

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

In re:)	Docket No. 19-NMFS-0001
)	
Proposed Waiver and Regulations Governing)	RIN: 0648-BI58 and
the Taking of Eastern North Pacific Gray)	RIN: 0648-XG584
Whales by the Makah Tribe)	

MARINE MAMMAL COMMISSION
PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The Marine Mammal Protection Act (MMPA) establishes a moratorium on the taking and importing of marine mammals subject to various exceptions (§ 101(a)(1)). One of those exceptions allows the Secretary of Commerce to waive the moratorium subject to certain requirements and findings (§ 101(a)(3)(A)). Section 101(a)(3)(A) of the MMPA, under which this waiver is being sought, specifies that the Secretary shall base his or her determination on the “best scientific information available,” giving “due regard to the distribution, abundance, breeding habits, and times and lines of migratory movements” of the affected marine mammals. Applying this information, the Secretary is tasked with determining “when, to what extent, . . . and by what means, it is compatible with [the] Act to waive” the moratorium and authorize the taking or importing of marine mammals. Among other things, that provision requires that any authorized taking be in accordance “with sound principles of resource protection and conservation as provided in the purposes and policies of [the] Act.” Those

purposes and policies are set forth primarily in section 2 of the Act, which is specifically referenced in the corresponding rulemaking section of the Act (§ 103(a)).

Section 103 sets forth additional issuance criteria. A key criterion under section 103(a) is that any authorized taking not be to the “disadvantage” of marine mammal species and population stocks. Section 103(b) further directs the Secretary to give full consideration to the effect of the regulations on (1) existing and future levels of marine mammal species and stocks; (2) existing international treaty and agreement obligations of the United States; (3) the marine ecosystem and related environmental considerations; (4) the conservation, development, and utilization of fishery resources; and (5) the economic and technological feasibility of implementation. Section 103(c) identifies some of the possible limitations that can be placed on the authorization, including restrictions on the numbers, ages, size, or sex of marine mammals that may be taken, and constraints on when and where taking can occur. By and large, the Marine Mammal Commission (MMC) believes that the proposed rule satisfactorily addresses these considerations, including its provisions specifying how many gray whales can be taken and when and where taking can occur. The proposed rule takes a balanced approach to accommodating the Makah Tribe’s request while trying to avoid adverse impacts not only on the target population, but also on a depleted stock that occurs seasonally at low numbers in the hunting area, and a localized feeding group that spends much of its time in the waters between northern California and northern Vancouver Island rather than migrating further north with the majority of the whales.

I. Proposed Findings of Fact

1. Gray whales in the North Pacific Ocean consist of at least two, and perhaps three, distinct stocks – the Eastern North Pacific (ENP) stock, the Western North Pacific (WNP) stock, and the Pacific Coast Feeding Group (PCFG), which may be a separate stock or part of the ENP stock. (Bettridge 1st declaration at p. 11 et seq.)
2. The ENP stock was removed from the list of endangered and threatened wildlife (50 C.F.R. § 17.11) on 16 June 1994. The WNP stock remains listed as endangered. (59 Fed. Reg. 31094.)
3. Prior to the 2019-2020 Unusual Mortality Event (UME), the abundance of the ENP stock was estimated to be nearly 27,000 and the stock was believed to be approaching about 90 percent of carrying capacity. (2018 Stock Assessment Report.)
4. Evidence from both photo-identification and genetic analyses indicates that levels of external (immigration) and internal (interbreeding within the group) recruitment within the PCFG are comparable. (Weller initial testimony at p. 9.)
5. Available information is insufficient to determine that the PCFG is at its optimum sustainable population level should it be determined a separate stock. (Yates 3rd declaration at p. 5.)

6. The International Whaling Commission (IWC) has, since 1997, adopted aboriginal subsistence catch limits for ENP gray whales to be shared by hunters in Russia and the United States. (IWC Schedule, par. 13(b)(2).) Any ambiguity as to whether the proposed whaling by the Makah Tribe is covered by those catch limits was cleared up at the 2004 IWC meeting and through its extension of those limits in 2007, 2012, and 2018 without any limiting language. (Tillman declaration at p. 13 et seq.)

7. Dr. Moore estimates that there is a 5.8 percent chance of striking at least one WNP whale over the 10 years that would be covered by the regulations if all allowable strikes were used (Moore, 1st Declaration at p. 11). This translates into striking one WNP whale every 170 years (Id.). Dr. Moore further estimates that there is essentially a 100 percent probability of approaching at least one WNP whale if all approaches to gray whales allowed under the proposed regulations are made and, if they are, he would expect 14 approaches to be on WNP whales over 10 years (Id.).

8. Mr. Yates stated that “Unsuccessful strike attempts and approaches may or may not constitute a ‘take,’ depending on the nature of the event and whether it causes a disruption of the subject whale’s behavior.” (Yates third declaration at p. 15.)

9. On 29 May 2019, NMFS issued a declaration under section 404 of the MMPA that the ENP gray whale population was experiencing a UME. (Yates 4th declaration at p. 1.)

10. Between 1 January 2019 and 13 March 2020, 264 stranded gray whales had been identified as part of the UME, with 49 of those occurring in 2020 (Id. at page 5, and updated by [NMFS UME webpage](#)). One of the stranded whales has been identified as belonging to the PCFG. (Day 1 transcript at p. 111.)

