



PENINSULA CITIZENS FOR THE PROTECTION OF WHALES

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William Stelle, Jr., Regional Administrator
National Marine Fisheries Service, West Coast Region
NOAA
7600 Sand Point Way, NE, Building 1
Seattle, WA 98115

RE: Comments on DEIS - Makah Tribe Request to Hunt Gray Whales

Dear Mr. Stelle:

Please accept these comments on behalf of the many members and supporters of PCPW, and all friends of the great gray whales. We are particularly concerned with the safety of the small number of gray whales who inhabit our State and County waters. As NMFS posted on their website in an article titled, "Safe Passage: NOAA Scientists and Gray Whales are Forging New Paths": ***"These days, the California gray whale is a beloved icon."*** We couldn't agree more.

Over the years PCPW has submitted reams of comments to NMFS on the issue of whaling. Our most substantive to date had been the comments to the 2008 DEIS. Although a few of our comments received answers, or "comments noted", the great bulk of our concerns remained unanswered, and problematic, in the 2015 DEIS. There are still great inaccuracies and inadequacies of analysis. The likely effects of perpetual whale hunts on the local tourism economy is minimized, and the local economy is inexplicably described as healthy and growing. The specter of tourism boycotts of the Olympic Peninsula is likewise deflected. This is a great disservice to the hardworking people of Clallam County, already struggling with job losses in traditional sectors, and a very "down" economy. The fact that "no boycott materialized" is a factor of the very short time span of actual whaling. When court actions stopped active whaling after one kill, most casual observers, including locals, mistakenly thought that whaling was "over". Had whaling continued, or if it resumes, there should be no doubt that there will be very measurable economic effects. The Olympic Peninsula is marketed as a natural wonderland. To contemplate a "new" high-profile image as a place where the locally viewable whales are regularly killed and butchered on the beach is worthy of some analysis. This DEIS does not dare to do such contemplation.

The issues related to the known contamination of the meat and blubber of "even healthy whales" such as the young whale killed in 1999, are also dealt with in a brief and cavalier manner. Will the co-managers be concerned with establishing proper "dosages" of pollutants in the diets of elders, children and pregnant women? Or will they continue to hide behind the "inability" to gauge current contaminant loads of individual consumers of whale products? Will there be cautions regarding the potential introduction of whale products into the school lunch programs or the senior nutrition programs? Doubtful, as whale products are being touted as a "health food"! With the high amount of potentially polluted seafood already consumed in Neah Bay, who will actually analyze or track the effects of ingesting the flesh and fat of up to five different whales per year? Or will that be a politically forbidden endeavor?

The social costs to the fabric of life on our Peninsula are also unanalyzed, but they will be great. There is simply no middle ground in a conflict over whether to kill or not to kill whales, complicated by the "piggy-backing" of racism from both sides. The "anti-tribal" or "anti-white" fringe element is out of the control of the mainstream proponents of whaling or whales. But its existence cannot be a deterrent to the serious voices on either side. The members of PCPW, especially in the years of active hunting, have withstood much in the way of harassment, name-calling, threats, bullying phone calls, and physical harm. All incidents were documented, and some referred to law enforcement, but we understood that this would likely "come with the turf". Eventually most of our members preferred some measure of anonymity. Many were/are vulnerable elders who could no longer take the bullying phone calls following their letters to the editor expressing opposition to whaling. Some members have held elected office, or are in businesses that have tribal clients. Whaling will add much negativity to relationships on the Peninsula, and the Makah Tribe understood that going in. In that way, and many others, whaling is a selfish and self-indulgent pursuit that will not resolve well for anyone. Collateral damage within the Peninsula's economy and community will harm us all.

There could possibly have been a way to moderate the impact to local whales and local feelings, but these options stand little chance against the co-managers' desire to expand local whaling to the greatest degree possible. There is only one alternative that can be endorsed as protective of the small group of genetically distinct local whales and the tiny group of highly endangered Western Pacific Gray Whales who transit the Makah U&A during hunt seasons. This alternative will also protect innocent bystanders from the dangers of the .50 cal. rifle, and will allow the Clallam County economy a fair chance to rebound without becoming "famous" for conflict and dead whales. **The only alternative that causes no harm to the local economy, the local people, and the local whales is Alternative 1, no action.**

OPENING STATEMENT

It has been a bumpy, twenty year ride for NMFS and the Makah Tribe in their joint quest to accomplish the killing of whales in the waters of Washington State. But a slow, stop-and-go ride is what you can expect when the cart you ride in is inextricably lashed before the horse. Observers of this misadventure know the timeline of the rush to judgment....the chain of decisions made by a handful of NMFS "higher ups" that the judges of the 9th Circuit Court of Appeals would ultimately designate as "*arbitrary, capricious, and otherwise outside the law.*" [*Anderson v Evans 2004*]

From 1994-2012, NMFS has presided over :1) the premature and contentious de-listing of the Eastern North Pacific gray whale, [petitioned for by the Northwest Indian Fisheries Commission], 2) the "Agreement" to help the tribe obtain a quota from the IWC without benefit of NEPA analysis, 3) the pushing through of a highly controversial new category of whaling at the IWC: "whaling for cultural [not nutritional] subsistence need", 4) the "back-door" bundling of the Makah request with the Russian quota request, sidestepping a vote on the merit of the Makah 's "needs" 5) two highly insufficient EAs that resulted in two insupportable" Findings of No Significant Impact", 6)back and forth lawsuits, 7) a huge loss for the government's position at the 9th Circuit Court of Appeals,[*Anderson v Evans*],8) weak studies utilizing small sample sizes that led to: 9) the de-bunking by independent scientists of many of NMFS' "facts" about the PCFG, and as a result, 10) an aborted DEIS [2008]. Throughout, NMFS has unapologetically lurching the cart, full of inappropriate decisions and justifications, in and out of the ditch while the poor, disregarded "horse" of science and law was dragged along in the rear.

But hope springs eternal, and it seemed there could be a *chance* that the decision of the 9th Circuit Court, coupled with fresh advances in knowledge about gray whales, would serve as a turning point for NMFS. A time to pause and to consider the new information coming in, get the "horse" in the logical lead position , and let the chips fall where they may concerning the ability of NMFS to advocate for a waiver from the MMPA to allow the Makah to kill local gray whales.

The 9th Circuit's Final Decision in 2004 clearly required NMFS to take a hard look at certain aspects of the whaling plans. High on the Court's list to NMFS were to: **1) analyze the effects of harassing and killing members of the small group of PCFG whales as well as the very small group faithful to the Makah U&A, 2) analyze the likelihood of other U.S. tribes following the Makah lead and requesting similar waivers to take whales, and 3) provide evidence of specific IWC approval for the Makah quota. These areas alone required an EIS, and the Court so ordered.**

Eleven years later, we have a second DEIS , but new science keeps on coming. Even as we comment on this DEIS, the "facts" about gray whale stock designations and population sizes and migration paths are in flux. ***Precaution dictates that no decisions regarding waivers***

from the MMPA be finalized until NMFS is certain about the nature and population status of the various branches and twigs on the gray whale family tree. It is hard to have faith that NMFS will take the path of precaution. Willingly or unwillingly, NMFS is continually pushed by the Pacific Northwest tribes to clear a path through the Marine Mammal Protection Act [MMPA], with haste more important than scientific certainty.

So we note with weary "surprise" that this DEIS is worse than the 2008 DEIS. It is worse, because there is more at stake than was even imagined in 2008. Unfortunately, this DEIS is over 1200 pages of avoidance and denial of NMFS' responsibility to make science-based assessments and management decisions. It has been said before, that when NMFS departs from science-based assessments, the integrity of its entire management system is harmed.

These comments are submitted by ordinary people of the Olympic Peninsula. We are not scientists, but avidly keep abreast of advances in gray whale science. We are not anthropologists, but have a genuine love and interest in the study of the deep and fascinating history of our tribal neighbors. And as neighbors, with a multitude of personal and business relationships, we uniquely care for, respect, and listen to our friends at The Cape. We all have our own stories of experiencing the warmth and generosity of the Makah people. To care about the local whales does not preclude caring about the local people, no matter their opinion of whaling. But we do know, as the DEIS points out, that the tribe is not "of one mind" on the plan to kill whales. We also know, sadly, that the freedom to oppose whaling is complicated in Neah Bay. It takes great courage to oppose the will of the politically dominant, and to suffer subtle and blatant bullying and abuse in one's own ancestral home. Abuse that is rooted in an attempt by "the powers that be" in Neah Bay to present a united, pro-whaling face to the world. Thus, we feel that some of our comments reflect the feelings of some of our neighbors, and this gives us even more strength of heart to continue to "speak for the whales".

Because of the great length of the DEIS and the great many scientific papers referenced, it has been difficult to feel that we have done "justice" to the gigantic task of analyzing the many issues raised [and not raised] by the draft in the short time allowed. 90 days might have seemed sufficient if one had no other tasks to deal with. To place this big job on top of one's "real" jobs and commitments has been extremely harsh. NMFS has allowed itself many years to put this document together. As much time as they wanted. Yet they made the responding public beg for more than 60 days. And the announcement that there would be another month or so added was not announced until well into the 60 day period, causing much extended anxiety. All disadvantage was to those committed to being part of this official process in their opposition to whaling. All advantage is to the pro-whaling "co-managers" who have had unlimited time to cut and paste old and new parts of the 2008 and 2015 DEISs together into this massive document.

PCPW requests, therefore, that our comments to the 2008 DEIS be re-reviewed along with these current comments. There is simply no time to accomplish the level of "cut and paste" that the government has accomplished in the short time allowed us. We believe our 2008

comments to still be relevant. The issues of conflicts of interest, anthropologist bias, effects to economy and community still exist. The degradation of the local ocean environment: acidification, warming waters on the coast, toxic algae blooms, low oxygen levels, and the many threats to the ENP population in the Arctic related to global warming and oil exploration and drilling...these are problems that have only gotten worse. As have the threats of ship strikes, noise pollution and fishing gear entanglements. Many believe that the so-called "healthy" ENP population of gray whales is far from secure, and is in fact depleted. Numbers are down. Breeding lagoon temperatures are up. Orca "takes" of calves are high. Prey species are at risk. The "stinky whale" mystery remains unsolved and the die-off of one third of the ENP population in 1999-2000 does not seem to be completely understood. The long-term survival of the ENP gray whales is not a given, and many believe that they should be re-listed. PCPW echoes these concerns.

But for the Peninsula Citizens for the Protection of Whales, as local people our first and foremost concern, and "expertise", is with the local whales, and that will be the primary focus of these comments.

THE PACIFIC COAST FEEDING GROUP (PCFG)

Observers of America's west coast waters have always known that a smattering of gray whales remain to feed in near-shore areas of California, Oregon, and Washington, while the main group migrates north to the Arctic for the summer. The old Yankee whalers knew it, the shore-based whaling stations knew it, and long before them, the indigenous coastal peoples knew it. The fossil record, and new DNA studies, tell us that these whales, in these various feeding areas north to south, pre-date human occupation here, and even human evolution.

Gray whales occupied the Pacific and Atlantic Ocean basins on the east and west sides of each ocean, in numbers far greater than now exist. They have witnessed the opening and closing of the connecting arctic waterway between the oceans, and on the Pacific side, they have survived at least forty ice-age advances of glaciation over their primary northern feeding grounds. Gray whales survived the ice-ages by being innovative, adaptable, and by diversifying their feeding strategies to match the seasonal food sources on the portions of the coast left ice-free.

Amazingly, those ice-age survival tactics have survived to this day, transmitted by example, from mothers to calves over a long enough stretch of time to differentiate them at the mtDNA level from the grays who feed in the far north. This small remnant of an unknown pre-historic population size, is what NMFS refers to as the "PCFG". They are the descendants of the gray whales who for some reason did not resume the full northbound migration with the majority of ENP gray whales, even after the ice melted back and cleared the route north. Instead, they stayed in pockets of habitat along the coast, transmitting the "south of the Arctic" survival techniques to their offspring over countless generations. There are fewer than 200 PCFG gray whales in existence.

The Makah U&A Gray Whales

It is from this small group of PCFG whales, that smaller sub-groups break off during spring northbound migration, to spend the next 8-10 months of the year feeding in the places their mothers showed them. Groups break off in Northern California and along the Oregon Coast. And a small number break off on the Northern Washington Coast. Some will head into the Strait of Juan de Fuca to find the shrimp their mothers showed them, deep in Puget Sound. "Patch" and his friends return in early spring, like swallows to Capistrano. These are the gray whales of the Puget Sound Feeding Group, unique, but possibly separate from the PCFG whales. Other whales go straight to feeding spots around Cape Alava, Point of Arches, Portage Head, Cape Flattery, and other spots on the outer coast, and into the Western Strait. These are the Makah U&A whales. They are a sub-group of the Oregon-S. Vancouver Island [OR-SVI] sub-group of the PCFG. The DEIS uses [152] as the OR-SVI population number, and the number [33] as an average annual population count for the tiny group faithful to the Tribe's "Usual and Accustomed" waters adjacent to the Makah Reservation: the Makah U&A whales.

There is an ebb and flow of whales between feeding hot-spots off South Vancouver Island, the North Washington Coast, and the Western Strait. The whales move to where the best food patch is at any given time. How do they find the shifting hot-spots? Their mothers certainly gave them the basic lay of their land... but the timing, as well ? No one knows. These few 33 or so whales are very special and irreplaceable. They hold the key knowledge of how to live well on this small portion of the coast. They are the only resident baleen whales in the shallow coastal waters, and their benefits to the environment are documented, as they plow up the muddy bottoms and suspend food up in the water column, to the benefit of seabirds, fish, and various benthic prey species. Their wastes fertilize the area. In the DEIS , **"Changes in Pelagic Community" pg.4-54: NMFS states: "...it is possible that abundance, species composition, and distribution could be altered if whales were harassed in or removed from the project area."**

The judges of the 9th Circuit Court understood the importance of this small sub-group of the PCFG, even before their genetic distinction was proven. They wrote in their final decision : **" We must consider not just the effects to the PCFG whales, but effects to the smaller group of whales frequenting the Makah U&A...The crucial question is : whether the hunting, striking and taking of whales from this smaller group could significantly affect the environment in the local area.....No one, including the government's retained scientists has a firm idea what will happen to the local whale population if the Tribe is allowed to hunt and kill whales pursuant to an approved quota and the Makah Management Plan."** [Anderson v. Evans -2004]

What would the "...hunting, striking and taking of whales from this smaller group..." look like in these local coastal waters? The DEIS provides a plethora of confusing charts that do not always agree with each other. On pg. 4-16 there is a chart giving the "likely" estimates of approaches, harpoon attempts and strikes [kills] on the 33 or so Makah U&A whales

under the Makah Management Plan. The word "likely" hints that this is a "low ball" prediction, not a worst case.

DEIS pg.4-16: In every 6 year quota period under Alt. 2:

[14] MU&A whales "likely" struck/killed

[84] MU&A whales "likely" will have harpoons thrown at them [misses].

[702] Approaches "likely" to MU&A whales

[386] rifle shots "likely" fired at MU&A whales

[82] "likely" grenade explosions aimed at MU&A whales

To have a loss of [14] MU&A whales in a 6 year period would be devastating: "likely" extirpation in 12 years. ***But on pg.4-71, Alt 2 is listed as having the potential to kill [36] Makah U&A whales in 6 years. That number, [36], represents the elimination of every single Makah U&A whale, "co-managed" to extinction in 6 years!*** Both scenarios will have the same effect, whether over 6 years or 24 years, but this is an example of the many difficulties the DEIS presents to readers trying to differentiate the "likely" from the "possible". When estimating and analyzing important risk factors, precaution dictates we assume the worst will happen, and analyze that.

In total, to satisfy a Makah quota demand of [24] gray whales butchered every 6 years, [42] gray whales can be struck and killed every 6 years. The difference between those two totals represents the number of wasted "struck and lost" whales that will "likely" sink to the bottom, dead of their injuries. ***Unknown numbers of Makah U&A whales, PCFG whales, and even Western Gray whales would be part of the [42] every 6 years, even though "migrating ENP whales" are the only whales named in the Makah waiver request. These gray whales all look alike, but they are each parts of very different ecosystems and genetic groups.***

The Makah Tribe announced in their Management Plan [represented by Alt. 2], that they will not count the wasted [struck and lost] whales against their self-allocated "annual allowable bycatch" of [3] PCFG whales. ***Therefore it will never be known how many PCFG whales have been killed each year. Worse, there is no prohibition on chasing or killing MU&A whales or female whales in particular.*** Again, they all look the same. The "Annual Allowable Bycatch" is calculated from the total number of OR-SVI whales [152], not from the [33] MU&A group, who are much more likely to be killed in the first years. ***This is a callous brand of "co-management" that is not sustainable even in the short term. There is no guarantee that any of the kills will be from the "targeted" migrating ENP whales in a particular time period, rather than from the PCFG whales.*** The main migratory corridor of the "targeted" ENP gray whales is an average 11 miles off shore. Far from the preferred "hunting grounds" : the near-shore shallow-water feeding grounds of the Makah U&A whales in the Olympic Coast National Marine Sanctuary, and right off the Wilderness beaches of the Olympic National Park.

