

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

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*In re:* )  
 ) Docket No. 19-NMFS-0001  
**Proposed Waiver and Regulations Governing** )  
**the Taking of Eastern North Pacific Gray** ) RIN: 0648-BI58 and  
**Whales by the Makah Indian Tribe** ) RIN: 0648-XG584  
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**NATIONAL MARINE FISHERIES SERVICE’S MOTION REQUESTING  
REVISIONS TO PROPOSED REGULATIONS**

**I. INTRODUCTION**

This proceeding concerns a waiver and regulations proposed by the National Marine Fisheries Service (“NMFS”) under the Marine Mammal Protection Act (“MMPA”).<sup>1</sup> The proposed waiver and regulations would allow the Makah Indian Tribe to carry out a limited ceremonial and subsistence hunt for eastern North Pacific “ENP” gray whales within the Tribe’s usual and accustomed fishing grounds. NMFS published its Proposed Regulations on April 5, 2019. *See* 84 Fed. Reg. 13,604 (2019). After reviewing the written testimony and other filings submitted by the parties to this proceeding, NMFS has determined that it would be appropriate to revise the proposed regulations to clarify certain provisions. Accordingly, as further explained below, NMFS respectfully requests that the Court adopt, in its recommended decision for this

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<sup>1</sup> 16 U.S.C. §§1361 et seq.

matter, the revisions to the proposed regulatory text set forth in Attachment A (proposed revisions in track-changes with explanation) and Attachment B (clean copy).<sup>2</sup>

## II. ARGUMENT

In its filed written testimony, party Animal Welfare Institute (“AWI”) noted some potential ambiguities in the Proposed Regulations, including how multiple strikes on the same whale would be accounted for. *See* Declaration of DJ Schubert, dated May 20, 2019, ¶¶ 61, 63-65. Because NMFS’s Proposed Regulations and supporting analyses assume that all struck whales would be killed, NMFS did not intend that multiple strikes on the same whale would count separately against the strike limits in the Proposed Regulations. *See* 84 Fed. Reg. at 13,608 (“Our proposed regulations . . . presume that any struck whale will die.”). The revisions shown in Attachments A and B clarify that multiple strikes on the same whale would count as one strike toward the applicable strike limits. *See* Attachment A at 7-8. The attachments also include technical revisions to the definition of “strike” to address interpretive issues raised by Mr. Schubert. *See* Attachment A at 5; Schubert Decl. ¶ 58.

AWI also asserts that the Proposed Regulations are unclear as to whether Makah Indian handicrafts could be exported internationally. Schubert Declaration ¶ 71. The Proposed Regulations provide that handicrafts can be possessed, transported, shared, bartered, or sold “in the United States,” but also contain some ambiguities. In requesting a waiver, the Makah Tribe did not seek authorization to export handicrafts, and NMFS did not intend to authorize international export in the Proposed Regulations. *See* 2015 DEIS, App. B at 15 (Makah Tribe

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<sup>2</sup> NMFS informed the parties and Court of its intention to offer revisions to the Proposed Regulations during the October 28, 2019 teleconference with the Court and parties regarding hearing logistics. NMFS understands that the Court will likely extend the time for parties to submit responses to NMFS’s motion in order to avoid conflicts with other hearing deadlines, and that the Court will likely rule on this motion after the hearing has concluded.

2013 Whaling Ordinance, providing that “handicrafts made from non-edible whale products may be sold or offered for sale only within the United States . . .”). The revisions in Attachments A and B are intended to clarify that international export of handicrafts would not be authorized by the Proposed Regulations. *See* Attachment A at 16-17.

Finally, the Makah Tribe has argued that the requirements in the Proposed Regulations regarding the sharing of edible whale products would prevent tribal members who reside outside of the Tribe’s reservation from sharing such products at their residences. *See* Declaration of Greig Arnold, dated May 16, 2019, ¶ 20. NMFS agrees that tribal members should be able to share edible products within their residences, whether they reside within or outside of the reservation, and has proposed appropriate modifications in Attachments A and B. *See* Attachment A at 11, 16-17.

### **III. CONCLUSION**

For the reasons explained above, NMFS requests that, in its recommended decision for this matter, the Court adopt the revisions to NMFS’s Proposed Regulations set forth in Attachments A and B hereto.

Respectfully submitted this 28th day of October, 2019.

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