

**ATTACHMENT A**

**Excerpt from Pre-Publication Version of 84 Fed. Reg. 13,604 (2019)  
Proposed Revisions – Track Changes with Explanation  
Prepared by the National Marine Fisheries Service for Docket No. 19-NMFS-0001**

**PART 216—REGULATIONS GOVERNING THE TAKING AND IMPORTING  
OF MARINE MAMMALS**

1. The authority citation for part 216 continues to read as follows:

**Authority:** 16 U.S.C. 1361 *et seq.*, unless otherwise noted.

2. Subpart J is added to read as follows:

**Subpart J—Taking of Eastern North Pacific (ENP) Gray Whales (*Eschrichtius  
robustus*) by the Makah Indian Tribe off the Coast of Washington State**

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**§ 216.110 Purpose.**

The purpose of this subpart is to establish regulations governing the take of whales from the eastern North Pacific (ENP) gray whale (*Eschrichtius robustus*) stock by the Makah Indian Tribe and its enrolled members in accordance with the Secretary's determination to issue a waiver of the MMPA take moratorium pursuant to 16 U.S.C. 1371(a)(3).

**§ 216.111 Scope.**

This subpart authorizes only the taking of ENP gray whales and only by enrolled members of the Makah Indian Tribe.

**§ 216.112 Definitions.**

In addition to the definitions provided in the MMPA, for purposes of this subpart, the following definitions apply:

*Barter* means the exchange of parts from gray whales taken under these regulations for other wildlife or fish or their parts or for other food or for nonedible items other than money if the exchange is of a noncommercial nature.

*Bonilla-Tatoosh Line* means the line running from the western end of Cape Flattery (48°22'53" N. lat., 124°43'54" W. long.) to Tatoosh Island Lighthouse (48°23'30" N. lat., 124°44'12" W. long.) to the buoy adjacent to Duntze Rock (48°28'00" N. lat., 124°45'00" W. long.), then in a straight line to Bonilla Point (48°35'30" N. lat., 124°43'00" W. long.) on Vancouver Island, British Columbia.

*Calf* means any gray whale less than 1 year old.

*Enrolled member or member* of the Makah Indian Tribe means a person whose name appears on the membership roll maintained by the Makah Tribal Council.

*ENP gray whale* means a member of the eastern North Pacific stock of gray

whales (*Eschrichtius robustus*).

*Even-year hunt* means a hunting season spanning six consecutive months from December 1 in an odd-numbered year to May 31 in the following even-numbered year.

*Gray whale* means a member of the species *Eschrichtius robustus*.

*Harpooner* means a member of the Makah Indian Tribe who has been certified by the Tribe as having demonstrated the qualifications commensurate with the duties and responsibilities of harpooning a gray whale.

*Hunt* and *hunting* mean to pursue, strike, harpoon, shoot, or land a gray whale under a hunt permit issued under § 216.113(a), or to attempt any such act, but does not include hunting approaches, training approaches, or training harpoon throws. A “hunt” means any act of hunting.

*Hunt permit* means a permit issued by NMFS in accordance with 16 U.S.C. 1374 and this subpart.

*Hunting approach* means to cause, in any manner, a vessel to be within 100 yards of a gray whale during a hunt.

*Land* and *landing* mean bringing a gray whale or any products thereof onto the land in the course of hunting.

*Makah Indian handicrafts* means articles made by a member of the Makah Indian Tribe that contain any nonedible products of an ENP gray whale that was obtained pursuant to a permit issued under this subpart; and are significantly altered from their natural form and which are produced, decorated, or fashioned in the exercise of traditional Makah Indian handicrafts without the use of pantographs, multiple carvers, or similar mass copying devices. Makah Indian handicrafts include, but are not limited to, articles that are carved, beaded,

drawn, or painted.

*Makah Indian Tribe* or *Tribe* means the Makah Indian Tribe of the Makah Indian Reservation as described in the list of federally recognized Indian tribes maintained by the U.S. Department of the Interior.

*Minimum population estimate* for PCFG gray whales is the lower 20th percentile of the PCFG population estimate;

*NMFS hunt observer* means a person designated by NMFS to accompany and observe a hunt.

*Odd-year hunt* means a hunting season spanning four consecutive months from July 1 to October 31 in an odd-numbered year.

*Pacific Coast Feeding Group (PCFG) gray whale* or *PCFG whale* means an ENP gray whale photo-identified during two or more years between June 1 and November 30 within the region between northern California and northern Vancouver Island (from 41°N. lat. to 52°N. lat.) and entered into a photo-identification catalog(s) recognized by the Regional Administrator.