11. A previous UME occurred in 1999-2000, during which 651 stranded whales were detected. (Gulland et al., NMFS Ex. 1-21.) NMFS determined that, following that UME, the gray whale population had declined by about 5,000 whales (Yates 4th declaration at p. 3.)

12. Because not all stranded whales are found, and because some whales die at sea and sink, the reported number of carcasses represents only a fraction of those whales that have died during the UME. Using data from the 1999-2000 UME, Punt and Wade (NMFS Ex. 4-3 at p. 25) estimated that only 3.9 to 13.0 percent of the whales that died ended up stranding and being reported. If we apply those estimated detection rates to the current UME, between 2,030 and 6,770 whales may have died thus far.

13. Concerning the need for a regulatory provision that anticipates future UMEs, Mr. Yates testified, “the population is so large and so robust” and the proposed removals so small that there was no need to set a low-abundance threshold to “turn off the hunt” for ENP whales, as it has proposed for the PCFG (Day 1 transcript at p. 81.) Rather, NMFS would rely on its permitting authority to address significant population declines associated with UMEs. (Id.)

14. The proposed rule addresses the use of parts and products from whales landed by the Makah Tribe in section 216.113(b). NMFS subsequently offered proposed changes to certain provisions governing the sharing of edible whale products and intended to clarify that only domestic sales of handicrafts would be allowed (NMFS [Motion Requesting Revisions to Proposed Regulations](#)).

II. Proposed Conclusions of Law

1. The record developed in this proceeding constitutes the best available scientific information regarding the stock structure and status of gray whales that occur in the North Pacific Ocean.
2. It would be compatible with sound principles of resource protection and conservation and the purposes and policies of the MMPA to issue the proposed waiver, subject to the terms and conditions of the proposed rule, subject to the additional terms and conditions and caveats identified in the Argument under Part III.
3. Taking gray whales in accordance with the terms and conditions of the proposed rule would not disadvantage the Eastern North Pacific stock.
4. Gray whales from the Western North Pacific stock are listed as endangered, are thus considered depleted under the MMPA, and, as such, their taking cannot be authorized under a waiver of the moratorium under MMPA sections 101(a)(3)(A) and 103.
5. Given that the status of the PCFG as a stock remains unresolved, it would be more precautionary to treat it as a separate stock for purposes of this rulemaking. However,

the MMC does not think this is necessary in light of the available scientific information on genetic exchange between the PCFG and the larger ENP stock and the measures in the proposed rule to minimize impacts on the PCFG.

6. Section 117 of the MMPA does not provide the exclusive mechanism under the Act for identifying stocks or reviewing the appropriateness of those designations. Review of such designations and their appropriateness under the heightened procedural and evidentiary standards applicable under section 103 is anticipated under the Act.
7. The proposed whaling by the Makah Tribe is consistent with U.S. treaty obligations under the International Convention for the Regulation of Whaling and with the catch limits set forth in the IWC Schedule.
8. The Ninth Circuit Court of Appeals noted that the Tribe may urge NMFS to consider its treaty right to whale in the agency's consideration of the waiver application, but the court did not suggest that the Tribe would qualify for a waiver if the statutory criteria are not met.
9. Because NMFS is unable to determine that the PCFG is within its OSP, the regulations should require that, if, in the future, the PCFG is determined to constitute a separate stock, all whaling and associated activities that have more than a remote likelihood of taking those whales be suspended until such time as the necessary authorizations for the PCFG are issued.
10. Section 216.113(a)(4)(vi) of the proposed rule would suspend hunting should the population estimate of the PCFG drop below 192 or the minimum population estimate be

projected to be less than 171. A similar provision to reduce the allowable number of strikes is needed should the population decline, but by a lesser amount (e.g., allow only one strike during the odd-year hunts if PCFG abundance estimate drops below 220).

11. *Kokechik Fishermen's Association v. Secretary of Commerce* governs situations in which the findings necessary to issue a taking authorization are met for some species or stocks, but not for others that might also be taken. In this rulemaking, the record supports the issuance of regulations and a permit for ENP gray whales, but not for the WNP or the PCFG, should it be considered a separate stock.
12. The best interpretation of the *Kokechik* decision is that the court meant to apply the ruling to all forms of taking, not just permanent removals from a population.
13. Because there is a high likelihood that some WNP gray whales will be taken during the proposed 10-year validity of the regulations, granting the requested authorization potentially runs counter to the *Kokechik* ruling. A strict reading of that ruling would preclude issuance of this waiver, even for ENP gray whales, unless the taking of WNP is authorized under other provisions of the MMPA.
14. The Makah Tribe might qualify for an incidental take authorization for WNP gray whales under section 101(a)(5) of the MMPA. Short-term close approaches of a small number of WNP gray whales during training activities likely would meet the negligible impact requirement necessary to obtain an incidental take authorization. It is unclear, however, whether intentional approaches to the whales, even if the intent is to approach an ENP whale, can be authorized under section 101(a)(5).

