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Via Mail Electronic Filing

William W. Stelle, Jr.
Regional Administrator
National Marine Fisheries Service, West Coast Region
National Oceanic and Atmospheric Administration
7600 Sand Point Way NE, Building 1
Seattle, WA 98115-0070

Re: Comments on Draft Environmental Impact Statement on the Makah Tribe Request to Hunt Gray Whales

Dear Mr. Stelle:

On behalf of Sea Shepherd Legal, I submit the following comments on the Draft Environmental Impact Statement on the Makah Tribe Request to Hunt Gray Whales, published March 20, 2015 by the National Marine Fisheries Service.

Thank you for the opportunity to comment.

Respectfully submitted,

/s/

Catherine Pruett, JD, MPA
Executive Director
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Encl.

Sea Shepherd Legal (SSL) is an international, nonprofit, public interest environmental law firm with a mission to save marine wildlife and habitats by enforcing, strengthening, and developing protective laws, treaties, policies, and practices worldwide. SSL works on a range of matters from ensuring proper governmental agency action to developing innovative policy approaches to encourage greater protections for marine wildlife and ecosystems.

I. INTRODUCTION

SSL submits these comments in an effort to protect gray whales from being brutally killed in archaic, unjustifiable and inhumane hunts. SSL's goal is to persuade the National Marine Fisheries Service (NMFS) to uphold its responsibility of "stewardship of the nation's ocean resources and their habitat."[1] We implore NMFS to take heed of our concerns, and of the concerns voiced by the multitude of others opposed to the resumption of the gray whale hunt. There is much at stake, and a great deal to lose.

As NMFS acknowledges, "[t]he resilience of our marine ecosystems and coastal communities depend on healthy marine species, including protected species such as whales, sea turtles, corals, and salmon."[2] NMFS has been tasked with securing that resilience through, among other things, appropriately implementing the Marine Mammal Protection Act (MMPA).[3] There are times, however, that NMFS fails in this duty - or comes dangerously close to doing so. This is one of those times. By disregarding the potential impacts of the Makah's proposed hunt, NMFS virtually abandons its post as the steward of our oceans and marine wildlife.

A. Conservation Takes Highest Priority

When enacting the MMPA, Congress mandated that conservation, including maintaining healthy populations of marine mammals, is of highest priority. The legislative history of MMPA makes it clear that the **precautionary principle must be applied and that any bias must favor marine mammals**.[4]

The courts have agreed. In *Comm. For Humane Legislation v. Richardson*, the court stated that any action subject to the MMPA, must "proceed knowledgeably and cautiously"[5] and that **the MMPA must be interpreted and applied for the benefit**

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[1] NMFS mission statement at http://www.nmfs.noaa.gov/aboutus/our_mission.html (last visited July 30, 2015).
[2] *Id*.
[3] *Id.*
[4] H.R. REP. NO. 92-707, at 24 (1971); 118 CONG. REC. S15680 (daily Ed. Oct. 4, 1971) (statement of Sen. Packwood) (emphasis added).
[5] 414 F. Supp. 297, 310 at n. 29 (D.D.C. 1976), *aff'd,* 540 F.2d 1141 (D.C. Cir. 1976) (emphasis added).

of marine mammals "**and not for the benefit of commercial exploitation."**[6] Similarly, in *Kokechik Fishermen's Ass'n v. Secretary of Commerce*, the District of Columbia Circuit Court of Appeals held that when balancing commercial fishing interests with the conservation goals of the MMPA, "**the interest in maintaining healthy populations of marine mammals comes first**."[7]

The burden of proof is borne by any party proposing to take marine mammals, or take actions contrary to the MMPA. This "is by no means a light burden."[8] **The intent behind the MMPA's "set of requirements is to insist that the management of the animal populations be carried out with the interests of the animals as the prime consideration**."[9]

B. Whale Hunting Cannot Be Justified

In Section 2. Findings and Declaration of Policy, the MMPA states:

> (6) marine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic, and it is the sense of the Congress that they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem. Whenever consistent with this primary objective, it should be the goal to obtain an optimum sustainable population keeping in mind the carrying capacity of the habitat.[10]

Congress clearly understood that whales are extremely valuable and highly revered. The $2.1 billion whale watching industry, involving more than 120 countries, exemplifies how critically important whales are to mankind.[11] Far beyond these anthropocentric benefit considerations, however, lies the fact that all cetaceans - not least of all gray whales - have intrinsic value.

There are abundant scientific findings demonstrating that whales are intelligent mammals with extensive cognitive abilities, emotional lives, and social

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[6] *Id.* at 24 (emphasis added).
[7] 839 F.2d 795, 802 (D.C. Cir. 1958), *cert. denied sub nom*., See also *Verity v. Center for Envtl. Educ*., 988 U.S. 1004 (1989) (emphasis added).
[8] H.R. REP. NO. 92-707, *supra*, at 4.
[9] *Id*. (emphasis added).
[10] 16 U.S.C. §1361.
[11] Russel McLendon. *Could whale-watching replace whaling in Japan?* June 6, 2014. http://www.mnn.com/earth-matters/animals/blogs/could-whale-watching-replace-whaling-in-japan#ixzz3h1svqQCv (Last visited July 27, 2015).

relations. Studies have shown that gray whales care for unrelated calves and assist injured companions - including those harpooned and dying. [12]

Multiple scientists acknowledge that whales have an extremely high cognitive function and "exhibit some of the most complex behavior in the animal kingdom."[13] "Evidence is growing that for at least some cetacean species, culture is both sophisticated and important."[14] Indeed, "if we wipe out a sub-group [of whales], it is more than killing a certain number of individuals, it could actually wipe out an entire culture."[15]

NMFS provides a plethora of notes from the Makah describing the nature and application of proposed weaponry for the hunt. [16] While there is some mention of how some of these weapons and methods might expedite a kill, nowhere does NMFS acknowledge that these sentient, magnificent creatures will suffer immense pain and stress. This omission alone violates the MMPA's mandate to ensure that the killing - or otherwise "taking" - of a marine mammal be conducted in the most humane way possible and for the right reasons. For these and a multitude of other reasons, the hunt cannot be justified and should not be permitted.

II. DISCUSSION

A. NMFS Has Illegally Predetermined the Outcome of the NEPA Process

NMFS has deliberately and inappropriately structured the DEIS in an effort to ensure, in one form or another, that there will only be a single outcome from this process: whaling by the Makah Tribe. By attempting to guarantee this predetermined outcome, NMFS' actions are arbitrary, capricious, and contrary to law.

The fundamental purpose of an EIS is to force the decision-maker to take a "hard look" at a particular action – at the agency's need for it, at the environmental consequences it will have, and at more environmentally benign alternatives that

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[12] Kim, Claire Jean. DANGEROUS CROSSINGS - RACE SPECIES AND NATURE IN A MULTICULTURAL AGE. Cambridge University Press (2015): 214.
[13] S. Savage. *Whales and Humans Have Much in Common*. June 21, 2010. http://www.redorbit.com/news/science/1881867/whales_and_humans_have_much_in_common/ (Last visited July 26, 2015).
[14] *Id.* (Citing Hal Whitehead, a professor at Dalhousie University in Halifax, in the Canadian province of Nova Scotia).
[15] *Id.* (Citing Lori Marino, a neurobiologist at Emory University in Atlanta, Georgia).
[16] U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Services, Northwest Region, Draft Environmental Impact Statement on the Makah Tribe Request to Hunt Gray Whales. 2015. (Hereinafter the "DEIS") at 2-30.

may substitute for it – before the decision to proceed is made.[17] This "hard look" requires agencies to obtain high quality information and accurate scientific analysis.[18] "General statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided." [19]

While it is true that an agency enjoys discretion in defining the purpose and need of a project in an EIS, "an agency cannot define its objectives in unreasonably narrow terms."[20] In particular, the agency cannot so narrowly craft those objectives so as transform the EIS into a "foreordained formality."[21] Moreover, the public purpose and need are given considerably more weight than the private goals and needs. In this respect, the private interests are not permitted to define the scope of the proposed project. Rather, as described by the D.C. Circuit:

> [A]gencies must look hard at the factors relevant to the definition of purpose.... Perhaps more importantly [than the need to take private interests into account], an agency should always consider the views of Congress, expressed, to the extent that the agency can determine them, in the agency's statutory authorization to act, as well as in other congressional directives.[22]

Where, as here, "an action is taken pursuant to a specific statute, the statutory objectives of the project serve as a guide by which to determine the reasonableness of objectives outlined in an EIS."[23]

Contrary to these well-recognized principles, NMFS drafted a narrowly circumscribed statement of purpose and need in the DEIS that elevates the private (Makah) interest well above NMFS' statutory obligations under the MMPA and ESA.[24] As stated in the DEIS:

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[17] 40 C.F.R. §§ 1500.1(b), 1502.1; *Baltimore Gas & Electric v. NRDC*, 462 U.S. 87, 97 (1983).
[18] 40 C.F.R. § 1500.1(b).
[19] *Klamath-Siskiyou Wilderness Center v. Bureau of Land Management*, 387 F.3d 989, 994 (9th Cir. 2004) (quoting *Neighbors of Cuddy Mountain v. United States Forest Service*, 137 F.3d 1372, 1380 (9th Cir. 1998)).
[20] *See Friends of Southeast's Future v. Morrison*, 153 F.3d 1059, 1066 (9th Cir.1998); *City of Carmel–By–The–Sea v. United States Dep't. of Transp.*, 123 F.3d 1142, 1155 (9th Cir.1997).
[21] *Friends*, 153 F.3d at 1066 (quoting *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 196 (D.C.Cir. 1991), *cert. denied*, 502 U.S. 994 (1991)).
[22] *Burlington,* 938 F.2d at 196.
[23] *Westlands Water Dist. v. U.S. Dep't of Interior,* 376 F.3d 853, 866 (9th Cir.2004).
[24] In fact, as discussed below, NMFS has completely abdicated its responsibility to protect a listed species under the ESA.

1.3.1 Purpose for Action

The Makah Tribe's purpose is to resume its traditional hunting of gray whales under its treaty right, as described in detail in Subsection 2.3.2, Alternative 2 (Proposed Action). NMFS' purpose is to implement the laws and treaties that apply to the Tribe's request, including the Treaty of Neah Bay, MMPA, and WCA.

