

ADMINISTRATIVE LAW JUDGE

August 6, 2019

THE HONORABLE GEORGE J. JORDAN

Docket No. 19-NMFS-0001

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

Rebuttal to the Declaration of Chris Yates , NMFS

Submitted by Margaret Owens

I appreciate this opportunity to respectfully differ with Mr. Yates on a few things. I will streamline the following comments as much as possible.

Yates , pg.8 : Overview of Management Considerations

“ ...the ENP is considered healthy.”

PCPW Response:

- (1) In light of the current UME, it seems wise to admit that there may be great unknowns regarding the future of the ENP gray whale stock, and whether or not it will remain “healthy” in the face of environmental changes in the Arctic feeding areas. Warmer water is not a good thing for the cold-water / ice-based food web or the many species that depend on that web. Models predict further warming, with unknown but likely negative impacts on many species. It is not comforting to say that the UMEs are a result of the ENP gray whales having reached their carrying capacity. The diminishing base-line for the environment's ability to support even a fraction of pre-whaling populations may well continue diminishing.
- (2) We have now experienced two UMEs in 20 years. So we know there will be a significant population drop, and likely low birth rates for the near future. What we do not know is what exactly caused either UME, or when the next one will occur. If there is no improvement in the feeding areas this feeding season, we could see another bad spring in 2020. As I write this , the highest temperatures ever recorded in Alaska are being reported.

- (3) A healthy ENP stock is not a given, even in the short term. The gray whale has been called a “canary in the coal mine” animal. We have a lot of dead canaries littering the beaches of the entire migratory corridor, with the greatest number sunk at sea and never to be seen or accurately counted.
- (4) Depending on the final estimated number of whales lost, the total could exceed the PBR without even counting the Chukotka quota. If there are signs of continued or more frequent UMEs, the next logical step needs to be a re-listing of the ENP gray whales under the Endangered Species Act, not increasing the human caused mortality .

Yates , pg.10 (23) : “The 2016 ENP gray whale SAR estimates PCFG abundance at 209, an informational PBR of 3.1, and human caused mortality and serious injury as 0.25 animals per year.”

PCPW Response:

- (5) It is hard to reconcile the mortality and serious injury number of 0.25 PCFG whales per year from NMFS' source (2016), with Scordino et al (2014). Scordino reports a minimum annual rate of serious injury and mortality in U.S. and Canada as 1.4-2.6 PCFG gray whales per year between 2008 and 2012. What explains the lower number quoted in the Yates Declaration? Scordino's upper range of 2.6 per year is about equal to the 3.1 PBR. Canadian mortalities and injuries to PCFG gray whales must be included in management decisions in the U.S.

Yates , pg.11 (27)-(32): **Summary of Proposed Management Measures**

PCPW Response:

- (6) ***Strikes, approaches, training harpoon throws, unsuccessful strike attempts, struck, struck and lost, landed.*** This section describes a hell-scape of allowable abuse. Fright, harm, and death to whales , which in any other context would be descriptions of heinous crimes. Every other year hunts to “protect” the small populations of WNP gray whales and the PCFG gray whales are proposed. But ***every year will be a year of criminal-level abuse visited on the PCFG whales of the Makah U&A. The most faithful whales to our area will be the most punished.*** Every year. During even year hunts, PCFG mothers and their very young calves will be sticking near shore to let the famished mothers eat and to keep the calves in shallow water to rest and nurse. Orcas kill many gray whale calves every year, but have a more difficult time attacking in shallow water. These sensitive and vulnerable gray whales will , however, also find themselves in the middle of deadly human attacks.
- (7) In odd year hunts, the faithful PCFG whales will be in the hunt zone feeding and packing

on blubber for the winter. Mothers with growing calves will be showing those calves where to eat, and later in summer weaning the calves, hopefully with the knowledge and experience they need to grow strong and be successful PCFG whales. And they will also be in the middle of the frightening action : gray whales being chased down by “hunters” in groups of boats . ***When do the local PCFG whales ever catch a break? Every year will be a horrible year for our local whales.*** As we commented to the 2008 DEIS, it is mathematically likely , over time, that every Makah U&A whale will be approached by Makah hunt boats on multiple occasions and repeatedly subjected to harpoon attempts and worse. Our former joy at seeing the neighborhood whales will be tainted always with the fear and sadness that they could “be next”.

Yates, (13) pg.12 :

(8) **“Our proposed waiver is limited to a 10 year period...limiting the waiver period provides an opportunity for adaptive management and to ensure that ceremonial and subsistence hunting by the Tribe does not result in unanticipated adverse effects.”**

(9) **PCPW response:** NMFS Ex. 1-10, pg 22, provides a table of what NMFS does **not** consider to be “adverse effects”: “Likely and maximum mortality of PCFG whales that might occur under proposed regulations”. This table reveals a maximum PCFG mortality of 25 animals in 10 years. I guess that 25 whales out of 243 PCFG sounds reasonable to NMFS. What about 25 out of 100? Or likely, 25 out of a much lower number of PCFG whales who are most likely to be in the “hunt area”.

(10) **PCPW considers that number of removals from, mainly, the localized PCFG whales to be absolutely unsustainable.** Twenty five, is just about *every* Makah U&A gray whale. (NMFS uses the number (33) MU&A whales in the 2015 DEIS). And when 8 whales killed can be females, we are looking at the possibility of the end of MU&A gray whale viability within 10 years. It will then be way too late to “adapt” or “ensure” anything for our local whales. “Other whales” will have no idea where or when the patchy, seasonal sustenance can be found in the Strait of Juan de Fuca or the outer coast. They will not magically “fill in “ for whales who were shown by their mothers where to eat.

Yates, (29) :

(11) Explanation quoted by Yates, about the northbound migration during the even-year hunt: **“...when nearly the entire ENP stock...transits the migration corridor off the Washington coast. Most of the approximately 243 PCFG whales are mixed in with the migrating herd (27,000) at this time, along with an unknown number of WNP whales.” (Weller Dec.)**

PCPW Response:

(12) This statement creates a flawed mental image, similar to imagining the odds of finding a

needle in a haystack. The reality is found in Yates Ex. 1-9, Appendix 5 : “Estimating gray whale travel times in the vicinity of the Makah hunt” contains the following information:

(13) - The north-bound migratory corridor is within 23 miles (37 km.) of shore, with an average distance of **5 to 7 miles (8-11 km.) off shore.**

(14) - “In the Draft EIS (2015) we note that most Makah hunts would occur **within 5 miles (8km.) of shore.**”

(15) And the PCFG whales will not be cutting north through deeper off-shore water with the large group of migrating ENP gray whales headed for the Arctic by a more direct route. PCFG whales will be heading into their home feeding areas , very close to shore. Within half a mile of shore is where all previous spring hunts have found their whales. So the likelihood of striking a PCFG whale at their feeding grounds in the spring will never be a “needle in the haystack” situation. It will always be quite likely. And in the summer it will be assured. **A hunt to honestly target ENP migrating whales will logically need to be taken at least 5 miles off shore.**

(16) As regards the WNP whales in the hunt zone, there must be a reason why so many photos ID'ed as WNP whales have been spotted in photos of PCFG whales at their feeding areas. Maybe it is because those WNP whales, whether with calves or not, need sustenance before their long journey west. They also should be spared the harassment of hunt activities in the near shore in the spring. In response to PCPW's similar comments [on the harassment to mothers and calves] to the 2008 DEIS, NMFS replied: **“In response to this and other comments, the new DEIS includes an alternative that would require any hunt to occur at least 5 miles from shore.” Alternative 3, Offshore Hunt , NMFS Ex.1-6, pg.405**

(17) **PCPW does not endorse the killing of any whales , and only endorsed Alt.1, No-action.** But our members understand that there are **gradations of harm** that will be done to gray whales by the different action alternatives proposed for a Makah hunt. An off shore hunt would shield the mothers and calves of the PCFG, the WNP, and the migrating ENP gray whales from great distress and harm at their near shore feeding areas. These mothers and calves begin arriving in the hunt area as early as March. The mothers must produce large quantities of milk during the winter, spring and summer, and, with their calves, are the group most sensitive to disturbance. It is inhumane to ignore this reality. **The Alt. 3 off shore hunt is the only action alternative that should ever be on the table.**

Yates, pg.816 (37)

(18) **“As an additional protection for PCFG whales, the proposed regulations include “low abundance triggers”,** which would halt hunting if the PCFG estimate were to drop below 192 whales, or the group's minimum abundance estimate were to drop below 171 whales.”