15. Whether the Tribe qualifies for an incidental take authorization for WNP is something beyond the scope of this proceeding. Nevertheless, to address the problem created by the *Kokechik* ruling, given the high likelihood that some WNP whales will be taken in the course of the proposed activities, a provision should be added to the rule to make the taking authorization contingent on the Tribe securing additional authorization under other provisions of the MMPA for non-lethal taking of WNP whales.
16. The likelihood of killing or taking PCFG whales is high enough that, under the *Kokechik* opinion, it could present an impediment to issuing the proposed regulations and associated permit, but this would present a problem only if the PCFG were determined to constitute a stock.
17. An attempted strike has the potential to injure a whale whether or not the target is hit and should be considered Level A harassment in all instances. NMFS needs to assess whether an approach to a whale constitutes harassment not based on whether the whale exhibits disturbance, but on whether the approach has the potential to disturb the whale.
18. The UME declared in May 2019 is continuing, its cause remains unknown, and environmental conditions in the ENP foraging areas appear to be changing, hence the scale of the mortality associated with this UME likely will be indeterminate for an unknown length of time.
19. If, based on the extrapolation provided in proposed finding of fact 12, as many as 6,800 whales may have died during the current UME, this would not warrant suspending the proposed hunt of ENP gray whales or reducing the proposed numbers of allowable

strikes. The population would still be within its OSP range and, based on the experience following the 1999-2000 UME, would be expected to recover.

20. The proposed hunt would have a *de minimus* impact on the population compared to the effects of one or a series of UMEs. Nevertheless, the inclusion of some population floor in the regulations below which hunting would be suspended is appropriate. From a legal perspective, the regulations should not allow hunting if the population drops to a level that corresponds to the estimated abundance at the stock's maximum net productivity level (MNPL), the lower bound of the OSP range.
21. The MMPA waiver provisions address a wide spectrum of possibilities, including justified culls of robust populations and even commercial exploitation. They do not necessarily limit use of whale products by the Makah Tribe to historical or traditional uses.
22. Rather, limits of how whale products can be used by the Tribe flow from the IWC's authorization and definition of aboriginal subsistence whaling. The MMC supports adoption of regulations that accommodate to the greatest extent allowable the uses sought by the Tribe, provided that they are consistent with the IWC requirements.

III. Argument in Support of Respondent's Position

The Marine Mammal Protection Act (MMPA) establishes a moratorium on the taking and importing of marine mammals subject to various exceptions (§ 101(a)(1)). One of those exceptions allows the Secretary of Commerce to waive the moratorium subject to certain requirements and findings (§ 101(a)(3)(A)). This waiver provision has rarely been used and, as a

result, there is scant historical precedent on which to draw. However, other authorizations under the Act follow identical procedures and apply similar issuance criteria; the use of these parallel provisions therefore is germane to this proceeding. Formal rulemaking under section 103 of the MMPA has most frequently been used to authorize the taking of marine mammals incidental to commercial fishing operations¹ (pursuant to § 101(a)(2)), and the bulk of legal interpretation of these provisions stems from those regulatory actions. Because the issuance criteria for waivers and those incidental take authorizations overlap significantly, the Marine Mammal Commission (MMC) will rely on those related precedents throughout this brief.

Section 101(a)(3)(A) of the MMPA, under which this waiver is being sought, specifies that the Secretary shall base his or her determination on the “best scientific information available,” giving “due regard to the distribution, abundance, breeding habits, and times and lines of migratory movements” of the affected marine mammals. Applying this information, the Secretary is tasked with determining “when, to what extent, . . . and by what means, it is compatible with [the] Act to waive” the moratorium and authorize the taking or importing of marine mammals. Among other things, that provision requires that any authorized taking be in accordance “with sound principles of resource protection and conservation as provided in the purposes and policies of [the] Act.” Those purposes and policies are set forth primarily in section 2 of the Act, which is specifically referenced in the corresponding rulemaking section of the Act (§ 103(a)).

Section 103 sets forth additional issuance criteria. A key criterion under section 103(a) is that any authorized taking not be to the “disadvantage” of marine mammal species and

¹ The issuance of such authorizations has been largely overtaken by a separate authorization under section 118, enacted in 1994.

population stocks. Section 103(b) further directs the Secretary to give full consideration to the effect of the regulations on (1) existing and future levels of marine mammal species and stocks; (2) existing international treaty and agreement obligations of the United States; (3) the marine ecosystem and related environmental considerations; (4) the conservation, development, and utilization of fishery resources; and (5) the economic and technological feasibility of implementation. Section 103(c) identifies some of the possible limitations that can be placed on the authorization, including restrictions on the numbers, ages, size, or sex of marine mammals that may be taken, and constraints on when and where taking can occur. By and large, the MMC believes that the proposed rule satisfactorily addresses these considerations, including its provisions specifying how many gray whales can be taken and when and where taking can occur. The proposed rule takes a balanced approach to accommodating the Makah Tribe's request while trying to avoid adverse impacts not only on the target population, but also on a depleted stock that occurs seasonally at low numbers in the hunting area, and a localized feeding group that spends much of its time in the waters between northern California and northern Vancouver Island rather than migrating further north with the majority of the whales. The Commission selectively addresses some of these factors and criteria in greater detail below.

