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BY ELECTRONIC AND U.S. MAIL

Dr. Douglas Demaster
Acting U.S. Commissioner to the International Whaling Commission
c/o National Oceanic and Atmospheric Administration
United States Department of Commerce
1401 Constitution Avenue
Washington, DC 20230

Dear Dr. Demaster:

We are writing on behalf of the Animal Welfare Institute, Australians for Animals, California Gray Whale Coalition, Cetacean Society International, Dolphin Connection, Fluke Foundation, Green Vegans, Pacific Whale Foundation, Peninsula Citizens for the Protection of Whales, TerraMar Research, Whale and Dolphin Conservation Society, The Whaleman Foundation, Ms. Sandra Abels, Mr. Will Anderson, Ms. Tami Drake, Mrs. Patricia Ness, Mr. Robert Ness, Mrs. Margaret Owen, Mr. Chuck Owens, and Toni Frohoff, Ph.D. to urge you to remove the United States' request for an aboriginal subsistence whaling (ASW) quota of Eastern North Pacific (ENP) gray whales from the draft Schedule Amendment to the International Whaling Commission (IWC). As we will explain, such a request – which we understand is being made on behalf of the Makah tribe of northwest Washington State – may not be submitted until an Environmental Impact Statement (EIS) is completed in compliance with the Ninth Circuit Court of Appeals' ruling in *Anderson v. Evans*, 371 F.3d 475 (9th Cir. 2004).

Background

Because of the long history behind the United States' effort to obtain a gray whale ASW quota for the Makah tribe, it is critical to briefly summarize that history to put the present issue in the appropriate context.

The Makah tribe has not had a tradition of whale hunting since the 1920s. In 1995, after the tribe decided it would like to resume whaling, NOAA prepared a report to consider whether the United States should support this effort, which would require an amendment to the



whaling schedule established by the IWC. In that report, NOAA recognized that a resumption of whaling by a tribe that has not engaged in this traditional practice for so long could encourage, and serve as a precedent for, other tribes to also seek whaling authorization. *See Metcalf v. Daley*, 314 F.3d 1135, 1137-39 (9th Cir. 2000) (summarizing this history).

Despite that concern, and without analyzing the impacts such a precedent may have on the environment in general, and on gray or other whale populations in particular, NOAA entered into several agreements with the tribe pursuant to which the United States then supported Schedule amendments seeking IWC approval of an ASW gray whale quota. After the initial effort to obtain a gray whale quota was withdrawn from consideration at the 1996 meeting, a second proposal was presented at the 1997 meeting that combined ASW quotas for the US (for the Makah) and Russia (for its aboriginal people). Although the proposed Schedule amendment was adopted, delegates were concerned that granting a quota to the United States to allocate to the Makah would open the door to whaling by other groups that no longer have a whaling tradition – echoing the concern NOAA had identified in its original report. *Id.* at 1139-40; *see also* Firestone and Lilley, *Aboriginal Subsistence Whaling and the Right to Practice and Revitalize Cultural Traditions and Customs*, 8 *Journal of Intl Wildlife Law and Policy* 177, 198 (2005) (explaining that “[b]ecause of the precedent that would be set if Makah whaling were approved—authorizing subsistence whaling *where there had been a long hiatus* in whale hunting by an aboriginal group—and in light of Japan’s effort to gain IWC authorization for community-based coastal whaling, the U.S. proposal generated controversy among IWC members.”) (emphasis added).

The National Environmental Policy Act (NEPA) requires that NOAA prepare an appropriate analysis of the environmental impacts of, and alternatives to, Makah whaling. 42 U.S.C. § 4321, *et seq.* In 1997, a group of plaintiffs (including several of the groups submitting this request) sued NOAA for its failure to complete this analysis – which had been prepared in an Environmental Assessment (EA) – *before* deciding to support the resumption of Makah whaling. In 2000, the Ninth Circuit Court of Appeals ruled for the plaintiffs, suspending NOAA’s Agreement with the tribe and approval of Makah whaling until appropriate NEPA analysis has been completed. *Metcalf*, 214 F.3d at 1146.

