

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

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

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NOTICE AND AGENDA: PREHEARING CONFERENCE

By order of the Administrative Law Judge, and as specified in the Notice of Hearing (84 Fed. Reg. 13639), the prehearing conference in this matter will commence on **June 17, 2019 at 10:00 a.m. PDT**. The prehearing conference will be held at:

Jackson Federal Building
915 Second Avenue
Seattle, WA 98174
Room 3090, Elliott Bay Conference Room

For parties who are unable to be physically present, a conference calling line will be available at:

Phone number: 1-866-713-3572
Passcode: 53966482#

Only registered parties may participate in this prehearing conference. 50 C.F.R. § 228.11(d). The registered parties, who may appear personally or be represented by counsel, are:

National Marine Fisheries Service (NMFS)
Makah Tribe
Ms. Innana McCarty
Marine Mammal Commission (MMC)
Sea Shepherd Conservation Society and Sea Shepherd Legal (collectively SSL)
Animal Welfare Institute (AWI)
Peninsula Citizens for the Protection of Whales (PCPW).

Under 50 C.F.R. § 228.11, the presiding officer must make a preliminary determination of the issue of fact which will be addressed at the hearing and provide it to the parties at least

five (5) days in advance of the prehearing conference. After reviewing the parties' filings, I noted that many of NMFS's proposed issues of fact are, in actuality, either conclusions of law or mixed issues of fact and law. I have also noted that the filings by other parties consist largely of argument regarding the parties' positions, but do not clearly delineate the issues of fact each party wishes me to consider. I have therefore compiled the following list, drawn from all the filings in the record, as a non-exclusive determination of factual issues to be considered.

During the prehearing conference, the parties will have the opportunity to state their positions as to whether significant issues have been omitted or any issue(s) designated here are inappropriate for consideration. The parties will also have the opportunity to stipulate to any facts which are not in dispute. 50 U.S.C. § 228.11(c)(1)-(2). While I find each of these issues to have been raised by one or more parties, I have not yet considered the merits of any argument on each point.

Issues to be Addressed at the Hearing

I. 16 U.S.C. § 1371(a)(3)(A): Requirements for Granting a Waiver. The MMPA requires the Secretary of Commerce to ensure, when granting waivers, promulgating regulations, issuing permits, and making determinations in accordance with Sections 1372, 1373, 1374, and 1381 of the Act, that any takings are "in accord with sound principles of resource protection and conservation." The first issue I must consider is whether NMFS has properly determined that the waiver is in accordance with such principles, as supported by the following underlying facts.

A. Principle: Did NMFS give due regard to the distribution, abundance, breeding habits, and times and lines of migratory movements of the stock subject to the waiver? Will the proposed waiver have a meaningful effect on the distribution, abundance, breeding habits, or migratory movements of the stock subject to the waiver?

1. Facts pertaining to Distribution and Abundance:

- a. Is NMFS's determination that there are two stocks of gray whales under the MMPA, the Eastern North Pacific (ENP) and Western North Pacific (WNP) stock appropriate? In particular, is NMFS's determination that the Pacific Coast Feeding Group (PCFG) is a subset of the ENP stock, rather than a separate stock, appropriate?

- b. Is NMFS’s definition of the 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” appropriate?
 - c. What numbers are appropriate to use for ENP, WNP, and PCFG:
 - i. Carrying capacity
 - ii. Current abundance estimates
 - iii. Population stability and/or historical fluctuation
 - iv. Optimum sustainable population (OSP) levels
 - d. What are the maximum number of ENP and PCFG whale deaths and maximum percentage reduction in ENP and PCFG abundance expected to result from Makah hunting over the 10-year waiver period?
 - i. Would this reduction have any impact on ENP or PCFG abundance?
 - e. Is the ENP stock currently undergoing an Unusual Mortality Event? If so, does this merit further consideration before a waiver may be granted?
 - f. Is the carrying capacity of ENP stock in the summer feeding areas being reduced and does this merit further consideration before a waiver may be granted?
2. Facts pertaining to Breeding Habits:
- a. Under the proposed waiver, will hunting or hunt training overlap with the breeding season? Will this most likely occur in December-January?
 - i. What is the expected frequency of hunt activities during the relevant time period?
 - ii. Will the boundaries set for the proposed hunt adversely affect mating whales or mothers and calves?
3. Facts pertaining to Time and Lines of Migratory Movements:
- a. Does the majority of the ENP stock range 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? Should the Okhotsk Sea be included in the migratory range?
 - b. Does the ENP stock migrate between the breeding and feeding grounds between December and May?
 - i. Is the timing of the southbound migration being altered due to a longer feeding season in the Arctic?
 - c. Will migrating ENP whales generally be encountered only during even-year hunts?