Stock Identity

Although certain provisions of the MMPA apply at the individual level (e.g., the prohibition on the unauthorized taking of any marine mammal), others are applied at the level of marine mammal species or stocks. That is the focus of this proceeding, as reflected by the references to "species and population stocks" in sections 2(1), 2(2), 103(a), 103(b)(1), 103(c), and 103(d). Thus, a crucial threshold issue is the identification of the marine mammal stocks potentially affected by the proposed regulations. The record of this proceeding is replete with

discussion of the stock structure of gray whales in the North Pacific Ocean. Three potential populations have been identified, the Eastern North Pacific (ENP) stock, the Western North Pacific (WNP) stock, and the Pacific Coast Feeding Group (PCFG), which may be part of the ENP stock or a separate stock unto itself. Although some uncertainty remains (and is likely to persist) concerning stock structure of gray whales in the North Pacific Ocean, the MMC considers the best available scientific evidence in the record to support the existence of two separate stocks, namely the ENP stock and the WNP stock, with the PCFG, pending further study, treated as part of the ENP stock. The Commission largely agrees with the analyses presented and the conclusions reached in the respective NMFS Stock Assessment Reports for the ENP and WNP population stocks.²

The whales that migrate between wintering areas in Mexico and summer feeding areas to the north, extending from northern California all the way to the Bering, Chukchi, and Beaufort seas, are genetically differentiated from the whales that occupy feeding areas in summer and fall in the Sea of Okhotsk, specifically eastern Sakhalin Island, Russia, where most of the genetic sampling in the western North Pacific has been conducted. The relatively recent discovery that a substantial proportion of the animals that feed off Sakhalin migrate across the Pacific and become part of the same migration stream as ENP gray whales to and from the Mexican wintering areas has led some scientists to suggest that the Sakhalin whales are nothing more than a western “feeding group” within the ENP stock. However, genetic differentiation between the two stocks has been confirmed by both mtDNA haplotype and microsatellite allele frequencies. As Bickham points out in his Declaration (p. 30), “Whereas mtDNA differences

² Available at <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-species-stock>.

alone could be explained as this being a feeding group, the nuclear markers are indicative of some degree of reproductive isolation, or of demographic isolation or independence. Or, to say it another way, [the Sakhalin whales] ‘interbreed when mature’ to a degree sufficient to be distinct at these loci.” The Commission agrees with this concise summary of the science and concludes that the Sakhalin whales are “a group of marine mammals of the same species or smaller taxa in a common spatial arrangement, that interbreed when mature” (MMPA § 2(11)) and therefore constitute a discrete population stock.

With regard to the PCFG, the Commission again agrees with the reasoning in the NMFS Stock Assessment Report for the ENP stock, which is consistent, for the most part, with the scientific testimony given at the hearing by NMFS and Makah scientists. The evidence currently available from both photo-identification and genetic analyses indicates that levels of external (immigration) and internal (interbreeding within the group) recruitment are comparable and therefore it would be wrong to conclude that the PCFG meets the MMPA definition of a “stock.” While it is recognized as a “distinct feeding aggregation,” NMFS concedes in the Stock Assessment Report that the PCFG “may one day warrant consideration as a distinct stock” (2018 Stock Assessment Report, p. 158). The report in fact goes so far as to calculate a separate potential biological removal (PBR) level for the PCFG “to assess whether levels of human-caused mortality are likely to cause local depletion.” In other words, it could be argued that NMFS is, in this important respect (i.e. setting a separate PBR), already treating the PCFG as though it could be a stock, quite apart from the precautionary measures being proposed in relation to management of a future Makah hunt.

Chris Yates (Day 1 transcript at p. 25 et seq.), when asked if the PCFG is not a stock, why NMFS has proposed to include its protection as a management goal, stated, among other

things, that this goal was “a precautionary measure in the event that PCFG might be designated as a stock in the future.” This point echoes what has repeatedly been stated in the Stock Assessment Reports. When asked under cross-examination by the MMC (Day 1 transcript at p. 76) whether NMFS had concrete plans to seek to resolve the acknowledged uncertainty as to whether the PCFG does or does not merit recognition as a population stock, Yates testified that the agency has “no additional plans to convene a new task force since there is, to my knowledge, no prompting scientific new information that would add new light to this question.” Importantly, in follow-up testimony, Yates states that NMFS and its partner (presumably referring to Cascadia Research Collective) are “funding and conducting surveys, photo ID surveys, taking genetic samples, each summer ... which is adding to the knowledge base of the dynamics of the Pacific Coast Feeding Group” (Id. at pp. 76-77) and that this work is leading to improved understanding of internal versus external recruitment. He further states, “we are surely poised to take advantage with our expertise of using ... new tools ... to continue to further look at whether [the] PCFG meets the Marine Mammal Protection Act definition of a stock or not.”

The MMC interprets this testimony to mean that NMFS remains somewhat agnostic on the question of whether the PCFG should be recognized as a population stock and is, in the meantime, taking steps to ensure that, if it is recognized as such at some point in the future, measures will already be in place to contribute to its conservation. It seems clear that NMFS intends to continue applying an adaptive management approach to the PCFG, that this would be the case regardless of whether a Makah hunt took place, and that, if there were to be a hunt, the provisions already would be available to avoid significant adverse impacts on the PCFG regardless of whether or not it is recognized as a stock.

The MMC recognizes that uncertainty surrounding this issue remains, and that it could be argued that NMFS should take a precautionary approach and treat the PCFG as a stock for purposes of this rulemaking until such time as it can definitively be demonstrated that this group of whales does not meet the statutory definition. The MMC thinks that this currently is not warranted, given the available scientific information on genetic exchange between the PCFG and the larger ENP stock (Weller initial testimony at p. 9). Further, given the agency's commitments to manage the PCFG in a precautionary manner – implicit in the Stock Assessment Report and explicit in Mr. Yates' testimony – the Commission supports NMFS's proposed approach to managing the Makah hunt on the understanding that proposed measures to prevent exposure of PCFG whales to unsustainably high levels of removals are adopted and strictly adhered to, timely efforts will be made to update relevant analyses with new samples and field observations, and the results of those studies will be used to modify the stock delineation or protective measures as appropriate.

