

ADMINISTRATIVE LAW JUDGE

May 17, 2019

THE HONORABLE GEORGE J. JORDAN

Docket No. 19-NMFS-0001

**DECLARATION OF the PENINSULA CITIZENS for the PROTECTION of WHALES
(PCPW)**

I, Margaret Owens, declare as follows:

1. I submit these comments on behalf of, and as a founding member of, PCPW. I have prepared the substantive comments submitted by PCPW for a great many years. In fact, we have commented at every opportunity for almost 20 years. Like other members of our group, I am not a scientist . I am an artist , (painter and sculptor), and curator of a small local history museum. Our group encompasses diverse ages and occupations; nurses, musicians, teachers, students, and a great many retired folks, from Port Townsend to Forks. The common denominators have always been a love of all animals, and a great appreciation for the fact that we live in an island-like setting that allows frequent

sightings of whales, especially the gray whales who feed in the near shore. We also share a great distress at the thought of these gentle giants being targeted for painful death in the waters that are their home. We believe that we represent the feelings of most residents of the Olympic Peninsula. In 2001 we easily gathered 5,000 local signatures on a petition opposing the hunt.

2. Our voices have been unique in this loud international debate, in that we live here. We have strong ties with our tribal neighbors, and agree on most things. Killing whales is not one of them. Our hope has been that the Tribe would use their unique location and access to seek friendship with these friendly, curious, and intelligent animals. To be cross-species ambassadors of peace. We still hope. But until that day, we will continue to "speak for the whales". It is our honor and privilege to do so. It has been said, and is worth repeating; "Sometimes the needs of nature surpass the needs of culture." We are in those times.

3. We have, in the past, commented on many aspects of this issue. (DEIS 2008 and DEIS 2015) Here, we will try to be concise and keep our comments to those of particular local interest: the safety of our (33) resident gray whales and the safety of our resident humans and visitors. (For a broader scope of comments we will attach our comments to the DEIS 2015. Attachment #1)

THE (33) GRAY WHALES OF CLALLAM COUNTY

4. The 2015 DEIS uses the number (33) for the number of PCFG whales faithful to the Makah U&A . This number has been fairly stable for many years. These (33) are a subset of the (200) or so PCFG whales who feed south of the arctic feeding grounds utilized by the 22,000 or so ENP gray whales. As the PCFG migrates north from the Baja birthing lagoons with the ENP gray whales every spring, they break off, in groups, to their own favorite feeding sites. Research "... supports the existence of five PCFG feeding aggregations within the West Coast region". (J. Calambokidis et al 2015 "Biologically Important Areas for Selected Cetaceans Within U.S. Waters - West Coast Region".) One group breaks off near Pt. St. George, California. Another group heads for the Cape Blanco coastline in Oregon. A third group of about 40-50 whales is very faithful to the feeding area at Depoe Bay. (Carrie Newell, 2011 "Meet the Gray Whales of Depoe Bay") The fourth Biologically Important Area (BIA), is at Grays Harbor, Washington. The fifth BIA is our own Northwest Washington Coast and Strait of Juan de Fuca , almost entirely within the Makah U&A and Clallam County. (BIAs and PCFG feeding groups illustrated on left-side panel of Attachment #4 : "Resident Gray Whales of Washington State")

5. A group of PCFG whales also continues north to rich feeding areas on

the west coast of Vancouver Is., and beyond. There is travel between adjacent areas, as ephemeral prey species shift and move in the water column, and as benthic species become abundant in places and recover in others. Some areas are so rich that many whales can share the bounty over a long period. Some spots can sustain a couple whales at a time for a shorter number of days. Gray whales move to where the food is at any given time. How do they find the patchy prey blooms? Their mothers must be great teachers, by example, in the calves' first months of life. Calves nurse while following their mothers in the waters they will likely return to as independent yearlings and beyond. Knowledge is matrilineal. Mothers teach calves the ancient wisdom of the great-great-great grandmothers of the PCFG clans. This is "internal recruitment", and has been well documented among the PCFG whales. (See "Site Fidelity, Resident Whales, and Familial Recruitment" - 2005 PCPW- Attachment #2). This internal recruitment has built the PCFG (200) into a group with significant genetic differences from the ENP (23,000) , and obvious behavioral differences. The stable population numbers challenge the NMFS theory of "external recruitment". While ENP whales may occasionally wander in with the PCFG, they have not disrupted the unique genetic structure of the PCFG, and are much less likely to be successful in the PCFG range without local instruction from their ENP

mothers when they were calves.