Location is definitely a big issue in protecting the resident whales, as is timing. DEIS pg. 2-12: **"The timing of the hunt, Dec.1-May 31...is designed to avoid any intentional harvest of PCFG whales ...by hunting outside the times that coincide with the summer feeding period."** The preferred hunt time will be March, April and May. ***This is the precise time when all resident MU&A whales are arriving, as well as the newly pregnant females, the mothers, calves, juveniles and adults of all the sensitive gray whale sub-groups: Puget Sound Feeding Group, MU&A, PCFG and Western North Pacific gray whales[WNP]. All are trailing through the Marine Sanctuary ["project area"] during those months.*** If the prospect was not so horrible to contemplate, it would be laughable that the Tribe designates this time-frame as "protective" of PCFG whales. ***Just because the decision was made to define "PCFG" whales as "seen between June 1 and November 1" [to exclude counting any migrating whales], does not mean that those dates define the actual times of arrival or departure from the "project area". To say that this time-frame will protect any particular whales in March, April or May is not supported by survey efforts or common sense.***

Makah U&A whales, including newly pregnant females, and juveniles, arrive " back home" in March and April, with the PCFG mothers and calves arriving in April and May, in sync with the phases of the ENP migration. And now we know that, ***additionally, Western North Pacific gray whale mothers and their calves are also traveling, nursing, and feeding on the near-shore Washington Coast during the same time-frame as the PCFG and the ENP whales. The very survival of the WNP gray whales who winter in Baja depends on "fueling up" at the PCFG feeding areas. This must explain the surprising number of photo IDs made of WNP whales mixed in with PCFG whales in the spring on the Washington Coast.*** They must eat, as they are preparing for the long open-ocean crossing-- final leg in the longest of all mammal migrations-- back to Russian waters. No doubt, as their mothers taught them. How could anyone contemplate bringing the hunting chaos into this sensitive time and place?

March, April, and May are obviously the absolute worst months to be chasing, frightening, scattering, harpooning, and shooting at whales in the Marine Sanctuary. This is a baby nursery in spring and summer, where PCFG mothers must feed themselves and their young. Milk production and nursing are imperative, as is resting, hiding near shore from orca attack, and beginning the "PCFG nursery school". Weaning will occur during the summer, and there is more for the calves to learn than we can imagine. We know practically nothing about their social lives, their relationships with each other, their vocalizations and communications, their methods of navigation, or their methods of finding the variety of seasonal foods. But these things the calves must learn in a few short months. These descendants of ice-age survivors, carriers and transmitters of ancient knowledge, should be protected from disturbance and unnecessary death. Not much chance of that, when the co-managers consider them, "Annual Allowable Bycatch" ; collateral damage, with no hint of regret should they even take them all.

These Makah U&A whales, "the residents", are the whales most personally known and loved by the members of the Peninsula Citizens for the Protection of Whales, [PCPW], and at the very least, the 5,000 local petition-signers against gray whale hunts on Washington State's Olympic Peninsula. These are the gray whales easily visible and photographed from every shore, spring through fall, from La Push to Port Angeles, to the delight of locals and tourists. There is a popular segment of "The Whale Trail" along the Strait of Juan de Fuca. The Whale Trail is an organized system of highlighting shore-based whale watching locations. There are at least 6 strategic feeding sites along the Strait marked with interpretive signage, and supported by a website and brochure maps. On the outer coast there are sites in 3 or 4 more locations, including on Olympic National Park's coastal strip. Resident gray whales are the stars of this segment of the Whale Trail, with their heart-shaped blows and near-shore presence most of the year. Their diminishment and ultimate disappearance would be a tremendous loss to local enjoyment of life, and to the tourists so important to the weak economy currently gripping Clallam County.

The members of PCPW adopted 7 of the whales from the small resident group many years ago. They were named in 1999 and have been followed via sighting reports ever since. "Our" whales have many years of documented life-histories, here in the waters next to us. There have been hundreds of photos of resident whales taken by our group alone; from shore, from small boats, and from kayaks. There have been many paintings and sculptures created featuring these gray whales. Poems and stories written. Additionally, we follow and pass on scientific information gathered about these whales by local scientists. These whales are personal to us, and it is unthinkable that our "Buddy", "Spot", "Kelpy", "Karin", "Grace", "Freedom" and "Hope" will "likely" have torturous ends to their gentle lives, as nothing more than "Annual Allowable Bycatch". The grim mathematical formulas of the Makah Management Plan will grind them to extinction in very short order. Our lives will never be the same.

The feelings of personal loss were brought home to all friends of whales, when a gray whale was killed by "rogue" Makah whalers in 2007, at a famous resident whale feeding spot inside the Strait. This was truly a case of "shooting a fish in a barrel". When this whale was finally identified, it hit us all very hard: this poor whale, CRC-175, was a very well known whale, who happened to be the companion of one of PCPW's adopted whales, "Freedom". The association of these two whales was documented in our adoption papers in 1999. We were so intrigued with the mysterious nature of gray whale "friendships". CRC-175's protracted and torturous death impacted so many, in such a sad way. It is impossible to believe that "Freedom's life was not also impacted. We will never know what conclusions may have been reached over time regarding the connection between these two adult whales. Quite a loss to science and the whale-loving public, as well as to "Freedom."

So why is this well known, well loved, tiny group of gray whales not worthy of protection from certain annihilation? We now know beyond a doubt that "other" whales will not magically fill in their places in the environments of the Northern Washington Coast, the

Strait of Juan de Fuca, and South Vancouver Island. They have been trained to these locations by their mothers, and random stragglers will not have the knowledge to thrive. The loss of these few whales will mean the loss of this knowledge, so faithfully transmitted through generations of mothers. And how many of the Makah U&A whales are reproductive age females? No answer in the DEIS. Their inevitable eliminations will have dramatic and immediate effects on such a small group. There is no analysis in the DEIS or the Makah Management Plan, of what the effect of taking out adult females will be to the tiny group.. The only prohibition is on striking a "cow with calf". In a primarily genetically discrete group like the PCFG, births are the main method of recruitment. The females represent the future, yet there is no limit on the taking of females. No doubt because there is no way of knowing the difference between male and female whales until they are beached and ready to butcher.

The problem with trying to "save" the Makah U&A whales, is that they are a subgroup of the 180 or so PCFG whales who themselves have no protection. So why doesn't the PCFG group deserve protection? They represent the sum total remaining population of whales who have received the "south of the Arctic" survival techniques from their mothers. The PCFG whales who show site fidelity to California and Oregon are relatively safe in the shorter term from a Makah hunt, as are the PCFG whales who generally head further north to Southern Alaska and Northern Vancouver Island. Although there is some interchange between adjoining regions, the burden of loss will fall most heavily and most quickly on the smallest group of PCFG whales, the ones that are most faithful to the Makah's hunt area. The only way to protect these Makah U&A whales is to put all PCFG whales off limits for killing.

Since at least 1998, management concerns have been raised by marine mammal biologists in Canada, the U.S., and at the IWC, in regard to the threats to the PCFG raised by a return to whaling by the Makah. The times and locations that the co-managers [NMFS and Makah Tribe] have always put forward for hunts "targeting migrating whales", have never been designed to actually kill migrating whales instead of resident whales. In 1998 and for many subsequent years, the co-managers denied that "resident whales" even existed. The co-managers were either blind to observable reality, unaware of years of documented "site fidelity" by resident whales, or guilty of a convenient bit of "political science". Much easier to say: "they are all migrating", and let the whalers take the easy, neighborhood whales that they have always preferred to take. And if they took them all, no problem: the story line would be that "so-called resident whales" were not special, and that "other whales" would "fill in" the holes the environment left by whales killed locally. The members and supporters of PCPW were ridiculed for insisting that there was a difference, and that the lives of resident gray whales mattered.

One would have thought that the finding of genetic distinctness among the PCFG would have ended the debate, and that the whales would finally receive the protection that such a tiny, unique, and threatened population deserves. That protection would need to take the

form of designation as a "distinct stock" from NMFS. So why has that not happened? Other small population sub-groups and feeding groups have received protected status.

The answer from NMFS regarding a lack of stock designation for the PCFG is that their scientists could not agree, and "more information was needed". During a "Task Force" workshop on gray whale stock identity, the arguments for and against the PCFG being a "demographically independent unit" have seemingly stalemated the process of decision-making since the 2012 workshop, at least. The definition of "demographic independence" on page 3-133 of the DEIS seems rather clear: "Different in biologically significant ways [i.e. genetic or behavioral differences] ."

Scientists who agree that this definition is a great fit with what is currently known about the PCFG include:

DEIS pg.1-5: "The IWC found it "plausible" that the PCFG may be a demographically distinct feeding group. [IWC 2011a] " footnote same page: " IWC Scientific Committee's [IWC 2012a] review of the ENP [with emphasis on the PCFG] was "...based on treating the PCFG as a separate management stock."

DEIS pg.3-120: "...Frasier et al [2011] concluded that the PCFG qualifies as a separate management unit under the criteria of Moritz [1994] and Palsboll et al [2007].

Marine Mammal Commission: comments to NMFS 2012: "...recent genetic studies indicate that the PCFG may be sufficiently distinct to merit consideration as a separate stock or management unit."

Makah Tribal Council -comments to NMFS [2000] pg. 6: "The Draft EA concedes that no evidence exists". [that the summer feeding aggregation is in fact a stock.] "To remedy this confusion, the EA should include a definition of the term "stock". One definition that would satisfy the conservation necessity was suggested in Clapham and Hatch [2000]: a grouping of individuals from a given species that if extirpated would not likely be recolonized by immigration from other areas on any time scale relevant to human management of whale populations." [inadvertently applicable suggestion]

DEIS pg.1-5, pg. 2-6, pg.2-25, pg.3-60, pg.3-68, pg.3-121, pg. 3-130, pg. 3-156, pg.4-62, pg.4-65, and pg.4-80: The following phrase repeated on all listed pages: "...we have stated that the PCFG seems to be a distinct feeding aggregation and may warrant consideration as a distinct stock in the future." [Carretta et al 2014]

For whatever reason, NMFS will not decide on a stock designation for the PCFG before the waiver process plays out. This non-decision strongly favors the whalers, and strongly disadvantages the whales. The devil is in the details. Because they have no separate status, the PCFG are treated as one and the same as the entire ENP gray whale population, and no

separate waiver application is needed. **DEIS pg. 2-7: "The Tribe did not request a waiver for the PCFG as they were not designated as a separate stock at the time of the request."**

This simple statement swings the door open for a waiver request, because many agree that the ENP can survive a certain "take" that would encompass the Makah request. The whales that will not survive Makah whaling, the MU&A in the short term, and the rest of the diminished and harassed PCFG eventually, need not be mentioned or considered, as they are officially invisible-- folded into the ENP stock of gray whales.

With no separation of the PCFG via stock designation, there is no need for a separate waiver request for the PCFG. Such a request would have triggered extra analysis and care by the decision makers to decide if a waiver was even possible from this group. Very unlikely as there is no evidence that the PCFG population is currently at more than even half it's OSP .

Additionally, certain strategic formulas for "takes" will only rely on ENP population numbers, not PCFG numbers. For instance, on pg. 33 of the Makah Waiver Request is this statement : **A recovery factor of 1.0 is used "...because best available science shows that the PCFG is part of the ENP stock...a recovered non-listed stock."** Based on this, the take of PCFG whales is calculated as 2.7 [or 3] "allowable bycatch" per year, [and struck and lost whales will not count against their PCFG quota.] The "co-managers" agree that the needs of the tribe should outweigh the needs of whales. On pg. 2-25 of the DEIS, NMFS reports allowing a 1% of PBR take of California Sea Lions in 2004, but did not consider a 1% of PBR for the PCFG, because that would "...not be sufficient for the tribe." This certainly raises questions as to whether NMFS has the will or the ability to stand up to the Tribe and protect the Makah U&A whales and the PCFG from extinction. It may sound reasonable to allow the tribe a quota of "migrating ENP gray whales" but, in reality, the overwhelming disadvantage will be to the Makah U&A whales and the rest of the PCFG whales.

If NMFS is complicit in the ruin of this small ancient group, it won't be because they did not understand the "likely" end result of the Makah plan, or any of the Alternatives they present. These quotes from the DEIS itself, speak the truth, however cautiously :

DEIS pg. 3-68: "...the Tribe's request addresses the potential for "local depletion of gray whales in the Makah U&A."

DEIS pg.4-56 : "It is possible that hunting under Alt.2 in the coastal portion of the Tribe's U&A could, over time, cause gray whales to use the area less frequently."

DEIS pg.4-66: "Over time, an ongoing hunt could reduce the abundance of PCFG whales compared to No Action...With respect to the viability of the PCFG, a reduction over time could decrease the likelihood that the PCFG is viable, compared to No Action."

DEIS pg. 4-69: "If there were a decrease in the number of whales using the coastal portion of the Makah U&A...it could also result in a decrease in the number of whales using the Strait of Juan de Fuca."

DEIS pg. 4-70 " It is also possible that animals could reduce the usage of, or stop using an area because of the disturbance associated with a hunt."

DEIS pg. 4-71: " In any given year...the total number of gray whales present during summer in the Makah U&A and OR-SVI would be at least temporarily reduced."

DEIS pg. 4-72: "Over time, an ongoing hunt could reduce numbers of whales in the Makah U&A and OR-SVI..."

DEIS pg. 4-72: "Numbers...could also be affected if gray whales change their distribution and habitat use in response to tribal hunts under action alternatives...Response could include changes in distance from shore that whales travel during migration, amount of time spent by whales while in the Makah U&A or OR-SVI, or changes in approachability of whales."

DEIS pg. 4-72: "It is possible hunts in the MU&A might disturb whales, causing them to move elsewhere...more approaches, etc., cause more disturbance of feeding whales."

DEIS pg. 4-83: Alt.2 "...could reduce abundance of PCFG, which could affect the viability of the PCFG."

DEIS pg. 4-84: "...the PCFG abundance trend appears to be flat." "Alt.2 could reduce the likelihood of PCFG being viable into the future."

DEIS pg.4-92: "If one PCFG whale was killed in a year it would represent a 0.5% reduction in the current abundance estimate of 209 PCFG whales...This would represent a small decrease in abundance...Over time it is uncertain to what extent the death of one PCFG whale per year might decrease the abundance of the PCFG whales."

DEIS pg. 4-277: Alt.2: Proposed Action: "Under current conditions, 2.8 [maximum of 6] PCFG whales are likely to be killed per year. If more than 3.0 whales are killed, they may not be replaced in a subsequent year, and would exceed current estimates of PBR. It is unclear whether the intensity of unsuccessful harpoon attempts [17 per year] or approaches [142 per year] would result in more than a temporary disturbance of PCFG whales and cause them to avoid this portion of their range."

DEIS pg.4-278: Alt.2: Proposed action: "Under current conditions, 2.3 Makah U&A whales, or 2.6 OR-SVI whales might be killed per year. It is unclear whether killed

whales would be replaced in the same year in which they were killed or in subsequent years because of the uncertainties regarding PCFG recruitment. It is also unclear whether the intensity of unsuccessful harpoon attempts [14 to 16 per year] or approaches [117 to 131 per year] would result in more than a temporary disturbance of whales using local survey areas."

DEIS pg 4-278: "All action alternatives are likely to increase the risk of adverse impacts on gray whales using local survey areas. Alternative 2 would likely have the most impact..."

DEIS pg.5-3: "...so it may take a long time to detect if the proposed action is affecting gray whales as expected under current harvest models. In addition, killing even a few animals per year [especially over an extended period of time] from the relatively small PCFG could have long-lasting impacts for a group of whales whose population dynamics are not well understood."

NMFS hides the truth in plain sight. These hunting schemes are all too risky, with irreversible harm accurately predicted for the depleted PCFG, and the tiny band of Makah U&A whales. It can only be hoped that savvy "deciders" in the path of this rush to judgment will ask themselves this: If the "co-managers" had been allowed to carry out their planned hunts from 2000 until now, what frightened fragment of the doomed PCFG would be left to pass on the ancient knowledge? Did that knowledge have no meaning? Could these whales have been a lifeboat for the species if disaster were to befall the Arctic feeding grounds? It is telling that no PCFG whales are known to have perished in the great die-off of 1999-2000. What consequences to the local ecosystem, if no Makah U&A whales remained to plow the bottoms and return nutrients to the water column? There are far too many questions, and in this case, no harm is done by waiting for further information before acting. *Dispersal is extinction insurance*. Gray whales must be allowed these pockets of "alternative lifestyle". These rare whales should be encouraged to thrive and expand in their environments, not be targeted for unbearable harassment and gruesome death. Fewer than 200 ENP gray whales know how to survive south of the Arctic. They must not be harmed.

NMFS understands that by "not deciding" on stock designation for the PCFG, they are sealing their doom. While NMFS may be shackled to the whaling ambitions of a fraction of the Makah Tribe, watch guards over the MMPA process should be under no such obligation, and must intervene to save these whales. History will judge harshly government agencies who betray the public trust, and allow the torment and destruction of this small race of whales.

