

HONORABLE GEORGE J. JORDAN  
ADMINISTRATIVE LAW JUDGE

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

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*In re:*

**Proposed Waiver and Regulations Governing  
the Taking of Eastern North Pacific Gray  
Whales by the Makah Indian Tribe**

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)  
) Docket No. 19-NMFS-0001  
)  
) RIN: 0648-BI58 and  
) RIN: 0648-XG584  
)

**NATIONAL MARINE FISHERIES SERVICE'S MOTION FOR LEAVE  
TO FILE A PROPOSED HEARING AGENDA**

The National Marine Fisheries Service (NMFS) respectfully moves the Court for leave to file the attached Proposed Hearing Agenda and associated attachments.

On April 5, 2019, NMFS announced its proposal to waive the Marine Mammal Protection Act (MMPA) ban on the take of marine mammals to allow the Makah Tribe to take eastern North Pacific Grey Whales. *See* Notice of Hearing, 84 Fed. Reg. 13639 (April 5, 2019); Proposed Rule, 84 Fed. Reg. 13604 (April 5, 2019). The Notice of Hearing gave notice that the prehearing conference in this matter will take place on June 17, 2019. *See* 84 Fed. Reg. 13639.

Under 50 C.F.R. § 228.11, the presiding officer will make a preliminary determination of issues of fact that may be addressed at the hearing at least five days before the prehearing conference. Then, within ten days of the conclusion of the prehearing conference, the presiding officer will issue a final hearing agenda that will identify, *inter alia*, the issues to be presented at

the hearing, the direct testimony that bears on those issues, and the witnesses that are expected to testify. 50 C.F.R. § 228.12.

In the interest of judicial economy and to facilitate discussions at the prehearing conference, NMFS submits as Exhibit 1 to this motion a proposed hearing agenda with attachments. NMFS alerted the parties of its intent to submit this filing at a joint conference call NMFS's counsel convened on May 22, 2019.

Further, since May 22, the parties have been discussing and exchanging drafts of a possible stipulation that would limit the issues presented at the hearing. However, at the time of this filing, the parties have not yet reached agreement on that matter. In the event the parties do not reach agreement on that stipulation, NMFS may file a motion to exclude certain issues from presentation at the hearing.

Respectfully submitted this 6th day of June, 2019.

CHRIS MCNULTY  
Section Chief  
National Oceanic & Atmospheric Administration Office of  
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**EXHIBIT 1 TO NATIONAL MARINE FISHERIES SERVICES'S  
MOTION FOR LEAVE TO FILE A PROPOSED HEARING AGENDA**

**PROPOSED HEARING AGENDA**

The National Marine Fisheries Service (“NMFS”), proponent of the proposed waiver and regulations that are the subject of this proceeding, respectfully submits the following proposed hearing agenda for the Court’s consideration in preparing the final agenda. 50 C.F.R. § 228.12. Pursuant to the regulations that govern this proceeding, the contents of the final hearing agenda shall include: (1) all issues that the hearing shall address, the order in which the issues shall be presented, and the direct testimony submitted that bears on the issues; (2) a final date for submission of direct testimony on issues of fact, if any, not included in the notice of hearing, and, optionally, a final date for submission of testimony to rebut testimony submitted during the time specified in the notice of hearing; and (3) a list of witnesses who may appear at the hearing, a list of parties, the nature of the interest of each party, and which parties’ interests are adverse on the issues presented. *Id.* § 228.12(b),(c).

## **I. ISSUES TO BE ADDRESSED AT THE HEARING**

NMFS proposes that the issues of fact stated in Attachment 1 hereto be addressed at the hearing in the order identified, which corresponds with the ordering of the applicable legal standards as set forth under sections 101(a)(3)(A) and 103 of the Marine Mammal Protection Act (“MMPA”). 16 U.S.C. § 1371(a)(3)(A), 1373(a)-(c); *see* 84 Fed. Reg. 13,604, 13,611-15 (NMFS’s Proposed Rule outlining applicable MMPA requirements). Attachment 1 identifies the direct testimony submitted by NMFS that bears on each issue of fact.

On May 24, 2019, NMFS shared a list of its proposed issues of facts with the other parties to this proceeding in efforts to determine if there were any facts to which the parties could stipulate in advance of the prehearing conference. The Makah Indian Tribe previously submitted to the Court the Tribe’s position on NMFS’s proposed issues of fact. The other parties did not provide responses.

NMFS also attempted to negotiate a stipulation among the parties that would limit the scope of issues to be determined at the hearing. The Makah Indian Tribe, Animal Welfare Institute, Sea Shepherd Legal, Sea Shepherd Conservation Society, and Peninsula Citizens for the Protection of Whales indicated interest in reaching a stipulation. At the time of this filing, negotiations were ongoing. Depending on the result of those discussions, the aforementioned parties may be able to stipulate that certain issues should be excluded from the hearing agenda, or, if agreement is not reached, NMFS may file a motion seeking to limit the scope of issues subject to decision at the hearing on legal grounds.

