

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
)

NATIONAL MARINE FISHERIES SERVICE’S PREHEARING BRIEF

I. INTRODUCTION

The National Marine Fisheries Service (“NMFS”) has spent many years thoroughly evaluating the Makah Indian Tribe’s (“Makah Tribe’s” or “Tribe’s”) request for a waiver of the moratorium on the take of Eastern North Pacific (“ENP”) gray whales under the Marine Mammal Protection Act (“MMPA”).¹ In doing so, NMFS has undertaken an extensive process—from publishing two draft environmental impact statements (“DEISs”) evaluating the Tribe’s proposal and a number of alternatives, reviewing and considering over 57,000 public comments, and holding several public meetings, to consulting with the Marine Mammal Commission (“MMC”) and drawing on the expertise and best scientific evidence available from NMFS’s lead whale scientists and hundreds of peer-reviewed and published scientific articles. Declaration of Chris Yates, dated April 2, 2019, ¶¶ 10, 12. After full consideration of the information gathered, NMFS responded to the Tribe’s request by proposing a waiver and

¹ 16 U.S.C. §§ 1361 *et seq.*

regulations that would authorize a limited ceremonial and subsistence hunt for ENP gray whales for a 10-year period.

As NMFS's evidence shows, this limited ceremonial and subsistence hunt will have no discernible effects on the ENP stock or marine ecosystems, reflects a conservative and precautionary approach with multiple built-in safeguards, is based on robust scientific evidence, and was reviewed by the world's top marine mammal experts. Consistent with their written testimony, the following NMFS expert witnesses will present such evidence:

1. Chris Yates, Assistant Regional Administrator for Protected Resources for the NMFS West Coast Region (WCR). Mr. Yates will testify regarding the WCR's decision-making concerning this proceeding, the underlying management and policy objectives of the proposed waiver and regulations, and NMFS WCR's determination that the proposed ceremonial and subsistence hunt satisfies all MMPA requirements.

2. Dr. Shannon Bettridge, Chief of the Marine Mammal and Sea Turtle Conservation Division, NMFS Office of Protected Resources. Dr. Bettridge will testify regarding the stock assessment reports ("SARs") issued by NMFS pursuant to section 117 of the MMPA, 16 U.S.C. § 1386, which contain the best available scientific information regarding the status of gray whale stocks and other pertinent information, as well as the Marine Mammal Health and Stranding Response Program's responses to unusual mortality events ("UMEs"), including the current UME declared for the ENP gray whale stock, through the process laid out in 16 U.S.C. § 1421c.

3. Dr. David Weller, wildlife research biologist with the Marine Mammal and Turtle Division of NMFS Southwest Fisheries Science Center ("SWFSC"). Dr. Weller will testify regarding his expertise in gray whale biology and marine ecology; his experience developing, collecting, and analyzing the best available scientific information about gray whale stocks; and

his expertise as a member of the U.S. delegation to the International Whaling Commission (IWC) and of the IWC's Scientific Committee.

4. Dr. Jeffrey Moore, research biologist with the Marine Mammal and Turtle Division of NMFS SWFSC, and leader of the California Current Marine Mammal Assessment Program. Dr. Moore will testify regarding population dynamics and risk assessment models for estimating gray whale abundance, trends and other demographic parameters, and quantifying the potential impact of the proposed hunt on gray whale populations.

This testimony, and the written record submitted by NMFS, demonstrates that the proposed waiver and regulations are supported by substantial evidence under each relevant MMPA requirement. See 5 U.S.C. § 556(d); 16 U.S.C. § 1371(a)(3)(A).

II. NMFS'S PROPOSED WAIVER AND REGULATIONS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

NMFS's decision-making in this matter is governed by the MMPA, which imposes a general moratorium on the "take"² of marine mammals but includes a number of exemptions and exceptions. See 16 U.S.C. § 1371. One exception allows the Secretary of Commerce,³ who has delegated authority to NMFS, to waive the moratorium from time to time to allow taking from a species or stock of marine mammals (MMPA § 101(a)(3)(A)), adopt suitable regulations governing the take (MMPA § 103), and issue permits authorizing the take (MMPA § 104). See 16 U.S.C. §§ 1371(a)(3)(A), 1373, 1374; Proposed Rule, 84 Fed. Reg. 13,604, 13,611-15 (2019). Both NMFS's decision to waive the moratorium and to adopt implementing regulations are subject to formal rulemaking requirements, which incorporate the Administrative Procedure

² Under the MMPA, "'take' means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." 16 U.S.C. § 1362(13).

³ The Department of Interior through the U.S. Fish and Wildlife Service also administers the MMPA with respect to certain species of marine mammals. See 16 U.S.C. § 1362(12).

Act's ("APA's") "substantial evidence" standard. As explained below, the declarations and exhibits submitted by NMFS in this matter represent the best scientific evidence available and amply support the proposed waiver and regulations.

A. NMFS's Proposed Waiver Is Supported by Substantial Evidence

Under MMPA section 101(a)(3)(A), any decision by NMFS to issue a waiver must: be based on the best scientific evidence available; be made in consultation with the MMC; and, have due regard to the distribution, abundance, breeding habits, and times and lines of migratory movements of the marine mammal stock subject to the waiver. 16 U.S.C. § 1371(a)(3)(A). Additionally, NMFS must "be assured" that the taking is "in accord with sound principles of resource protection and conservation as provided in the purposes and policies of the MMPA." *Id.* The MMPA's purposes and policies include maintaining marine mammals as a significant functioning element of their ecosystems, maintaining the health and stability of the marine ecosystem, and managing stocks to attain or maintain their optimum sustainable population ("OSP")⁴ levels, keeping in mind the carrying capacity of their habitat. 16 U.S.C. § 1361.

1. The Proposed Waiver Is Based on the Best Scientific Evidence Available and Was Made in Consultation with the MMC

In developing the proposed waiver, NMFS relied on the best scientific evidence available, pursuant to 16 U.S.C. § 1361(a)(3)(A). Gray whales are data-rich species, and the ENP gray whale stock, in particular, is extremely well-studied. NMFS has abundance records for the stock dating back to 1967 and continues to conduct routine abundance surveys. NMFS Ex. 1-7, at 15, 57-70; NMFS Ex. 2-12. The Pacific Coast Feeding Group ("PCFG"), a

⁴ "The term "optimum sustainable population" means, with respect to any population stock, the numbers of animals which will result in the maximum productivity of the population or species, keeping in mind the carrying capacity of the habitat and health of the ecosystem of which they form a constituent element." 16 U.S.C. § 1362(9); *see also* Proposed Rule, 84 Fed. Reg. at 13,605.

component of the ENP stock, and western North Pacific (“WNP”) gray whale stock are also regularly surveyed through photo-identification. NMFS Ex. 2-12.