"CO-MANAGING" THE PCFG WHALES

In the early 1990's, the Northwest Indian Fisheries Commission [NWIFC], on behalf of twenty Washington State tribes, petitioned the National Marine Fisheries Service [NMFS] to remove the ENP gray whales from the Endangered Species List. **"The tribe hopes to get the northern gray whale...downgraded...not to hunt them but so research money can be moved to other species that need monitoring."**[PDN 11-13-92] The ink was barely dry on the contentious de-listing documents before the Makah Tribe formally notified the Government of its desire to initiate a harvest of ENP gray whales. This "bait and switch" tactic initiated the relationship between the Makah Tribal Council and NOAA / NMFS in regard to gray whale harvests.

Senior NMFS personnel had already decided that they could go ahead and allow the taking of seals and sea lions by NWIFC member tribes, with minimal NMFS oversight. A perfunctory legal analysis had persuaded them that there was no conflict between the Makah's Treaty of 1855 and the MMPA. They believed that hunting clauses in the various Stevens treaties entered into by the U.S. Government with Pacific Northwest Tribes in the 1850's, gave NMFS the ability to grant permission for the taking of marine mammals without triggering NEPA or MMPA protocols. [R. Schmitt letter to NWIFC 9-22-94] Upon this weak foundation, built to accommodate the taking of seals and sea lions, NMFS "architects" built a context for Makah whaling to go forward. Without benefit of NEPA analysis, binding agreements were made with the Tribe to support their gray whale quota-quest at the IWC. Ultimately, these agreements, and all the decisions that would flow from them over the next 10 years, would be denounced by the 9th Circuit Court of Appeals in this way : **"Because the agencies have not complied with NEPA, we set aside the FONSI, suspend the "Agreement" with the Tribe, and vacate the approved quota..." And in even stronger language, the Court proclaimed that the issuance by NOAA of a gray whale quota to the Tribe, absent compliance with the MMPA, had violated federal law. In their words, the Court described the actions of NMFS' decision-makers as: "...arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."** [Anderson vs. Evans 2004]

So these are the two "co-managers": the Makah Tribal Council and NOAA/NMFS personnel favorable to allowing a hunt. Between them, their over-zealous plans and weak science would have caused immense environmental harm, particularly to the local whales and the local environment, and still threatens to do so.

The "summer resident " grays, known and loved by the local public and by tourists, were a problem for the co-managers from the beginning. The Tribe's Whaling Commission President, Keith Johnson, responded to the issue by saying that he did not see killing a resident whale as a problem: **"If we were to take nothing but resident whales it would not severely impact the rest of the whale population."** [Peninsula Daily News [PDN], Sept.27,1998] In a subsequent article, *"Would Makah kill resident whale?"*, NMFS spokesman Brian Gorman opined that **"It would be easier and safer if the Makah were**

free to hunt resident whales."[PDN :Oct. 19, 1998] NMFS decision makers backed up the Tribe by asserting that government scientists were certain that the so-called "resident" grays were simply a few random wanderers...lolly-gaggers from the "main herd", and that in the unlikely event any were taken in a hunt , that "other whales" would fill in their places in the local environment.

In May, 2000, responding to an article in the PDN regarding the Peninsula Citizens for the Protection of Whales having adopted a group of resident whales through Cascadia Research, "*Group starts adopt-a-whale campaign*", Keith Johnson both denies their existence "**..disputes calling the whales "residents"...**", and asserts ownership over them: "**As to their claim to be adopting certain whale populations, I don't think they can adopt whales in our usual and accustomed [hunting] areas.**"

By July, 2001 the co-managers had announced a new Management Plan. The PDN article titled "*Does Makah decision put local whales at risk? Some fear impact of new rules on relatively tame resident pods*", explained: "**A new federal environmental assessment now allows the Makah to hunt not only migrating gray whales off the coast but also the so-called "resident whales" that feed near Neah Bay. It also increases the tribe's hunting territory from the open Pacific off the coast into the Strait of Juan de Fuca.**" Said NMFS' Brian Gorman: "**There is no biological reason in terms of a hunt why they [the resident whales] should be separated out. We have clear evidence that the whales found in the Strait of Juan de Fuca are not a separate population .**" [PDN-July 16, 2001]

Regarding protecting local gray whales in the Strait: "**It was a political decision that science couldn't support," said Pat Gearin of the National Marine Fisheries Service. "It was some politician's interpretation, to avoid the so-called "friendly whales". But there really was very little science behind it, and we were in an untenable position with the tribe saying "You can't hunt in your traditional time and area' without any scientific basis for that." No conservation issues will be raised should the tribe take another whale this spring, Gearin said. The gray whale population is robust, even above historic levels.**"[Seattle Times, Lynda Mapes, April 15, 2002]

Strangely, Pat Gearin made those comments about the "robust" gray whale population shortly after the huge gray whale die-off [Unusual Mortality Event] of 1999 - 2000. ***One third of the entire ENP gray whale population died. The west coast was littered with carcasses.*** An odd time to describe their population as "even above historical levels." He certainly knew better.

What can we glean from all this, about predicting the behavior of the "co-managers"? What we observe is that ***NMFS will twist science and law and good judgment into pretzels to accommodate tribal demands.*** The NWIFC threatened to sue NMFS when the de-listing of the ENP gray whales seemed to be proceeding at a slow pace in the early 1990's. Six months after petitioning for the de-listing, an impatient Bill Frank wrote to the Department of Commerce: "**Continued inaction by NMFS can only lead to Federal Court to explain**

the lack of timely response that is required by the ESA." [letter 10-16-91] NMFS sped things up right away. A little over a month later, NMFS replied to Mr. Franks: " Thanks for your letter...I am pleased to inform you that the proposed rule to delist the eastern Pacific gray whale stock has been published in the Federal Register..." [letter to Bill Franks 11-27-91.]

To this day, it seems that the combination of the NMFS "old guard" sympathy towards aboriginal whaling, in addition to an institutional fear of being sued by tribes, is what motivates NMFS. Our naive belief that NMFS/NOAA would consider their top priority to be protection and conservation of the marine environment was long ago dashed. We still hold, however, that NMFS' main focus *should be* protecting whales from the significant impacts they know that any hunt plan will have, rather than tailoring whaling plans to placate the Makah whaling faction.

So, it is left to the general public, educated by the work of independent scientists, to care enough about these whales to check NMFS' work as carefully as possible. Thankfully, lawsuits were successfully brought against the co-managers' plans. If not for the efforts of those opposed to whaling, the questions surrounding the odd presence of gray whales in the Pacific Northwest who do not travel to the Arctic would be moot. Their unique genetic story would never have been told. After 17 years of co-managed hunts, they would *all* be gone by now. Gone from the Strait, gone from the Marine Sanctuary, gone from Neah Bay, gone from all the Whale Trail look-outs.

That is certain, because in 2001 the co-managers announced that they had expanded what was possible, in terms of whaling in the Makah U&A, to the maximum extent. NMFS agreed with their Makah co-managers that ***it would now be fine to go whaling anytime of the year--go whaling anywhere in their entire U&A --and kill any gray whale they came across.*** Exactly what the Makah whalers had wanted all along. It had only taken two years for the co-managers to expand the Makah Management Plan from an outer-coast-only hunt for migrating whales, to the 2001 no-holds-barred, into-the-Straits to Salt Creek County Park plan. NMFS must have had no desire-or no will-to oppose the Tribe and keep the Straits off-limits. That would have at least given the "so-called" resident whales some ability to escape the torment. Even the issue of public safety [regarding the use of the 50 cal. rifle on a populated coast] did not deter the co-managers.

These reckless decisions do not signal any regard for under-studied whale populations or for innocent human by-standers, by the Tribe or by NMFS. Neither do these decisions seem to reflect an equal "co-manager" balance of power. Assuming NMFS would prefer to show some good faith in regard to protecting the resident whales, why does all advantage go to the whalers, and why is all harm, injury, and disadvantage borne by the whales whose welfare is entrusted to NMFS? Both co-managers defended the new plan, with NMFS seeing no reason to "separate out" the resident whales from the killings. ***Luckily for the whales, the 9th Circuit Court saw things differently and stopped the co-managers in their tracks before irreversible harm could be done.***

NMFS should be embarrassed at having been *so wrong* on so many of their assumptions in regards to the gray whales. Assumptions that were not corrected by open-minded and thorough research before binding agreements were made with the Tribe. Assumptions that could have, if acted upon, done irreversible harm to several small gray whale populations, in utter disregard to the spirit and purposes of the MMPA.

In 1998 NMFS told the public: "trust us-- there are no resident whales". In 2001 they claimed that they had "clear evidence" that there were no "resident" gray whales. This in spite of over 20 years of research by local scientists on maternally directed site-fidelity. Based on a tiny sampling, NMFS announced that there was no genetic difference between the "summer" gray whales and the "rest of the herd". NMFS has been proven **WRONG**. Based on another tiny sampling, NMFS assured the public that "most" local whales were males. **WRONG**. Based on a minimal legal analysis, NMFS asserted that the Makah hunt was not bound by the MMPA. **WRONG**. This is a very bad track record for our government's co-manager of a much-loved public treasure.

For their part, the Makah Tribal Council also proclaimed that there were no "resident whales". With their oft-stated intimate knowledge and understanding of the resources in their waters, they really should have known better. After all, we now know that the ancestors of the present day Makah Tribe hunted the ancestors of the present day PCFG gray whales.

So does the current 2015 DEIS show any signs of compliance by the co-managers with the dictates of the 9th Circuit Court? Will there be safeguards in place to ensure a stable future for the PCFG gray whales in their various environments? Will extra care be taken not to harm the very small group of Makah U&A gray whales that the 9th Circuit was concerned with? Or did past actions correctly foreshadow the current proposals? For their part, the Makah Tribe's waiver request, did not change in the slightest to acknowledge the new information about the uniqueness of the PCFG gray whales. Not a word has changed in the original 2005 Waiver Request.

And no words needed to change, as the co-managers had years ago developed a strategy to circumvent any need for "special care" for the PCFG whales. It is diabolical in its simplicity. ***Just continue to designate all Eastern North Pacific gray whales as a single stock. With this system, PCFG whales practically disappear. Do the PCFG whales give birth in the warm waters of Mexico with the ENP gray whales? If so, they are a single stock. No one knows who is breeding with whom, so assume that PCFG whales are interbreeding with "other" whales, and claim that this precludes separate stock designation. Do many scientists disagree with the decision not to give stock designation to the PCFG whales? That's fine...quote some government scientists who do agree, and declare a stalemate. Problem solved for now. The Tribe's favored Alternative, Alt.2, encodes this solution to an extreme degree, and insures that the pesky resident whales won't be around to be a problem for too long.***

Because NMFS has balked at stock designation for the 200 PCFG whales, many policy details favor the co-managers' desire to "not separate out" the PCFG whales. **These devilish details will ensure the brisk elimination of the 33 or less Makah U&A whales. At a worst-case rate of 42 whales killed in pursuit of 24 butchered every 6 years, or in any lesser annual take, it is obviously not a matter of *if* the resident whales are eliminated, it is only a matter of *when*. This is a plan that gives no value or mercy to the resident whales, but goes after them in a very aggressive way.** A Makah whaler once commented gleefully that hunting the resident whales would be "like shooting cows in the barn", and the "safety" of the whalers is often used to justify taking the local whales.

The Makah's "Annual Allowable Bycatch" [AAB] of three PCFG whales a year is a "management to extinction plan" for the majority of the PCFG gray whales. The term AAB itself is straight from fisheries management, and refers to how many of the "wrong" fish you can catch per year without penalty. In this case, since lip service is being paid in the waiver request to targeting "migrating ENP whales", any landing of a known PCFG whale is considered a landing of a "wrong" whale. From the 152 OR-SVI grays, the Makah biologists have calculated an Annual Allowable Bycatch of 3 per year, or 18 in every 6 year quota period. So out of a maximum of 5 whales butchered each year, or 24 in a 6 year period, the great majority can, and likely will be, resident whales--as long as they last. The DEIS 2015 at pg.3-156 gives a Potential Biological Removal rate for the entire 200 member PCFG of 3.1 per year, so Tribal managers are calculating their AAB [from the smaller OR-SVI population] in their own, less protective way.

How is such an unreasonable bycatch quota calculated for a small population that is estimated to be at half its optimum sustainable population? [A.E. Punt IWC 2015] ***Because the PCFG has no separate stock status, the co-managers make their calculations based on the ENP population as a whole.*** From the Waiver Request [2005] , pg. 33: " A recovery factor of 1.0 is used [to develop the bycatch number] because best available science shows that the PCFG is part of the ENP stock...a recovered non-listed stock." If the PCFG were granted stock status, "separated out", the recovery factor would have to be calculated at a much lower rate.

NMFS' response to a 2008 comment regarding Potential Biological Removal [PBR] states: **"NMFS' guidance on preparing stock assessment reports generally recommends using a recovery factor of 0.1 for a depleted population, a recovery factor of 0.5 for a population of unknown status, and a recovery factor of 1.0 when a population is known to be stable and at OSP [NMFS 2005]...NMFS uses 1.0 in setting PBR for the ENP [gray whales]."** In the 2013 stock assessment report [Carretta et al 2014], authors concluded that the PCFG may warrant consideration as a stock in the future and used a recovery factor of 0.5 to calculate its PBR, as appropriate for a stock of unknown status. But because the Makah co-managers can "get away with it" on a NMFS-facilitated technicality, the "unknown status" of the PCFG population conveniently becomes one and

the same as the "stable and at OSP" status of the entire ENP gray whale population. The outcome is a callous Annual Allowable Bycatch [AAB] quota for resident whales, self-allocated by Tribal co-managers and ready for approval by NMFS.

In addition to the 3.0 AAB, any whales struck and not landed [and presumed dead] will not, says the Tribe, be counted against their AAB. In a 6 year period 18 whales can be struck and lost. Any or all could be PCFG whales. And in another blow to the resident whales, ***"The Tribe does not propose to account for other sources of human-caused mortality when setting the allowable by-catch limit for PCFG....In its' comments on the 2008 DEIS, the Marine Mammal Commission questioned this approach."*** [DEIS 2015, pg. 2-10] Also on this topic, the DEIS at pg. 5-37: "The IWC Implementation Review of PCFG [IWC 2013c] included an even more precautionary estimate of non-hunting human caused mortality [2.0 PCFG whales] which is considerably higher than the 0.45 whales in the PCFG range and season reported in the most recent stock assessment report [Carretta 2014]." **An honest calculation would show that there is no "take" possible from the PCFG.**

Whether we consider the OR-SVI population of 152, or the Makah U&A whales at about 33 members, where is any discussion of the extra value of the reproductive age female gray whales? Where is any cautionary note regarding avoidance of killing too many females? There is no discussion of this, even though the females are the only hope for the future for the PCFG whales. How many of either group are adult females? How many are likely to be pregnant each spring? No answer in the DEIS. The example from another small stock, the Western Pacific gray whales, gives us a clue. Out of a total population of about 130 whales, it is known that only about 24 WNP gray whales are breeding age females. So how does this translate to the OR-SVI population? It could mean that there are barely 30 mothers in whole the group. And of the 33 Makah U&A whales? There could be as few as 6 or 7. How is it possible for NMFS to support, or the Tribe to conceive, a plan so short-sighted? It's easy if you just don't care about the PCFG whales. It is quite an understatement for NMFS to say in the 2015 DEIS at pg.4-66: **"Over time, an ongoing hunt [under Alt.2] could reduce the abundance of the PCFG whales compared to No Action...With respect to the viability of the PCFG, a reduction over time could decrease the likelihood that the PCFG is viable, compared to No Action."**

Can NMFS be trusted to closely monitor the swift hunting-out of the Makah U&A whales, and call a halt to any over-harvest before they are eliminated from the Neah Bay area and the Strait of Juan de Fuca? [The gray whales feeding near shore along the Strait are one and the same as the Makah U&A whales feeding on the coast. The small group moves freely between the outer coast, inside the strait , and to S. Vancouver Island.] Nowhere in the DEIS , the Waiver Request, or the Management Plan, is there any mention of limits or concerns on "over-takes" from the 33 resident whales. So there is no reason to believe that either co-manager cares. NMFS' shameful "co-management" of the Alaska Natives' hunt of Cook Inlet beluga whales is a cautionary tale. On NMFS' watch, their tribal co-managers killed half the total population in four years! This same depletion and possible decline to extinction could befall the PCFG whales, with the Makah U&A whales eliminated first.