Although the MMC supports the conclusions reached by NMFS as to how the stocks of gray whales in the North Pacific should be characterized for purposes of this rulemaking, we disagree with NMFS's contention (Bettridge 1st declaration at p. 3; NMFS Motion to Limit Issues and Testimony) that stock determinations are to be made exclusively under section 117(a) of the MMPA and are not a relevant issue for consideration in this matter. The MMC does not endorse the agency's attempt to shield itself from critical review and thorough examination of the critical issue of stock delineation as part of this rulemaking. The information in the stock assessment reports prepared under section 117 clearly is relevant to this proceeding—this is not surprising since sections 101(a)(3)(A), 103(a), and 117(a) all require the Secretary to use the best scientific evidence/information available—the conclusions drawn in those reports should

not be determinative. The review processes under sections 117 and 103 are quite different, and the latter affords heightened procedural and substantive safeguards to the rulemaking parties. Draft stock assessment reports prepared under section 117 are examined by scientific review groups and subject to public review and comment, but this is less rigorous than the scrutiny provided by formal rulemaking, which allows cross-examination of witnesses, applies a substantial evidence standard, and requires the issuance of recommended determinations by an independent arbiter.

The fact that formal rulemaking provides greater opportunity to scrutinize and obtain independent review of stock determinations and related information is underscored by MMPA section 117(b)(2). That provision grants Alaska Natives the right to secure a “proceeding on the record” to review the information in a draft stock assessment for any stock taken for subsistence or handicraft purposes under section 101(b). There would be no need for this special provision, applicable only to Alaska Natives, if review under section 117 were equivalent to that afforded by adjudication. This same heightened scrutiny of stock delineations should be given to parties in a proceeding conducted under section 103.

This view as to whether the identification of stocks by NMFS is a relevant issue for independent review in the course of a formal rulemaking conducted under section 103 also is supported by the legislative history and past implementation of the MMPA. In most of those past rulemakings, the identity and status of marine mammal stocks were central and often contentious issues.³ In each instance, those questions were resolved as part of the rulemaking. Congress was well aware of the fact that stock determinations were made in those rulemakings

³ See e.g., Gosliner, M.L., “The Tuna-Dolphin Controversy,” in Twiss, J.R. and R.R. Reeves (eds.), *Conservation and Management of Marine Mammals*, Smithsonian Institution Press, 1999.

when it added section 117 to the Act. In fact, it was a lawsuit challenging some of those determinations, *Kokechik Fishermen's Association v. Secretary of Commerce*, 839 F.2d 795 (1988), that prompted Congress to enact sections 117 and 118 to govern taking of marine mammals incidental to commercial fishing operations⁴. However, there is nothing in either of those provisions or their legislative history to suggest that Congress intended section 117 to be the exclusive mechanism by which stocks are identified or to bypass the additional procedural and substantive safeguards provided in a rulemaking convened under section 103. It is untenable to suggest that Congress intended stock assessment reports to be the sole basis for identifying or evaluating marine mammal stocks in the formal rulemaking context, or that the information in stock assessment reports and testimony based on those reports would not be subject to additional scrutiny as part of the rulemaking.

Disadvantage Test

Before a waiver can be issued under the MMPA, section 103(a) requires the Secretary to insure that any authorized taking “will not be to the disadvantage of those species and stocks and will be consistent with the purposes and policies set forth in section 2 of [the] Act.” While the statute does not provide additional guidance on determining when a marine mammal species or stock would be “disadvantaged,” applicable case law provides such guidance. In one of the seminal cases interpreting the provisions of the MMPA, *Committee for Humane Legislation v. Richardson*, 540 F.2d 1141, the court ruled that only by knowing whether a population would be reduced to less than its optimum sustainable population (OSP) level as a result of the taking could the agency determine whether the taking would disadvantage the species or stocks involved. In *Kokechik*, the Court of Appeals underscored that a taking authorization could not

⁴ See e.g., House Report 103-439 at 22-25, 35-37.

be issued for a depleted stock and that an affirmative finding that a stock is within its optimum sustainable population range, and would remain so despite the authorized taking, is required to sustain the issuance of regulations and a related permit under section 104. That is, NMFS can authorize the taking of marine mammals under section 103 only if there is substantial evidence to support a finding that each stock is within its OSP or is otherwise not designated as depleted.

As discussed in greater detail below, the record in this rulemaking supports such a finding only for the ENP stock. The MMC concurs with the conclusion in the most recent (2018) stock assessment report for the ENP gray whale (revised as of 15 May 2019) that, prior to the current unusual mortality event, the population was approaching 27,000 individuals and 90 percent of carrying capacity. Based on the available information on the extent of the die-off, the ENP stock likely remains above its maximum net productivity level, the lower bound of OSP.

The WNP stock is considered to be depleted by virtue of its listing under the Endangered Species Act (ESA). As such, a waiver for that stock cannot be issued. Further, the stock numbers only about 200 individuals, and likely remains below its OSP. Currently, there is insufficient information in the record to support a determination that the PCFG would be considered at OSP (Yates 3rd declaration at p. 5), if it were determined to be a separate stock. However, if the PCFG is determined to be part of the ENP stock, then it, too, would be covered by the finding for the stock as a whole and considered to be at OSP.

