

ADMINISTRATIVE LAW JUDGE

March 19, 2020

THE HONORABLE GEORGE J. JORDAN

Docket No. 19-NMFS-0001

POST HEARING BRIEF

PENINSULA CITIZENS for the PROTECTION of WHALES

submitted by Margaret Owens

Honorable Judge Jordan,

Participating in the Seattle hearing was quite an experience, and I appreciated meeting participating parties from all sides. I credit you for creating a calm, tolerant atmosphere.

However, the members and supporters of PCPW remain frustrated and anxious, believing that our local concerns remain unanswered, and that most "facts" remain in stark dispute.

We certainly do not believe that NMFS has made the case nor used best available science in the attempt to justify the killing of gray whales.

We see the government and the Tribe preparing to go forward with a plan, "into perpetuity", that guarantees inevitable and cumulative harms to local whales and the local ecosystem.

Eastern North Pacific and Western North Pacific gray whales migrating through local waters will also face harassment, harm, and death. Local beaches well within the 5 mile range of the whale hunting rifle and the near shore hunting area, will put hikers and campers in a danger zone. We see in the hearing transcripts misleading and inaccurate testimony meant to

deflect from legitimate concerns.

We ponder the exchange in the Hearing Transcript, Vol.1, pg.39, between Mr. Gruber (Makah) and Mr. Yates (NMFS) discussing NMFS' respect for treaty rights:

(line 5) : Mr. Yates: "...The U.S. government has a long history of supporting the Tribe's desire to resume ceremonial and subsistence hunting as evidenced by our carrying forward a request for a catch limit at the IWC. *Absent that treaty right and absent that quota from the IWC, we would not be moving forward with a MMPA waiver for gray whales.*" (emphasis added)

As plaintiffs in the Anderson v Evans proceedings of the early 2000s , this statement brings back the words of those 9th Circuit Court judges to our minds, including these:

"This court reversed the District Court in Metcalf. We held that the EA was invalid...it was not produced until after the agreement with the Tribe had been consummated."

"A new EA must be drafted ...under circumstances that ensure an objective evaluation free of the previous *taint*." (Anderson v Evans)

We do not understand how NMFS could ever claim to have accomplished that clear, basic directive. To actually remove the "taint" of their previous actions, NMFS would have had to roll back all the decisions, from the mid-1990's forward, that sprang from their hastily arrived at belief that the Treaty of Neah Bay took precedence over the conservation principles of the Marine Mammal Protection Act. That includes the 1996 and 1997 decisions to represent the Tribe's controversial quota request at the IWC. NMFS's confidence that U.S. law allowed domestic support of the Tribe's " quota needs ",without NEPA analysis, was strongly refuted by the 9th Circuit. NMFS and the Tribe should cease calling the 1999 kill "legal", and the IWC quota for Makah "settled".

In the case of the IWC quota, NMFS should have put the cart back behind the horse. No support for an IWC quota ahead of an objective, and public, EIS process to evaluate the Makah request. **No consummation without evaluation.** And only when domestic laws had been adhered to, would a quota perhaps be sought at the IWC. And that quota request should be then subjected to an IWC vote, as was standard practice at the IWC, "un-bundled" from the long-standing Russian subsistence quota. NMFS never did roll back these improper actions, and the "taint", embedded and enshrined in the IWC quota, remains. This quota win in 1997 was the "consummation": a "back door" deal with the Russians that provided forward momentum for an activity, killing whales, so abhorrent to most Americans, and so wrongly categorized as a "cultural and subsistence need". **This IWC quota is the shaky legal "sand" that is at the foundation of this rickety 25 year construct.**

Obfuscation of these and other issues by NMFS and the Makah Tribe has led them both down a path strewn with partial truths and questionable interpretation of data. Math and science have remained fuzzy and subject to the bias inherent in ensuring a pre-determined outcome. A few examples from the Hearing:

* Government experts are obviously not yet able to give the public a full range of possible explanations for gray whales dying in the 2019-2020 UME, but NMFS cannot even explain the 1999- 2000 UME. The most likely explanation, climate change's huge impact on the arctic ecosystem's food web, is already being marginalized by NMFS. The government's favored explanation will always be "carrying capacity" related. The ENP will always be "robust" and " healthy" and at OSP, no matter what the population falls to, if blaming a continually shifting carrying capacity is the "best available science". NMFS should be realistic, and describe this ENP population as the last shred of a once mighty gray whale population that existed on both sides of the Atlantic and Pacific Oceans. They are vulnerable to numerous possible calamities , and there should surely be an estimated number that would trigger alarm.

*Jonathan Scordino and Dr. Weller undermine the value of the genetically distinct foundation of the PCFG population (internally recruited), by repeating over and over that "other" whales (externally recruited) will take their places, and that will be just fine. And with no evidence, Scordino asserts that perhaps the prey species will *benefit* from the removal of the PCFG whales, the very whales who have counted most on feeding in those Biologically Important Areas for generations. The same generational foraging grounds on the coast that also "happen to be" the preferred "hunting" areas of the Makah whalers. (Hearing Transcript :Vol.3, pg. 212)

* NMFS' failure to analyze the ENP / PCFG's Salish Sea Ecosystem is also dealt with in a very cavalier manner . NMFS believes that they score easy points, and end the discussion on this topic, when they prompt their scientist in this way, after my questions about a lack of analysis of the Salish Sea Ecosystem: **(Vol. 1- Hearing transcript, pg.85, lines 13-16):**

Ms. Beale (NMFS) : " Mr. Yates, under the proposed waiver, would hunting occur anywhere in the Salish Sea ?"

Yates (NMFS) : " It would not."

Ms. Beale (NMFS) : "That's all I have. No further questions."