1.3.2 Need for Action

The Makah Tribe's need for the action is to exercise its treaty whaling rights to provide a traditional subsistence resource to the community and to sustain and revitalize the ceremonial, cultural, and social aspects of its whaling traditions. NMFS' need for this action is to implement its federal trust responsibilities to the Makah Tribe with respect to the Tribe's reserved whaling rights under the Treaty of Neah Bay. In meeting this need, NMFS must also comply with the requirements of the MMPA and the WCA. Under the MMPA, we must protect and conserve the gray whale population; under the WCA, we must regulate whaling in accordance with the ICRW and IWC regulations.[25]

This statement of purpose and need narrowly focuses on the Tribe's "traditional hunting of gray whales under its treaty right."[26] Although mentioning NMFS' statutory responsibilities in passing, the statement strongly emphasizes NMFS' alleged duty to "implement" this treaty right and its "federal trust responsibilities to the Makah Tribe with respect to the Tribe's reserved whaling rights under the [treaty]."[27] The needs statement, in particular, subordinates the agency's public responsibility, stating that "NMFS must ***also*** comply with the requirements of the MMPA and the WCA."[28]

The manner in which NMFS has framed this important, threshold provision in the DEIS runs directly counter to the Ninth Circuit's pronouncements in *Anderson v. Evans*.[29] Significantly in this regard, the court placed supreme importance on NFMS' obligation to ensure that any proposed action satisfied the "conservation necessity" of the MMPA. The court observed that the Tribe's treaty right was a factor to be considered in deciding whether to permit an exception to the MMPA's moratorium on the take of marine mammals.[30] However, the *Anderson* court's prime directive was that the agency safeguard the conservation goals of the MMPA.

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[25] DEIS, at 1-27.
[26] *Id.*
[27] *Id.*
[28] *Id.* (emphasis added).
[29] 371 F.3d 475 (9th Cir. 2004).
[30] *Id.* at 501n.26.

In support of this directive, the court expressed the congressional intent behind the MMPA in clear terms:

> 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."

The *Anderson* court further held that NMFS has a duty to uphold the "nonconsumptive" uses of the gray whales.[31] On this point, the court noted that the Makah had a treaty right "in common with all citizens of the United States" and that this language "creates a relationship between Indians and non-Indians similar to a cotenancy, in which neither party may 'permit the subject matter of [the treaty] to be destroyed.'"[32] As a consequence of this "co-tenancy" relationship, the Tribe was only entitled to its "fair share" of whales that must be allocated in a manner that upheld the conservation principles of the MMPA:

> [W]e conclude that to the extent there is a "fair share" of marine mammal takes by the Tribe, the proper scope of such a share must be considered in light of the MMPA through its permit or waiver process. The MMPA will properly allow the taking of marine mammals only when it will not diminish the sustainability and optimum level of the resource for all citizens. The procedural safeguards and conservation principles of the MMPA ensure that marine mammals like the gray whale can be sustained as a resource for the benefit of the Tribe and others.

Viewed through the lens of the *Anderson* decision, NMFS' statement of purpose and need – the language that sets the stage for the proposed alternatives – is grossly deficient. NMFS has abdicated its public responsibility and ignored the court's clear directives in focusing almost exclusively upon the Tribe's asserted treaty right to traditional whaling while marginalizing the "conservation necessity" of the MMPA and completely ignoring the right of nontribal persons to enjoy these magnificent creatures in nonconsumptive ways.

NMFS' digression at the outset of the DEIS has serious, and fatal, consequences for the remainder of the document. Of greatest concern is that the agency relies upon this narrow and tribally-biased statement of purpose and need

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[31] *Id.* at 500 ("[T]he Makah cannot, consistent with the plain terms of the treaty, hunt whales without regard to processes in place and designed to advance conservation values by preserving marine mammals or to engage in whale-watching, scientific study, and other non-consumptive uses.").
[32] *Id.*

to dismiss the No Action Alternative and promote action alternatives that lead to a single result: whaling by the Makah. NMFS then uses the No Action Alternative (no whaling) as the benchmark upon which to justify its cursory dismissal of all other potential action alternatives that do not involve whaling. By taking this approach, NMFS impermissibly and illegally disregards its mandate to promote the MMPA's conservation necessity and to uphold the "cotenancy" rights of nonconsumptive users.

One example of NMFS' myopic focus is its discussion of the rejected "nonlethal hunt" alternative. The agency's failure to consider the conservation necessity is no more evident than in its description of the applicable laws (*e.g.* WCA and MMPA) as supporting whaling in their "contemplation" of "lethal takes" and its linking of this circumstance with the Treaty of Neah Bay's conveyance of the "opportunity" to kill whales.[33] Noting that Tribe seeks authorization under these "authorities" to hunt whales, NMFS concludes that a "non-lethal hunt would therefore not meet the purpose and need for the Tribe's proposed action."[34] The agency then dismissively compares the outcome of the non-lethal hunt to the no action alternative, finding that the non-lethal hunt need not be considered because it will have the same effects as the no action (no whaling) alternative.[35] This narrow, circular "analytical" approach, anchored only in whaling, graphically illustrates the manner in which NMFS uses the statement of purpose and need to predetermine the outcome of this entire process.

NMFS provides a nearly identical "analysis" for other rejected alternatives, including "alternative compensation to the Makah." Notably, this alternative encompasses at least one nonconsumptive use envisioned by *Anderson*: whale-watching. Yet, here and elsewhere in the DEIS, NMFS forgoes the opportunity to explore the potential benefits associated with the promotion of this particular activity for the Makah and the Tribe's "co-tenants." Instead, NMFS again cursorily dismisses the "alternative compensation" as equivalent to the (rejected) No Action Alternative and inconsistent with the purpose and need.

In summary, NMFS has most certainly "preordained" the result of this NEPA process at the expense of its mandatory duty to uphold the MMPA's "conservation necessity" and the "rights in common" to enjoy whales held by others outside the Makah Tribe. The law is clear that the EIS must be a pre-decisional, objective, rigorous, and neutral document, not a work of advocacy to justify an outcome that has been foreordained. The agency has, therefore, acted arbitrarily and capriciously in crafting the narrow statement of purpose and need and infecting the remainder of the DEIS with its singular focus in promoting a lethal hunt of the whales.

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[33] DEIS, at 2-22.
[34] *Id.* at 2-23.
[35] *Id.*

B. The Makah Do Not Have a Valid Subsistence Right To Hunt Whales

In 1982, the International Whaling Commission (IWC) issued a moratorium on commercial whaling.[36] A recognized exception to the moratorium is "Aboriginal Subsistence Whaling" (ASW), which allows qualifying indigenous peoples to hunt a small number of whales for legitimate aboriginal subsistence needs.[37] NMFS claims that the Makah qualify for this exception. They do not.

The IWC has repeatedly clarified its position that the ASW exception should never undermine the overarching purpose of the IWC and its regulations - the conservation of whales.[38] For example, in its 45th Annual report, the IWC stated:

> While allowing aboriginal people to meet their cultural and nutritional requirements is an important objective, that objective is subject to the other objectives of preventing risks of extinction and maintaining stocks at the highest level of recruitment. **In fact, the highest priority shall be accorded to the objective of ensuring that the risks of extinction to individual stocks are not seriously increased by subsistence hunting**.[39]

It is with this caveat that all risks to whales - whether by ship strikes, pollution or aboriginal subsistence whaling - must be considered. Thus, any claim of an ASW right must be legitimate, substantiated and incontrovertible.

1. The IWC Never Granted the Makah a Whaling Right

The IWC is the only entity authorized to officially recognize subsistence rights in support of a whaling quota allotment. Pursuant to the International Convention for the Regulation of Whaling (ICRW), "the number of whales killed for aboriginal subsistence must align with subsistence needs; **national governments are responsible for providing the IWC with evidence of the *cultural, nutritional, and subsistence needs* of their people**."[40] The parties provide this evidence so that the IWC can make a determination. Clearly, a party itself cannot

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[36] *Id.* at 1-20.
[37] *Id.* at 1-21. (Note: SSL is merely stating IWC law on this issue. SSL believes that cetaceans should never be killed by anyone, for any reason.)
[38] See IWC History and Purpose. https://iwc.int/history-and-purpose. (Last visited July 29, 2015).
[39] IWC, 45th Annual Report of the International Whaling Commission , at 42-43 (1995). Emphasis added.
[40] Wold Chris, and Michael D. Kearney. *The Legal Effect of Greenland's Unilateral Aboriginal Subsistence Whale Hunt*. American University International Law Review 30 no. 3 (2015): 564, citing ICRW Art. XI, ¶ 10, Dec. 2, 1946, 62 Stat. 1716, 161 U.N.T.S. 72.

unilaterally determine that a subsistence need exists, which means that the U.S. could not unilaterally do so for the Makah. Yet it did.[41] It is clear that the U.S. does not firmly believe that it was authorized to make this determination independently. In its DEIS, NMFS states that the IWC's adoption of the U.S.-Russian Federation joint quota request **merely** "**suggest[s] the possibility** that each IWC party was free to recognize the subsistence and cultural needs of its aborigines."[42]

In May 1995, the Makah submitted a needs statement to the U.S. government, requesting representation before the IWC, in an effort to be granted an annual quota to hunt whales.[43] The U.S. acquiesced and, in 1996, sought to attain that quota as a contracting party to the IWC.[44] The request received strong resistance from the other parties to the IWC, with no less than 17 countries expressing skepticism. Throughout the process, much debate ensued as to whether the Makah were even entitled to invoke the ASW exception. Ultimately, the IWC denied the request for a Makah quota.[45]

A year later, the U.S. and the Russian Federation submitted a joint request for a quota - both claiming to require the quota for aboriginal groups with alleged legitimate subsistence needs. While the IWC ultimately granted the joint quota - it never did so for the purpose of granting the Makah any specific right or ASW recognition. This is made patently clear in the following quoted correspondence from Dr. Ray Gambell, Secretary to the IWC:

> The IWC sets catch limits for whale stocks. It cannot set individual quotas for nations, or communities of people. Once having set the stock catch limit, it is the responsibility of the government(s) which wish(es) to take the whales to arrange that the catch limit is not exceeded.
>
> The IWC's Aboriginal Subsistence Whaling Management procedure normally also takes into account the perceived needs claimed by the prospective hunters in setting the catch limit, but **in the case of the gray whale the catch of 140 whales requested by the Russian Federation was not increased to accommodate the USA's request**. You can see how this arose in the records of our meetings. **The IWC has specifically not passed a judgement on recognising or**

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[41] *Id.* at 4-269 (emphasis added).
[42] *Id.* at 4-269.
[43] NOAA Fisheries website Chronology of Major Events Related to Makah Tribal Gray Whale Hunt. http://www.westcoast.fisheries.noaa.gov/protected_species/marine_mammals/cetaceans/chronology.html (Last visited July 230, 2015).
[44] *Id*.
[45] *Id.*

otherwise the claim by the Makah Tribe, since the member nations were clearly unable to agree.[46]

Unabashedly, the U.S., by and through NMFS, has repeatedly pressed forward with its efforts to allot a whale quota to the Makah. How they can do this with a straight face is astounding. Quite evidently, the U.S. fully understood that an IWC ASW determination was a necessary legal prerequisite to permitting a Makah hunt, otherwise the U.S. would not have so fervently initially pursued that course of action. When that failed, the U.S. resorted to its backdoor deal with Russia.