ESA Listing

The Fish and Wildlife Service listed the gray whale as an endangered species under the precursor to the ESA, the Endangered Species Conservation Act of 1969, on 2 December 1970

(35 Fed. Reg. 18320). That listing was carried forward upon enactment of the ESA and included the entire species throughout its range. On 7 January 1993, NMFS published a notice in the Federal register (58 Fed. Reg. 3121) indicating its intent to remove the ENP (California) stock of gray whales from the listing, while retaining the listing for the WNP population. The delisting itself was accomplished in a final rule published jointly by NMFS and the Fish and Wildlife Service on 16 June 1994 (59 Fed. Reg. 31094). Importantly, that rule specified that the listing would apply to gray whales throughout the entire range of the species, except for the population in the “eastern North Pacific Ocean: coastal and Bering, Beaufort, and Chukchi Seas.” The clear intent of the revision was to retain endangered status for the whales referred to in the current waiver rulemaking as WNP whales. Because these whales remain listed under the ESA, they are considered depleted under the MMPA⁵ and, in accordance with section 101(a)(3)(B), a waiver allowing taking from this stock cannot be issued.

Treaty Obligations

One of the issuance criteria for a waiver under MMPA section 103(b) is that the proposed taking be consistent with existing international treaty and agreement obligations of the United States. Here, the relevant agreement is the International Convention for the Regulation of Whaling (ICRW), which regulates both commercial and subsistence whaling. Dr. Michael Tillman presented compelling and uncontroverted testimony that the hunting of gray whales by the Makah Tribe from the “Eastern stock in the North Pacific” is authorized by the International Whaling Commission (IWC), which implements the ICRW. The IWC has, since 1997, adopted aboriginal subsistence catch limits for ENP gray whales to be shared by hunters in Russia and

⁵ MMPA section 3(1)(C) defines the term “depleted” to include any species or population stock listed as endangered or threatened under the ESA.

the United States (IWC Schedule, par. 13(b)(2)). As detailed in Dr. Tillman’s testimony, the IWC does not assign catch limits to specific hunting groups, or even particular member nations. However, the negotiating history behind the Schedule amendments adopted over the years and other actions taken by the IWC and its Aboriginal Subsistence Whaling Working Group to clarify which hunters are covered under the catch limits make it quite clear that the subsistence and cultural needs of the Makah Tribe have been appropriately recognized and that the IWC has acted affirmatively to include the Tribe in that authorization.

Although not an international treaty, per se, the 1855 Treaty of Neah Bay also is relevant to this rulemaking. The Ninth Circuit Court of Appeals said as much in *Anderson v. Evans*, 371 F.3d 475 (2004). The primary ruling in that case was that “the procedures of the MMPA apply to the Tribe,” which prompted the Tribe to initiate this rulemaking. However, in footnote 26 the court observed that “Unlike other persons applying for a permit or waiver under the MMPA, the Tribe may urge a treaty right to be considered in the NMFS’s review of an application submitted by the Tribe under the MMPA.” Despite, this directive, however, the court did not suggest that the Tribe would qualify for a waiver if the statutory criteria are not met. Thus, a waiver should not be issued that authorizes whaling by the Tribe unless all of the applicable requirements under the MMPA are met.

PCFG

As discussed above, the MMC agrees with NMFS that the best available scientific information does not currently support identification of the PCFG as a separate stock. However, as noted in the ENP gray whale stock assessment report, “the status of the PCFG as a population stock remains unresolved.” Therefore, its status may change as additional information is collected and analyses undertaken. If, at some point, NMFS determines that the PCFG does

constitute a stock, this would immediately invoke the impact of the *Kokechik* ruling. Given that there is more than a remote possibility of taking PCFG whales, both by strikes and close approaches, a contingency provision is needed in the regulations to trigger suspension of whaling under those regulations and/or any permit issued thereunder if the PCFG is determined to be a stock. Such a suspension should remain in place until the necessary authorization to take PCFG whales has been issued.

The MMC thinks it laudable that the proposed rule includes provisions to protect the PCFG whether or not it qualifies as a stock. These measures will help ensure that impacts on the PCFG are kept to acceptable levels. Among other things, the proposed rule (§ 216.113(a)(4)(vi)) would suspend hunting should the population estimate of the PCFG drop below 192 or the minimum population estimate be projected to be less than 171. The Commission has advocated that, rather than wait until PCFG abundance has dropped to 192 from the current estimate of 243 whales (more than a 20 percent decline) before any remedial action is taken to reduce the exposure of these whales to hunting, the regulations include provisions to reduce the numbers of allowable strikes at lesser levels of decline. When asked about this at the hearing, Mr. Yates responded that this was unnecessary because the proposed provision already was set at a “very conservative level” (Day 1 transcript at p. 80). The Commission continues to disagree and advocates that the presiding officer’s decision recommend the inclusion of a “dimmer switch” in the regulations that would ratchet down the number of allowable strikes before the PCFG abundance estimate has dropped by more than 50 whales and hunting is suspended entirely. This could be accomplished, for example, by adding a provision to reduce the allowable number of strikes during an odd-year hunt from two per year to one per year, if the population estimate of the PCFG drops below 220 whales.

