UNITED STATES OF AMERICA
Department of Commerce
National Oceanic and Atmospheric Administration

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

**DECLARATION OF BRETT SOMMERMEYER**

I, Brett Sommermeyer, hereby declare as follows:

1. I am an attorney and serve as the Legal Director of Sea Shepherd Legal (SSL), a nonprofit law firm that I co-founded. SSL's mission is to protect marine wildlife and habitats by enforcing, strengthening, and developing protective laws, treaties, policies and practices worldwide. SSL represents the interests of itself and Sea Shepherd Conservation Society (SSCS) in this proceeding. As such, I also serve as an attorney of record in this matter for SSCS. SSCS is a nonprofit organization with a mission to end the destruction of habitat and slaughter of wildlife in the world's oceans in order to conserve and protect ecosystems and species. I refer collectively to SSL and SSCS, where applicable, as "Sea Shepherd."



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2. The proposed waiver allowing the hunt of gray whales raised in this matter is of utmost concern to Sea Shepherd as such a hunt undermines Sea Shepherd's decades-long work to protect marine wildlife. I am responsible for overseeing all aspects of Sea Shepherd's review and responses to National Marine Fisheries Service's (NMFS) efforts to grant a waiver of the Marine Mammal Protection Act (MMPA) moratorium on the take of marine mammals to allow for take of Eastern North Pacific gray whales. I am hereby submitting written testimony in this matter on behalf of Sea Shepherd.

3. I received a Bachelor of Arts in Political Science from Duke University in 1990, a Doctorate of Jurisprudence and a Certificate in Natural Resources and Environmental Law from the Northwestern School of Law at Lewis and Clark College in 1995, and a Master of Public Administration in Environmental Science and Policy from Columbia University's School of International and Public Affairs in 2010. My Curriculum Vitae is attached as SS Ex. 1.

4. Over the course of the past 28 years, I have attained extensive fluency in the nuances of environmental law and policy through the practice of law and my formal legal education and have authored a multitude of materials pertinent thereto. I have provided comprehensive legal guidance on marine policy to multiple foreign governments. Having served as counsel in numerous environmental law matters, I am intimately familiar with the provisions and application of the relevant legislation in this matter, including the Administrative Procedure Act (APA), National Environmental Policy Act (NEPA), Endangered Species Act (ESA), and MMPA, as well as with the duties and obligations of the agencies that are tasked with upholding the purpose and tenets of such legislation. I have dedicated a significant portion of my career to marine policy matters involving the application of domestic and international legal regimes.



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5. In submitting this testimony, I rely on my above-described expertise about the legislation and legislative history that governs these proceedings, my extensive review of materials relevant to the waiver issue, including, for example, associated case law, NMFS's aborted 2008 Draft Environmental Impact Statement (DEIS), and NMFS's 2015 DEIS and public comments thereto. My testimony is also based on my preliminary review of the subject waiver materials submitted by NMFS in this matter.

6. As expressed in Sea Shepherd's briefing in conjunction with its Expedited Motion for Extension of Time To Submit Initial Direct Testimony and for Continuance of Hearing filed in this matter, the extraordinarily short timeframe provided by this formal rulemaking process was prejudicial to Sea Shepherd and made it impossible for me to fully review NMFS's newly-released nearly 5,000 pages of waiver materials, including the Federal Register notices, declarations from NMFS personnel, and the extensive exhibits attached to those declarations.

7. On July 27, 2015, SSL submitted comprehensive comments in response to the six action alternatives proposed by NMFS in its 2015 DEIS. I incorporate by reference those comments in their entirety here. *See* SS Ex. 2.

8. In the remainder of my declaration responding to the Issues of Fact defined in the Notice of the Hearing, I divide my testimony into the following four categories:

- The Proposed Waiver and Regulations Violate the National Environmental Policy Act;
- The Appointment of the Administrative Law Judge Violates the Appointments Clause;[1]

[1] All of the Issues of Fact defined in the Notice of Hearing were submitted by NMFS under the apparent assumption that the procedures followed in this formal rulemaking process were appropriate. While NMFS's Issues of Fact do not expressly describe the propriety of the appointment of the Administrative Law Judge (ALJ), the consideration of the constitutionality of such appointment is a necessary prerequisite to moving forward with this entire process and to


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- NMFS's Failure to Consider Cumulative Impacts Violates NEPA and the MMPA Waiver Provision; and
- If Permitted, the Hunt Will Set a Dangerous Precedent.

**THE PROPOSED WAIVER AND REGULATIONS VIOLATE THE NATIONAL ENVIRONMENTAL POLICY ACT**

9. In addition to failing to satisfy the waiver criteria of the MMPA, NMFS's proposal violates NEPA. 42 U.S.C. 4321 *et seq.* As the Supreme Court has explained, NEPA's "twin aims" require an agency "to *consider* every significant aspect of the environmental impact of a proposed action" and to "*inform* the public that it has indeed considered environmental concerns in its decisionmaking process." *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 97 (1983) (emphasis added). Here, NMFS has compromised both of these goals by introducing a new preferred alternative that it did *not* evaluate in its draft environmental impact statement (DEIS) — and that it communicated to the public for the first time just six weeks ago, crippling the public's ability to offer meaningful commentary on this alternative (both within the context of the present hearing and otherwise). *Compare* NMFS, Proposed Regulations Governing the Taking of Marine Mammals, 84 Fed. Reg. 13604 (April 5, 2019) (Proposed Regulations) *with* 2015 DEIS.

10. In its DEIS, released to the public in February 2015, NMFS evaluated half a dozen alternatives in response to the Makah Tribe's petition. *See generally* 2015 DEIS. These alternatives were: (1) a no-action alternative (*i.e.*, denial of the petition), *id.* at 2.3.1; (2) the Makah Tribe's proposed alternative, *id.* at 2.3.2; (3) an "offshore hunt" alternative, *id.* at 2.3.3; (4)

(continued . . .)
evaluating each of the Issues of Fact. To the extent that the ALJ declines to expressly rule on this issue, Sea Shepherd believes that the issue must be preserved in the record of the hearing.