## **II. DATES FOR SUBMISSION OF ADDITIONAL DIRECT TESTIMONY**

Should the court determine that any issues of fact beyond those identified in Attachment 1 should be addressed at the hearing, NMFS proposes that any testimony on such new issues be due July 9, 2019. NMFS proposes that any direct testimony to rebut testimony that was

submitted within the time specified in the Notice of Hearing for this matter (May 20, 2019),<sup>1</sup> also be due July 9, 2019. NMFS also notes that there are ongoing discussions among the parties whether to propose extending the current schedule.

### **III. WITNESSES**

#### **A. NMFS's List of Witnesses**

NMFS proposes to call the following witnesses to appear at the hearing in the following order in support of the proposed waiver and regulations:

- Chris Yates, Assistant Regional Administrator for Protected Resources, West Coast Region, National Marine Fisheries Service.
- Dr. Shannon Bettridge, Chief, Marine Mammal and Sea Turtle Conservation Division, Office of Protected Resources, National Marine Fisheries Service
- Dr. David Weller, Research Biologist, Marine Mammal and Turtle Division, National Marine Fisheries Service, Southwest Fisheries Science Center
- Dr. Jeffrey Moore, Research Biologist, Marine Mammal and Turtle Division, National Marine Fisheries Service, Southwest Fisheries Science Center

NMFS reserves the right to call additional witnesses for rebuttal purposes or in the event that the court identifies new issues of fact in the final hearing agenda.

#### **B. List of Parties and Their Interests**

In response to the Notice of Hearing published in this matter, NMFS received notices of intent to participate from the following individuals/entities:

- Animal Welfare Institute (Docket No. 13)
- Makah Indian Tribe (Docket No. 8)
- Marine Mammal Commission<sup>2</sup>
- Ms. Inanna McCarty (Docket No. 11)

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<sup>1</sup> 84 Fed. Reg. 13,639 (2019).

<sup>2</sup> NMFS received a notice from the Marine Mammal Commission, however it is not currently reflected on the Court's docket.

- Peninsula Citizens for the Protection of Whales (Docket No. 7)
- Sea Shepherd Legal (Docket No. 9)
- Sea Shepherd Conservation Society (Docket No. 12)

NMFS is not contesting the right of any of these individuals/entities to participate as parties at the hearing.

On information and belief, Sea Shepherd Legal and Sea Shepherd Conservation Society (collectively, “Sea Shepherd”) are represented by the same counsel in this matter and are opposed to the proposed waiver and regulations. On information and belief, the Animal Welfare Institute and Peninsula Citizens for the Protection of Whales are also opposed to the proposed waiver and regulations. On information and belief, Ms. Inanna McCarty is a member of the Makah Indian Tribe, and both Ms. McCarty and the Makah Indian Tribe support the Tribe’s treaty right to conduct ceremonial and subsistence hunting for gray whales within the Tribe’s usual and accustomed fishing grounds. The Marine Mammal Commission is a scientific advisory body established under the MMPA whose responsibilities include, among other things, consulting with NMFS regarding the issuance of any waiver and regulations under the MMPA. In carrying out consultation with NMFS for the proposed waiver and regulations that are the subject of this hearing, the Commission expressed support for NMFS’s proposals. *See* 84 Fed. Reg. at 13,616-17.

Pursuant to the hearing regulations, in the final hearing agenda, the Court must identify which parties are adverse on the issues presented. 50 C.F.R. § 228.12(c). At the hearing, only a party that has been determined to have an adverse interest on an issue may conduct cross-examination on that issue, and the Court may limit the extent of cross-examination by parties with common interests. 50 C.F.R. §§ 228.17(4), .18(a)(2)-(3). All parties are considered adverse to NMFS for this purpose. 50 C.F.R. § 228.18(a)(2). In order to ensure fair and efficient

conduct of the hearing, NMFS proposes that the parties be grouped in accordance with their interests for purposes of cross-examination at the hearing.

#### **IV. PUBLICATION OF FINAL HEARING AGENDA AND OTHER NOTICES**

Per the hearing regulations, the final hearing agenda is to be published within 10 days of the conclusion of the prehearing conference, or June 28, 2019. If new issues are included in the agenda, interested persons not already participating may announce their intent to participate solely for purposes of the new issues no later than 10 days after publication of the final agenda. 50 C.F.R. § 228.12(a), .14(b). To facilitate the publication of the final hearing agenda and any other notifications in the *Federal Register*, NMFS includes a proposal as Attachment 2 that would allow NMFS to publish such notices on behalf of the Court in a transparent manner that would avoid *ex parte* concerns.

Respectfully submitted this 6 day of June, 2019.