2. The Makah Do Not Qualify for the ASW Exception

NMFS has failed to meet the burden of showing that the Makah meet <u>any</u> of the requisite criteria to qualify for ASW status. To qualify, the Makah must have cultural, nutritional and subsistence needs for whale products. <u>All</u> three of these criteria must be established. None are.

<u>The Makah Do Not Have A Nutritional Need to Whale</u>

For the Makah's proposed whaling practices to legitimately fall within the realm of "Aboriginal Subsistence Whaling," NMFS must demonstrate that whale meat and blubber are required in diets of Makah tribal members for health reasons or survival. A desire or preference for whale meat and blubber is not sufficient justification.

The Makah by no means require whale meat for nutritional sustenance. While not living in direct proximity to a major metropolitan area, the tribe has consistent access to a multitude of nutritional sources, including approximately four food service establishments and two grocery purveyors directly on tribal grounds, a direct, weekly grocery delivery service, and 7 other food stores and restaurants within a 20 mile radius - not to mention their own fish hatchery and vast backyard expanse of open water.[47]

Notwithstanding the foregoing, NMFS spends several pages in the DEIS espousing the purported potential virtues of a diet rich in seafood - specifically whale meat and blubber.[48] Yet after this long monologue, NMFS concedes that ". . . it is difficult to compare essential nutrients and minerals of whale products directly

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[46] October 5, 1998 electronic communication from Dr Ray Gambell, Secretary to the International Whaling Commission, to Eric Dickman, counsel for the Makah Tribal Council (emphasis added).

[47] By making this statement, SSL does not claim that fish hatchery practices are ecologically sound or that any ocean wildlife exploitation is justified. We merely wish to point out the absurdity of NMFS' position that whale products are a nutritional *requirement* for the Makah.

[48] DEIS at 3-370.

to other protein sources because the former have not been studied extensively." NMFS further concludes that there is "[i]nsufficient information about nutritional value and contaminant levels in current Makah diet to predict the precise changes in exposure to contaminants or foodborne pathogens or the nutritional composition of the Makah diet if tribal members have the opportunity to consume freshly harvested whale. However, whale products, in particular blubber, could contain higher levels of certain contaminants . . . All action alternatives are likely to have a mix of beneficial and adverse impacts associated with nutritional benefits, environmental contaminants, and exposure to food-borne pathogens."[49]

The one thing that is not misguided in NMFS' diatribe about speculative nutritional benefits is its reference to the risk of contaminant exposure when consuming whale products. To be sure, whale meat is broadly considered unfit - if not outright dangerous - for human consumption. As numerous studies note, "[w]hale meat can be highly contaminated with organic contaminants and heavy metals."[50] Notably, "organochlorine pollutants—namely, polychlorinated biphenyls (PCBs), pesticides (DDT, dieldrin, chlordanes, and hexachloro- cyclohexane [HCH])—and mercury (inorganic and organic) are typically present in cetacean tissues"[51] These contaminants are considered "ubiquitous pollutants of the marine environment and biomagnify up the marine food chain as a result of their lipophilic and persistent nature" and bioaccumulate "in lipid-rich tissues, particularly [whale] blubber."[52] Moreover, studies conducted on laboratory animals, marine mammals and humans accidentally poisoned prove that PCBs and organochlorine pesticides "have the potential to cause adverse health effects, such as immunosuppression, endocrine disruption, reproductive and nervous system disorders, and cancer,"[53] while mercury has been associated with kidney damage as well as "neurological and developmental abnormalities."[54]

Finally, even if the Makah remain undeterred by the known toxicity risk, a large number of the whales they slaughters could simply go to waste. As detailed in the DEIS, "[s}ince 1998, Chukotka Natives have been reporting a number of hunted whales from the Bering Sea that exhibit a strong medicinal odor, referred to as the 'stinky whale' phenomenon (IWC 2007b). From 2008 through 2012, 1 to 8 stinky whales (approximately 1 to 6 percent of whales landed) have been reported by Chukotka Natives each year. Tissues from these whales have been deemed inedible by hunters. In some cases, **people who have tasted the blubber or meat have reported symptoms of numbness of the oral cavity, skin rashes, or stomach**

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[49] *Id*. at 4-294.
[50] Simmonds, M. P., et al. *Human health significance of organochlorine and mercury contaminants in Japanese whale meat.* Journal of Toxicology and Environmental Health Part A 65.17 (2002): 1212.
[51] *Id*.
[52] *Id.* at 1213.
[53] *Id.*
[54] *Id.*

aches. Toxicologists have recommended that such whales be considered unfit for human consumption."[55] The risk is very real. As with the whales killed by the Chukotka, the gray whales subject to the Makah hunt are exposed to exorbitant levels of pollution throughout their lives.[56]

The Makah Do Not Have a Subsistence Need To Hunt Whales

The argument that the Makah have a subsistence need is similarly a fallacy. By definition, subsistence is "the action or fact of maintaining or supporting oneself at a minimum level."[57] The Makah do not require whale meat, blubber or other whale products to maintain or support themselves. NMFS has not shown that the Makah require access to whale meat or blubber to subsist. Indeed, NMFS cannot point to a single shred of evidence that the Makah have suffered from or have in any way been adversely impacted by failing to have access to whale products. As noted above, the Makah have access to boundless resources to ensure that they will not only subsist - but thrive.

The Makah Cannot Show that Any Alleged "Cultural Need" Exists

As noted above, the Makah have neither a nutritional need nor a subsistence need to hunt whales. Lacking either one of those required criteria is enough to affirmatively state that the Makah do qualify for an the ASW exception. While a cultural need alone is not a sufficient basis for an ASW quota, we address this claim as well.

The Makah stated that "[w]haling and whales are central to Makah culture. The event of a whale hunt requires rituals and ceremonies which are deeply spiritual. Makah whaling the subject and inspiration of Tribal songs, dances, designs, and basketry."[58] Historically, "the process of dividing up the carcass was a

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[55] *Id*. 3-376.

[56] Based on multiple scientific reports over the course of more than 20 years on the contaminant load of numerous beached and stranded whales. See Wolman, A.A. and AJ Wilson. *Occurrence of pesticides in whales*. Pesticides Monitoring J., 4 (1970): 8–10; Schafer, Henry A., et al. *Chlorinated Hydrocarbons in Marine Mammals.* Biennial Report (1983) 109; Varanasi, Usha, et al. *Chemical Contaminants in Gray Whales (Eschrichtius robustus) Stranded Along the West Coast of North America*. Science of the Total Environment 145.1 (1994): 29-53. ; and Ruelas-Inzunza, J., and F. Páez-Osuna. *Distribution of Cd, Cu, Fe, Mn, Pb and Zn in Selected Tissues of Juvenile Whales Stranded in the SE Gulf of California (Mexico).* Environment International 28.4 (2002): 325-329.

[57] Concise Oxford English Dictionary 1438 (12th ed. 2011).

[58] Makah website http://makah.com/makah-tribal-info/whaling/ (Last visited July 31, 2015).

community affair [for the Makah], with all sharing in the work and bounty. . . the entire village turned out to divide up the carcass."[59]

In 1999, the Makah killed and landed a whale in an allegedly legal hunt using modern assault weaponry.[60] Captured on film, it became immediately clear that no one in the tribe knew how to render a whale. Indeed, an Inuit member of an Alaskan tribe was recruited to assist with the slaughter. Left alone to butcher the whale by himself after the Makah had gone home, the Inuit man proclaimed "[w]here are my Makah brothers?! Where I live we butcher our own whales!" Footage showed that traditionally used whale parts, including meat and blubber were wasted and left to rot.[61]

As the evidence suggests, with much of the historical knowledge of the process lost, the actual killing of a whale is clearly not a cultural necessity.

3. The Makah Do Not Have a Continuing Traditional Dependence on Whaling and the Use of Whales

When originally seeking a quota from the IWC for the Makah, the U.S. relied upon the following functional definition of "Aboriginal Subsistence Whaling"

> [W]haling for purposes of local aboriginal consumption carried out by or on behalf of aboriginal, indigenous or native peoples who share strong community, familial, social and cultural ties related to a **continuing traditional dependence** on whaling and on the use of whales. [62]

The Makah do not fit within the ASW definition because they do not have a "continuing traditional dependence on whaling and on the use of whales." While whaling may have been a regular part of the Makah culture over 150 years ago, any "dependence" on whaling had nearly completely died out by 1860, when the Makah turned to the more economically lucrative and socially equitable practice of sealing. Indeed, by 1875, sealing had become the Makah's principal source of income.[63]

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[59] Collins, Cary C. *Subsistence and Survival: The Makah Indian Reservation, 1855–1933*. Northwest Quarterly 87:4 (Fall 1996): 180-193

[60] http://makah.com/makah-tribal-info/whaling/

[61] DVD titled, Butchering of Gray Whale; Neah Bay, WA; May 18, 1999; © Erin O'Connell.

[62] G.P. Donovan, The Ad Hoc Committee Working Group on Development of Management Principles and Guidelines for Subsistence Catches of Whales by Indigenous (aboriginal) Peoples, International Whaling Commission and Aboriginal/Subsistence Whaling: April 1979 to July 1981, Special Issue 4 (1981).

[63] U.S. Department of Commerce, National Oceanic and Atmospheric Administration, National Marine Fisheries Services, *Draft Environmental Impact Statement for Proposed Authorization of the Makah Whale Hunt*. May 2008. (2008 DEIS), 3-235.

A "continuing" activity is one that is enduring and uninterrupted. Here we are, more than a century after the Makah's whaling activities nearly completely ceased, faced with the claim that the tribe has a "continuing traditional dependence" on whaling. The argument is ludicrous. NMFS' reference to the short-lived and minor resurgence in whaling activity between 1916 and 1920 does not change that, nor does the one inappropriately authorized hunt in 1999.[64] As the Makah concede, there simply is not a "continuing cultural dependence" on whaling or the use of whales. For example, after the 1999 hunt, a young fisherman pointed out, "[i]t's not like we have a bunch of favorite recipes to work with . . . this may be an ancient tradition, but it's all new to us."'[65] Similarly, an elder opposed to whaling noted that, with the passage of time since whaling ceased, "none of us knows what it tastes like or likes what it tastes like."[66]

4. Alternatives to Simultaneously Honor Makah Cultural Traditions and Protect Whales

A purely ceremonial hunt - without the bloodshed, without the risk of extirpation of whole whale populations, and without the certain ensuing public outcry against the Makah - could readily supplant and restore the associated traditional practices. The Makah could still honor whales and their whaling heritage through "rituals and ceremonies," much as they once did. These ceremonial hunts could still be "deeply spiritual" and remain "the subject and inspiration of Tribal songs, dances, designs, and basketry."[67]

From an economic and social standpoint, a purely ceremonial hunt - particularly one open to the public - would be lucrative. Rather than undermining the source of critical tourist dollars, and risk being boycotted by the public, the Makah would be heralded for showcasing their inherent respect for nature and humanity's place in nature. It its DEIS, NMFS fails to even consider this possibility, similarly dismissing whale watching - a $2.1 billion dollar industry across 120 countries[68] - as a lucrative alternative for the Makah.