In developing the proposed waiver, NMFS drew on the expertise of NMFS’s lead whale scientists, Dr. David Weller and Dr. Jeffrey Moore, with the NMFS SWFSC, the Chief of our Marine Mammal and Sea Turtle Conservation Division in the NMFS Office of Protected Resources, Dr. Shannon Bettridge, and other experienced NMFS scientists and managers. Yates Decl. ¶ 14. NMFS submitted over a hundred exhibits in support of the proposed waiver and regulations, most of which are peer-reviewed and published scientific articles relevant to evaluating the effects of the proposed ceremonial and subsistence hunt on gray whales and their ecosystems. *Id.*; see e.g., NMFS Ex. 2-12 (2018 SARs for the ENP and WNP gray whale stocks); 2015 DEIS on the Makah Tribe Request to Hunt Gray Whales; NMFS Ex. 3-2 (Report of the National Marine Fisheries Service Gray Whale Stock Identification Workshop); NMFS Exs. 4-8, 4-15 (NMFS analyses estimating the probability of encountering WNP gray whales during a Makah hunt); NMFS Ex. 3-43 (IWC Scientific Committee’s review of the proposed hunt management scheme relative to IWC conservation objectives for North Pacific gray whales); NMFS Ex. 1-7 (NMFS Biological Report on the Eastern North Pacific (ENP) Gray Whale Stock. Also, NMFS has relied and will continue to rely on the best scientific evidence available to evaluate the 2019 UME for ENP gray whales. Fourth Declaration of Chris Yates, dated Aug. 5, 2019, ¶ 13.

In addition, as required under the MMPA, NMFS consulted with the MMC regarding the proposed waiver, and the MMC agreed that NMFS relied on the best available scientific evidence: “Our overall impression is that the draft regulations are based on the best available science and are appropriately precautionary.” As more fully described in the Proposed Rule, the

MMC submitted comments on the 2015 DEIS and provided written advice in response to two NMFS requests for consultation in 2017. Proposed Rule, 84 Fed. Reg. 13,604, 13,611, 13,616 (2019). Accordingly, NMFS has satisfied the MMPA requirements to rely on the best scientific evidence available and consult with the MMC.

2. NMFS Gave Due Regard to the Distribution, Abundance, Breeding Habits, and Times and Lines of Migratory Movements of the ENP Gray Whale Stock

The requirement that an agency give “due regard” to certain considerations calls for the exercise of discretion by the agency, with the purposes of the governing act in mind. *See Opp Cotton Mills, Inc. v. Administrator of Wage and Hour Div. of Dep’t of Labor*, 312 U.S. 126, 151 (1941); *Jeffries v. Olesen*, 121 F. Supp. 463, 475 (S.D. Cal. 1954) (“due regard” standard depends on “reason and common sense and the circumstances of the case”). NMFS satisfied the MMPA requirement to give due regard to the distribution, abundance, breeding habits, and migratory movements of the ENP gray whale stock by fully evaluating the potential effects of the proposed waiver and designing the proposed regulations so as to minimize adverse effects to the ENP stock consistent with the MMPA’s purposes and policies.

a. Distribution

NMFS gave due regard to the possibility that the proposed waiver could result in changes in the ENP stock’s distribution by limiting mortality of and interactions with ENP whales in general and PCFG whales in particular. The proposed waiver, at a maximum, could result in the removal of 25 whales over 10 years (average 2.5 / year) out of a population most recently estimated to number nearly 27,000 whales. Declaration of Dr. David Weller, dated April 1, 2019, ¶ 39. The proposed waiver would limit unsuccessful strike attempts and training harpoon throws (combined), to an average of 15 per year and would limit approaches (within 100 yards) of gray whales to 353 per year. Yates Decl. ¶¶ 41-42. This is a small number of approaches

compared with what NMFS authorizes for research and compared with the overall population size of the ENP stock. Proposed Rule, 84 Fed. Reg. at 13,612.

Particularly to ensure that the waiver does not alter ENP distribution within the PCFG summer feeding area, NMFS included strict limits on the allowable number of strikes, unsuccessful strike attempts/training harpoon throws, and approaches of PCFG whales. *See* Yates Decl. ¶¶ 33, 41-42 (explaining that under proposed waiver, only 16 PCFG whales could be struck over the 10-year period, including a sub-limit of 8 PCFG females; approaches would be limited to 142 per year; and unsuccessful strike attempts/training harpoon throws would be limited to 15 per year on average). The best scientific evidence available indicates that approximately four new ENP gray whales recruit into the PCFG each year, which is more than the number of removals that could occur under the waiver. Weller Decl. ¶ 27. Also, as an additional precaution, NMFS included PCFG “low abundance triggers” in the proposed waiver, which would require hunting to cease if PCFG abundance declined below recent stable levels. Yates Decl. ¶ 37. These low-abundance triggers are 192 whales, or a minimum abundance estimate of 171 whales. *Id.* NMFS selected these triggers because they represent the lowest PCFG abundance estimate during the recent period of stability in PCFG population size starting in 2002. *Id.* NMFS will use a forecasting model to provide up-to-date PCFG abundance estimates during the waiver period. *Id.*; Declaration of Dr. Jeffrey Moore, dated April 1, 2019, ¶¶ 20-25.

As explained in Dr. Weller’s declaration, the small number of removals and interactions that would be allowed under the proposed waiver is not expected to affect the ENP stock’s distribution or cause ENP or PCFG whales to avoid or abandon the hunt area. Weller Decl. ¶ 59. The evidence supporting Dr. Weller’s conclusion includes: his first-hand experience as a field

researcher witnessing the reactions (or lack thereof) of large whales to vessel approaches and tagging/biopsying; published scientific literature; the fact that decades of hunting by Chukotkan natives (who take over a hundred gray whales per year) has not caused gray whales to abandon the hunt area; and, the ENP stock's resiliency to ongoing human disturbance within the stock's migratory corridor. Weller Decl. ¶¶ 24-25, 44-59.

