

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

<i>In re:</i>) Administrative Law Judge
) Hon. George J. Jordan
Proposed Waiver and Regulations Governing the Taking of Eastern North Pacific Gray Whales by the Makah Indian Tribe) Docket No. 19-NMFS-0001
)
) RINs: 0648-BI58; 0648-XG584

MAKAH TRIBE’S PROPOSED HEARING AGENDA

The Makah Indian Tribe (Makah or Tribe) submits the proposed the hearing agenda below to assist the presiding officer in identifying issues to be addressed at the hearing, organizing the presentation of testimony on such issues, and preparing a final agenda of the hearing pursuant to 50 C.F.R. § 228.12.

The Tribe’s proposed hearing agenda is generally organized following the MMPA criteria for approving a waiver of the take moratorium and prescribing regulations with respect to the taking of marine mammals, including the requirement that the National Marine Fisheries Service (NMFS) must rely on the best scientific evidence available. 16 U.S.C. §§ 1371(a)(3)(A), 1373(a)-(c). However, unlike NMFS’s proposed hearing agenda submitted June 6, 2019, the Tribe identifies the issues for the hearing in question form and includes additional issues not published in the April 5, 2019, hearing notice. The additional issues of fact are presented of bold text for ease of identification. In addition, for each hearing issue the Tribe provides citations to the issues of fact proposed by all parties to date, including the Tribe and Animal Welfare Institute (AWI).

I. Parties to the Hearing

The following entities and one individual have provided timely notice to NMFS pursuant to the Notice of Hearing published in the Federal Register on April 5, 2019, 84 Fed. Reg. 13639

(April 5, 2019), of their desire to participate as a party in the hearing. In addition to listing the parties to the hearing, the table below identifies the parties' legal counsel (if applicable) and, based on the party's initial direct testimony or other available information, the party's interest in the issues for the hearing.

Party and Legal Counsel	Interest
National Marine Fisheries Service (NMFS) Laurie K. Beale and Caitlin B. Imaki, NOAA Office of General Counsel	NMFS is the proponent of the proposed waiver and regulations
Makah Indian Tribe (Makah or Tribe) Brian C. Gruber, Marc D. Slonim, and Wyatt F. Golding, Ziontz Chestnut	The Tribe submitted a request for a waiver to NMFS in February 2005 and generally supports the proposed waiver and regulations as necessary to enable the Tribe to exercise its treaty-secured "right of . . . whaling." However, the Tribe objects to one aspect of the proposed regulations regarding the use of edible whale products outside of the Makah Indian Reservation.
Inanna McCarty Pro Se	Ms. McCarty has not (to date) submitted any documents identified as initial direct testimony. However, based on her letter of notification postmarked May 6, 2019, it appears that Ms. McCarty is a member of the Tribe and generally supports the proposed waiver and regulations.
Marine Mammal Commission (MMC) Michael L. Gosliner, General Counsel, MMC	The MMC has an independent statutory role under the MMPA, and has not (to date) submitted any documents identified as initial direct testimony.
Animal Welfare Institute (AWI) Bill Eubanks and Elizabeth Lewis, Meyer Glitzenstein & Eubanks, and Georgia Victoria Hancock, AWI	AWI opposes the proposed waiver and regulations.
Sea Shepherd Conservation Society and Sea Shepherd Legal (collectively, SS)	SS opposes the proposed waiver and regulations.

Catherine Pruett, Brett Sommermeyer, and Nick Fromherz, Sea Shepherd Legal	
Peninsula Citizens for the Protection of Whales (PCPW) Pro Se (Charles and Margaret Owens)	PCPW opposes the proposed waiver and regulations.

II. Issues to be Addressed at the Hearing.

In the Notice of Hearing, NMFS published 65 “Issues of Fact that May be Involved in the Hearing.” 84 Fed. Reg. at 13641-43. On May 20, the Tribe submitted 20 proposed issues of fact. AWI identified “[o]ther issues of fact that warrant consideration at the hearing.” Declaration of DJ Schubert ¶ 102. SS and PCPW did not identify additional issues of fact for the hearing in their initial direct testimony, nor did the MMC or Ms. McCarty in their notices to NMFS.