How is it that co-managers can take with such a heavy hand from a tiny group of genetically distinct whales with 1) no well established population count, 2) no known Optimal Sustainable Population number, 3) living in the Makah U&A , whose carrying capacity is, according to NMFS, "unknown" ? This would not pass muster with any objective "decider". All these problems with "saving" the Makah U&A whales from oblivion are rooted in NMFS' simple strategy of refusing to decide "yet" to give the PCFG gray whales separate stock status. NMFS repeats many times in the DEIS that "the PCFG...may warrant consideration as a distinct stock in the future". Will there be any whales left to protect after even one 6 year period of Makah hunts? We are extremely concerned that there may not be a "future" for the local whales.. It was also problematic to receive the following response to us from NMFS regarding a reference in the 2008 DEIS to an annual PCFG quota that could possibly be exceeded by the Tribe: **Said NMFS: " The Tribe's proposal also implies that more than one hunting party may be active at a time, which could lead to the quota being exceeded." What kind of co-management is this, where the ability to exceed a quota is built in and taken for granted?**

And there is at least one more huge benefit to the Tribe springing from the refusal to decide on stock status for the PCFG. **DEIS 2015 pg. 2-7: "The Tribe did not request a waiver for the PCFG as they were not designated as a separate stock at the time of the request."** So there may be no scrutiny by "waiver grantors" of the impact of the "bycatch allowance on the PCFG whales, the Makah U&A whales, and their environments. If this waiver is granted under such questionable circumstances, there will be no hope for the PCFG. If NMFS has not decided on stock designation by now, when will they? They will be irreversibly locked into the scenario they have designed for years to come, and the PCFG whales will be irrevocably harmed to the great detriment of the local environment, the local whale-loving public, and the economy of local nature-based tourism.

To quote the DEIS quoting the 9th Circuit [Anderson v Evans] pg.1-18: " The Court defined the conservation purpose of the MMPA as "To ensure that marine mammals continue to be significant functioning elements in the ecosystem.....and not diminish below their optimum sustainable population." And: "Without review under the MMPA, there is no assurance takes by the tribe, including both killed and harassed without success, will not threaten the role of gray whales...in the ecosystem."

These quotes do not refer to "stocks". They refer to "gray whales" and "ecosystems". The only gray whales utilizing , dependent upon, and functioning in the ecosystems of the Makah U&A in anything other than a "migrating through" capacity are the Makah U&A portion of the PCFG whales. The Court did not care if they were genetically distinct or not, from " the other California gray whales". The words of the judges are crystal clear: **" If California gray whales disappear from the area of the Strait of Juan de Fuca, the Marine Sanctuary, or both, that would be a significant environmental impact even if the PCFA whales populating the rest of the Pacific Coast in the summer are**

genetically identical to the local whales, and even if the PCFA whales are genetically identical to the migrating whales." [Anderson v Evans 2004]

What wise and important words. The 9th Circuit was not concerned with stocks or the definition of a stock. They insist that the co-managers must honor the will of the American people, as Congress expressed it in the MMPA: protect the whales, whoever they are, in the specific environments that they inhabit, such as the Makah U&A. The American people, the Congress, and the 9th Circuit Court are concerned with the ecosystems, large and small, and that whales remain a functioning part of them in populations as large as the ecosystems will support. The DEIS quotes the Court [Anderson v Evans] often, but the co-managers don't seem to "get" that it applies to them.

DEIS [2015] pg. 1-18: "...whether the Tribe's whaling will damage the delicate balance of gray whales in the ecosystem is a question that must be asked long before we reach the desperate point where we face a scramble for species preservation." [Anderson v Evans]

DEIS [2015] pg. 3-122 : "Even if the eastern Pacific gray whales overall or the smaller PCFA group are not significantly impacted by the Makah Tribe's whaling, the summer whale population in the local Washington area may be significantly affected. Such local effects are a basis for a finding that there will be a significant impact from the Tribe's hunts. Thus, if there are substantial questions about the impact on the number of whales who frequent the Strait of Juan de Fuca and the northern Washington Coast, an EIS must be prepared [Anderson v. Evans 2004]."

In response, the DEIS could not be more straightforward about the likely results of a Makah hunt on the local whales : Pg. 4-66: "Overtime an ongoing hunt could reduce the abundance of PCFG whales... With respect to viability of the PCFG , a reduction over time could decrease the likelihood that the PCFG is viable..." Pg. 4-69: "...a decrease in the number of whales using the coastal portion of the MU&A...could also result in a decrease in the number of whales using the Strait..." Pg. 4-70: "It is also possible that animals could reduce their usage of or stop using an area because of the disturbance associated with a hunt." Pg.4-71: "In any given year...the total number of gray whales present during summer in the MU&A and OR-SVI would be at least temporarily reduced." Pg. 4-72: "Over time, an ongoing hunt could reduce the number of whales in the Makah U&A and the OR-SVI survey areas...The number of whales in the MU&A or OR-SVI could also be affected if gray whales change their distribution and habitat use in response to a tribal hunt under action alternatives...Responses could include changes in distance from shore that whales travel during migration, amount of time spent by whales in the MU&A or OR-SVI, or changes in approachability of whales...It is possible a hunt in...MU&A might disturb whales, causing them to move elsewhere...more approaches, etc cause more disturbance of feeding whales." Pg.3-

133: "Animals with strong site fidelity may be unlikely to move or select new habitats if their traditional habitat becomes less favorable.[Quan 2000]."

So how does the Makah Management Plan respond? **Under Alt.2, 6 Makah U&A whales may be killed per year, which is 36 in every 6 year quota period. With only 33 MU&A whales in existence, the 9th Circuit Court would never condone this plan.** There is no doubt that a great number of kills will be from the local whales. **The most "likely" hunt times will fall in the months of April and May, "designed to avoid any intentional harvest of PCFG whales...by hunting outside of times that coincide with the summer feeding period."**[DEIS pg. 2-12] **That statement is as deceptive as it can be. The PCFG whales arrive in force to the Makah U&A in March, April and May.** As explained in earlier comment sections, these are the arrival months for the Western Pacific grays, the PCFG whales, and all mothers and calves . This is terrible timing, meant to accommodate good weather "safety" for the whalers, and the pretense that PCFG whales arrive in June to feed. This timing has little to do with "avoiding" the harvest of local whales.

It is a fact that the local whales will be much easier and "safer" targets, not only because they are close to shore and the weather is better in April and May. At DEIS pg. 4-26 we learn another reason : **" The Makah Tribe's marine biologist...is surveying the Makah U&A throughout the year. The survey involves searching for, approaching, photographing, and/or taking biopsies..."** In other words, the constant "research" by the tribe's own biologist and the various NMFS biologists, is specifically habituating Makah U&A whales to contact with small boats. The co-managers are basically "training " the whales to be docile and unafraid of vessel approach and "grooming" them for killing. The whalers should keep in mind that in Russia, the years of whaling have resulted in 44% of whales landed demonstrating aggressive behavior.[IWC 2015]. And they will be frightened into avoiding their feeding areas, to their own detriment. Three days after the 1999 hunting mayhem culminated in a young dead gray whale, the large group of whales that had been feeding together in the Cape Alava area was seen 10 miles south of that area. And these were whales that the co-managers insisted were "migrating north".

To say that the Makah co-managers have disregarded the Court's edicts would be putting it mildly. Even NMFS admits: **"All action alternatives are likely to increase the risk of adverse impacts on PCFG gray whales. Alt.2 would have the most impact."** [DEIS 4-277]

WESTERN NORTH PACIFIC GRAY WHALES (WNP)

Along with the finding of genetic difference between the PCFG and the migrating ENP gray whales, there was another big reason for this "back to the drawing-board" DEIS. That was the new realization that some extremely rare gray whales from the Western North Pacific (WNP) utilize the birthing lagoons in Mexico. And to the dismay of the co-managers, their epic migration takes them right through the Makah U&A waters during the prime hunt time: December through May. They are migrating in sync with the ENP gray whales and the

PCFG whales, both southbound and northbound, and cannot be differentiated from each other on the fly.

The population number used in the DEIS for the WNP gray whales is 140. They are thought to be a practically extinct remnant of a once robust Western North Pacific gray whale stock, and are genetically distinct from the ENP gray whales and the PCFG whales. However there are various and conflicting hypotheses regarding the population structure of gray whales as a whole, and many years of studies will be needed to come close to understanding what the facts are. What is accepted is that the WNP gray whales are at very low numbers and far below their OSP. They are listed as endangered on the U.S. ESL, listed as depleted by the MMPA, and listed as critically endangered by the IUCN. From the DEIS [2015]:

DEIS pg. 3-94: " The IWC and a series of independent expert panels established by the IUCN have emphasized the urgent need for a comprehensive international strategy to eliminate or mitigate anthropogenic threats facing WNP gray whales throughout their range."

The International Western Gray Whale Rangewide Workshop [IUCN] in Tokyo, 2008, recommended the implementation of a conservation plan for WNP gray whales. **In 2014 the "Memorandum of Cooperation Concerning Conservation Measures for the Western Gray Whale Population" was signed by the U.S., the Russian Federation, and Japan. The text begins : " Acknowledging that the Western Gray Whale population has the critically endangered status on the IUCN Red List of Threatened Species...". The Memorandum is non binding, but is a stirring call to action to "...prevent the disappearance of the existing population...and manage human activities that affect their status..."**

The 140 Western Pacific gray whales have many threats to their survival. High on the danger list is the intrusion of oil and gas exploration and development in the waters off Sakhalin Island, the main feeding area for the WNP gray whales. There are very real concerns about the deafening underwater noises created by these industrial activities. The danger of collisions with ships will only increase. Oil spills could devastate this small population, as could any disruption in their effort to consume a year's worth of food in the summer months. Entanglements in fishing gear have already occurred with WNP whales off-shore of Sakhalin Island. The DEIS mentions none of this, and only tells us [pg. 3-11], that there are photos of [28] Western grays with entanglement scars and [3] with collision scars. Even at that, it is obviously a perilous world for 140 whales to navigate and survive in. But in a great lapse, the DEIS leaves all these threats un-analysed, and does not add them to any "cumulative effects" discussion.

At least 19% of all Western Pacific gray whales also face the many additional threats involved in their only recently observed migration to and from Mexico. At the very least, 27 WNP gray whales have been noted, mixed in with the ENP [and PCFG] migrations. To achieve this stupendous migration they first must cross the deep Pacific Ocean. Then, they share with the entire ENP gray whale population the threats of ship strikes, fishing gear

entanglements, oil spills, and orca predation, as they move up and down the Canadian, U.S., and Mexican coastlines. They may also be impacted by Navy training exercises in California and the Pacific Northwest. The Navy is currently authorized by NMFS to "take" [60] WNP whales in the SOCAL Complex by Level B harassments and [3] per year in ship strikes.

The effects of climate change, and how that will affect all gray whales, is a vast and depressing topic. Changes in water temperature already seem to be having a negative effect in some Baja birthing lagoons.[Urban IWC doc. 2015]. And the implications of a warming Arctic are continuously studied and modeled . No scenario favors the gray whales' benthic prey species, and neither does the acidification that is already measurable in the Makah U&A. Climate change should be considered an ever more crushing over-arching limiting factor for many aquatic species, including whales. Sadly, NOAA's scientists tell us that climate change is "real", and will have heavy consequences to everything in NOAA's purview. The entire west coast is currently experiencing a "blob" of water many degrees warmer than normal. Acidification has already killed billions of oysters along the Washington coast and at Hood Canal. **" This change we're seeing is happening so fast it's almost instantaneous. I think it might be so important that we will see large levels, high rates, of extinction." ["Sea change..." Craig Welch, Seattle Times, Sept.11,2013-- quote from James Barry, Monterey Bay Aquarium Research Institute]**

And to all this the co-managers propose to add even more deadly drama to the gray whales' lives. On top of the existing gauntlet of perils all gray whales must face, NMFS and the Tribe propose to operate a completely unnecessary chamber of horrors and death row for gray whales on our beautiful North Washington Coast. The net of boat approaches, boat chases, harpoon attempts, strikes with harpoons, strikes with .50 cal shells and possibly penthrite grenade blasts and strikes, will be cast over all gray whales transiting through or returning home to the Makah U&A. The likely hunt time will be the milder weather of April and May. Nursery time for all gray whales. Math formulas churn out annual and 6-year estimates of the numbers of frightening and injurious contacts that gray whales will encounter every spring in waters they have been accustomed to trust.

Takes of Western Gray whales will be inevitable, and there are no mitigation measures possible to prevent that. **DEIS pg. 3-1 : "...and there is a chance that WNP gray whales might be killed, subjected to harpoon attempts, or approached."** Also from the DEIS:

DEIS pg. 3-93: "...Potential Biological Removal [PBR] values [for WNP stock] ranging from 0.07...to .033, with uncertainty in these values being driven by uncertainty in the fraction of WNP animals migrating in ENP areas."

"...it is most likely that whales from this stock could be encountered in the vicinity of the Makah U&A during the hunting season proposed by the Tribe..."

"...there is a high probability that during a 6-year period a WNP whale would be pursued or approached by Makah hunters [a probability of 0.98 to 1.0]."

"The probability of an attempted strike on at least one WNP in 6 years was still fairly high...[35%] and the chance of actually striking at least at least one WNP whale in 6 years was relatively low but non trivial" [7%].

"The loss of a single whale, particularly if it were a reproductive female , would be a conservation concern for this small stock."

pg.5-29: "It is unclear how natural mortality may be influencing WNP whales. High incidence of orca tooth scars, small size and limited number of reproductive females, and relatively low calf survival, are likely to be key factors limiting potential population growth. They are likely more susceptible to changes in mortality, natural or human caused." [Burdin 2012]

Given the above statements of risks and probabilities, it is instructive to read *the definition of "negligible impact" from the DEIS pg. 2-21: "An impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival."*

From the DEIS pg. 5-36: "Given the small size of the WNP in the analysis area, it is speculative to predict whether appreciable effects would be expected from any of the activities assessed in Subsection 5.1.3, past, Present, and Reasonably Foreseeable Future Actions."

Add to that the often repeated phrase in the DEIS: **"There are very limited data for WNP whales in the project area to inform this analysis."**

From the GAMMS SAR guidelines, June 2005, pg.10: Definition of Strategic stock: " If human caused mortality is likely to be significant relative to stock size...the stock should be considered as strategic."

And: "In the complete absence of any information on sources of mortality, and without guidance from the Scientific Review Groups, the precautionary principle should be followed and the default stock status should be "strategic" until information is available to demonstrate otherwise."

It is heartening to see the Precautionary Principle invoked by the government. *A precautionary approach to risk management states that if an action or policy has a suspected risk of causing harm to the public or the environment, in the absence of scientific consensus that the action or policy is not harmful, the burden of proof that it is not harmful falls on those taking an action.*

NMFS has in no way proven that there will be no harm, or even "negligible impact", to the 27 WNP whales from Russia on the U.S. coast, or that there will be no harm or impact to the entire 140 WNP grays by removal of adult females [likely pregnant] from the Baja-migration group. For NMFS to green-light the action of Makah whale hunts during migration times is to green-light the never-ending harassments, woundings and deaths that math formulas assure us will likely touch 27, or more, WNP gray whales transiting the Makah U&A near-shore December-May into perpetuity. And those losses will affect the viability of the WNP gray whale population.

In fact, it bears repeating that what NMFS says is: **"There are very limited data for WNP whales in the project area to inform this analysis."**[DEIS pg. 4-34]

Making a decision to allow actions that can harm the WNP gray whales, will make Makah whaling one big game of Russian Roulette. No one will ever know the identities of the hungry WNP whales chased from their productive food sources before the longest known mammal migration....the WNP mothers, desperately needing to eat to produce milk for precious calves, chased and disrupted from feeding and nursing...possibly chased into dangerous deep water. The struck and wounded WNP whales, the struck and lost WNP whales, sinking to the sea floor. Only the struck-and-butchered-on-the-beach WNP whales will be ID'd. Then it will be too late for those whales, and too late for NMFS to back-pedal on the whole whaling scheme. By the time NMFS admits that math formulas and computer models can be wrong, irreparable harm will likely have been done.

The risks to the severely depleted WNP stock are high and not easily calculable. The very time to act in a precautionary manner. The U.S. has a responsibility to assist the recovery of the Western North Pacific gray whales, not drive the nails into the coffin of this population. To satisfy the demands of a small group of whaling families to carry on the elitist activities of their ancestors, NMFS offers up small, vulnerable whale families as sacrificial lambs. The judges of the 9th Circuit Court were extremely concerned about the PCFG whales, and even more concerned for the survival of the Makah U&A whales. We can only imagine what their opinion would have been of this unmitigated threat to the Western Pacific Gray Whales.

The Peninsula Citizens for the Protection of Whales strongly believe that these once thought to be extinct Western Pacific gray whales are guests in our waters. Important guests, with much to teach us about their surprising lives. Perhaps the "Russian" whales are well known to the PCFG families as individuals. We have no idea what harm can come from "hunters" running amuck amongst these sensitive animals. These ancient lineages of whales deserve better. ***Why don't the Makah need a waiver from the MMPA for "takes" of WNP whales? The DEIS describes the possibility of a "take" as "non-trivial". The MMPA must protect them as well as the PCFG whales.***

SMALL POPULATIONS

There are many problems with, and objections to, the NMFS/Makah whale hunt plans. But none is more important or urgent to address than the issue of stock designation for the PCFG gray whales. Nothing bothers the Peninsula Citizens for the Protection of Whales more than contemplating the chasing, terrifying, scattering, ambushing, harpooning, wounding, shooting, and killing of our resident whales. Every year, multiple times a year, for years on end. Until it becomes obvious that there are no more grays in the Strait...or at the Cape. Or on the coast. Their absence will bring a great sadness and leave a huge void in the ecosystem. How can this be allowed to happen?

