

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

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

**POSITION OF MAKAH TRIBE’S WITNESSES REGARDING NMFS’S PROPOSED
ISSUES OF FACT**

Pursuant to 50 C.F.R. 228.7(b)(1), the Makah Tribe submits the attached summary of positions of Jonathan Scordino, John W. Bickham and John R. Brandon, the Tribe’s three scientific expert witnesses in this matter, as to NMFS’s published issues for the hearing, *i.e.*, the “Issues that May be Involved in the Hearing,” 84 Fed. Reg. 13639, 13641-43 (Apr. 5, 2019). A “no comment” entry in the table indicates that the witness does not have knowledge of this fact issue and/or it was outside the scope of the witness’ testimony.

Respectfully submitted, this 20th day of May, 2019.

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Reference Number	NMFS's Issue of Fact that May Be Involved in the Hearing	Jonathan Scordino	John W. Bickham	John R. Brandon
I.A (Waiver)	NMFS gave due regard to the potential effects of the proposed waiver on the distribution, abundance, breeding habits, and times and lines of migratory movements of the ENP gray whale stock.	Agree	No comment	No comment
Waiver A.1	1. The proposed waiver will not have a meaningful effect on the distribution, abundance, breeding habits, or migratory movements of the ENP gray whale stock.	Agree	Agree	Agree
Waiver A.2	2. NMFS recognizes two stocks of gray whales under the MMPA, the western North Pacific (WNP) stock and the eastern North Pacific (ENP) stock.	Agree	Agree	Agree
Waiver A.3	3. Under the MMPA, NMFS defines the Pacific Coast Feeding Group (PCFG) as gray whales observed between June 1 and November 30 within the region between northern California and northern Vancouver Island (from 41°N lat. to 52°N lat.) and photo-identified within this area during two or more years. The PCFG is part of the ENP stock.	Agree	Agree	Agree
Waiver A.4	4. The ENP stock ranges from the winter/spring breeding grounds in northern Mexico and southern California to the summer/fall feeding grounds in the Bering, Beaufort, and Chukchi seas. The ENP stock migrates between the breeding and feeding grounds between December and May. The PCFG spends the summer and fall feeding season off the Pacific coast of North America from northern California to northern Vancouver Island.	Agree, but with the following qualifications: (1) The best available science indicates that the Western Feeding Group (WFG) is also a part of the ENP and the ENP range should therefore include the Okhotsk Sea; and (2) Some PCFG whales may be present in the PCFG range through the winter.	Agree, with Scordino's qualifications.	No comment
Waiver A.5	5. The best available abundance estimate for the ENP stock is 26,960.	Agree	Agree	Agree

Waiver A.6	6. The best available abundance estimate for the PCFG is 243.	Agree	Agree	Agree
Waiver A.7	7. The proposed waiver, at a maximum, would result in the deaths of 25 whales over 10 years, or an average of 2.5 per year. The proposed waiver, at a maximum, would reduce the ENP gray whale stock by 0.09 percent over 10 years, or an average of 0.009 percent per year.	Agree, but with the following qualification: This calculation assumes that except for removals by the Makah hunt, the ENP population will remain constant over 10 years.	No comment	Agree, with Scordino's qualification.
Waiver A.8	8. Reducing the ENP stock by 0.009 percent per year or 0.09 percent over 10 years would not have a discernable effect on the ENP stock's abundance.	Agree	Agree	Agree
Waiver A.9	9. The United States is a signatory to the International Convention for the Regulation of Whaling (ICRW). The ICRW establishes the International Whaling Commission (IWC), which, among other things, establishes catch limits for aboriginal subsistence whaling by member states.	Agree	Agree	Agree
Waiver A.10	10. Since 1997, the IWC has routinely approved an aboriginal subsistence catch limit for ENP gray whales for joint use by the United States and the Russian Federation. The United States and the Russian Federation have been routinely, and currently are, parties to a bilateral agreement that allocates the IWC catch limit between the two countries and allows either country to transfer to the other any unused allocation.	Agree	Agree	No comment
Waiver A.11	11. The United States has routinely transferred its unused share of the IWC catch limit to the Russian Federation for use by Chukotkan hunters.	Agree, but with the following qualification: The catch limit should be referred to as the "IWC <u>gray whale</u> catch limit" to distinguish it from the IWC bowhead whale catch limit	Agree, with Scordino's qualification	No comment