On May 24, 2019, NMFS shared a list of its proposed issues of facts with the other parties to this proceeding in efforts to determine if there were any facts to which the parties could stipulate in advance of the prehearing conference. On May 29, 2019, the Tribe did the same for its proposed issues of fact. In addition to the Tribe’s submission of Position of Makah Tribe’s Witnesses Regarding NMFS’s Proposed Issues of Fact on May 20, the Tribe also responded to NMFS’s list of proposed issues on June 7. The other parties have not (to date) provided responses to the proposed issues of fact shared by NMFS or the Tribe. The parties are in ongoing discussion about potential stipulations regarding the proposed issues of fact, and this list of issues may be modified pending the outcome of such discussions and notification of the presiding officer of any stipulated facts.

Based on the submissions of proposed issues of fact and the presiding officer’s review of

the initial direct testimony filed to date in this matter, the following issues will be addressed at the hearing. Issues of fact proposed by the parties are identified for each issue for the hearing, although this list may not be comprehensive.

A. The Makah Tribe's Treaty Whaling Right.

- 1. Is the proposed waiver necessary to enable the Makah Tribe to exercise its "right ... of whaling" under the Treaty of Neah Bay?**

Makah A.1, A.2, A.3, A.4, A.5

- 2. Would whale watching or other non-hunting alternatives be consistent with the "right ... of whaling" under the Treaty of Neah Bay?**

Makah A.4

B. North Pacific Gray Whale Stocks.

- 1. Did NMFS correctly determine, based on the best available scientific evidence, including but not limited to the International Whaling Commission's range-wide review of the stock structure of North Pacific gray whales, that there are two gray whale "population stocks" or "stocks" within the North Pacific Ocean (the Eastern North Pacific or ENP Stock and the Western North Pacific or WNP Stock) as the terms "population stock" and "stock" are used in the MMPA?**

NMFS I.A.2, I.A.3

Makah B.3, B.4, B.5

AWI ¶ 102

- 2. Did NMFS correctly determine, based on the best available scientific evidence, including but not limited to the International Whaling Commission's range-wide review of the stock structure of North Pacific gray whales, that the Pacific Coast Feeding Group or PCFG is not a "population stock" or "stock" as those terms are used in the MMPA and, instead, is part of the ENP Stock?**

NMFS I.A.3

Makah B.3

AWI ¶ 102

- 3. Did NMFS correctly determine, based on the best available scientific evidence, including but not limited to the International Whaling Commission's range-wide review of the stock structure of North Pacific gray whales, that the WNP Stock is the same stock that is listed as endangered under the Endangered Species Act?**

NMFS I.A.2
Makah B.6

C. MMPA Criteria for a Waiver of the Take Moratorium to Allow the Taking of Gray Whales from the ENP Stock (including the PCFG).

1. Did NMFS give due regard to the potential effects on the distribution, abundance, breeding habits and times and lines of migratory movements of the ENP Stock (including the PCFG) in proposing to waive the MMPA take moratorium on that stock?

NMFS I.A, I.A.1

- a. Did NMFS correctly determine, based on the best available scientific evidence, that the proposed waiver is not expected to affect the range-wide distribution of the ENP Stock, including within the PCFG range?

NMFS I.A.4, I.A.13, I.A.14, I.A.16, I.A.17, I.A.18, I.A.26
Makah B.1, B.10, B.11, B.17

- b. Did NMFS correctly determine, based on the best available scientific evidence, that the proposed waiver would not have a discernable effect on the ENP Stock's abundance and will not cause PCFG abundance to decline below recent stable levels?

NMFS I.A.5, I.A.6, I.A.7, I.A.8, I.A.9, I.A.10, I.A.11, I.A.12, I.A.15, I.A.19, I.A.20, I.A.21, I.A.22, I.A.23, I.A.24, I.A.25
Makah B.1, B.7, B.10, B.11, B.12, B.17

- c. **Does the International Whaling Commission's evaluation of the Tribe's proposed hunt, as constrained by NMFS's proposed regulations, provide further support for NMFS's determination that the proposed waiver would not have a discernable effect on the ENP Stock's abundance and will not cause PCFG abundance to decline below recent stable levels?**

NMFS II.C.5
Makah B.2, B.8, B.9, B.15

- d. Did NMFS correctly determine, based on the best available scientific evidence, that the proposed waiver is not expected to adversely affect the breeding habits of the ENP Stock?

NMFS I.A.27, I.A.28
Makah B.1, B.10, B.11, B.17

- e. Did NMFS correctly determine, based on the best available scientific evidence, that the proposed waiver would not affect the times and lines of migratory movements of the ENP Stock?