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a "summer/fall hunt" alternative, *id.* at 2.3.4; (5) a "split-season hunt" alternative, *id.* at 2.3.5; and (6) an alternative that, while similar to the Makah Tribe's proposed alternative, built in additional limitations to protect Pacific Coast Feeding Group (PCFG) gray whales, *id.* at 2.3.6.

11. In addition to these six alternatives, all of which NMFS evaluated, the agency identified seven other alternatives (not counting additional alternatives from the 2008 DEIS) that it "considered but eliminated from detailed analysis." *Id.* at 2.4. These other alternatives included iterations such as hunting with traditional gear, a stricter mortality limit, and a non-lethal hunt. *See id.*

12. In contrast to the alternatives analyzed in the 2015 DEIS, the current proposal contains several elements that were not present in any of the previously examined iterations. *See* Proposed Regulations, at 13604, 13618–13624 (setting forth new proposed regulations). Most significantly, the new alternative contemplates an even-odd year regime (a.k.a, "alternating hunt seasons") that does not have any counterpart in the 2015 DEIS. Additionally, within this new scheme, there are new combinations of different factors (*e.g.* limitations on the number of authorized strikes [successful and unsuccessful], training exercise restrictions, and landing limits) that often vary depending on the year (even or odd) in question. *Id.* at 13619 (col. 3)–13620 (col. 2). The even-odd year regime also contains distinct approaches to identification and accounting of gray whales. *Id.* at 13621 (col. 2). In general, this new scheme is allegedly designed to enhance protections for PCFG gray whales and western North Pacific (WNP) gray whales. *Id.* at 13608–13609 (col. 2).

13. In addition to the proposed regulatory language setting forth the new even-odd year scheme, NMFS submitted four declarations and associated exhibits, spanning approximately


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4,900 pages, in support of its new approach. *See* In re: Proposed Waiver and Regulations Governing the Taking of Eastern North Pacific Gray Whales by the Makah Indian Tribe (No. 19-NMFS-0001), USCG Electronic Reading Room, *available at* https://www.uscg.mil/Resources/Administrative-Law-Judges/Decisions/ALJ-Decisions-2016/NOAA-Formal-Rulemaking-Makah-Tribe/. A large portion of these materials consist of relatively obscure International Whaling Commission (IWC) submissions. The attachments to NMFS's declarations (lengthy in themselves) include such documents as the 2019 Biological Report – an 89-page report containing detailed scientific information that provides claimed support for the conclusions (and assumptions) that underlie the various new features and combinations of temporal and geographic restrictions and limitations found in the proposed waiver regulations. *See* Declaration of Chris Yates (Docket No. 3), NMFS Exhibit 1-7. The Biological Report, in turn, refers to other attachments containing complex analyses (and associated assumptions) concerning such topics as (1) the likelihood of the Makah Tribe encountering a WNP gray whale during training and hunting activities and (2) the mixing rate of PCFG gray whales during the even year hunting period, which forms the basis for a number of elements, including the new PCFG strike limit. *See* Declaration of Dr. David Weller (Docket No. 5), NMFS Ex. 3-39; Declaration of Dr. Jeffrey Moore (Docket No. 6), NMFS Ex. 4-8. Again, these extensive materials – containing numerous assumptions and conclusions allegedly supporting the selected features of the new alternative – were all released for the first time on April 5, 2019.

14. Under the regulations implementing NEPA, this new alternative is unlawful in the absence of a supplemental environmental impact statement (SEIS). Section 1502.9 provides that


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an agency "[s]hall prepare supplements to either draft or final environmental impact statements if," after issuing its latest impact statement, "the agency makes substantial changes in the proposed action that are relevant to environmental concerns[.]" 40 C.F.R. § 1502.9(c)(1)(i). The case-law interpreting this provision holds that this regulation applies with particular force in the context of post-DEIS alternatives, such that an agency proposal is invalid when, in the absence of an SEIS, it reflects an approach that is substantially different from the alternatives discussed in the DEIS. *See, e.g., Dubois v. United States Dep't. of Agric.*, 102 F.3d 1273, 1292 (1st Cir. 1996) (requiring preparation of an SEIS where new alternative "involve[d] a 'substantial change' from the prior proposals at Loon Mountain"); *New Mexico ex rel. Richardson*, 565 F.3d 683, 708 (10th Cir. 2009) (rejecting agency's argument that new alternative did not require an SEIS open for public comment prior to the final EIS, and observing that "[i]nformed public input can hardly be said to occur when major impacts of the adopted alternative were never disclosed").

15. Here, there is little question that the new alternative marks a "substantial change" from the alternatives discussed in the 2015 DEIS. For instance, according to NMFS, the even-odd year scheme would mitigate the risk of takes of WNP gray whales. Proposed Regulations at 13608 (col. 2). WNP gray whales, in contrast to ENP gray whales, remain listed as endangered under the Endangered Species Act (ESA). *Id.* Because odd-year hunts would be limited to the time period between July 1 and October 31, the chances of a strike or attempted strike on a WNP during those years would be reduced to insignificant levels, according to NMFS, because WNP gray whales "would be feeding in the western North Pacific[.]" *Id.* NMFS pairs this general temporal restriction with other criteria allegedly designed to further protect WNP gray whales, including *e.g.* a three-strike limit and limits on training throws. *Id.* at 13608 (col. 2) & 13610


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(col. 2). However, this new approach — which, again, finds no counterpart in the 2015 DEIS alternatives — rests on several assumptions that must be tested under the NEPA rubric. These assumptions include, *inter alia*:

- WNP gray whales are never present in the waters of the proposed hunting area during the months of July, August, September, and October; and
- a three-strike limit in even years is sufficient to ensure that WNP gray whales will be adequately protected.

16. It is especially important to subject such assumptions to public comment given the uncertainty surrounding the numbers of WNP whales in the Makah Tribe's proposed hunting area during different times of the year and, as recognized by NMFS, **the dire consequences of losing female WNP gray whales.**[2]

17. A similar dynamic is at play with respect to NMFS's new strategy for protecting the vulnerable PCFG gray whales, a subset of ENP gray whales exhibiting unique genetics and seasonal fidelity to West Coast feeding grounds. Proposed Regulations at 13607 (col. 1). Whereas the odd-year measures are ostensibly designed to protect WNP gray whales, the even-year scheme, according to NMFS, aims to protect PCFG gray whales. *Id.* at 13608 (col. 2). During even years, hunts would be authorized to occur between December 1 and May 31. NMFS claims that this period coincides with the season "when most ENP gray whales are migrating to and from northern feeding grounds," such that exclusively permitting hunting during this season would "minimize the potential that a PCFG whale would be killed." *Id.* at 13608 (col. 2). NMFS

[2] *See* 2015 DEIS, at 3.4.3.2.4 (noting that 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") & 4.4.3.2.2 ("the loss of WNP whales, particularly reproductive females, from this small stock could be a conservation concern").