The Makah could follow the laudable path taken by their neighbors, the Quileute Tribe, who have abandoned whaling traditions and found great spiritual and cultural enrichment in celebrating the lives of whales. In 1988, the Quileute

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[64] DEIS at 3-306.
[65] Interview of Richard Markishtum, fisherman and member of the Makah tribe. *After the Hunt, Bitter Protest and Salty Blubber*. May 19, 1999. Sam Howe Verhovek. New York Times.
[66] Interview of Makah Elder, Alberta Thompson. *Elder Opposed to Whaling Finds Resistance at Home*. October 04, 1998. Peggy Anderson, Associated Press.
[67] Makah website. http://makah.com/makah-tribal-info/whaling/ (last visited July 26, 2015).
[68] R. McLendon, *supra* n. 11.

passed a resolution to end all whaling. A tribal member strongly supporting this move commented:

> Our tribe fully supports our Makah neighbors in their treaty rights. But our Quileute elders have made a different decision. Even though we and other tribes along the coast have the same treaty rights to hunt, our elders have chosen to support the gray whale. For thousands of years, this whale has been valuable under subsistence, but now the value is in its life. The gray whale is more valuable to the Quileutes living than hunted. We must begin the healing here in our village and hope it can help others, as well. We Quileutes would like to offer a new vision and a different model for other tribes, as well as peoples."[69]

Appalled by the needless slaughter of the whale targeted in the 1999 Makah hunt, the First Nations Environmental Network issued the following press release:

> **Press Release: May 18th, 1999.**
>
> Re: The Killing of a Grey Whale by Makah at Neah Bay, Washington, U.S.A. on May 17th, 1999.
>
> **NOT ALL INDIGENOUS PEOPLE SUPPORT MAKAH WHALING**
>
> We are deeply concerned and saddened by the killing of a whale at Neah Bay, Washington by members of the Makah Nation.
>
> There are many implications involved in this and we cannot support this action due to the following:
>
> 1) The International Whaling Commission meets this month to determine what is acceptable globally to the world's whale populations and this will have a negative impact on their decision.
>
> 2) Japan, Norway, Iceland and other countries are working towards getting commercial whaling approved once again. The Japanese have been lobbying First Nations Peoples on the West

[69] Kim, Claire Jean. Dangerous Crossings. Cambridge University Press, 2015, citing Peterson, Brenda and Linda Hogan, Sightings: The Gray Whales' Mysterious Journey, Washington DC: National Geographic 2002, 121.

> Coast and around the world to open the door on 'cultural whaling' which they also claim as a 'right'.
>
> 3) The Makah Nation is divided within, with many elders and others speaking against this 'return to Traditional Practices' and their voices are being ignored and suppressed.
>
> 4) While we respect Treaty Rights, this is a political reason being used for killing and not a true meaning of need when it comes to the taking of another being's life. Using 'Treaty Rights' in this way may set dangerous precedents.
>
> At this point in human history, we feel that spiritually and morally, the act of killing whales cannot be justified.
>
> For All Our Relations, Steve Lawson
> FNEN Representative on West Coast[70]

NMFS completely disregards the sentiments and guidance of the Makah's indigenous neighbors.

C. If Permitted, the Hunt Will Set a Dangerous Precedent

The court in *Anderson v. Evans* expressed a grave concern that the actions taken by the U.S. to rely on a self-fashioned and implemented "cultural whaling" exception would set a dangerous precedent for other countries to claim a subsistence need.[71] The court stated:

> The 1997 IWC gray whale quota, as implemented domestically by the United States, could be used as a precedent for other countries to declare the subsistence need of their own aboriginal groups, thereby making it easier for such groups to gain approval for whaling. If such an increase in whaling occurs, there will obviously be a significant impact on the environment.[72]

The validity of the court's concern had been established long before this ruling. As the First Nations Environmental Network noted in the press release

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[70] Kim C. J. at 241. According to its website (http://www.fnen.org/), the First Nations Environmental Network is a Canadian national organization of individuals, non-profit groups and Indigenous Nations who are actively working on environmental issues. It is an affiliate network of the Canadian Environmental Network.

[71] *Anderson,* 371 F.3d 475 at 493.

[72] *Id*.

above, these nefarious machinations were already well underway.[73] Countries such as Japan, Norway and Iceland had been lobbying Pacific Coast tribes for years in an effort to encourage the development of the "cultural whaling" exception.[74]

There is no doubt that if NMFS approves the Makah's proposal to whale it will create a new form of ASW based solely on purported "cultural needs." There is clear and present danger that this precedent could open the door to whale hunting by other coastal tribes and aboriginal populations that have preserved hunting (or even fishing) rights in their treaties.

NMFS inaccurately claims that Japan has not yet attempted to propose an amendment to the IWC Schedule to allow for small-type coastal whaling.[75] On the contrary, Japan has tried to get on the "cultural needs" bandwagon on multiple occasions - most recently in May 2014, when it proposed a new kind of "small-type coastal whaling," which it alleges should be treated like aboriginal subsistence whaling.[76] Japan claims that the "nutritional, subsistence and cultural needs" of small-type coastal whaling in some of its communities should be recognized, given that "Japanese have utilised whale meat as one of the principal sources of protein since ancient times."[77]

The *Anderson* Court expressed further disquiet about NMFS' claim that bad precedent was improbable given that only the Makah hold a treaty right to whale. On this point the court stated:

> [W]e cannot agree with the agencies' assessment that because the Makah Tribe is the only tribe that has an explicit treaty-based whaling right, the approval of their whaling is unlikely to lead to an increase in whaling by other domestic groups. And the agencies' failure to consider the precedential impact of our government's support for the Makah Tribe's whaling in future IWC deliberations remains a troubling vacuum.[78]

The court was clearly not persuaded by NMFS' position - nor should it have been. Surprisingly, NMFS does not appear to have taken the court's concerns seriously; it continues to take the same unsupportable and speculative position.

NMFS also claims that "[i]f a Makah hunt were to have a precedential effect on whaling regulations, it is likely such an effect would have manifested following

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[73] Kim, C. J. at 241.
[74] *Id*.
[75] DEIS at 4-266.
[76] 2014 Report of the International Whaling Commission Scientific Committee (2104) IWC/65/Rep 1. Available at www.iwc/int
[77] Government of Japan, (1986) Small-Type Coastal Whaling in Japan's Coastal Seas, (IWC) TC/38/AS2.
[78] *Anderson,* 371 F.3d 475 at 493.

approval of a U.S. request for a catch limit on the Makah Tribe's behalf."[79] This statement is absurd for at least two reasons. First, the U.S. never received *approval* of a request for a catch limit "on the Makah Tribe's behalf." As noted above, the U.S. request for the Makah was denied outright. Just because the U.S. pursued a spurious plan to share a quota with Russia does not change this fact. Again, the U.S. is *unilaterally* applying its designated catch quota to benefit the Makah, without the required finding by the IWC that the Makah qualify under the ASW exception.

Second, it is not even remotely logical to assume that the mere request for a catch limit would trigger a multitude of new claims for ASW quotas. The threat of a dangerous precedent would not become patent until NMFS follows through on its ill-fated mission to allow the Makah to hunt whales under an unsupportable "cultural whaling exception."

The *Anderson* Court conveyed the following additional concerns about potential dangerous precedent in speculating whether tribes with only "fishing" rights might also be able to claim a whaling right:

> If the MMPA's conservation purpose were forced to yield to the Makah Tribe's treaty rights, other tribes could also claim the right to hunt marine mammals without complying with the MMPA. While defendants argue that the Makah Tribe is the only tribe in the United States with a treaty right expressly guaranteeing the right to whale, that argument ignores the fact that whale hunting could be protected under less specific treaty language. The EA prepared by the federal defendants notes that other Pacific Coast tribes that once hunted whales have reserved traditional "hunting and fishing" rights in their treaties. These less specific "hunting and fishing" rights might be urged to cover a hunt for marine mammals. Although such mammals might not be the subject of "fishing," there is little doubt they are "hunted."[80]

As of July 9, 2015, the *Anderson* Court's dire predictions may be one step closer to reality. In *U.S. v. State of Washington*, the U.S. District Court for the Western District of Washington concluded that the term "fish" in the Treaty of Olympia was intended to include sea mammals such as whales and seals. Thus, the Quinault and Quileute tribes, as signatories to the Treaty of Olympia, could be said to have a right to take whales and seals.[81]

If the Makah hunt is permitted, the court's decision in *U.S. v. State of Washington* could set the stage for a rapid-fire onslaught of claims for further cultural whaling privileges.

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[79] DEIS at 4-269.
[80] *Anderson,* 371 F.3d 475 at 499.
[81] Findings of Fact Conclusions of Law and Memorandum Order, *U.S. v. State of Washington*, 2:70-cv-09213, subproceeding 09-01. July 9, 2015.

D. NMFS Has Doomed the PCFG Gray Whales to Certain Extirpation

Two general themes emerge from NMFS' analysis of PCFG whales in the DEIS: uncertainty concerning their conservation status and risk that their populations, especially in the Makah U&A, will be decimated by any of the proposed action (whaling) alternatives. SSL is disturbed and amazed by these circumstances given that the *Anderson* court made it very clear that PCFG whales should be one of the cornerstones of the EIS:

> **The crucial question . . . is whether the hunting, striking, and taking of whales from this smaller group could significantly affect the environ-ment in the local area.** The answer to this question is, we are convinced, both uncertain and controversial within the meaning of NEPA. No one, including the government's retained scientists, has a firm idea what will happen to the local whale population if the Tribe is allowed to hunt and kill whales pursuant to the approved quota and Makah Management Plan. There is at least a substantial question whether killing five whales from this group either annually or every two years, which the quota would allow, could have a significant impact on the environment.[82]

The same dire state of affairs described by the court exists today. In its DEIS, NMFS repeatedly (but dismissively) acknowledges the risks to the PCFG occasioned by any degree of whale hunting and admits that a great deal of uncertainty remains as to whether *e.g.* PCFG whales are within their optimal sustainable population ("OSP"). Yet, in the face of this risk and uncertainty, the agency attempts to hide any concerns within a linguistic maze while actively promoting the whale hunt. NMFS' actions are, again, arbitrary and capricious and will certainly lead to the eventual extirpation of these unique, fascinating and much appreciated resident whales in the very near future.