CHRIS MCNULTY  
Section Chief  
National Oceanic & Atmospheric Administration Office of  
General Counsel, Northwest Section

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## NATIONAL MARINE FISHERIES SERVICES' PROPOSED ISSUES OF FACT

Item # per Notice of Hearing <sup>1</sup>	Proposed Issue of Fact	NMFS Direct Testimony <sup>2</sup> / Paragraph Number(s)
<b>Requirements for Waiver</b>		
Requirement that NMFS have due regard to the distribution, abundance, breeding habits, and times and lines of migratory movements of the stock subject to waiver. <sup>3</sup>		
I.A	NMFS gave due regard to the potential effects of the proposed waiver on the distribution, abundance, breeding habits, and times and lines of migratory movements of the ENP gray whale stock.	Yates ¶¶ 26, 47
I.A.1	The proposed waiver will not have a meaningful effect on the distribution, abundance, breeding habits, or migratory movements of the ENP gray whale stock.	Weller ¶¶ 38-60
<i>Distribution / Abundance</i>		
I.A.2	NMFS recognizes two stocks of gray whales under the MMPA, the western North Pacific (WNP) stock and the eastern North Pacific (ENP) stock.	Bettridge ¶¶ 16-18, 20, 22, Weller ¶¶ 7, 35
I.A.3	Under the MMPA, NMFS defines the Pacific Coast Feeding Group (PCFG) as gray whales observed between June 1 and November 30 within the region between northern California and northern Vancouver Island (from 41°N. lat. to 52°N. lat.) and photo-identified within this area during two or more years.	Bettridge ¶ 15, Weller ¶ 16

<sup>1</sup> 84 Fed. Reg. 13,639 (2019).

<sup>2</sup> Yates = Declaration of Chris Yates (Docket No. 3); Bettridge = Declaration of Dr. Shannon Bettridge (Docket No. 4); Weller = Declaration of Dr. David Weller (Docket No. 5); Moore = Declaration of Dr. Jeffrey Moore (Docket No. 6).

<sup>3</sup> 16 U.S.C. § 1371(a)(1)(A) (“[NMFS], on the basis of the best scientific evidence available and in consultation with the Marine Mammal Commission, is authorized and directed, from time to time, *having due regard to the distribution, abundance, breeding habits, and times and lines of migratory movements of such marine mammals*, to determine when, to what extent, if at all, it is compatible with this chapter to waive the requirements of this section so as to allow taking, or importing of any marine mammal . . . .” 16 U.S.C. § 1371(a)(1)(A) (emphasis added).



**NATIONAL MARINE FISHERIES SERVICES' PROPOSED ISSUES OF FACT**

I.A.3	The PCFG is part of the ENP stock.	Bettridge ¶ 16, Weller ¶¶ 17-20
I.A.4	The ENP stock ranges from the winter/spring breeding grounds in northern Mexico and southern California to the summer/fall feeding grounds in the Bering, Beaufort, and Chukchi seas. The ENP stock migrates between the breeding and feeding grounds between December and May.	Weller ¶¶ 12-14
I.A.4	The PCFG spends the summer and fall feeding season off the Pacific coast of North America from northern California to northern Vancouver Island.	Weller ¶ 16
I.A.5	The best available abundance estimate for the ENP stock is 26,960.	Weller ¶ 25, Bettridge ¶ 23
I.A.6	The best available abundance estimate for the PCFG is 243.	Weller ¶ 26, Bettridge ¶ 24
I.A.7	The proposed waiver, at a maximum, would result in the deaths of 25 whales over 10 years, or an average of 2.5 per year	Yates ¶¶ 32-33, Weller ¶ 38
I.A.7	The proposed waiver, at a maximum, would reduce the ENP gray whale stock by 0.09 percent over 10 years, or an average of 0.009 percent per year.	Weller ¶ 39
I.A.8	Reducing the ENP stock by 0.009 percent per year or 0.09 percent over 10 years would not have a discernible effect on the ENP stock's abundance	Weller ¶ 40
I.A.9	The United States is a signatory to the International Convention for the Regulation of Whaling (ICRW). The ICRW establishes the International Whaling Commission (IWC), which, among other things, establishes catch limits for aboriginal subsistence whaling by member states.	Weller ¶ 4
I.A.10	Since 1997, the IWC has routinely approved an aboriginal subsistence catch limit for ENP gray whales for joint use by the United States and the Russian Federation.	Weller ¶ 9
I.A.10	The United States and the Russian Federation have been routinely, and currently are, parties to a bilateral agreement that allocates the IWC catch limit between the two countries and allows either country to transfer to the other any unused allocation.	Weller ¶ 9