Waiver A.12	12. Based on long-standing practice and the current United States-Russian Federation bilateral agreement, the United States would likely continue to transfer any unused IWC catch limit to the Russian Federation for use by Chukotkan natives, so that the net effect of the hunt on ENP gray whale abundance would be the same with or without the proposed waiver.	Agree	Agree	No comment
Waiver A.13	13. The proposed waiver, at a maximum, would result in a total of 150 unsuccessful strike attempts and training harpoon throws, combined, over 10 years, or an average of 15 per year.	Agree	No comment	No comment
Waiver A.14	14. The proposed waiver, at a maximum, would result in a total of 353 approaches (causing a hunt or training vessel to be within 100 yards of a gray whale) per year, with a sub-limit of 142 approaches of PCFG whales.	Agree	No comment	No comment
Waiver A.15	15. The ENP stock has demonstrated resiliency to decades of active hunting by Chukotkan natives and other human activities. Gray whales were classified as an endangered species under U.S. law in 1970 (the original listing included both ENP and WNP gray whales). Subsequently, the ENP stock recovered and was de-listed in 1994. The ENP stock grew from 12,771 animals to approximately 27,000 animals between 1970 and 2016.	Agree	Agree	Agree
Waiver A.16	16. Despite over a hundred gray whales being pursued and killed in aboriginal subsistence hunts off Chukotka each year, many of which are killed during the summer feeding months, there has not been a discernible change in the availability or location of gray whales in the Chukotkan hunt area.	Agree	No comment	No Comment
Waiver A.17	17. Unsuccessful strike attempts and training harpoon throws are expected to result in temporary disturbance but not to	Agree	No comment	No Comment

	have a lasting effect on the affected whale's health or behaviors.			
Waiver A.18	18. Approaches are not expected to have a lasting effect on the affected whale's health or behaviors.	Agree	No comment	No Comment
Waiver A.19	19. Photo-identification is a reliable, feasible method of identifying PCFG and WNP whales.	Agree	Agree	Agree
Waiver A.20	20. The proposed waiver, at a maximum, would result in 16 strikes of PCFG whales over the 10-year duration of the waiver period (average of 1.6 per year), of which only 8 strikes would be of PCFG females (average of 0.8 per year).	Agree, but with the following qualification: This statement makes the reasonable assumption that for struck and lost whales, the estimated PCFG availability in even-year hunts is the same or greater than the proportion of PCFG whales actually struck and lost.	No comment	Agree, with Scordino's qualification
Waiver A.21	21. Under the proposed waiver, NMFS would manage impacts of the proposed waiver to PCFG whales through photo-identification and specified assumptions.	Agree	No comment	No Comment
Waiver A.22	22. The proposed waiver would require that hunting cease if PCFG abundance were to fall below set levels. The levels, referred to as low-abundance triggers, are 192 whales, or a minimum abundance estimate of 171 whales.	Agree	No comment	Agree
Waiver A.23	23. NMFS would use a forecasting model to provide up-to-date PCFG abundance estimates during the waiver period.	Agree	No comment	Agree

Waiver A.24	24. PCFG abundance has been stable or increasing since around 2002, with an average annual increase in abundance of 3.5 animals between 2002 and 2015.	Agree	Agree	Agree
Waiver A.25	25. The combination of strike limits and low-abundance triggers will ensure that the proposed waiver will not cause PCFG abundance to decline below recent stable levels.	Agree	No comment	Agree
Waiver A.26	26. Because the proposed waiver will not cause PCFG abundance to decline below recent stable levels, the proposed waiver is not expected to affect the range-wide distribution of the ENP stock, including the stock's distribution within the PCFG range.	Agree	No comment	Agree
Waiver A.27	27. Under the proposed waiver, hunting or hunt training is most likely to overlap with gray whale breeding in December–January. NMFS expects that few if any hunt activities would occur in December–January due to inclement weather and unfavorable ocean conditions, but it is possible that hunt activities could occur in December- January and could encounter mating whales.	Agree	No comment	No comment
Waiver A.28	28. The proposed waiver would not adversely affect ENP gray whale breeding, because the proportion of the migration corridor where hunt activities could occur is small, the level of hunt activity likely to occur in December–January is low, the number of whales that could be struck is extremely small, and any whales that were disturbed would likely have repeated opportunities to mate throughout the remainder of the southward migration.	Agree	Agree	Agree