As a threshold matter, one chief concern is NFMS' decision to proceed with this DEIS without first determining whether the PCFG should be designated as a stock under the MMPA. Throughout the DEIS, the agency repeatedly notes that it "does not recognize the PCFG as a 'population stock' as [it] interpret[s] that term under the MMPA, but [it] [has] stated that the PCFG seems to be a distinct feeding aggregation and may warrant consideration as a distinct stock in the future."[83] NMFS further discloses that it convened a task force in 2012 to consider gray whale stock structure, including whether the PCFG was a distinct stock.[84] The workshop ended with no consensus and a recommendation of continued research in the future.[85]

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[82] *Anderson,* 371 F.3d 475 at 490.
[83] DEIS at 5-1, 3-36, 3-130, & 5-36.
[84] *Id.* at 3-129.
[85] *Id.* at 3-130.

Despite this uncertainty, NMFS has elected to proceed with this consideration of the Tribe's proposed hunt. This decision is potentially dire for the PCFG whales in light of their acknowledged small population – approximately 188 animals in the PCFG survey area[86], 152 in the OR-SVI area,[87] and 33 in the Makah U&A.[88] As discussed below, the Makah's preferred Alternative 2 will likely result in the extirpation of the local U&A population. Additionally, the admitted impacts to the PCFG whales of permitting hunting under any of the action alternatives are likely to have significant consequences for the small PCFG population as well as the considerably larger ENP gray whale population. Accordingly, NMFS should adhere to the precautionary principle, as required under the MMPA, and suspend this NEPA process until there is a final decision on the PCFG stock status. In fact, a recent study, partially authored by one of the Tribe's own marine biologists, recommends caution on the face of uncertainty surrounding the PCFG:

> Although uncertainty remains, our results indicate 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 on this group of animals.[89]

NMFS openly admits that all of the action (whaling) alternatives pose a danger to the small PCFG population, with the worst impact from Alternative 2: "All action alternatives are likely to increase the risk of adverse impacts on gray whales using local survey areas. Alternative 2 would likely have the most impact …."

Alternative 2 is particularly problematic for a multitude of reasons, which are summarized in the following chart:

Makah Proposal	**Issue**
Only PCFG whales in Cascadia Research Collective's photo-identification catalog that have been seen in at least 1 year are used for determining whether a harvested whale is a PCFG whale and therefore counts against a bycatch or mortality limit.[90]	Given that some whales seen in year 1 may not be seen in year 2, this method artificially inflates the abundance measure of PCFG whales used in calculating the Potential Biological Removal ("PBR").

[86] *Id.* at 3-145 n.40.
[87] *Id.* at 3-155.
[88] *Id.*
[89] Lang, A. R. *et. al*. (2014). *Assessment of genetic structure among eastern North Pacific gray whales on their feeding grounds*. Marine Mammal Science, 30(4), 1473 – 1493.
[90] DEIS at 2-7.

The allowable bycatch limit for PCFG whales does not count whales that were struck but not landed toward the bycatch limit, which is set according to the Tribe's PBR calculation of the PCFG.[91]	The requirement that the PCFG be landed allows for a larger number of PCFG whales to be killed than would be permitted if the Allowable Bycatch Limit counted struck but not landed whales.
In calculating PCFG PBR, the Tribe will use the same recovery factor (currently 1.0) that NMFS uses to calculate PBR for the ENP stock as a whole.[92]	The recovery factor should be no greater than 0.4-0.5, which is the range used for threatened or depleted species, and for stocks of unknown status. Given the small PCFG population, it is possible that the range for endangered species or stocks known to be declining (0.1-0.3) should be used.
The PCFG minimum abundance is calculated using the OR-SVI.[93]	The minimum abundance should be calculated using the Makah U&A because this will be the site of the hunt. Using the much larger population numbers from the OR-SVI overinflates the PBR.
Other sources of human-caused mortality not considered when setting the allowable bycatch limit for PCFG whales.[94]	"In its comments on the 2008 DEIS, the Marine Mammal Commission questioned this approach."[95] A 2013 IWC Implementation Review of PCFG used a precautionary estimate of non-hunting human caused mortality: 2.0 PCFG.[96]

The above-identified issues with Alternative 2 will likely have serious consequences for the PCFG. Using the Tribe's proposed numbers yields a PBR of 3.0, which corresponds to a PCFG allowable bycatch of 3 whales. When combined with the failure to count struck but lost PCFG whales, the potential number of PCFG whales killed each year is 6 (3 struck but not landed and 3 bycatch).[97] In the likely event that all 6 whales are from the Makah U&A, then there is a possibility of a loss

[91] *Id.* at 2-8 & 2-9.
[92] *Id.* at 2-9.
[93] *Id.*
[94] *Id.* at 2-10.
[95] *Id.*
[96] *Id.* at 5-37.
[97] Alternative 2 allows 3 whales to be struck and lost. *See* DEIS at 2-10.

of 18 whales in only three years and 30 whales in 5 years. In light of the fact that there are only estimated to be 33 PCFG whales in the Makah U&A, the proposed hunt represents a significant threat to this small whale population.

Although Alternative 2 presents the greatest risk to PCFG survival, given the level of uncertainty associated with these whales, ***the loss of even a single PCFG whale presents an unacceptable level of risk*** – one that NMFS is apparently prepared to accept. One key piece missing with respect to the PCFG is whether the population is within OSP. This should be a significant issue for NMFS in fulfilling its management obligations under the MMPA. The regulations implementing the statute clearly mandate that "marine mammals should be managed "to obtain an optimum sustainable population [OSP] keeping in mind the carrying capacity of the habitat."[98] Yet, as acknowledged in the DEIS, the IWC has concluded that it is currently not possible to determine if PCFGs are within OSP.[99] Under these circumstances, it is unclear how NMFS could even contemplate authorizing whaling in the Makah U&A – when there is such great potential (of unknown proportions) for permanently harming the PCFG.

NMFS proposes other action alternatives allegedly designed to minimize the risk to the PCFG, but also admits that the true level of risk from the taking of only one or a few PCFG whales is not presently known. For example, in NMFS' own words:

- "If one PCFG whale was killed in a year it would represent a 0.5% reduction in the current abundance estimate of 209 PCFG whales . . . This would represent a small decrease in abundance...Over time it is uncertain to what extent the death of one PCFG whale per year might decrease the abundance of the PCFG whales."[100]

- "[I]t may take a long time to detect if the proposed action is affecting gray whales as expected under current harvest models. In addition, killing even a few animals per year [especially over an extended period of time] from the relatively small PCFG could have long-lasting impacts for a group of whales whose population dynamics are not well understood."[101]

- "Under current conditions, 2.3 Makah U&A whales, or 2.6 OR-SVI whales might be killed per year. It is unclear whether killed whales would be replaced in the same year in which they were killed or in subsequent years because of the uncertainties regarding PCFG recruitment. It is also unclear whether the intensity of unsuccessful harpoon attempts [14 to 16 per year]

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[98] 16 U.S.C. § 1361(6). *See id.* § 1361(2).
[99] DEIS at 3-158.
[100] *Id.* at 4-92.
[101] *Id* at 5-3.

> or approaches [117 to 131 per year] would result in more than a temporary disturbance of whales using local survey areas."[102]

The third quote above highlights one particular area of uncertainty that NMFS goes to great lengths to marginalize: the effect of the admittedly high frequency of predicted disturbances on PCFG distribution. This issue is especially relevant to the small population of PCFG whales in the Makah U&A. For example, NMFS notes the uncertainty concerning the effect of unsuccessful strikes on PCFG whales in the OR-SVI or Makah U&A.[103] The agency then dismisses any concerns about the potential negative effect upon PCFG whale distribution on two highly speculative grounds:

- Many new whales are seen in the Makah U&A and OR-SVI every year and **there is significant interchange** with whales from other adjacent areas in the PCFG range . . . Thus, even if some whales do abandon the area as a result of hunting disturbance, new whales that had not previously been exposed to hunting might come into the area.[104]

- The example of gray whales hunted by Chukotka Natives may be instructive in trying to predict whether there would be a change in gray whale use of the Makah U&A and OR-SVI survey areas. Scores of whales have been hunted and killed by Chukotka Natives over several years (Table 3-52), yet whales continue to be available for harvest, suggesting that hunt-related activities have not resulted in major changes in gray whale numbers, distribution, or habitat use in that area.[105]

As to the first point, Dr. James Sumich, a prominent whale scientist, has a different opinion.[106] SSL asked Dr. Sumich to review the statement in *Anderson* that "[I]t remains a reasonable possibility that removals of resident whales would deplete their presence in specific areas from which they would require an extended time period to recover." Agreeing with that statement, Dr. Sumich explained:

> I know of no evidence to indicate that the individual whales are randomly distributed within the PCFG range or that they move randomly within that range. Consequently, it seems meaningless to focus on the total population size when the removal effort will be concentrated in a very localized area. The available evidence on

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[102] *Id.* at 4-277.
[103] *Id.* at 4-87–4-88.
[104] *Id.* at 4-88 (emphasis added).
[105] *Id.*
[106] Dr. Sumich is the author of a best-selling textbook on marine biology and co-author of the widely adopted "Marine Mammals: Evolutionary Biology." He has taught at the college and university level for more than four decades and has conducted research on gray whales from British Columbia to Baja California.

> individual whale site fidelity does not support the idea that removed whales will necessarily be replaced by 'fill-ins' from other portions of the PCFG range. Therefore, I agree with the court's statement . . . .[107]

A recent PCFG study, not cited in the DEIS, offers a similar opinion concerning the absence of random movement, thus further undercutting NMFS' replacement theory:

> [W]hile some whales are known to move throughout the range of the PCFG, sightings of other whales are concentrated within subareas (Calambokidis et al. 2012), suggesting that individual gray whales may not use the range of the PCFG randomly.[108]

NMFS' second basis for minimizing the likely effects of disturbances on PCFG behavior is even more fanciful. Even assuming the accuracy of the referenced example, it does not follow that ENP whales occupying a distinctly different habitat in Russian waters with likely very different feeding regimes (*e.g.* less distinct feeding areas with greater population dispersal over a wider area) will react in the same manner as PCFG whales in the *e.g.* Makah U&A. Additionally, while subject to some uncertainty, there is evidence that matrilineally directed fidelity plays a role in the PCFG.[109] NMFS presents no similar evidence concerning the ENP whale populations that are subject to the Chukotka hunts. There is simply no basis for drawing a parallel between the two groups, much less one to support a theory concerning the degree of replacement in PCFG feeding areas.