PCPW Response:

(18) **“ Additional protection...?” It is little help to the local whales to have “low abundance triggers” based on the entire PCFG population.** There are no safeguards to ensure that the small number of Makah U&A whales are not experiencing declines or extirpation due to Makah takes . We will never know until it is too late. There is also no mention of the dozen or so gray whales known as the **“Puget Sounders”**. These gray whales come through the hunt area every year from March to mid-spring , and like the “swallows to Capistrano”, enter the Strait of Juan de Fuca and head into the Puget Sound end of the Salish Sea to feast on shrimp. These whales have been documented and ID'ed for decades , and are watched for and loved by the many people of the San Juan Islands, and Seattle area. They have been named for years, and were the basis of Cascadia Research's adoption program in the mid-1990's. Whales such as “Patch”, “Little Patch”, “Earhart” and her best friend “Shackleton” (who often arrive together and feed together) , “Lucyfer” and others. Whale watching operators count on taking people to see these grays in the spring. **Does NMFS care if these whales are taken out in Makah hunts? There will be a huge public reaction if any of these whales become food and handicrafts.** They are not PCFG whales, but they are very important ENP gray whales who will no doubt have members taken at some point. They must have a very dynamic impact on their feeding environments in Puget Sound. Their feeding pits can be seen from satellite imagery in river mouth mud . **The “Sounders” are another small group who would likely be protected by an off-shore hunt.**

Yates pg. 22 (53):

(19) **“ The NMFS WCR carefully considered the effects of the proposed waiver on the role of the ENP gray whale stock in its ecosystem and on the health and stability of the marine ecosystem.** We took the precautionary approach of evaluating the impact of the proposed waiver on the smallest of the recognized ecosystems that the ENP stock inhabits, the north California Current ecosystem and also considered impacts on the environment of the northern Washington coast...(we found) **no discernible effect on the health or stability of the marine ecosystem or on ENP function within the marine ecosystem at any scale.”**

PCPW Response :

(20) **Just as NMFS now ignores the Makah U&A whales, they also ignore a major ecosystem just as vital to many PCFG gray whales as the outer coast. Right around the corner from the north Washington coast is the entrance to a large series of waterways known collectively as the Salish Sea . The Salish Sea Ecosystem is one of the world's largest and biologically rich inland seas. It is also home and host to many marine mammal species , including humpback whales, minke whales, transient orcas , resident orcas, seals, sea lions, elephant seals, dolphins, porpoise , sea otters, and gray whales of the local PCFG. (See Exhibit #6 – map of Salish Sea)**

(21) The Salish Sea includes all of the connected waters of Puget Sound, the San Juan Islands, Vancouver B.C. to the north, Olympia to the south, and west past Neah Bay to the entrance to the Strait of Juan de Fuca. Across the Strait in Canadian waters are long miles of the shallow shores of South Vancouver Island. All of these locations of the Salish Sea have experienced the occasional presence of gray whales, but some areas get more use than others.

(22) The Northwestern Washington Biologically Important Area (BIA), is designated as one of five major feeding areas for PCFG gray whales in U.S. waters. The BIA stretches up the north Washington coast, adjacent to Olympic National Park, and within the Olympic Coast National Marine Sanctuary and the Makah Tribe's coastal U&A. This strategic feeding area is also known as the "hunt area". The BIA doesn't stop at Cape Flattery, however, it wraps right around the Cape, into the Strait and keeps on going into the Salish Sea, all the way to Clallam Bay. There, the heavily used contiguous feeding area breaks into small pockets of feeding sites that continue east along the south side of the Strait, all the way to Discovery Bay. There has been scanty scientific survey effort in this long stretch of the Strait, because the small number of local PCFG whales who know where to forage in the Salish Sea are spread out over a large area. **(See Exhibit # 1 – Map of Strait of Juan de Fuca to Port Angeles)**

(23) It is the local residents (human), living on the bluffs and near the beaches, who are aware of the whales' presence in, and patterns of use of, these smaller areas stretching east. Some feeding sites are visible from public places like Clallam County parks, and highway pullouts along the Strait. Those viewing areas are highlighted on The Whale Trail, an organized series of interpretive signs alerting people to places with good odds of seeing orcas, gray whales, and other marine mammals around the Salish Sea. Based on local knowledge and years of observations, signs have been installed along the Strait at known gray whale "hang outs". These land-based viewing spots are popular wayside stops for tourists and locals alike. No boat needed. No bothering the whales. Just the thrill of watching them exhaling and diving and being at ease in their environment. Seeing a whale from shore is one of the most exciting things a visitor or long-time resident of the Olympic Peninsula can experience. **(See Exhibit # 3- The Whale Trail)**

(24) Across the Strait, facing the U.S., is the south shore of Vancouver Island. There are many important feeding areas for the local PCFG on that side as well. There is much movement between the Strait of Juan de Fuca on the U.S. side, the Washington outer coast, and south Vancouver Island, Canada. These are short commutes for gray whales, who are dependent on an assortment of prey "blooms" to get the caloric intake they need. There are 'old stand by' locations to suction feed from the mud bottoms, and there are seasonal delicacies, such as those cataloged in 1998 by Jim Darling: " A generalized progression of gray whale prey in Clayoquot Sound from spring to fall was seen (herring eggs, mobile amphipods, mysids, porcidid crab larvae, and benthic amphipods), as each presumably became the optimum species to "harvest" ". (Gray Whale Habitat Utilization and Prey Species Off Vancouver Island, B.C.' Darling, Keogh,Steeves 1998) A similar line-up of edibles must loosely structure the movements of PCFG whales in the local areas of the coast and Strait. It is not

known how gray whales accurately arrive at widely spaced , seasonal feeding opportunities.

(25) The great waterway known as the Salish Sea is an ecosystem quite apart from the northern California Current ecosystem , but equally important to the local PCFGs. The gray whales of the local PCFG who utilize the Salish Sea are one and the same as the local PCFG whales who are most faithful to the Makah coastal hunt area. Their importance to the Salish Sea Ecosystem is becoming an increasing topic of interest. As whale populations increase world wide, their benefits to the environment are being quantified and described . In “The Unseen Significance of Whales”, National Geographic, J.Perelman, writes:

(26) “Whales are key players in global cycling of environmental resources like carbon and nutrients, which makes them even more significant in the face of global warming and climate change...”*Fecal plumes”* bring fertilizers to the water column and spread nutrients like iron and nitrogen through various marine layers, which stimulate growth of plankton and other microorganisms that are the foundation of all oceanic food chains.”

(27) Joe Roman, in “Whales as Ecosystem Engineers”writes,“The continued recovery of the great whales may help to buffer marine ecosystems from destabilizing stresses. As long-lived species they enhance the predictability and stability of marine ecosystems.

(28) A report specific to the PCFG gray whales of the Salish Sea, was delivered to the Salish Sea Ecosystem Conference in April, 2016 by John Calambokidis. The title was, **“New Research reveals more complex role of gray whales in the Pacific Northwest including the Salish Sea.”** ***“ The PCFG represents about 150 gray whales that feed in the spring through fall from N. California to S.E. Alaska. Recent research has revealed a more complex and extensive use of the Salish Sea and surrounding waters.”*** This is the only quote available from that conference, but hopefully there will be more information coming.

