



# MARINE MAMMAL COMMISSION

27 August 2012

Mr. Steve Stone  
Protected Resources Division  
National Marine Fisheries Service  
1201 NE Lloyd Boulevard, Suite 1100  
Portland OR 97232

Dear Mr. Stone:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the National Marine Fisheries Service's 21 May 2012 notice (77 Fed. Reg. 29967) regarding a draft environmental impact statement on the Makah Tribe's proposal to take gray whales for ceremonial and subsistence purpose. The Service's notice indicates that it intends to terminate its review of a prior draft statement and prepare a new one. The Commission offers the following recommendations and rationale.

## RECOMMENDATIONS

The Marine Mammal Commission recommends that the National Marine Fisheries Service—

- publish a new draft environmental impact statement on the proposal to authorize whaling by the Makah Tribe under the Marine Mammal Protection Act
- retain sufficient flexibility in its NEPA process to respond to new information or changed circumstances (e.g., by issuing supplemental analyses if needed)
- either not include an adaptive management alternative in the draft environmental impact statement or, if such an alternative is included, provide an explanation of how it would be consistent with the procedural requirements of the Marine Mammal Protection Act and describe what, if any, procedural safeguards it would build into its management regime to ensure that parties to the rulemaking are ongoing participants in post-rulemaking decisions
- add to the environmental impact statement an alternative that includes both temporal limits on the hunting season to avoid times when either feeding-group whales or western stock whales are most likely to be present, and
- discuss in the new draft environmental impact statement the implications of the *Kokechik* decision for the rulemaking in the Makah Tribe's request for a waiver.

## RATIONALE

### New information

More than seven years have passed since the Makah Tribe first submitted its application seeking a waiver of the Marine Mammal Protection Act's taking moratorium so that it could hunt gray whales for ceremonial and subsistence purposes. Thus, the Commission does not take lightly

the idea of recommending that the National Marine Fisheries Service now set aside its previous draft environmental impact statement on this action and begin the NEPA review process anew. Nevertheless, doing so appears to be the best course of action to ensure that the Service meets its responsibilities under that Act. A new analysis is warranted because understanding of gray whale movements along the Pacific coast of the United States has changed materially since publication of the original draft statement. Two findings are particularly noteworthy and require consideration by the Service. First, recent genetic studies indicate that the Pacific Coast Feeding Group may be sufficiently distinct to merit consideration as a separate stock or management unit. Second, satellite telemetry, photo-identification, and genotype studies have revealed the occurrence of gray whales from the endangered western Pacific stock in U.S. west coast waters, where they become part of the migratory stream of gray whales along the coast between Alaska and Mexico. The Service could consider these issues in a supplemental draft environmental impact statement, but a new document would make it easier for the Service to describe the implications of these findings to the Makah Tribe, conservation organizations, and the public and thereby enable them to comment more meaningfully. Therefore, the Marine Mammal Commission recommends that the National Marine Fisheries Service publish a new draft environmental impact statement on the proposal to authorize whaling by the Makah Tribe under the Marine Mammal Protection Act.

### **Continued uncertainty**

The implications of the new information on the Pacific Coast Feeding Group and the mixing of western and eastern Pacific gray whales remain uncertain, but likely will require some adjustments to current scientific assessments and management strategies. For example, the International Whaling Commission's Scientific Committee noted in the report from its 2012 meeting that the strike limit algorithm variants that it tested to support issuance of a new aboriginal subsistence whaling catch limit for gray whales "did not correspond exactly to the management plan proposed by the Makah to the IWC." Thus, the Committee agreed to test a variant that did match the Tribe's management plan at its 2013 meeting.

The 2012 report also notes the Scientific Committee's concern "about the possibility of whales feeding in the Western North Pacific being taken during the proposed Makah Tribe hunt in northern Washington." Among the issues identified by the Committee were—

- the need to estimate the probability of a western gray whale being taken in aboriginal hunts for gray whales
- the possibility that research results may indicate the need for further testing of strike limit algorithms, and
- the need to continue monitoring this situation and conduct additional analyses as the International Whaling Commission requests.

The Committee noted that research was ongoing to investigate the timing, routes, and destinations of migrations by western Pacific gray whales and the resulting management implications. It noted the need for such research before drawing conclusions about the possible effects of the Makah hunt on the western Pacific gray whale stock. It plans to consider these matters again at its 2013 meeting.

Because of the remaining uncertainty regarding the potential effects of the Makah hunt on both the Pacific Coast Feeding Group and the endangered western Pacific gray whale stock, the Marine Mammal Commission recommends that the National Marine Fisheries Service retain sufficient flexibility in its NEPA process to respond to new information or changed circumstances (e.g., by issuing supplemental analyses if needed).