6. Although the latest NMFS regulations do not seem to mention "the 33" Makah U&A whales, the Ninth Circuit Court thought about them a great deal. The following statement was made by the judges of the 9th Circuit Court of Appeals in *Anderson v. Evans*, 2004 :

"Even if the eastern Pacific gray whales overall or the smaller PCFA group are not significantly impacted by the Makah Tribe's whaling, the summer whale population in the local Washington area may be significantly affected. Such local effects are a basis for a finding that there will be a significant impact from the Tribe's hunts." quoted in DEIS (2015) pg.3-122

NMFS agrees about the likely results of Makah hunts on the PCFG and the (33) local whales:

"Over time an ongoing hunt could reduce the abundance of PCFG whales...with respect to viability of the PCFG, a reduction over time could decrease the likelihood that the PCFG is viable." DEIS (2015) pg.4-69

"...a decrease in the number of whales using the coastal portion of the Makah U&A...could also result in a decrease in the number of whales using the Strait..." (DEIS (2015) pg. 4-70

"It is also possible that animals could reduce their usage of , or stop using an area because of the disturbance associated with a hunt." DEIS (2015) pg.4-71.

"...an ongoing hunt could reduce the number of whales in the Makah U&A and the OR-SVI survey areas." DEIS (2015)pg.3-13

The 9th Circuit Court anticipated these worries in Anderson v. Evans :

"We must consider not just the effects to the PCFG whales, but effects to the smaller group of whales frequenting the Makah U&A. The crucial question is: whether the hunting, striking, and taking of whales from this smaller group could significantly affect the environment in the local area...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."

7. These words say it all. NMFS does not have the "luxury" of ignoring the local whales or the local environment. The above statement is not referencing the "California Current Ecosystem" or even the PCFG whales in total. The judges are speaking about the "local area" and the Makah U&A whales. NMFS is well aware, as they paraphrase the 9th Circuit in the 2015 DEIS pg. 3-121 :

"....the Court concluded that we must consider not just the effects to the PCFG whales, but the effects to the smaller group of whales frequenting the Makah U&A... The Court referred to these whales as the '...relatively small group of whales that comes into the Tribe's hunt area each summer...about sixty percent are returning whales.' "

8. So has NMFS satisfied this Court mandate to consider the effects to the (33) whales of the Makah U&A? No they have not . Not even a mention in these regulations. Instead we hear excuses for their failure to "decide" on a stock designation that would give protection to the entire 200 PCFG whales. They deserve it no less than the Western gray whales. Both are small , genetically distinct populations with feeding habits unlike the ENP gray whales. Both likely breed outside their group in Baja, although this is conjecture in both cases. The 9th Circuit required protection for the local whales "whether or not" they are genetically different from the ENP :

"If California gray whales disappear from the area of the Strait of Juan de Fuca, the Marine Sanctuary, or both, that would be a significant environmental impact even if the PCFG whales populating the rest of the Pacific Coast in the summer are genetically identical to the migrating whales."
(Anderson v. Evans 2004)

9. The 2015 DEIS at least referenced the Makah U&A whales in terms of how many could be taken every year. In all the current regulations and writings released in April by NMFS that I have been able to read through so far, I don't think I have seen any mention of "the 33". All "PBR's", "strike limits", "approaches", "likely mortalities", "maximum mortalities", "OSP's", etc. are calculated in reference to the PCFG, the ENP, and the WNP whales. The all-important Makah U&A whales have disappeared. What would the judges of the 9th Circuit Court say to that? All harm, and the "low abundance triggers" meant to moderate the harms, are tied to the entire PCFG population estimates. This is "political science" sleight of hand, that ignores the reality that most of the PCFG population is not likely to be in the Makah U&A during hunts. Not the California group or even the Oregon groups. There are occasional wandering PCFG whales, but there is no mention, much less analysis, of the devastating impact the hunt activities will undoubtedly have on our "sitting ducks": the (33) Clallam County / Makah U&A gray whales.

10. It has been hoped for many years that NMFS could put aside its long-standing and highly improper partiality toward allowing a hunt, and actually produce a proper science-based analysis of risks to our small local whale groups, as the 9th Circuit Court directed them many years ago:

"A new E.A. must be drafted under circumstances that ensure an objective evaluation free of the previous taint...the burden shall be on the Federal defendants to demonstrate ...that they have complied with the requirement to evaluate the environmental impact of the proposal objectively and in good faith."

