



# MARINE MAMMAL COMMISSION

11 July 2017

Mr. Barry A. Thom  
Regional Administrator  
West Coast Region  
National Marine Fisheries Service  
1201 NE Lloyd Boulevard, Suite 1100  
Portland, OR 97232

Dear Mr. Thom:

The Marine Mammal Commission (the Commission) is pleased to submit its comments on the proposed waiver determination and draft regulations under the Marine Mammal Protection Act (MMPA). These draft documents were prepared by the National Marine Fisheries Service (NMFS) West Coast Region in response to a request from the Makah Tribe for a limited waiver of the MMPA's moratorium on the taking of marine mammals.

Section 103 of the MMPA sets forth the process for issuing such regulations and directs that decisions on whether to propose waiver regulations are to be made in consultation with the Commission. NMFS has consulted with the Commission informally at various points while developing these regulations and the Commission has commented on the associated NEPA documents. Section 103(d) of the MMPA further requires that NMFS publish before, or concurrent with, proposing such regulations, "any recommendations made by or for the...Marine Mammal Commission which relate to the establishment of such regulations." The intent of this letter is to provide those recommendations.

Our overall impression is that the draft regulations are based on the best available science concerning gray whales and are appropriately precautionary. The Commission also notes that the regulations, to a large extent, address the comments raised in our [31 July 2015](#) letter to NMFS commenting on the revised draft environmental impact statement, as well as staff-to-staff discussions as the rule was being drafted. The Commission believes that the draft documents lay out a *prima facie* case that the requirements for granting a waiver under the MMPA have been met and recommends that NMFS proceed with issuing a proposed rule and scheduling an administrative hearing in accordance with the requirements of section 103 of the MMPA and sections 554, 556, and 557 of the Administrative Procedure Act.

As noted in previous comments on the Makah Tribe's proposal, the Commission's primary concern has been the need to avoid, to the maximum extent practicable, the accidental taking of gray whales from the endangered Western North Pacific (WNP) stock, and secondarily, to avoid taking that could disadvantage the Pacific Coast Feeding Group (PCFG) regardless of whether it is considered a stock. The design of an odd year/even year hunting pattern is key to both controlling the harvest of PCFG whales and minimizing any take of WNP gray whales. There is some trade-off between the two goals. For example, eliminating the proposed even-year hunt would further reduce the chances of killing WNP whales, but likely would shift more

hunting effort to the season when PCFG whales predominate in the hunting area. The Commission believes that the proposed rule strikes an appropriate balance between the goals of protecting WNP and PCFG whales. Based on the analyses prepared by NMFS, it appears that the risk of killing or seriously injuring a WNP gray whale is sufficiently low that authorizing the Tribe to take whales from the Eastern North Pacific (ENP) stock should not be inconsistent with the ruling in *Kokechik Fishermen's Association v. Secretary of Commerce*. Although there is a fairly high likelihood that some WNP whales will be taken by approach during the life of the envisioned regulations, NMFS anticipates that the impact of such taking will be negligible and that such taking can be authorized under other provisions of the MMPA. In addition, the proposed regulations would treat PCFG gray whales as a "putative stock" as a precautionary measure and also seek to avoid "local depletion." Finally, the Commission understands that NMFS intends to address the issue of acceptable hunting methods as part of the permit process, which is a step to be taken only after regulations have been finalized.

The draft proposed rule notes that, although NMFS currently does not recognize the PCFG to be a separate stock, the agency calculates a separate potential biological removal (PBR) level for the group in case it is determined to "warrant consideration" as a distinct stock in the future. By maintaining removals of PCFG whales below their PBR, NMFS expects the PCFG "to maintain its presence in the...feeding area at a level equivalent to a 'theoretical optimum sustainable population (OSP) range' for the group, or to eventually achieve OSP if the PCFG is currently below this level." The Commission believes that this is an acceptable approach for providing additional protection for the PCFG and for avoiding local depletion. However, we question whether keeping removals below PBR would be a sufficient basis to allow the taking of PCFG whales if those whales were determined to constitute a separate stock. As noted in the draft rule, a waiver of the MMPA's moratorium can be issued only for stocks that are not depleted (i.e., that are determined to be within OSP). The Commission therefore recommends that NMFS clarify what the implications would be if the PCFG were recognized as a separate stock. Would hunting be allowed to continue under this rule or would new rulemaking be necessary to consider the status of PCFG whales relative to OSP before the taking of PCFG whales could be authorized?