*PCFG population estimate* means an abundance estimate based on data derived from photo-identification surveys and catalog(s) recognized by the Regional Administrator. Such data will also be the basis for projecting PCFG population estimates in future hunting seasons.

*Recordkeeping* and *reporting* mean the collection and delivery of photographs, biological data, harvest data, and other information regarding activities conducted under the authority of this subpart.

*Regional Administrator* means the Regional Administrator of NMFS for the West

Coast Region.

*Rifleman* means a member of the Makah Indian Tribe who has been certified by the Tribe as having demonstrated the qualifications commensurate with the duties and responsibilities of shooting a gray whale.

*Safety officer* means a member of the Makah Indian Tribe who has been certified by the Tribe as having demonstrated the qualifications commensurate with the duties and responsibilities of evaluating hunt conditions including but not limited to visibility, target range and bearing, and sea condition.

*Strike* or *struck* means to cause a harpoon, darting gun, or other weapon device, or a projectile from a rifle or other weapon, to penetrate a gray whale's skin or an instance in which a gray whale's skin is penetrated by such a weapon or projectile ~~a harpoon or other device during while hunting.~~

Commented [A1]: Clarifying edits.

*Struck and lost* refers to a gray whale that is struck but not landed.

*Training approach* means to cause, in any manner, a training vessel to be within 100 yards of a gray whale.

*Training harpoon throw* means an attempt to contact a gray whale with a blunted spear-like device that is incapable of penetrating the skin of a gray whale.

*Training vessel* means a canoe or other watercraft used to train for a hunt that does not carry weapons ordinarily used by a harpooner or rifleman to strike a gray whale.

*Tribal hunt observer* means a tribal member or representative designated by the Tribe who has been certified by the Tribe as having demonstrated the qualifications commensurate with the duties and responsibilities of monitoring and reporting on a hunt.

*U&A* or *Makah Indian Tribe's U&A* means the Tribe's usual and accustomed

fishing grounds, which area consists of the United States waters in the western Strait of Juan de Fuca west of 123°42'17" W. long. and waters of the Pacific Ocean off the mainland shoreline of the Washington coast north of 48°02'15" N. lat. (Norwegian Memorial) and east of 125°44'00" W. long.

*Unsuccessful strike attempt* means any attempt to strike a gray whale while hunting that does not result in a strike.

*WNP gray whale* means a member of the western North Pacific stock of gray whales (*Eschrichtius robustus*).

*Whaling captain* means a member of the Makah Indian Tribe who has been certified by the Tribe as having demonstrated the qualifications commensurate with the duties and responsibilities of leading a hunt and is authorized by the Makah Indian Tribe to be in control of the whaling crew.

*Whaling crew* means those members of the Makah Indian Tribe taking part in a hunt under the control of a whaling captain, not including the tribal hunt observer.

**§ 216.113 Take authorizations.**

(a) The Regional Administrator may issue hunt permits to the Makah Indian Tribe authorizing hunting of ENP gray whales, as well as hunting approaches, training approaches, and training harpoon throws by enrolled members in accordance with 16 U.S.C. 1374 and the requirements of this subpart.

(1) Hunt permit duration. The duration of the initial hunt permit may not exceed three years from its effective date, and thereafter the duration of a hunt permit may not exceed five years.

(2) Hunting seasons. Even-year hunts and hunting approaches will only be authorized

from December 1 of an odd-numbered year through May 31 of the following even-numbered year. Odd-year hunts and hunting approaches will only be authorized from July 1 through October 31 in an odd-numbered year.

(3) Training period. Hunt permits may authorize training approaches in any month and training harpoon throws in any month, except as provided in § 216.113(a)(4)(ii).

(4) Limits on the number of gray whales approached, subjected to unsuccessful strike attempts, struck, struck and lost, and landed.

(i) Approaches. A hunt permit may authorize no more than 353 approaches, including both hunting and training approaches, each calendar year of which no more than 142 of such approaches may be on PCFG whales. Any hunting approach on a gray whale that has already been struck will not count against these limits.

(ii) Unsuccessful strike attempts and training harpoon throws. A hunt permit may authorize no more than 18 unsuccessful strike attempts during even-year hunts and no more than 12 unsuccessful strike attempts during odd-year hunts. Any unsuccessful strike attempt on a gray whale that has already been struck will not count against these limits. Training harpoon throws may occur at any time during even-numbered years and between July 1 and October 31 in odd-numbered years. Each training harpoon throw will count against the unsuccessful strike attempt limit in effect during the calendar year that the throw is made.