NMFS I.A.29, I.A.30, I.A.31
Makah B.1, B.10, B.11, B.17

- 2. Did NMFS correctly determine, based on the best available scientific evidence, that the proposed waiver will not affect the health, stability or functioning of the marine ecosystem or the ENP's Stock's abundance relative to its Optimum Sustainable Population or OSP?

NMFS I.B, I.B.1, I.B.2

- a. Did NMFS correctly determine, based on the best available scientific evidence, that the ENP Stock functions within many large ecosystems shaped by a variety of processes, and that the smallest recognized ecosystem that encompasses the hunt area is the Northern California Current Ecosystem?

NMFS I.B.3

- b. Did NMFS correctly determine, based on the best available scientific evidence, that the Northern California Current Ecosystem is shaped by dynamic, highly energetic, large-scale processes, including currents, upwelling, freshwater runoff, seasonal wind/storm patterns, and variable climate patterns such as El Niño, and that the role of ENP gray whales in structuring this ecosystem is limited?

NMFS I.B.4

- c. Did NMFS correctly determine, based on the best available scientific evidence, that the number of removals of gray whales that could occur under the proposed waiver is too small to have a discernable effect on the Northern California Current Ecosystem?

NMFS I.B.5

- d. Did NMFS correctly determine, based on the best available scientific evidence, that even at the smallest biologically relevant scale, the northern Washington coast environment, the level of hunting that could occur under the proposed waiver would not have a perceptible effect on the health or stability of the marine ecosystem or the functioning of the ENP Stock within the ecosystem?

NMFS I.B.6

- e. Did NMFS correctly determine, based on the best available scientific evidence, that the ENP Stock has been within OSP levels since at least 1995 and that the removal of up to 25 whales from the ENP stock over 10 years, or 2.5 whales average per year, is not expected to affect the ENP Stock's abundance relative to its OSP levels?

NMFS I.B.7, I.B.8

- f. **Does the International Whaling Commission's evaluation of the Tribe's proposed hunt, as constrained by NMFS's proposed regulations, provide further support for NMFS's determination that the proposed waiver would not affect the ENP Stock's abundance relative to its OSP levels?**

NMFS II.C.5

Makah B.2, B.15

- g. **Does the International Whaling Commission's evaluation of the Tribe's proposed hunt, as constrained by NMFS's proposed regulations, support the proposition that the proposed waiver will not prevent the PCFG from reaching or maintaining an abundance equivalent to an OSP level under the MMPA?**

NMFS II.C.5

Makah B.2, B.8, B.9, B.15

AWI ¶ 102

D. MMPA Criteria for Regulations Governing the Taking of Gray Whales from the ENP Stock.

- 1. Did NMFS correctly determine, based on the best available scientific evidence, that the proposed regulations are necessary and appropriate to ensure that a tribal hunt will not disadvantage the ENP Stock because the proposed regulations will have no discernable effect on the ENP Stock's abundance relative to OSP?

NMFS II.A, I.A.7, I.A.8, I.B.7, I.B.8, II.C.5

Makah B.2, B.15

AWI ¶ 102

- 2. Did NMFS correctly determine, based on the best available scientific evidence, that the proposed regulations are necessary and appropriate to ensure that a tribal hunt will be consistent with the purposes and policies of the MMPA and, more

specifically, will not affect the health, stability or functioning of the marine ecosystem or the ENP's Stock's abundance relative to its OSP?

NMFS II.A., I.B.1, I.B.2, I.B.3, I.B.4, I.B.5, I.B.6, I.B.7, I.B.8
Makah B.8, B.9, B.13, B.14, B.15, B.17

3. Did NMFS fully consider all relevant factors in prescribing the proposed regulations, including existing and future levels of marine mammal stocks, existing international treaty obligations of the United States, the marine ecosystem and related environmental considerations, the conservation, development and utilization of fishery resources, the economic and technological feasibility of implementation, and potential effects to the WNP Stock?

NMFS II.C

- a. Did NMFS fully consider the effects of the proposed regulations on existing and future levels of the ENP Stock? Did NMFS correctly determine, based on the best available scientific evidence, that the proposed regulations would have no discernable effect on the ENP Stock's abundance and would not cause PCFG abundance to decline below recent stable levels?

NMFS II.C.1, II.C.5
Makah B.1, B.7, B.10, B.11, B.17

- b. Did NMFS fully consider the effects of the proposed regulations on existing international treaty and agreement obligations of the United States?