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is correct in its observation that the Makah Tribe originally proposed hunts during this season (*i.e.*, December 1 through May 31) in the DEIS. *Id.* at 13608 (col. 2).

18. Given that NMFS analyzed the Makah Tribe's proposed alternative in the 2015 DEIS, it might be tempting to conclude that the relevant analysis has been completed. Yet, there are significant differences. Most notably, again, the Makah Tribe's proposed alternative (and the other DEIS alternatives) do not include **both** the "even" and "odd" year seasonal hunts in the same scheme. This alternating temporal arrangement is also paired with new restrictions and limitations supposedly tailored to protect PCFG gray whales – *e.g.* a two-strike limit in odd years, an overall strike limit for PCFG whales, and a PCFG abundance trigger. *Id.* at 13608 (col. 2).

19. Of particular note, the use of PCFG strike limits and low-abundance triggers differs significantly from the methods employed in the Makah Tribe's proposal (and the other 2015 DEIS alternatives) to calculate strike limits for PCFG gray whales. *Id.* at 13609 (col. 2). Specifically, the DEIS alternatives relied upon a potential biological removal (PBR) based approach. NMFS concedes that this marks a change from the alternatives considered in the DEIS. *See id.* ("The Tribe's request, as well as some of the DEIS alternatives, used PBR-based approaches to manage impacts on PCFG whales instead of the combination of PCFG strike limits and low-abundance triggers that we are now proposing."). While the agency offers several justifications for this shift, this reasoning belongs in an SEIS. The agency states that its new approach is warranted because: (1) PBR may not account for all human-caused mortality; (2) PBR is more appropriate in the case of data-poor stocks, whereas "[f]or the PCFG, population dynamics are well understood"; and (3) the "PBR approach was developed for 'closed' populations," whereas "[i]n the case of the PCFG, new recruits come from immigration as well as



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births, and whales leave the population by emigration as well as death." *Id.* The scientific analysis backing the agency's approach may or may not be convincing — but it is certainly complex and novel enough to warrant an SEIS. NMFS's new approach, by the agency's own admission, rests on at least three important scientific conclusions that ought to be explained (and made available for public comment and challenge) through the NEPA framework.

20. As stated above, the alternatives that NMFS analyzed in the 2015 DEIS are substantially different from the newly-minted approach. For example, despite the similar sounding title, the "split-season hunt" alternative analyzed in the 2015 DEIS is entirely different from the new even-odd year proposal. Under the "split-season hunt" alternative, NMFS considered "two hunting seasons of 3 weeks each: one from December 1 through December 21 and one from May 10 through May 31[.]" 2015 DEIS, at 2.3.5. Apart from other points of distinction, the "split-season alternative" envisioned a total hunting season of less than two months each year. The new proposed regulations, on the other hand, contemplate a four-month season during odd years and a six-month season during even years.

21. The other alternatives analyzed in the 2015 DEIS are also distinct. The Makah Tribe's proposed alternative, for example, calls for hunting every year from December 1 to May 31. *Id.* at 2.3.2.2.9. NMFS's current approach calls for hunting during that time period every other year, with hunting in July, August, September, and October during intervening years.

22. The "offshore hunt" alternative, for its part, incorporates the same hunting season as the Makah Tribe's proposed alternative (which, again, is vastly different from the agency's new proposal) while calling for hunts only in waters more than five nautical miles from the shoreline.



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*Id.* at 2.3.3. NMFS's current approach would authorize hunts in coastal waters. *See* Proposed Regulations at 13620 (col. 2) (proposed language for 50 C.F.R. 216.113(a)(6)(iii)).

23. As its name suggests, the "summer/fall hunt" alternative envisions hunting activity from June through November. 2015 DEIS, at 2.3.4. Apart from the timing differences, the "summer/fall hunt" alternative, like the Makah Tribe's proposed alternative, prohibits hunting within 200 meters of either Tatoosh Island or White Rock in order to protect nesting seabirds. *Id.* at 2.3.2.2.8. This prohibition does not appear in NMFS's current proposal.

24. The pattern continues with 2015 DEIS Alternative 6 ("Different Limits on Strikes and PCFG, and Limited Duration of Regulations and Permits"). 2015 DEIS, at 2.3.6. As NMFS stated in the 2015 DEIS, Alternative 6 is substantially similar to the Makah Tribe's proposed alternative, with the key difference lying in the inclusion of additional measures designed to protect PCFG gray whales. *Id.* Apart from the fact that these PCFG-specific measures are different from those contained in the proposed regulations (including the central reliance on PBR that was dropped from the proposed regulations), Alternative 6, like the Makah Tribe's favored alternative, envisions an annual hunting season from December 1 to May 31. *Id.* The proposed regulations, in contrast, call for alternating hunting seasons accompanied by radically different rules depending on the year.

25. The above description provides but a small sampling of the many differences between the alternatives analyzed in the DEIS and NMFS's newly proposed rules. However, even this sample firmly supports the conclusion that the new approach marks a "substantial change" from the 2015 DEIS baseline.



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26. Granted, some post-DEIS alternatives vary so little so as to avoid triggering the SEIS obligation. As the Ninth Circuit has explained, "[a] supplemental EIS is not required if "(1) the new alternative is a 'minor variation of one of the alternatives discussed in the draft EIS,' and (2) the new alternative is 'qualitatively within the spectrum of alternatives that were discussed in the draft [EIS].'" *Japanese Vill., LLC v. Fed. Transit Admin.*, 843 F.3d 445, 471 (9th Cir. 2016) (quoting *Russell Country Sportsmen v. U.S. Forest Serv.*, 668 F.3d 1037, 1045 (9th Cir. 2011) (quoting *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18026, 18035 (Mar. 17, 1981))).