(iii) Strikes. A hunt permit may authorize no more than three gray whales to be struck~~strikes~~ in an even-year hunt and no more than two gray whales to be struck~~strikes~~ in an odd-year hunt. Multiple strikes on the same whale will count as a single struck whale. In an even-year hunt, a hunt permit may authorize no more than one gray whale to be struck~~strike may be authorized~~ within the 24-hour period commencing at the time of the

**Commented [A2]:** Clarifying edits. The Proposed Regulations and NMFS's supporting analyses presume that a struck whale will die, therefore NMFS did not intend that approaches, strikes, or strike attempts on a whale already struck would count against the limits.

**Commented [A3]:** Clarifying edits. The Proposed Regulations and NMFS's supporting analyses presume that a struck whale will die, therefore NMFS did not intend that approaches, strikes, or strike attempts on a whale already struck would count against the limits.

~~first strike on a whale.~~ The Regional Administrator may authorize the full number of ~~gray whales to be struck~~ ~~strikes~~ in the initial hunt permit and will adjust strikes downward in subsequent permits if necessary to ensure that ~~no more than 16 strikes on~~ PCFG whales ~~are struck~~ ~~do not exceed 16~~ over the waiver period, of which no more than 8 ~~struck whales strikes~~ may be on PCFG females.

(iv) Struck and lost. A hunt permit may authorize no more than three gray whales to be struck and lost in any calendar year.

(v) Landings. A hunt permit may authorize no more than three gray whales to be landed in an even-year hunt and no more than one gray whale to be landed in an odd-year hunt; the number of gray whales that the hunt permit may authorize to be landed in any calendar year will not exceed the number agreed between the United States and the Russian Federation as the U.S. share of the catch limit established by the International Whaling Commission.

(vi) PCFG whales. Notwithstanding the limits specified in this section, no hunting will be authorized for an upcoming season if the Regional Administrator determines, and notifies the Makah Indian Tribe pursuant to § 216.114(a)(1) of this subpart, that either of the following conditions applies:

(A) The most recent PCFG population estimate, based on photo-identification surveys, is less than 192 whales or the associated minimum population estimate is less than 171 whales; or

(B) The PCFG population estimate for the upcoming hunting season is projected to be less than 192 whales or the associated minimum population estimate is projected to be less than 171 whales.

(vii) WNP gray whales. The hunt permit will provide that in the event the Regional

**Commented [A4]:** Clarifying edits. The Proposed Regulations and NMFS's supporting analyses presume that a struck whale will die, therefore NMFS did not intend that approaches, strikes, or strike attempts on a whale already struck would count against the limits.

Administrator determines a WNP gray whale was struck during a hunt, the Regional Administrator will notify the Makah Indian Tribe in writing, and require that the Tribe cease hunting for the duration of the permit, unless and until the Regional Administrator determines that measures have been taken to ensure no additional WNP gray whales are struck during the duration of the permit. No further hunt permits will be issued unless and until the Regional Administrator determines that measures have been taken to prevent additional WNP gray whale strikes during the remainder of the waiver period.

(5) Images and samples. NMFS hunt observers, tribal hunt observers, and members of the Makah Indian Tribe may collect still or motion pictures as needed to document hunting and training approaches, strikes (successful and unsuccessful attempts), and landings. Persons designated by NMFS and by the Makah Indian Tribe may also collect, store, transfer, and analyze specimen samples from struck gray whales.

(6) Hunt permit terms and conditions. Each hunt permit will specify:

(i) Those terms required by 16 U.S.C. 1374(b);

(ii) The limits established under paragraph (a)(4) of this section;

(iii) The area where hunts, hunting approaches, training approaches, and training harpoon throws are allowed, which will be limited to the waters of the Makah Indian Tribe's U&A west of the Bonilla-Tatoosh Line except as provided in § 216.115(a)(7), and any site and time restrictions to protect Olympic Coast National Marine Sanctuary resources pursuant to consultation under 16 U.S.C. 1434(d) of the National Marine Sanctuary Act;

(iv) The type and timing of notice that the Makah Indian Tribe must provide to NMFS before issuing a tribal whaling permit authorizing a hunt, hunting or training approaches, or training harpoon throws;

(v) Measures to be taken by the hunt permit holder to provide for the safety of the whaling crew, the public, and others during a hunt;

(vi) That the hunt permit authorizes only the take of ENP gray whales and not the take of any other marine mammals; and

(vii) Such other provisions as the Regional Administrator deems necessary.