(29) Another local study,from 2008, by Eric M. Anderson and James Lovvorn is titled “Gray Whales May Increase Feeding Opportunities for Avian Benthivores”. This study describes a symbiotic relationship between gray whales and the endangered surf scoters (sea ducks) of the Salish Sea :

“ Given the large and protracted impacts of gray whales on benthic communities, our observations suggest that whale feeding may have increasing influence on the foraging patterns and trophic relations of a range of bottom feeding vertebrates.” Dr. Anderson found that gray whales can provide particularly important foraging opportunities for scoters during the spring when other foods may have declined , and the birds must prepare for migration and reproduction.

(30) **It is clear that NMFS neglected to analyze the importance of the local PCFG whales to the Salish Sea Ecosystem.** But as NMFS ignores the gray whales' impact on this ecosystem, non governmental scientists seem to be giving special attention to the local PCFG whales' roles as real **“movers and shakers”-- the only baleen whales of the near shore of the Salish Sea. The loss of even a few of these local PCFGs will certainly negatively impact this delicate inland sea ecosystem.**

Yates pg.14 (33) :

(31) “During odd-year (summer/fall) hunts...proposed regulations would impose a cumulative limit of 16 strikes of PCFG whales over the 10 year waiver period, of which no more than 8 strikes could be of PCFG females. ***The strike limit on females is a precautionary measure based on evidence that PCFG whales may be recruited through maternally directed site fidelity and that females constitute around 50 percent of the PCFG.***”

(32) PCPW Response:

This passage is particularly problematic. **Giving the female gray whales no more intrinsic value to the PCFG clan than the males is a dangerously cavalier attitude towards the future viability of the Makah U&A / local PCFG gray whales. In a small population, females simply are more valuable.** The adult males certainly have important roles in the group success, but only females can reproduce. How are the females of the PCFG only given a 50 % valuation, when they are at least twice as important as the males. NMFS is clearly in error on this, and must be catering not to “the best available science”, but to the maximum quota possible of PCFG whales for the Makah. To say that this proposal is “precautionary” is a clear misuse of the word. And to further state that the “precaution” is in place because the PCFG “*may*” gain members when females give birth to calves, **disrespects the years of work it has taken to produce the long sighting histories of PCFG mothers and calves, laboriously documented for over 20 years by Canadian and American scientists.** Whether or not unrelated gray whales sometimes join feeding groups for lengths of time, **it is the mother-calf site-fidelity factor that builds a genetically distinct group that always passes localized knowledge to the next generations.**

Yates pg 14 (34)

(33) “For purposes of the PCFG strike limits, we would account for any unidentified whales using specific presumptions. The estimated proportion of male to female PCFG whales would be factored into the accounting if the animal's sex were unknown.”

PCPW Response:

(34) This statement reiterates NMFS's undervaluation of the females of the PCFG. A 50-50 value on the sexes is not “best available science” when the females are the only ones reproducing and passing the culture of Pacific Northwest survival to another generation of PCFG whales.

(35) PCPW is dismayed at many aspects of the Chris Yates Declaration. The assessment

of the ENP population as “healthy” needs review in light of the ongoing UME . There must also be an accounting of whether or not this UME has taken a toll on the PCFG population. We do not know what the immediate future holds for the ENP gray whales. One cannot even make reliable predictions out 10 years from now. Re-listing is a possibility if the causes of this UME are not determined, or if the starvation continues.

(36) The idea that the odd year / even year hunt scheme is “protective” of any of the PCFG is absolutely not true. Every year will likely be deadly for one or more PCFG whales. Perhaps 5 every two years. There will be no year without fear, harassment , and suffering inflicted on our local whales. This is not “protective” of anything but the near-shore hunt plan.

(37) For some reason , NMFS declined or neglected to include the Salish Sea in their analysis of ecosystems impacted by PCFG whales. Even the loss of a few whales could have a large impact on the near shore habitats of many small but important organisms that add vital nutritional elements to the overall food web in the Salish Sea. NMFS is also no doubt incorrect and short-sighted in “finding” that the gray whales have no effect on the coastal ecosystem. There are always effects when large whales are feeding and recycling nutrients into the water column, even in the context of a large dynamic system.

(38) The fact that NMFS assigns female PCFG whales equivalent worth to male PCFG whales is shocking but not surprising. Giving fair valuation, meaning extra protection to females , would be a “taking” from the Tribe's potential quota numbers. The resident whales have always been the “inconvenient” whales in this never-ending story. The “co-managers”, NMFS and the Tribe, both denied the existence of “resident” whales in the late 1990's. NMFS knew better and the Makah should have known better. If their early hunt plans had not been challenged and stopped by the court, they would have gotten their wish : there would no longer be any of the local whales left. Those up-close whales who are visible from almost anywhere along the Strait , known and loved by the local people and enjoyed by visitors from around the world, would be gone. With the local whales quickly eliminated, the DNA work never would have been done, and we never would have understood the special history and worth of the PCFG gray whales : the only ENP gray whales who know the secrets to surviving south of the Arctic feeding grounds. The holders of knowledge passed mother to offspring for uncountable generations. **The mothers are the key. They need far better than a 50-50 deal.**

(39) A general comment in response to all the scientists' declarations is this: It is impossible for PCPW to give meaningful or informed rebuttals to the many

mathematical machinations involved in NMFS policy decisions. There is an inherent **lack of transparency in the use of computer models, predictions, algorithms, formulas, etc.** These esoteric methodologies are certainly comprehensible to those well versed in whale population math and statistics, but are impossible for an ordinary person to judge. Are there presumptions and guesses mixed in? The government “owns” the population numbers. With NMFS policy preferences at stake, are results safe from motivated manipulation and biases? **Doubtful.**

(40) This is the hidden side of decision -making. But one can get a sense that since ENP and PCFG population *increases* serve government and Tribal purposes, it is will never be surprising that the numbers *will always go up*. And an ordinary person *can* recognize that these pages of inscrutable justifications are over-complicated for a reason : **NMFS is still trying to ram a square peg into a round hole.** With barely a thought, and a hasty Memorandum of Understanding, NMFS green-lighted a pursuit of whale killing in the mid-nineties. It was a bad idea then and it is a bad idea now. All the math in the world cannot legitimize it. PCPW once commented to NMFS that they were turning science and the law into pretzels to accommodate a near shore hunt. They now turn the pretzels inside out.

Yates Declaration, pg. 20, (47)-(54): Compliance with MMPA Requirements- Waiver

(41) “In issuing our proposed waiver, the NMFS WCR gave due regard to the distribution, abundance, breeding habits, and times and lines of migratory movements of the ENP gray whales stock.”

Abundance: approximately 26,960 animals. “We conclude that this level of removals would not have a discernible effect on the ENP stock's abundance.”

PCPW Response:

(42) We do not argue that the planned “removals” will effect the ENP's current viability as a stock. But we do worry about what the future holds for this group. With two UMEs in 20 years, we are in uncharted waters. If this current feeding season is as bad as the last , will we see more starving whales in spring 2020? Has NMFS or the IWC run their computer models on ENP UMEs that occur every 10 years or every 5 years? We know that birth rates decline during these events. Temperatures in the arctic are at extreme highs this year. Warmed northern waters continue the unprecedented sea-ice melt .

(42) It is not sufficient for NMFS to declare that the UME of 2019 is due to “ENP exceeding carrying capacity”. We need to know which arctic feeding areas are being negatively effected right now. Can the feeding grounds only improve if temperatures drop and ice re-forms? Are some areas still producing sufficient bio-masses of prey to support the current population ? Are good feeding areas being under-utilized by the ENP? Are the prey species available to the gray whales changing due to changing conditions? If so, are

the “replacement prey” of equal caloric content?