By limiting to low levels the number of strikes, unsuccessful strike attempts and training harpoon throws, and approaches, and by including the additional safeguard of the PCFG low-abundance triggers, NMFS gave due regard to potential effects of the proposed waiver on the ENP stock's distribution, including the stock's distribution within the PCFG summer range.

b. Abundance

NMFS has also demonstrated due regard to how the proposed waiver will affect the ENP gray whale stock's abundance. As noted, the proposed waiver would result in an average of 2.5 deaths per year, which at a maximum, would reduce the ENP gray whale stock by 0.09 percent over 10 years. Weller Decl. ¶ 39. This level of mortality is a small fraction of the annual variability in the stock's abundance (~16,000-27,000 animals since the mid-1990s) and well below the potential biological removal ("PBR") level (801 whales per year) for the ENP gray whale stock, factoring in estimated human-caused mortality from other sources. Second Declaration of Dr. Shannon Bettridge, dated April 1, 2019, ¶ 5; Weller Decl. ¶ 39. Furthermore, it is likely that the net effect to ENP gray whale abundance would be the same with or without a Makah tribal hunt. Weller Decl. ¶ 43. The United States has routinely transferred its unused portion of the IWC quota for ENP gray whales to the Russian Federation for use by Chukotkan hunters. *Id.* at ¶¶ 9, 43. Accordingly, the proposed waiver and regulations are expected to have no discernible effect on the ENP gray whale stock's abundance.

As mentioned above, on May 29, 2019, NMFS declared an UME for the ENP gray whale stock. Fourth Yates Decl. ¶ 2. While the 2019 UME was declared after NMFS published the proposed waiver and regulations, NMFS fully considered the possibility of a UME in developing the waiver and included safeguards to ensure that the waiver does not result in unanticipated long-term consequences for the ENP stock. *See* 2015 DEIS at 3-84 to 3-87, 5-28 to 5-29 (discussing 1999/2000 UME); Fourth Yates Decl. ¶ 6 (noting that NMFS expects ENP stock to fluctuate as stock adjusts to natural and human-caused factors affecting carrying capacity); *id.* (“A population near or at carrying capacity is expected to be more susceptible to environmental fluctuations”) (citing NMFS Ex. 1-24); Yates Decl. ¶ 28 (stating that the proposed waiver is limited to a 10-year period to allow for adaptive management); Third Declaration of Chris Yates, dated Aug. 5, 2019, ¶ 11. The proposed waiver would authorize ceremonial and subsistence hunting for only a 10-year period, after which time NMFS would have to undertake a new regulatory process in order to allow continued hunting. Yates Decl. ¶ 28. Also, under the waiver, NMFS would have to issue hunt permits to authorize the take of any whales. 84 Fed. Reg. at 13,606. Permits could be issued for a maximum of three to five years, and NMFS could issue shorter-term permits if warranted. *See id.*; Yates Decl. ¶ 28. Notably, the IWC expressly factored future gray whale UMEs into its analysis in concluding that the proposed waiver meets with all IWC objectives. Third Weller Decl. ¶ 10.

Previously, NMFS declared a UME for the ENP stock in 1999-2000 after an unusually large number of dead gray whales stranded along the west coast of North America from Mexico to Alaska. Fourth Yates Decl. at ¶ 3. More than 650 gray whales had stranded along the west coast by the time that NMFS closed the UME on December 7, 2001. *Id.* Following the 1999-2000 UME, the ENP gray whale stock demonstrated resilience: after declining from about

21,000 in 1997-98 to 16,000 in 2001-02, in the following few years' gray whale strandings returned to pre-1999 levels, and the ENP gray whale stock has since rebounded to about 27,000 animals as of the most recent published estimate. *Id.* at ¶ 5. Significantly, the ENP gray whale stock has been within OSP levels since at least 1995, including during the two-year period of the 1999-2000 UME. *Id.* at ¶ 6.

As of September 30, 2019, 122 gray whales had stranded in the U.S., ten stranded in Canada, and 81 stranded in Mexico, for a total of 213 stranded gray whales.⁵ NMFS is closely monitoring the current ENP gray whale UME and will continue to consider the best scientific information available regarding the status of the ENP stock prior to making a final decision on the proposed waiver and regulations, and if NMFS does issue a waiver, prior to issuing any hunt permit. Fourth Yates Decl. ¶¶ 7, 13.

c. Breeding Habits

In addition to distribution and abundance, the proposed waiver and regulations also have due regard for the breeding habits of the ENP gray whale stock. The only time that hunting or hunt training is likely to overlap with gray whale breeding is in December-January. Yates Decl. ¶ 52; Weller Decl. ¶ 60. NMFS expects that few if any hunt activities would occur in December-January due to inclement weather. Yates Decl. ¶ 52; 2015 DEIS at 3-354 to 3-357, 4-10. While it is possible that hunt activities could occur in December-January and could encounter mating whales, NMFS does not expect adverse biological effects due to the small portion of the migration corridor where hunt activities could occur, the limited likelihood of hunting or training due to poor weather conditions, and the fact that whales mate repeatedly throughout the

⁵ Additional updated information may be found at: <https://www.fisheries.noaa.gov/national/marine-life-distress/2019-gray-whale-unusual-mortality-event-along-west-coast>, last visited November 7, 2019.

migration, suggesting that any whales disturbed by hunt activities would have additional opportunities to breed. Weller Decl. ¶ 60.

d. Times and Lines of Migratory Movements

NMFS, in proposing the waiver and regulations, has also given due regard to the times and lines of migratory movements of the ENP gray whale stock. Based on the analysis above regarding effects on distribution of ENP gray whales, hunting activities under the proposed waiver are unlikely to cause lasting effects to gray whale behaviors, including migratory movements. Weller Decl. ¶ 59.