NOAA subsequently prepared a new EA and once again approved Makah whaling – and these decisions were once again set aside. In this second Ninth Circuit decision, the Court determined that before NOAA may decide whether to support Makah whaling the agency must *first* complete an Environmental Impact Statement (EIS), which must address two particular issues, among others. *Anderson*, 371 F.3d at 489-494.

First, the Court found that NOAA must analyze the extent to which the planned Makah whaling may have significant impacts on the local gray whale population in the area where the tribe intends to hunt. Particularly because the tribe no longer intended to carry out plans designed to limit the hunt to migrating whales, the Court concluded that there were significant concerns that Makah whaling might deplete the number of local whales in the area. Those risks, the Court concluded, must be analyzed in an EIS. *Id.* at 490-492.

Second, reiterating a concern NOAA itself had recognized in its original Report on Makah whaling, and that IWC delegates had recognized in opposing the quota, the Court concluded that NOAA must analyze the extent to which the IWC granting a whaling quota to be used by the Makah *may serve as a precedent leading to increased whaling by others*. In particular, the Court noted that if the Makah – who have not whaled for many decades – are deemed to be engaged in traditional subsistence whaling, “the heretofore narrow aboriginal subsistence exception” may be significantly widened, and that “[i]f such an increase in whaling occurs, there will obviously” be serious impacts on whale species. *Id.* at 493-494; *see also* Firestone and Lilley at 202 (“The panel also faulted the EA for failing to properly consider the effect of the decision to permit the Makah to whale on other Native American tribes that may wish to hunt whales as well as its effect on other IWC member countries”).

The Court in *Anderson* also concluded that Makah whaling is governed by the Marine Mammal Protection Act (MMPA), and thus that the tribe must also obtain proper authorization under that statute before whaling may proceed. Based on these concerns, the Court once again suspended NOAA’s Agreement with the Makah, vacated the whaling quota, and directed NOAA to prepare an EIS. *Id.* at 494.

In 2008, NOAA released a Draft EIS on Makah whaling. However, just a few weeks ago NOAA *withdrew* that Draft EIS and announced that, in light of significant new information the EIS process would begin anew. 77 Fed. Reg. 29,967 (May 21, 2012). As explained in the recent notice, “several substantive scientific issues” have recently arisen that must be considered and addressed, including the extent to which gray whales from the endangered western stock may be migrating into the area where Makah whaling would occur, and the recent scientific evidence demonstrating that the resident gray whales are genetically distinct from the migratory whales. *Id.* at 29,968.¹

Despite these Court rulings and most recent developments, the United States has recently submitted a proposed Schedule amendment that combines its ASW quota requests on behalf of the Makah (gray whales) and Alaskan native people (bowhead whales) with quota requests by the Russian Federation (gray and bowhead whales) and St. Vincent and the Grenadines (humpback whales). The proposed Schedule amendment, to be considered at the upcoming IWC meeting, if approved by the IWC, would allow the United States to allocate gray whales to the Makah for whaling between 2012-2018 if not barred by outstanding domestic requirements.² As we explain below, the United States may not present such a proposed amendment to the IWC at this time.

¹ Recent photo-identification and radio-tagging data demonstrate the presence of highly endangered Western gray whales (*e.g.*, Flex in 2010/11 and Varvara in 2011/12) within the migratory corridor of the Eastern North Pacific population, including within the Makah’s Usual and Accustomed hunting area.

² Although the Schedule amendment does not identify the Makah, NOAA has explained that these amendments “never mention particular aboriginal tribes,” *Anderson*, 371 F.3d at 496, and so far the Makah is the only Native American tribe or group from the United States with a

Discussion

Since NOAA first began considering the Makah's effort to resume the killing of gray whales after many decades without whaling, there have been serious concerns that allowing the Makah to resume whaling may encourage, and serve as a precedent for, others who have not whaled in many years to also seek whaling authorization – including both other United States tribes, as well as groups from other IWC countries. As the Court recognized in *Anderson*, while the IWC has recognized ASW, the “precise reach of the exception” allowing such whaling has always been “unclear.” 371 F.3d at 483. However, prior to the Makah's effort to resume whaling, the IWC had limited the exception to whaling that was “related to a continuing traditional dependence on whaling and on the use of whales.” *Id.* at 496 (emphasis added).