(43) **At what lowered ENP population estimate will NMFS and the IWC agree that there is a problem? The ENP cannot be trapped in a calculation that always labels them as being within their newly lowered carrying capacity and OSP. What population estimate would trigger NMFS' concern?**

Yates declaration, (54) :

“We do not expect non-lethal hunt activities, including unsuccessful strike attempts, training harpoon throws, and hunting and training approaches, to have lasting effects on the affected whales' health or behaviors.”

(44) **PCPW Response :**

PCPW 's response begins with: **NMFS does not have a history of credibility that would give us confidence in what they “expect” or “do not expect”to happen.**

300,000,000 U.S. citizens are prohibited by law from inflicting the above mentioned harms on whales. The implication of the harsh legal penalties is that those “non-lethal” activities *will* do harm. **Whales subjected to such harassment will be likely to react by abandoning feeding, or sleeping, or resting, or socializing, or nursing their calves, or whatever else they were doing.** They will expend energy ,and experience stress , in a startle response that moves them out of the area of harassment. This will no doubt result in their being chased , with harassment continuing until they remove themselves completely from the area. We know that stress hormones are released into their systems, as stress can ,and has been, measured in the earwax of the large whales :

(45) “This study shows that anthropogenic stressors result in physiological response in large whales. These chronic stressors may impact life history events such as reproductive parameters.” Stephen Trumble, Baylor Univ., *“Whale Stress Levels Influenced by Human Activity, Earwax Study Suggests”.*

(46) This study mapped stress levels from 1870-2016. Stress levels rose between 1930 – 1945 , reflecting the increased stress of WWII activities in the oceans. During the peak of commercial whaling in the 1960's, when 150,000 whales were hunted and killed, the cortisol in earwax was at its highest level. The researchers also believe that rising sea temperatures have led to the rising stress indicators in their earwax. **Whales are large animals ,encased in blubber, but they are also sensitive to their environments and experience stress when conditions change in their habitats.**

(47) **PCPW believes that there *will* be lasting effects on the affected whales' health and behaviors. And we strongly believe that no whales should be subjected to this criminal level of abuse for 10 years in order to find out.** PCFW whales are tied to their feeding areas

by generations of cultural transmission of feeding methods. It is not easy for them to abandon the feeding areas of their ancestors. They will return. It is unfair to expect them to do otherwise. **It is simply unconscionable to stalk them at their Biologically Important Areas of feeding , then assume they are not bothered by the harassment/killings , if they return.** That is a heartless “science”, and undermines any declarations of “caring” by NMFS or the Tribe. It would be like “hunting” elephants at their watering hole, then claiming the animals must not “mind”, if elephants continued to return to drink at that watering hole. The great majority of Americans would consider that “unfair”, if not despicable.

Yates Declaration:

(48) “We conclude that the PCFG strike limits combined with PCFG low-abundance triggers and limits on unsuccessful strike attempts, and PCFG approaches, will ensure that the proposed waiver does not cause PCFG abundance to decline...and therefore the proposed waiver will not affect the ENP stock's distribution within the PCFG range...The proposed regulations provide protections [the low abundance triggers] in case PCFG abundance declines for any reason.”

PCPW Response:

(49) **How accurately and how quickly will PCFG numbers be known by NMFS any given year? PCPW proposes an immediate test of this capability , with the question to be answered: were any PCFG whales lost due to the 2019 UME?** This is a question that would have to be answered quickly, if there was to be a hunt in 2020. That is not likely timing , but would be a good test of the system that NMFS puts such faith in and wants the public to take on faith. Many whales died in the PCFG range during May and June, 2019. Were they PCFG whales? Will NMFS commit to this “test” and make this accounting of the PCFG numbers ,post UME, a transparent public process?

(50) Obviously PCFG whales will be killed if a waiver is approved. We are asked to believe that it will not be “too many”. NMFS has calculated allowable strikes(kills), and “low-abundance triggers” , based on the highest ever PCFG count. Do we believe that this PCFG count will only *ever* go up? Yes we do, as ever higher PCFG counts, equals ever higher allowable takes of the PCFG by the Tribe. But the biggest problem rests with the answer to this question : **Will NMFS ever comply with the directives of the judges of the *Anderson v Evans* case ?** We will allow the judges to speak for themselves:

Regarding the Makah U&A whales :

(51) - **“ The whales' fidelity to specific locations could subject them to differential harvests and potential depletions if there are unregulated *local takes*.” (emphasis added by judge, *Anderson v Evans*)**

There are still unregulated local takes in the proposed waiver request. (PCPW)

(52) - **“The government estimates that a conservative allowable take from a group of 222-269 whales is 2.5 per year...Thus with a smaller group...a take of 2.5 per year would exceed the allowable PBR established under MMPA standards.” (Anderson v Evans)**

NMFS has still not established a lower allowable take limit for the “smaller group”, the Makah U&A whales. The local whales are still lumped in with the PCFG whales at an allowable 2.5 per year, thereby still allowing the exceeding of the “the allowable PBR established under MMPA standards” , as noted by the court. (PCPW)

Again, from the judges:

(53) - **“There is no disagreement in this case concerning the EA's conclusion that the impact of the Makah Tribe's hunt on the overall California gray whale population will not be significant. What is in hot dispute is the possible impact on the whale population in the local area where the tribe wants to hunt. In our view, the answer to this question- of greatly increased importance with the revision of the Makah Management Plan so as expressly to allow hunting of local nonmigrating animals- is sufficiently uncertain and controversial to require the full EIS protocol.**

(54) - **Our reasoning in this regard is as follows: the government agrees that a relatively small group of whales comes into the area of the tribe's hunt each summer, and that about sixty percent of them are returning whales (although, again, not necessarily whales returning annually). Even if the eastern Pacific gray whales overall or the smaller PCFA group of whales 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. Thus, if there are substantial questions about the impact on the number of whales who frequent the Strait of Juan de Fuca and the northern Washington Coast, an EIS must be prepared.**

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

PCPW Comments to these statements by the 9th Circuit in Anderson v Evans:

(56) - *The current waiver request does **still** allow hunting of “local nonmigrating animals”. Three local whales can be taken in the spring, and in the summer hunts, the two possible strikes **must be local whales!** So the “possible impact on the whale population in the local area” is **still** just as uncertain and controversial”. Maybe more so. (47)*

- *There are **still** just as many “substantial questions” about the “ impact on the number of whales who frequent the Strait of Juan de Fuca and the northern Washington Coast”.*
(48)

- *And the crucial question is **still** whether “the hunting, striking, and taking of whales from this smaller group could significantly affect the environment in the local area.” (49)*

(57) Is it any wonder that we 'adverse' commenters become frustrated with NMFS ? When the 9th Circuit Court's judges deemed NMFS' decisions to have been “*arbitrary, capricious, and otherwise outside of the law*”, we assumed that there would be significant thought to dis-allowing a hunt. Not even close. But neither have they come close to abiding by the judges' directions. **The waiver proposal , as it stands, is an insult to the Court and to those of us who have worked so long on protecting, in particular, the local whales.**

Yates Declaration , (52):

(58) “...we expect that hunting under the proposed waiver, ENP gray whale mating would overlap only during December – January during the ENP southbound migration. ..we expect that few, if any, hunt-related activities would occur in December and January due to inclement weather...Adverse conditions would keep most hunts and training exercises close to shore.”

PCPW Response:

(59) With all the disclaimers in this statement concerning the viability of a December-January hunt, why is it even on the table? This is actually terrible timing for any gray whale harassment . Of course the hunt will be “close to shore”. All hunts will be “close to shore”. So what gray whales will be “close to shore” in December and January?