(7) Required determinations. Before issuing a hunt permit the Regional Administrator must make the following determinations:

(i) The authorized manner of hunting is humane;

(ii) The Makah Indian Tribe has enacted a tribal ordinance governing hunting that is consistent with these regulations;

(iii) The Makah Indian Tribe has in place certification procedures for whaling captains, riflemen, harpooners, tribal hunt observers, and safety officers and a process to ensure compliance with those procedures;

(iv) There are adequate photo-identification catalogs and processes available to allow for the identification of WNP gray whales and PCFG whales as described in § 216.114(b);

(v) The most recent PCFG population estimate is at least 192 whales and the associated minimum population estimate is at least 171 whales;

(vi) The PCFG population estimate for the first hunting season covered by the permit is projected to be at least 192 whales and the associated minimum population estimate is projected to be at least 171 whales; and

(vii) The Makah Indian Tribe has obtained any relevant incidental take authorization for other marine mammals.

(viii) Except for the initial hunt permit, before issuing a hunt permit the Regional Administrator must determine that the Makah Indian Tribe has complied with the requirements of these regulations and all prior permit terms and conditions, or if the Makah Indian Tribe has not fully complied, that it has adopted measures to ensure compliance.

(b) Gray whales landed under a hunt permit may be utilized as follows:

(1) *Edible products of ENP gray whales* – (i) Enrolled members of the Makah Indian Tribe may possess, consume, and transport edible whale products, and may share and barter such products with other enrolled members, both within and outside the Makah Indian Tribe’s reservation boundaries. Within the Tribe’s reservation boundaries, enrolled members of the Makah Indian Tribe may share edible ENP gray whale products with any person. Outside the Makah Indian Tribe’s reservation boundaries, enrolled members of the Makah Indian Tribe may share edible ENP gray whale products (A) at the tribal member’s residence with any person provided the products are shared for consumption at the tribal member’s residence, or (B) with any person attending a tribal or intertribal gathering sanctioned by the Makah Tribal Council, so long as there is not more than two pounds of such edible product per person attending the gathering.

(ii) Any person who is not an enrolled member of the Makah Indian Tribe may possess, consume, and transport edible ENP gray whale products within the Makah Indian Tribe’s reservation boundaries so long as the products are shared by an enrolled member of the Makah Indian Tribe. Outside the Tribe’s reservation boundaries, any person who is not an enrolled member of the Makah Indian Tribe may possess and consume edible gray whale products only at a tribal member’s residence, or at a tribal or intertribal gathering sanctioned by the Makah Tribal Council if such products are shared

**Commented [A5]:** Proposed modification in response to concerns raised by Makah Indian Tribe regarding appropriate ceremonial and subsistence use of landed whales. The proposed regulations were intended to balance the Tribe’s ability to utilize landed whales/whale parts with feasible and reasonable management and enforcement of authorized hunt activities. It is NMFS’s position that the proposed revisions will further these objectives.

**Commented [A6]:** See comment above.

by an enrolled member of the Makah Indian Tribe and the person consumes the products at the gathering.

(2) Nonedible products of ENP gray whales – (i) Enrolled members of the Makah Indian Tribe may possess nonedible whale products that have not been fashioned into Makah Indian handicrafts, and Makah Indian handicrafts that have not been marked and certificated per § 216.113(b)(2)(iii), may transport such products, and may share and barter such products with other enrolled members, both within and outside the Makah Indian Tribe’s reservation boundaries.

(ii) Enrolled members of the Makah Indian Tribe may share or barter Makah Indian handicrafts that have not been marked and certificated per § 216.113(b)(2)(iii) with any person within the Tribe’s reservation boundaries.

(iii) Any person may possess, transport, share, barter, offer for sale, sell, or purchase a Makah Indian handicraft in the United States, provided the handicraft is permanently marked with a distinctive marking approved by the Makah Tribal Council, and is accompanied by a certificate of authenticity issued by the Makah Tribal Council or its designee and entered in the Tribe’s official record of Makah Indian handicrafts. Such handicrafts may be delivered, carried, transported, or shipped in interstate commerce.

(iv) Within the Makah Indian Tribe’s reservation boundaries, any person who is not an enrolled member of the Makah Indian Tribe may possess and transport Makah Indian handicrafts that have not been marked and certificated per § 216.113(b)(2)(iii), provided the handicraft was shared by or bartered from an enrolled member. Within the Makah Indian Tribe’s reservation boundaries, persons not enrolled as a member of the Makah Indian Tribe may share or barter such handicrafts only with enrolled members.

(c) The Makah Indian Tribe is responsible for managing all activities of any Makah Indian tribal member carried out under this section.