Kokechik Decision

As discussed above, the decision in *Kokechik* provides guidance on implementing the “disadvantage test” under the MMPA. That case also governs situations in which the findings necessary to issue a taking authorization are met for some species or stocks, but not for others that might also be taken. That is the situation we are faced with in this rulemaking.

In the rulemaking reviewed in *Kokechik*, NMFS had issued an authorization to the Japanese high seas salmon fishery to take Dall’s porpoises, for which it had made the required findings under the MMPA. However, other marine mammals, primarily fur seals, also were expected to be taken incidentally by the fishery. NMFS was in the process of designating the Pribilof Islands fur seal stocks as depleted and had found there to be insufficient information on which to make an OSP determination for the Commander Islands stock. As such, NMFS was unable to include either stock in the taking regulations or permit.

As characterized by the court, the central issue in *Kokechik* was whether the MMPA enabled the Secretary of Commerce to “issue a permit allowing incidental taking of one protected marine mammal species knowing that other protected marine mammal species will be taken as well.” The court concluded that, “[w]hile the Act may not prohibit issuance of a permit where there is only a very remote possibility that marine mammals for which an optimum sustainable population has not been determined may be taken..., such a situation clearly is not the case here.” The court found that the taking of fur seals “is not merely a remote possibility but a certainty.” Under these circumstances, the Secretary in effect was allowing the unauthorized taking of marine mammals for a price, the civil penalties that might be levied. The court found this to be “a result that the MMPA does not countenance” and invalidated the permit in its entirety.

In this rulemaking we are faced with a similar situation. The record supports the issuance of regulations and a permit for ENP gray whales. However, no authorization for the WNP stock, which is depleted, can be issued. In addition, as was the case with Commander Islands fur seals in *Kokechik*, the record in this rulemaking is insufficient to support an OSP finding for the PCFG, should it be considered a separate stock at some future time.

This rulemaking also differs from the *Kokechik* situation in perhaps significant ways. First, lethal taking was the primary concern for the high seas salmon fishery. In this case, the best available evidence indicates that there is fairly low probability that a WNP gray whale will be killed in the course of the proposed hunting. Dr. Moore estimates that there is a 5.8 percent chance of striking at least one WNP whale over the 10 years that would be covered by the regulations if all allowable strikes were used (Moore, 1st Declaration at p. 11). This translates into striking one WNP whale every 170 years (Id.). However, there is a high likelihood that WNP whales will be taken by close approaches during the proposed 10-year validity of the regulations. Dr. Moore states that there is essentially a 100 percent probability of approaching at least one WNP whale if all approaches to gray whales allowed under the proposed regulations are made and, if they are, he would expect 14 approaches to be on WNP whales over the 10 years (Id.). The likelihood of killing or taking PCFG whales is high enough that, under the *Kokechik* opinion, it could present an impediment to issuing the proposed regulations and associated permit, but this would present a problem only if the PCFG were determined to constitute a stock.

Although the court in *Kokechik* may have been most concerned about lethal taking of fur seals and other marine mammals, and whether these removals may “disadvantage” their populations, the opinion seems to apply to all forms of taking. Not only does the court use the

term “take” in its general sense throughout the opinion, but footnote 11 specifically references the broader statutory definition, which includes harassment, hunting, capturing, or killing, or attempts to engage in such activities. The Commission believes that, as a legal matter, the court meant to apply the ruling to all forms of taking, not just permanent removals from the population. This being the case, because there is a high likelihood that some WNP gray whales will be taken during the proposed 10-year validity of the regulations, the authorization potentially runs counter to the *Kokechik* ruling. Thus, a strict reading of that ruling may preclude issuance of this waiver, even for ENP gray whales.

The MMC notes that Mr. Yates, in his third declaration (at p. 15), observed, “Unsuccessful strike attempts and approaches may or may not constitute a ‘take,’ depending on the nature of the event and whether it causes a disruption of the subject whale’s behavior.” His assessment, however, does not comport with the statutory definition of the term “harassment” (MMPA § 3(18)), which is the primary form of taking involved (although some activities might include hunting). Level A harassment is defined as “any act of pursuit, torment, or annoyance which has *the potential* to injure a marine mammal.... (emphasis added).” Clearly, an attempted strike has the potential to injure a whale whether or not the target is hit. Similarly, the definition of Level B harassment is based on the “*potential* to disturb a marine mammal” (emphasis added); observable disruption of each individual’s behavior is not required.

In *Kokechik*, the court held out the possibility that taking that could not be authorized under section 103 regulations could be authorized under other provisions of the Act. In the case of the Japanese fishery, those alternative mechanisms were precluded because the statutory provisions were available only to United States citizens and the Japanese fishermen did not qualify. The Makah Tribe, on the other hand, might qualify for an incidental take authorization

under section 101(a)(5), which allows NMFS to authorize the incidental, but not intentional, taking of small numbers of marine mammals from both non-depleted and depleted marine mammal species and stocks, provided that the taking would have only a negligible impact on the affected species and stocks.

It appears that short-term close approaches of a small number of WNP gray whales during training activities likely would meet the negligible impact requirement necessary to obtain an incidental take authorization. This assumes that no deaths or serious injuries of those whales occur (which under the terms of this proposed rule (§ 216.113(a)(3)(vii)) would trigger an immediate closure of further hunts until measures are taken to ensure that no additional WNP whales are struck). However, as noted above, section 101(a)(5) authorizations apply only to incidental taking, not intentional taking. In the case of whaling and training activities by the Makah Tribe, the approaches to those whales would be intentional, but the intent presumably would be to approach ENP rather than WNP whales. It is unclear whether the statutory criteria would be met in the case where hunters intend to approach only ENP whales, but “incidentally” approach WNP whales in some instances.