The question has no relevance, and neither does the answer. The same PCFG whales that feed in the outer coast hunt zones, also feed on the Salish Sea coast lines. Depletion of PCFG whales on the coast equals depletion in the Strait, in both the U.S. and Canadian waters. The effect on the entire Salish Sea must be analyzed. And unless NMFS can explain how *any* gray whales find the patchy areas of seasonal food, we will assume that the Salish Sea is a complex and varied ecosystem that works best for gray whales whose PCFG mothers brought them in on their first spring migration . **(More about the Beale / Yates**

quote above, later.)

* Mr. Yates notifies us in his Declaration that stock designation for the PCFG will remain "equivocal". We believe him, as there are no plans for a Task Force meeting that could reconsider the evenly split scientific opinions on PCFG designation *before* decisions are made that could threaten their numbers and future viability. **(Vol.1 - Hearing transcript, pg.105, line 6):**

Ms. Lewis (AWI) : "So given the information and studies that have been published since 2012 regarding this issue (PCFG stock status), is NMFS planning to hold another workshop to reassess and update its guidelines regarding gray whale stock structure?"

Ms. Bettrige (NMFS) : "I do not know of any plans for such a workshop at this point."

NMFS requires "internal recruitment", but there is no definition of what percent of internal recruitment will tip the scale to allow stock status designation for the PCFG . NMFS admits internal / external recruitment is at 50-50 now. How much will be enough ? The Task Force has no answer.

* And after over 12 years of suggesting that NMFS consult with Olympic National Park about the grave human safety issues involved with the firing of .50 caliber rounds right off shore of the Park's premier coastal wilderness hiking and camping areas, where have we gotten? NMFS *has* been pushed by commenters to analyze the risk . (DEIS 2015) They were also pushed to analyze a safer- for- bystanders off shore hunt alternative (DEIS 2015 Alt 3- Off Shore Hunt). But it seems that they will *not* be pushed to *pick* that safer scenario or to even speak to the Park leaders about it. What they *will* do is accommodate the Tribe's wish for a near shore hunt at the feeding sites. Park visitor safety? Not the top priority for either co-

manager.

Public trust, locally, has never been earned by NMFS when it comes to this whaling effort. We can never forget that NMFS once allowed the Tribe to change its' Management Plan after the comment period had ended on a Draft EA in 2001. NMFS allowed the Makah to make a massive change to their Management Plan, from a coastal, migration-focused hunt, to a hunt with no time or area restrictions. That meant hunting all the way into the Strait almost to Port Angeles, any time of year. This illustrated to us the Tribe's control over the process, and NMFS' insupportable reflex to acquiesce to their demands.

No wonder the Court took NMFS to task, and no wonder the local public lost all faith in NMFS' ability to fairly assess or control a hunt plan. In the end, it was our argument about the planned use of the .50 cal. rifle near the shore, not the existential risk to our local whales, that kept the hunt out of the Strait. Had the Tribe enacted that Management Plan, taking 20 whales every 5 years from the coast and Strait, the whole issue of "local whales" or "resident whales", would be moot. Potentially, 80 whales gone by now. Would "other" whales have found the moveable feast in the Salish Sea ? Or would the inland hunting waters be empty of gray whales?

PCPW would like to point out:

(1) Failure of NMFS to analyze the potential cumulative negative effects to the Salish Sea Ecosystem, of removing Makah U&A PCFG gray whales into perpetuity.

"The primary objective of marine resources management under the MMPA is to maintain the health and stability of the marine ecosystem."

" The MMPA states that species and population stocks of marine mammals should not be permitted to diminish beyond the point at which they cease to be a significant

functioning element of the ecosystem.” (Fed. Register April 5, 2019)

These statements reflect a strong emphasis on the requirement that removal of marine mammals from their ecosystems must cause no harm to the ecosystems. For some reason , NMFS has assumed that they only needed to consider the ecosystem on Washington's outer coast: the hunt area portion of the PCFG range. Either NMFS does not believe the Salish Sea to be a legitimate "ecosystem", separate from the California Current ecosystem, or NMFS does not believe that ENP / PCFG whales utilize it in a significant way as part of their spring/summer/fall feeding range. No substantive answers were forthcoming from NMFS at the hearing.

Whether or not NMFS considers these inland waters to be worthy of the designation, "ecosystem", PCPW did not invent the concept. In fact , the federal government's EPA website has posted: **"Health of the Salish Sea Ecosystem Report"**, a joint initiative between the EPA and Environment and Climate Change Canada . This report is described as "...a collaboration to report to the public on the health of our shared ecosystem."

Use of the Strait of Juan de Fuca, and connected inland waters, by ENP / PCFG gray whales is beyond dispute. And as a multi national species, all the numerous sightings of PCFG gray whales feeding in the near shore areas of South Vancouver Island, Canada, (SVI) count as Salish Sea habitat use by PCFG whales. There are not "Canadian PCFG" and "U.S. PCFG". On the U.S. side of the Strait, NMFS defines Makah U&A PCFG whales as : **" PCFG whales observed in either the northern Washington survey area (from Cape Alava to Cape Flattery) or Strait of Juan de Fuca survey area (from Cape Flattery to Admiralty Inlet)."** (DEIS 2015 , pg. 3-122, lines 21-23) Admiralty Inlet is many miles east into the Strait , far east of Jonathan Scordino's surveys in the western Strait. The Puget Sound spring feeding

ENP whales, also show strong site fidelity deep in the Salish Sea in the Admiralty Inlet area.

Washington Department of Fish and Wildlife (WDFW) stated in their 1997 Status Report on Gray whales, Executive Summary : " Gray whales present in inland marine waters during the summer may constitute a "significant portion of the species' range within the state."