27. However, as explained above, the new alternative is neither a "minor variation" nor an approach that was "qualitatively within the spectrum of alternatives discussed in the draft EIS." *Id.* Certainly, NMFS cannot claim NEPA compliance by merely pointing to the fact that *some* of the elements of the new approach are contained in previously analyzed alternatives. The courts have rejected the idea that agencies can avoid an SEIS by simply "[c]obbling together" components of preciously analyzed approaches. *See Miccosukee Tribe of Indians v. United States*, 420 F. Supp. 2d 1324, 1334 (S.D. Fla. 2001) (holding unlawful failure to prepare an SEIS over government's argument that new structures "were components of two previously authorized projects"). Further, courts also reject a claim that a new alternative, compiled from reconfigured previously-considered alternatives, does not require an SEIS because it is allegedly more protective than any of the prior alternatives. *See Dubois*, 102 F.3d at 1292-1293 (finding that the new alternative entailed "a different configuration of activities and locations, not merely a reduced version of a previously-considered alternative" and further observing that public commentators must have the opportunity to point out "wholly new problems posed by the new


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configuration (even if some of the environmental problems present in the prior alternatives have been eliminated)"); *New Mexico ex rel. Richardson*, 565 F.3d at 706-707 (noting that "this is not a case where components of fully-analyzed alternatives were recombined or modified to create a 'new' alternative whose impacts could easily be predicted from the existing analysis"; dismissing the relevance of the claim that the new alternative was more protective than some of the earlier alternatives). Notably, while some of the new features in the Proposed Regulations, as described by NMFS, may ultimately be found to offer more protections than any of the 2015 DEIS alternatives, such an assessment can only be properly made through the SEIS process. Accordingly, to comply with the law, NMFS must withdraw its proposed rulemaking and conduct an SEIS.

28. Beyond a failure to subject the new alternative to the SEIS process, the presence of new information and altered circumstances further counsels in favor of completing an SEIS before moving forward with the proposed MMPA waiver. In addition to a changed position by the agency, the regulations implementing NEPA mandate an SEIS when "[t]here are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts." 40 C.F.R. § 1502.9(c)(1)(ii).

29. Here, there are such "significant new circumstances [and] information[.]" *Id.* Specifically, there is emerging evidence of a potentially catastrophic mortality event — an event which is relevant to both the NEPA analysis and the MMPA waiver provision, the latter of which instructs NMFS to give "due regard to the distribution, abundance, breeding habits, and times and lines of migratory movements of such marine mammals[.]" 16 U.S.C. § 1371(a)(3)(A).


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30. Total strandings of gray whales across the West Coast stand at 57 in 2019 to date, compared to 45 in the same area all of last year. Lynda V. Mapes, *Researchers Seek Answers to Gray Whale Deaths After 57 Are Stranded this Year*, THE SEATTLE TIMES (May 17, 2019), *available at* https://www.seattletimes.com/seattle-news/environment/researchers-seek-answers-to-gray-whale-deaths-after-57-are-stranded-this-year/. Just two weeks ago, two more gray whales were found washed ashore in Washington, suggesting that this die-off is a continuing event. *Two Dead Grey Whales Wash Ashore, Raising Total to 13 in Wash. This Year*, KOMO NEWS (May 5, 2019), *available at* https://komonews.com/news/local/dead-whale-washes-ashore-at-harborview-park-in-everett. In addition, researchers are extremely concerned about a significant increase in underweight gray whales sighted. Bridgit Katz, *Nine Gray Whales Have Washed Up Dead in the San Francisco Bay Area*, SMITHSONIAN (May 8, 2019), *available at* https://www.smithsonianmag.com/smart-news/nine-gray-whales-have-washed-dead-san-francisco-bay-area-180972132/. While it may be too early to draw any firm conclusions from these recent events, this is hardly an insignificant occurrence. As one leading researcher and member of the Marine Mammal Commission explained, "[i]f this continues at this pace through May . . . we would be alarmed." *Id.* (quoting Frances Gulland, UC Davis School of Veterinary Medicine and Commissioner of the Marine Mammal Commission) (internal quotation marks omitted).

31. Significantly, even scientific experts working for NMFS are troubled by this situation, recognizing that it is abnormal and possibly due to warming waters and altered food webs. In an interview with *The Seattle Times* published on May 17, 2019, research ecologist Elliott Hazen of NMFS's Southwest Fisheries Science Center responded as follows when asked


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whether climate change could be the cause: "It is almost too soon to tell, are we in a new world where we are going to see more mortalities in top predators like sea lions and gray whales, is this the harbinger of things to come?" Lynda V. Mapes, *Researchers Seek Answers to Gray Whale Deaths After 57 Are Stranded this Year*, THE SEATTLE TIMES (May 17, 2019) (internal quotation marks omitted), *available at* https://www.seattletimes.com/seattle-news/environment/researchers-seek-answers-to-gray-whale-deaths-after-57-are-stranded-this-year/. When NMFS's own experts are expressing both profound concern and considerable uncertainty over the implications of this ongoing phenomenon, the agency should recognize that an SIES is necessary.

32. Despite NMFS's acknowledgement of this emerging issue in other venues, in this proceeding, NMFS appears to deny it altogether. By way of example, in his Declaration submitted as direct testimony by NMFS, Dr. David Weller states:

- Climate change is likely to affect the availability of habitat and prey species, but species such as the gray whale (which feed on both benthic and pelagic prey) have been predicted in some studies, see, e.g., NMFS Ex. 3-41, at 17 (Bluhm and Gradinger 2008), to adapt better than trophic specialists. April 5, 2019 Declaration of Dr. David Weller (Docket No. 5), ¶ 24.

- Durban et al. (2017) noted that a recent 22 percent increase in ENP gray whale abundance over 2010/2011 levels is consistent with high observed and estimated calf production between 2012 and 2016. *Id.*, ¶ 25.

- Recent increases in abundance also support hypotheses that gray whales may experience more favorable feeding conditions in arctic waters due to an increase in ice-free habitat that might result in increased primary productivity in the region. NMFS. *Id*.


