



MARINE MAMMAL COMMISSION

13 November 2021

Ms. Janet Coit
Assistant Administrator for Fisheries
National Marine Fisheries Service
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Silver Spring, MD 20910-3225

Attn: Grace Ferrara
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West Coast Region
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Dear Ms. Coit:

On 29 September 2021 the National Marine Fisheries Service (NMFS) published a notice in the *Federal Register* (86 Fed. Reg. 53949) announcing the availability of the Administrative Law Judge's (ALJ) recommended decision in the formal rulemaking on the agency's proposed waiver of the Marine Mammal Protection Act's (MMPA) moratorium on taking marine mammals and issuance of regulations to authorize the Makah Tribe to take gray whales for ceremonial and subsistence purposes. That notice invited public comments on the recommended decision. Given its consultative role under section 103(a) of the MMPA, participation as a party to the rulemaking, and comments provided at other stages, the Marine Mammal Commission (Commission) has had numerous opportunities to weigh-in on the proposed waiver and regulations. As such, the Commission is limiting these comments to specific aspects of the recommended decision that raise novel issues, require clarification, or fail to address past concerns voiced by the Commission or other parties adequately. By and large, the Commission (i) thinks that Judge Jordan has done a commendable job of sifting through a voluminous record, evaluating the available science, applying it to the applicable statutory requirements, and making helpful suggestions for revisions to the regulations, and (ii) concurs with most of his determinations and proposed revisions to the regulatory text.

Eastern North Pacific (ENP) Gray Whale Stock

In the course of the rulemaking, the Commission advocated for the inclusion of a regulation that would set a "population floor" below which hunting ENP gray whales would be suspended. The Commission believes that such a provision is needed and appropriate given the stock's history of unusual mortality events (UMEs), which are associated with rapid, significant declines in abundance. Such a decline could reduce the stock's abundance to below its maximum net productivity level (MNPL), and therefore below its optimum sustainable population (OSP) level, an eventuality that would render the waiver no longer legally defensible.

While not specifically referencing the relationship between such a floor and the ENP stock's MNPL or the legal implications for the waiver if the population were to decline below that threshold, Judge Jordan generally agreed with the Commission's recommendation. His recommended decision states—

However, I find the scientific evidence weighs in favor of an overall abundance threshold and recommend the Secretary consider setting one in the final regulations. Particularly in light of the current UME, this would provide additional assurance that the hunt will not continue if the ENP population begins to decline at rates that spark alarm in the scientific community. While year-by-year management by permit may in fact be a scientifically sound method, it nevertheless risks the appearance of being arbitrary. Setting clear lower limits on ENP abundance, below which the hunt could not be permitted, removes much of that risk.

Although supportive of setting a numeric floor in the regulations, the recommended decision did not suggest what number would be appropriate.

In this regard, the Commission recommends that NMFS include a population floor in the final regulations and adopt a conservative approach in setting that number, which reflects the uncertainties in estimating abundance and determining the upper and lower bounds of the OSP range (carrying capacity and MNPL). As noted in the most recent (2020) stock assessment report for the ENP gray whale stock, "Carrying capacity for this stock was estimated at 25,808 whales in 2009 (Punt and Wade 2012), however the authors noted that carrying capacity was likely to vary with environmental conditions." Inasmuch as recent, pre-UME abundance estimates exceeded this level, it appears that either the Punt and Wade estimate of carrying capacity was too low or the stock exceeded its carrying capacity (which could be a cause of or a contributing factor in the UME). The Commission proposes that, in setting the appropriate floor, NMFS use the upper 95 percent confidence interval of the best (e.g., most recent), pre-UME abundance estimate as a measure of carrying capacity and a factor of .60 as the theoretical relationship between carrying capacity and MNPL. Using that upper bound (approximately 30,000) and .60, the Commission recommends that the floor be set at 18,000 ENP whales. If NMFS decides not to adopt this recommendation, the Commission further recommends that, in no event, should the floor be set lower than 16,000, which would be about 60 percent of the point estimate of abundance in the 2020 stock assessment report.

Pacific Coast Feeding Group (PCFG)

As discussed in the recommended decision, the Commission agreed with NMFS that the PCFG does not meet the MMPA's definition of a stock and should not be treated as such for purposes of this rulemaking. More specifically, the Commission observed, "the evidence currently available for both photo-identification and genetic analyses indicates that levels of external (immigration) and internal (interbreeding within the group) recruitment are comparable and therefore it would be wrong to conclude that the PCFG meets the MMPA definition of a 'stock.'" Nevertheless, the Commission supports NMFS's efforts to build safeguards into the regulations designed to help minimize adverse impacts on the PCFG.

