



# MARINE MAMMAL COMMISSION

13 March 2018

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:

On 11 July 2017, the Marine Mammal Commission (the Commission) provided comments and recommendations to the National Marine Fisheries Service (NMFS) on a proposed waiver determination and draft regulations under the Marine Mammal Protection Act (MMPA) to authorize the Makah Tribe to hunt gray whales. Those comments and recommendations were provided in accordance with section 103(d) of the MMPA, which 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.” Based on the Commission’s comments and other input, NMFS has indicated that it is considering certain modifications related primarily to the proposed approach for managing the taking of gray whales from the Pacific Coast Feeding Group (PCFG). NMFS requested that the Commission review the proposed changes and provide any supplemental comments and recommendations it may want to submit for publication with the proposed rule.

The Commission identified as its primary concern 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 PCFG whales regardless of whether they are considered a separate stock. The revisions being proposed by NMFS are not expected to have any negative effect on the possibility that WNP gray whales will be taken and, as such, the Commission stands by its earlier comment that the risk of killing or seriously injuring a WNP gray whale appears to be sufficiently low that it should not present an insurmountable obstacle to NMFS moving forward with a proposed rule to authorize the Makah Tribe to take whales from the Eastern North Pacific (ENP) stock.

The revised proposal, however, would change the way the odd-year hunt is to be managed and would have implications related to PCFG whales. NMFS has revised its draft proposal to switch from managing the take of PCFG whales based on a potential biological removal (PBR) formula, to one that would set a strike limit of 16 PCFG whales over the 10-year life of the proposed regulations and establish a minimum PCFG population abundance level below which no hunting would be allowed. As noted by NMFS in the preamble accompanying the revised draft proposed rule, this change was made in response to comments that a PBR-based approach should account for all human-caused mortality and the fact that NMFS lacked such information for parts of the range occupied by PCFG whales outside U.S. waters. In addition, the revised preamble notes that the PBR concept was developed to allow precautionary management in situations where managers lack

reliable or complete information regarding a stock's abundance, trends, and productivity and over relatively long time frames (i.e., decades). For PCFG whales, NMFS has over 20 years of data from annual surveys, which yield relatively precise abundance estimates and enable the agency to use a population forecast model for regulating the taking of PCFG whales. NMFS contends that this approach is more appropriate than a PBR approach for managing the taking of PCFG whales, because population information is readily available. Also, NMFS states that, because it is proposing to issue regulations for a ten-year period, this shorter-term management approach is appropriate.

The Commission agrees that, given the availability of reliable information on the abundance and trends of PCFG whales and rates of recruitment of whales to this putative stock, there is no reason to manage removals under a PBR framework. Further, the Commission believes that setting the allowable strike limit at 16 PCFG whales over a ten-year period should provide reasonable certainty that the proposed level of hunting PCFG whales will not have adverse impacts on this "stock." We note, however, that the resulting harvest levels (no more than one whale landed per year during odd-year hunts and up to three whales landed per year during even-year hunts) falls well short of the Makah Tribe's identified subsistence need and the Tribe's initial waiver request. We trust that NMFS will assess the relationship between the adopted harvests levels and the Tribe's subsistence and cultural needs as part of the final environmental impact statement on this action.

NMFS is proposing to limit further the number of strikes of female gray whales during odd-year hunts to no more than eight over the ten-year period covered by the regulations. As the draft preamble explains, this secondary strike limit is being proposed as a "precautionary measure given recent evidence that maternally directed site fidelity contributes to the population structure of the PCFG."<sup>1</sup> The Commission concurs with NMFS's proposal from a biological standpoint, but notes that the female strike limit may cause additional shortfalls in meeting the Tribe's subsistence needs. First, available information suggests that about 60 percent of PCFG whales are female (see Lang et al. 2001b in the references section of the draft preamble)<sup>2</sup>. Second, if the sex of a whale targeted during the hunt is a random event, chance may further limit the use of all 16 strikes if the first whales struck in a given ten-year period happen to be predominately female. Given the conditions under which hunts would be conducted, it may not be possible to selectively target males. Nevertheless, the Marine Mammal Commission recommends that NMFS and other appropriate experts work with the Tribe to develop hunting methods that minimize the chances that the female strike limit will be reached early in any ten-year period.

Under the draft proposed rule, odd-year hunting would be suspended if the most recent population estimate of PCFG whales drops below 192 individuals or if the associated  $N_{\min}$  is less than 171 whales. The Commission agrees that setting such minimum thresholds is appropriate and that the values proposed are good starting points for examination in the course of the rulemaking. However, we note that, as proposed, reaching one of these thresholds would act as an on-off switch. If the PCFG declines, but still remains at or above the specified minimum levels, full hunting would be allowed. A more measured approach should be considered whereby intermediate thresholds

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<sup>1</sup> Presumably, the limit on taking females is also being proposed the help maintain the reproductive potential of the PCFG.

<sup>2</sup> However, the revised draft preamble states, without further explanation, that "[f]emales are expected to comprise 50 percent of the PCFG," and cites a personal communication with Lang as the source of this information. We note further that NMFS proposes to attribute the sex of struck and lost whales according to the proportions of females and males within the PCFG.

Mr. Barry A. Thom

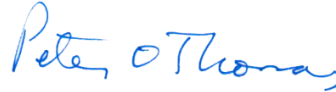
13 March 2018

Page 3

would be set and allowable hunting levels lowered if the PCFG declines to such levels. It may be that NMFS considered such an approach but concluded that, with only two strikes and one landed whale allowed under the proposed odd-year hunts, there was not much room to establish intermediate harvest levels in response to some lesser population decline. If so, this should be noted in the preamble to the proposed rule and final environmental impact statement.

The Commission appreciates the opportunity to review and comment on the revisions to the draft proposed regulations.

Sincerely,



Peter O. Thomas, 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