3. NMFS Is Assured that the Proposed Waiver Is In Accord with the MMPA's Purposes and Policies

The purposes and policies of the MMPA include maintaining marine mammal stocks as a significant functioning element in the ecosystem of which they are a part, maintaining the health and stability of the marine ecosystem, and obtaining an optimum sustainable population keeping in mind the carrying capacity of the habitat. 16 U.S.C. § 1361. Based on careful consideration of the best available scientific evidence, NMFS is assured that the proposed waiver is in accord with the MMPA's purposes and policies, as discussed below.

a. Effects to Marine Ecosystems

Because the limited level of hunting that could occur under the proposed waiver would affect only a small fraction of the ENP stock in a small portion of its range, the proposed waiver would not have a discernible effect on the ENP stock's role in their ecosystem or on the health and stability of that ecosystem. Weller Decl. ¶¶ 69-73. Although ENP gray whales traverse five large marine ecosystems, the northern California Current ecosystem is the smallest scientifically recognized ecosystem that encompasses the area of the proposed hunt, an area which comprises less than one percent of the lineal distance of the ENP stock's range and less than 4 percent of

the lineal distance of the PCFG summer range. Third Declaration of Chris Yates, dated Aug. 5, 2019, ¶ 16; Weller Decl. ¶ 52. NMFS took a precautionary approach in examining the impact of the proposed waiver and regulations on the smaller northern California Current ecosystem, which also corresponds to the seasonal range of the PCFG. Proposed Rule, 84 Fed. Reg. at 13,613. An average annual removal of up to 2.5 ENP gray whales from a population of over twenty thousand would not have a discernible effect on the functioning of ENP gray whales in any of these marine ecosystems, on the ecosystems themselves, or, specifically, on the functioning of ENP gray whales in the northern California Current ecosystem. Weller Decl. ¶¶ 69-73.

Furthermore, although it is not considered a separate ecosystem, even at the scale of the northern Washington coast—that is, the coastal portion of the Makah U&A—NMFS does not expect the proposed waiver to have a perceptible effect on the marine environment. Weller Decl. ¶¶ 71-72. ENP gray whales play a limited role in that environment, which is shaped by dynamic, highly energetic, large-scale ecosystem processes. *Id.* at ¶ 70. Similarly, given the best available scientific evidence, NMFS does not anticipate that the proposed waiver would cause gray whales to abandon the hunt area as a summer feeding area or interfere with the PCFG’s role as a significant functioning element of their ecosystem during the summer feeding period in the PCFG range. Weller ¶¶ 58, 71-73. NMFS does not expect discernible effects to the PCFG whales that feed in the hunt area during the summer given the size of this group, variable distribution and habitat use in the PCFG’s summer range, and the levels of annual recruitment, which exceed the level of removals that would be allowed under the proposed regulations. NMFS Ex. 3-33 (discussing the average number of whales sighted in the Makah U&A); 2015

DEIS 4.4.2.4 (discussing the range of PCFG whales during the feeding season and PCFG recruitment to take advantage of prey resources).

b. Effects to Optimum Sustainable Population

The potential removal of up to 2.5 whales average per year over 10 years is unlikely to have a discernible effect on the ENP stock's abundance relative to OSP. Weller Decl. ¶ 37. As discussed above, the ENP stock has been within OSP since 1995 and did not drop below OSP during the 1999-2000 UME. Moore Decl. ¶ 9; Fourth Yates Decl. ¶ 6; *see* NMFS Ex. 2-12, at 4-8 (2018 ENP Gray Whale SAR). Moreover, as previously explained, any portion of the IWC quota for ENP gray whales that is not harvested by the Makah Tribe is likely to be allocated to Chukotkan hunters, based on recent practice and as articulated in joint U.S-Russia monitoring agreements dating back to the IWC catch limit set in 2003. Weller Decl. ¶¶ 9, 43. Assuming this practice continues, the proposed waiver would have no net effect on ENP gray whale abundance or OSP.

B. The Proposed Regulations Are Supported by Substantial Evidence

When issuing a waiver, NMFS must also adopt regulations governing the take. 16 U.S.C. § 1371(a)(3)(A). The requirements for regulations are set forth in MMPA section 103, which provides:

[NMFS], on the basis of the best scientific evidence available and in consultation with the Marine Mammal Commission,^[6] shall prescribe such regulations with respect to the taking . . . of animals from each species of marine mammal (including regulations on the taking . . . of individuals within population stocks) as [NMFS] deems necessary and appropriate to insure that such taking will not be

⁶ Section II.A.1 above explains that NMFS relied upon the best scientific evidence available and consulted with the Marine Mammal Commission on the proposed waiver and regulations.

to the disadvantage of those species and population stocks and will be consistent with the purposes and policies [of the MMPA].

16 U.S.C. § 1373(a). In prescribing regulations, NMFS must

give full consideration to all factors which may affect the extent to which such animals may be taken . . . , including but not limited to the effect of such regulations on—

- (1) existing and future levels of marine mammal species and population 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.

16 U.S.C. § 1373(b). Section 103 also includes a non-exclusive list of restrictions that regulations may include, such as the number of animals to be taken in any year, the season or time when they may be taken, and the manner and location of the taking. 16 U.S.C. § 1373(c).

In addition to these factors, and as an additional precautionary measure, NMFS also considered the potential effects of the proposed regulations on the WNP stock.

1. NMFS Properly Concluded that the Proposed Regulations Are Necessary and Appropriate to Insure that a Tribal Hunt Will Not Disadvantage the ENP Stock and Will Be Consistent with the MMPA’s Purposes and Policies

The MMPA, in authorizing NMFS to prescribe such regulations as it deems “necessary and appropriate,” expressly delegates to the agency broad rulemaking authority, so long as the regulation conforms to the MMPA’s objectives. *United States v. Clark*, 912 F.2d 1087, 1090 (9th Cir. 1990) (“16 U.S.C. § 1382(a) provides the Secretary authority to ‘prescribe such regulations as are necessary and appropriate to carry out the purposes of this subchapter.’ Under the Administrative Procedure Act, we must show deference to the interpretation by the agency charged with a statute’s interpretation . . . ‘The regulation is proper so long as it conforms to the fundamental objective of the Act’ . . .”); *Balelo v. Baldrige*, 724 F.2d 753, 760 (9th Cir.) (en banc), *cert. denied*, 467 U.S. 1252 (1984) (discussing § 1373(a)’s “necessary and appropriate”

clause in the context of the “broad rule-making authority expressly delegated to the Secretary.”).