(60) It won't be the main, migrating herd of ENP grays coming south from the Arctic. They will be well off-shore, cutting a straight course south. There will be almost full-term pregnant females among them, as well as whales mating on the southbound journey.

(61) The only gray whales still near shore would be PCFG whales, either still feeding, and not going south, or still feeding but hadn't left yet, or socializing / mating PCFG whales who may or may not leave Washington waters and go further south in December or January. PCFG whales can be somewhere in the Salish Sea in any month of the year. We know that all PCFG do not go south every year, and they don't have to go south to mate.

(62) Gray whale researcher Carrie Newell, has spent decades studying the PCFG whales of Depoe Bay, Oregon. Although some of “her” whales are sighted in Washington State quite often, many of “her” whales have not been ID'ed in the Makah U&A. She takes people on research trips in her Zodiac, out of Depoe Bay. Her photos are up close and personal, as she and her dog interact with the whales. Her stories are just the kind of anecdotes one needs to begin to understand what it is like to “know” the playful, curious, friendly gray whales. Her names for the whales reflect the marks that life in the ocean has left on each whale, no two alike. Prop scars, rope cuts, orca teeth rakes tell the stories of dangers facing PCFG gray whales. And one old mother gray whale named Scarback, whose gigantic healed over gouge in her back shows that she survived an exploding harpoon. It entered on one side, exploded, and exited. She is friendly and a great mother. And it seems evident that she **did** abandon the northern feeding / hunting area.

(63) Carrie Newell has also documented “courting” behaviors among those PCFG whales that she knows so well. She describes this behavior in the chapter called “Courting Whales”, in her book, A Guide to Summer Resident Gray Whales along the Oregon Coast (2013). Courting usually occurs all through September. As gray whales can only get pregnant in December and January, Carrie describes all the behaviors as “practice mating”. Enthusiastic practicing. So there may be no internal taboo on PCFG females mating within the PCFG group.

(64) Carrie's observations, as well as similar anecdotal observations, lend weight to the likelihood that there is more, not less, mating within the PCFG than is known. They are known to group together in the fall to feed in Oregon and California. They are known to at times migrate in groups. Groups are known to have traveled to the same lagoon together. We know very little about the mating habits of the PCFG gray whales.

(65) PCPW couldn't believe more strongly that gray whales should be left in peace in December and January. Those are the only months females can become pregnant. And the only whales “available” to hunt at that time in the near shore will be PCFG whales eating, mating, or maybe full term pregnant and ready to head south. I would like to hear the “best available science” that recommends hunting season overlap on mating season...?

Yates Declaration, (53):

(66) “The NMFS WCR carefully considered the effects of the proposed waiver on the role of the ENP gray whale stock in its ecosystem and on the health and stability of the marine ecosystem. There will be no effect on the California Current ecosystem or on the northern Washington coast.”

PCPW Response :

(67) We have already mentioned the **Salish Sea Ecosystem**, ignored by NMFS in this waiver proposal. This mighty waterway is integral to the successful lives of the local PCFG whales. And in return, the local gray whales enhance life in the Salish Sea. NMFS and the Tribe have little interest in the PCFG use of the Strait of Juan de Fuca and beyond. It was a different story in 2001, when NMFS agreed to the ultimate Tribal hunt plan : no time or area restrictions. That meant any gray whale, 4-5 per year, any day of the year, many miles into the Strait to Crescent Bay, a feeding area (and County park) frequented by PCFG whales and lots of people. **Does NMFS still believe that this was a good plan?** When the public safety issues pushed any hunt out of the Strait, gone was the interest. Even Jon Scordino admits that he only surveys for gray whales east in the Strait to Sekiu. I don't think that NMFS surveys the middle and eastern Strait either. The local whales are utilizing many miles of coastline on the American and Canadian sides of the Strait, and are time consuming to survey. (**See Exhibit # 1- Map of Strait of Juan de Fuca- Neah Bay to Port Angeles**)

(68) So who does know where the local whales feed in the Salish Sea? It is the local Peninsula citizens. The bluff dwellers, old timers,boaters, beach walkers, water watchers, visitors to Clallam County Parks on the Strait, and followers of the Whale Trail. The Whale Trail is a wonderful string of interpretive signs all around the Salish Sea , and down the outer coast. Thanks to local knowledge in different areas, signs are placed at good spots to see marine mammals from land. Especially gray whales. No boats necessary, no bothering the whales, just , if you are lucky, the awesome joy of watching whales exhaling and calmly going about their business near shore. There are at least two known “rubbing spots” in the Strait, as well.

(69) Local whales become “known” to local people. Sports fishermen and commercial fishermen have many stories of local encounters, always told with excitement and happiness. The places of sightings always remembered. Kayakers and canoe paddlers have been awestruck by close encounters. Ferry riders have chance sightings, and at certain times in the early spring, whale watch boats take people to see the gray whales called the Puget Sounders. Hundreds of residents of Whidbey Island and the surrounding areas just have to look out at the water to see whales they know by name.

(70) Such is the local contact with the local whales. Always on their terms, always surprising, always joyful. What a public mental health service gray whales provide, and an economic boon to eco-tourism in the entire area. **This is what the Marine Mammal Protection Act means by “aesthetic value”. This is the joy behind the dry term “non-consumptive use”.**

(71) Washington Department of Fish and Wildlife (WDFW) also knows the Washington State gray whales , and lists them as “Sensitive”. They have done some mapping of feeding areas on the U.S. side of the Strait. One feeding area is east of Port Angeles at Green

Point , well known and always watched by residents on the bluff above the water. Sighting logs have been kept for decades, showing incredibly frequent gray whale use, in every month of the year. (More details on this sighting log in PCPW rebuttal to Scordino Declaration.) As described elsewhere, gray whales contribute nutrients and raise food to the water column for a myriad of species as they feed. They basically plow and re-seed, as they sift through the benthic layers. They have no doubt contributed the biological “hot spot” that is the Green Point area. Several Washinton State listed species are abundant in this compact area, including geoduck, pinto abalone, hard-shelled clams, eelgrass, and the Washington State gray whales (PCFG). (It is against state law to harass or harm gray whales.) (See Exhibit # 2, WDFW- Gray whale feeding area mapped at Green Point, 2017)

(72) So did NMFS “carefully consider the effects of the proposed waiver on the role of the ENP gray whale stock in its ecosystem “ ? NMFS only considered the migrating group of ENP gray whales and the outer coast ecosystem portion of their migration. As always , no consideration of the portion of the ENP / PCFG/ whales who spend so much of their lives in the Salish Sea , and the impact they have on that environment : the so called “Makah U&A whales”. Known to Peninsula citizens as simply “the residents” . When NMFS ignores the PCFG whales, the local whales pay the price.

Yates Declaration, (54):

(73) “NMFS concludes that the proposed waiver will not affect the status of the ENP gray whale stock relative to its OSP levels.”

PCPW Response:

(74) When it comes to the ENP gray whale stock, it will not be the waiver that reduces the stock below its OSP. It will be whatever climate change consequences are causing portions of the ENP stock to die of starvation. We only hope that NMFS is working hard to diagnose the problem, and not planning to dismiss the deaths by blaming the gray whales' own “success story” for the current die-off. This is a time for honest answers from actual field research on the northern feeding grounds. Do climate trends seem to indicate a permanent or semi/ permanent reduction in the carrying capacity for gray whales in specific northern feeding areas? Or will every year be a mystery as to consequences for the ENP? At what population drop will NMFS and the IWC re-assess takes from the ENP? Was this year's PBR exceeded by the UME plus the Russian take? This is no time for over confidence or quick answers. How can decisions be made about deliberate killings from this group, when we don't know the answers to these mass deaths?