- i. How long is it expected to take for a migrating ENP whale to pass through the proposed hunt boundary?
- ii. Proportionally, how much of the migratory range is included in the proposed hunt boundary?
- iii. What is the expected range and duration of hunting activities during the even-year hunts?
- iv. How many whales are likely to be subjected to hunt or training activities?
- d. Does the PCFG spend the summer and fall feeding season off the Pacific coast of North America from northern California to northern Vancouver Island? Are some PCFG whales also present in the feeding area throughout the winter?
 - i. Are PCFG whales expected to be encountered during both even-and odd-year hunts?
 - ii. Is the PCFG further delineated into sub-groups with distinct feeding areas? Do PCFG whales randomly choose feeding areas or are they internally or externally recruited into sub-groups?
 - iii. Will the proposed waiver have a disproportionate impact on PCFG whales in the Makah Tribe's Usual and Accustomed (U&A) hunting area? Particularly, will it have an impact on reproductive females?
- e. Will non-lethal hunting activities result in a lasting effect on ENP/PCFG migratory movements?

B. Principle: Are NMFS's Determinations Consistent with the MMPA's Purposes and Policies?

- 1. Facts pertaining to the Health and Stability of the Marine Ecosystem and Functioning of Marine Mammals within their Ecosystems
 - a. Is the northern California Current ecosystem the appropriate ecosystem to focus on for this proceeding? Should the focus instead be on a smaller biologically relevant scale such as the northern Washington coastal environment or an even more localized area such as the Makah U&A?
 - b. What effect would the waiver have on the relevant ecosystem(s) or area(s)?
 - i. What role do gray whales play in structuring the relevant ecosystem? Does this differ in the various geographical areas in which gray whales are present?
 - ii. In light of NMFS's assertion that "most effects of the hunt would be temporary and localized," does the environmental role and impact of the small groups of whales feeding in the Makah U&A necessitate separate consideration?

- iii. Would the level of hunting proposed affect only a small fraction of the ENP stock and the stock's ecosystems? Should the effects on ENP stock as a whole be compared and contrasted to the effects on the PCFG subset?
 - c. How do non-lethal activities such as training approaches and training harpoon throws affect whale health and behavior?
 - d. Consideration of waiver's collateral effects on WNP stock
 - i. Do WNP whales occasionally migrate along with ENP whales to the North American breeding grounds, or are these whales in fact a Western Feeding Group (WFG) of the ENP stock?
 - ii. If WNP whales are present in the ENP migration, how many are expected? Is this number constant or does it fluctuate?
 - iii. What is the appropriate calculation for the likelihood that a WNP whale will be approached, struck, or killed?
 - iv. Given that the waiver only applies to ENP stock, will an incidental take permit be required under the Endangered Species Act (ESA) to account for the possibility of a WNP whale being taken?
 - v. Should struck or lost whales that cannot be identified as ENP stock be considered to be WNP whales rather than PCFG whales?
- 2. Facts pertaining to Stocks to Attaining or Maintaining Optimum Sustainable Population (OSP) Levels
 - a. Is NMFS's conclusion that ENP stock are within OSP levels, at 85 percent carrying capacity, and with an 88 percent likelihood that the stock is above its maximum net productivity level scientifically valid?
 - i. Does this account for the possibility of an Unusual Mortality Event as discussed in section I.A.1.e, above?
 - ii. Will the removal of whales pursuant to this waiver affect these calculations?
 - b. Regardless of whether the PCFG is properly considered a separate stock or a subset of the ENP stock, should an OSP be separately determined for this group of whales?
 - c. What are the effects on the OSP of WNP whales if a WNP whale is killed?

II. 50 U.S.C. § 1373: Regulatory Requirements. The MMPA requires the Secretary, on the basis of the best scientific evidence available and in consultation with the MMC, to prescribe regulations as deemed necessary and appropriate to insure that takings will not be to the disadvantage of the affected species and populations stocks and will be consistent with the purposes and policies of the MMPA. The second major issue I must consider is whether the proposed regulations published by NMFS at 84 Fed. Reg. 13604 (Apr. 5, 2019) sufficiently address the required criteria, as follows:

A. *Consideration of all Enumerated Factors in Prescribing Regulations*

1. Facts pertaining to the effect of regulations on existing and future levels of marine mammal species and population stocks (50 U.S.C. § 1343(b)(1)):
 - a. Many issues related to this factor are discussed in the Section I, pertaining to the Requirements for Waiver.
 - b. Are the protections in the waiver, such as reduced strike and landing limits, new strike limits for PCFG whales and PCFG females, minimum abundance threshold for PCFG whales, photographic and genetic matching, restrictions on additional strikes, restriction of the hunt to U&A waters, 10-year sunset provision sufficiently protective?
 - c. Are the protections for WNP whales sufficient and appropriate, including 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 in 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?
2. Facts pertaining to existing international treaty and agreement obligations of the United States (50 U.S.C. § 1343(b)(2)):
 - a. The Treaty of Neah Bay, between the Makah Tribe and the United States, is the only such agreement that explicitly protects the tribe's right to hunt whales.
 - b. 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 sets catch limits for aboriginal subsistence whaling by member states.
 - i. 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.
 - ii. The United States and the Russian Federation have been routinely, and are currently, 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.
 - iii. The IWC gray whale catch limit is currently 140 per year, with 5 gray whales per year allocated to the United States
 - iv. If the waiver at issue here is not approved, will the United States continue to transfer the unused portion of the gray whale catch limit to the Russian Federation for use by Chukotkan natives, as has been current practice?
 - v. Does the proposed hunt comply with the IWC conservation objectives for WNP, ENP, and PCFG whales?

- vi. Is the proposed hunt an aboriginal substance hunt as defined by the IWC?
 - A. Is the entire constellation of activities involved in hunting whales integral to the Makah Tribe?
 - B. How central is whaling to Makah Tribal identity? Does the Tribe have a continuing traditional dependence?
 - C. Does the Makah Tribe have a nutritional, substance, and cultural need for whaling?
 - D. Is any traditional dependence on whaling obviated by the Makah Tribe's engagement in sealing starting in the latter half of the 19th century and the near-cessation of whale hunting after 1927?
 - E. Is it possible for the Makah Tribe to substitute other, non-lethal activities and maintain their traditional ties to whaling?

- 3. Facts pertaining to the marine ecosystem and related environmental considerations (50 U.S.C. § 1343(b)(3)):
 - i. Is NMFS's risk analysis sufficiently conservative and based on the best available scientific evidence?
 - ii. Is consideration of cumulative impacts, including those including those from military exercises, marine energy and coastal development, and climate change, necessary? If so, is there evidence these factors were considered?
 - iii. Were all local impacts discussed in *Anderson v. Evans*, 371 F.3d 475 (9th Cir. 2002) adequately considered?

- 4. Facts pertaining to the conservation, development, and utilization of fishery resources (50 U.S.C. § 1343(b)(4)):
 - i. NMFS asserts the proposed hunt will have no effect on the conservation, development, and utilization of fishery resources.

- 5. Facts pertaining to the economic and technological feasibility of implementation (50 U.S.C. § 1343(b)(5)):
 - i. What are the specific costs to NMFS and to the Makah Tribe associated with regulating a hunt under the proposed regulations? Are these feasible?
 - ii. What are the specific technological requirements associated with managing and carrying out a hunt? Are these feasible?
 - iii. What are the costs of enforcing the various restrictions contained in the regulations? Are these feasible?
 - iv. Who is specifically tasked with each type of enforcement (i.e. training restrictions, strike restrictions, use and sale restrictions on edible and non-edible whale parts) and do those persons/organizations have the necessary training and authority to carry out their obligations?

- v. How will records be kept and shared amongst the necessary parties? How will any discrepancies in the records be resolved?
 - vi. Is the use of photo-identification technology economically and technologically feasible? How quickly can identification be made? Is genetic identification more scientifically reliable and how does its economic and technological feasibility compare?
6. Other factors not enumerated in 50 U.S.C. § 1373(b), but raised by parties to this proceeding and meriting consideration:
- i. What is the appropriate degree to which the analysis in *Anderson v. Evans* should be considered in this proceeding?
 - ii. Are the definitions contained in the proposed regulations adequate or do they contain ambiguities, omissions, and/or inconsistencies?