Summer surveys in the Pacific Northwest have always found individually identified PCFG whales utilizing the inland waterways and adjoining survey areas. An extensive survey was reported in "Gray Whale Photographic Identification in 2002: Collaborative Research in the Pacific Northwest", prepared for the National Marine Mammal Laboratory, and released in 2003. Regarding utilization of feeding sites, (Results and Discussion, pg.5) : **"Interchange rates were highest among close neighboring areas, with [Strait of Juan de Fuca (SJF) and North Washington Coast (NWA)] , [Strait of Juan de Fuca (SJF) and South Vancouver Island (SVI)], [NWA and SVI] , and [SVI and West Vancouver Island] having the highest interchange. "**

These results confirm what all parties know, and what NMFS stated in **DEIS 2015**:

"Although all of the action alternatives restrict hunting to the coastal portion of the Makah U&A, the analysis of all of the alternatives considers gray whale numbers in both portions (coastal and Strait of Juan de Fuca) of the Makah U&A. This is because of the overlap of whales identified in both areas. If there were a decrease in the numbers of whales using the coastal portion of the Makah U&A under alternatives that limit hunting to that area, it could also result in a decrease in the number of whales using the Strait of Juan de Fuca." (DEIS 2015, pg. 4-69, lines 13-18)

So, again, how does NMFS' question to Chris Yates (above) clarify NMFS' position? By insinuating that there is no connection between the PCFG whales in the Strait and the PCFG whales in the hunt area? They are the same , relatively few, whales.

NMFS was directed by the Court in *Anderson v. Evans* (2004) " to evaluate local effects". In DEIS 2015, at page 4-69, lines 6-9, NMFS states : "...the Court concluded that we must consider not just the effects to the PCFG whales, but effects to the smaller group of whales frequenting the Makah U&A. The "...Court referred to these whales as "the relatively small group of whales that comes into the tribe's hunt area each summer- about 60% are returning whales." (DEIS 2015, pg. 3-121)

The Court also stated : "In short the record establishes that there are "substantial questions" as to the significance of the effect on the local area...The EA simply does not adequately address the highly uncertain impact of the Tribe's whaling on the local whale population and the local ecosystem. This major analytical lapse is, we conclude, a sufficient basis for holding that the agency's Finding of No Significant Impact cannot survive the level of scrutiny applicable in this case." (*Anderson v. Evans* 2004)

NMFS has *still* failed to comply with the Court's directions , and adds to that their failure to comply with the MMPA waiver requirements. NMFS must evaluate ecosystems which could suffer from the lethal removal of gray whales. Makah U&A gray whales certainly utilize, out of necessity , the length and breadth of the Salish Sea as part of their "south of the Arctic" feeding strategy. The Salish Sea is already a struggling ecosystem, suffering from the "death by 1,000 cuts" that our environments experience at human hands. Common sense tells us that this vital waterway will suffer

numerous harms if gray whales are slowly but surely removed from the local environment. The "environmental services" that the only baleen whales in the near shore provide, are not reproduced by any other method. We believe that 'brushing aside' the need to analyze the role of gray whales in the Salish Sea is a continuation of the "major analytical lapse", and should not survive the level of scrutiny required by this decision to seek a waiver to kill these whales.

We do not believe that the judges in *Anderson v. Evans* would have been entertained or fooled by NMFS' dismissive question (above) to Mr. Yates. NMFS smiles and winks as they mislead.

We also believe that objective observers should be as concerned as we are with the following exchange during the hearing: **Hearing Transcript, Vol 3, pg. 210-211 .**

(PCPW asked Jonathan Scordino why the Salish Sea Ecosystem was not analyzed by NMFS as part of the PCFG range.)

(pg. 210, line 12-24) :

Scordino (Makah): "...so the conclusions that NOAA made regards to California Current ecosystem could be drawn for the Salish Sea as well..."

Owens (PCPW): "...You could draw the same conclusion that there'd be no impact?"

Scordino: "If you do the same analysis that they did...it's mainly they have large scale processes." (continued Pg. 211, line 1-6) " I'll let them (NOAA) do their analysis.

...but if... I was doing that analysis, I would come to the same conclusion as they did for the California Current ecosystem."

Owens: (line 7) "That there would be no impact?"

Scordino: "That you wouldn't have an observable impact on the ecosystem. And you've got to remember, these whales are going to replace, right?"

PCPW gleans the following from this exchange:

- There is not much "analysis" needed to simply use the phrase: "large scale processes" or "no observable impact".

- The actual definition of the word "analysis", from Merriam- Webster and other dictionaries: "A detailed examination of anything complex in order to understand its

nature or to determine its essential features: a thorough study. Literally to break a complex topic into smaller parts in a methodical way, in order to gain a better

understanding of it. To learn about its parts, what they do, and how they are related to each other. To find out how something works."

If Mr. Scordino believes that the roles gray whales play in any environment will be easily "observable", then he wants us to forget that those roles are played out over time and

under water. His drive-by observations of the gray whales in the Salish Sea, east of Sekiu, and his lack of local benthic prey studies disqualify him from announcing what rapid

"conclusions" he would come to if he were "doing the analysis." An actual "analysis" would have many components, including: the effects that benthic feeding habits of the PCFG

have on the various prey species and their habitats; the impacts to other aquatic and bird species of the raising into the water column of nutritious matter; the enrichment of the

ecosystem from the wastes of whales; an examination of any possible acidification mitigation that results from whales' activities and presence in the ecosystem.

Equally discouraging is Scordino's implication that NMFS would see things as he does. **Let neither the Makah nor NMFS forget what an "analysis" actually is.**

- Scordino's last line again repeats the argument that is meant to solve all problems : "And you've got to remember, these whales are going to replace, right?"

PCPW strongly recommends that :

- NMFS should admit that the Salish Sea is an ecosystem, separate from the California Current Ecosystem.

- NMFS should admit that the Salish Sea is used by ENP / PCFG gray whales, as an important part of their unique "southern" feeding behavior.

- NMFS should admit that the PCFG whales that utilize the Strait of Juan de Fuca / Salish Sea also feed on the outer coast in the hunt area and are most certainly "significant functioning elements "of both of the ecosystems. That is something that *can* be seen from the surface.