From the DEIS pg.1-5: " NMFS currently does not recognize the PCFG as a " population stock" as we interpret that term under the MMPA, but we have stated that the PCFG seems to be a distinct feeding aggregation and may warrant consideration as a distinct stock in the future. [Carretta et al 2014]" This phrase is repeated over and over throughout the DEIS. "In the future.." ?

We do not feel that we can over-emphasize the harm that NMFS does by postponing the decision to give stock designation to the 200 PCFG gray whales until some indefinite future. It is now that it matters, as NMFS contemplates allowing a hunt [into perpetuity] that will quickly do away with a great portion of the PCFG . So what is the hold-up?

NMFS mentions in the DEIS holding a "workshop" on gray whale stock ID. **From the DEIS: pg. 3-56: "Workshop participants recommended that the criterion for determining when a group of animals should be considered a separate population stock is when it is demographically independent, rather than demographically isolated."**

The workshop report states: "**The group agreed to replace references to "reproductive isolation" and "demographic isolation" in the report guidelines with references to "demographic independence" as the term "isolation" is likely to be interpreted by some as implying that there should be no interchange between stocks."** [Moore and Merrick 2011]

DEIS at pg.3-129:[NMFS 2012 workshop ["Task Force"] on Gray whale Stock ID] The discussion on stock designations continued among un-named government scientists. Arguments were made for and against the PCFG being deemed a "demographically independent unit". The scientists could not agree. **The definition of "demographically independent" is given at DEIS pg.3-133 as : "Different in biologically significant way [i.e. genetic or behavioral difference.]"** The PCFG gray whales are different from the rest of the ENP gray whales genetically AND behaviorally. How could there be disagreement on the facts? So apparently, from 2012 until now there has been no movement toward a consensus on this important point. A point so important that ***no waiver should be considered, and no DEIS should have been completed, without a decision on stock identity for the PCFG whales.*** Their survival now hangs in the balance, and still no decision

from NMFS. *It would do no harm to delay a waiver request until this important stock designation is decided. It will do immense harm to the PCFG whales to go ahead without it. So who does NMFS decide to tip the advantage to? As usual, all advantage is to the hunters. With no stock designation for the PCFG whales, they are part and parcel of the entire "plentiful" ENP gray whale population, wide open for killing.*

The reckless nature of this co-managed maneuver is staggering. How could there be two less worthy "stewards" of our whales? Real stewards would insist on actually conducting more research if there are more questions. A few thoughts from non-governmental scientists:

-"The precautionary principle, adopted by the U.N. Conference on Environmental Development, urges caution when making decisions about systems that are not fully understood."[Meffle & Carroll, 1997]

-"The negative consequences of ignoring potential population structure when making management decisions, such as the extinction of unrecognized populations and/or species, are well known." [Frasier et al, "Assessment of population substructure in relation to summer feeding ground use..."]

-And from the same paper: "The combined genetic and photo-ID data showing that the southern feeding group [PCFG] represents a distinct maternally based seasonal sub-population indicates that these whales require separate management consideration from the larger population."

These words are re-enforced at: **"Definition of Stocks" [GAMMS pg.4]: "Insufficient dispersal between populations where one bears the brunt of exploitation coupled with their inappropriate pooling for management could easily result in failure to meet MMPA objectives. For example, it is common to have human-caused mortality restricted to a portion of the species' range. Such concentrated mortality [of a large magnitude] could lead to population fragmentation, a reduction of range, or even the loss of undetected populations, and would only be mitigated by high immigration rates from adjacent areas."**

That paragraph could not describe the current situation more clearly. ***The PCFG whales ARE being "inappropriately pooled" with the entire ENP gray whale population. The Makah U&A whales WILL bear the "brunt of exploitation", as the "human-caused mortality" WILL be restricted to a certain portion of the PCFG range: the Makah U&A.*** And the following passage explains why there will NOT be "high immigration rates from adjacent areas":

"Because of site fidelity, knowledge of specific feeding areas is only present within certain matriline. Therefore, if whales are extirpated from a specific feeding ground, they will not be "replaced" by others from the larger population, because

knowledge of that feeding area has been lost. Indeed, such localized extinctions and lack of subsequent re-population of areas [despite an increasing overall population size] is widely documented in whales." [Northridge 2008]

And for the record, NMFS policies in the 1990's and early 2000's WOULD have led to the loss of at least one "undetected" population. The then "non-existent" resident whales. And what of the Western North Pacific gray whales? Their migration through the Makah U&A was un-imagined then. Who knows what harm could have been done to that tiny group after 17 years of whaling?

NMFS needs to follow its own advice: **From "Definition of Stocks---management units" [SARS pg.4]: "In the absence of adequate information on stock structure...a species' range within an ocean should be divided into stocks that represent defensible management units. Examples of such management units include...semi-isolated habitat areas, and areas of higher density of the species that are separated by relatively lower density areas. Such areas have often been found to represent true biological stocks where sufficient information is available."** How could anyone argue that the PCFG is not a "defensible management unit"?

Whatever kind of management philosophy NMFS is engaged in, it is certainly more politics than science. NMFS charges forward, ready to give up the resident whales to the Tribe, when it is scientifically defensible to put the local whales off limits. What gives? Will NMFS promise anything to avoid a lawsuit from the Tribe? NMFS cannot fault observers for wondering what the explanation is. And there is no clue in the DEIS as to whether NMFS intends to rein-in their co-managers at the last minute. We certainly cannot count on that happening. Past actions do not predict it.

So how does our small, genetically distinct, PCFG group --population size: 200 -- geographically isolated from the "main herd" most of the year, and possibly utilizing birthing areas specific to their small group--compare to other small populations of whales in numbers and PBRs?

-Gulf of Mexico sperm whales: population size: 1,400-1,660. " If the Gulf of Mexico oil spill kills just three sperm whales [PBR set by NOAA, 2009] it could seriously endanger the long-term survival of the Gulf's native whale population, scientists say...the population is thought to be especially vulnerable due to its relatively small size." [National Geographic News, 5-21-2010]

-CA-OR-WA sperm whales: population size: 751- 971. PBR: 1.5 per year

-Western Pacific Gray whales: population size:134-146. PBR: .07- .33 per year [with "uncertainty", DEIS pg.3-93] "Loss of a single whale, particularly a reproductive female, would be a conservation concern for this small stock." [DEIS pg. 3-93]

In these examples, ***a population of 1,400 -1,660 cannot sustain a loss of (3), a population of 751-971 cannot lose more than (1) per year, and a population of 134-146 should only lose (1) over a span of years. By contrast, the Tribe could potentially eliminate (6) out of the (33) Makah U&A grays whales per year.*** This illustrates the low value NMFS places on the PCFG and MU&A gray whales. What reason could there be to decide to place no value on the PCFG, other than as an aid to the Tribal whaling plan ? ***NMFS should have learned a lesson from their Cook Inlet Beluga co-management debacle.***

-Cook Inlet Beluga Whales: population size:"Once thought to number 1,300, beluga whales in the waterway plummeted during the 1990s in a decline federal biologists blamed on over hunting by Alaska Natives, the only people allowed to kill them." [Philly burbs.com, 5-28-04] From a more recent article: "The 2014 estimate is 340 animals...The Cook Inlet beluga population dwindled steadily through the 1980s and early 1990s. The decline accelerated between 1994 and 1998 when Alaska Natives harvested nearly half the remaining 650 whales in only four years. NMFS initially determined that controlling subsistence hunting would allow the population to recover. When it did not, the agency declared belugas endangered and a "strategic stock" in 2008. Population estimates have ranged from 278 to 375 animals in the past decade. The overall trend shows the beluga population is not recovering and is in decline at an average rate of 0.4 percent.... Researchers conclude the population remains in danger of extinction." ["NOAA says Cook Inlet beluga numbers..." AP 3-30-15.]

Looking at the sad history of the Cook Inlet beluga whales, ***it is obvious that a once-healthy sub-population of around 1,300 was reduced in a very short time, [thanks to NMFS's authorized "subsistence" hunting] , to a marginally viable population number that may lead to extinction of the stock. Where was NMFS when the hunters were butchering half the remaining population between 1994 and 1998 ? Where was the monitoring? Was "take" information being submitted to NMFS by the tribes and analyzed more than annually? Was there blind trust in the Alaska Native co-managers? NMFS cannot blame the hunters, alone. NMFS set up the system, and the system failed. How in the world can we be persuaded to trust NMFS/Makah co-management of the 33 Makah U&A gray whales, or the additional 100 or so OR-SVI whales? We cannot and we do not.***

The fact that the tribal managers "gift" themselves with an annual allowable bycatch of three PCFG whales per year betrays either a severe disconnect from reality, or a cold lack of interest in preserving the Makah U&A gray whales or any of the other PCFG whales that by chance or necessity enter their area. Estimates of non-hunting human-caused mortality for gray whales between California and B.C. for 1990-2010 found an annual PCFG mortality rate of 1.845 whales per year. "Total estimates of non-hunt human-caused mortality reported are minimum estimates because it is not likely that all whales killed by human activities are reported...and because mortalities in Mexico are not in this

report." [Moore,J.E. and D.W. Weller 2013] Other calculations come up with higher annual PCFG mortalities: 2.6 to 2.3 for the years 2005-2012. It has also been noted that there are many PCFG gray whales known to have very visible, large, healed wounds. A.E. Punt [2015 IWC] finds the average incidental deaths of PCFG whales to be: [December-May] :1.10, [June-November] 1.55 with California [June-November] 3.65. ***Punt also found the PCFG "sub-stock" to be at half of carrying capacity.***

We will never know how many PCFG whales meet untimely deaths per year without hunting. We must assume that the number is at least three. The DEIS at pg. 4-71 gives a maximum number of PCFG whales killed per year under Alt.2 of 5 per year, MU&A whales:6 per year. ***So we are contemplating the possible loss of 9-10 PCFG whales per year, considering hunting and non-hunting causes of death together. The only comparable PBR is for the CA-OR-WA Humpback population of 1,878 with a PBR of 11.3 per year.***

So what does NMFS say is the PBR for 197 PCFG whales? DEIS pg. 3-156: 3.1 per year. The Makah co-managers have claimed that same number as their annual allowable take from the smaller OR-SVI group, with no allowance for the non-hunt mortality number. ***Is there really a surplus of expendable PCFG whales in the Makah U&A?***

DEIS at pg.3-156: "It was not possible to draw a definitive conclusion as to whether the PCFG is within its Optimal Sustainable Population [OSP]." From Punt and Moore [2013], "With variants of the model, the probability that the PCFG was at OSP ranged from 0.35...to 0.88. they concluded that additional data were needed to obtain better empirical estimates of bycatch mortality and net annual immigration rates and to reduce uncertainty in Maximum Sustainable Yield rate [MSYR] and Maximum Net Productivity Level [MNPL] that would potentially improve inferences about the likelihood of the PCFG being at OSP"

So it is NOT known if there are more than enough PCFG gray whales in the Makah U&A to sustain hunting AND non-hunting mortality rates. NMFS knows there are way too many unknowns.

- What is the carrying capacity of the PCFG range? Unknown
- What is the OSP of the PCFG gray whales? Unknown
- Are the PCFG within OSP? Unknown
- What is the annual immigration rate to the PCFG? Unknown
- Is there sub-structuring in the Baja lagoons? Unknown
- How long ago did the PCFG population originate? Unknown
- Why did the population originate? Unknown
- Why does the PCFG persist? Unknown
- What is the average annual calf-count in MU&A? Unknown
- What is the status of the food supply? Unknown
- How do PCFG whales find their food? Unknown
- What effects will acidification have on their prey? Unknown

- What effect are warm water temps having on prey? Unknown
- Will increased killer whale predation be a concern? Unknown
- What is the carrying capacity of the Makah U&A? Unknown
- How many adult females are in MU&A sub-group? Unknown
- What is OSP of the MU&A gray whales? Unknown
- What is the population trend for the PCFG? Unknown
- How many PCFG females are newly pregnant per year? Unknown
- What is the annual bycatch mortality rate for the PCFG? Unknown
- How does underwater noise impact PCFG communication? Unknown
- Are elevated water temperatures in Baja driving whales from some lagoons? Unknown

It is crystal clear why NMFS refuses to protect the PCFG whales. To do so would force the Tribe to an off-shore hunt in the actual migratory corridor. This type of hunt, while sparing PCFG whales, would be a threat to the Western North Pacific gray whales coming and going from Sakhalin Island. The WNP gray whales do have stock designation, and all possible care must be taken not to harm even one. "The world is watching" when it comes to the severely depleted WNP gray whales. Not quite so much with the PCFG whales, as NMFS has kept the waters muddied on stock designation, and continues to do so. In actuality, there are only a few more PCFG whales than WNP whales. In the case of the MU&A whales, there are far fewer. The PCFG whales are genetically distinct from the larger ENP gray whale population, as are the WNP whales. The PCFG whales give birth in Baja, as do many WNP whales.

The only way for NMFS to comply with tribal hunting demands is to keep the PCFG whales "hunt-able". That is what drives the "inability to decide on stock designation", and thus protection, for the PCFG gray whales. There are no plans for protections. They will be sacrificial lambs for the Makah and whatever other tribes gain access to whaling rights. They just won't last very long.

However, NMFS must answer the questions listed above before they decide that ANY gray whales in the Makah U&A are "disposable". The 9th Circuit Court of Appeals requires, as does the MMPA, that the PCFG and MU&A whales remain "functioning parts of their environments." It will be interesting to see how all parties to the coming decisions will navigate these issues of local whales and those who would kill them all. If only NMFS had given more thought, and more value, to the lives of the Cook Inlet Beluga Whales

DOMESTIC EXPANSION OF WHALING

When the judges of the 9th Circuit Court [Anderson v Evans 2004] took a hard look at NMFS' then most recent EA, and ordered an EIS be prepared instead, one of the very important areas that the Court deemed lacking in the EA was an analysis of the *"precedent*

for future actions." By this the Court meant : could there be an expansion of whaling domestically or internationally as a result of approval of Makah whaling?

The Court said: " We cannot agree with the agency's assessment that because the Makah Tribe is the only tribe that has an explicit treaty-based whaling right, the approval of their whaling is unlikely to lead to an increase in whaling by other domestic groups. " And: "...while defendants argue that the Makah Tribe is the only tribe in the U.S. with a treaty right expressly guaranteeing the right to whale, that argument ignores the fact that whale hunting could be protected under less specific treaty language...less specific "hunting and fishing" rights might be urged to cover a hunt for marine mammals. Although such mammals might not be the subject of "fishing", there is little doubt they are "hunted"." [Anderson v. Evans 2004]

So what does this DEIS have to say on the topic?

- "The scope of reserved hunting rights...is very broad. Twenty Indian tribes in Western Washington State have treaty protected fishing rights in the Pacific Ocean, the Strait, and Puget Sound." [pg.1-8]

- "Other tribes historically hunted whales, and the authorization of a Makah whale hunt...could lead them to request a similar authorization." [pg. 4-261]

- "This authorization...could lead other parties to seek similar authorization to harvest marine mammals other than whales. Some NW Indian tribes traditionally harvested...seals, sea otters, and other marine mammals. Northwest Indian tribes have, in the past, expressed an interest in harvesting marine mammals. Authorization of a Makah gray whale hunt could revive the interest of the Makah or other tribes in hunting marine mammals. It could also lead to interest by non-Indians in sport or commercial hunting of marine mammals. Such interest could lead to additional requests for MMPA waivers from Indian or non-Indians, and ultimately to the federally authorized harvests of additional marine mammals." [pg.4-261]

- "Alternatives 2- 6 could encourage applicants [including Makah] to consider seeking waivers of the MMPA to allow subsistence, commercial, or sport harvest of gray whales or other marine mammals. Thus there would be an increased likelihood of future requests. We consider the increased likelihood to be small." [pg.4-265]

- "Under Alternatives 2- 6, we would authorize a Makah gray whale hunt, and that authorization would make it more likely for parties to seek an MMPA waiver compared with the No-action alternative."

- "The most likely increase in waiver applications would come from other treaty tribes, who might view the approval of the Makah's application as a precedent for approval of additional waiver applications to take marine mammals that they had

harvested traditionally and that remained important to them for cultural or other reasons." [pg. 4-266]

-"Nevertheless, tribes other than the Makah traditionally hunted gray whales, and authorization of a Makah hunt could encourage them to seek a similar authorization ." [pg. 4-266]

- "Authorization of the Makah Tribe's request under Alternatives 2 through 6 could also lead the Makah Tribe or other tribes to request additional authorization to hunt other species of whale besides gray whales." [pg.4-266]

From the above excerpts, it would seem that NMFS is now bending over backwards to finally agree that other tribes do indeed have the same treaty right to request waivers from the MMPA to take many species of marine mammals, and may indeed seek similar waivers. [There is no explanation for why they also raise the odd specter of "non-Indian sport or commercial hunting of marine mammals."] It appears that NMFS understands the risk that a regular Pandora's Box will be opened by creating a precedent-setting breach in the MMPA with a waiver for the Makah. Especially a waiver request so boldly callous to the small PCFG and WNP gray whale groups. A waiver request so much in violation of the spirit and the intent of the Marine Mammal Protection Act. A waiver which, if granted, will remove the ancient lineages of "summer" gray whales from the Olympic Peninsula waters forever. A waiver request that will eventually do damage to the WNP whales, and will open the door for a crush of tribal [and non-tribal?] requests for a variety of marine mammal takes. Because if this request "passes muster", the bar is set so low that it will be difficult to reject any request that follows. So what is NMFS' analysis of the potential outcome of the scenarios that they themselves describe?