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I.A.11	The United States has routinely transferred its unused share of the IWC catch limit to the Russian Federation for use by Chukotkan hunters	Weller ¶ 9
I.A.12	Based on long-standing practice and the current United States-Russian Federation bilateral agreement, the United States would likely continue to transfer any unused IWC catch limit to the Russian Federation for use by Chukotkan natives, so that the net effect of the hunt on ENP gray whale abundance would be the same with or without the proposed waiver.	Weller ¶ 43
I.A.13	The proposed waiver, at a maximum, would result in a total of 150 unsuccessful strike attempts and training harpoon throws, combined, over 10 years, or an average of 15 per year.	Weller ¶ 48
I.A.14	The proposed waiver, at a maximum, would result in a total of 353 approaches (causing a hunt or training vessel to be within 100 yards of a gray whale) per year, with a sub-limit of 142 approaches of PCFG whales.	Yates ¶¶ 27, 42
I.A.15	The ENP stock has demonstrated resiliency to decades of active hunting by Chukotkan natives and other human activities. Gray whales were classified as an endangered species under U.S. law in 1970 (the original listing included both ENP and WNP gray whales). Subsequently, the ENP stock recovered and was de-listed in 1994. The ENP stock grew from 12,771 animals to approximately 27,000 animals between 1970 and 2016.	Yates ¶ 19
I.A.16	Despite over a hundred gray whales being pursued and killed in aboriginal subsistence hunts off Chukotka each year, many of which are killed during the summer feeding months, there has not been a discernible change in the availability or location of gray whales in the Chukotkan hunt area.	Weller ¶ 47
I.A.17	Unsuccessful strike attempts and training harpoon throws are expected to result in temporary disturbance but not to have a lasting effect on the affected whale's health or behaviors.	Weller ¶¶ 49-50
I.A.18	Approaches are not expected to have a lasting effect on the affected whale's health or behaviors.	Weller ¶¶ 46-47
I.A.19	Photo-identification is a reliable, feasible method of identifying PCFG and WNP whales.	Weller ¶ 63
I.A.20	The proposed waiver, at a maximum, would result in 16 strikes of PCFG whales over the 10-	Yates ¶ 33

## NATIONAL MARINE FISHERIES SERVICES' PROPOSED ISSUES OF FACT

	year duration of the waiver period (average of 1.6 per year), of which only 8 strikes would be of PCFG females (average of 0.8 per year).	
I.A.21	Under the proposed waiver, NMFS would manage impacts of the proposed waiver to PCFG whales through photo-identification and specified assumptions.	Yates ¶¶ 34-36
I.A.22	The proposed waiver would require that hunting cease if PCFG abundance were to fall below set levels. The levels, referred to as low-abundance triggers, are 192 whales, or a minimum abundance estimate of 171 whales.	Yates ¶ 37
I.A.23	NMFS would use a forecasting model to provide up-to-date PCFG abundance estimates during the waiver period.	Yates ¶ 37
I.A.24	PCFG abundance has been stable or increasing since around 2002, with an average annual increase in abundance of 3.5 animals between 2002 and 2015.	Weller ¶¶ 26-27, 55
I.A.25	The combination of strike limits and low-abundance triggers will ensure that the proposed waiver will not cause PCFG abundance to decline below recent stable levels.	Moore ¶ 19
I.A.26	Because the proposed waiver will not cause PCFG abundance to decline below recent stable levels, the proposed waiver is not expected to affect the distribution of the ENP stock within the PCFG range.	Weller ¶¶ 58-59
<i>Breeding Habits</i>		
I.A.27	Under the proposed waiver, hunting or hunt training is most likely to overlap with gray whale breeding in December-January.	Weller ¶¶ 14, 60
I.A.27	NMFS expects that few if any hunt activities would occur in December-January due to inclement weather and unfavorable ocean conditions, but it is possible that hunt activities could occur in December-January and could encounter mating whales	Yates ¶ 52, Weller ¶ 60
I.A.28	The proposed waiver would not adversely affect ENP gray whale breeding, because the proportion of the migration corridor where hunt activities could occur is small, the level of hunt activity likely to occur in December-January is low, the number of whales that could be	Weller ¶ 60, Yates ¶ 52

## NATIONAL MARINE FISHERIES SERVICES' PROPOSED ISSUES OF FACT

	struck is extremely small, and any whales that were disturbed would likely have repeated opportunities to mate throughout the remainder of the southward migration.	
<i>Times and Lines of Migratory Movements</i>		
I.A.29	Migrating ENP gray whales are only expected to be encountered during even-year hunts.	Weller ¶¶ 13, 51-52
I.A.29	Migrating whales are steady swimmers that would transit the hunt area within several hours.	Weller ¶¶ 51, 60
I.A.29	The hunt area is a very small portion of the ENP gray whale stock's migration corridor.	Weller ¶ 29
I.A.30	During even-year hunts, adverse weather and ocean conditions coupled with shorter periods of daylight would keep most hunts and training exercises close to shore and of short duration	Yates ¶ 52
I.A.31	A very small number of migrating ENP gray whales would be subjected to hunt or training activities.	Weller ¶ 51
I.A.31	Any gray whale subject to such activities (but not struck) would likely experience the encounter as a temporary and localized near-shore event that would not result in a lasting effect on the whale's migratory movements.	Weller ¶¶ 51, 59
Requirement that NMFS be assured that its determinations are consistent with the MMPA's Purposes and Policies. <sup>4</sup>		
I.B	NMFS properly determined that the proposed waiver is in accord with the MMPA's purposes and policies because it will not affect the health or functioning of the marine ecosystem or the ENP stock's abundance relative to OSP.	Yates ¶¶ 53-55
I.B.1	The proposed waiver is not expected to have a meaningful effect on the health, stability, or functioning of the marine ecosystem or the ENP stock's abundance relative to OSP.	Weller ¶¶ 40, 67-73