- NMFS should admit that to comply with MMPA waiver requirements, they need to stop the waiver process while they analyze the effects of removing gray whales from the Salish Sea. And by "analyze", we have noted our research expectations , at the least, above.

- NMFS should admit that it is immaterial, in this regard, to state that there is "no hunting in the Strait" .

NMFS should also explain what Dr. Bettridge (NMFS) meant in her exchange with Ms. Imaki (NMFS) regarding PCFG stock status : (Hearing Transcript, Vol.1, pg.95) :
(line 9) Dr. Bettridge: '...we recognize that this is a population that we want to make sure continues its role in the ecosystem.'

What *is* the role of the PCFG in the ecosystems relevant to this Hearing? NMFS has decided that there is no discernible role played on the outer coast, so what is Dr. Bettridge referring to?

{Note to NMFS: The Salish Sea Ecosystem Conference convenes on April 19-20, 2020, in Vancouver, B.C.}

(2) Failure of NMFS to insist on a hunt plan that provides safety to Olympic National Park visitors:

The use of the very long-range .50 caliber rifle, near shore, has been a 20 year controversy. The reason that there is now no hunting allowed within the Strait , is the acknowledgement by NMFS of the very real danger to "bystanders". But the current

near shore hunt plan embraces the *same risks*. The alternative eventually proposed by NMFS to mitigate the risk, the **Off Shore Hunt (Alt.3), DEIS 2015**, gave us fleeting hope that public safety would be a priority this time. **But the Tribe has prevailed, and there will be no off shore hunt.** From (Transcript Vol. 3, pg.188 , starting at line 15) :

Ms. Owens (PCPW) : "...How does the tribe feel about the off shore alternative?

Mr. Scordino (Makah) : " The off shore alternative would significantly reduce the opportunity to hunt whales. During the northbound migration...the whales are often traveling...inside the 5 mile number that you give there. " {Referring to PCPW Exhibit, " Whales, Campers, and the 50 Caliber Rifle".} "(The off shore hunt) ...would fully eliminate the summer and fall odd-year hunts, because the whales are not observed outside of 5 nautical miles in any predictable measure."

PCPW agrees with Mr. Scordino's last statement. An off shore alternative *should* be focused on hunting during migration times. Hunting migrating, not resident, whales was always the stated objective in the late 1990s. Avoiding "resident" whales was the reason that the first hunt season in 1998 began in the fall, and that the 1999 hunt occurred in the spring.

"Local"whales were always supposed to be avoided. It is only now, with the realization that WNP whales are in the migration with the ENP, that saving *them* became such a high priority, and PCFG whales were demoted to "sacrificial lamb" status. There has never been a summer only near shore hunt plan targeting PCFG whales , and there shouldn't be one now.

In the case of the 1999 hunt, the dangers of the .50 caliber had seemingly not been considered by anyone but the **Coast Guard**, who stated in 1999 :

**"The uncertain reactions of a pursued or wounded whale and the inherent dangers in firing a .50 cal. hunting rifle from a pitching and rolling small boat are likely to be present in all future hunts, and present a significant danger to life and property."
(DEIS 2008, pg.3-10.)**

This warning was not taken to heart by anyone involved in managing the Makah hunt. Only PCPW followed up by researching the .50 cal. weapon, and after getting advice from a respected U.S. Army ballistic expert, we took a strong position against its' use close to populated areas and have commented extensively over the years. In the name of human safety, an off shore hunt was analyzed by NMFS , and could be a compromise position that some could accept. So why isn't this considered?

The Transcript exchange above with Mr. Scordino sheds light on the prime excuse: not enough whales off shore. He rightly notes that a summer off shore hunt will not be fruitful, but in the first two sentences he is saying that there are also not enough whales 5 miles off shore during the *northbound migration* time. I countered in my cross examination, that I had used the study by Green et al, describing an off shore migratory "corridor" used by ENP whales, (at **Hearing Transcript Vol.3, pg. 189 , lines 2-19**) . His counter to me was to denigrate the Green et al study, and remark upon his own, different, observations :

Scordino: "So Green et al. had very limited observations of whales, that was based on some aerial flights and did not see very many whales. So, the spacial scope and the time scope of that analysis was very limited...February we'll see a little bit more whales that are outside than maybe inside of 5. Outside of that, the whale observations are mostly inside of 5 miles." (Vol.3, starting: pg. 190 ,line 20 through pg. 192) One would need to read the Green et al. paper to understand the extent of

Mr.Scordino's misrepresentation of it.

So who has the "best available science" in this discussion of off shore gray whale density during migration seasons? The report by Green et al. is titled " **Offshore Distances of Gray Whales Migrating Along the Oregon and Washington Coasts** ", (1990). It has been the "go-to" reference for decades. **NMFS must have faith in the research, because they referenced Green et al. studies on migration through Washington State waters (17) times between pages 3-104 and 3-108 of DEIS 2015. After lengthy discussion of various researchers' work, including Green's findings , the DEIS 2015 has this to say on pg. 3-105 and pg.3-106:**

" These sightings *farther offshore along the Washington coast* are consistent with those reported by the following researchers:"

- **"Wilkes and Fiscus (1961), who sighted over 200 gray whales in late April generally travelling north 6 to 17 miles (9 to 28 km) offshore, just south of the project area in waters over the relatively wide continental shelf between James and Destruction Islands."**

- **"Green et al. (1992), who reported a mean offshore distance of 5 miles (8 km) for northbound whales off Oregon and Washington."**

- **"Green et al. (1995) ,who documented phase-one northbound migrants off the coast of Washington from March 11 through 16, 1990, as far out as 12.4 miles (20 km) and averaging a distance of 7.3 miles (11.8 km)."**

- **"Calambokidis et al. (2009a), who sighted northbound whales during February to April**

that tended to be close to shore, with *most* about 6 miles (10 km) offshore ."