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33. These statements are in direct contrast to information provided in studies[3] recently submitted to the Scientific Committee of the International Whaling Commission concerning the biological status of gray whales that reach the birthing lagoons in Mexico at the end of their southward migration. Two of these studies, and their general conclusions, are as follows:

- F. Ronzón-Contreras *et al., Gray whales' body condition in Laguna San Ignacio, BCS, México, during 2019 winter breeding season*, SC/68A/CMP/13:

  > Recent fluctuations in ocean environment conditions associated with warmer-than normal sea temperatures in the North Pacific/Gulf of Alaska may disrupt seasonal primary production during the summer months in the high latitudes where the gray whales feed (Belles 2016). This could impact and even reduce the availability of seasonal food that gray whales depend on during the summer to obtain sufficient energy to survive the winter and breed successfully. Recent observations of increasing "poor" condition gray whales and low calf production in the breeding and calving lagoons suggest that finding sufficient food is becoming a problem for the gray whales.

- S. Martínez-Aguilar, *et al.*, *Gray whale (Eschrichtius robustus) stranding records in Mexico during the winter breeding season in 2019*, SC/68A/CMP/14:

  > The connection between the increment of fair and poor body condition in the migration route and breeding areas (Ronzón-Contreras, et al. 2019), and the high numbers of stranding events including a majority of sub-adults and adults whales,

[3] Under the IWC guidelines, "[p]apers submitted to the IWC are produced to advance discussions within that meeting; they may be preliminary or exploratory." *See* IWC/67/FA/20. To cite a paper "outside the context of an IWC meeting, you [are required to] notify the author at least six weeks before it is cited to ensure that it has not been superseded or found to contain errors." *Id.* Accordingly, I do not provide the full citations of the papers or attach them as exhibits at this time. However, given that these papers are publicly available and in light of their importance to this proceeding and the short timeline involved for submission of direct testimony, I provide partial citations and a brief summary of the relevant conclusions. I intend to provide full citations and copies of the papers at a later date. In any event, the authors of the papers are currently attending the IWC meeting and are not available to grant such permission.



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> is similar to observations during and following the 1999-2000 UME event, and seems to reflect gray whales are encountering difficulty obtaining sufficient sources of food in their feeding areas in their North Pacific and Arctic.

34. Accordingly, these studies may help explain the rash of recent gray whale strandings – which may signal the beginning of a new gray whale Unusual Mortality Event. To the extent it is claimed that the strandings are due to the gray whale population reaching carrying capacity, it should be noted that **a reduction in carrying capacity** due to climate change may also be responsible. *See* F. Ronzón-Contreras *et al., Gray whales' body condition in Laguna San Ignacio, BCS, México, during 2019 winter breeding season*, SC/68A/CMP/13 ("Perhaps during the past decade, the ENP gray whale population has reached the current 'carrying capacity' of its high-latitude feeding areas, and/or that the capacity for the marine environment to produce gray whale prey has changed."). In any case, the recent stranding reports in conjunction with scientific studies concerning the possible negative effects of climate change on gray whales represents "significant new circumstances [and] information" requiring preparation of an SEIS.

35. The decision in *Kettle Range Conservation Group v. United States Forest Service* is illustrative of how emerging information and changed circumstances can mandate an SEIS. *Kettle Range Conservation Group v. United States Forest Serv.*, 148 F. Supp. 2d 1107 (E.D. Wash. 2001). In *Kettle Range Conservation Group*, the U.S. Forest Service had proposed a timber harvest and restoration project following an outbreak of the Douglas-fir bark beetle. *Id.* at 112. The outbreak had left many trees in the area dead or dying. *Id.* In its DEIS, the agency analyzed several alternatives, with the differences including, *inter alia*, varying approaches to total acreage, restoration components, and the relative emphasis between harvest and restoration.



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*Id.* In its final EIS (FEIS), the agency added two additional alternatives. *Id.* Then, in its Record of Decision (ROD), the agency selected one of the alternatives from the DEIS — a fairly aggressive plan that called for "harvest of over 4,600 acres, prescribed burning of another 3,269 acres, and treatment of fire fuel on 1,493 acres by 'lopping and scattering' dead or dying trees." *Id.* at 112-13. The choice to adopt this approach was based, in large measure, on the understanding that the Douglas-fir bark beetle would continue to spread. *Id.* However, following the ROD, the agency discovered that its projections were wrong — the beetle was not spreading as predicted. *Id.* at 113. Accordingly, the agency scaled back its plan following publication of the ROD. *Id.* But the agency did not "[m]ake the Project changes public through another draft EIS." *Id.* Although the agency claimed that an SEIS was not necessary because, *inter alia*, the ultimate plan involved fewer impacts to the environment, the court disagreed. The court wrote as follows:

> This court cannot say that it was reasonable for Federal Defendants to determine that a supplemental EIS was unnecessary in this case. As Federal Defendants admit, the Project currently resembles Alternative E more than it resembles Alternative D. In effect, Federal Defendants have switched alternatives without inviting public review or comment. Seventy-six percent of the Project has been dropped because the beetle has not spread as predicted. . . . The beetle has not acted as predicted, and the Project must be reevaluated in light of the new information. *Id.* at 1139-40.

36. The parallels between *Kettle Range Conservation Group* and the facts at issue here are undeniable. Similar to the Forest Service in *Kettle Range Conservation Group*, NMFS has "switched alternatives without inviting public review or comment." *Id.* at 1139. Moreover, just as the changed behavior of the beetle in *Kettle Range Conservation Group* was sufficient to trigger an SEIS, so too is an SEIS necessary in light of the emerging evidence of an unexpected



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gray whale mortality event. In the final analysis, the combination of a NMFS's decision to adopt a new alternative and changed environmental circumstances clearly mandate an SEIS.

**THE CURRENT PROCEEDING VIOLATES THE APPOINTMENTS CLAUSE OF THE CONSTITUTION**

37. With all due respect to Judge Jordan, the current proceeding is invalid for want of a presiding officer appointed in compliance with the Appointments Clause.