NMFS II.C.2, I.A.9, I.A.10, I.A.11, I.A.12

- i. Did NMFS correctly determine that the proposed regulations would not authorize the Makah Tribe to harvest more ENP gray whales than available under the International Convention for the Regulation of Whaling and the U.S.-Russian Federal bilateral agreement?

NMFS II.C.3, II.C.4

- ii. Did NMFS correctly determine that a work group of the International Whaling Commission's Scientific Committee (the Standing Work Group on Aboriginal Subsistence Whaling Management Procedures) evaluated a Makah hunt as it would be carried out under the proposed regulations and determined that the hunt would meet the International Whaling Commission's conservation objectives for ENP, WNP and PCFG whales?

NMFS II.C.5
Makah B.15

iii. Are the International Whaling Commission’s conservation objectives the same as the MMPA’s conservation objectives relative to OSP levels?

Makah B.8

- c. Did NMFS fully consider the effects of the proposed regulations on the marine ecosystem and related environmental considerations, including water quality, pelagic and benthic habitats, other species of fish and wildlife, and marine noise levels? Did NMFS correctly determine, based on the best available scientific evidence, that the proposed regulations would have no discernable effect on the Northern California Current Ecosystem or the northern Washington coast environment?

NMFS II.C.6, II.C.7, I.B.1, I.B.2, I.B.3, I.B.4, I.B.5, I.B.6

- d. Did NMFS fully consider the effects of the proposed regulations on the conservation, development and utilization of fishery resources? Did NMFS correctly determine, based on the best available scientific evidence, that the proposed regulations would have no effect on the conservation, development and utilization of fishery resources?

NMFS II.C.8

- e. Did NMFS fully consider the economic and technical feasibility of implementation of the proposed regulations?

NMFS II.C.9

- i. Did NMFS correctly determine that NMFS’ costs associated with the proposed regulations would primarily involve the continuation of longstanding gray whale surveys and photo-identification work, and that the costs to NMFS associated with regulating a hunt under the proposed regulations are feasible?

NMFS II.C.10, II.C.11

- ii. Did NMFS correctly determine that the Makah Tribe’s 1999 gray whale hunt successfully demonstrated the economic and technical feasibility of the Tribe prosecuting a gray whale hunt under the proposed regulations?

NMFS II.C.12

- iii. **Is the Tribe's proposed method of hunting under the proposed regulations likely to result in an efficient, quick and safe hunt?**

Makah B.18, B.19

- iv. **Should the proposed regulations be clarified to make clear that multiple strikes on a single whale count as a single strike?**

N/A

- v. Did NMFS correctly determine that the Makah Tribe's whaling ordinance demonstrates the feasibility of tribal hunt management?

NMFS II.C.12

- vi. Did NMFS correctly determine that the procedure for matching photographs of struck whales to those of known whales, which is included in the proposed regulations, is technologically feasible?

NMFS II.C.13

- vii. Did NMFS correctly determine that provisions for marking and tracking handicrafts made from non-edible whale products, which are included in the proposed regulations, are technologically feasible?

NMFS II.C.14

- viii. **Are the provisions in the proposed regulations that limit the use of edible whale products outside of the Makah Indian Reservation necessary and appropriate under the MMPA? Will those provisions impose an undue burden on members of the Makah Tribe who live outside of the Reservation and whose households include non-Makah members?**

Makah B.20

- f. Did NMFS fully consider the effects of the proposed regulations on the WNP Stock?

- i. Did NMFS correctly determine, based on the best available scientific evidence, that the proposed regulations contain a number of restrictions to limit the risk of death, injury, or other harm to WNP gray whales?

NMFS II.C.16

Makah B.16

- ii. Did NMFS correctly determine, based on the best available scientific evidence, that there is a 5.8 percent probability of hunters striking one WNP gray whale over the ten years of the regulations, meaning over the course of seventeen ten-year hunt periods, one WNP gray whale would be expected to be struck (*i.e.*, in one year out of 170), if the Tribe made the maximum number of strike attempts allowed in even-year hunts and if ENP and WNP population sizes and migration patterns remained constant?

NMFS II.C.17, II.C.18
Makah B.16

- iii. Did NMFS correctly determine, based on the best available scientific evidence, that unsuccessful strike attempts and training harpoon throws are expected to result in temporary disturbance but not to have a lasting effect on the behavior of the affected whales' health or behaviors?