Green et al. is the reference I used in creating my Exhibit, "**Whales, Campers and the 50-Caliber Rifle**" in 2008. On the subject of off shore migration patterns of the ENP, I will take the observations of the scientists used by NMFS in the 2015 DEIS. **Those scientists have found that there are plenty of migrating whales 5 miles off shore.**

The Tribe's other excuse not to support an offshore hunt is their own safety. But the truth is that Tribal fishermen are quite at home in off shore waters, with the various fisheries that take them out 40 miles and more at all times of the year. They well know that those waters can be very safe and accessible, weather depending. So the following part of Mr. Gruber's Redirect examination of Mr. Scordino is meant to counterbalance my statements about **public** safety in Olympic National Park, by making misleading statements about **crew** safety,: (**Vol.3, pg. 238, lines 9-11**):

Mr. Gruber (Makah):" In your opinion, is there zero risk to the crew if the hunt is 5 or more miles offshore?"

Mr. Scordino (Makah): " No. The risk would increase as you go offshore. You are exposed to weather and ocean conditions."

No one, including NMFS, expects the modern Makah "whaler" to paddle off shore like their great grandfathers did. (Makah have claimed a 150 mile off shore whaling area.) **NMFS, in describing Alt.3 Offshore Hunt in DEIS 2015,pg. 4-17:**

" Alternative 3 assumes that the Tribe would most likely conduct a motorized hunt and not use canoes."

So the risks taken,voluntarily, by Makah whalers would likely be much **less** offshore, in large

boats, than canoe based whaling inshore. Additionally, the difference between risks to Makah whalers and risks to Olympic National Park hikers and campers is obvious. Whalers are **choosing** the risk, like skydivers or mountain climbers. Park visitors are on the beach for safe, peaceful recreation and contemplation of man's place in nature, **unaware they risk death or injury** from a .50 caliber rifle. Not comparable. Unconscionable for NMFS to refuse to contact Olympic National Park. (Related and unanswered question: who will be held responsible for whale hunting related death or injury to "bystanders" in the Park?)

So what is the real reason for the Tribe to oppose the "public safety first" Alternative 3, Off Shore Hunt ? All we are left with is guesswork. It could be the irresistible lure of the easily ambushed PCFG whales at their Biologically Important Areas : Jonathan Scordino's "habituated herd" at their near shore feeding areas . Tribal whalers may relish the "cultural" danger, but *public* safety must be assured to the maximum degree possible.

NMFS should heed the Coast Guard's warning. Shooting at an aggressive, charging, gray whale ,fighting for it's life, and possibly attacking the small boats, could preclude efficient use of safety protocols. **Safety protocols described by Scordino in his Declaration, pg. 17, as shooting at : "...a downward angle of more than 6.2 degrees, within 50 feet of the whale is the proper angle."** NMFS estimates that there will be (16) shots per kill. Odds are there will be many shots taken at less than "proper angles", in situations of iffy weather and visibility, and perhaps fear and panic. The "rogue whalers" were in no danger from their chosen whale, but managed to drop at least one .50 caliber rifle overboard in their chaotic 2007 "hunt".

NMFS need not and should not acquiesce to unreasonable demands that compromise public safety in this blatant way. This is a plan headed into "perpetuity". Everything

that can happen will happen, eventually.

PCPW strongly recommends that NMFS:

- Admit that they need to initiate contact with Olympic National Park Administrators, and have honest and transparent consultation on the risks inherent in the use of the 50. caliber. The public needs to know the Park's response.

- Decide who will be legally liable if there is human injury ,or property damage, on land or sea as a result of the use of the .50 caliber rifle.

- Re-assess Alternative 3, Offshore Hunt, to ascertain and analyze whatever the Tribe's objections are to it, in light of the human safety problem. It was, after all, put forward as a solution to the deadly risk to people on shore. Why is it not the *only* plan on the table now?

- Do all these things *immediately*, before this rushed process loses necessary time and flexibility.

Chris Yates states in his Third Declaration, pg. 23, "Other Matters":

"Ms. Owens asserts in her declaration that NMFS must consult with ONP regarding the proposed waiver...There is no statutory requirement for NMFS to consult with ONP."

He also states that Park safety "could be taken into account through the hunt permitting process..."

PCPW response:

First, how does sticking to "no statutory requirement" serve this analysis? There may not be "statutory requirement", but there is certainly no prohibition on consulting any public or private entity with a vital need to know! And who should be consulted with more rigor than land owners with property adjacent to NMFS' dangerous " project area "? Who are the property owners? The American people "own the land ".

And their/our land is administrated by government employees whose **greatest responsibility is to assure, as much as possible, the safety of people from all over the world who come to the Olympic Peninsula to enjoy the National Park. I believe that the American people would desire and expect the federal agency planning and supporting a dangerous activity (NMFS) ,to consult with the endangered federal entity (ONP) about the risks being imposing on them.** It may well be that ONP will need to weigh their responses, which could include actions that would require public comment periods. The coast is bound by the dictates of the Wilderness Act, which prohibit many activities within its' purview. There are whaling scenarios that could lead to a wounded or dead whale beaching or being beached in Olympic National Park. Does ONP need plans in place to allow motorized vessels to beach in the Park? To allow the dispatch of a whale, with the .50 caliber, on the beach? To butcher a whale on the beach? To load whale blubber and meat into motorized vessels on the beach? To clear people from the area? Some of these activities are clear violations of the Wilderness Act. **The Park may respond to NMFS by saying: "A near shore hunt is not an option !" Is this the response that NMFS expects, and seeks to avoid, by not communicating with the Park? If not, what *is* the reason to not explain the dangers NMFS brings to the "doorstep" of Olympic National Park? Locals would like to know.**

Secondly, the solution to the safety problem lies in the off shore hunt, which we don't

believe can be dealt with "through the hunt permitting process." For a different alternative to be seriously considered at this late date, will require more than the "permitting process" is meant to handle. At that point it will no doubt be presumed way too late to 'switch horses in mid-stream', and a **dangerous plan will go forward on its accumulated momentum , and push from the Tribe. Perhaps tragically. It is far beyond time for NMFS to work this out with the Park.**

But it is not too late.

