under the MMPA, its decision to issue a waiver and regulations without considering whether the statutory criteria are satisfied as to the PCFG (as opposed to the larger ENP stock), its decision to issue the proposed waiver and regulations is not supported by substantial evidence. 5. U.S.C. 706(2).

**B. NMFS Failed To Demonstrate That The Waiver Criteria Are Satisfied With Respect To The PCFG.**

286. To waive the MMPA’s moratorium to allow the taking of a marine mammal species or stock, NMFS must demonstrate “due regard” for the affected stocks’ “distribution, abundance, breeding habits, and times and lines of migration,” and must also determine that the proposed taking is consistent with the policies and purposes of the Act. 16 U.S.C. § 1371(a)(3)(A). Those policies and purposes require that NMFS ensure that the taking will not cause 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 stocks to diminish below their [OSP]; or affect the health or stability of the marine ecosystem. *Id.* § 1361.

287. A decision to waive the moratorium must be based on the best available science. *Id.* § 1371(a)(3)(A).

288. Because NMFS failed to consider the best available science in determining that the PCFG is not a “stock,” NMFS’s decision not to consider the PCFG a “stock” when considering the waiver’s impacts on North Pacific gray whales was also not based on the best available science. *Id.* § 1371(a)(3)(A).

289. Because NMFS failed to consider the best available science when evaluating the proposed waiver’s impacts on the PCFG, the proposed waiver cannot be issued. *Id.* § 1371(a)(3)(A).

290. Because stocks must be identified in accordance with the sound principles of resource protection and conservation that must inform all management decisions under the MMPA, Bettridge Decl. Ex. 2-8 at 4, and because NMFS’s conclusion that new evidence did not merit reexamination of whether the PCFG should be considered a “stock” ran counter to those sound principles, NMFS’s determination thus focused its analysis of whether the proposed taking met the waiver criteria at the level of the larger ENP stock, *accord* 84 Fed. Reg. at 13,607

(“[T]his waiver process applies at the level of the ENP gray whale stock as a whole.”).

291. Because NMFS unlawfully failed to consider the PCFG to be a “stock” as that term is defined under the MMPA, and thus focused its analysis of whether the proposed taking met the waiver criteria at the level of the larger ENP stock, 84 Fed. Reg. at 13,607 (“[T]his waiver process applies at the level of the ENP gray whale stock as a whole.”), NMFS failed to consider whether the waiver demonstrates “due regard” for the PCFG’s distribution, abundance, breeding habits, and times and lines of migratory movements. 16 U.S.C. § 1371(a)(3)(A).

292. Because NMFS unlawfully failed to consider the PCFG to be a “stock” as that term is defined under the MMPA, NMFS failed to consider whether the waiver is in accord with sound principles of resource protection and conservation,” as articulated in the MMPA’s purposes and policies, 16 U.S.C. § 1361. In other words, NMFS failed to ensure that the taking will not cause the small PCFG stock to diminish to the point where it “cease[s] to be a significant functioning element in the ecosystem of which they are a part”; cause the PCFG stock to diminish below its OSP; or affect the health or stability of the marine ecosystem.

293. In fact, because NMFS unlawfully failed to consider the PCFG to be a “stock” as that term is defined under the MMPA, NMFS proposed a waiver and regulations that will impact the PCFG without determining whether the PCFG is within OSP, *see* Yates Decl. ¶ 8 (noting that “NMFS does not have sufficient information to determine whether the PCFG, if it were a stock, would be within OSP levels”). Accordingly, NMFS’s waiver does not ensure that the taking will not cause the PCFG stock to diminish below its OSP. *See* Yates Decl. ¶ 8.

294. Because NMFS did not demonstrate that the waiver criteria were satisfied with respect to the PCFG, its decision to issue the waive is not supported by substantial evidence. 5. U.S.C. § 706(2).

**C. NMFS Failed To Demonstrate That The Proposed Regulations Comply With The Statutory Criteria With Respect To The PCFG.**

295. Regulations to allow the taking of a marine mammal pursuant to a waiver of the moratorium must ensure that the taking will not disadvantage the affected species. 16 U.S.C. §§ 1371(a)(3)(A), 1373.

296. NMFS interprets “‘disadvantage’ in relation to the impact of take on the stock’s OSP.” 84 Fed. Reg. at 13,605.

297. Because NMFS has not made a determination that the PCFG stock is within OSP, Yates 3d Decl. ¶ 8, NMFS has not ensured that the proposed taking will not disadvantage the PCFG stock.