**§ 216.114 Accounting and identification of gray whales.**

(a) Notifications – (1) Thirty days prior to the beginning of a hunting season specified in § 216.113(a)(2), the Regional Administrator will notify the Makah Indian Tribe in writing of the maximum number of PCFG whales, including females, that may be struck during the upcoming hunting season. The limit will take into account the abundance of PCFG whales relative to the conditions specified under § 216.113(a)(4)(vi) and the number of strikes made on PCFG whales as described under § 216.113(a)(4)(iii).

(2) By November 1 of each year, the Regional Administrator will notify the Makah Indian Tribe in writing of the proportion of gray whales in the hunt area that will be presumed to be PCFG whales and the proportion of PCFG whales that will be presumed to be females for each month of the upcoming calendar year. The presumed proportion of PCFG whales will be based on the best available evidence for the months of December and January through May, and will be 100 percent for the months of June through November. The presumed proportion of female PCFG whales will be based on the best available information for each month. These proportions will be used for purposes of accounting for PCFG whales that are not otherwise identified or accounted for as provided under subsection § 216.114(b).

(3) The Regional Administrator will notify the Makah Indian Tribe in writing when the Tribe has reached the limit of PCFG whales that may be struck in any hunting season.

(b) Identification and accounting of gray whales – (1) Even-year hunts. Based on the best available evidence, the Regional Administrator will determine in writing whether a gray whale that is struck in an even-year hunt is a WNP gray whale or a PCFG whale or neither, or

cannot be identified due to a lack of photographs or genetic data useful for making identifications. A whale affirmatively identified as a PCFG whale will be counted accordingly. A whale that cannot be identified will be presumed to be a PCFG whale in accordance with the proportions specified in § 216.114(a)(2) and will be counted accordingly. If the sex of a whale that is counted, in whole or in part, as a PCFG whale cannot be identified, the proportions specified in § 216.114(a)(2) will be applied.

(2) Odd-year hunts. Based on available evidence, the Regional Administrator will determine in writing whether a gray whale that is struck in an odd-year hunt is a WNP gray whale or cannot be identified due to a lack of photographs or genetic data useful for making identifications. A gray whale that cannot be identified as a WNP gray whale will be counted as a PCFG whale. If the sex of a whale that is counted as a PCFG whale cannot be identified, the proportions specified in § 216.114(a)(2) will be applied.

(3) Hunting and training approaches. Gray whales subjected to hunting or training approaches are presumed to be PCFG whales in accordance with the proportions specified in § 216.114(a)(2).

(4) Unauthorized strikes. If a tribal member strikes an ENP gray whale without authorization under this subpart, the strike will be counted against the total number of strikes allowed under these regulations and will be counted against the U.S. share of any applicable catch limit established by the International Whaling Commission.

**§ 216.115 Prohibited acts.**

(a) It is unlawful for the Makah Indian Tribe or any enrolled Makah Indian tribal member to:

(1) Take any gray whale except as authorized by a hunt permit issued under

§ 216.113(a) or by any other provision of part 216.

(2) Participate in a hunt while failing to carry onboard the vessel at all times a hunt permit issued by NMFS and a tribal whaling permit issued by the Makah Indian Tribe, or an electronic copy or photocopy of these permits.

(3) Make a training approach or a training harpoon throw while failing to carry onboard the training vessel at all times an electronic copy or photocopy of the hunt permit issued by NMFS and a training logbook approved by the Makah Indian Tribe for recording training approaches and training harpoon throws.

(4) Participate in a hunt as a whaling captain, rifleman, harpooner, tribal hunt observer, or safety officer, unless the individual's name is included in a tribal certification report issued under § 216.117(a)(6)(i).

(5) Violate any provision of any hunt permit issued under § 216.113(a).

(6) Hunt or make a training harpoon throw on a calf or an adult gray whale accompanying a calf.

(7) Hunt outside the geographic area identified in § 216.113(a)(6)(iii), unless in pursuit of a gray whale that has already been struck within that area.

(8) Hunt, make a hunting or training approach, or make a training harpoon throw after reaching the limits specified in the hunt permit per § 216.113(a)(4)(i) through (v).

(9) Hunt if the limit on PCFG whales or PCFG females that may be struck is less than one as a result of accounting per § 216.114(b)(1) through (3).

(10) Hunt after the Makah Indian Tribe has been notified in writing by the Regional Administrator under § 216.114(a)(3) that the limit of PCFG whales that may be struck has been reached or that the PCFG abundance is below the limits specified in § 216.113(a)(4)(vi).

(11) Hunt after a gray whale has been landed and before the Makah Indian Tribe has received notification from the Regional Administrator in accordance with § 216.114(b).