11. Shannon Bettridge explains the status of the "stock designation versus no stock designation for the PCFG " stalemate in her "Declaration" :

"...the Pacific SRG (Scientific Review Group) recommended NMFS reconsider the characteristics and status of the PCFG and whether it should be recognized and managed as a full stock. NMFS replied that it does not believe that currently available information supports classifying the PCFG as a stock under the MMPA."

Chris Yates also ignores the recommendations of the Pacific SRG with this statement in his "Declaration" :

No designation for the PCFG, as "the evidence is equivocal."

And what a word to use . The definitions are telling:

"Equivocal:"

"uncertain" (Webster)

"two opposing meanings" (Cambridge Dictionary)

"unclear" (Cambridge)

"debatable" (Webster)

"usually used to mislead or confuse" (Merriam- Webster Dictionary)

"used especially to purposefully deceive" (Oxford Dictionary)

12. If the evidence is truly split down the middle, then the Precautionary Principle should guide NMFS' decision-makers to protect the weakest "stock" from potentially irreversible harm, until all evidence is in. The PCFG and the Makah U&A whales are the weakest "stock". By lumping the PCFG in with the ENP, and by lumping the Makah U&A whales in with the entire PCFG group, NMFS is complicit in an experiment with unknown consequences to our Washington State whales. Is there "purposeful deception" here? Our local whales will be hit hard. Under the proposed regulations, (16) PCFG whales will "likely" be killed every ten years. And half of those can be females. The Makah U&A whales only have (5) known reproductive females. That is, whales who have been seen with calves. (see attachment #2) The killing of even one mother could be

hard to recover from for this tiny group. The mothers hold ancient wisdom passed mother to calf perhaps since the ice age. Wisdom and knowledge that allow these few whales to survive and thrive in these southern waters. Springtime on the Washington coast is a baby nursery , so important to local PCFG mothers and calves. They stay very near shore , where the mothers can feed and the calves can nurse away from the deeper waters where transient orcas may prowl, and seas are rougher and noisier. This is also a "nursery school" for the calves who have much to learn from their mothers. PCPW submitted comments to this effect to the 2008 DEIS:

"NMFS refuses to consider an alternative that takes the hunt off-shore to the migratory corridor....Mothers and calves (of all gray whale groups) will be in the hunt area in April and May, and will feel the 'collateral harassment' of the hunt activities."

NMFS' reply to this comment:

"In response to this and other comments, the new DEIS includes an alternative that would require a hunt to start 5 miles off-shore."

13. But that off-shore alternative was not chosen. The refusal to resolve the "equivocal" evidence for stock designation for the PCFG is not a "neutral"

position. It has the effect of deciding in the negative. The "non-decision" puts a firm hand on the scale to advantage the hunters' desires to kill the passive, hungry, slow moving local whales at their feeding sites near shore. These whales are predictable and easy to ambush as they eat after their long fast. These whales are also "groomed " for the kills. They have been approached by boats many, many times as they are photographed, darted for skin samples, counted in surveys, etc. These are the "sitting ducks" of the Makah U&A , and they have received no thought of meaningful protection from NMFS or the Makah Tribe. History will harshly judge the destroyers of this tiny peaceful family-nation of whales. Yes, there is no threat to the ENP whales, as NMFS often crows...but what about these whales? They are likely to be disadvantaged to extinction by the co-managers of the proposed hunts.

14. Why the strange refusal to protect the small, irreplaceable whales of Clallam County? There is only one reason, and it is far from science-based. Both NMFS and the Tribe denied their existence for years, despite the studies of the "summer residents" since the 1970's. They both continued to deny the existence of "resident" gray whales in 1998, even though Cascadia Research Collective partnered with Washington Dept. of Fish and Wildlife to publish "Gray Whales of Washington State : Natural History and Photographic Catalog" in 1994 . The very

mention of "resident whales" was met with derision from the Tribal spokespeople and from NMFS . In a conversation with Lynda Mapes (Seattle Times, 2002), NMFS biologist Pat Gearin, stationed at Neah Bay for decades, opined:

The delay of whaling was... **"a political decision that science couldn't support. It was some politician's interpretation to avoid the so-called "friendly whales", but there really was very little science behind it."**

15. Why the need to deny the existence of the resident whales?

Then, once DNA results proved their existence and uniqueness, to deny them protection? The answer is simple and obvious. If the Makah U&A whales (and the rest of the PCFG) are granted protection, there can be no near-shore hunt on the "sitting ducks", slowly milling and feeding and so used to boats. This whole issue of "stalemated decision makers" and Chris Yates' "equivocal" evidence, reflects the "taint". It is the smoking gun that shows us NMFS is still "all in" to allow a hunt no matter the consequences to whales in their "care". The 9th Circuit Court would not be pleased.