DEIS pg. 4-265: " Although it has been ...over 15 years since the Makah Tribe received their allocation , no other Indian tribe...has requested an allocation ...This history suggests that beyond the Makah...there is very little interest by other native groups to seek authorization to harvest whales. In addition, the complexity of the process and length of time required to complete it would probably limit the interest of most potential applicants.." and finally: " If authorization of a hunt under Alternatives 2- 6 did lead to an additional waiver request by the Makah Tribe or other tribes, the outcome of any process would depend on facts specific to those requests that are not presently known, making it speculative to conclude that the harvest of whales nationally would change as a result of implementing Alternatives 2 through 6." [DEIS pg.266]

It does us no good to continue to quote the various tribal sources proclaiming the right and the intent to pursue marine mammal hunts, as NMFS refuses to "speculate" without specific requests in front of them. It is also of no use to continue to point out that it is common sense to believe that "other tribes" understand the negative complication they pose to the Makah's waiver attempt. It seems obviously strategic to "hang back" and let the Makah

precedent be set. We will only add three more quotes to the many we have sent in the past, the first one an "oldie but a goodie":

"Even the Makah say it is likely that their proposal, if successful, will inspire Native Americans throughout the Pacific Northwest to again take to the seas on the trail of the whale. Already 13 Nuu-chah-nulth tribes of Vancouver Island, cousins to the Makah from across the Strait of Juan de Fuca, have launched treaty talks in Canada aimed at resuming whale hunting. *"We're hearing rumblings that some of the tribes up in Alaska will want to start whaling, too. We know there are three in Washington that would like to. The 13 in Canada. We kind of figure there will be a domino effect," said Denise Dailey, marine biologist for the Makah Tribe. "Everybody's kind of looking at us and saying, 'See what you've caused?' But as Makahs we always feel like we're in the front of a lot of issues, especially when it comes to treaty rights."* [L.A. Times, 8-2-95]

NWIFC comments to DEIS 2008: ""The DEIS correctly notes that the tradition of whaling is not unique to the Makah Tribe and that other Pacific Northwest Indian tribes traditionally harvested marine mammals and have expressed relatively recent interest in doing so. The connection of other treaty tribes to whaling continues to this day. See DEIS [2008] at 1-38 [ceremonial involvement of four canoes from various Washington Indian tribes in the landing of whale harvested by Makah Tribe in 1999."

And from the Report of the Scientific Committee, June, 2012: 2.2.2 Stock structure:"
SC/64/AWMP2 tested the assertion that individuals of the southern feeding groups mate with the rest of the population, and therefore that the ENP gray whale represents one interbreeding population because this assumption is key to making appropriate management decisions given there is an interest by native groups in Washington and British Columbia to resume their traditional hunts. Such hunts could disproportionately affect whales of the PCFG, and understanding how these whales are related to the rest of the population is necessary for properly managing such hunts."

How the PCFG gray whales "are related to the rest of the population", may take many years to unravel. But in U.S. waters, it doesn't really matter. The MMPA requires *optimum populations* of whales to be sustained in the various ecosystems, large and small. **The 9th Circuit stated in Anderson vs. Evans: "If California gray whales disappear from the area of the Strait of Juan de Fuca, the Marine Sanctuary, or both, that would be a significant environmental impact even if the PCFA whales populating the rest of the Pacific Coast in the summer are genetically identical to the local whales, and even if the PCFA whales are genetically identical to the migrating whales."**

The Makah hunt, under Alternatives 2 through 6, will definitely impact the Makah U&A whales first and foremost, through deaths and unending harassments. Over time the fright

and destruction will also cut into the wider PCFG population. If other Western Washington tribes obtain similar waivers, what other whales are there to be targeted but the "plentiful" ENP gray whales? And because NMFS gives no stock designation to the PCFG whales, but folds them into the ENP population, there will be nothing to stop multiple tribes from killing and harassing the same small group of PCFG whales. The template will have been created, and any changes in the "rules" will be poorly received and hard for NMFS to justify. NMFS' strategy to assist the Makah Tribe could result in many more tribes demanding a share of the "plentiful" ENP gray whales. With or without the "help" of other tribes in Washington State and Canada, the PCFG whales are doomed to extinction in the Pacific Northwest in a relatively short time frame. Under 20 years will be long enough to have finished off the peaceful springtime "baby nursery" of the Makah U&A mothers, the PCFG mothers, the ENP gray whale mothers, the WNP gray whale mothers, and all of their offspring.

NMFS wants us to have faith that : " The complexity of the process--the length of time to complete it...would probably limit the interest of most potential applicants. It therefore seems unlikely that Alt.2 through 6 would lead other Indian tribes to seek authorization to hunt whales." [DEIS pg.4-264-265]

This is an extremely weak argument, and a cowardly avoidance of the type of analysis that we believe the 9th Circuit Court had in mind. The "complexity" and the "length of time to complete" will be immensely reduced by a successful waiver request this time. Why would any tribe be anything other than encouraged and energized by the opened door? Besides, it is NMFS that does most of the "complex process", and all the tribes have lawyers and the Northwest Indian Fisheries Commission to press their demands. It is simply a matter of sending a request letter to NMFS, and letting the process get under way. A whaling request is also a proven "cash cow" for travel, jobs, "whaling commission" start-ups, equipment, etc. **" The government plowed \$200,000 into Makah whaling in 1996; \$60,000 in 1997; and 475,000 in 1998. The money paid to send delegations to represent the Tribe before the IWC in Monaco, Dublin, and London; to determine a humane whale-killing method; to monitor the 1999 hunt; and to hire a tribal biologist. The federal government gave the tribe \$25,000 more last month to pay for an upcoming trip to Japan to appear before the IWC...financial support for Makah whaling has totaled \$360,000 since 1996, though none was spent to actually kill a whale said Brian Gorman, NMFS spokesman." [[Seattle Times](#), Lynda Mapes, April 15, 2002]** It is a money-maker without ever killing a whale or selling an ounce of meat. NMFS knows more than they admit about tribal desires to hunt marine mammals. They cover themselves by admitting the possibility, but declare over and over that it is "too speculative to conclude" that authorization of the Makah to hunt whales "would affect marine mammals in the U.S." Credulity strains to breaking on that one.

The Peninsula Citizens for the Protection of Whales believe that until such time that NMFS has a more complete understanding of the cumulative results of this action, it is **"too speculative"** to allow this whaling to be approved. The members and supporters of the

PCPW are also very concerned about the future and the integrity of the MMPA itself. We are afraid that this waiver request process, if successful, will undermine the meaning and the effectiveness of this Act. An Act that reflects the will and desire of the great majority of Americans to see marine mammals thrive in U.S. waters to their fullest extent. There is no legal reason that the will of the American people bend to the desires of a particular tribal council, or multiple tribal councils.

In the words of the Court [Anderson vs. Evans] : " The intent of Congress cannot be held hostage to the goodwill or good judgment or good sense of the particular leaders empowered by the tribe at present; it must be assumed that Congress intended to effectuate policies for the United States and its residents, including the Makah Tribe, that transcend the decisions of any subordinate group."

THE IWC " MAKAH QUOTA"

The Final Decision of the 9th Circuit Court in Anderson v Evans [2004] gives great emphasis to the issue of the IWC quota for the Makah Tribe, and was a primary reason for ordering an EIS to be prepared. **From the opening statement of the Court's Final Decision: " Appellants' complaint sought relief broader than invalidation of the procedures used to obtain the IWC permit and of the Cooperative Agreement as violative of NEPA and the and the MMPA. The government activity challenged...is the way the government has gone about contracting with the Makah, obtaining "aboriginal subsistence" quotas from the IWC, and allocating them to the Tribe...Precedential harms continue to flow from the government's action."**

Continuing the words of the Court: **" Delegates at the IWC again disagreed about whether the Tribe qualified under the aboriginal subsistence exception. Rather than resolving the disagreement, the delegates papered it over with ambiguous language...It remained unclear whether a majority of the members considered the Tribe entitled to the aboriginal subsistence exception..." It had been the understanding among IWC members "...that only the IWC [not individual member countries] could decide which groups met the subsistence exception...The 1997 IWC gray whale quota, as implemented by the U.S., could be used as a precedent for other countries to declare subsistence needs of their own aboriginal groups, thereby making it easier for such groups to gain approval for whaling."**

And: **"...the agencies' failure to consider the precedential impact of our government's support for the Makah Tribe's whaling in future IWC deliberations remains a troubling vacuum."**

The Court found the problems to involve "specificity"...the IWC Schedule fails to expressly provide any whaling quota for the Tribe...and "uncertainty": "...surrounding circumstances of the adoption of the Schedule cast doubt on the intent of the IWC to approve a quota for the Tribe..."Whether recognition must

formally come from the IWC or the U.S. is not clear...the "expressly provided for " requirement is not satisfied." [Anderson v Evans]

We believe that the 9th Circuit would continue to see a "troubling vacuum" in the DEIS' analysis of the impact that the Makah's "aboriginal subsistence" could have at the international level. When ordered to prepare an assessment "free of the previous taint", we really assumed that NMFS compliance on this topic would need to entail an actual re-visiting of the IWC quota arrangement with Russia. sharing of the Russian quota with more U.S. tribes. Maybe more bowheads would be traded to Russia to sweeten the deal. ***There is only one way to establish the "specificity" required by the Court , to resolve the "uncertainty" described by the Court, and to remove the " previous taint" of unlawful actions by NMFS in the procedures leading to the IWC. That one and only way is to unbundle the Makah request from the Russian request and allow the IWC member countries to vote separately on each request. Many delegates to the IWC complained that a "good request" [Chukotka] was tied to a "bad request" [Makah]. We believe that the U.S. well knows that a stand-alone vote on Makah "subsistence needs" would not be successful. It is only by binding itself to the actual needs of the Chukotka people that the Makah have slipped through the cracks of true IWC approval. The ultimate result of this strategy could become the expanded sweeten the deal. A very bad precedent to be left standing as an example to other nations and other domestic tribes.***

The concerns of the 9th Circuit are certainly not satisfied by this DEIS. The Court saw fit to repeat these words in their concluding statement: **"The government activity challenged is not an ordinary time-limited regulatory permit, but rather the way the government has gone about contracting with the Makah. obtaining "aboriginal subsistence quotas" from the IWC, and allocating them to the Tribe."**

The challenge has not been satisfactorily answered . The NMFS position remains "...arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law", and in spite of a 1,200+ page DEIS., the taint remains.

EASTERN NORTH PACIFIC GRAY WHALES (ENP)

It is difficult to read this DEIS without experiencing extreme concern for the ultimate survival of the ENP gray whales. Threatened on every side, ecosystems changing out from under them, food sources unreliable, mothers and calves hounded by whalers on the northern feeding grounds, surrounded by ship traffic and increasing underwater noise, crowded by oil explorations, threading through increasing hazards of fishing gear entanglement and orca predation on their calves. Absorbing pollutants into their systems, Navy war games throughout their migration route. Stinky whales, skinny whales, the huge die-off...and now the Makah want to take a stab at them, too.

These whales should never have been removed from the Endangered Species List, and they could never have been de-listed under current conditions. They have been left with far less

protection than they should have . Less money is available for a "recovered species", so there is less time and attention to their problems. NMFS boldly describes them as "at Optimal Sustainable Population".

This is an example of "shifting baseline syndrome". **"What has become a degraded state of nature for the previous generation becomes the normal state of nature for the present generation." (J.B. McKinnen)** It seems that things now degrade in an even quicker time-frame than a generation.

What were once mighty oceans-full of gray whales is down to a trickle, and that is the new "healthy stock." With the opening of the Arctic passage to the Atlantic Ocean, ENP gray whales should be left to explore, to expand, and to move about in peace. At least two gray whales have already made it to the Atlantic side. The ENP should be helped to reach greater population numbers that would possibly support a shift, by some, to old territories. Maybe into WNP gray whale turf, too, to help build that population back up to viable numbers. ***Dispersal is extinction insurance!***

The ENP gray whale situation is frustrating. They should be re-listed, but that seems a long shot now, with NMFS bent on committing the ENP gray whales to deadly encounters with Makah guns and harpoons " into perpetuity." And to think that the Makah Tribe, along with all the Northwest Indian Fisheries Commission member tribes, got this ball rolling 25 years ago with the demand that NMFS de-list the ENP gray whales..."not so we can hunt them, but so money can go to other species."

We support and appreciate the more thorough analyses done by those with more expertise on the plethora of problems plaguing the ENP, although no one knows better than NMFS what the situation is. The Peninsula Citizens for the Protection of Whales wish for nothing less than full protection for all gray whales. Every stock is depleted, and every stock will be harmed by tribal hunts.

CO-MANAGEMENT OF PUBLIC SAFETY IN OLYMPIC NATIONAL PARK

For a great many years, the Peninsula Citizens for the Protection of Whales have advocated for the protection of Peninsula citizens as well. Our primary safety concern involves the use of high-powered rifles close to the Pacific Coast areas of Olympic National Park [ONP]. ***For close to 20 years we have insisted that NMFS must consult with the Park on the risks to their visitors on the coast. The Park can then decide whether to issue warnings, close trails, or somehow lower the chances of harm. The DEIS [2015] pg.8-2 and 8-3 : "List of Preparers and Agencies Consulted" does not list the Olympic National Park , although ONP is on the distribution list and is specifically mentioned in various locations of the DEIS. The following quotes from the DEIS should be of interest to the "deciders" at the National Park Service and ONP:***

-pg. 3-168: "The Makah propose to use a .50 cal. rifle...In 1999 (4) rifle shots were fired over a span of 5 minutes, the first 2 shots either missed or were ineffective..." [cameras caught at least one of the two bullets bouncing over the whale and flying off in an unknown direction]

-pg.3-169: "...the maximum range [for .50 cal.] is 4.97 miles."

-pg.4-246: "The possibility of any person being struck by a bullet or shoulder-fired explosive projectile would be minimized by proposed safety requirements..."

-pg.3-169: [footnote] " Safety measures: 1) within 30' of a whale 2) field of view clear of vessels, persons, etc. 3) minimum visibility of 500 yards in any direction."

-pg.4-248: "There is nevertheless a remote possibility that a bystander on shore could be struck by a .50 cal. bullet which has a range of up to 5 miles."

The Park should be informed that the Makah's proposed Alternative 2 will have a likely hunt season of March, April and May. Each year there will likely be (60) days of hunt-related activity on the water, likely (64) rifle shots, possibly (12) grenade explosions, and likely (353) approaches to whales. *The Park should understand that all previous hunts have taken place between Shi Shi Beach and Cape Alava, and within one and a half miles of shore, putting the beach areas well within the danger zone of the .50 cal. rifle. ONP well knows the high numbers of campers who use the Wilderness Beach areas in March, April and May. PCPW would like to know why the Olympic National Park--the biggest draw for the tourism industry on the Olympic Peninsula, visited by millions annually, and at the greatest risk for "bystanders" injury --was not consulted for comment by NMFS. And if it was, where is the evidence? We would be interested to know if the Park feels that the "safety measures" are adequate. On a misty, foggy coast, "500 yards visibility" should not inspire confidence when considering a weapon with a 5 mile range.*

The Park may have also wanted to weigh in on the noise factor: DEIS pg. 4-218-220: "Noise Generated by Hunt-Related Activities - Recreational users of beaches in the OCNMS,...and the ONP would be most likely to hear noise." And the ONP would be wise not to underestimate emotional discomfort: DEIS pg. 4-226-227: " "On Scene Observers... [there is the] potential for inadvertent encounters with views of whale hunting from hiking trails and beaches along the Pacific coastal portion of the project area." Does the Olympic National Park understand that they are participating in and giving tacit approval to this "project" in their "area"?

The Park would also be wise to have policies in place to deal with another "Yellow Banks"-type incident. *In 2001 a young gray whale stranded alive on the beach at Yellow Banks. The Park response was disorganized. The public eventually learned that the whale had lived for days before being butchered ["dead or alive": ONP report] by Makah tribal*

members who accessed the wilderness beach by motorboats. Park Rangers who went out to check on the whale found a partially butchered whale, chunks of blubber littering the shoreline, tarps laying abandoned on the beach, and hikers found a bloody kitchen knife which they turned over to rangers. [Sanny Lustig ONP ranger: ONP Incident Report-OLYMO100000192 + photos]. There were rumors that the whale had been shot on the beach. The Tribe had not asked to access the ONP Wilderness beach. They were alerted to the whale's presence by a NMFS biologist, who witnessed but failed to report the butchering. There were never clear answers as to the legal status of the situation, although many questions were put to ONP Supt. Morris, the National Park Service and NMFS.