The Commission believes that this is something best resolved once the Tribe has applied for and NMFS is considering issuing an incidental take authorization. Nevertheless, to address the problem created by the *Kokechik* ruling, given the high likelihood that some WNP whales will be taken in the course of the proposed activities, the Commission believes that the section 103 regulations (or the permit issued thereunder) should be made contingent on the Tribe securing an authorization under other provisions of the MMPA for non-lethal taking of WNP whales.

Unusual Mortality Event

On 29 May 2019, NMFS issued a declaration under section 404 of the MMPA that the ENP gray whale population was experiencing an unusual mortality event (UME) (Yates 4th declaration at p. 1). As of 26 July 2019, 191 stranded gray whales had been detected throughout the stock's range in Mexico, the United States, and Canada since the beginning of the event⁶ (Id. at p. 5). Since then, the number of known strandings between 1 January 2019 and 13 March 2020 had increased to 264, with 49 occurring in 2020 ([NMFS UME webpage](#)). One of the stranded whales has been identified as belonging to the PCFG (Day 1 transcript at p. 111). The UME is continuing, its cause remains unknown, and environmental conditions in the ENP foraging areas appear to be changing, hence the scale of the mortality associated with this UME likely will be indeterminate for an unknown length of time. Because not all stranded whales are found, and because some whales die at sea and sink, the reported number of carcasses must represent only a fraction of those whales that have died during the UME. The total number of deaths associated with the UME can only be inferred by comparing a series of annual abundance estimates, so it will be some time before a reliable estimate of the total mortality becomes available.

Additional insight can be gleaned from comparison with a previous gray whale UME that occurred in 1999-2000, although there is no way to tell if the current UME or future UMEs will be similar. During that UME, 651 stranded whales were detected (Gulland et al., NMFS Ex. 1-21). As Mr. Yates explained in his declaration, following that UME, the population had declined by about 5,000 whales (Ibid. at p. 3). By comparing the number of strandings of ENP gray whales reported in Gulland et al. with the estimated numbers of deaths that occurred during

⁶ The declaration identified the beginning of the event as 1 January 2019.

the years surrounding the mortality event, Punt and Wade (NMFS Ex. 4-3 at p. 25) estimated that only 3.9 to 13.0 percent of the whales that died ended up stranding and being reported. If we apply the same range of detection rates to the number of strandings reported during the current UME, between 2,030 and 6,770 whales may have died thus far. Even if abundance estimates over the next few years bear out a population decline at the upper end of that range, this may not warrant suspending the proposed hunt of ENP gray whales or reducing the proposed numbers of allowable strikes. The population would still be within its OSP range and, based on the experience following the 1999-2000 UME, would be expected to recover.

Although UMEs are likely to occur in the future, NMFS has largely ignored the need to build some contingency into the regulations to address their potential impact on the population. As Mr. Yates testified, “the population is so large and so robust” and the proposed removals so small that there was no need to set a low-abundance threshold to “turn off the hunt,” as it has proposed for the PCFG (Day 1 transcript at p. 81). Rather, NMFS would rely on its permitting authority to address significant population declines associated with UMEs (Id.). The MMC agrees that the anticipated hunt would have a de minimus impact on the population compared to the effects of one or series of UMEs that would activate such a trigger. Nevertheless, the Commission continues to advocate for the inclusion of some population floor in the regulations below which hunting would be suspended. From a legal perspective, the regulations should not allow hunting if the population drops to a level that corresponds to the estimated abundance at the stock’s maximum net productivity level (MNPL), the lower bound of the OSP range. As noted in the 2018 stock assessment report for the ENP gray whale, Punt and Wade estimated that the stock was at 129 percent of its MNPL in 2009. Using the corresponding best estimate of the stock’s abundance at that time (20,366), the MNPL for the stock at that time would have

been reached at a population of around 15,800 whales. Since 2009, new demographic information has become available that would change those results. As such, NMFS should be asked to derive a new estimate of the stock's MNPL for consideration in setting a population level below which hunting would not be allowed.

Uses of products

The proposed rule addresses the use of parts and products from whales landed by the Makah Tribe in section 216.113(b). NMFS subsequently offered proposed changes to certain provisions governing the sharing of edible whale products and intended to clarify that only domestic sales of handicrafts would be allowed (NMFS [Motion Requesting Revisions to Proposed Regulations](#)). Rather than commenting on specific aspects of the proposed regulations, the MMC would like to address these provisions generally. The Makah Tribe submitted extensive testimony documenting its historical use of whales and has largely structured its waiver request to accommodate those traditions. This is admirable, but product use does not represent a legal limitation under the MMPA waiver provisions. In fact, those provisions were designed to address a wide spectrum of possibilities, including justified culls of robust populations and even commercial exploitation. The real limitations on the use of whale products in this instance are those that flow from the IWC's authorization and definition of aboriginal subsistence whaling. The MMC supports adoption of regulations that accommodate to the greatest extent allowable the uses sought by the Tribe, provided that they are consistent with the IWC requirements.