In *Balelo*, the Ninth Circuit upheld NMFS’s regulation requiring vessel owners to consent to placement of observers, although not expressly authorized, because it was implicitly authorized by the broad rule-making authority delegated to the Secretary by the MMPA. *Id.* at 759. The court noted the U.S. Supreme Court’s emphasis that:

Where the empowering provision of a statute states simply that the agency may “make ... such rules and regulations as may be necessary to carry out the provisions of this Act,” ... a regulation promulgated thereunder will be sustained so long as it is “reasonably related to the purposes of the enabling legislation.

Mourning v. Family Publications Service, Inc., 411 U.S. 356, 369 (1973); *Id.* at 760. From there, the Ninth Circuit concluded, “It appears to us that the regulation at issue here is consistent with the objective and directives of the MMPA.” *Id.* at 760.

NMFS interprets the ‘disadvantage’ standard as requiring consideration of the potential effects to the stock’s abundance relative to OSP. Yates Decl. ¶ 56. As explained above, the proposed regulations incorporate multiple safeguards to ensure that the proposed waiver will not have a detectable effect on the ENP stock’s abundance or on the stock’s functioning of the marine ecosystem or the health and stability of the marine ecosystem. For those same reasons, the proposed regulations are necessary and appropriate to ensure that the proposed ceremonial and subsistence hunt will not disadvantage the ENP gray whale stock and will be consistent with the MMPA’s purposes and policies.

2. NMFS Fully Considered All Relevant Factors in Prescribing the Proposed Regulations

NMFS fully considered all of the relevant statutory factors in the proposed regulations and also fully considered the risk that the proposed regulations would result in injury or harm to a WNP whale as an additional relevant factor.

a. Existing and Future Levels of Marine Mammal Species and Population Stocks

The proposed regulations will have no discernible effects on the future levels of ENP gray whales. As noted, the proposed waiver would result in an average of 2.5 deaths per year over 10 years, which is unlikely to have a discernible effect on the stock's abundance relative to OSP. Weller Decl. ¶ 37.

b. International Treaty and Agreement Obligations

In prescribing the proposed regulations, NMFS fully considered the United States' existing international treaty and agreement obligations, namely, the International Convention for the Regulation of Whaling (ICRW). Through the IWC, the United States has obtained a catch limit for ENP whales for the Makah Tribe. Weller Decl. ¶ 9. Through a bilateral agreement with the Russian Federation, the United States can allow the Makah Tribe to harvest up to five whales per year. *Id.* The proposed regulations would authorize harvest below the level allowed by the IWC. Yates Decl. ¶ 59. The IWC scientific committee has also evaluated a Makah tribal hunt as would be implemented under the proposed regulations and determined that the hunt meets IWC conservation objectives for ENP, WNP, and PCFG whales. Weller Decl. ¶ 42; Yates Decl. ¶ 59.

c. Marine Ecosystem and Related Environmental Considerations

NMFS fully considered the effects of the proposed regulations on the marine ecosystem, as documented in NMFS's Biological Report and the 2015 DEIS. *See* NMFS Ex. 17, at 25-29. Again, average annual removal of up to 2.5 ENP gray whales from a population of over 20,000 would not have a discernible effect on the functioning of ENP gray whales in the marine ecosystem, on the functioning of ENP gray whales in the northern California Current ecosystem, or in the hunt area. Weller Decl. ¶¶ 69-70. Moreover, in the 2015 DEIS, NMFS considered other elements of the marine environment, including water quality, pelagic and benthic habitats,

other species of fish and wildlife, and noise levels. Weller Decl. ¶ 72; *see* 2015 DEIS 4-11 to 4-30, 4-63 to 4-96, 4-160 to 4-166.

d. Fishery Resources

The proposed regulations would have no effect on the conservation, development, or utilization of fishery resources.

e. The Economic and Technological Feasibility of Implementation

In the 2015 DEIS, NMFS fully analyzed the economic costs of hunt management and law enforcement. 2015 DEIS Section 4.6.2.5. NMFS's costs would primarily involve the continuation of longstanding whale surveys and photo-identification work, with additional funding of approximately \$2,000 per day of hunting needed to support NMFS monitoring and enforcement personnel. As noted in the DEIS, the annual NMFS budget for marine mammal management in the West Coast Region is over \$700,000, so such costs are feasible to obtain and are not expected to affect NMFS's ability to implement a hunt. Third Yates Decl. ¶ 24. The Tribe's 1999 gray whale hunt successfully demonstrated the technological feasibility of prosecuting a hunt according to the proposed regulations. Yates Decl. ¶ 62. Likewise, the proposed regulations include provisions for matching photographs of struck whales to those of known whales, a procedure which is technologically feasible. Weller Decl. ¶ 57. The proposed regulations include provisions for marking and tracking handicrafts made from harvest whale parts, which is also technologically feasible. Yates Decl. ¶ 62.

f. The Proposed Regulations Appropriately Manage Risk to WNP Gray Whales

In developing the proposed waiver and regulations, NMFS determined that the potential effect of the proposed hunt on WNP gray whales was an additional relevant factor that should be fully considered. NMFS, in evaluating the risk to WNP gray whales, considered both: (1) the

probability of encountering a WNP gray during an ENP gray whale hunt or training; and (2) the likelihood that an encounter would kill or otherwise harm a WNP whale. To reduce the risk of encountering WNP gray whales during an ENP hunt, 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 or June, seasonal restriction on training harpoon throws, restriction on multiple strikes within 24 hours during even-year hunts, and the requirement if a WNP whale is confirmed to be struck, the hunt will cease until steps are taken to ensure such an event will not recur. Yates Decl. ¶¶ 27-29, 31-32, 34-35, 40-43.

Additionally, NMFS's scientists undertook a risk analysis to quantify risk to WNP whales from strikes, strike attempts, and approaches. Based on conservative assumptions, there is a 7.4 percent probability of hunters striking one WNP gray whale over the 10 years of the regulations, meaning that one in 13.5 10-year hunt periods (*i.e.*, one year out of 135) would result in an individual WNP gray whale being struck 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. Second Moore Decl. ¶ 8.

Also, based on the proposed regulations' limit on unsuccessful strike attempts and training harpoon throws, there is a 36.5 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 27 years 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. NMFS Ex. 4-15, at 12. A WNP whale subjected to an unsuccessful strike attempt or training harpoon throw would likely experience the event as a temporary

disturbance that would not have a lasting effect on the whale's health or behavior. Weller Decl. ¶¶ 48-51.