Waiver A.29	29. Migrating ENP gray whales are only expected to be encountered during even-year hunts. Migrating whales are steady swimmers that would transit the hunt area within several hours. The hunt area is a very small portion of the ENP gray whale stock's migration corridor.	Agree generally but with the following qualification: In the Makah U&A it is common to see ENP gray whales on migration feeding or milling in the area during the December through May migratory time period.	No comment	No comment
Waiver A.30	30. During even-year hunts, adverse weather and ocean conditions coupled with shorter periods of daylight would keep most hunts and training exercises close to shore and of short duration.	Agree, but with the following addition: Hunting and training in even-year hunts is more likely to occur within 5-7 miles of shore because of observed whale availability.	No comment	No comment
Waiver A.31	31. A very small number of migrating ENP gray whales would be subjected to hunt or training activities. Any gray whale subject to such activities (but not struck) would likely experience the encounter as a temporary and localized near-shore event that would not result in a lasting effect on the whale's migratory movements.	Agree	No comment	No comment
I.B (Waiver)	B. NMFS properly concluded that the proposed waiver is in accord with the MMPA's purposes and policies because it will not affect the health, stability, or functioning of the marine ecosystem or the ENP stock's abundance relative to its optimum sustainable population (OSP) levels.	Agree	No comment	No comment
Waiver B.1	1. The proposed waiver is not expected to have a meaningful effect on the health, stability, or functioning of the marine ecosystem or on the ENP stock's abundance relative to OSP.	Agree	No comment	Agree

Waiver B.2	2. The level of hunting that could occur under the proposed waiver would affect only a small fraction of the ENP stock and the stock's ecosystems. Most effects of the hunt would be temporary and localized.	Agree	Agree	Agree
Waiver B.3	3. The ENP stock functions within many large ecosystems shaped by a variety of processes. The smallest recognized ecosystem that encompasses the hunt area is the northern California Current ecosystem.	Agree	No comment	Agree
Waiver B.4	4. 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. The role of ENP gray whales in structuring this ecosystem is limited.	Agree	No comment	Agree
Waiver B.5	5. 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.	Agree.	No comment	Agree
Waiver B.6	6. Even at the smallest biologically relevant scale, the northern Washington coastal 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.	Agree	No comment	Agree

Waiver B.7	7. The ENP stock has been within OSP levels since at least 1995. In 2012, NMFS concluded that the ENP stock was at 85 percent of carrying capacity with an 88 percent likelihood that the stock was above its maximum net productivity level. NMFS's current stock assessment report for the ENP stock continues to adopt this conclusion.	Agree	No comment	Agree
Waiver B.8	8. 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.	Agree	No comment	Agree
II.A (Regulations)	A. The proposed regulations are necessary and appropriate to ensure that a tribal hunt will not disadvantage the ENP gray whale stock, because the proposed regulations will have no discernable effect on the ENP gray whale stock's abundance relative to OSP. See Issues of Fact I.A.7-8, I.B.7-8.	Agree that the Makah hunt, as constrained by the proposed regulations, will not disadvantage the ENP gray whale stock for the reason stated, but in my opinion the regulations are more restrictive than necessary for that purpose.	Agree	Agree
II.B (Regulations)	B. The proposed regulations are necessary and appropriate to ensure that a tribal hunt will be consistent with the purposes and policies of the MMPA. See Issues of Fact I.B.1-8.	Agree that the Makah hunt, as constrained by the proposed regulations, is consistent with the purposes and policies of the MMPA, but in my opinion the regulations regarding handicrafts are not necessary for that purpose.	Agree	Agree

II.C (Regulations)	C. NMFS gave full consideration to all relevant factors in prescribing the proposed regulations, including existing and future levels of marine mammals stocks, existing international treaty and agreement 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.	Agree	No comment	No comment
Regulations II.C.1	1. NMFS fully considered the effects of the proposed regulations on the existing and future levels of the ENP gray whale stock. <i>See</i> Issues of Fact I.A.7–8, I.B.7–8.	Agree	No comment	Agree
Regulations II.C.2	2. NMFS fully considered the effects of the proposed regulations on existing international treaty and agreement obligations of the United States.	Agree	No comment	No Comment
Regulations II.C.3	3. Under the ICRW and through the bilateral agreement between the United States and the Russian Federation, the Makah Tribe can harvest up to five ENP gray whales per year.	Agree	No comment	Agree
Regulations II.C.4	4. The proposed regulations would not authorize the Tribe to harvest more ENP gray whales than available under the ICRW and the U.S.-Russian Federation bilateral agreement.	Agree	No comment	Agree