~~(12)~~ (13) Sell, offer for sale, or purchase, ~~or export~~ any gray whale products, except Makah Indian handicrafts that have been marked and certificated per § 216.113(b)(2)(iii)

~~(13)~~ (14) Export any gray whale products.

**Commented [A7]:** Clarifying edits. The Makah Tribe did not request authorization to export gray whale products.

~~(14)~~ (15) Barter edible gray whale products with any person not enrolled as a member of the Makah Indian Tribe.

~~(15)~~ (16) Share edible gray whale products outside the Makah Indian Tribe's reservation boundaries with any person not enrolled as a member of the Makah Indian Tribe, except at a tribal member's residence, or with persons attending a tribal or intertribal gathering sanctioned by the Makah Tribal Council, so long as there is not more than two pounds of edible product per person attending the gathering per § 216.113(b)(1)(i).

**Commented [A8]:** Clarifying edits for consistency with edits above regarding use of edible products.

~~(16)~~ (17) Share or barter nonedible gray whale products:

(i) Outside the Makah Indian Tribe's reservation boundaries with any person not enrolled as a Makah Indian tribal member, except Makah Indian handicrafts that are permanently marked and certificated per § 216.113(b)(2)(iii).

(ii) Within the Makah Indian Tribe's reservation boundaries with any person not enrolled as a Makah Indian tribal member except a product that has been fashioned into a Makah Indian handicraft.

~~(17)~~ (18) Make a false statement in an application for a hunt permit or in a report required under this subpart.

~~(18)~~ (19) Transfer or assign a hunt permit issued under this subpart.

~~(19)~~ (20) Fail to submit reports required by this subpart.

~~(19)~~(20) Deny persons designated by NMFS access to landed gray whales for the purpose of collecting specimen samples.

~~(20)~~(21) Fail to provide required permits and reports for inspection upon request by persons designated by NMFS.

~~(21)~~(22) Allow anyone other than enrolled Makah Indian tribal members to be part of a whaling crew or to allow anyone other than such members or tribal hunt observers to be in a training vessel engaged in hunt training.

(b) It is unlawful for any person who is not an enrolled member of the Makah Indian Tribe to:

(1) Gift, barter, purchase, sell, export, or offer to gift, barter, purchase, sell, or export edible gray whale products.

(2) Possess or transport edible gray whale products except (i) within the Makah Indian Tribe's reservation boundaries, when such products have been shared by an enrolled Makah Indian tribal member; (ii) at the residence of a tribal member, whether or not the residence is within the Tribe's reservation boundaries; and (iii) at and possessed or transported within the Makah Indian Tribe's reservation boundaries, or possessed outside the Makah Indian Tribe's reservation boundaries as part of a tribal or intertribal gathering sanctioned by the Makah Tribal Council, whether or not the gathering is within the Tribe's reservation boundaries.

(3) Purchase, sell, export, or offer to purchase or sell, or export nonedible gray whale products except Makah Indian handicrafts that are marked and certificated per § 216.113(b)(2)(iii).

~~(3)~~(4) Export any nonedible gray whale products.

~~(4)~~(5) Outside the Makah Indian Tribe's reservation boundaries, possess,

**Commented [A9]:** See comment above regarding use of edible products.

**Commented [A10]:** Clarifying edit per note above, Makah Tribe has not requested that export of products be authorized.

transport, gift, or barter nonedible gray whale products except Makah Indian handicrafts that are marked and certificated per § 216.113(b)(2)(iii).

~~(5)~~(6) Within the Makah Indian Tribe's reservation boundaries, possess, transport, gift, or barter any nonedible gray whale product other than a Makah Indian handicraft that is marked and certificated per § 216.113(b)(2)(iii), unless the product has been fashioned into a Makah Indian handicraft and was shared by or with, or bartered from or to, an enrolled member of the Makah Indian Tribe.

**§ 216.116 Applications for hunt permits.**

(a) To obtain an initial hunt permit, the Makah Indian Tribe must submit an application to the Regional Administrator, signed by an official of the Makah Tribal Council, that contains the following information and statements:

- (1) The maximum number of gray whales to be subjected to hunting or training approaches, struck, landed, and subjected to unsuccessful strike attempts;
- (2) A demonstration that the proposed method of taking is humane;
- (3) A demonstration that the proposed taking is consistent with these regulations;
- (4) A copy of the currently enacted Makah Indian tribal ordinance governing whaling by Makah Indian tribal members; and
- (5) A description of the certification process for whaling captains, riflemen, harpooners, tribal hunt observers, and safety officers, including any guidelines or manuals used by the Tribe to certify such persons.