(75) The group that will be most harmed by the proposed waiver is the PCFG and its' sub-group, faithful to the northern Washington coast and the Salish Sea, the local resident

whales. As the judges of the 9th Circuit put it in *Anderson v Evans* :

“ (The government) does not adequately address the highly uncertain impact of the tribe's whaling on the local whale population and the local ecosystem.” (See also the quotes at (47), (48), and (49).)

Also from the *Anderson v Evans* decision, regarding the “local” whales:

(76) **“The whales' fidelity to specific locations could subject them to differential harvests and potential depletions if there are unregulated *local takes* .”** (emphasis added by judges)

(77) **“ The government implies that any whales taken from the local resident group will be replaced in the local area by other whales from the PCFA, so the number of whales locally will not decline...Whether there will be fewer or no whales in the pertinent local area if the hunt is permitted depends not on whether the whales who frequent that area also travel elsewhere, but upon the opposite inquiry: whether whales who heretofore have not visited the area will do so, thereby replenishing the summer whale population in the area, if some of the returning whales are killed.”**

(78) **“ As the underlying studies establish, the local impact of the Tribe's whaling therefore turns on whether different PCFA whales will fill in for the killed, struck, or frightened whales no longer in the area. This critical question is never analyzed , numerically or otherwise... The EA simply does not adequately address the highly uncertain impact of the tribe's whaling on the local whale population in the local ecosystem. This major analytical lapse is, we conclude, a sufficient basis for holding that the agencies' finding of no significant impact cannot survive the level of scrutiny applicable in this case.”**

PCPW comments to preceding quotes :

(79) - The preceding quotes from the 9th Circuit Court were made over 15 years ago in response to an Environmental Assessment (EA) published by NOAA / NMFS to justify Makah whaling.. In spite of all the intervening years, and incalculable public expense, the government is still unable to satisfy the Appeals Court's challenges to their analyses. **Their “best available science” was not good enough then, and it is not good enough now.**

(80) - **The government still has not adequately addressed the potential impacts to the local whales ,and the Salish Sea Ecosystem that they are a part of.** (66)

(81) - **There are still unregulated local takes allowed from the local PCFG whales of the Salish Sea and northern Washington outer coast.** Their fidelity to the BIA feeding area

on the northern Washington coast puts them squarely in the hunt area during odd and even hunt years. There will certainly be local depletions, as “takes” are allocated from the entire PCFG population number, with no consideration of the smaller local population number.

(82) - When NMFS claimed in 2002 that “5 strikes over 2 years should alleviate fears of local depletion”, the Court responded that : **“The EA's conclusion simply does not follow from its premise.”** NMFS still wants us to believe the *exact same premise* and the *same unanalysed conclusion*.(67)

(83) - There has **still** been no analysis of this question. (68)

(84) -**This “major analytical lapse” still stands.** In fact the Tribe's answer seems to be that “other whales” (not even other PCFG whales) will fill the gaps left by local whales who are killed at the feeding ground or frightened away from the feeding ground. That is a step backwards from the reassurance the Court required regarding local whales in the local environment. (69)

(85) It is clear that the U.S. government agency tasked with protecting our precious gray whales is more devoted to establishing a rationale for killing them. They've been at it since the early 1990's when they certainly greased the skids by hastening the contentious de-listing of the ENP, at the impatient urging of the Washington State Tribes. *Even the Marine Mammal Commission objected.*

(86) There is a country whose government is taking a different look at the gray whales in their waters : the “Assessment and Status Report on the Gray Whale in Canada, 2017” was released by our neighbors to the north.

(87) Canada's Species at Risk Act (CASA) established the committee on the Status of Endangered Wildlife (COSEWIC). **They have recently embarked on a study that likely will result in the listing next year of the PCFG gray whales as Endangered in their system.** From the Preface of their analysis document, “COSEWIC Assessment and Status Report on the Gray Whale in Canada”:

(88) “ The PCFG is genetically distinct insofar as there is a consistent pattern of mtDNA differentiation. Furthermore, recent analysis of photo-identification data through 2015 indicated a higher degree of internal recruitment than had previously been suggested. (Calambokidis and Perez 2017) Genetic results and photo-identification data suggest strong maternally directed fidelity to summer feeding grounds.”

(89) Canada has rated the threats to the PCFG gray whale as medium to high, based upon IUCN-CMP (International Union for the Conservation of Nature – Conservation Measures Partnership) unified threats classification system. The threats include:

- off shore oil and gas development
- transport of oil
- fishing gear entanglement
- boat collisions
- off shore energy development projects
- and due to small population, vulnerability to sudden events such as oil spills

(90) The “Status Report”, page 12, quotes from an interesting paper written by Nicholas Pyenson and David Lindberg titled “What Happened to the Gray Whale During the Pleistocene? The Ecological Impact of Sea-level Change on Benthic Feeding Areas in the North Pacific Ocean”, 2011.

In this study of ice ages and sea level changes. The carrying capacity of the North Pacific gray whale is calculated based on the availability of benthic feeding areas during different time periods. The likely history of the resident gray whales plays a part in this study of shifting baselines, adaptation, and survival. In a concluding statement titled “Implications for conservation”, the authors say this:

(91) **“ We suggest that any extensions or special provisions for protecting gray whales should explicitly favor *resident gray whales* in the coastal areas of the eastern North Pacific, (i.e. British Columbia and Washington State) because they exhibit an important behavioral plasticity that confers an increased fitness for the entire population in the North Pacific Ocean. It is unclear if resident whales are genetically distinct from the other gray whales, but we suggest that such ecological plasticity in feeding will be an important trait with the increasingly rapid heating of the northern cryosphere projected to occur in the coming decades. Beyond benthic availability, there are additional causes that may restrict gray whale population size to its current level, given the changes to the Bering Sea ecosystem, which may have altered the capacity of the nearshore to support such important habitat modifying predators. Nonetheless, *protecting those individuals that display alternative migrating behavior and feeding modes should be an important priority regardless of their molecular or morphological similarity.*”**

(92) **We are gratified that Canada will be taking (hopefully) precautionary steps to “explicitly favor resident gray whales “ in their waters. We should be doing the same.**

(93) **We hope that it will not come to pass that Canada needs to add “ U.S. whaling – targeting of PCFG gray whales” to it's list of threats to the PCFG gray whales . Takes of PCFG gray whales in U.S. waters are takes from Canada's PCFG gray whales. Takes of PCFG**

whales in Washington waters are taken from Oregon's PCFG whales.

(94) Mr. Yates, what is the OSP of the local whales who show fidelity to the northern outer coast of Washington, Strait of Juan de Fuca, and southern end of Vancouver Is. ? Maybe an ID list / photo collection, needs to be created to match against kills from the PCFG. Otherwise there is no accountability for the fate of the local whales. It is such a small group, (NMFS used (33) in DEIS 2015), these whales will easily just disappear. This situation is not tolerable. Is it possible for you to imagine the attachment people form to wild whales that they see regularly? Who show behavioral signs that allow differentiation between, and recognition of, individual whales? Who make children scream with excitement, and always watch for another blow? Whose distinctive markings make them very "nameable"?

(95) **From the Marine Mammal Protection Act:**

"Marine mammals have proven themselves to be resources of great international significance, aesthetic and recreational as well as economic, and it is the sense of this Congress that they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem..."

(96) **We used to say that the MMPA was our government's treaty with the whales. It is also our government's binding promise to all American citizens, that our country, and our citizens, will not be parties to the unnecessary bothering, or harming, or killing of whales.** And after the era of world-wide commercial whaling, many sought to know and understand and appreciate these mysterious and gentle animals.