Regulations II.C.5	5. The IWC Scientific Committee's Standing Work Group on Aboriginal Subsistence Whaling Management Procedures evaluated a Makah tribal hunt as would be carried out under the proposed regulations and determined that the hunt would meet the IWC conservation objectives for ENP, WNP, and PCFG whales.	Agree, but with the following addition - The IWC's Scientific Committee fully endorsed the evaluation and determination by the Standing Working Group - and corrections - "Western Feeding Group (WFG)" should be substituted for "WNP" and "Northern Feeding Group (NFG)" should be substituted for "ENP" to accurately reflect the Scientific Committee's conclusions and definitions.	Agree	Agree, with Scordino's qualifications
Regulations II.C.6	6. NMFS fully considered the effects of the proposed regulations on the marine ecosystem. <i>See Issues of Fact II.A.2.a-f. See Issues of Fact I.B.1-6.</i>	Agree	No comment	No comment
Regulations II.C.7	7. NMFS fully considered the effects of the proposed regulations on environmental considerations related to the marine ecosystem, including potential effects to water quality, pelagic and benthic habitats, other species of fish and wildlife, and marine noise levels.	Agree	No comment	No comment
Regulations II.C.8	8. The proposed regulations would have no effect on the conservation, development, or utilization of fishery resources.	Agree	No comment	Agree

Regulations II.C.9	9. NMFS fully considered the economic and technological feasibility of implementation of the proposed regulations.	Agree, but with the following qualification - There is no evidence that NMFS a) considered the economic feasibility of the following requirements the regulations impose on the Tribe: monitoring of the hunt and certification and maintaining an official record of handicrafts, or b) considered the technical feasibility of marking all handicrafts (particularly small pieces of art).	No comment	No comment
Regulations II.C.10	10. NMFS's costs associated with the proposed regulations would primarily involve the continuation of longstanding gray whale surveys and photo-identification work, with additional funding of approximately \$2,000 per day of hunting needed to support NMFS monitoring and enforcement personnel. The annual NMFS budget for marine mammal management in the West Coast Region is over \$700,000.	Agree, but with the following qualification - NMFS does not currently provide financial support for the Tribe's (and many other researchers') efforts in conducting gray whale surveys and photo-identification work, so the budget would need to reflect such a commitment in the future.	No comment	No comment
Regulations II.C.11	11. The costs to NMFS associated with regulating a hunt under the proposed regulations are feasible.	Agree	No comment	No comment

Regulations II.C.12	12. The Tribe's 1999 gray whale hunt successfully demonstrated the economic and technological feasibility of the Tribe prosecuting a gray whale hunt. The Tribe has enacted a detailed Tribal Whaling Ordinance, which demonstrates the feasibility of tribal hunt management.	Agree, but with the following qualification - The 1999 hunt had far fewer requirements than the proposed regulations would impose. Nonetheless, future hunts under a waiver that utilize similar methods as the 1999 hunt are expected to be economically and technologically feasible.	No comment	No comment
Regulations II.C.13	13. The proposed regulations include provisions for matching photographs of struck whales to those of known whales, a procedure which is technologically feasible.	Agree	Agree	No comment
Regulations II.C.14	14. The proposed regulations include provisions for marking and tracking handicrafts made from non-edible whale products, which is technologically feasible.	Disagree, in part, because there is no evidence that marking small carved objects from bone or baleen is technologically feasible for Makah artists.	No comment	No comment
Regulations II.C.15	15. NMFS determined that potential risks to WNP gray whales from implementation of the proposed regulations is an additional relevant factor in prescribing the regulations and fully considered such risks.	Agree, but see the Tribe's proposed issues of fact for additional scientific support for the very low impacts a Makah hunt would have on whales migrating from feeding grounds off of Sakhalin Island to wintering grounds off the coast of North America and the stock structure of these whales.	Agree	No comment