(3) Disadvantages to be Suffered by the PCFG / Makah U&A Gray Whales Under the Conditions of This Waiver Request:

The members and supporters of the Peninsula Citizens for the Protection of Whales have never been more concerned about the future of the local gray whales. - This is a plan that cannot help but take out local whales every year. When the local PCFG whales are killed and beached and identified, they will have ID numbers, life histories, and names. The emotional impacts will be harsh, and the environmental impacts will only be known once it is too late. We do not believe that NMFS will be able to perceive the local losses in time to save this small population of Makah U&A gray whales from falling below a viable population number. Those inevitable losses will have detrimental impacts on the ecosystem of the Salish Sea. Ten years is too long to wait to assess.

We are not reassured by NMFS' theories that "other" whales will immigrate into the area and "find" the seasonal, patchy, and important food resources in Washington State waters. **We are concerned with the conservation of the genetically distinct PCFG gray whales , specifically. They are unique, and only replaceable through births to genetically distinct PCFG mothers. We will do not find it acceptable to be told that eventually they will be replaced by ENP whales from the migratory group. We interpret Scordino's and**

Yates' comments on "replacement" to mean that non PCFG whales who "become" PCFG whales could become a "renewable resource" for people to see, and for hunting purposes, with none of the genetic "complications". This is a despicable and self-serving *theory*.

The Hearing Transcripts give us a preview of what NMFS' responses will likely be in the future, to concerns raised about PCFG gray whales:

(Hearing Transcript Vol.2 pg. 18, line 12-25 and pg. 19 lines 1-10):

Ms Beale (NMFS) asks Dr. Weller (NMFS) about a new exhibit, a Cascadia Research paper (2019) updating PCFG abundance assessment:

Ms. Beale: "Do you consider the drop in abundance from 243 to 232...significant biologically?"

Dr. Weller: "No I don't. It could easily be an artifact of sampling effort or variance within the estimate itself. "

PCPW asks: Is this the kind of obfuscation that we will hear from NMFS whenever PCFG numbers go down? If the low abundance trigger is reached by Cascadia calculations, will NMFS accept the numbers, or make excuses? What if *this* drop had taken the PCFG below the trigger?

(Hearing Transcript Vol.2, pg.21, line 7-20):

Ms. Beale (NMFS): "If a PCFG whale were killed by Makah hunters, would that

potentially reduce the number of PCFG whales that use the Makah U&A?"

Dr. Weller: " No, not over the long term."

PCPW asks: What does this mean? It is *exactly* in the long term that PCFG whales that use the Makah U&A would be "reduced" or eliminated. Unless Dr. Weller refers to the "new PCFG", the ENP immigrants who he *theorizes* would eventually replace the small genetically distinct group. We value the "*old*" PCFG, who have spent great portions of their lives here over countless generations. We want no losses from the "old" PCFG.

(Hearing Transcript Vol.2, pg. 22, lines 2-19, pg. 23, lines 1-6, and pg. 24 , line 8 :

(Ms. Beale is asking Dr. Weller about internal versus external recruitment proportions in the PCFG) :

Ms. Beale (NMFS) : (paraphrased)" What is the proportion?"

Dr. Weller (NMFS) : "It's about 50-50... approximately 8 new whales per year."

Ms Beale (NMFS) : "Have you reviewed the Calambokidis and Perez 2017 article referenced in Mr. Schubert's declaration?"

Dr. Weller: "Yes I have."

Ms. Beale: " Does that article show that recruitment is actually more due to internal than external recruitment?"

Dr. Weller's long answer, line 14-22, pg. 23, contains the following comments:

The results "may be inconclusive", "may be an artifact of increased awareness", may be "increased effort to try and detect and record calves", and may be "an increase in the number of reproductive females having calves".

PCPW comments: The topic of internal vs. external recruitment *plagues* the discussion of whether or not the PCFG whales "deserve" stock designation. A 50-50 proportion does not break their "equivocal" findings . But NMFS does not specify what proportion *would*. We see

in the exchange above, the knee-jerk reaction to dismiss a paper implying a possible larger proportion of internal recruitment. The authors of the study admit that their results may be inconclusive, but Dr. Weller certainly piles on his skepticism. Is this what we can expect NMFS' reaction to be in the face of new information that may not conform to their preferences? And they obviously do prefer to deny official protection to the PCFG, as they have done for 20 years. ***We are reminded that in 2002 NMFS ruled that Southern Resident Orcas did not warrant Endangered Species Act protection, because they did not meet criterion for consideration as a distinct population segment.***

(Hearing Transcript Vol.2, pg. 26, (Q) at line 9,(A) at line 22) :

Ms. Beale (NMFS): " Ms.Newell is concerned that the loss of any PCFG whales will have adverse consequences for scientific research. Do you agree with that concern? "

Dr. Weller (NMFS): " No I don't. And that's because there is this recruitment that we've talked about...whales that are removed are over time replaced. "

PCPW comments: Variation on the theme: "no worries, these PCFGs will be replaced." I think that perhaps Dr. Weller has been so focused at the population level, that he has lost sight of the "trees". But he should not devalue what can be learned by other scientists, whose method is to observe individual whales over a long period of time. The data that Carrie Newell has amassed in her years on the water with individual whales , photographing every breath they take, will undoubtedly yield unknown treasures of new knowledge and understandings of gray whales. *Of course* it will have adverse consequences for her scientific research to have whales she has documented at very close range "body snatched" . Small comfort , realizing she has recorded her last data on a long time Depoe Bay whale, to be told that eventually some other whale may wander in. **Again, the complete lack of interest in preserving the ancient lineages that built the PCFG.** In (Transcript