Thus, in its original Report, NOAA recognized that Makah whaling, by opening the door to whaling that does not involve a “continuing” tradition, may lead to expanded whaling by others. *Daley*, 314 F.3d at 1137-39. This was also a major issue when the Makah quota was originally considered by the IWC, and it remains a serious issue today. See generally Beck, *The Makah's Decision To Reinstate Whaling: When Conservationists Clash With Native Americans*, 1996 Journal of Env'tl Law and Lit., 359, 381-402 (1996) (summarizing precedential concerns).

The Court in *Anderson* also explicitly recognized this concern, explaining that an IWC gray whale quota intended for the Makah may “make it easier for [other] groups to gain approval for whaling.” 371 F.3d at 493, and n.17 (citing Jenkins and Romanzo, *Makah Whaling: Aboriginal Subsistence or a Stepping Stone to Undermining the Commercial Whaling Moratorium*, 9 Colo. J. Int'l Env'tl. L. & Policy 71, 88-89 (1998)). As noted, the Court therefore directed NOAA to prepare an EIS that, among other things, explored this potential for opening the door to expanded whaling and the impacts of such a precedent.

To date, NOAA has not completed such an EIS. To the contrary, NOAA just recently *withdrew* the draft EIS that it had prepared and intends to begin the entire process anew. Moreover, NOAA has also recognized other serious issues that must be addressed in an EIS, including the potential for risks to endangered western stock gray whales.

Under these circumstances, not only is it entirely premature to present a Schedule amendment to authorize Makah whaling, doing so contravenes NEPA and the Court's *Anderson* ruling. Certainly, the potentially precedential effect of the Schedule amendment must be considered in an EIS *before* the amendment is adopted. Otherwise, that discussion in the EIS will be a make-work exercise, since it will not be informing any decision whether to seek authorization from the IWC. Indeed, as the Court's decision in *Metcalf* makes plain, NEPA's procedures only work when an agency considers the impacts of, and alternatives to, actions *before* they occur. 214 F.3d at 1146; see also, e.g., *Andrus v. Sierra Club*, 442 U.S.

Statement of Need on file with the IWC to hunt gray whales. See <http://www.iwcoffice.org/conservation/aboriginal.htm>.

347, 351 (1979) (explaining that the NEPA process must be completed “early enough” so as to “insure that planning and decisions reflect environmental values”); *WildWest Institute v. Bull*, 547 F.3d 1162, 1165 -1166 (9th Cir. 2008) (explaining that an EIS must “serve practically as an important contribution [and may] not be used to rationalize or justify decisions already made”).³

NOAA cannot defend its failure to complete an EIS before a Schedule amendment is presented by the United States to the IWC on the grounds that actions before the IWC have no environmental impacts by a federal agency, and thus are not governed by NEPA – an argument NOAA has presented in other contexts. *See, e.g.*, EIS for Subsistence Hunt on Bowhead Whales for the Years 2008 through 2012 at 210 (Jan. 2008). Such an argument is foreclosed by *Anderson*, which held that the mandated EIS must consider, among other things, “the precedential impact of *our government’s support for the Makah Tribe’s whaling in future IWC deliberations.*” 371 F.3d at 493 (emphasis added). Thus, under *Anderson* it is absolutely clear that an EIS must be completed before the United States may propose the new Schedule amendment for the Makah. *Cf. Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 925-28 (D.C. Cir. 2008) (rejecting the argument that the Coast Guard’s participation in international proceedings before the International Maritime Organization (IMO) exempted the Coast Guard from domestic law in connection with decisions made at the IMO).