B. Restrictions in the Proposed Regulations.

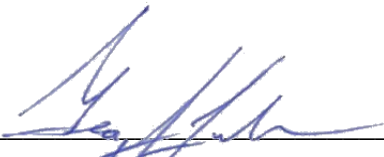
1. Issues pertaining to the proposed restrictions on the number of animals that may be taken in any calendar year (50 U.S.C. § 1343(c)(1)):
 - i. Hunt permits may authorize no more than three gray whales to be landed in an even-year hunt and no more than one to be landed in an odd-year hunt. No more than three strikes are permitted during an even-year hunt and no more than two are permitted in an odd-year hunt.
 - ii. Additional restrictions are placed on the taking of PCFG whales and WNP whales.
 - iii. How were the low-abundance triggers for PCFG whales, which would cause hunting activity to cease, determined? Is the proposed use of PCFG strike limits and low-abundance triggers, rather than the potential biological removal (PBR) based approach contained in the DEIS, complex and novel enough to require supplemental study, notice, and comment?
2. Issues pertaining to the proposed restrictions on the age, size, sex, or any combination thereof of animals that may be taken (50 U.S.C. § 1343(c)(2)):
 - i. Are the limits set on authorized strikes of PCFG females appropriate?
 - ii. Are there, or should there be, limitations on approaches or strikes on calves or mother-and-calf pairs?
3. Issues pertaining to the season or other period of time within which animals may be taken (50 U.S.C. § 1343(c)(3)):
 - i. The hunting seasons are split into “even-year hunts,” during which hunting would be authorized from December 1 of an odd-numbered year until May 31 of the following even-numbered year, and “odd-year hunts,” during which hunting would be authorized from July 1 through October 31 of the odd-numbered year.

- ii. Questions have been raised about whether the alternatives proposed in the DEIS are sufficiently similar to the even-odd structure contemplated by the proposed waiver and regulations, or whether they are different enough as to require supplemental study, notice, and comment.
4. Issues pertaining to the manner and locations in which animals may be taken (50 U.S.C. § 1373(c)(4)):
- i. Are the limitations on authorized strikes (successful and unsuccessful), training exercise restrictions, landing limits, and methods of identifying and accounting for whales in the proposed waiver and regulations sufficiently similar to those in the DEIS or is supplemental study, notice, and comment required?
 - ii. The proposed waiver and regulations authorize training exercises, including approaches and training harpoon throws. A question has been raised as to whether the inclusion of training exercises is necessary and/or appropriate.
 - iii. Do the definitions of “land” and “landing” provide sufficient information about where the Makah Tribe would be permitted to land whales? Are consultation with other Federal and state agencies necessary (*see* 50 U.S.C. § 1382)?
 - iv. Are the definitions of “strike” and “struck” ambiguous? Specifically, issues have been raised regarding the single-strike limit within 24 hours (whether a harpoon strike followed by a firearm shot consist of a single “strike” or two separate strikes, and whether this will lead to unnecessary suffering on the part of a whale that is struck but not immediately killed); whether whales can be appropriately identified as belonging to WNP stock, ENP stock, or the PCFG during a 24-hour post-strike period; whether the use of crossbows or other devices to obtain genetic material from a struck whale should also be considered a strike; and whether the struck-and-lost limits proposed are inconsistent with the definition of “strike.”
 - v. Will independent observers be present at every hunt or only certain hunts? How are these observers selected and trained?
 - vi. NMFS has not specified the precise methods by which the hunt may be accomplished, stating this will be included in the permit. Must the regulations prescribe the criteria NMFS will use to determine that the methods are humane and to assess the risks to public safety?
 - vii. Should the potential for an off-shore hunt to result in the taking of more migratory ENP whales and fewer PCFG/Makah U&A whales be considered?
5. Issues pertaining to techniques which have been found to cause undue fatalities to any species of marine mammal (50 U.S.C. § 1343(c)(5)):
- i. Do the mechanics of the hunt fall under this factor? If so, have any such techniques been identified and do they merit discussion during this proceeding?
6. Issues related to other proposed restrictions not specifically enumerated in 50 U.S.C. § 1343(c):

- i. Restrictions on the use or sale of gray whale products:
 - A. Do the restrictions on utilization of edible products of ENP gray whales off-reservation unfairly burden enrolled Makah Tribe members living elsewhere? Are such members permitted to share ENP gray whale products with members of their immediate households who are not enrolled in the Makah Tribe?
 - B. Are there any restrictions on the resale of handicrafts by persons who are not enrolled members of the Makah tribe, either on a small or large scale?
 - C. Are there restrictions on the international sale or transportation of handicrafts?

Other topics that will be addressed during the prehearing conference are which witnesses may appear at the hearing; and the nature and interest of each party and which parties' interests are adverse. 50 C.F.R. § 228.11(c)(3)-(4). Parties who do not appear at the prehearing conference will be bound by any determinations made during the conference. 50 C.F.R. § 228.11(e).

IT IS SO ORDERED.



George J. Jordan
Administrative Law Judge

Done and dated this 10th day of June, 2019
At Seattle, Washington.