Vol. 2, line 6 of page 26), Dr. Moore says, " I don't know that there's a multi-generational transfer of knowledge." That's not something he can ever observe from a "population level". But it is *exactly* what Carrie Newell can see and document from eye to eye level. She has already documented the evidence of generational transfer of knowledge." **Only an off shore hunt or no hunt will save this precious scientific resource.**

PCPW feels very strongly that:

- The threats of a near shore hunt to people and whales bears repeating. **NMFS stated in " NMFS comments to PCPW comments on the DEIS 2008", Declaration of Chris Yates, attachment, pg.4.15 Public Safety : "We have incorporated the information presented in this comment in the new DEIS (2015) to provide a more complete picture of potential impacts to public safety of authorizing a Makah gray whale hunt...In addition, the new DEIS includes the alternative of an off shore hunt, (Alt. 3, Offshore hunt), in which we selected the distance from shore specifically to avoid the potential for someone on shore to be injured by a bullet from the hunt." (5 miles)**

How much more clear can it be: the off shore hunt (or no hunt) is the only and best guarantee of safety to people "into perpetuity" ? Why are the Tribe's specious claims of "not enough whales off shore " and " 5 miles off shore is too unsafe" , allowed to take this alternative off the table? We need an explanation.

- The fate of the genetically distinct PCFG gray whales is tied to the off shore hunt. We are ***repulsed*** at the "game plan" by both NMFS and the Makah Tribe to take as their argument to various issues raised, that "**other whales will replace PCFG whales killed in hunts.**" This is an acknowledgement that there *will* be a disproportionate and inevitable take

from our local whales. **They say, by all this talk of "replacement", that the genetically distinct matrilineal lines have no intrinsic value.** Since when do we make policy decisions that fail to value and protect small, unique, populations ? In this case, do we "give up" our resident whales to a small group that "prefers " to hunt inshore ? To a small group that has no *actual* subsistence need for the meat? We say no. **The Tribe seeks to re-enact the feeding activities of their ancestors by destroying a small group of whales who are actually still in need of , and using, the subsistence knowledge of their ancestors. An unbroken "tradition" of unknown span of centuries. We will never get these whales back. These PCFG whales feed near shore, for the most part. An off shore hunt will spare most of them. NO hunt will spare them all.**

- **We can see from the transcript that the deck will always be stacked against providing the PCFG whales with meaningful protection. That seems to get back to the issue of near shore versus off shore hunting. This current plan will be a never ending "numbers game." What a lot of resources will be wasted "into perpetuity", to keep track of PCFG numbers, even as they are killed year after year. All to assuage the preferences of the "royal ancestry " component of a well fed group of people. The Makah witnesses who testified at the Hearing are all fine people, but they hardly represent a cross section of the Makah population. They all trace their whaling ancestry to the same one or two whaling families. Whaling was always an elitist activity, and will continue to be so.**

- **PCPW is particularly distressed at the proposed removals of the female whales of the PCFG: to allow (8) to be killed every 10 years is not a sustainable take from, primarily, our small group of local whales.**

The years that it will take for young females to achieve breeding age and replace mature

females, would be years lost to potential population growth.

The two year old female killed in the 1999 hunt could have had 6-7 calves by now, had she lived. If half her calves had survived to maturity, that would have been helpful to this small group. (It was suspected that she was a PCFG, as she was in the company of known PCFG whales before she was killed.) Likewise, the killing of the mature mother whale in the 2007 "rogue hunt" was a great disservice to the PCFG population. **Only an off shore hunt , or no hunt, can give these mothers and future mothers some protection.**

- The PCFG whales feeding in our waters are already susceptible to multiple hazards. They are a small population with a plateaued or *declining* population trend. The intensity of threats is increased by the small number of animals in the population. **In Transcript Vol 1, pg. 35, ,**

Mr. Yates states: "We considered all the known threats to the ENP gray whales. Certainly climate change, ocean acidification, and many other human impacts."

We note that he specifies "to the ENP". NMFS will be hard pressed to ever admit that there is a threat to the ENP. It is the PCFG that is at risk. In that regard, Mr. Yates should have elaborated on what NOAA has discovered about ocean acidification in recent benthic surveys off the coast of Washington.

On January 26, 2020,our local paper, [Peninsula Daily News](#), ran an Associated Press article describing results of a **NOAA funded study on ocean acidification in the Pacific Northwest.**

"Ocean acidification is damaging the shells of young Dungeness crabs in the Pacific Northwest , an impact that scientists did not expect until *much later this century*, according to new research. ... 'If the crabs are affected already, we really need to make sure we start to pay attention to various components of the food chain before it is too late', said Nina Bednarsek, the lead author among 13 contributing scientists...Bednarsek and her colleagues -for the first time- documented that some Dungeness larvae in the wild already had pitted and folded shells, described in their journal article as 'severe carapace

dissolution', and that these larvae were typically smaller in size. They also found damage...that could lead to slower movements, impaired swimming and other problems."(AP)

This study was released during during the week of Jan.26, 2020 in the journal "Total Environment", and is based on a 2016 survey of near shore waters of Oregon, Washington and British Columbia. The feeding areas of the PCFG. The paper is titled "Exoskeleton dissolution with mechanoreceptor damage in larval Dungeness crab related to severity of present-day ocean acidification vertical gradients". The second listed author is Richard A. Feely-NOAA Pacific Marine Environmental Laboratory, Sand Point Way, Seattle, WA.