<sup>4</sup> 16 U.S.C. § 1371(a)(3)(A) (“*Provided, however,* That [NMFS] in making such determinations [to issue a waiver and regulations] must be assured that the taking of such marine mammal is in accord with sound principles of resource protection and conservation as provided in the purposes and policies of this chapter.”); *see* 16 U.S. C. § 1361 (MMPA's purposes and policies of maintaining marine mammals as significant functioning elements of their ecosystems and managing stocks so as to attain or maintain optimum sustainable population levels).

## NATIONAL MARINE FISHERIES SERVICES' PROPOSED ISSUES OF FACT

<i>Health and Stability of the Marine Ecosystem / Functioning of Marine Mammals within Their Ecosystems</i>		
I.B.1	The proposed waiver is not expected to have a meaningful effect on the health, stability, or functioning of the marine ecosystem.	Weller ¶¶ 67-73
I.B.2	The level of hunting that could occur under the proposed waiver would affect only a small fraction of the ENP stock and the stock's ecosystems.	Yates ¶ 53, Weller ¶¶ 72-73
I.B.2	Most effects of the hunt would be temporary and localized.	Weller ¶ 72
I.B.3	The ENP stock functions within many large ecosystems shaped by a variety of processes. The smallest recognized ecosystem that encompasses the hunt area is the northern California Current ecosystem.	Weller ¶¶ 12, 68
I.B.4	The northern California Current ecosystem is shaped by dynamic, highly energetic, large-scale processes, including currents, upwelling, freshwater runoff, seasonal wind/storm patterns, and variable climate patterns such as El Niño. The role of ENP gray whales in structuring this ecosystem is limited.	Weller ¶ 70
I.B.5	The number of removals of gray whales that could occur under the proposed waiver is too small to have a discernible effect on the northern California Current ecosystem.	Weller ¶¶ 69-70
I.B.6	Even at the smallest biologically relevant scale, the northern Washington coastal environment, the level of hunting that could occur under the proposed waiver would not have a perceptible effect on the health or stability of the marine ecosystem or the functioning of the ENP stock within the ecosystem.	Weller ¶¶ 71-72
<i>Stocks to Attain or Maintain Optimum Sustainable Population Levels</i>		
I.B.7	The ENP stock has been within OSP levels since at least 1995. In 2012, NMFS concluded that the ENP stock was at 85 percent of carrying capacity with an 88 percent likelihood that the stock was above its maximum net productivity level.	Moore ¶ 9
I.B.7	NMFS's current stock assessment report for the ENP stock continues to adopt the conclusion	Moore ¶ 9

## NATIONAL MARINE FISHERIES SERVICES' PROPOSED ISSUES OF FACT

	that the ENP stock is within OSP levels.	
I.B.8	The removal of up to 25 whales from the ENP stock over 10 years, or 2.5 whales average per year, is not expected to affect the ENP stock's abundance relative to its OSP levels.	Weller ¶¶ 39-40
<b>Requirements for Regulations</b>		
Requirement that NMFS establish regulations necessary and appropriate to ensure that taking will not disadvantage stock and will be consistent with the MMPA's purposes and policies. <sup>5</sup>		
II.A	Because the proposed regulations will not affect the status of the ENP stock relative to its OSP, the proposed regulations will not disadvantage the ENP stock.	Yates ¶¶ 48, 56-58, 70, <i>see</i> Issues of Fact I.A.7-8, I.B.7-8
II.B	The proposed regulations are necessary and appropriate to ensure that a tribal hunt will be consistent with the purposes and policies of the MMPA.	<i>See</i> Issues of Fact 1.B.1-8
Requirement that NMFS give full consideration to all relevant factors. <sup>6</sup>		
II.C	NMFS gave full consideration to all relevant factors in prescribing the proposed regulations, including the potential effects of the proposed regulations on WNP whales.	Yates ¶63
<i>Existing &amp; Future Stock Levels</i>		
II.C.1	NMFS fully considered the effects of the proposed regulations on the existing and future levels of the ENP gray whale stock.	<i>See</i> Issues of Fact 1.A.7-8, I.B.7-8

<sup>5</sup> 16 U.S.C. § 1373(a) (“[NMFS] . . . shall prescribe such regulations with respect to the taking and importing of animals from each species of marine mammal . . . as [NMFS] deems necessary and appropriate to insure that such taking will not be to the disadvantage of those species. . . and will be consistent with the purposes and policies set forth in section 1361 of this title.”).