NMFS engages in yet more flights of fancy in attempting to deemphasize the potential harm to the ENP whales from the possible loss of PCFG whales under Alternative 2. The agency begins by recognizing the likely importance of the PCFG to the ENP whale population: "If PCFG whales are uniquely adapted to exploit feeding areas in the southern portion of the ENP summer range, and that adaptation were lost if the PCFG were compromised, Alternative 2 has the potential to affect the long-term viability of the ENP stock as a whole."[110] NMFS then backs off from this observation – claiming that the maximum removal rate of PCFG whales will likely be 2.8 rather 5 individuals.[111] The agency bases this assertion upon the dubious assumption that a smaller number of PCFG whales will be present during the hunting season than the total number that have been observed in the area of the hunt.[112] However, NMFS next predictably retreats from that position as well in admitting that it is unclear whether even this smaller removal rate will not

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[107] Dr. Sumich, personal communication, July 27, 2015.
[108] Lang, *supra* n. 89, at 1485.
[109] *Id.* at 1486.
[110] DEIS at 4-82.
[111] *Id.* at 4-83.
[112] *Id.* at 4-14.

adversely affect the PCFG.[113] NMFS then resorts to its speculative replacement (through external recruitment) theory again, while also acknowledging that the PCFG abundance trend is "flat."[114] The agency's final fallback position is that a study by the IWC Scientific Committee suggests that the PCFG would remain viable under Alternative 2 if there is a bycatch limitation and a monitoring program.[115] Nevertheless, for reasons discussed previously, the bycatch limitation is hopelessly flawed.[116] As to the proposed monitoring, there are numerous challenges to obtaining accurate sighting records. In the end, it is clear that NMFS' conclusion regarding the viability of the PCFG under Alternative 2 is beset by uncertainty and based upon speculation.

Despite NMFS' attempt to muddy the waters in its over 1200 page DEIS, one very clear and undeniable truth emerges from the depths: there is an unacceptably strong likelihood that PCFG whales will be severely impacted by all of the proposed action alternatives. In light of the additional fact that OSP cannot presently be determined for this population, NMFS should strongly reconsider its rejection of the Marine Mammal Commission's ("MMC") entreaty that the agency look to the *Kokechik* decision. As held by the court, no taking could be authorized for any marine mammal stock because of the **virtual certainty of taking** marine mammals **from stocks for which an optimum sustainable population determination could not be made**.[117] Precisely the same circumstances exist here. The MMC was not inviting the agency "to assert legal opinions or conclusions," but rather reminding NMFS of its obligation under the MMPA to manage marine mammals in a manner that allows them to attain or maintain their OSP.

E. NMFS' Analysis of WNP Gray Whales Is Fatally Deficient

The population of the WNP gray whale stock is extremely small – numbering no more (and likely less) than 140 animals.[118] The WNP stock is also listed as "endangered" under the Endangered Species Act ("ESA") and as "depleted" under the MMPA.[119] Despite these dire circumstances, NMFS provides very little analysis in the DEIS of the potential effects of the action alternatives on the WNP stock.

NMFS' abject failure to meaningfully address WNP whales is especially troubling given its admissions that the WNP stock is present in the Makah U&A and will likely be negatively affected by the proposed hunt. The following are a few examples of the agency's numerous admissions concerning the WNP stock:

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[113] *Id.* at 4-83.
[114] *Id.* at 4-84.
[115] *Id.*
[116] *Id.*
[117] *Kokechik*, 839 F.2d 795 at 802.
[118] DEIS at 3-67.
[119] *Id* at 3-66.

- "The limited sighting data available on WNP migrations and movements suggest that it is most likely that whales from this stock could be encountered in the vicinity of the Makah U&A during the hunting season proposed by the Tribe . . . ."[120]

- "[T]here is a high probability that during a 6-year period a WNP whale would be pursued or approached by Makah hunters [a probability of 0.98 to 1.0]."[121]

- "The probability of an attempted strike on at least one WNP in 6 years was still fairly high...[35%] and the chance of actually striking at least at least one WNP whale in 6 years was relatively low but non trivial" [7%].[122]

- "PBR values for the WNP stock are estimated to range "from 0.07...to .033, with uncertainty in these values being driven by uncertainty in the fraction of WNP animals migrating in ENP areas."[123]

- "The loss of a single whale, particularly if it were a reproductive female, would be a conservation concern for this small stock."[124]

- "It is unclear how natural mortality may be influencing WNP whales. High incidence of orca tooth scars, small size and limited number of reproductive females, and relatively low calf survival, are likely to be key factors limiting potential population growth. They are likely more susceptible to changes in mortality, natural or human caused."[125]

What additional evidence does the agency need to take the next logical step to conclude that, in light of the WNP stock's precarious biological status and the high likelihood of, at the very least, extremely stressful encounters with the Makah hunters, **absolutely no hunting should be permitted**? The answer is of course that the agency has preordained that tribal whaling, in one form or another, will take place in the Makah U&A. NMFS makes that intent clear in its statement of purpose and need and in its summary dismissal of the no action alternative and the non-whaling action alternatives.

To conceal this agenda, NMFS again raises the specter of scientific uncertainty – adopting the mantra throughout the DEIS that "[t]here are very

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[120] *Id.* at 3-93.
[121] *Id.*
[122] *Id.*
[123] *Id.* at 3-93.
[124] *Id.* at 4-83.
[125] *Id.* at 5-29.

limited data for WNP whales in the project area to inform this analysis."[126] Yet, the agency should be well-aware of its NEPA obligations when it seeks to invoke scientific uncertainty as a basis for its actions (or inaction).

NEPA requires agencies to ensure the "professional integrity, including scientific integrity," of the discussions and analyses that appear in EISs.[127] When an agency claims that the information is unavailable or incomplete, and that "the information relevant to **reasonably foreseeable significant adverse impacts** cannot be obtained because the overall costs of obtaining it are exorbitant or the means to obtain it are not known," then it must follow certain steps to ensure full transparency.[128] To that end, the agency must make every attempt to obtain and disclose data necessary to their analysis.[129] Agencies are further required to identify their methodologies, indicate when necessary information is incomplete or unavailable, acknowledge scientific disagreement and data gaps, and evaluate indeterminate adverse impacts based upon approaches or methods "generally accepted in the scientific community."[130] While repeatedly acknowledging scientific uncertainty in the face of **reasonably foreseeable significant adverse impacts** to the WNP stock, NMFS fails to comply with its NEPA obligations – choosing instead to erect the alleged uncertainty as a barrier to further scrutiny of its actions (or inaction). Such conduct by an agency – charged with the duty of ensuring the biological integrity of marine mammal populations – is arbitrary, capricious, and contrary to law.

One example of NMFS' grossly deficient approach to alleged scientific uncertainty is its assessment of the effects of the admittedly high probability of an "approach" by a Makah hunting party and strong likelihood of an attempted strike on a WNP gray whale.[131] For each of the action alternatives (except 4), the agency downplays the likely impact on the whale with the following statement:

> It is uncertain how whales would react to unsuccessful harpoon attempts, but the reaction may be similar to that observed in whales that are tagged or biopsied (i.e., a dramatic but temporary change in behavior).[132]

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[126] *See, e.g., id.* at 4-14.
[127] 40 C.F.R. § 1502.24.
[128] *See* 40 C.F.R. § 1502.22(b). "Reasonably foreseeable" impacts include "impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason."
[129] *Id*.
[130] 40 C.F.R. §§ 1502.22(2), (4), 1502.24.
[131] *See, e.g.,* DEIS at 4-83.
[132] *Id.* Action Alternative 4 is specifically tailored to allegedly avoid the WNP stock migration period, but times the hunt to coincide with the period in which PCFG whales will allegedly be present in the hunt area.

Aside from speculation, NMFS provides no scientific basis for this blanket statement, thus violating its NEPA obligations when faced with alleged uncertainty or incomplete information. Additionally, from a common sense point of view, the statement defies reality. Although not described in the DEIS, the tagging process presumably involves considerably less stress for the whale than a group of whale hunters hurling harpoons or firing guns at a retreating whale. Moreover, NMFS utterly fails to address the likely indirect effects of these highly stressful encounters that may occur long after the hunt if the whale survives the initial attack.[133] This deficiency is especially egregious in light of the agency's admission that: "The loss of a single whale, particularly if it were a reproductive female, would be a conservation concern for this small stock."[134]

NMFS further fails to make a meaningful attempt to identify sufficient mitigation measures (if such are even possible) for the WNP stock.[135] In this regard, the agency repeats the following simplistic statement for each action alternative: "To mitigate for the possibility of a Makah hunt killing a WNP whale, regulations governing a hunt could require a suspension of the hunt if a WNP whale were killed."[136]

This statement is astounding in view of the agency's admission that even the loss of a single whale would be a conservation concern. NMFS also neglects to explain the parameters of any required suspension. Accordingly, there is no question that the agency has failed to make any meaningful attempt to provide for mitigation measures protecting the WNP stock.

Finally, the same considerations under the *Kokechik* decision discussed with respect to the PCFG apply with even more force to the smaller population of endangered WNP gray whales. In the DEIS, NMFS acknowledges that OSP has not been assessed for this population.[137] While obscured behind a wall of alleged scientific uncertainty, it also seems a virtual certainty that a WNP whale will be taken during a Makah hunt – further driving the stock toward inevitable extinction.

F. NFMS Failed To Comply with the Endangered Species Act

Although not explicitly addressed in the DEIS, the Tribe's MMPA waiver only applies to the ENP stock, not the WNP stock. In order to engage in an activity with

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[133] NMFS' analysis cannot simply be limited to direct effects, *i.e.,* effects that occur at the same time and place as encounters with the hunting party. 40 C.F.R. § 1508.8(a). It must also take into account the activity's indirect effects, which, though reasonably foreseeable, may occur later in time or are further removed. 40 C.F.R. § 1508.8(b).

[134] DEIS at 4-83.

[135] 40 C.F.R. § 1502.14(f).

[136] DEIS at 4-83.

[137] *Id.* at 3-162.

the potential to affect an ESA listed species, the Tribe would have to obtain an incidental take permit. There are, however, many steps that must be completed before such a permit could even potentially be secured.

As an initial matter, under Section 7 of the ESA, NMFS must conduct an internal consultation for any agency action that "may affect" a listed species or its critical habitat.[138] The ESA defines "action [s]" requiring consultation broadly to include "the granting of permits."[139] Further, "may effect" has been interpreted broadly to mean that "any possible effect, whether beneficial, benign, adverse, or of an undetermined character," triggers the consultation requirement.[140] ESA regulations additionally define "effects" as:

> [T]he direct and indirect effects of an action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action, that will be added to the environmental baseline.[141]

Following formal (in this case, internal) consultation, NMFS must produce a biological opinion ("BiOp") that analyzes whether the proposed action is likely to jeopardize the continued existence of a listed species or adversely modify its critical habitat.[142] If the BiOp concludes that the action is not likely to jeopardize the species, but is likely to result in some take, NMFS will include an incidental take statement ("ITS") with its BiOp.[143] An ITS specifies the impact (*e.g.* the "amount or extent") of the incidental take on the listed species, contains terms and conditions designed to minimize the impact, and, in the case of marine mammals, specifies measures that are necessary to comply with Section 101(a)(5) of the MMPA.[144] Take that complies with the terms and conditions of an ITS is not a prohibited take under ESA Section 9.[145]

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[138] 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).
[139] 50 C.F.R. § 402.02(c).
[140] *See* 51 Fed.Reg. 19926, 19949 (June 3, 1986). There are additional standards applicable to the Section 7 process that come into play once a "may affect" determination has been made. However, SSL does not reach those standards at this stage given NMFS' failure even to acknowledge the applicability of the Section 7 process. SSL reserves the right to further address NFMS' Section 7 obligations in the future.
[141] 50 C.F.R. § 402.02.
[142] 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. § 402.14(h).
[143] 50 C.F.R. § 402.14(i).
[144] 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i)(1).
[145] 16 U.S.C. § 1536(o)(2); 50 C.F.R. § 402.14(i)(5).