(b) To obtain subsequent hunt permits, the Makah Indian Tribe must submit an application to the Regional Administrator, signed by an official of the Makah Tribal Council, that contains the information required in § 216.116(a) and the following information and

statements:

(1) A description of how the Makah Indian Tribe has complied with the requirements of these regulations and previously issued hunt permits;

(2) A description of circumstances associated with gray whale(s) struck and lost under the most recently issued hunt permit, a description of the measures taken to retrieve such whale(s), and a description of measures taken by the Makah Indian Tribe to minimize future incidents of struck and lost gray whales; and

(3) A description of products obtained from gray whales landed under the most recently issued hunt permit, including a description of the disposition of any gray whale products deemed unsuitable for use by Makah Indian tribal members.

(c) The Regional Administrator will notify the Makah Indian Tribe of receipt of the application and will review the application for completeness. Incomplete applications will be returned with explanation. If the Makah Indian Tribe fails to resubmit a complete application within 60 days, the application will be deemed withdrawn.

(d) After receipt of a complete application, and the preparation of any NEPA documentation that the Regional Administrator has determined to be necessary, the Regional Administrator will publish a notice of receipt in the **Federal Register** and review the application as required by 16 U.S.C. 1374.

**§ 216.117 Requirements for monitoring, reporting, and recordkeeping.**

(a) In addition to the reporting provisions described in 50 CFR 230.8, the Makah Indian Tribe will:

(1) Ensure a certified tribal hunt observer accompanies each hunt. The tribal hunt observer will record in a hunting logbook the time, date, and location (latitude and longitude,

accurate to at least the nearest second) of each hunting approach of a gray whale, each attempt to strike a gray whale, and each gray whale struck. For each gray whale struck, the tribal hunt observer will record whether the whale was landed. If not landed, the tribal hunt observer will describe the circumstances associated with the striking of the whale and estimate whether the animal suffered a wound that might be fatal. For every gray whale approached by the whaling crew, the tribal hunt observer will attempt to collect digital photographs useful for photo-identification purposes.

(2) Ensure that each vessel involved in a training approach has onboard a training logbook for recording the date, location, and number of gray whales approached and the number of training harpoon throws. Each training approach and training harpoon throw must be reported to the tribal hunt observer within 24 hours.

(3) Maintain hunting and training logbooks specified in § 216.117(a)(1) and (2) and allow persons designated by NMFS to inspect them upon request.

(4) Ensure that each whaling captain allows a NMFS hunt observer to accompany and observe any hunt.

(5) Maintain an official record of all articles of Makah Indian handicraft, including the following information for each article certified by the Makah Tribal Council or its designee: the date of the certification; the permanent distinctive mark identifying the article as a Makah Indian handicraft; a brief description of the handicraft, including artist's full name, gray whale product(s) used, and approximate size; and at least one digital photograph of the entire handicraft. A copy of the official record of Makah Indian handicrafts must be provided to NMFS personnel, including NMFS enforcement officers, upon request.

(6) Ensure that the following reports are filed electronically with the NMFS West Coast

Region's office in Seattle, Washington, by the indicated date:

(i) Tribal certification report. Thirty days prior to the beginning of a hunting season, the Makah Indian Tribe must provide NMFS with a report that includes the names of all tribal hunt observers and enrolled Makah Indian tribal members who have been certified to participate in a hunt as whaling captains, riflemen, harpooners, and safety officers. The Tribe may provide additional names during the hunting season.

(ii) Incident report. After striking a gray whale, the Makah Indian Tribe must submit an incident report within 48 hours to NMFS. A report may address multiple gray whales so long as the Tribe submits the report within 48 hours of the first gray whale being struck. For any gray whale(s) struck and lost, the report must contain the information in paragraph (a)(1) of this section and for any gray whale(s) struck and landed the report must contain the information in paragraph (a)(2) of this section:

(A) Struck and lost gray whale(s): the whaling captain's name; the tribal hunt observer's name; the date, location (latitude and longitude, accurate to at least the nearest second), time, and number of strikes and attempted strikes if any; the method(s) of strikes and attempted strikes; an estimate of the whale's total length. The report will describe the circumstances associated with the striking of the whale and estimate whether the animal suffered a wound that might be fatal. The report will include all photographs taken by a tribal hunt observer of gray whales struck and lost by the whaling crew. The report may also contain any other observations by the Makah Indian Tribe concerning the struck and lost whale(s) or circumstances of the hunt.