<sup>6</sup> 16 U.S.C. § 1373(b) (“In prescribing such regulations, [NMFS] shall give full consideration to all factors which may affect the extent to which such animals may be taken or imported, including but not limited to the effect of such regulations on—(1) existing and future levels of marine mammal species and populations stocks; (2) existing international treaty and agreement obligations of the United States; (3) the marine ecosystem and related environmental considerations; (4) the conservation, development, and utilization of fishery resources; and (5) the economic and technological feasibility of implementation.”).

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<i>International Treaty &amp; Agreement Obligations of the United States</i>		
II.C.2	NMFS fully considered the effects of the proposed regulations on existing international treaty and agreement obligations of the United States.	Yates ¶ 59
II.C.3	Under the ICRW and through the bilateral agreement between the United States and the Russian Federation, the Makah Tribe can strike up to five ENP gray whales per year.	Weller ¶ 9
II.C.4	The proposed regulations would not authorize the Tribe to harvest more ENP gray whales than available under the ICRW and the U.S.-Russian Federation bilateral agreement.	Weller ¶ 41, Yates ¶ 59
II.C.5	The IWC Scientific Committee's Standing Work Group on Aboriginal Subsistence Whaling Management Procedures evaluated a Makah tribal hunt as would be carried out under the proposed regulations and determined that the hunt would meet the IWC conservation objectives for ENP, WNP, and PCFG whales.	Weller ¶ 42
<i>Marine Ecosystem and Related Environmental Considerations</i>		
II.C.6	NMFS fully considered the effects of the proposed regulations on the marine ecosystem.	See Issues of Fact I.B.1-6
II.C.7	NMFS fully considered the effects of the proposed regulations on environmental considerations related to the marine ecosystem, including potential effects to water quality, pelagic and benthic habitats, other species of fish and wildlife, and marine noise levels.	Weller ¶ 72, Yates ¶¶ 53, 61
<i>Conservation, Development, &amp; Utilization of Fishery Resources</i>		
II.C.8	The proposed regulations would have no effect on the conservation, development, or utilization of fishery resources.	Yates ¶ 60
<i>Economic &amp; Technological Feasibility of Implementation</i>		
II.C.9	NMFS fully considered the economic and technological feasibility of implementation of the proposed regulations.	Yates ¶ 62

**NATIONAL MARINE FISHERIES SERVICES' PROPOSED ISSUES OF FACT**

II.C.10-11	The costs to NMFS associated with regulating a hunt under the proposed regulations are feasible.	Yates ¶ 62
II.C.12	The Tribe's 1999 gray whale hunt successfully demonstrated the economic and technological feasibility of the Tribe carrying out a gray whale hunt.	Yates ¶ 62
II.C.12	The Tribe has enacted a detailed Tribal Whaling Ordinance, which demonstrates the feasibility of tribal hunt management.	Yates ¶¶ 8, 62
II.C.13	The proposed regulations include provisions for matching photographs of struck whales to those of known whales, a procedure which is technologically feasible.	Yates ¶¶ 34, 62
II.C.14	The proposed regulations include provisions for marking and tracking handicrafts made from non-edible whale products, which is technologically feasible.	Yates ¶ 62
<i>Other Relevant Factors: Risk to WNP whales</i>		
II.C.15	NMFS determined that potential risks to WNP gray whales from implementation of the proposed regulations is an additional relevant factor in prescribing the regulations and fully considered such risks.	Yates ¶ 63
II.C.16	The proposed regulations contain a number of restrictions to limit the risk of death, injury, or other harm to WNP whales. These include alternating hunt seasons, a limit of three strikes during even-year hunts, a ban on hunting during November and June, seasonal restriction on training harpoon throws in odd-numbered years, restriction on multiple strikes within 24 hours during even-year hunts, and the requirement that if a WNP is confirmed to be struck, the hunt will cease until steps are taken to ensure such an event will not recur.	Yates ¶¶ 27, 28, 29, 31, 32
II.C.17	NMFS's scientists undertook a risk analysis to quantify risk to WNP whales based on the best scientific evidence available and using conservative assumptions.	Moore ¶¶ 12-13, 18, Weller ¶ 62
II.C.18	NMFS's risk analysis concludes that there is a 5.8 percent probability of hunters striking one WNP gray whale over the 10 years of the regulations, meaning over the course of seventeen 10-year hunt periods, one WNP gray whale would be expected to be struck (i.e., in one year	Moore ¶ 14-18