298. Regulations to allow the taking of a marine mammal pursuant to a waiver of the moratorium must also be based on the best available science. 16 U.S.C. § 1373.

299. Because NMFS failed to consider the best available science in determining that the PCFG is not a “stock,” NMFS’s decision not to consider the PCFG a “stock” when considering the regulations’ impacts on North Pacific gray whales was also not based on the best available science. *Id.*

300. Regulations must ensure that the proposed taking is consistent with the policies and purposes of the Act. *Id.* Those policies and purposes require that NMFS ensure that the taking will not cause 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 stocks to diminish below their [OSP]; or affect the health or stability of the marine ecosystem. *Id.* § 1361.

301. Because NMFS unlawfully failed to consider the PCFG to be a “stock” as that term is defined under the MMPA, NMFS failed to consider whether the regulations are in accord with sound principles of resource protection and conservation,” as articulated in the MMPA’s purposes and policies. *Id.* In other words, the regulations fail to ensure that the taking will not cause the small PCFG stock to diminish to the point where it “cease[s] to be a significant functioning element in the ecosystem of which they are a part”; cause the PCFG stock to diminish below its OSP; or affect the health or stability of the marine ecosystem. *Id.*; *see also* 84 Fed. Reg. at 13,607 (acknowledging that NMFS considered the waiver process to “appl[y] at the level of the ENP gray whale stock as a whole”).

302. In fact, because NMFS unlawfully failed to consider the PCFG to be a “stock” as that term is defined under the MMPA, NMFS has not determined whether the PCFG is within OSP, and thus did not ensure that the taking will not cause the PCFG stock to diminish below its OSP. *see also* 84 Fed. Reg. at 13,607 (acknowledging that NMFS considered the waiver process to “appl[y] at the level of the ENP gray whale stock as a whole”).

303. Because NMFS did not demonstrate that the statutory criteria were satisfied with respect to its proposed regulations, its proposed regulations are not supported by substantial evidence. 5. U.S.C. § 706(2).

## **VI. ISSUING A WAIVER FOR A SPECIES UNDERGOING AN UNUSUAL MORTALITY EVENT WOULD CONTRAVENE THE PRECAUTIONARY PRINCIPLE BUILT INTO THE MMPA.**

304. 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).

305. 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.

306. 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.

307. 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.

308. 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.” *Id.* § 1361(6).

309. It is not in accordance with this objective to issue a waiver for the directed take of marine mammals while that population is undergoing a UME, which by definition, means the ecosystem is out of balance.

310. 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.

311. Because the MMPA requires that the interests of the marine mammals come first, *Comm. for Humane Legislation*, 540 F.2d 1141, and because 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, 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.<sup>10</sup>

312. 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.

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<sup>10</sup> 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. “[T]he people of this country, speaking through their Congress, declared that porpoise and other marine mammals must be protected from the harmful and possibly irreversible effects of man’s activities.” *Comm. for Humane Legislation*, 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)).

313. Because the proposed waiver and regulations are not based on the best available science, they are not supported by substantial evidence. 5 U.S.C. § 706(2).

314. Proposed conclusions 43-60 are incorporated here by reference. Accordingly, 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. *See* 5 U.S.C. §§ 556, 557; 16 U.S.C. §§ 1371(a)(3)(A), 1373; 50 C.F.R. part 228.

315. Because Congress built into the MMPA a conservative bias that was intended to prevent the taking of any “steps . . . regarding these 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, and because 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, NMFS cannot issue a waiver or regulations.

316. 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 – ARGUMENT IN SUPPORT OF AWI’S POSITION**

AWI appreciates Judge Jordan’s invitation to supply further written argument here (i.e., what serves as a written closing argument), but wishes to avoid burdening the presiding officer with any additional written materials. AWI has articulated in its post-hearing brief myriad compelling reasons why Judge Jordan should recommend that NMFS deny the proposed waiver and revoke the proposed regulations in order to effectuate the mandates of the MMPA. Accordingly, AWI respectfully requests that Judge Jordan recommend the denial of the proposed waiver and regulations unless and until NMFS can design a proposal that fully complies with the precautionary standards Congress imposed in the MMPA.

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Respectfully submitted,

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