What will ONP's response be to beaching and butchering whales on the Wilderness beaches?

It is likely that with most hunts occurring in shallow waters right off-shore of the Park, that scenario could be an unintended consequence at any point in time "into perpetuity". The Park might want to exercise its stewardship over its reputation and it's visitors by making a strong case for either Alternative 1 [no action] or Alternative 3, [the "off-shore" hunt.] They should at least have a chance to take a public stand. Or has the NPS declined to comment for political reasons? The public has a right to know who is behind a lack of comment from the Park Service. After all, in 1999 the Coast Guard found that "...The uncertain reactions of a pursued or wounded whale and the inherent dangers in firing a .50 cal. hunting rifle from a pitching and rolling small boat are likely to be present in all future hunts, and present a significant danger to life and property." [DEIS 2008 pg.3-10] When asked by PCPW : "Who will be responsible if a person in the coastal beach area of ONP is struck by a .50 cal. bullet?", the Coast Guard response was: "Our responsibility ends when the bullet crosses the shore." In over 20 years of controversy, the Park has remained absolutely silent. Has NMFS thoroughly briefed ONP on the risks to their visitors that will accompany Makah whale hunts? Or does ONP management close its eyes and hope for the best, rather than "engage" with the Tribe over a perceived treaty right?

And what is the plan to protect occupants of fishing boats, pleasure boats, the increasing numbers of freighters, or any of the other vessels that could be hidden in the mist as far as 5 miles in any direction? The co-managers' safety plans are minimal to the point of ridiculous. **This whole plan should be dead in the water based on hazards to human life.**

ENFORCEMENT

While PCPW does not believe that it will be possible to allow these hunt plans to be realized, we will comment on the problem of enforcement. There is no point in making rules and regulations if they are not, or cannot be, enforced. When it comes to killing whales, the public will expect and demand complete transparency in every aspect of the co-management of this very valued public resource. The Makah Tribe does not own the gray

whales. These whales cross international boundaries as they feed and as they migrate. They are beloved in Mexico--their birthplace--as well as along the American west coast. "Beloved icons" NMFS called them on their website. The PCFG whales, including the Makah U&A whales, spend time feeding in Canada as well, along the outer coast of Vancouver Island. Numerous Canadian whale watch companies feature gray whale encounters, and they have been studied by Canadian scientists since the 70's. The Russian gray whales cross even more international boundaries in their annual cycles.

The Makah Tribal Council cannot take the attitude that they have proprietary control over all these whales, whether transiting through or feeding, in their U&A. After all these years, it is still surprising to local observers that there is no interest in being "good stewards" of the whales in their back yard. No interest in getting to know them or in protecting them. They just want to kill as many as possible per year. Where is the incentive to play by "the rules" and where is the deterrent to breaking them?

The Makah co-managers have always insisted that they could deter their own tribal members from violating the rules of the hunt. This was an untested hypothesis right up until September 8, 2007. The story of the "rogue hunt" was followed closely in the press by the public and the politicians. Five members of previous "cultural, traditional and spiritual" whaling crews had pumped numerous harpoons and bullets into a resident whale at a feeding site within the Strait. They did not kill for the previously proclaimed reasons of "culture and tradition", but out of feelings of frustration, anger and unrequited entitlement. They failed to kill the whale outright, and it slowly bled to death over a 10 hour period.

How did the Makah co-managers handle this incident? First, three days after the "hunt", Makah Tribal Council members went to Washington D.C. and made promises. "We are taking care of it in our own judicial system," said former Council Chairman, Ben Johnson. Sen. Patty Murray commended the Makah leaders "for immediately condemning this rogue act and taking steps to prosecute the offenders."

A flurry of headlines continue the story of the Makah's judicial system:

"Makah file charges against whalers" [PDN Nov.27, 2007]

"Search for a judge" [PDN Feb.10,2007]

"New judge assumes bench on Makah Tribal bench" [PDN Feb.20,2007]

"Tribal judge rejects plea deal" [Seattle Times April 19, 2007]

"Makah court defers prosecution for 5 who killed gray whale" [AP May 15, 2007]

"Makah judge fails to empanel jury to prosecute whalers" [Seattle Times May 15, 2007]

Lynda Mapes summed up the situation in the Seattle Times article of May 15, 2007:

"They promised tough prosecution, but in the end the Makah Nation couldn't put together a jury to try five whalers who were charged with illegally killing a gray

whale off Neah Bay last fall. Tribal Judge Stanley Myers on Wednesday instead granted the men one-year deferred prosecution and...the whalers were each ordered to pay a \$20 fine. The deferral came after the judge summoned more than 200 people from the village of Neah Bay on the Olympic Peninsula to serve as prospective jurors. But the judge gave up on impaneling a jury because just about everyone was either related or said they had strong feelings about the case... It was a far cry from last fall... Then a tribal council held a news conference and flew to Washington, D.C., to promise swift and sure prosecution. "We are a law-abiding people and we will not tolerate lawless conduct by any of our members", they said in a prepared statement at the time."

The Makah Tribal Council lost a great amount of credibility with most of the public over this terrible incident. Many felt there was a lack of fairness in the very light punishment dealt out by the Federal Government, as well. The crime was treated as a "hunting violation". Astute observers felt that strings were being pulled to help the Makah Tribe avoid a scenario where some of its own members, rebelling against stiff sentences, would feel compelled to seek relief from the Supreme Court. The uncertainty of the outcome at the Supreme Court level rattled the Tribal Council. The entire situation has rattled the public's faith in the ability of either co-manager to discourage violations of any agreed upon policies in the future. What assurance can NMFS give that breaking the rules will not be tolerated? What "illegal" acts will trigger Federal, rather than Tribal, investigation? Which will not? This was not well explained in the DEIS. Can the public be assured of transparency in all things regarding whaling by the Makah Tribe? Or will NMFS allow there to be the usual veil of secrecy over "tribal matters".

We need to see an itemized listing of potential types of violations, and which co-manager will be charged with bringing justice. Whaling is bad enough without also being lawless. There can be no gray areas, where breaches of rules fall between the cracks or are swept under the carpet. Potential punishments are far more serious if the Federal Government is charged with enforcement, and more likely to dissuade violations. NMFS cannot take a hands off approach to enforcement.

THE TREATY

NMFS's support for whaling by the Makah Tribe has always been predicated on the well-known and oft-repeated clause in the Treaty of Neah Bay of 1855, preserving the right to take whales and seals in common with all citizens of the United States. This reserved whaling right has been touted as "unique" among treaties, and the Makah described as "unique" among Northwest tribes in their whaling culture, and that their ability to claim a treaty right to whale could not be claimed by any other tribes. The Peninsula Daily News said in May, 2014: "**The Makah is the only tribe in the lower 48 states to have that right guaranteed in its treaty with the United States.**" **The media has repeated this claim for 20 years.** And it has been an up-hill struggle to make the argument for the last

20 years, that many other Washington State tribes could claim the same right. But we did have an unexpected ally:

The 9th Circuit Court of Appeals was skeptical .

"While defendants argue that the Makah Tribe is the only tribe in the U.S. with a treaty right expressly guaranteeing the right to whale, that argument ignores the fact that whale hunting could be protected under less specific treaty language...less specific "hunting and fishing" rights might be urged to cover a hunt for marine mammals. Although such mammals might not be the subject of "fishing", there is little doubt they are "hunted".[Anderson v Evans]

This just in:

On July 9,2015, U.S. District Court Judge Ricardo Martinez wrapped up a decision on disputed fishing boundaries of Washington State's coastal tribes: the Makah, the Quileute, and the Quinault. The Judge noted that each of the tribes' word for "fish" at the time of the treaty negotiations with the U.S. government in 1855 encompassed all marine life- including seals, whales, and shellfish. So there should be no further argument about whether the Makah treaty is "unique". In the Judge's ruling he also detailed the whaling cultures of the Quileute Tribe and the Quinault Tribe. All the coastal tribes were whalers, had rituals and customs, used harpoons and gear identical to that used by the Makah. It was not part of that court case, but tribes on the inner waters of the Salish Sea also whaled, so we are left with the fact that about 20 Northwest tribes could claim rights to whale identical to the Makah , by utilizing their treaty rights to "fish". The cost to NMFS in time, personnel, and tax dollars to give equal effort to even a handful of other tribes is not analyzed in the DEIS. The cost to the whales will be high, and should have been analyzed as well. It is common sense to expect that any new requests would be for takes from the ENP gray whale population. There are no other de-listed whale species at this writing, and the population is believed by NMFS and the IWC to be able to sustain a greater take. The problem will be, of course, that the real damage will be to the "invisible" PCFG and MU&A gray whales, hastening their demise beyond what the Makah will have already accomplished. The eventual impact on the Western North Pacific gray whales can be imagined.

Makah whaling proponents have often said , when asked to hold the whaling right in reserve: ***"A treaty right is not a right unless you use it." "We need to prove the treaty right". "A treaty right must be exercised to continue to exist.."*** In a [Seattle Times](#) article, April 15,2002, a tribal council luke-warm to whaling is described by reporter Lynda Mapes: ***"...a new slate of Makah tribal leaders slashed funding for whaling--arguing other needs are more pressing...To be sure, the tribal council wants to ensure the Makah's treaty right to hunt gray whales remains protected. But actually landing a whale on the beach is not on this council's to-do list...[said tribal council-man David***

Lawrence :] "It's not so much the whaling; we are securing the treaty right." ["Makah leaders say more pressing needs than whale hunts face their people", Seattle Times]

So, will other tribes use the same rationale and insist on "proving" or "securing" or "protecting" the right to kill whales by following the Makah through the waiver process and killing whales ? A successful waiver outcome for the Makah may ring the starting bell for a rush of other tribal requests. If that happens it will be too late to close the lid on Pandora's Box.

Where is the "cultural necessity" in the statement, *"It's not so much the whaling; we are securing the treaty right."* ? And if whaling was such a watershed cultural boon to the tribe, why did enthusiasm wane to such a low, just three years after the 1999 hunt? From the same Seattle Times article: ***"Keith Johnson said he was voted off the council after the first hunt amidst criticism that the council had spent too much time and money on whaling. "It was really clear that whaling was a dead horse", he said." And Wayne Johnson, captain of the first whale hunt said : " People have lost interest. We need to have a few more whales on the beach to keep it alive."*** And this was at a time when the ability to whale was wide open. ***"Burdensome federal restrictions on when and where whalers can hunt have been largely lifted." [Lynda Mapes, Seattle Times, 2002]***

One month before the above statements were made to reporter Lynda Mapes, Gordon Smith, Makah Tribal Chairman, submitted Ann Renker's "Needs Statement" to Rolland Schmitt to be submitted to the IWC meeting in Shimonoseki, Japan. In this "Needs Statement" are Ann Renker's Household Survey results. She found close to 100% enthusiasm and support and desire for whale hunts and whale meat in Neah Bay ! We did show her statistics to be skewed in our 2008 comments, and the statements from Keith Johnson, Wayne Johnson and David Lawrence back up our distrust of her "results". But the IWC and NMFS always seem satisfied to take her biased findings of "need" at face value.

So what is really "needed" that would justify the killing of five whales per year? It does not really seem to be about free meat, traditional food, cultural rejuvenation, or a cure for drug and alcohol problems. It seems to be about "proving" and "securing" the words in the treaty. And maybe "proving" and "preserving" whaling family status, as well. Is that sufficient reason for the IWC to approve an aboriginal subsistence quota? The IWC agenda should not be to help the U.S. government avoid lawsuits from U.S. tribes. So is the real "need", NMFS' need to prove that the word of the government is good, by allowing the tribe to "prove" the treaty right? Is it sufficient reason to allow a first-ever waiver from the MMPA to kill and injure whales from three separate gray whale groups? Is it sufficient reason for the residents of the Peninsula to deal with the economic and emotional fall-out? If the tribes use the killing of whales to measure the Federal Government's willingness to support their treaty rights, will each tribe need to continually "prove" that the government will still back them up no matter the public outcry ? The gray whales should not be

sacrificial lambs in this political chess match. Dead gray whales will not erase the horrid history of government / tribal relations.

And though the judges of the 9th Circuit Court of Appeals said in their decision: "**We need not and do not decide whether the Tribe's whaling rights have been abrogated by the MMPA...**", many tribal attorneys believe they did just that. From a legal brief submitted to the 9th Circuit Court by the lawyers for 20+ Washington State Tribes [*Amici Curiae*] requesting en banc re-hearing of the Anderson v Evans decision of 2002: "***The Panel's conclusion that Makah must be treated the same with respect to the MMPA as anyone without treaty whaling rights therefore constitutes nothing less than a decision that the MMPA abrogated the Makah treaty.***"

The tribes' lawyers also attempt to make the case that the protections afforded marine mammals are excessive and should not apply to treaty tribes : "***The "conservation" purposes of the MMPA, are much broader than simply ensuring perpetuation with a reasonable margin of safety. They are geared instead to maintaining optimum populations without regard to other considerations, including treaty rights. The MMPA "conservation" purposes therefore have no relation to the conservation standards that have always been applied to treaty rights, and the Panel's opinion marks a radical expansion of the allowable limits on treaty rights that is contrary to settled law in this and other Circuits.***" [*Amici Curiae, 2003*]

It is obvious that the tribes would prefer that whales be treated [legally] as fish. What they understand is that the MMPA has a higher protective bar than the Endangered Species Act. Tribes have never before had to deal with this level of protection over something they wanted to kill. What the Makah realize is that there can be no whaling of the type they want to do, that can ever comply with the protections afforded whales by the MMPA. Particularly in regard to the PCFG and MU&A gray whales. **This is the dilemma that NMFS attempts to solve for the Tribe by postponing stock designation for the PCFG gray whales.** We will have to see if this strategy passes deeper scrutiny.

From Anderson v Evans: "**Whether the tribe's whaling will damage the delicate balance of the gray whales in the marine ecosystem is a question that must be asked long before we reach the desperate point where we face a reactive scramble for species preservation.**" Footnote 24 "**This conclusion is re-enforced by our holding in Midwater Trawlers Co-operative v Dept. of Commerce [9th Cir. 2002] wherein we held that the Magnuson-Stevens Act [protection of U.S. fisheries] applies to Makah's fishing rights despite the Treaty of Neah Bay.**"

The 9th Circuit Court was not swayed by the opinions of the lawyers for the tribes. There was no *en banc* hearing granted, and the Makah Tribe did not choose to challenge the decision at the Supreme Court level. So it stands. In the Court's words: "**The Tribe may urge a treaty right to be considered in the NMFS review of an application submitted by the Tribe under the MMPA.**"

"May urge a treaty right to be considered." Not exactly a ringing endorsement of the treaty's power to break down the protective walls of the MMPA, and quite a difference from NMFS' long-standing policy of doing just about *anything* to comply with the Makah's "unique" treaty right-based demands.

And while NMFS tries to "make something" of diminished protests after the 1999 kill and the 2000 "family" hunts, that is understandable: there were no serious attempts to hunt after that. There was nothing to protest.

Of more note, if NMFS was doing a balanced analysis, was the low turn-out for a 15th Anniversary "event" on May 17, 2014, staged by the Makah Whaling Commission: "A small flotilla of canoes...a feast, dancing and traditional songs to celebrate the whalers and the whale" was announced in a front page story on May 16. [PDN "Makah to mark anniversary"] Surprisingly, the Tribal Council "was unaware of the event." The Peninsula Daily News covered the anniversary celebration in another front page story on May 18. There was a very small turnout, as it turned out. "...the rogue 2007 hunt created divisions, Keith Johnson said, pointing out there was no event to mark the 10-year anniversary of the 1999 hunt. "Do you see the whole tribe here?" he asked as he pointed to the *three dozen people* on the beach before Saturday's commemorative paddle. Keith Johnson expressed hope that the divisions within the tribe would be closed. "It's our traditional food and people still want it. ***And if for no other reason, a lot of people here will support us for the treaty right.***" [PDN, May 18, 2014]

It seems that "proving the treaty right" is the cultural necessity. Let the IWC vote on that need.

AESTHETICS AND TREATY RIGHTS

The Marine Mammal Protection Act opens with an important statement :

" Marine mammals have proven themselves to be resources of great international significance, *esthetic* and recreational as well as economic, and it is the sense of the Congress that they should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management, and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem. Whenever consistent with this primary objective, it should be the goal to obtain an optimum sustainable population keeping in mind the carrying capacity of the habitat."

From the DEIS, pg.5-45, Cumulative Effects on Aesthetics:

"Under Alternatives 2 through 6 there may be some temporary aesthetic effects to people viewing gray whale hunts through the media or from local vantage points both

inside and outside of the project area...we do not expect there would be significant cumulative effects on aesthetics. One sentence to dismiss the feelings of the majority of all people everywhere who find whales to be ***"resources of great international significance, esthetic and recreational as well as economic..."***

Does NMFS understand the poetic and subtle meanings of the word "aesthetics"? The framers of the MMPA certainly did. NMFS' reference to "temporary aesthetic effects to people viewing gray whale hunts..." seems to define "aesthetic effects" as a fleeting negative response to watching a "distasteful" act. Nothing that would persist after the fact. It is hard to fathom the meaning of NMFS' final phrase: "...we do not expect there would be significant cumulative effects on aesthetics," but we are sure NMFS could not be more wrong. NMFS interpreted "aesthetics" as a negative noun, never dealing with its profound meaning as a positive.