38. In 2018, the Supreme Court held that Administrative Law Judges (ALJs) are inferior officers of the United States for purposes of the Appointments Clause. *Lucia v. SEC*, 138 S. Ct. 2044, 2055 (2018); U.S. Const. art. II, § 2, cl. 2. Building on its decision in *Freytag v. Commissioner*, 501 U.S. 868 (1991), where the Court similarly held that "special trial judges" of the United States Tax Court are inferior officers, the Court in *Lucia* reasoned that ALJs are officers, not mere employees, in light of their continuing tenure, "significant discretion," and "important functions." *Lucia*, 138 S. Ct. at 1053 (quoting *Freytag*, 501 U.S. at 882) (internal quotation marks omitted). As such, the Court concluded that the appointment of ALJs is only constitutional insofar as it complies with Article II, Section 2, Clause 2. *Lucia*, 138 S. Ct. at 2055.

39. In the case of inferior officers (like ALJs), the Constitution provides for presidential appointment with senatorial confirmation as the default method. U.S. Const. art. II, § 2, cl. 2. Yet Congress may choose to override this default scheme through a decision to vest, "by Law," the power of appointment "in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2. In *Lucia*, this process had not been observed. Although the Court concluded that the Securities and Exchange Commission (SEC or


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Commission) qualified as a "Head of Department" within the meaning of the Appointments Clause, *id.* at 2050, the Commission did not directly appoint the relevant ALJ. Instead, other SEC staff members appointed the ALJ. *Id.* at 2049. Because ALJs are officers of the United States, and the Appointments Clause had not been satisfied, the Court vacated the administrative proceeding and ordered a fresh hearing by a constitutionally-appointed ALJ. *Id.* at 2055.

40. The fall-out from *Lucia* was swift, with several agencies across the nation scrambling to ensure that their ALJs were shielded from constitutional attack. As is relevant to the present case, it appears that the Department of Homeland Security (DHS) also took steps in an attempt to address the defects exposed by *Lucia*. Pursuant to the Homeland Security Act of 2002, 6 U.S.C. § 291 *et seq.*, the United States Coast Guard (USCG or Coast Guard) became a component of DHS. 6 U.S.C. § 468(b), (c); *see also Detroit Int'l Bridge Co. v. Gov't of Can.*, 53 F. Supp. 3d 1, 7 (D.D.C. 2014) ("The Coast Guard is now a constituent agency of DHS[.]"). Following this reorganization, it was clear that USCG was not a "Head of Department" (if it ever had been). *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 511 (2010) ("Because the Commission is a freestanding component of the Executive Branch, *not subordinate to or contained within any other such component*, it constitutes a 'Departmen[t]' for the purposes of the Appointments Clause.") (emphasis added). Instead, the relevant "Head of Department" became the Secretary of Homeland Security. The upshot of this, in light of *Lucia*, is that any ALJs appointed by USCG following the reorganization were not appointed in compliance with the Constitution. Recognizing as much, it appears that the Secretary of Homeland Security recently "ratified" USCG ALJ appointments.



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41. Although we have not been able to locate official documents reflecting this ratification, a respected secondary publication reports that this took place. *See* Jack M. Beermann & Jennifer L. Mascott, *Research Report on Federal Agency ALJ Hiring After* Lucia *and Executive Order 13843*, Administrative Conference of the United States, at p. 44 (March 28, 2019), *available at* https://www.acus.gov/sites/default/files/documents/3.28.19 DRAFT Research Report on Federal Agency ALJ Hiring after Lucia and Executive Order 13843.pdf ("In reaction to *Lucia*, the Coast Guard submitted paperwork to the Secretary of Homeland Security to ratify the appointment of its ALJs, which she did."). Presumably, the appointment of Judge Jordan, who assumed his position as a Coast Guard ALJ in 2010, was included in this ratification process. *See* U.S. Dep't. of Homeland Security, Biography of Hon. George J. Jordan, *available at* https://media.defense.gov/2017/Oct/11/2001825640/-1/-1/1/ALJ_GEORGE_J_JORDAN.PDF.PDF.

42. While the Secretary of Homeland Security's ratification might appear to cure the constitutional defect of Judge Jordan's appointment, two constitutional problems remain. First, ratification is not appointment. Simply put, after-the-fact ratification does not satisfy the plain language of the Appointments Clause. Second, even if ratification were potentially sufficient to satisfy the Appointments Clause under certain circumstances, the present situation would still be unconstitutional because the ratification did not occur *at the direction of Congress "by Law."* U.S. Const. art. II, § 2, cl. 2 (emphasis added). This, too, is a defect under the plain language of the Appointments Clause.

43. Taking these points in turn, it is clear that ratification is not the constitutional equivalent of appointment. As a textual matter, the Appointments Clause uses the words


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"appoint" and "appointment" (and, in the case of principal officers, "nominate"). It does not use the word "ratify" or any variation thereof. If we compare the dictionary definitions of the verb "to appoint" and the verb "to ratify," at least one point of distinction becomes obvious: the temporal element. To "appoint" means "to name officially," Merriam-Webster's Unabridged Dictionary (2019), *available at* https://www.merriam-webster.com/dictionary/appoint, or to "[a]ssign a job or role to (someone)." Oxford English Dictionary (2019), *available at* https://en.oxforddictionaries.com/definition/appoint. To "ratify," in contrast, means "to approve and sanction formally," to "confirm," Merriam-Webster's Unabridged Dictionary (2019), *available at* https://www.merriam-webster.com/dictionary/ratify, or to "[s]ign or give formal consent to (a treaty, contract, or agreement), making it officially valid. Oxford English Dictionary (2019), *available at* https://en.oxforddictionaries.com/definition/ratify. Put differently, to "appoint" implies the selection of a particular person to a particular office; to "ratify" implies the mere confirmation of a decision *already made by someone else*.

44. Far from an academic matter, the distinction between appointment and ratification is also important for functional reasons. In the normal appointment situation, an agency chooses to select an individual from a range of candidates. In a ratification scenario, there is simply the binary choice to ratify or reject the continued service of a single individual — and inertia will usually point decisively toward ratification. Just as the Senate plays a relatively limited role in the ratification of a treaty — the Senate does not make the treaty or negotiate its terms with foreign representatives, as that comparatively active role is fulfilled by the Executive Branch, *see* U.S. Const. art. II, § 2, cl. 2 — so, too, does ratification of the continued service of an ALJ represent a cabined choice.