The recommended decision acknowledges that the status of the PCFG relative to the ENP stock as a whole is still being studied and it is possible that the PCFG might be designated as a stock in the future. The Commission recommended that such a possibility be reflected in the regulations by including a contingency clause that would suspend the authorization to conduct a whale hunt if, at some time in the future, PCFG whales are determined to constitute a separate stock. Whaling would then be allowed to resume only after authorization to take PCFG whales has been obtained. The recommended decision takes notice of this recommendation but does not discuss whether such a provision is necessary or appropriate. Including such a provision would be consistent with Judge Jordan's recommendation that allowance to carry out hunting and training activities during months when Western North Pacific (WNP) gray whales are expected to be in the Makah hunting area be contingent on securing the necessary authorization for taking whales from that stock. During both the odd-year and even-year hunts, there is a much higher probability that PCFG whales will be subject to hunting or other types of taking than gray whales from the WNP stock. As such, a similar contingency provision for PCFG whales is needed.

The ALJ may have considered a determination that the PCFG is a stock to be such a remote possibility within the 10-year duration of the proposed regulations that no such regulation was needed. It is also possible that, given the high likelihood of taking PCFG whales, he thought application of the ruling in *Kokechik Fishermen's Association v. Secretary of Commerce (Kokechik)* would automatically compel NMFS to suspend whaling activities if the PCFG were considered a stock, unless and until the necessary authorizations were obtained. However, in light of the possibility that the PCFG will be identified as a separate stock, the Commission still thinks that it would be a good idea for the regulations themselves to address the implications of such a determination for the Makah Tribe's hunting and training activities. The Commission therefore reiterates its previous recommendation that such a clause be added to the regulations.

One way in which the proposed rule seeks to protect the PCFG is through the establishment of abundance thresholds for the PCFG below which hunting would be suspended. Hunting would not be allowed in the upcoming season if the most recent PCFG abundance estimate drops below 192 whales or the associated minimum abundance estimate is less than 171 whales, or if one of these thresholds is projected to be met during that hunting season. An updated abundance estimate released just before the hearing set the population size of the PCFG at 232 whales, as noted in the recommended decision. The recommended decision also cited testimony from Dr. Moore that, even if the proposed hunt were authorized and all strikes used, the PCFG population size is expected to grow to 281 whales during that 10-year interval and that the "population is not expected to fall below the minimum abundance triggers." Elsewhere, however, the recommended decision discusses the possible effects of the recent UME on the PCFG. Judge Jordan noted that one of the stranded whales was confirmed to be from the PCFG and, depending on what detection rate is used in extrapolations (only between 3.9 and 13 percent of whales that die are believed to be observed), concluded that "the full extent of the UME is unknown [and] it is possible the low abundance trigger for [the] PCFG has already been met or exceeded if the current UME is affecting the PCFG."

Given this uncertainty in the trend and size of the PCFG population, the Commission supports the inclusion of the proposed "floors" below which hunting would stop. However, the

Commission also recommended that a “dimmer switch” be added to the regulations that would slow the hunt before the “on-off” triggers are reached, if the number of PCFG whales drops below some higher, as yet unspecified threshold. The Commission is only advocating for such a provision in odd-year hunts, where the probability of striking a PCFG whale is much higher than in even-year hunts.

The recommended decision discusses the Commission’s proposal on page 150. It recounts the testimony of Chris Yates, a NMFS witness, who thought such a provision unnecessary because the proposed floors already were sufficiently conservative. In contrast to that assessment, Judge Jordan agreed with the rationale behind the Commission’s proposal, stating that the “record does not contain clear evidence about the ability of the PCFG to recuperate from various levels of decline” and embracing the view that, if there are early signs of decline, NMFS might want “to slow the hunt...rather than waiting for a more extensive decline to cease it entirely.” Nevertheless, the ALJ concluded that a new regulatory provision was unnecessary because, in his view, section 216.114(a) of the proposed regulations already functions as a dimmer switch because it grants the Regional Administrator discretion not to authorize the full number of strikes that otherwise would be allowed.

While it is true that the cited regulatory provision grants the Regional Administrator the discretion to slow the hunt if PCFG abundance drops significantly, but before either closure threshold is reached, doing so is not mandatory. Given that the West Coast Region’s top protected species official, who presumably would be a key advisor in making such a decision, testified that he saw no need to slow the hunt before the point where a closure threshold is reached, the Commission is not very confident that this discretion would be exercised in the manner that the ALJ suggests. Therefore, the Commission again recommends that the regulations be revised to specify a threshold of PCFG abundance below which the odd-year hunt would be slowed. Such a provision is needed, in part, because there can be a lag of two or more years between when surveys are conducted and when results become available¹ and because a UME has the potential to cause a rapid decline in the PCFG. That is, it could be a number of years between when the population drops below the threshold that would require cessation of hunting and when that decline is detected and hunting actually stops.