From on-line dictionary definitions of "aesthetics":

"Critical reflection on art, culture and nature..."

"A branch of philosophy dealing with the nature of beauty--what is pleasing to the senses."

"The study of sensory--emotional values."

"Relating to, involving, or concerned with pure emotion and sensation as opposed to pure intellectuality."

"To perceive, to feel."

"The study of the nature of sensation."

So NMFS 's "analysis" of the "aesthetics" of whaling is this: Viewing the slaughter would be "a temporary aesthetic effect ". We assume they mean a temporary "negative" aesthetic effect. So evidently their position is that if you don't "watch" unpleasantness, it can't hurt you . And if you do have an aesthetically bad glimpse of whaling , it will be a temporary effect. End of story.

We do not think that is what the writers of the MMPA meant when they used the word, but we will try to explain what we think it's context should be in regard to whales and whaling.

The Olympic Peninsula is experienced by its residents and visitors as "a world apart". It is practically an island, with water all around. The Olympic National Park is the centerpiece, with soaring snow-capped peaks, lush rain forests, and rocky wilderness coasts. Wildlife of all kinds can be spotted if one is lucky..elk, black bear, cougar, eagles, sea birds in the thousands. The waters of the Strait of Juan de Fuca and the Pacific Coast are homes to many species of marine mammals . Seals, sea lions, dolphins, porpoise, orcas, humpback whales, and gray whales can sometimes be glimpsed from shore, if one is lucky. ***The impact on people of all of these natural wonders of the Peninsula, added together ,comprises the intrinsic aesthetic value of this corner of the state. Visitors come here to relax and enjoy the rejuvenating effects of seeing and experiencing and feeling the beauty and awe of nature. The feeling one has looking out from a mountain top...looking up into***

the forest canopy...watching a herd of magnificent elk grazing in a meadow. We all know that feelings and emotions can come from "seeing": the "sensory--emotional values" noted in one definition of aesthetics above. These feelings are deeper than a "fleeting enjoyment" that adds nothing significant to life. People go to great lengths to trigger these aesthetic feelings: they climb mountains, hike into the back country, camp on wilderness beaches, stand by the edge of the ocean's breakers. And they watch for whales. Something about being in the presence of the largest beings on earth is a huge trigger of aesthetic emotions for most people. Many people are surprised to feel the unexpected levels of excitement and emotion that can be triggered by proximity to whales. It can't be explained well, but this definition helps: "Relating to, involving, or concerned with pure emotion and sensation as opposed to pure intellectuality." These feelings are "good for what ails us" in our hurried technical lives.

Those of us lucky enough to live by waters populated by whales know that the aesthetic joy does not diminish with each sighting. It is a "heart-filling" experience that is wonderful to anticipate, to feel and to share with others time after time.. There is a reason that whale watching is such huge business, and that boatloads of men, women and children will break out into uncontrollable screams, cheers, and even tears at the sight of a whale exhaling! Or at the sight of a few square feet of gray skin. What other animal generates responses like this everywhere in the world? ***That "joy at seeing" is the great aesthetic gift the whales give to humans. The opportunity to "perceive and to feel" unexpected emotions in the presence of huge, mysterious, and gentle animals.***

The opposite of that great aesthetic joy is the contemplation of the unnecessary, and inhumane killings of these same whales. The sad feelings and the anxiety provoked by the fear that these local whales will suffer and die is enough to trigger a great gray gloom, even without actually witnessing a kill. And let us assure you that community-wide sadness and anxiety *do and will* have "significant cumulative effects."

The whales that PCPW members and supporters, and all residents and visitors to the Olympic Peninsula can hope to see at any time of the year, and are most likely to see from our beaches and look-outs, are the resident gray whales: the Makah U&A sub-group of the PCFG. We have seen them in every month of the year. We adopted seven of these whales many years ago, and we believe we may have seen several of them. We have amassed a large collection of photos, some of which were used to convince the Whale Trail Association to place interpretive signs about gray whales along the Strait. The aesthetic delight that our families and friends have experienced with these whales has inspired art enough to fill a gallery, stories, dreams, and poems enough to fill many children's story books. "They're sprouting!" our youngest child would holler. He is now 36 years old, and still just as enthusiastic about "spout spotting". The resident whales are most certainly resources of great and significant aesthetic pleasure to the resident people and their visitors, and add greatly to the aesthetics of the Olympic Peninsula. Just the chance of seeing a whale adds to the excitement of a visit to the water's edge.

If Makah whaling is approved, there will eventually be no more gray whales to be spotted near shore. There may still be distant migrating whales moving way off the coast in winter and spring, but we will likely never see them. We can certainly never "know" them. Our "big friends" will be a mere memory. The cumulative negative feelings of sadness and loss will last as long as our memories and the memories of our children last. That time-frame is measured in lifetimes. The gloom will spread outward from "ground zero", and before long the unique aesthetics of the entire Olympic Peninsula will be tainted by the continual slaughter. We will no longer be the "happy place" to relax amidst natural wonders. We will be "the place where whales are killed." A place to be shunned. And there will be an entirely different "aesthetic" with likely harsh economic effects that *will* be cumulative.

But we believe that the 9th Circuit Court of Appeals, the Marine Mammal Protection Act and the Treaty of Neah Bay hold the keys to protecting the resident whales and the aesthetic joy they provide to so many.

The key phrase in the Treaty of Neah Bay is this: "...in common with all citizens of the United States."

From the 9th Circuit's 2004 Final Decision in Anderson v Evans:

"In common with all citizens of the United States" creates a relationship between Indians and non-Indians similar to a co-tenancy, in which neither party may permit the subject matter (of the treaty) to be destroyed. The treaty secures the rights to both. *The Makah, consistent with the plain terms of the treaty may not hunt whales without regard to processes in place and designed to advance conservation values by preserving marine mammals or to engage in whale watching, scientific study, and other non-consumptive uses.*"

So the Makah's "treaty right to kill whales" is no more binding or important than the "treaty right" of other U.S. citizens to "preserve whales" for "non-consumptive use". Since all whales referenced by both sides, for killing or saving, are primarily the PCFG whales, and more specifically the Makah U&A whales, all local whale watchers, local whale biologists, and local "whale lovers" have an equal right to the local whales, for "non-consumptive uses". As do the whale-watchers and scientists in other areas of the PCFG range. The Makah will be killing PCFG whales studied, known, and loved in Oregon and off the west coast of S. Vancouver Island. U.S. laws may not cover Canadians' rights to "non-consumptive" use of the shared local whales, but Oregonians *should* be covered by the treaty right.

This sets up a decision worthy of King Solomon. How can the Makah U&A whales, or the PCFG whales, be divided in half for two opposite uses? Should the Makah be allowed to kill only half of the MU&A gray whales? What if they kill most of the reproductive age females? "Our half" would not then be a viable population remnant.

And what of the MMPA's decree that whales should be protected to the greatest extent feasible, and to be allowed to expand to their optimum sustainable population? The MMPA does not restrict this proviso to "stocks", they say "marine mammals". If you take half of a small population, you are not left with a population safe from extinction. Think of the Cook Inlet belugas. Will the aesthetics of Cook Inlet be harmed if the little white whales are gone? Does their sad fight for survival already damage the aesthetics of a "pristine" environment? We believe the answer is yes.

THE KOKECHIK DECISION [1988]

In its 2012 comments to NMFS, The Marine Mammal Commission brought a new topic to the table; the Kokechik case. This case involved a waiver request from the MMPA for a Japanese salmon fisheries cooperative. Their overnight gill-netting technique, within U.S. waters, would not permit discrimination between which species of fish and mammals would be ensnared, and which would not. The permit the Federal Government sought to renew for the Japanese fishing group asked for an annual take of 5,500 Dall's porpoise, 450 fur seals, and 25 sea lions. Statements were required concerning the status of each marine mammal stock affected, and the effects of any permitted taking on its OSP. A DEIS was published that contained no reference to the northern sea lions, as NMFS considered the probability of takings "too remote to warrant it's concern." Observers found there were also problems with potential takings from the Commander Island northern fur seal stock. The proposed regulations dealt solely with the incidental taking of Dall's porpoise. The Administrative Law Judge recommended a take of 1750 Dall's porpoise and 45 northern fur seals from the Commander Is. stock. The Secretary of Commerce's final decision also allowed the annual taking of 25 northern sea lions, while prohibiting takes of harbor porpoise, Pacific white-sided porpoise, and orca, subject to prosecution under the MMPA.

With the gill-netting scenario, marine mammals protected by the MMPA end up as unintended victims. This result is absolutely prohibited by the MMPA unless the Secretary of Commerce grants permission for the taking. Only the Dall's porpoise had a specified quota with Federal permission, but it was foreseeable that takes of northern sea lions, harbor porpoise, etc. would occur. Thus the legitimacy of the permit issued came under scrutiny. The question was: can the Secretary of Commerce issue a permit allowing incidental taking of one protected species, knowing that other protected species would be taken as well?

The MMPA moratorium means a complete cessation of taking marine mammals. The Act defines "taking" as "to harass, hunt, capture or kill or attempt to harass, hunt capture or kill any marine mammal." Before any permit can be issued, species and population stocks should not have been permitted to diminish below OSP. Further, the Act was to be administered "for the benefit of the protected species rather than for the benefit of commercial exploitation." [540 F.2d 1141,1148[D.C.Cir.1976] The MMPA also requires

"incidental kills or injury ...be reduced to insignificant levels approaching zero mortality and serious injury rate..."

In the Kokechik case, the taking of the fur seals was not merely a remote possibility, but a certainty. The Secretary concluded that it was not possible to make the required finding that the northern fur seal population from the Commander Is. stock was within its OSP level...evidence was unclear, and a "significant dispute" existed as to whether it was above the minimum level of its OSP. Therefore it could not be determined that this protected stock would not be disadvantaged by takings. **"The Secretary chose to issue the permit anyway, taking the position that as long as the permit did not authorize the taking of northern fur seals, he had complied with the MMPA. "The Secretary chose to disregard the incidental takings in this case as "negligible", an undefined and ambiguous standard at best. The MMPA ,however, does not provide for a "negligible impact" exception to its permitting requirements where incidental takings are not merely a remote possibility but a certainty. The Secretary has no authority...to issue a permit that allows conduct prohibited by the Act." [Animal Legal and Historical Center]**

Shortly after the Secretary's final decision, all parties filed petitions for review of the permit in U.S. District Court. **In the words of the Marine Mammal Commission, "...the court [Court of Appeals, D.C. 1988] ruled that no taking could be authorized for any marine mammal stock because of the virtual certainty of taking marine mammals from stocks for which an OSP determination could not be made." [MMC comments to NMFS 2012]**

Said the MMC in 2012 comments to NMFS: *"The Service may find itself able to authorize the taking of whales from some groups, but not others. Such a finding will depend on (1) resolution of the stock identity questions related to the PCFG and the whales that spend some time in both the western and eastern Pacific, and (2) the information available to make OSP determinations for the whale groups whose members may occur in Washington waters. Such an outcome would be similar to that faced in Kokechik .."*

We now know, of course, that ***the DEIS did not announce a resolution of the "stock identity questions related to the PCFG". Neither did NMFS determine an OSP for the PCFG or the WNP gray whales. It is agreed that both groups are far below their OSP, however. The way that NMFS attempts to circumvent the "PCFG problem" is by not resolving the stock identity question. The WNP gray whale problem may be more severe, because the WNP whales do have stock designation, and are listed as endangered or depleted on any list that exists world-wide. Their "takes" by all forms of harassment are detailed in the DEIS, and are not "negligible" by any stretch of the definition. The possibility of killings are estimated as "non trivial", yet no waiver is requested for any stock but the Eastern North Pacific gray whale.***

So did NMFS comply with the MMC's recommendation that they discuss the implications of the Kokechik case for the Makah's waiver request in the DEIS? Absolutely not. Their answer to the MMC: "The purpose of the analysis in the DEIS is not to assert legal opinions or conclusions..."

So the problem remains that it is necessary to know the OSPs in order to determine whether or not an activity will "disadvantage" the marine mammals involved. And the question remains, can the Secretary of Commerce legally issue a permit allowing deliberate taking of one protected stock, knowing that other protected stocks will be taken as well?

The Marine Mammal Commission should not be satisfied with the lack of answers.

ALTERNATIVE 1 - NO ACTION

There is only one of NMFS' alternatives that is endorsed by the members and supporters of PCPW. That is Alternative 1, No Action. NMFS must consider Alternative 1 as more than just a meaningless requirement on the list of alternatives. ***Alternative 1 is the only "action" that will keep whales and people safe.***

From the DEIS:

pg. 4-251: " **Alternative 1 represents the lowest risk to the public and the hunters. All action alternatives likely increase the risks of injury.**" [pg. 4-294]

pg.4-274: " **Alternative 1 will cause no increased risk to water quality.**"

pg.4-275: " **Alternative 1 will cause no increased disturbance to marine species and habitats.**"

pg. 4-276: "**Alternative 1 will cause no increased risk to Western North Pacific gray whales.**"

pg.4-277: " **Alternative 1 will cause there to be no hunting and killing of PCFG gray whales.**"

pg.4-278: "**Alternative 1 will cause there to be no hunting and killing of OR-SVI and MU&A gray whales.**"

pg.4-66 : "**With respect to the viability of the PCFG [under Alt.2], a reduction over time could decrease the likelihood that the PCFG is viable, compared to No Action [Alt.1]**

pg.4-280: "**Alternative 1 will cause there to be no hunt-related boycott of tourism.**"

pg.4-282: **"Alternative 1 will cause no change and no increased costs to law enforcement."**

pg.4-284: **"Alternative 1 will create no change in the social environment- no protests and no related social tensions."**

pg.4-258: **"Alternative 1 will create no change [increase] in exposure to contaminants. There is no data to suggest that current diets of Makah Tribal members are lacking in Omega-3 oils...a lack of fresh whale products would not negatively impact current dietary conditions."**

pg.4-296: **"A decision not to authorize Makah whaling [Alt.1] could discourage future requests for waivers from the MMPA."**

pg.4-255: **"With each strike attempt, rifle shot, or grenade explosion, there would be an increased risk, compared to the No-action Alt.1,of weapons-related injury to the hunt party, protesters, or bystanders."**

NMFS has always attempted to make the argument that if there was "no action"- no Makah whaling-the same number of whales would be killed by the Russians, anyway. And to really "stick it" to those who care about whales, they have also stated that those whales would be killed in a less humane way. But there is another difference that should be factored in. **Under Alt.1, the Russians will not be taking from or causing harm to the PCFG and the WNP groups.**

The UN World charter for Nature urges "strong precaution", and states that "...when potential adverse effects are not fully understood, the activities should not proceed." The Precautionary Principle should be applied when risks are high and not easily calculable. The La Jolla Workshop 2015 enumerated many studies that still need to be done regarding PCFG recruitment , the comparing of PCFG cow-calf pairs to lagoon IDs, satellite tags on PCFG whales, more photos and biopsies of PCFG whales. Certainly years more work. From the workshop report: "...the value of such work is in filling important data gaps...regarding understanding the dynamics of the PCFG". It was noted that there are no confirmed plans for more telemetry work off Sakhalin. Huge "data gaps" will persist for many years in regards to all gray whales.

What sane person or agency would choose any of the "action alternatives" in light of the numerous problems and hazards they will entail? ***If the theoretical "benefits" to the whaling factions of the tribe[s] are placed on one side of a scale, and the inevitable ecological losses, unavoidable cruelty to whales, and harm to people and the community are placed on the other side of a scale, how can justice, the common good, and the MMPA be served in any way other than a strong tip of the scale to Alternative***

1? It is the only alternative that meets the needs and purposes of the overwhelming majority of whales and people in the affected environment.

The genetic uniqueness of the PCFG gray whales increases the importance of the population, as extirpation will eliminate those genetic traits and lineages from the worldwide population of gray whales. There is value to their knowledge and culture. We cannot know the future, but the PCFG may have a great role to play in the ultimate survival of the species. Their knowledge was vital once, it could be again. During the great die off years of 1999 and 2000, abnormally large numbers of gray whales were seen feeding in the spring in the Makah U&A with known resident whales. They obviously did not "become" PCFG whales, but feeding with them during that hard time of starvation may have given many the strength to complete their migrations north and survive.

To paraphrase Heckel, it would be unwise to wait until it can be shown that the whales' feeding areas, etc., have been displaced to modify the activity [hunting], because the long-term effect may be irreversible. Management has to be based on best available knowledge and the precautionary principle.

There are many hypotheses and little absolute knowledge regarding the Western North Pacific gray whales and the PCFG gray whales. In light of such uncertainty, we cannot stand silently by while NMFS mismanages our tiny group of resident whales to extinction, and proposes such unnecessary threats to the struggling WNP whales. Remember the grave management mistakes at Cook Inlet .