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45. Here, it is important to note the distinction between ratification of an unconstitutional appointment (the case at hand) and ratification of a *decision* made by an unconstitutionally appointed officer. While the latter scenario may defeat an otherwise valid Appointments Clause challenge, *see, e.g.*, *Guedes v. BATFE*, 920 F.3d 1, 12-13 (D.C. Cir. 2019) (upholding the Bump-Stock Rule following ratification by a duly-appointed Attorney General), the former scenario is different. The distinction is logical: A properly appointed officer may, exercising her independent judgment, come to the same conclusion as her predecessor. Assuming the decision itself was not substantively unconstitutional, ratification may cure the constitutional defect. However, to ratify the unconstitutional appointment of an officer is something else altogether. This is to sanction, with no constitutional authority, an ongoing violation of the Constitution. Although we note that the Supreme Court in *Lucia* declined to address this issue because it was not squarely before the Court, that should hardly be interpreted as approval. *See Lucia*, 138 S. Ct. at 2055 n.6. ("While this case was on judicial review, the SEC issued an order 'ratif[ying]' the prior appointments of its ALJs. . . . We see no reason to address that issue. The Commission has not suggested that it intends to assign Lucia's case on remand to an ALJ whose claim to authority rests on the ratification order. The SEC may decide to conduct Lucia's rehearing itself. Or it may assign the hearing to an ALJ who has received a constitutional appointment independent of the ratification.").

46. The second defect relates to the first — and it is just as clear. While the Appointments Clause contemplates appointments of inferior officers by Heads of Department, it does not authorize them *carte blanche*. Instead, appointments of inferior officers by Heads of Department are only valid insofar as *Congress has passed a law* authorizing such appointment.


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After all, the Appointments Clause reads in relevant part: "[B]ut the Congress may *by Law* vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2 (emphasis added). There can be no real dispute that that "by Law" refers to a duly-enacted statute. *See Clinton v. City of New York*, 524 U.S. 417, 437 (1998) (observing that Congress makes "law" through the enactment of legislation pursuant to its Article I, § 8 powers); *Lucia*, 138 S. Ct. at 2057 (Thomas, J., concurring) (noting that "by Law" means "by statute"). Of course, Congress *has* passed a law pertaining to the appointment of ALJs, but that law only reinforces the notion that appointment is just what it sounds like: a prospective decision to select a person to serve as a presiding officer, not a retroactive decision to *ratify* someone already serving in that capacity. The statute in question provides as follows: "Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title." 5 U.S.C. § 3105. If the Secretary of Homeland Security had appointed Judge Jordan, this would have at once satisfied the statute *and* the Constitution. Ratification, on the other hand, is neither constitutionally nor statutorily permitted. Judge Jordan's appointment is doubly defective.

**NMFS'S FAILURE TO CONSIDER CUMULATIVE IMPACTS VIOLATES NEPA AND THE MMPA WAIVER PROVISION**

47. As part of its comprehensive comments submitted in 2015, SSL raised concerns about NMFS's utter disregard for the multitude of threats faced by gray whales – threats that are continuing to increase. *See* SS EX. 2 With little more than an offhand sentence about climate


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change, NMFS continues to disregard these concerns. In doing so, NMFS violates NEPA and the MMPA Waiver Provision, rendering the proposed waiver and regulations a non-starter.

48. 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." 40 C.F.R. § 15807.1. *See also Kern v. BLM*, 284 F.3d 1062, 1078-79 (9th Cir. 2002). 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." More generally, the basic point of a cumulative impacts analysis is to ensure that the agency does not consider the proposed action in isolation but, rather, in context. While a proposed action by itself — here, hunting gray whales — may appear to have limited environmental impacts, a proper cumulative impacts analysis can reveal myriad of threats that, when combined with the proposed action in question, render the proposal untenable.

49. Although NMFS may attempt to argue that consideration of cumulative impacts (and NEPA generally) is beyond the scope of this hearing, that is patently untrue. The MMPA provision authorizing waivers provides as follows:

> The Secretary, on the basis of the best scientific evidence available and in consultation with the Marine Mammal Commission, is authorized and directed, from time to time, *having due regard to the distribution, abundance, breeding habits, and times and lines of migratory movements of such marine mammals*, to determine when, to what extent, if at all, and by what means, it is compatible with this chapter to waive the requirements of this section so as to allow taking, or importing of any



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> marine mammal, or any marine mammal product . . . [p]rovided, however, [t]hat the Secretary, in making such determinations must be assured that the taking of such marine mammal is in accord with *sound principles of resource protection and conservation* as provided in the purposes and policies of this chapter. 16 U.S.C. § 1371(a)(3)(A) (emphasis added).

50. While this language does not explicitly incorporate a "cumulative impacts analysis" (*i.e.*, it does not employ that very term), there is no way for NMFS to have paid "due regard to the distribution, abundance, breeding habits, and times and lines of migratory movements" of gray whales in the absence of a thorough consideration of cumulative impacts. The statute's reference to "sound principles of resource protection and conservation" only reinforces this conclusion. If NMFS is to consider distribution, abundance, breeding habits, and migratory patterns of gray whales, it must necessarily consider *threats* to those variables — and many of those threats are threats (past, present, and future) *other* than the proposed hunt.

51. With this in mind, 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.'" *Soda Mountain Wilderness Council v. Norton*, 424 F. Supp. 2d 1241, 1266 (E.D. Cal. 2006). 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." *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 810 (9th Cir. 1999). 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."


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*Neighbors of Cuddy Mountain v. United States Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998). "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." *Soda Mountain Wilderness Council*, 424 F. Supp. 2d at 1266 (citing *Ocean Advocates v. Army Corps of Eng'rs*, 402 F.3d 846, 868 (9th Cir. 1998)).

52. When judged by these standards, NMFS's cumulative impacts analysis in the DEIS is woefully inadequate. While the analysis is generally perfunctory, I focus my attention on three categories: (1) military exercises; (2) marine energy and coastal development; and (3) climate change.

53. SSL provided extensive information related to these three categories in its comments on the 2015 DEIS. *See* SS Ex. 2. In addition to the information and arguments provided in those comments, I note the following developments related to these three categories as they relate to cumulative impacts.