The draft proposed rule is premised on NMFS and the Tribe being able to distinguish between WNP whales and ENP whales, and to determine which of the ENP whales are from the PCFG. Currently, there are ongoing efforts to identify WNP and PCFG whales individually and to document them in accessible photo catalogs. However, whether those efforts will continue at current levels and whether equally extensive and reliable catalogs of whales will continue to be available in the future are open questions. The Commission recommends that this issue be addressed in the rulemaking, either by including mechanisms to ensure that current efforts are maintained or by making hunting during the specified season contingent on having available and reliable means of distinguishing WNP or PCFG whales (as relevant) from other whales.

In addition to establishing alternating hunting seasons, NMFS is proposing to set various limits on the numbers of approaches, attempted strikes, strikes, and landings. These limits are designed to allow the Makah Tribe to hunt whales and engage in training activities, while keeping the impacts on gray whales at acceptable levels. The Commission has two specific recommendations concerning the proposed limits. First, the Commission believes that

approaches and attempted strikes would have far less severe and more transitory impacts on gray whales than striking or killing. Therefore, although we believe that the proposed limits on striking and landing whales are appropriate and should be retained, the Commission recommends that NMFS review the proposed numbers of takes that would be authorized for approaches and attempted strikes. In particular, NMFS might want to provide separate authorizations for attempted strikes and approaches depending on whether they occur during hunting or training exercises. It would be unfortunate, and perhaps counterproductive to achieving an effective and efficient hunt, to limit the level of training because of the specified caps. Second, the draft proposed rule (see § 216.115(h)) specifies that all approaches, whether for hunting or training purposes, would be prohibited for the remainder of the year once any of the limits on strikes, approaches, unsuccessful strike attempts, struck and lost whales, or landings is reached. As this provision is written, if hunters successfully land a whale early in the year, no training could occur until the following year. The Commission recommends that NMFS revise the provisions of the draft rule to allow training activities to be conducted throughout the year, subject to appropriate limitations, despite one of the take limits for hunting activities (e.g., strikes or landings) having been reached.

The Commission notes that the provisions in the draft rule that specify how whale meat and non-edible products can be used and distributed by Makah Tribe members differ somewhat from similar provisions applicable to Alaska Natives who engage in subsistence whaling. The Commission has no problem with this, if these differences reflect tribal preferences. If it has not already done so, the Commission recommends that NMFS share these portions of the draft rule with the Tribe to determine whether there are any proposed restrictions on the use and distribution of whale products to which the Tribe objects and, if there are, request that the Tribe suggest alternatives for consideration as part of the rulemaking.

The proposed regulations indicate that the hunting season will be closed indefinitely if a WNP gray whale is harvested. We agree that such a closure would be an appropriate immediate response. We also agree that the regulations should allow for reopening the even-year hunting season if steps can be taken to provide reasonable assurance that no further WNP whales would be struck or killed. One possible response is to close the even-year hunt, in which the risk of taking WNP whales is higher, and shift more hunting effort into the odd-year hunt to make up for otherwise lost hunting opportunities. Under the draft rule, shifting effort from one season to another does not seem possible without regulatory amendments, which would take some time to adopt. The Commission therefore recommends that NMFS consider building some flexibility into the regulations to allow a small increase in the numbers of whales that can be struck and landed in odd-year hunts should it become necessary to close the even-year hunt.

One other issue that NMFS should consider is how it would respond to substantive changes that called into question the data or circumstances underlying the rulemaking. For instance, there could be a die-off of gray whales or Canada could authorize a subsistence hunt. While we are not suggesting that NMFS anticipate particular changes or particular responses, the Commission recommends that NMFS address whether there are circumstances that would prompt it to revisit or revise the regulations before the end of their anticipated lifetime.

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The Commission appreciates the opportunity to comment on the draft waiver determination and regulations.

Sincerely,



Rebecca J. Lent, Ph.D.,  
Executive Director

cc: Ms. Donna Darm, West Coast Regional Office, National Marine Fisheries Service  
Mr. Steve Stone, West Coast Regional Office, National Marine Fisheries Service  
Ms. Kirsten Erickson, Office of General Counsel, National Oceanic and Atmospheric Administration