(97) **And so we did. And now we are expected to adjust to a new reality where whales are kill-able after all ? We cannot make that adjustment. We love them too much now. Alive and breathing, close to shore, somewhat predictable, but always a surprise. That is life with gray whales in the Salish Sea.** Calmer waters at most times than on the coast. Easy beach accesses to sandy shores for all ages to have a chance to catch a glimpse. A truly egalitarian pursuit. Kelp beds mark the target feeding depths for gray whales in the Strait. Many rivers enter the Salish Sea, and river mouths seem to attract gray whales, too. We are in a "whale wonderland" here, with a great resurgence of humpback whales and minke whales returning year after year and becoming known as individuals. We are heartbroken at the rapid decline of the resident orca pods. They are also a small group of whales showing a "culture" that is unique among orcas. There are plenty of orcas in the world's oceans. But people care very much about *these* local whales, close enough

to know as individuals. And now we must contemplate the torturing to death of our even smaller group of local grays?

- (98) We actually already know what that will feel like, because we have experienced the deaths of two whales by the harpoons and guns. We now consider both of those deaths to have been **wrongful** deaths. The 9th Circuit did not mince words in describing the entire NMFS decision-making process leading up to the May 17, 1999 kill as : **“arbitrary, capricious, and otherwise outside of the law.”** **Sounds like the May 17, 1999 kill and the 2007 “rogue hunt “were both illegal hunts.**

The judges of the 9th Circuit also said:

- (99) **“ (An EIS)...weighs any significant negative impacts of the proposed action against the positive objectives of the project.”**

(100) Were the impacts fairly weighed? It doesn't seem so.

On the “positive objectives” side: (What the whalers gain)

Prof. Reid helps us understand a few things very clearly , 4.3.5 pg.125-129:

“Affirming the Authority of Whalers”

(101) **“Whalers occupied a central role in both shaping and reflecting Makah's governance, particularly the authority exercised by whalers...whalers often held the highest positions of authority...whaling helped to create and sustain a heirarchical structure of authority among the People of the Cape...Only whalers held this combination of wealth and status that enabled them to have such large families and influence in the village.”**

(102) **“Non natives interacted with whalers, mostly. Whalers continued to hold positions of authority in dealing with outsiders...whalers also served in the critical role as negotiators with the U.S. treaty commission in 1855...and who met with Gov. Isaac Stevens and insisted on whaling rights.”**

“Economic Importance of Makah Whaling, pgs.161- 173

(103) **Before, during and after Treaty time, the Makah were oil rich. “Given the size and number of whales hunted, whale oil was clearly the substantial portion of this large and valuable oil market...we must recognize the subsistence and commercial importance of this activity...other lucrative market items were human slaves.”**

In 1850, the whalers of Neah Bay sold 60,000 gallons of whale oil. That represents 26 whales killed.

In 1852 the Makah made “large profits by reselling oil from Vancouver Island tribes to non native

traders at a large profit.

By 1850's the Makah were "...the top indigenous producers of whale oil in the Pacific Northwest."

By treaty time, "Makah whaler/chiefs knew the continued sale of whale oil and other products from the sea would keep them wealthy and influential in the region. "

PCPW Response:

(104) Is it any wonder that the whaler/chiefs who negotiated the Treaty of Neah Bay had whales on their minds? They were at that time making incredible profits. In 1852, the price per gallon for oil was 68 cents. That year they made \$20,475. Sometimes whale oil sold for \$1 / gallon. *Makah whalers, at treaty time, were killing as many whales as they could, as fast as they could.*

(105) Of course they wanted their whaling to be assured to continue. The Makah's "need" for whale products had gone far beyond nutritional subsistence. It was now big business. In this light, it is amazing that the whale populations locally were not quickly depleted. In the early 1890's , Makah oil "readily" sold at \$1/gallon ..."the profits from whale oil would have been substantial" (Reid).

(106) Reid, pg. 129: " Based on her fieldwork in 1920's Francis Densmore noted that "... successful whalers held high positions in the tribe. Their descendants continue to hold positions of authority at Neah Bay today... a family's whaling past shapes present and future identities and authority."

(107) It is no secret that the Makah tribal members who have pushed for resumption of whaling since at least the early 1990's have been whaling descendants. The "elite" families , to whom the status of the great grandfathers still accrues. And to whom the elected and positional power and authority within the tribe are usually assured. Of course their family stories have been remembered and passed down. Of course they have family songs and dances and secret whaling rituals. That is the claim to fame that still supports their prestige as large and influential families. Of course their relatives were treaty signers. In effect, the U.S. government negotiated a treaty with whaling families. Makah whaling at treaty time was a hot commercial operation. Did they take "more than they needed "? There were certainly always more things to need. Was there still a spiritual element to the all-out killing of as many whales as possible?

(108) So it is not surprising that the first plan that the Makah Tribe pitched to NOAA/NMFS in the mid-1990's, was for a large scale commercial enterprise. A processing plant at Neah Bay, where marine mammals harvested by various tribes could be processed for sale. Japan and Norway were admitted, by the Tribe, to be very interested. (Maybe less in the whale meat, more in putting the U.S.'s anti-whaling stance at the IWC in a compromised position.)

(109) That plan could not come to fruition with a moratorium on commercial whaling,

so the tribe agreed to an “*interim*” ceremonial hunt, but always claimed the right to a commercial hunt in the future, “as guaranteed by their treaty”. That is a “positive” postponed, although never ruled out.

(110) So the “positives” we are left with are emotional, political, personal, and hard to pin down, but we do see that the “uplifting” of the status and authority of the politically dominating families via whaling resumption is part of the motivation. They would again be at the forefront of renewed attention, glory, and extra power, resurrected with the old family songs. They would be the “co-managers”, on equal footing with the federal government and have easy access to it's productivity as a cash cow.

(111) In an interview with the “Peninsula Daily News” on September 27, 1998, Keith Johnson, former Tribal councilman and whaling family member said:

“ Whaling brings in all of the cultural aspects of our heads of family...and lifts that family up in its identity as a whaling family.”

(112) That same fall in 1998, John McCarty , grandson of the last Makah whaling chief, and Makah Whaling Commissioner, interviewed on KIRO-7 TV said:

“There could be with the lesser families that, uh, like I don't like to call them slave families, but the slave families and the less prominent ones, that there might be a feeling of-- what's going to happen now?”

(113) The Tribe's anthropologist bemoaned “the introduction of American values” in the 1800's, such as “the American philosophy of of social equality”, and how that social equality “made it difficult for Makahs to continue to staff and organize whaling canoes , and therefore households, according to ancient patterns.” (DEIS 2008, pg.30) “Staff “ *missing in the canoes? ...that would be the newly freed slaves.*

(114) **Social equality is considered by most Americans today to be a hallmark of a just and free society. Are the whaling families actually wishing for a return to a traditional status and power structure that is above the shifting winds of the democratic process? (PCPW comment to 2008 DEIS pg. 14)**

(115) It has been a commonly held rule of thumb for 20 years, that the tribe is split into three camps. One third of the tribe is gung-ho for whaling. One third of the tribe is apathetic to whaling. One third of the tribe is opposed to whaling. Is it any wonder why?

(116) Again, from 1855 until now, the U.S. government has been speaking to, and making deals with, whaling families. Not the whole tribe.

(117) **So when the government's EIS weighs the positive effects of whaling, they are really weighing the “positive” of reaffirming the revival of the old whaling families' rights to what**

their forefathers had : power and authority in the tribe. The power and authority that the tribe's in-house anthropologist complains was “*disrupted*” by democracy's enforced credo of “all men created equal” and “one man, one vote”. The Makah social hierarchy was whalers at the top (chiefs), fishermen / shellfish gatherers (commoners), and slaves at the bottom. When the “whalers” desired the tribe to 'speak with one voice' in support of whaling at the IWC in Aberdeen, Scotland, dissenting elder Makah women were bullied and called “*slaves*”. Delegates from other countries were appalled! But the intimidation by the “whalers” did continue, and the case was made to dissenters within the tribe, and “lesser family” tribal members, that it would not pay to subvert the efforts of the “whaling families” . Lesson learned. The “whalers” do have control over most tribal jobs, and they can easily keep dissent stifled.