54. Military Exercises: The scientific literature continues to evolve in the direction of a consensus that Navy sonar is having a dramatic impact on whale populations, including gray whales. *See, e.g.,* E.C.M. Parsons, *Impacts of Navy Sonar on Whales and Dolphins: Now Beyond a Smoking Gun?*, Frontiers in Marine Science (Sept. 13, 2017), *available at* https://www.frontiersin.org/articles/10.3389/fmars.2017.00295/full. NMFS is intimately and routinely involved in analysis of U.S. Navy sonar exercises under the MMPA. In fact, NMFS just released for comment a proposed rulemaking regarding this activity, which will impact WNP gray whales, in March 2019. *See* NMFS, *Takes of Marine Mammals Incidental to Specified Activities: Taking Marine Mammals Incidental to U.S. Navy Surveillance Towed Array Sensor System Low*

*Frequency Active Sonar Training and Testing in the Central and Western North Pacific Ocean and Eastern Indian Ocean*, 84 Fed. Reg. 7186 (March 1, 2019). Despite the admitted connection between sonar activity and takes of cetaceans, NMFS gave no meaningful consideration to military exercises in its NEPA analysis.

55. Marine Energy and Coastal Development: In the years since NMFS released its 2015 DEIS, there have been continuing efforts to develop coastal infrastructure harmful to gray whales. One example is the Jordan Cove liquefied natural gas (LNG) facility proposed for construction in Coos Bay, Oregon. Although the Jordan Cove LNG project appeared to be headed for the graveyard following a permit denial by the Federal Energy Regulatory Commission (FERC) in 2016, the Trump Administration has since thrown its support behind the project. FERC is now analyzing the matter anew, having just released a DEIS in late March 2019. FERC, Draft Environmental Impact Statement for the Jordan Cove Energy Project (March 2019), *available at* https://www.ferc.gov/industries/gas/enviro/eis/2019/03-29-19-DEIS.asp. While far from a satisfactory document, the Jordan Cove DEIS acknowledges that gray whales occur within Coos Bay — and it furthers acknowledges that whales may be impacted by pile driving and other construction activities, as well as increased shipping traffic following completion of the terminal. *Id.* at 4-319. This is just one example of major coastal development projects within gray whale habitat, all of which must be considered as part of the cumulative impacts analysis in connection with the current proposed waiver and regulations authorizing hunting for gray whales.

56. Climate Change: Warming ocean temperatures, particularly in the Arctic, are having a drastic impact on gray whales' ability to feed. As I noted earlier, nearly sixty gray whales have been found stranded so far this year along the West Coast. Yereth Rosen, *Gray Whale Deaths on*



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*West Coast May Be Linked to Arctic Warmth*, Reuters (May 16, 2019), *available at* https://www.reuters.com/article/us-alaska-whales/gray-whale-deaths-on-west-coast-may-be-linked-to-arctic-warmth-idUSKCN1SN031. Even NMFS spokesperson Michael Milstein acknowledges the possibility (and, indeed, probability) that a main driver is warming temperatures in Arctic feeding grounds. In a recent news article on the matter, Milstein commented as follows: "People think that clearly something happened up there that led the whales to not get as much food . . . . Given that they put on the bulk of their weight in the summer season up there, the die is sort of cast there." *Id.* (internal quotation marks omitted).

57. In light of the emerging evidence that climate change is having a drastic effect on ENP gray whales — and that these impacts will only grow in the future — NMFS's failure to engage in a robust analysis of climate change is more alarming than ever. NMFS's cursory treatment of climate change is a textbook example of an agency failing to heed the command of section 15807.1. *See* 40 C.F.R. § 15807.1 (instructing agencies to assess 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").

58. In essence, NMFS seems to take the position that it can ignore the plethora of threats faced by the environment, and more specifically gray whales, where such threats cannot yet be fully quantified or elucidated. NMFS is wrong. As Congress made abundantly clear when adopting the MMPA, the precautionary principle is the foundation of the MMPA. Congressional testimony leading to the adoption of the MMPA is rife with iterations of this tenet. For example, Senator Bob Packwood explained:

> It seems elementary common sense to the Committee that legislation should be adopted to require that we act conservatively-- that no steps should be taken regarding these animals that might prove to be adverse or even irreversible in their effects until more is known. As far as could be done, we have endeavored to build such a conservative bias into the legislation here presented." H.R. REP. NO. 92-707, at 24 (1971); 118 CONG. REC. S15680 (daily Ed. Oct. 4, 1971) (statement of Sen. Packwood) (emphasis added).

**IF PERMITTED, THE HUNT WILL SET A DANGEROUS PRECEDENT**

59. In its comments to the 2015 DEIS, SSL also noted that, if permitted, the Makah hunt of gray whales would set a dangerous precedent. In taking this position, SSL echoed the sentiment of the 9th Circuit Court of Appeals in *Anderson v. Evans*, which expressed disquiet about NMFS's 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. *Anderson v. Evans*, 371 F.3d 475, 493 (9th Cir. 2004).

60. The *Anderson* Court was clearly not persuaded by NMFS's position - nor should it have been. The Court conveyed the following additional concerns about potentially 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


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> 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." *Id.* at 499.

62. The *Anderson* Court's dire predictions became a reality in 2017 when, in *Makah Indian Tribe v. Quileute Indian Tribe*, 873 F.3d 1157, 1162 (9th Cir. 2017), *cert. denied* 139 S. Ct. 106 (2018), the 9th Circuit confirmed a district court ruling concluding that the term "fish" in the Treaty of Olympia was intended to include sea mammals such as whales and seals:

> Based on the considerable evidence submitted throughout the lengthy trial, the district court's finding that the Quileute and Quinault intended the Treaty's "right of taking fish" to include whales and seals was neither illogical, implausible, nor contrary to the record. We conclude that the district court properly looked to the tribes' evidence of taking whales and seals to establish the U&A for the Quileute and the Quinault and did not err in its interpretation of the Treaty of Olympia. We do not address or offer commentary on whether the same result would obtain for the "right of taking fish" in other Stevens Treaties. *Id*.

63. While neither the Quiluete and Quinault tribes have requested a waiver to hunt whales, it is certainly a plausible concern that they and other tribes will do so given the foregoing ruling. And certainly nothing would make that more likely than if the Makah hunt were permitted.

I declare under penalty of perjury under the laws of Washington and the United States that the foregoing is true and correct.

DATED this 20th day of May 2019

Brett Sommermeyer



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