**NATIONAL MARINE FISHERIES SERVICES' PROPOSED ISSUES OF FACT**

	out of 170), if the Tribe made the maximum number of strikes attempts allowed in even-year hunts and if ENP and WNP population sizes and migration patterns remained constant.	
II.C.19	NMFS's risk analysis concludes that there is about a 30 percent probability that one WNP whale would be subjected to an unsuccessful strike attempt or training harpoon throw over the 10 years of the regulations, or one such encounter every 33 years, if the Tribe made the maximum number of strike attempts allowed in even-year hunts and if ENP and WNP population sizes and migration patterns remained constant.	Moore ¶¶ 14-18
II.C.20	Unsuccessful strike attempts and training harpoon throws are expected to result in temporary disturbance but not to have a lasting effect on the affected whale's health or behaviors.	Weller ¶ 65
II.C.21	NMFS's risk analysis concludes that a maximum of 14 WNP gray whales could be approached within 100 yards over the ten years of the waiver period, or an average of 1.4 per year, if ENP and WNP population sizes and migration patterns remain constant.	Moore ¶¶ 14-18
II.C.21	NMFS's analysis assumes that all allowed approaches (3,530 over 10 years) are made and all occur between December 1 and May 31, meaning that no hunting would occur during odd-year (summer) hunts.	Moore ¶ 15
II.C.22	Approximately twice as many suitable days for hunting and training occur during the months of odd-year hunt seasons than during the months of even-year hunt seasons, considering weather conditions and whale availability.	Yates ¶ 66
II.C.23	If the Tribe made the full number of approaches allowed under the proposed regulations each year of the waiver period, and those approaches were divided evenly between odd-year and even-year hunts, then approximately 0.7 WNP whales would be subjected to an approach annually.	Yates ¶ 66
II.C.24	Approaches are not expected to have a lasting effect on the whale's health or behaviors.	Weller ¶ 64

**National Marine Fisheries Service's Proposed Hearing Agenda  
Attachment 2**

**Proposed Process for NMFS to Publish Notices on behalf of the Court with the Office of the  
Federal Register**

The hearing regulations governing the above-referenced proceeding (50 C.F.R. part 228) require the presiding officer to publish certain notices in the *Federal Register*, such as the final hearing agenda. To facilitate the publication of such notices, including the final hearing agenda, we propose a process that will allow NMFS to facilitate the Court's filing of such notices with the Office of the Federal Register (OFR) in a manner transparent to all parties and that avoids any concerns of ex parte communications.

As an overview, we propose that the Court prepare such notices and when ready, transmit a draft notice to the NMFS Regulatory Unit, which is the segment of NMFS that facilitates the transmittal of all NMFS OFR filings. At the time of transmittal, the Court would also transmit the draft notice to all parties to the proceeding. The staff of the NMFS Regulatory Unit are the only NOAA personnel that would review the draft notice, and their review would be limited to ensuring the notice complies with the applicable OFR filing requirements. The Court would work with the NMFS Regulatory Unit directly to review any changes they propose to meet OFR filing requirements. Once the notice is in final form, the NMFS Regulatory Unit would transmit the notice to Barry Thom (NMFS Regional Administrator for the West Coast Region) for his signature. Mr. Thom would not make or request any changes to the notice, only sign to authorize the filing with the OFR.

A detailed set of proposed instructions for carrying out this process are included as well as a sample notice that the Court may use as a template. We can provide the template in a Microsoft Word document if the Court would find that useful.

## National Marine Fisheries Service's Proposed Hearing Agenda

### Proposed Process Steps for *Federal Register* Notices

1. The Coast Guard Office of Administrative Law Judge (ALJ)<sup>1</sup> contacts the NMFS Regulations Unit (Regs Unit)<sup>2</sup> by email to notify them of its intention to prepare a *Federal Register* Notice (FRN) for publication, and provides a very brief (1-2 sentences) description of the action.
2. The Regs Unit will add the description of the action to the agency's internal in-season and notices spreadsheet for Department of Commerce (DOC) tracking/awareness (but DOC will not review the actual FRN).
3. The ALJ prepares the draft FRN and emails it to the Regs Unit for editorial review and formatting. At the same time, the ALJ transmits the draft notice to the parties. The Regs Unit typically requires three business days for review of draft notices.
4. The Regs Unit will review the draft FRN for purposes of compliance with filing requirements of the Office of the Federal Register (OFR) and provide any recommended edits to the ALJ by email.
5. The ALJ will make any necessary revisions and email a clean copy of the FRN to the Regs Unit.
6. The Regs Unit will email the FRN to Barry Thom<sup>3</sup> for electronic signature.
7. Barry Thom will apply his e-signature as soon as possible and email the FRN back to the Regs Unit.
8. The Regs Unit will complete internal steps for transmitting the signed FRN to the OFR. Notices transmitted to the OFR typically publish within three business days of transmittal.
9. The Regs Unit will notify the ALJ of filing and publication dates, once those are confirmed by the OFR.
10. The ALJ will download the published FRN and post it to the Hearing Docket.