The fact that the IWC approved an ASW Schedule amendment in 2007 that included the United States also does not undermine the conclusion that the present amendment is premature. Before the Makah can engage in whaling NOAA must complete not only an EIS, but the MMPA waiver process as well. Though the 2007 amendment was for five years, NOAA has been unable to complete either the EIS or MMPA waiver processes. The current proposed Schedule amendment, by contrast, extends for six years. Given that time, the work that has already been done on the now defunct Draft EIS for Makah whaling, and the potential for completing the MMPA process, there is every reason to assume that, unlike the last amendment, the Makah will obtain whaling authorization under this current proposed Schedule amendment – thereby establishing the precedent that must be analyzed in an EIS.

³ Indeed, the United States’ effort to seek a gray whale quota at the IWC is inextricably intertwined with its intent to allocate the quota to permit whales to be killed (*i.e.*, the United States would not seek the quota unless it intends to allocate the quota). NEPA specifies that “connected actions” – actions that “are closely related” – “should be discussed in the same impact statement.” 40 CFR 1508.25(a)(1). Actions are considered “connected” if they “automatically trigger other actions which may require environmental impact statements, cannot or will not proceed unless other actions are taken previously or simultaneously, and/or if they are interdependent parts of a larger action and depend on the larger action for their justification.” *See* 40 CFR 1508.25 (a)(1)(i-iii). Thus, it could not be more clear that NEPA review is required on the IWC Schedule Amendment, and that the review must be completed *before* the Amendment is proposed.

Moreover, even assuming *arguendo* that, once again, the quota obtained by the Schedule amendment is never allocated to the Makah (as in 2007), the United States is only further aggravating the precedential effect of its actions here. In particular, other tribes in the United States, or even groups from other countries, may seek to obtain IWC whaling quotas in the *absence* of domestic authorization for such whaling. Once again, these are all matters that, under *Anderson*, must be considered by NOAA in an EIS, which must be completed before the United States takes further steps to authorize Makah whaling.

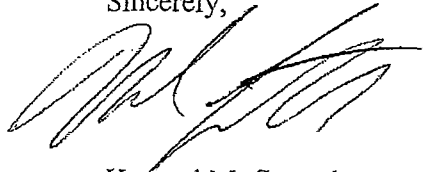
There is also no urgency to obtaining a gray whale quota now, rather than once NOAA is able to comply with federal law – by both completing the NEPA process and issuing an MMPA waiver to the Makah tribe. At that time, the United States can return to the IWC to seek a gray whale quota for the Makah tribe, even if this is before the ASW quota issued for the take of gray whales by aboriginal groups from other countries has expired.

In conclusion, the United States may not seek an ASW gray whale quota for the Makah at this time, given the lack of an EIS as mandated in *Anderson*; thus the proposed Schedule amendment should be modified to remove any reference to the United States seeking a gray whale quota. If the United States wants to seek a gray whale quota for the Makah, it must ensure that its domestic requirements and responsibilities are addressed first and then, and only then, seek a quota from the IWC. Seeking a quota now is entirely premature and fatally undermines the Court-mandated NEPA process.

Moreover, the ongoing efforts to secure a gray whale quota for the Makah could undermine the United States' efforts to achieve its other objectives at IWC/64, including obtaining a renewal of the bowhead whale quota. Considering the current status of the IWC, taking up valuable Commission time by seeking a quota that the United States is legally barred from requesting or using may be counterproductive toward other United States supported efforts. In addition, while there was no opposition to the United States' request for an ASW gray whale quota in 2007, this is unlikely to be repeated at the upcoming meeting in light of the new scientific information about so-called resident whales and interactions between Eastern and Western North Pacific whales. This is yet another reason why the United States should remove any reference to its request for a gray whale quota from the proposed Schedule amendment.

For all these reasons, we urge the United States to: 1) withdraw its request for a gray whale quota from the proposed Schedule amendment and adjust the remaining quota numbers accordingly; 2) withdraw the Makah Needs Statement from consideration by the ASW Subcommittee; 3) suspend the bilateral agreement with Russia to share a gray whale quota from the IWC; and 4) agree to take no further steps toward obtaining a gray whale quota from the IWC on behalf of the Makah until the NEPA and MMPA processes mandated by *Anderson* are completed.

Sincerely,



Howard M. Crystal



Trevor Smith

cc: Ryan Wulff, NOAA/NMFS
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