NMFS does not address any of the above-outlined procedural steps in the DEIS and has not attempted to comply with its mandatory ESA obligations. Projecting that there is, at the very least, an extremely high probability that the Makah will approach (chase) a WNP gray whale (*e.g.* 97% for Alternative 2) and a significant chance of an actual attempt, the DEIS clearly spells out circumstances demonstrating the hunt "may affect" the WNP stock. Accordingly, NMFS must suspend the current EIS process pending its compliance with ESA Section 7.

G. NMFS Failed To Adequately Consider Cumulative Impacts

Under NEPA, it is not enough for NMFS to simply consider the impacts of the proposed hunt. Rather, NMFS must also consider the "impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions."[146] Two points emerge clearly from this regulatory definition: (1) the identity of the acting party is of no relevance to the analysis; and (2) the action need not be guaranteed to occur – it must be only "reasonably foreseeable."

It is well-established that "a cumulative impacts analysis must include 'some quantified or detailed information' since without such information it is not possible for the court or the public to be sure that the agency provided the hard look that is required of its review.'"[147] In a cumulative impact analysis, "general statements about possible effects and some risk do not constitute a hard look. . . . The cumulative impact analysis must be more than perfunctory; it must provide a 'useful analysis of the cumulative impacts of past, present, and future projects."[148] Moreover, a cumulative impact analysis must be timely; "it is not appropriate to defer consideration of cumulative impacts to a future date when meaningful consideration can be given now."[149] "If the agency did not present this detailed information and analysis it will be found to have violated NEPA unless it provides a convincing justification as to why more information could not be provided."[150]

When judged by these standards, NMFS' cumulative impacts analysis is

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[146] 40 C.F.R. § 15807.1. *See also Kern v. BLM*, 284 F.3d 1062, 1078-79 (9th Cir. 2002).
[147] *Soda Mountain Wilderness Council v. Norton*, 424 F. Supp. 2d 1241 (E.D. Cal. 2006).
[148] *Muckleshoot Indian Tribe v. U.S. Forest Serv*, 177 F.3d 800, 810 (9th Cir. 1999).
[149] *Neighbors of Cuddy Mountain*, 137 F.3d 1372 at. 1380.
[150] *Id*. (citing *Ocean Advocates v. Army Corps of Eng'rs*, 402 F.3d 846, 868 (9th Cir. 1998)).

woefully inadequate. While the analysis is generally perfunctory, SSL focuses its attention on three categories: (1) Military Exercises; (2) Marine Energy and Coastal Development; and (3) Climate Change.

1. Military Exercises

In its discussion of the potential cumulative impacts of military activities throughout the range of the ENP gray whales (thus, including WNP and PCFG whales), NMFS concentrates on the training activities conducted by the U.S. Navy. Among the possibly deleterious impacts addressed are underwater noise and pressure waves and ship strikes.[151] Not surprisingly, the agency concludes that gray whales will not be impacted by the naval activities. In reaching this conclusion, NMFS largely relies upon its BiOP submitted in connection with the Southern California Range ("SOCAL") Complex and the Navy's EIS for the Northwest Training Range ("NWTR") Complex.

As SSL pointed out in its previously submitted oral comments, in *Conservation Council for Hawaii v. NMFS*, a federal court recently found that NMFS' approval of a Navy training and testing plan violated multiple requirements of the MMPA and ESA.[152] The court ruled that nearly 9.6 million underwater assaults on whales and dolphins were improperly assessed as "negligible" by the agency. NMFS not only takes the same dismissive approach here, but also employs many of the same tactics that the court held violated NEPA, the MMPA, and the ESA.

At issue in the *Conservation Council* case was the Hawaii-Southern California Training and Testing ("HSTT") Study Area, which includes the SOCAL Complex that is discussed in the DEIS. NMFS stated in its BiOP that it did "not expect any western North Pacific gray whales to be involved in a ship strike event" because of "the low number of western North Pacific gray whales in the HSTT Study Area." Rejecting this contention, the court held:

> But if Western North Pacific gray whales are so scarce in the area, why does NMFS proceed to authorize mortalities for that species and on what basis does NMFS conclude that those mortalities in an area where the species is low in number "would not appreciably reduce the Western North Pacific gray whales' likelihood of surviving and recovering in the wild"? . . . The "no jeopardy" finding is rendered

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[151] *See,* DEIS, at 5-11 – 5-13.

[152] *See* SSL oral comments submitted during public comment session held in Seattle, Washington, April 29, 2015; *see also* May 31, 2015 Amended Order (Docket #98) filed in *Conservation Council for Hawaii v. NMFS*, 1:13-cv-00684-SOM-RLP.

> further perplexing by the recognition within the Biological Opinion itself that "[t]he death of a female of any of the large whale species would result in a reduced reproductive capacity of the population or species."[153]

The court further criticized NMFS' "Species-Specific Analysis" in the BiOp for including "a subsection on 'mysticetes' that mentions 'humpback, blue, Western North Pacific gray, fin, and sei whales' **without including a separate discussion of the effects on the population of each**."[154] Similarly, NMFS discussed the "potential effects of impulsive and nonimpulsive sound sources and vessel strike on marine mammals, but [did] not examine, with specific reference to the Navy's proposed activities, what impact those potential effects may have on annual rates of recruitment and survival of affected species and stock."[155] On this issue, the court observed:

> [A]n agency may have a basis for assuming that members in different stocks of that species will react similarly . . . That does not mean, however, that the analysis of population effects may be grouped, as it is unlikely that different stocks of the same species will share the same population numbers, or have identical sex, age, and reproduction statistics such that the effects of an activity on the different stock populations can be assumed to be identical . . .
>
> NMFS provides record references to only general discussions with little, if any, relevance to the population-level effects on specific species and stock, and to conclusory statements that no such effects are expected.[156]

Significantly, the court then concluded that "NMFS' failure to explain the bases of its conclusion with respect to all species and stocks affected renders its 'negligible impact' findings arbitrary and capricious."[157]

In addition to finding fault with the agency's failure to consider population level effects, the *Conservation Council* court rejected NMFS' slavish reliance on the Navy's conclusion that time and area restrictions were impractical:

> NMFS cannot just parrot what the Navy says. If NMFS is accepting the

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[153] *Conservation Council for Hawaii v. NMFS*, at 50.
[154] *Id.* at 24.
[155] *Id.* at 25.
[156] *Id.* at 25-26.
[157] *Id.* at 29.

> Navy's position, NMFS must articulate a rational basis for that decision. NMFS does not meet the "least practicable adverse impact" requirement when it just repeats the Navy's position.[158]

Turning to the DEIS at issue here, the same precise issues identified by the *Conservation Council* court are present in the cumulative impacts analysis. First, with respect to WNP gray whales in the NWTR Complex, NMFS repeats the Navy's claim that "it does not anticipate encountering WNP gray whales during training or testing activities, as their presence is very rare in the study area.[159] In this statement, NMFS is committing two of the same errors identified in *Conservation Council*: (1) assuming that WNP whales will not be affected because of their small numbers in the operational area and (2) parroting the Navy's conclusions as a basis for a finding of no impact. NMFS similarly concludes that WNP whales in the SOCAL complex will not be affected because of their small numbers.[160] NMFS' conclusions based on small numbers of whales is equally specious as its finding for the HSST area given its similar determination here that "[w]hile the chances of killing a WNP whale are low . . . the loss of WNP whales, particularly reproductive females, from this small stock could be a conservation concern."

The second area of overlap with the *Conservation Council* case concerns NMFS' extrapolation of the anticipated effects of training activities on other whale species to gray whales without considering population level effects. As explained by NMFS':

> We did not specifically analyze gray whales in that Biological Opinion because at the time recent sightings of WNP gray whales in the ENP were still being investigated to determine whether or not those sightings were anomalies . . . However, we did analyze other ESA-listed baleen whales, including humpback, fin, blue, and sei whales. Our analysis did not identify situations where the proposed training activities are likely to indirectly affect ESA-listed species by disrupting marine food chains or by adversely affecting the predators, competitors, or forage base of endangered or threatened species. In addition, we concluded that endangered or threatened individuals that are likely to be exposed to the Navy's activities in the NWTR Complex are not likely to experience reductions in fitness. In light of the expected impacts on other whale species analyzed in that

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158 *Id.* at 44.
159 *Id.* 5-13.
160 *Id.* at 5-11.

> Biological Opinion, we believe it is reasonable to conclude that any stress responses or disruptions of normal behavior patterns of gray whales would not continue long enough to have fitness consequences for individual animals.[161]

This quote illustrates the extent to which NMFS provides "only general discussions with little, if any, relevance to the population-level effects on specific species and stock" and, based on these generalities, makes "conclusory statements that no such effects are expected." As held by the *Conservation Council* court, by doing so, NMFS acted arbitrarily and capriciously.

2. Marine Energy and Coastal Development

The DEIS is also flawed for failure to consider the cumulative impacts of a proposed phosphate mine off the coast of Mexico. If approved, this suction-dredging "mine" (known as the "Don Diego Project") would wreak havoc on lagoons used by gray whales for birthing and rearing calves.[162] When the impacts of this reasonably foreseeable project are added to the baseline – as they must be under NEPA – the impacts of the Makah hunt become much more serious.

NMFS cannot ignore the Don Diego Project simply because it is sponsored by a private enterprise and subject to approval by the Mexican government. And where, as here, the project is "reasonably foreseeable," NMFS cannot turn a blind eye on the grounds that the project is speculative.

Publicly available documents, including documents filed with the Mexican government, establish the following:

- The Don Diego Project is an initiative by Odyssey Marine Exploration, Inc. ("Odyssey"), a U.S. company based in Tampa, Florida, in conjunction with Mexican affiliate Exploraciones Oceánicas.[163]

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[161] *Id.* at 5-13.

[162] *See generally* Anna Cederstav, *Underwater Mining in Mexico Threatens Gray Whale Nursery*, EARTHJUSTICE (June 11, 2015), at http://earthjustice.org/blog/2015-june/underwater-mining-in-mexico-threatens-grey-whale-nursery (last visited July 30, 2015).

