

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

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

FIFTH DECLARATION OF CHRIS YATES

I, Chris Yates, declare as follows:

1. I am the Assistant Regional Administrator for Protected Resources for the West Coast Region of the National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA). I previously filed the following declarations in the above-referenced matter: Declaration of Chris Yates (initial direct testimony, dated April 2, 2019); Second Declaration of Chris Yates (testimony in support of NMFS's opposition to motions to extend the hearing dated, dated May 15, 2019); Third Declaration of Chris Yates (rebuttal testimony, dated August 5, 2019); and, Fourth Declaration of Chris Yates (direct testimony regarding the new issue of fact identified by the ALJ (eastern North Pacific (ENP) gray whale stock unusual mortality event (UME)), dated August 5, 2019). I incorporate here by reference my previous declarations filed in this matter.

2. My fourth declaration and the Third Declaration of Dr. Shannon Bettridge (dated August 6, 2019, explain that, on May 29, 2019, NMFS declared a UME for the ENP stock of

gray whales, pursuant to section 404 of the Marine Mammal Protection Act (MMPA), 16 U.S.C. § 1361c. Fourth Yates Decl. ¶ 2; Third Bettridge Decl. ¶ 10. Our previous declarations explain the legal, procedural, and factual basis for the ENP gray whale UME; the previous UME that NMFS declared for the ENP gray whale stock in 1999/2000; information learned from the 1999/2000 UME; and information regarding NMFS's investigation and evaluation of the current UME.

3. I have reviewed the direct testimony filed by the parties to this proceeding regarding the UME, including the Declaration of John Brandon, July 30, 2019, filed by the Makah Indian Tribe, and the Declaration of DJ Schubert, dated August 6, 2019, filed by the Animal Welfare Institute. I submit this declaration to rebut certain assertions made by Mr. Schubert in his August 6, 2019 UME declaration.

4. As explained in my previous declaration and in the Third Declaration of Dr. David Weller (filed herewith), NMFS's investigation of the current UME for the ENP gray whale stock is in its early stages and ongoing. It is premature to speculate as to the potential causes, severity, or duration of the UME. Fourth Yates Decl. ¶ 16; Third Weller Decl. ¶¶ 5-6. In developing the proposed waiver and regulations that are the subject of this proceeding, NMFS considered information relating to the 1999/2000 UME and the possibility that the stock could be subject to additional UMEs. Fourth Yates Decl. ¶ 10. The 2015 Draft Environmental Impact Statement (DEIS) prepared by NMFS for this matter states: "We conclude that natural mortality is a reasonably foreseeable future event that will continue to impact North Pacific gray whales and that the ENP gray whale stock will continue to fluctuate as it adjusts to natural and human-

caused factors affecting the carrying capacity of the environment (Carretta et al. 2014).” 2015 DEIS at 5-29.¹

5. In his UME declaration, Mr. Schubert asserts that both the western North Pacific (WNP) gray whale stock and the Pacific Coast Feeding Group (PCFG) are “imperiled,” and therefore NMFS should not proceed with this proposed waiver until NMFS determines the effects of the UME on the WNP stock and the PCFG. Schubert UME Decl. ¶¶ 12, 15. Mr. Schubert argues that, based on the “possibility that PCFG or WNP whales may be affected by the cause of the current UME,” NMFS may have underestimated mortality risk to whales from these groups and therefore should not proceed with the waiver decision-making until the results of NMFS’s investigation into the current UME are made available. *Id.* ¶ 15. I disagree. I also note that Mr. Schubert asserts that the UME is due to effects of climate change on prey availability in the ENP stock’s summer feeding grounds in the Arctic Ocean, yet WNP whales do not feed during the summer in the Arctic Ocean, nor do PCFG whales primarily feed there. *See* Weller Decl. (dated Apr. 1, 2019) ¶¶ 12, 16, 33

6. As previously explained, the results of NMFS’s investigation of the current UME may not be available for several years. Third Bettridge Decl. ¶ 12. In the case of the 1999/2000 UME, NMFS’s investigation as to the cause of the event was inconclusive. Fourth Yates Decl. ¶ 4. The ENP gray whale stock rebounded subsequent to that UME, and its abundance never fell below optimum sustainable population levels during the UME. *Id.* ¶¶ 5, 11. Abundance of the PCFG increased during and subsequent to the 1999/2000 UME. Third Weller Decl. ¶ 8. There

¹ Per the regulations that govern MMPA waivers, NMFS will introduce the 2015 DEIS into evidence at the commencement of the hearing. *See* 50 C.F.R. § 228.16(b).

is no scientific evidence that the WNP gray whale stock abundance was affected by the 1999/2000 ENP gray whale stock UME. Third Weller Decl. ¶ 9.

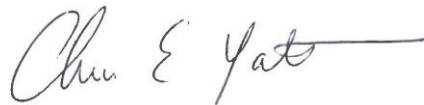
7. Mr. Schubert’s UME declaration does not provide any scientific evidence suggesting that the WNP stock or the PCFG are being affected by the current UME for the ENP gray whale stock. To date, none of the stranded whales has been identified as belonging to the WNP stock or to the PCFG. *See* Fourth Yates Decl. ¶ 15. NMFS’s decision-making for the proposed waiver and regulations must be based on the best scientific evidence available. 16 U.S.C. § 1371(a)(1)(A), 1373. As explained in Dr. Weller’s third declaration, there is no established basis for modeling a proportion of unidentified stranded whales to the PCFG or to the WNP stock. Third Weller Decl. ¶ 11.

8. The WNP gray whale stock is designated as “depleted” under the MMPA, and NMFS is not proposing to issue a waiver allowing the take of WNP gray whales. *See* Proposed Rule, 84 Fed. Reg. 13,604, 13,608. NMFS included a number of restrictions in the proposed regulations to reduce the risk of incidental take of WNP gray whales in a tribal hunt targeting ENP gray whales. *Id.* If NMFS were to determine that a single WNP gray whale were struck or killed during a tribal hunt, all hunting would cease unless/until additional measures were imposed to prevent such an event from recurring. *See id.* at 13,620. While there currently is no scientific evidence suggesting that the UME for the ENP gray whale stock is affecting the WNP gray whale stock, should any such information become available, NMFS would consider it when issuing a final decision on the proposed waiver and regulations, and in the context of the agency’s consideration of any application by the Makah Tribe for a permit to carry out a ceremonial and subsistence hunt for ENP gray whales, as required under the MMPA. 16 U.S.C.

§§ 1371(a)(1)(A), 1373, 1374 (requiring that waivers, regulations, and permits be based on the best available scientific evidence).

9. Contrary to Mr. Schubert’s assertions, there is no scientific evidence that the PCFG is “imperiled,” and, contrary to his postulations, there is no scientific evidence that the current UME is having a negative effect on PCFG whales. *See* Schubert UME Decl. ¶¶ 12, 15. As NMFS has previously documented, PCFG abundance has been and continues to be well-studied, the group’s abundance increased during and after the 1999/2000 UME, and the proposed waiver and regulations include strike limits, conservative assumptions, and low-abundance (“stop-hunt”) triggers to ensure that a tribal hunt does not reduce PCFG abundance below recent stable levels. As noted in the most recent stock assessment report, “Abundance estimates of PCFG whales increased from 1998 through 2004, remained stable for the period 2005-2010, and have steadily increased during the 2011-2015 time period (Calambokidis et al. 2017).” NMFS Ex. 2-12, at 4-5.

I declare, under penalty of perjury under the laws of the United States, that the foregoing is true and correct to the best of my knowledge, information, and belief.



Chris Yates

Dated: September 10, 2019