Regulations II.C.16	16. The proposed regulations contain a number of restrictions to limit the risk of death, injury, or other harm to WNP whales. These include alternating hunt seasons, a limit of three strikes during even-year hunts, a ban on hunting during November and June, seasonal restriction on training harpoon throws in odd-numbered years, restriction on multiple strikes within 24 hours during even-year hunts, and the requirement that if a WNP is confirmed to be struck, the hunt will cease until steps are taken to ensure such an event will not recur.	Agree	Agree	Agree
Regulations II.C.17	17. NMFS's scientists undertook a risk analysis to quantify risk to WNP whales based on the best scientific evidence available and using conservative assumptions.	Agree, but with the following qualification - The "WNP gray whales" subject to NMFS's risk analysis are different from the ESA- and IUCN-listed Western Breeding Stock (WBS) of gray whales, which under the IWC Rangewide Review's most plausible stock structure hypotheses (3a and 5a) do not migrate to North America.	Agree	Agree
Regulations II.C.18	18. NMFS's risk analysis concludes that there is a 5.8 percent probability of hunters striking one WNP gray whale over the 10 years of the regulations, meaning over the course of seventeen 10-year hunt periods, one WNP gray whale would be expected to be struck (<i>i.e.</i> , in one year out of 170), if the Tribe made the maximum number of strikes attempts allowed in even-year hunts and if ENP and WNP population sizes and migration patterns remained constant.	Agree, but with the following qualification - The "WNP gray whales" subject to NMFS's risk analysis are different from the ESA- and IUCN-listed Western Breeding Stock (WBS) of gray whales, which under the IWC Rangewide Review's most plausible stock structure hypotheses (3a and 5a) do	Agree	Agree

		not migrate to North America.		
Regulations II.C.19	19. NMFS's risk analysis concludes that there is about a 30 percent probability that one WNP whale would be subjected to an unsuccessful strike attempt or training harpoon throw over the 10 years of the regulations, or one such encounter every 33 years, 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.	Agree, but with the following qualification - The "WNP gray whales" subject to NMFS's risk analysis are different from the ESA- and IUCN-listed Western Breeding Stock (WBS) of gray whales, which under the IWC Rangewide Review's most plausible stock structure hypotheses (3a and 5a) do not migrate to North America.	No comment	Agree
Regulations II.C.20	20. Unsuccessful strike attempts and training harpoon throws are expected to result in temporary disturbance but not to have a lasting effect on the affected whale's health or behaviors.	Agree	No comment	No comment
Regulations II.C.21	21. NMFS's risk analysis concludes that a maximum of 14 WNP gray whales could be approached within 100 yards over the ten years of the waiver period, or an average of 1.4 per year, if ENP and WNP population sizes and migration patterns remain constant. This analysis assumes that all allowed approaches (3,530 over 10 years) are made and all occur between December 1 and May 31, meaning that no hunting would occur during odd-year hunts.	Agree, but with the following qualification - The "WNP gray whales" subject to NMFS's risk analysis are different from the ESA- and IUCN-listed Western Breeding Stock (WBS) of gray whales, which under the IWC Rangewide Review's most plausible stock structure hypotheses (3a and 5a) do not migrate to North America.	No comment	Agree, but with the following qualification – 14 is the mean number of whales in Table 1 of Moore and Weller (2018)

Regulations II.C.22	22. Approximately twice as many suitable days for hunting and training occur during the months of odd-year hunt seasons than during the months of even-year hunt seasons, considering weather conditions and whale availability.	Agree	No comment	No comment
Regulations II.C.23	23. If the Tribe made the full number of approaches allowed under the proposed regulations each year of the waiver period, and those approaches were divided evenly between odd-year and even-year hunts, then approximately 0.7 WNP whales would be subjected to an approach annually.	Agree, but with the following qualification - The "WNP gray whales" subject to NMFS's risk analysis are different from the ESA- and IUCN-listed Western Breeding Stock (WBS) of gray whales, which under the IWC Rangewide Review's most plausible stock structure hypotheses (3a and 5a) do not migrate to North America.	No comment	Agree, but with the following qualification – This calculation is based on the mean number of whales in Table 1 of Moore and Weller (2018)
Regulations II.C.24	24. Approaches are not expected to have a lasting effect on the whale's health or behavior	Agree	No comment	No comment