## Alternatives

The Service's notice identified five alternatives that it may include in a new draft environmental impact statement. Alternative 5 is the adoption of an adaptive management strategy to govern the hunt. Generally, the Commission supports adaptive management strategies that allow managers to monitor the effectiveness of conservation programs, learn as they go, and refine regulatory mechanisms in response. As indicated above, the Commission also believes that the Service should maintain some flexibility for meeting its NEPA responsibilities, which are intended to ensure that decision-makers and the public are well-informed about the consequences of possible alternative actions.

However, the Makah Tribe is seeking to waive the Marine Mammal Protection Act's taking moratorium and an adaptive management process may require more flexibility than can reasonably be accommodated under a waiver. Indeed, Congress provided a number of checks on the waiver process, including increased scrutiny of waiver decisions under the Marine Mammal Protection Act, a heightened evidentiary burden under the Administrative Procedure Act, and the opportunity for interested parties to make their case before an independent decision-maker as to whether the requirements of the Marine Mammal Protection Act have been met fully. Allowing the Service regulatory flexibility to adjust the management regime in potentially fundamental ways—but outside the scope of the formal rulemaking process—poses various problems. It suggests that the Service may not be confident that it has sufficient information to meet the rigorous standards of the Act at the outset, but rather would offer a speculative guarantee that, if a waiver is granted, it will ensure that those standards are met through its post-rulemaking management decisions. In essence, this approach runs the risk that interested parties will be excluded from the decision-making process in ways not envisioned by the Marine Mammal Protection Act or the Administrative Procedure Act. If an adaptive management approach is included in the draft environmental impact statement as one of the alternatives, the Marine Mammal Commission recommends that the National Marine Fisheries Service explain how it would be consistent with the procedural requirements of the Marine Mammal Protection Act and describe what, if any, procedural safeguards it would build into its management regime to ensure that parties to the rulemaking will be able to participate in post-rulemaking decisions.

Two of the five alternatives have temporal limitations that, based on what we know at this point, are designed to avoid taking whales from either the Pacific Coast Feeding Group (the Tribe's proposed action) or the western Pacific stock (the summer-only hunt). Another alternative also should be analyzed—a combination of those two alternatives that would limit the hunting season to avoid times when either the Pacific Coast feeding group whales or western Pacific stock whales are most likely to be present. To address both concerns, the Marine Mammal Commission recommends that the National Marine Fisheries Service add to the environmental impact statement an alternative

that includes both temporal limits on the hunting season to avoid times when whales of either the Pacific Coast Feeding Group or the western Pacific stock are most likely to be present. In developing this alternative (and in assessing the original two alternatives) the Service will need to account for the considerable uncertainty regarding the movement patterns of these two whale groups.

### The *Kokechik* decision

Finally, the Service may find itself able to authorize the taking of whales from some groups, but not others. Such a finding will depend on (1) resolution of the stock identity questions related to the Pacific Coast Feeding Group and the whales that spend some time in both the western and the eastern Pacific, and (2) the information available to make optimum sustainable population determinations for the whale groups whose members may occur in Washington waters. Such an outcome would be similar to that faced in *Kokechik Fishermen's Association v. Secretary of Commerce*, 839 F.2d 795 (1988), in which the Service determined that it could issue a taking authorization for some marine mammal species and stocks, but not others. In that case, the court of appeals indicated that "the Act may not prohibit issuance of a permit where there is only a very remote possibility that marine mammals for which an optimum sustainable population has not been determined may be taken...." However, in the *Kokechik* case, the court ruled that no taking could be authorized for any marine mammal stock because of the virtual certainty of taking marine mammals from stocks for which an optimum sustainable population determination could not be made.

To address the possibility of taking a whale from the Pacific Coast Feeding Group or the western Pacific stock, the Marine Mammal Commission recommends that the National Marine Fisheries Service discuss in the new draft environmental impact statement the implications of the *Kokechik* decision for the rulemaking in the Makah Tribe's request for a waiver. The Service should discuss (1) whether it intends to treat the Pacific Coast Feeding Group and/or the western Pacific gray whales that migrate to the eastern Pacific Ocean as separate stocks, (2) whether it believes that it will be able to make an optimum sustainable population determination for either of those putative stocks, (3) how it will judge the likelihood of taking whales from either of those putative stocks, and (4) whether it believes that authorizing the taking of migratory gray whales along the Washington state coast is consistent with the ruling in *Kokechik* if authorizations cannot be issued for gray whales from the putative stocks that also might be in the area.

Thank you for the opportunity to comment. The Commission looks forward to further discussions with the Service about these matters.

Sincerely,



Timothy J. Ragen, Ph.D.  
Executive Director