As for approaches, given the Proposed Regulations' limits, NMFS's risk analysis indicates that approximately 18 WNP gray whales could be approached within 100 yards over the ten years of the waiver period, or an average of 1.8 per year. NMFS Ex. 4-15, at 13. This analysis conservatively assumes that all allowed approaches (353) would be made during even-year hunts when there is the potential for WNP whales to be present in the hunt area and no approaches, either for training or hunting, would be made during odd-year hunts. *Id.* at 12, n.3. NMFS expects that ENP whales will be more readily available in the hunt area and the weather more conducive for hunting and training during summer and fall months. Yates Decl. ¶ 66. If the Tribe made the full number of approaches allowed under the proposed regulations and divided those approaches evenly between odd-year and even-year hunts, then our analysis suggests that less than one WNP whale (.9 whale) would be subjected to an approach annually. An approach is not likely to result in more than temporary disturbance. Weller Decl. ¶¶ 46-47. Thus, NMFS, in keeping with its conservative and precautionary approach, ensured that the proposed waiver and regulations pose an extremely low risk to WNP gray whales.

III. NMFS RENEWS ITS MOTIONS TO LIMIT SCOPE

NMFS filed its Motion to Limit Issues and Testimony on August 9, 2019, and its Motion to Limit Rebuttal Issues and Testimony on August 16, 2019 ("NMFS's Motions to Limit Scope). Additionally, on August 19, 2019, NMFS filed its Combined Response to Parties' Motion to Exclude ("NMFS's Combined Response"). On October 19, 2019, Judge Jordan issued an Order Granting in Part And Denying in Part Motions in Limine And Requests to Modify the Final Agenda ("Order"). For the reasons articulated in NMFS's Motions to Limit Scope and

Combined Response, NMFS hereby renews those aspects of its Motion that would eliminate extraneous matters from being relied on in the Court’s recommended decision for this matter, namely, issues and testimony unrelated to the controlling legal requirements or public comment/opinion or legal argument improperly proffered as expert testimony.

IV. PROPOSED DEMONSTRATIVE EXHIBITS

NMFS has prepared four demonstrative exhibits, which NMFS proposes to use as visual aids at the hearing to facilitate and streamline NMFS’s oral testimony. Each demonstrative exhibit includes references to the filed NMFS exhibits from which the data presented is derived. NMFS’s proposed demonstrative exhibits are attached hereto and include:

NMFS Demonstrative Exhibit 1, “Range of ENP Gray Whale Stock, PCFG, and Proposed Hunt Area,” which is a map of the ENP gray whale stock’s range showing the PCFG summer feeding area and proposed hunt area;

NMFS Demonstrative Exhibit 2, “1999/2000 & 2019 Gray Whale Unusual Mortality Events (UME) along the West Coast,” which is a chart and graph illustrating mortality estimates from the 1999-2000 UME and the 2019 UME, as well as PCFG abundance estimates and ENP calf production estimates;

NMFS Demonstrative Exhibit 3, “Abundance Estimates for ENP Gray Whale Stock and Pacific Coast Feeding Group (PCFG),” which displays ENP and PCFG abundance estimates from 1967 to present; and

NMFS Demonstrative Exhibit 4, “Key Hunt Elements Under the Proposed Regulations,” which outlines the main hunt management provisions in the Proposed Regulations.

V. CONCLUSION

As explained above, NMFS has demonstrated, based on the record in this matter, including the best scientific evidence available, that the proposed waiver and regulations are supported by substantial evidence under each of the relevant MMPA statutory requirements. By authorizing a limited ceremonial and subsistence hunt for ENP gray whales for only a 10-year period, NMFS's proposed waiver and regulations will have no discernible effects on marine mammals or their ecosystems, reflect a conservative and precautionary approach, and are based on robust scientific evidence reviewed by experts from top marine mammal scientific bodies. Accordingly, NMFS's proposal is squarely within its broad rulemaking authority and consistent with the objective and directives of the MMPA.

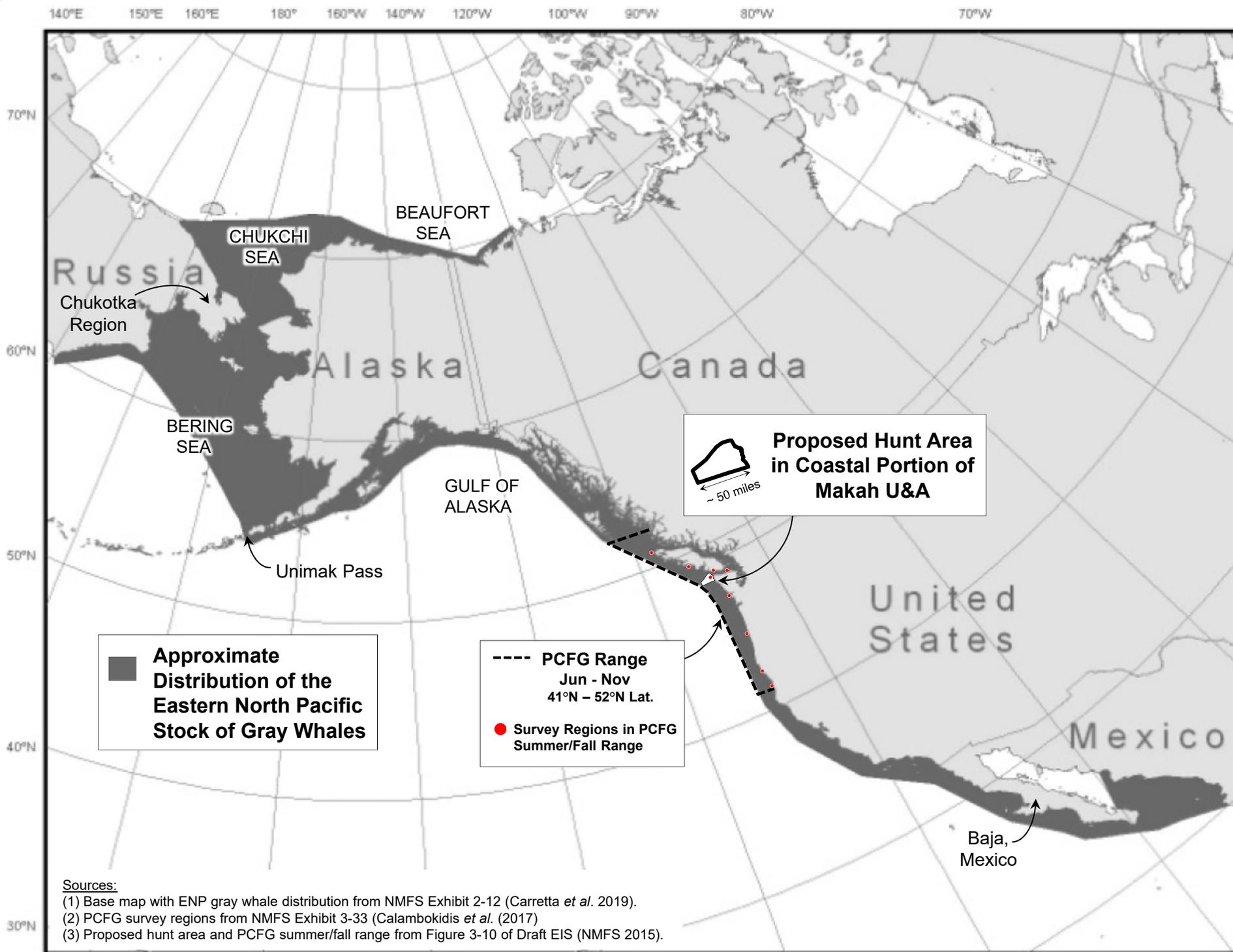
Respectfully submitted this 7th day of November, 2019.