DANGERS TO HUMAN SAFETY FROM A NEAR-SHORE HUNT

16. It is not only the whales whose lives are endangered by the current hunt plans. As always, NMFS ' near-shore-hunt centric decisions create dangerous scenarios just waiting to become tragedies. In 2001 NMFS authorized a plan to allow no time or area restrictions to Makah hunters in their U&A. As the Tribe includes many miles of shoreline inside the Strait in their U&A, that meant that hunting in the summer , with the .50 caliber rifle, all the way to Crescent Bay at Salt Creek County Park would have been A-OK. Gray whales do utilize Crescent Bay as a feeding area, much to the delight of local residents, tourists, and the campers that pack the Salt Creek campground and the adjacent beaches and rocky tidepool areas. PCPW submitted comments to NMFS that included the opinion of a retired U.S. Army ballistics expert. His strong recommendation was that no firings of a .50 cal. rifle should occur within 4-5 miles of the shoreline ,or any surface vessel, especially since the shooter will be standing in a moving, rocking boat shooting at a moving wounded whale. NMFS admitted as much in their 2001 FEA :

"...the use of a large caliber rifle...does raise safety concerns due to the long range of these rifles."

17. NMFS also stated that this alternative would allow the killing of up to five whales a year from the PCFG , but "there will be no effects on the gray whale population. However , if the PCFG is treated as a separate management unit, then without some type of ... quota restriction, this alternative might exceed the annual average PBR range of 2.08 to 6.78 for the PCFG."

18. So what did NMFS assert in this preferred alternative?

*** Long-range rifle use is OK , in close proximity to people, roads, recreational boaters, vessel traffic, fishing boats, etc.**

*** Hunts taking Makah U&A / PCFG whales are OK as long as they are NOT treated as a separate management unit.**

*** NMFS can allow PCFG whales to be killed while emphasizing that there will be no effects on the gray whale population.**

*** NMFS can state a very wide PBR range for the PCFG, without concern for the obvious extra harm to Makah U&A whales.**

19. This FEA was stopped by the Court, and NMFS was sent back to the drawing board. But the strategies listed above from the 2001 FEA ,have been utilized ever since, in one DEIS after another, and are evident in the current

proposals. The blocking of a "separate management unit" designation has held for at least 18 years. Does NMFS have the honesty to admit that there would be no Makah U&A whales left if this 2001 plan had proceeded down the years?

20. Another constant in NMFS proposals over the years, has been authorizing the use of the .50 cal.rifle in near-shore hunt plans. In the DEIS (2005) the statement was made that the Makah Tribe was choosing not to hunt in the Strait for "safety reasons". This was welcome news, but there was no plan to eliminate the rifle use on the Outer Coast. Despite the constant questioning of this potential threat to human life by PCPW and others, there had been no satisfactory response from NMFS. For close to 20 years PCPW has insisted that NMFS must consult with Olympic National Park, as it is the campers , hikers, and other visitors to the Olympic Wilderness Coast who will be in the danger zone of the .50 cal. rifle. It defies comprehension, that in spite of Olympic National Park (ONP) bordering the entire Makah hunt area, the Park has never been contacted by NMFS about all the various hunt plans over the years. In 2008 , PCPW commented heavily on the dangers to Park visitors, and Attachment #3 was submitted with our written comments. This graphic is titled "Whales, Campers, and the .50 Caliber Rifle". It shows gray whales sighted at their feeding areas over many years, as documented by Cascadia Research. It also

shows where the previous hunts (and kill) occurred . Camper groups in March, April, and May of 2004 are represented by colored dots. Each dot represents a permit for a party of 1-14 people. A bold red dashed line off the coast represents the 5 mile range of the gun.