[163] *See "Don Diego" Project Achieves Important Milestone*, ODYSSEY MARINE EXPLORATION (Sept. 9, 2014) *at* http://ir.odysseymarine.com/releasedetail.cfm?ReleaseID=869839 (last visited July 30, 2015); *see also Advierte ONG Afectaciones a Ballena Gris por Proyecto Minero Don Diego* (NGO Warns of Impacts to Gray Whales from Don Diego Mining Project), BAJA CALIFORNIA SUR NOTICIAS (describing relationship between Odyssey and Exploraciones Oceánicas) (in Spanish) (last visited July 30, 2015).

- The Don Diego Project is set to take place in the Gulf of Ulloa, a region of Baja California Sur characterized by a high level of biodiversity, including various species of whales, sharks, rays, lobster, shrimp, and sea turtles.[164]

- The Don Diego Project calls for the use of marine dredges to rip phosphatic sand from the ocean floor and to load the sand onto barges.[165]

- According to statements made by Mexican affiliate Exploraciones Oceánicas, "The objective for the dredging project is the extraction of 7 million tons of phosphatic sand every year over 50 years . . . to produce 350 million tons of phosphatic sand . . . as a final product. The dredging and pumping of material to the barge will be a continuous process, 24 hours per day, 7 days per week, 52 weeks per year."[166]

- The Don Diego Project is far from speculative. Through a concession from the Mexican government, Odyssey already has rights to the phosphate located in the Don Diego deposit, estimated at over 327 million tons.[167]

- The area to be dredged is 91,000 hectares in size.[168]

- Odyssey has filed an environmental impact statement that is several hundred pages in length. Given the scope and unprecedented nature of this project, the length of this document is hardly surprising.[169]

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[164] *See generally Estudio Sobre La Caracterización Socioeconómica y Pesquera del Área Golfo de Ulloa* (Study Regarding the Fishing and Socio-economic Characteristics of the Gulf of Ulloa Area), COMISIÓN NACIONAL PARA EL CONOCIMIENTO Y USO DE LA BIODIVERSIDAD, *available at* http://www.conabio.gob.mx/institucion/proyectos/resultados/HQ003_Anexo5_Carac_Socioeco_Golfo_Ulloa.pdf (last visited July 30, 2015) (in Spanish).

[165] Carlos Ibarra, *Exploraciones Oceánicas Presenta ante la Semarnat Proyecto Minero para el Golfo de Ulloa* (Exploraciones Oceánicas Presents Gulf of Ulloa Mining Project to the Secretary of Environment and Natural Resources), BAJA CALIFORNIA SUR NOTICIAS (Sept. 4, 2014), at http://www.bcsnoticias.mx/exploraciones-oceanicas-presenta-ante-la-semarnat-proyecto-minero-para-el-golfo-de-ulloa/ (last visited July 30, 2015) (in Spanish).

[166] *Id.*

[167] *See "Don Diego" Project Achieves Important Milestone*, ODYSSEY MARINE EXPLORATION (Sept. 9, 2014) *at* http://ir.odysseymarine.com/releasedetail.cfm?ReleaseID=869839 (last visited July 30, 2015).

[168] *Id.*

[169] *See Manifestación de Impacto Ambiental*, *Modalidad Regional para el Proyecto "Don Diego"* (Environmental Impact Assessment, Regional Modality for the "Don

- The work area is in close proximity to coastal lagoons that serve as nurseries for Pacific gray whales, whales that migrate up the west coast of the United States to Alaska and beyond. The lagoons at issue are San Ignacio and Ojo de Liebre Lagoons.[170]

- San Ignacio and Ojo de Liebre Lagoons are located within the Whale Sanctuary of El Vizcaino, a UNSECO World Heritage Convention site. "The lagoons are recognized as the World's most important place for the reproduction of the once endangered Eastern subpopulation of the North Pacific Grey Whale."[171]

- The proposed mining technique is Trailer Suction Hopper Dredging. Odyssey proposes to dredge millions of tons of sediment from the ocean floor, collect the phosphate, and dump the spoils back into the ocean.[172]

- According to Exploraciones Oceánicas, "seabed sediments are removed by a process that is essentially similar to a 'vacuum cleaner.'[173]

- As Exploraciones Oceánicas acknowledges, this mining process is associated with the release of highly toxic substances, including uranium.[174]

- In addition, the mining process will produce dangerous levels of noise pollution. Gray whales depend on sound to communicate, stay together, and track down food. The dredging involved in the Don Diego Project will disrupt the whales' ability to use echolocation. Odyssey's own environmental

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Diego" Project) (filed with the Mexican Secretary of Environment and Natural Resources), *available at* app1.semarnat.gob.mx/dgiraDocs/documentos/.../03BS2014M0007.pdf (in Spanish) (last visited July 30, 2015).

[170] *See* Anna Cederstav, *Underwater Mining in Mexico Threatens Gray Whale Nursery*, EARTHJUSTICE (June 11, 2015), at http://earthjustice.org/blog/2015-june/underwater-mining-in-mexico-threatens-grey-whale-nursery (last visited July 30, 2015).

[171] UNESCO, *Whale Sancturay of El Vizcaino*, *at* http://whc.unesco.org/en/list/554 (last visited July 31, 2015).

[172] *See "Don Diego" Project Achieves Important Milestone*, Odyssey Marine Exploration (Sept. 9, 2014) *at* http://ir.odysseymarine.com/releasedetail.cfm?ReleaseID=869839 (last visited July 30, 2015).

[173] Exploraciones Oceánicas, *Environmental Impact Assessment, Non-Technical Executive Summary, Don Diego Project: Feeding the Future*, at 4, *available at* www.rockphosphate.co.nz/s/Oceanica-Non-Technical-Summary.pdf (last visited July 31, 2015).

[174] *Id.* at 14.

assessment acknowledges as much, stating that the mine could create a "modification of vocal behavior or surprise reaction" in the whales.[175]

- The process of dredging the ocean floor will change the topography of the seabed, upending mineral and organic matter that forms the basis of the local marine ecosystem. This, too, is acknowledged by Odyssey and Exploraciones Oceánicas.[176]

- As Exploraciones Oceánicas candidly admits, "[f]ew if any of the seabed organisms that are removed under the path of the draghead are likely to survive the dredging process."[177]

- Perhaps of most concern, the dredging and discharge process will produce massive sediment plumes.[178]

- Scientists report that such sediment plumes "would smoother habitats and flora and fauna and, depending on their origins and composition, could result in the exposure of benthic communities to heavy metals and acidic wastes."[179]

- Moreover, "[i]t is likely to be impossible to restrict impacts of sedimentation . . . to a local mining area due to current movements and the unconstrained nature of the oceans. Depending on the scale of mining, impacts could spread between ocean basins, far away from original mine sites . . . ."[180]

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[175] *Manifestación de Impacto Ambiental*, *Modalidad Regional para el Proyecto "Don Diego"* at 229 (Environmental Impact Assessment, Regional Modality for the "Don Diego" Project) (filed with the Mexican Secretary of Environment and Natural Resources), *available at* app1.semarnat.gob.mx/dgiraDocs/documentos/.../03BS2014M0007.pdf (in Spanish) (last visited July 30, 2015); *see also* Mario Sánchez Castro and Haydée Rodríguez, *Comentarios Adicionales Acerca de Afectaciones por Ruido al Ecosistema Marina* (Additional Commentary Regarding Sound Impacts on the Marine Ecosystem) (submitted to Mexican government by AIDA-Americas) (June 2, 2015) (in Spanish) (on file with Sea Shepherd Legal).
[176] Exploraciones Oceánicas, *supra* n.11, at 4.
[177] *Id.* at 6.
[178] *Id.* at 7-11.
[179] M. Allsopp, et al., *Review of the Current State of Development and the Potential for Environmental Impacts of Seabed Mining Operations* at 12, Greenpeace Research Laboratories Technical Report (2013), *available at* www.greenpeace.to/greenpeace/.../seabed-mining-tech-review-2013.pdf (last visited July 30, 2015).
[180] *Id.* at 13.

- In fact, the contemplated mining process is so fraught with risk and uncertainty that the government of Namibia imposed an 18-month moratorium on off-shore phosphate mining pending further study.[181]

- Citing "significant and permanent adverse effects," New Zealand has likewise recently rejected a bid for offshore phosphate mining.[182]

With these facts in mind, NMFS' failure to analyze the Don Diego Project as a source of cumulative impacts is unacceptable. The Don Diego Project is reasonably foreseeable; it entails the use of a highly destructive process – laden with uncertainties and unknown risks – on an unprecedented scale; and it is set to take place in a fragile ecosystem that serves as a critical nursing ground for gray whales. The Makah hunt for these whales cannot properly be analyzed without taking this project into account.

3. Climate Change

Finally, there is NMFS' "analysis" of the potential cumulative effects of climate change. This section requires little analysis by SSL because NMFS provides virtually none. NMFS devotes about a single page to this complex topic – filling that page with generalities about *e.g.* global warming, sea level rise, ocean acidification, and the trophic plasticity of some (unnamed) marine species. NMFS makes no mention of gray whales and reaches the resounding conclusion that "it is speculative to predict how those changes will affect marine food webs."[183]

NMFS' reliance on generalities without making population specific findings, again, echoes its rejected approach in *Conservation Council*. Further, the agency, again, abdicates its NEPA obligation to address alleged uncertainty and incomplete information rather than using it as a shield.[184] Thus, NMFS has, again, acted arbitrarily, capriciously, and contrary to law.

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[181] *Phosphate Mining Banned*, The Namibian (Sept. 19, 2013), at http://www.namibian.com.na/indexx.php?archive_id=114235&page_type=archive_story_detail&page=1.
[182] *See* Jamie Morton, *EPA Rejects Second Seabed Mining Bid*, The New Zealand Herald (Feb. 11, 2015), *at* http://www.nzherald.co.nz/nz/news/article.cfm?c_id=1&objectid=11400171 (last visited July 30, 2015).
[183] DEIS, at 5-29 – 5-30.
[184] 40 C.F.R. §§ 1502.22.

H. SSL Strongly Supports the No Action Alternative

SSL concludes by strongly urging NMFS to reverse its apparent course and approve the No Action Alternative. As discussed above, the agency fatally marginalizes this, the only non-whaling, alternative by finding it to be contrary to the narrowly drafted statement of purpose and need that preordains the approval of some degree of whaling. One of the agency's chief criticisms of this alternative is that, if the Makah do not use the allocated portion of the Chukotkan quota, it will just be allocated back to the Russian natives – with the result that gray whales will not benefit from a denial of the Makah hunt.

The agency's assessment is flawed. If the No Action Alternative receives approval, the WNP and PCFG gray whales, who do not travel to the icy arctic waters of the Chukotka natives, will certainly benefit handsomely. They will be permitted to continue feeding, playing and rearing their young in their ancestral waters without being chased and harpooned or shot. These small populations of magnificent, social and highly intelligent beings will be given the gift, sought by all sentient life on the planet, to live out their lives in peace. SSL cannot conceive of a better outcome.