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

By: /s/ Rachel Morris
Laurie K. Beale, Attorney-Advisor
Caitlin B. Imaki, Attorney-Advisor
Rachel L. Morris, Attorney-Advisor
7600 Sand Point Way NE
Seattle, WA 98115
laurie.beale@noaa.gov
(206) 526-6327
caitlin.imaki@noaa.gov
(206) 526-6159
rachel.morris@noaa.gov
(206) 526-6537

Counsel for the National Marine Fisheries Service

Range of ENP Gray Whale Stock, PCFG and Proposed Hunt Area

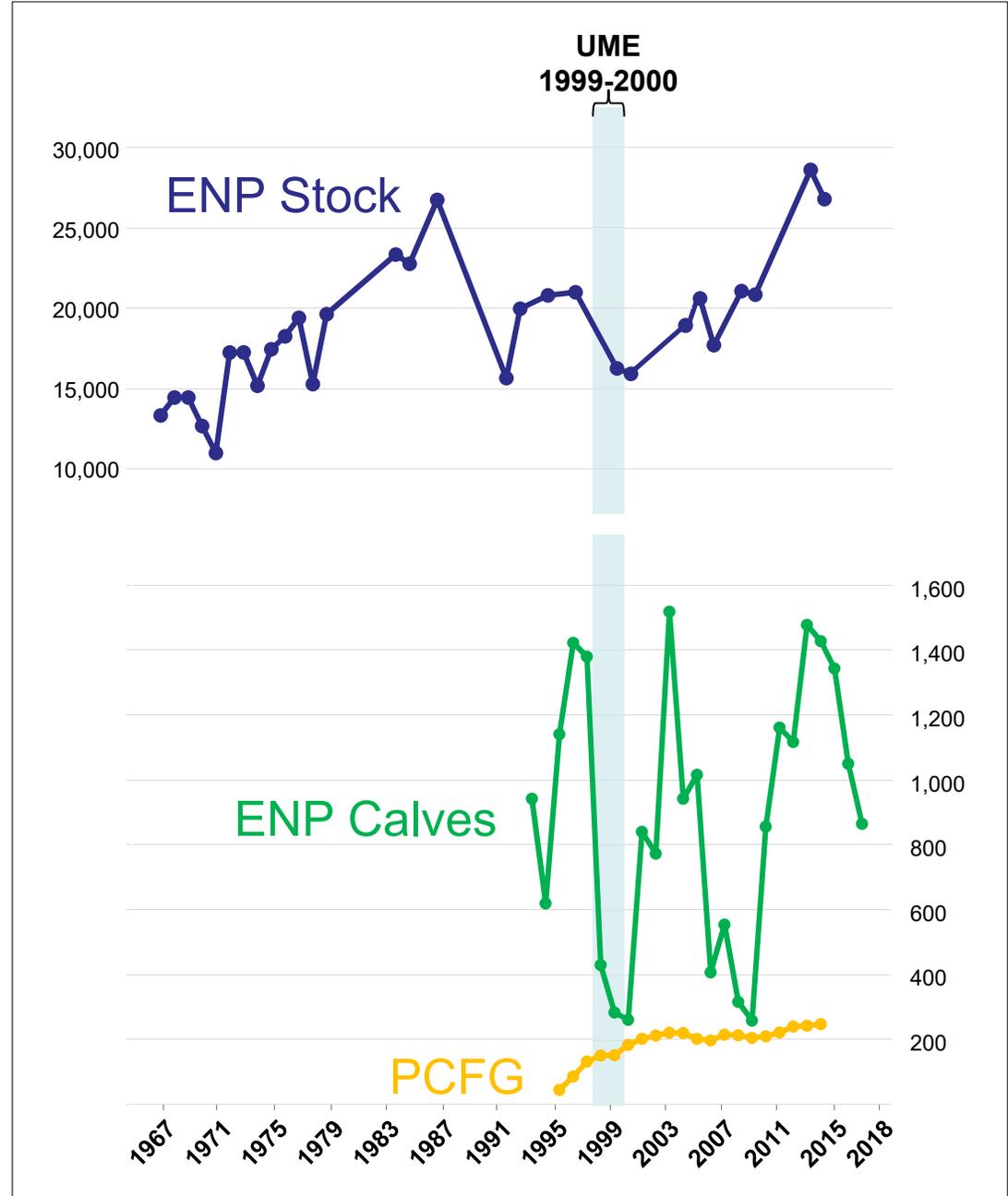


1999/2000 & 2019 Gray Whale Unusual Mortality Events (UME) along the West Coast

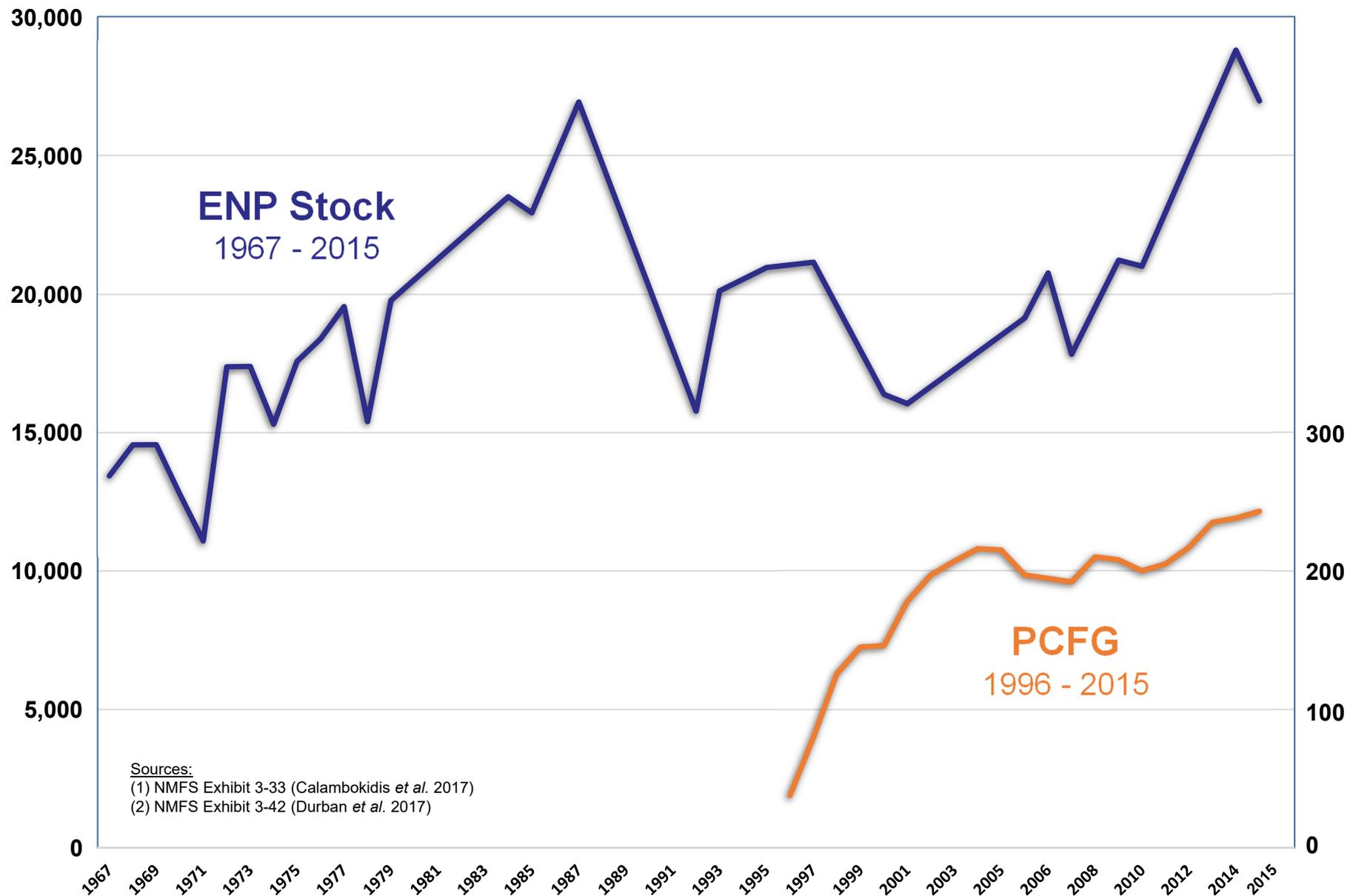
Country	1999 UME	2000 UME	2019 UME (As of 11/5/19)
Canada	10	22	10
U.S.	149	139	122
Mexico	124	207	81
Total	283	368	213
Per Capita Stranding Rate (Jan - Apr)	0.0018	0.0022	0.0011

Sources:

- (1) NMFS Exhibit 1-21 (Gulland *et al.* 2005)
- (2) NMFS Exhibit 2-20 (UME Working Group 2019)
- (3) NMFS Exhibit 3-42 (Durban *et al.* 2017)
- (4) NMFS Exhibit 3-86 (Weller and Perryman 2019)
- (5) NMFS UME website - <https://www.fisheries.noaa.gov/national/marine-life-distress/2019-gray-whale-unusual-mortality-event-along-west-coast>



Abundance Estimates for ENP Gray Whale Stock and Pacific Coast Feeding Group (PCFG)





Key Hunt Elements Under the Proposed Regulations

Source: NMFS Proposed Rule (84 FR 13604)