(114) So put all that ego-boosting “positive outcome” on one side of a scale, along with some hunks of whale meat , and some trickle-down whale oil for the “lesser people”each year. What is on the “negative impact of the proposed action” side of the scale?

- Unnecessary harassment, harpooning, and shooting of whales at their feeding areas.
- Likely depletion of PCFG in their local ecosystems.
- Harm to all mothers and calves ,by way of collateral harassment at the feeding areas.
- Harm to the Salish Sea ecosystem as local whales are removed from the coast who are also faithful to the near shores of the Strait of Juan de Fuca.
- Extirpation of the genetically linked Makah U&A whales as females are killed at an allowed rate of 8 every ten years.

(115) Harm to the many whale watching businesses who specifically target the viewing of gray whales in Puget Sound in March, April, and May, as specific Puget “Sounders” are eventually struck on the coast in March, April, and May.

- Devastating mental anguish to the people of the Olympic Peninsula who are attached to the neighborhood whales and get huge joy from their presence.
- Loss to science of the continuation of long-term studies of the gray whales of Washington State.
- (116) Washington State is very reliant on tourism. Eco-tourism. NMFS' DEIS imagines a scenario where whaling

could “bring people” to see whales killed and butchered. More likely is a tourism boycott. Three million people come to Olympic National Park every year. How many will want to chance camping and hiking on the coast with whaling possible a great part of every year, or support a region that has given tacit approval of whaling? Many leaders in the forefront of tourism promotion on the Peninsula believe that whaling will be the worst thing that could happen for tourism.

- (117) Community relations really suffered during 1998, 1999. Letters to the editor ran 10 to 1 against whaling. Opponents of whaling were publicly accused of being racists, “neo-colonialists”, and “eco-terrorists”. Unsubstantiated claims were made about abuse of tribal members by opponents of whaling. It was a mess. This was a problem that the tribe was well aware would occur. They went ahead anyway, to the great detriment of the social fabric of the Peninsula.
- (118) Another negative of waiver approval is the potential for any number of other tribes to also ask NMFS help them get into whaling. NMFS objects, and declares that no tribe would likely want to go through the time-consuming process that the Makah have experienced. But once a waiver is granted to one tribe, it will be a much more streamlined process. The precedent will have been set. What will the rationale be for denying the next tribe? What is the downside to the next tribe in line? NMFS does all the work, NMFS pays to start up a Whaling Commission, pays for exotic travel, NMFS pays lawyers to make the case, NMFS has the Coast Guard to “protect” the hunt area. Many perks flow from a simple request letter. When NMFS only need think of the ENP stock's population, there could be plenty of whales in the “harvest-able “ category for another tribe or two.
- (119) Another negative of the proposed action is the potential harm to the public. Olympic National Park's wilderness coast is right in the sights and the range of the .50 cal weapon. We have commented over and over about this.

- (120) The strange inclusion of December and January in the “even year” hunt plan, is unexplained in the DEIS. Why decide that it is acceptable to potentially harass and strike whales near shore who may be mating? There is a very strong biological urge in those two months , and PCFG whales have been documented exhibiting “courting” behavior in the fall. Leave them alone !
- (121) This is a real example of the “precaution-to-the-wind “ approach that NMFS has taken for 20 years . NMFS seems trapped in their own improper actions of the 1990's. The Appeals Court ordered an EIS “*free of the previous taint.*” Many of the “old guard” architects of the aboriginal whaling policies in Alaska, became the proponents of aboriginal whaling in Washington State, the difference being that no tribe in Washington State has an actual subsistence need for whale meat. Many of those same NMFS scientists, lawyers, policy makers, and IWC representatives have continued to champion this unnecessary “cultural subsistence” whaling ,at any cost to science and reason and the American tax payers. *The “taint” remains.*
- (122) The list of “negatives” is quite substantive. The list of “positives” is weak, and relies on the government's reticence to be sued by the tribes of Washington State , and the public's reticence, in the face of name-calling and intimidation, to object to, or even question , the revival of a “cultural” practice. There are many analogies to other “cultural practices” that are deemed unacceptable in modern times. We don't object to whaling because we are racists. We object because we can see that NMFS has not made a case that can stand up to scrutiny. And there is no actual reason for NMFS to allow the killing of the PCFG gray whales . The “healthiness” of the ENP stock is now in question. Not a good time to make decisions that will be hard to reverse.

PCPW - Conclusion:

(123) The group for whom we speak are part of the great majority of Olympic Peninsula citizens who feel strongly that our resident PCFG whales should be protected. The diminishment of the quality of life that will accompany the systematic removals of known

whales will be immense. Sadness will hang like a cloud over any whaling here in Washington State. The loss of specific beloved whales will be deep losses all around the state, not to mention in Canada and Oregon. We believe that the plight of the resident whales constitutes an exceptional circumstance that calls for exceptional scrutiny of a plan that allows the diminishment / elimination of the local whales in the local environment.

(124) On March 27, 2019, the local paper, The Peninsula Daily News (PDN) ,ran the results of their daily on-line poll. The question for local readers was: Have you ever seen a whale in the waters off the North Olympic Peninsula?

- *Of 710 respondents, 77.18% said yes.*

On June 7, 2019, the PDN asked the question: Have you ever encountered a whale washed up on shore ?

- *Of 600 respondents, 27.17% said yes.*

On August 2, 2019, the PDN asked the question: Where in nature do you feel most happy? The beach, the forest, the mountains, rivers, other.

- *Of 599 respondents, the majority, 37.9% , answered : the beach.*

(125) We are a water oriented citizenry, here on the Olympic Peninsula. We can look to the Strait of Juan de Fuca from just about anywhere. Beaches are not so much for swimming and sun-bathing, but for rock and fossil hunting, tide-pooling, bird watching, hiking, and just staring out “to sea” from a seat on a drift log. All of these activities are highly conducive to a lucky whale sighting. And any gray whale seen in the Strait is 99% sure to be a resident PCFG gray whale.

(126) There have been 20 years of relative peace on the water and in the community. PCFG mothers have raised many calves, and some females have survived to carry the culture into the future. Makah U&A whales have been seen somewhere every year. The Puget Sounders have lingered longer in recent years, and been joined by a PCFG whale.

(127) Wonderful Makah traditions have continued to flourish , uninterrupted by the long lapses in whaling. The last 20 years have seen 19 Paddle Journeys, 20 Makah Days, 20 years of song, dance, and language instruction, art has been created in many mediums, non-stop. A generation of Makah children have grown up to adulthood and are pursuing their dreams.

(128) But all is not well in the Salish Sea. Like everywhere else, this ecosystem is in trouble. Salmon runs dwindle, forage fish no longer plentiful, orcas starving for lack of enough PCB-laden Chinook salmon. This is not the time to remove the gray whales from the nutrient equation. Their gifts to the ecosystem are being recognized more and more.

(129) And all is not well on the Makah Reservation. But drugs, crime, and bad behavior are problems in every part of our country. Whaling will not cure these ills, nor is the lack of whaling the cause of those ills.

(130) We believe that the risks to the local whales and the local ecosystems far outweigh the mainly “ elite family” benefits a resurrection of whaling would bring. Particularly, whaling close to shore. The weight of the scales drops heavily on the “negatives” side.

(131) It is not too late to consider a change of plan. A great deal of momentum has built to get this done once and for all. The Tribe pushes. But “momentum” and time invested, and money invested, and the fear of lawsuits, and “pushing” are not the same thing as “*best available science.*” So , one last time, from the 9th Circuit Court of Appeals:

“ The court must defer to an agency decision that is “fully informed and well-considered,” but need not rubber stamp a clear error of judgement.”

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