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<sup>1</sup> Heather MacClintock, Attorney-Advisor to the Hon. George J. Jordan  
[Heather.L.MacClintock@uscg.mil]

<sup>2</sup> Tracey Thompson, NOAA Supervisory Fisheries Regulations Specialist [Tracey.Thompson@noaa.gov], and Rey Marquez, NOAA Fisheries Regulations Specialist [Rey.Marquez@noaa.gov]

<sup>3</sup> As Regional Administrator for the NMFS West Coast Region, Barry Thom has been delegated the authority to sign *Federal Register* notices associated with the formal rulemaking process.

# National Marine Fisheries Service's Proposed Hearing Agenda

## Sample FRN for Hearing Agenda

**Billing Code: 3510-22-P**

### DEPARTMENT OF COMMERCE

#### National Oceanic and Atmospheric Administration

[Docket No. {NMFS Regs Unit to provide}]

**RIN 0648-XG584**

#### **Announcement of Hearing and Final Agenda Regarding Proposed Waiver and Regulations Governing the Taking of Marine Mammals**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice of hearing; final agenda.

**SUMMARY:** This notice announces the final hearing agenda for a hearing before an administrative law judge (ALJ) [and the process by which interested persons can participate in the hearing on issues not previously included in the notice of hearing published on April 5, 2019 (84 FR 13639)]. The hearing involves a proposed waiver under the Marine Mammal Protection Act (MMPA) and proposed regulations governing the hunting of eastern North Pacific (ENP) gray whales by the Makah Indian Tribe in northwest Washington State.

**DATES:** NMFS has scheduled a hearing before Administrative Law Judge George J. Jordan to consider the proposed MMPA waiver and the proposed regulations previously published on April 5, 2019 (84 FR 13604). It will begin on [date], at [time] in the Henry M. Jackson Federal Building, 915 Second Ave., 4<sup>th</sup> Floor Auditorium, Seattle, WA, 98174. [Persons interested in

## National Marine Fisheries Service's Proposed Hearing Agenda

participating as a party in the hearing on issues not included in the notice of hearing should consult regulations at 50 CFR part 228, the notice of hearing (84 FR 13639), and this notice and notify NMFS by the filing deadline below.]

*Filing deadlines:* The final date for submission of direct testimony to rebut testimony previously submitted is [date]. [The final date for submission of direct testimony on issues of fact not included in the notice of hearing (84 FR 13639) is [date], and the final date for any rebuttal testimony to such testimony is [date].] [Any person desiring to participate as a party at the hearing on issues not previously included in the notice of hearing published on April 5, 2019 (84 FR 13639), must notify the NMFS West Coast Region Regional Administrator, by certified mail, postmarked on or before [INSERT DATE 10 DAYS AFTER DATE OF FEDERAL REGISTER PUBLICATION].]

**ADDRESSES:** The hearing will be held before Administrative Law Judge George J. Jordan of the United States Coast Guard at the Henry M. Jackson Federal Building, 915 Second Ave., 4<sup>th</sup> Floor Auditorium, Seattle, WA, 98174.

[Any person desiring to participate as a party in the hearing on issues not previously included in the notice of hearing published on April 5, 2019 (84 FR 13639), must notify NMFS, by certified mail, at the following address:

Mr. Barry Thom

Regional Administrator

NMFS, West Coast Region

1201 NE Lloyd Boulevard, Suite 1100

Portland, OR 97232

## National Marine Fisheries Service's Proposed Hearing Agenda

Any person desiring to participate as a party in the hearing should also send an electronic copy to [aljseattle@uscg.mil](mailto:aljseattle@uscg.mil). Such persons may present direct testimony or cross-examine witnesses only on those issues not previously included in the notice of hearing.]

**FOR FURTHER INFORMATION CONTACT:** [Insert Coast Guard contact or if prefer to use NMFS contact: Michael Milstein, NMFS West Coast Region, 1201 NE Lloyd Blvd., Suite 1100, Portland, OR 97232-1274; 503-231-6268.]

### SUPPLEMENTARY INFORMATION:

#### Background

[Background on actions to date and summary of proposed waiver and regulations.]

#### Issues to be Addressed at the Hearing

[Describe all issues which the hearing shall address, the order in which those issues shall be presented, and the direct testimony submitted which bears on the issue per 50 CFR 228.12(b)(1).]

#### List of Witnesses and Parties

[Include list of witnesses who may appear at the hearing, a list of parties, the nature of the interest of each party, and which parties' interests are adverse on the issues presented per 50 CFR 228.12(c).]

The presiding officer, Judge George J. Jordan, prepared the contents of this notice. A copy of the draft notice Judge Jordan submitted to the NMFS Regulations Unit for filing with the Office of the Federal Register (OFR) was made available to all parties to this proceeding. The NMFS Regulations Unit reviewed the notice to ensure consistency with the OFR filing

## National Marine Fisheries Service's Proposed Hearing Agenda

requirements. NMFS was otherwise not involved in the review of the contents of the notice. The signature of NMFS West Coast Regional Administrator Barry Thom is required to authorize the filing of the notice with the OFR.

Dated:

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Barry A. Thom

Regional Administrator, West Coast Region,

National Marine Fisheries Service