Was Dr. Weller aware of this 2016 study when he had this exchange with Mr. Gossliner at the hearing? (Hearing Transcript Vol.2, pg.96, lines 6-17):

Mr. Gossliner (MMC) : "Are you aware of any studies that are ongoing...that might give insights into the status and trends of the prey resources , used by the PCFG whales?"

Dr. Weller: "No, I am not aware of any type of benthic sampling...that is going on...I don't know if the agency is interested in doing that."

PCPW would like to know how to reconcile Dr. Weller's answer with this new (to us) information about a benthic sampling study. And more importantly, a study that describes a potential disaster for the PCFG whales. We know that they eat crab larvae, specifically, as well as other shelled animals, including the mysid shrimp described as so important by Carrie Newell. A decline in the health and likely existence of the shelled benthic and water column species, could be an existential threat to the PCFG. It may not be "ongoing", but it should be, and it was certainly the right time to mention it!

This situation has been known by many scientists since the 2016 survey results were analyzed. But no mention of this by NMFS scientists at the hearing, or in the

Declarations, even though NOAA funded the study, and co-author, NOAA scientist Richard Feely is based in Seattle.

We believe that this study *alone* requires an investigation into who knew this, and what further studies NMFS proposes to do to check on the advance of this problem through the food chain. As the study authors say in the article "...more research is needed to understand what the new findings may mean for the future of the Dungeness crab as the Pacific coastal waters continue to absorb more carbon dioxide." This study was likely done because the Dungeness crab is an important commercial species, worth over \$200 million annually. But it speaks volumes about the likely future of other species in the food web, the PCFG gray whales being prime examples. It has been four years since the sampling was done. High time to check the shelled species in the PCFG feeding areas again. We need to know the speed and trend of the potential apocolypse occuring beneath the surface.

This research has been ongoing for at least five years. It must be assumed that within NMFS, knowledge of the greatly speeded up effects of ocean acidification has been available. This new information is now the best available science regarding "food security" for the PCFG . We worry, because NMFS has demonstrated very little commitment to the well being of the PCFG...the resident gray whales . NMFS has, in the last 20 years: denied their existence; allowed a hunt to start in October 1998, saying they were "migrating" whales; falsely claimed the 1999 hunt targeted migrating whales; allowed open season on PCFG whales in the Strait; denied they could be genetically distinct; claimed they were "mostly males"; allowed the Tribe to put forward a management plan that allowed generous takes of PCFG whales as "allowable bycatch ", and currently proposes they be specifically killed, including 50-

50 females. Now we find out there is a big problem that "science" didn't expect for many decades.

Could this problem in the food web be contributing to the recent decrease in PCFG numbers? Or the reported poor body condition of PCFG whales at different times?

Where is the commitment to continue the benthic research? Is "the Agency" interested? Does Dr. Weller's misinformed answer to Mr. Gossliner reflect a gap in knowledge of "best available science", or an unwillingness to share information that doesn't support the waiver request ? Did Jonathan Scordino know about this study? He must have. We expect answers. We expect benthic prey surveys before decisions are made about killing these resident whales.

Your honor, I know that in my ignorance I made " speeches" rather than effective cross-examinations. But in those "speeches" lie many of the local concerns. The harassment of mothers and calves of the PCFG, the ENP and the WNP, who all **must** use the near shore for their needs. The dangers to the innocent public recreating in the Olympic National Park. The potential, but unanalyzed, harms to the Salish Sea that likely will result from the removal of the gray whales who utilize it so regularly. The danger to the local gray whales who are not only unprotected from the hunt, but will be ,for the first time, **targeted** by the hunt. The willingness to allow the killing of 8 females of the PCFG every 10 years. The Makah U&A whales will obviously have a disproportionate death count in this plan, and we only *have* about 8 known mothers that are accustomed to bringing their calves to the Salish Sea. NMFS is willing to allow the taking of every one.

I have tried to point out what seems to be the emergence of an insidious new definition of the PCFG. It will describe whales who are seen in more than one year, but less and less it will

describe whales who are genetically distinct. Those original PCFG whales will admittedly be "removed" over time, and , theoretically," other whales will take their places." And if, as NMFS says, the PCFG have no discernible role in the environment, what is their worth, anyway? A grim future for these whales we have grown accustomed to, and vice-versa, is foreshadowed in this hearing transcript.

It is difficult for many people to outright oppose a Treaty claim. But we know that legally, the Treaty of Neah Bay, in relation to the MMPA and it's "in common with" language, is in a gray area of law that would take the Supreme Court to sort out. We also note that every coastal Northwest tribe now has an identical claim to treaty whaling rights. The 9th Circuit Court warned of this years before a court case clarified it. If this hunt plan can be justified by NMFS, any of the other tribes can come forward with the same request. The only solution may be to deny this waiver or send NMFS back to the drawing board to seriously analyze an off shore hunt.

We believe, additionally, that the highly endangered Western Pacific gray whales are, in some proportion, traveling down and up the west coast very close to shore. Photo IDs of WNP whales in association with PCFG whales and PCFG feeding areas, suggests that it is likely that WNP whales are doing some feeding and traveling close to shore, both southbound and northbound. In that case, we feel that an off shore hunt would be more protective of those WNP whales. Of course, **no hunt** , would protect all.

Thank you for your acceptance of the amateur look and nature of my submissions. I really have little idea what a "post hearing brief" should be, as we have no legal counsel. We are not scientists, of course, but have for 20 years dedicated ourselves to the attempt to remain abreast of ,and understand, the "best available science" as it relates to "our" local gray

whales. It is the best we can do with very limited resources, and minimal computer skills. I apologize for my failure to enclose the "Finding of Facts..." component of this task, but I really do not know how to accomplish that. I will assume that AWI and Sea Shepherd Legal will ably represent PCPW's point of view with their submissions. And I do apologize for any little "speeches" embedded in these pages.

Respectfully submitted,

Margaret Owens

Peninsula Citizens for the Protection of Whales