(B) Struck and landed gray whale(s): the whaling captain's name; the tribal hunt observer's name; the date, location (latitude and longitude, accurate to at least the nearest second), time, and number of strikes and attempted strikes if any; the method(s) of strikes and

attempted strikes; the whale's body length as measured from the point of the upper jaw to the notch between the tail flukes; an estimate of the whale's maximum girth; the extreme width of the tail flukes; the whale's sex and, if female, lactation status; the length and sex of any fetus in the landed whale; photographs of the whale(s), including the entire dorsal right side, the entire dorsal left side, the dorsal aspect of the fluke, and the ventral aspect of the fluke. All such photographs must include a ruler to convey scale and a sign specifying the Makah Indian Tribe's name, whaling captain's name, whale species, and date. The report must also describe the time to death (measured from the time of the first strike to the time of death as indicated by relaxation of the lower jaw, no flipper movement, or sinking without active movement) and the disposition of all specimen samples collected and whale products, including any whale products deemed unsuitable for use by Makah Indian tribal members. The report may also contain any other observations by the Makah Indian Tribe concerning the landed whale or circumstances of the hunt.

(iii) Hunt report. Within 30 days after the end of each hunting season the Makah Indian Tribe must submit a report to NMFS that describes the following information for each day of hunting:

(A) Struck and lost gray whale(s): the report must contain the information specified in § 216.117(a)(6)(ii)(A).

(B) Struck and landed gray whale(s): the report must contain the information specified in § 216.117(a)(6)(ii)(B).

(C) Hunting approaches and unsuccessful strike attempt(s): For each gray whale approached or subjected to an unsuccessful strike attempt(s), the report must contain: the whaling captain's name; the tribal hunt observer's name; the date, location (latitude and longitude,

accurate to at least the nearest second), time, and number of approaches and unsuccessful strike attempts; the method of attempted strikes; an estimate of the total length of any whale subjected to an unsuccessful strike attempt; and all photographs taken by a tribal hunt observer of gray whales approached by the whaling crew. The report may also contain any other observations by the Makah Indian Tribe concerning the whale(s) approached or subjected to unsuccessful strike attempts or circumstances of the hunt.

(iv) Annual approach report. By January 15 of each year, the Makah Indian Tribe must submit a report to NMFS containing the dates, location, and number of gray whales subjected to hunting approaches, training approaches, and training harpoon throws during the previous calendar year. The report may also contain any other observations by the Makah Indian Tribe concerning the approached whales or circumstances of the approaches and training harpoon throws.

(v) Annual handicraft report. By April 1 of each year, the Makah Indian Tribe must submit a report to NMFS which describes all Makah Indian handicrafts certified by the Makah Tribal Council or its designee during the previous calendar year. The report must contain the following information for each handicraft certified: the date of the certification; the permanent distinctive mark identifying the article as a Makah Indian handicraft; a brief description of the handicraft, including artist's full name, gray whale product(s) used, and approximate size; and at least one digital photograph of the entire handicraft.

(vi) The hunt report, annual approach report, and annual handicraft report collected pursuant to this section will be maintained and made available for public review in the NMFS West Coast Region's office in Seattle, Washington.

(b) Upon receiving an incident report specified in § 216.117(a)(6)(ii)

documenting that 8 gray whales have been struck, the Regional Administrator will evaluate:

(1) The photo-identification and notification requirements described in § 216.113(a)(7)(iv) and § 216.114. The evaluation will address the status of gray whale photo-identification catalogs used to manage gray whale hunts authorized under this subpart, the survey efforts employed to keep those catalogs updated, the level of certainty associated with identifying cataloged WNP gray whales and PCFG whales, the role of ancillary information such as genetic data during catalog review, and any other elements deemed appropriate by the Regional Administrator. The evaluation will be made available to the public no more than 120 days after receiving the subject incident report.

(2) The humaneness of the authorized manner of hunting as specified in § 216.113(a)(7)(i). To evaluate humaneness, NMFS will convene a team composed of a veterinarian, a marine mammal biologist, and all tribal hunt observers and NMFS hunt observers who were witness to the strikes described in the incident reports required by this section. The team's evaluation will address the effectiveness of the hunting methods used by the Makah Indian Tribe, the availability and practicability of other such methods, and the time to death of hunted whales, and any other matters deemed appropriate by the Regional Administrator and the team. The team's evaluation will be made available to the public no more than 120 days after receiving the subject incident report.

(c) The NMFS West Coast Region's Seattle office is located at 7600 Sand Point Way NE, Seattle, WA 98115-0070.

**§ 216.118 Expiration and amendment.**

(a) These regulations will expire 10 years after the effective date of the initial hunt permit

specified under § 216.113(a)(1), unless extended.

(b) These regulations may be periodically reviewed and modified as provided in 16 U.S.C. 1373(e).

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