Element/ Regulation	Management Response	
	Even Year Hunts	Odd Year Hunts
Waiver Period §216.118(a)	10 years	
Permit Duration §216.113(a)(1)	Initial permit ≤ 3 years; subsequent permits ≤ 5 years	
Hunt Seasons §216.113(a)(2)	Dec - May	Jul - Oct
Landing Limits §216.113(a)(4)(v)	3	1
Strike Limits §216.113(a)(4)(iii)	3 (limit 1 strike per 24 hour period)	2
Struck & Lost Whales §216.113(a)(4)(iv)	3 max per calendar year	
Limits on Strike Attempts + Training Throws §216.113(a)(4)(ii)	18	12
Limits on Approaches §216.113(a)(4)(i)	353 (hunting + training) per calendar year, [sub-limit of 142 for PCFG]	
Identification & Accounting §216.114(a)(2)	After a whale is landed, hunting ceases until NMFS completes identification process	
	Unidentified struck whales counted as PCFG based on best available information (current est. ~ 28% PCFG)	Unidentified struck whales all counted as PCFG (current est. ~ 48% PCFG)
PCFG Strike Limits §216.113(a)(4)(iii)	16 over 10 years (average 1.6 / year) [sub-limit of 8 PCFG females]	
PCFG Stop-hunt Triggers §216.113(a)(4)(vi)	No permits issued if PCFG Abundance estimate drops below 192 or Minimum Abundance estimate drops below 171	
WNP Stop-hunt Provision §216.113(a)(4)(vii)	All hunting ceases if WNP is struck (no further hunting unless new measures are imposed to ensure no additional gray whales are struck)	