NMFS II.C.20
Makah B.11

- iv. Did NMFS correctly determine, based on the best available scientific evidence, that approaches are not expected to have a lasting effect on the affected whales' health or behaviors.

NMFS II.C.24
Makah B.11

- v. **Does the International Whaling Commission's evaluation of the Tribe's proposed hunt, as constrained by NMFS's proposed regulations, provide further support for NMFS's determinations relative to the effects on the WNP Stock from the Tribe's hunt?**

NMFS II.C.5
Makah B.2, B.13, B.14, B.15, B.16

- vi. **Does the International Whaling Commission's evaluation of the Tribe's proposed hunt, as constrained by NMFS's proposed regulations, support the proposition that the proposed waiver will not prevent the WNP Stock from reaching or maintaining an abundance equivalent to an OSP level under the MMPA?**

NMFS II.C.5

Makah B.2, B.8, B.13, B.15
AWI ¶ 102

III. Additional Deadlines.

As specified in Part II above, certain issues of fact not included in the Notice of Hearing are relevant to the presiding officer's recommended decision on the proposed waiver and regulations and will be addressed at the hearing, *i.e.*, the Makah Tribe's Proposed Issues of Fact 1 through 20 and some of AWI's "other issues of fact that warrant consideration at the hearing." The final date for submission of direct testimony on such issues is July 9, 2019. 50 C.F.R. § 228.12(b)(2). The final date for submission of direct testimony to rebut testimony submitted by the May 20 deadline for filing initial direct testimony, *id.*, is also July 9, 2019.

IV. Witnesses and Order of Testimony.

A list of witnesses and the party each witness is affiliated with is provided below. At the hearing, NMFS, as the proponent of the proposed waiver and regulations, will present initial direct testimony from the agency's four witnesses first. Cross-examination by the other parties of NMFS's witnesses will be allowed following the order of parties in the table, as all parties are deemed by the hearing regulations to be adverse to NMFS, 50 C.F.R. § 228.18(a)(2). The other parties will then present their initial direct testimony in the order the parties appear in the table, beginning with the Makah Tribe. AWI, SS and PCPW, as parties opposing the proposed waiver and regulations, shall combine their initial direct and rebuttal testimony and may present their witnesses in any order they prefer following initial direct testimony by Ms. McCarty. After the completion of AWI, SS and PCPW's testimony, NMFS, the Tribe, and the MMC shall present any rebuttal testimony.

Cross-examination of the parties' witnesses other than NMFS will be allowed by adverse parties following the order in the table, with limits for parties having a common interest on the

matter in question. *Id.* § 228.18(a)(3). The Tribe concurs with NMFS’s suggestion that parties be grouped according to their interests for purposes of cross-examination, noting that, pursuant to the hearing regulations, NMFS is adverse to all other parties.

Witness	Party
Chris Yates, Assistant Regional Administrator for Protected Resources for NMFS’s West Coast Region	NMFS
Dr. Shannon Bettridge, Chief of the Marine Mammal and Sea Turtle Conservation Division for NMFS’s Office of Protected Resources	NMFS
Dr. David Weller, Wildlife Marine Biologist with the Marine Mammal and Turtle Division of NMFS’s Southwest Fisheries Science Center	NMFS
Dr. Jeffrey Moore, Research Biologist with the Marine Mammal and Turtle Division of NMFS’s Southwest Fisheries Science Center	NMFS
Greig Arnold, Makah Tribal Member and former Chairman of the Makah Tribal Council	Makah
Polly DeBari, Makah Tribal Member	Makah
Daniel J. Greene, Sr., Makah Tribal Member	Makah
Maria Pascua, Makah Tribal Member	Makah
Dr. Joshua L. Reid, Associate Professor of History, University of Washington	Makah
Jonathan Scordino, Marine Mammal Biologist for the Makah Indian Tribe	Makah
Dr. John W. Bickham, Professor Emeritus, Texas A&M University	Makah

Dr. John R. Brandon, Biometrician	Makah
Inanna McCarty, Makah Tribal Member	Inanna McCarty
DJ Schubert, Wildlife Biologist, AWI	AWI
Brett Sommermeyer, Legal Director, Sea Shepherd Legal	SS
Margaret Owens, Member of PCPW	PCPW

The list of witnesses may be modified depending on the submission of rebuttal testimony, including new witnesses providing only rebuttal testimony, and the order of witnesses may be adjusted in the discretion of the presiding officer, upon request by the relevant party.

Respectfully submitted, this 7th day of June, 2019.

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