21. This graphic illustrates the untenable risk to the people on the beach. As we have often stated to NMFS, we cannot endorse ANY killing of gray whales, but an off-shore hunt is the only way to eliminate the dangers to people. And still NMFS did not consult with ONP, and in DEIS 2015 proposed more near-shore hunts. But there was also Alternative 3 : the "Off shore hunt". This is explained in the "NMFS comments to PCPW comments on the DEIS 2008", contained in the "Declaration of Chris Yates" attachment. As response to our comments to DEIS 2008 , Pg. 4.15 Public Safety,NMFS responded :

"We have incorporated the information presented in this comment in the new DEIS(2015) to provide a more complete picture of potential impacts to public safety of authorizing a Makah gray whale hunt...In addition , the new DEIS includes the alternative of an offshore hunt (Alt. 3, Offshore hunt), in which we selected the distance from shore specifically to avoid the potential for someone on shore to be injured by a bullet from the hunt."

22. So NMFS admitted that there was a problem with safety for people in Olympic National Park, and offered a solution. But still they declined to choose it! And all proposals currently are for a near shore hunt. What gives? What is a higher priority than public safety? When asked, the Coast Guard has stated (pers. comm.) that once the bullet crosses the shoreline, they are not responsible for shots fired from the water. The Park has not been consulted about issuing warnings, closing trails, or posting .50 cal. danger zone signs. Neither have they been apprised of the potential for gunshot noise and emotional stress at the sight of a hunt in progress right off the beach. This is a designated wilderness area, that rates the highest levels of protection from outside disruption. People go to the Wilderness Coast to experience the awesome beauty of nature, and perhaps to see some wildlife. Not to be traumatized by the noise and violent scenes of a whale being pursued and killed. Not to mention being unwittingly in harm's way and possibly killed or maimed by a .50 cal. projectile. Will NMFS announce responsibility for whatever happens? Will NMFS ever warn, or solicit comment from ONP?

23. And back to the question: what gives? Back to the usual answer: there are no slow moving, milling, circling, feeding, "groomed for the kill" whales off shore. Just 23,000 or so migrating whales. The whales that NMFS and

the Tribe have always professed to be targeting.

24. And to our 2008 DEIS comments about the harm to mothers and calves being subjected to "collateral harassment" in March, April and May at their most sensitive times, and the high level of harassment the Makah U&A whales will have to endure...the same empty response from NMFS :

"In response to this and other comments, the new DEIS (2015) includes an alternative that would require any hunt to occur at least 5 miles from shore (Alt. 3 Offshore hunt)."

Again, a problem acknowledged, a solution devised, but no intent to suggest using it. Why not? See "usual answer" above.

25. If frustration can be felt in this "Declaration", it is the frustration of dealing with an agency that has , from the beginning, favored and worked toward allowing the killing of whales. The legitimate issues we earnestly raise are dealt with in a dismissive and patronizing way. The decisions are already made. The only common sense has come from the high court...the 9th Circuit Court. Those judges are not beholden to government scientists or government agencies or even tribes. I hope, at the least, that Judge Jordan will give us the courtesy of reading these comments with an open mind, and with the intent of

understanding our views. And please look over the graphic attachments.

Homemade, imperfectly rendered ,for sure. But sincerely offered as an aid to getting "the picture" we see from here...from our close up contact with our environment. I am one person, but I speak for many more. For my family, for the other members , living and passed, of the Peninsula Citizens for the Protection of Whales, for the majority of people on the Peninsula, in America, and in the world who believe that the time has passed for killing whales. As I write this, gray whales are dying along the coast. They need us to care, and to find out why this is happening. This is NMFS' true mission. Not to waste time and resources arguing about how many of the gray whale mothers, grandmothers, sons and daughters can be killed for no reason. Whales paid a heavy price in the old times to help the coastal tribes survive and grow rich on their flesh and fat. It would be a higher calling now...gratitude... to be their friends. They are not fish. They are thinking , feeling, fellow travelers in this life. They know each other. They have friendships that last for years. They enjoy each other's touch. They care for their young, and teach them well the vital knowledge of survival.They feel pain. They speak to each other in soft voices, easily drowned out by human noise. And they show curiosity about us. And trust to approach. Betraying that trust will be hard on the soul. NMFS has no interest in comments like this. They have no vocabulary

to react to emotions.

We will never stop speaking for the whales.

A handwritten signature in cursive script that reads "Margaret Owens". The signature is written in black ink on a light-colored background.

Margaret Owens

Dated: 5/17/2019