Having an intermediate threshold to act as a dimmer switch would help buffer the population against this eventuality. In making this recommendation, the Commission acknowledges that, inasmuch as only two strikes per year would be authorized during odd-year hunts, there is not much room to apply the brakes. Nevertheless, doing so has the potential to reduce by half any adverse impacts from the hunt on PCFG whales in situations where a significant decline in the population has begun. As for the threshold at which hunting should be slowed, the Commission suggests using the midpoint between the shutdown threshold (192) and the current (2019) PCFG population size (232). That is, the maximum number of strikes authorized during an odd-year hunt should be reduced from two to one per year if the abundance of PCFG whales (N_{best}) drops below 212.

¹ The most recent estimate of PCFG abundance (Calambokidis et al., 2019), made available just before the hearing in November 2019, was based on data collected between 1996-2017.

Western North Pacific (WNP) Gray Whale Stock

The parties to the rulemaking expressed different views about the ancestry of the WNP gray whale stock and its relationship to the ENP stock. In the end though, the Commission agrees with the ALJ's conclusion that how this issue is resolved is of little consequence. The WNP stock is listed as endangered under the Endangered Species Act and is therefore considered depleted under the MMPA. Under the ruling in *Committee for Humane Legislation v. Richardson*, any taking of a WNP whale would "disadvantage" the stock and, as such, no waiver for this stock can be issued.

The other relevant case to factor into this rulemaking is *Kokechik*. The crucial part of that ruling for this proceeding is the Court of Appeals' finding that, "While the [Marine Mammal Protection] 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..., such a situation is clearly not the case here." In *Kokechik*, the court found that "incidental takings [of other species] are not merely a remote possibility but a certainty."

The parallel to the proposed waiver for ENP gray whales is readily apparent. In this instance, NMFS is proposing to issue a waiver for ENP whales knowing that WNP whales, for which a waiver cannot be issued, also might be taken. Although there may be only a remote possibility that WNP whales will be killed incidental to hunting ENP whales,² modelling by NMFS found that there is essentially a 100 percent probability that WNP whales would be taken in other ways (e.g., by close approaches) during the 10-year period the regulations would be valid. Applying the principles of the *Kokechik* ruling to the Makah waiver, it would appear that NMFS is precluded from issuing the waiver, or at least the subsequent permit, if there is a sufficiently high likelihood that other marine mammals for which a taking authorization cannot be issued also will be taken. However, as discussed below, mechanisms other than this waiver potentially are available under the MMPA for authorizing such take.

Judge Jordan tried to differentiate the Makah rulemaking from the situation considered in *Kokechik*. The latter relates to taking incidental to commercial fishing, the former to subsistence hunting. One instance presented a high likelihood that depleted marine mammals would be killed, the other a near certainty that depleted marine mammals would be taken, but a low probability of death. In the rulemaking reviewed in *Kokechik*, NMFS merely concluded that a taking authorization of depleted fur seals could not be issued but did not assess the impacts of the unavoidable taking on the stock. Here, NMFS has "engaged in a thorough and detailed analysis of the potential impact on [sic] the hunt to WNP gray whales...." Judge Jordan also noted that the *Kokechik* ruling applied to the permitting stage, rather than the waiver rulemaking itself. The Commission is not convinced that any of these differences warrant deviating from the basic ruling of *Kokechik*³ and cautions NMFS against doing so lest it risk adverse litigation.

² NMFS witnesses testified about the results of their modelling, indicating that there is a 5.8 percent chance that a WNP whale will be struck during the 10-year period covered by the regulations if all available strikes are used during even-year hunts. Put another way, the models predict that one WNP whale would be struck every 170 years if all variables remain constant.

³ That a waiver cannot be issued for one species if there is more than a remote possibility that other species for which a taking authorization cannot be issued will also be taken.

Rather, the key difference is that, for the Japanese high-seas salmon fishery that was at issue in *Kokechik*, there was no other provision of the MMPA under which the taking of depleted species could be authorized. For Makah whaling, there arguably is. While the Commission does not believe that lethal taking of WNP gray whales could be authorized under section 101(a)(5) of the Act (because it would have more than a negligible impact on the stock), it may be possible for NMFS to make the required findings that would enable it to authorize other types of take (e.g., harassment). On this point, the Commission takes issue with the characterization of its position on page 121 of the recommended decision. Judge Jordan stated that the Commission “disagreed” with Animal Welfare Institute’s argument that approaching, throwing a harpoon at, or striking a gray whale are “intentional” actions that never can be considered “incidental” for purposes of applying section 101(a)(5). In fact, the Commission has not taken a position on this issue one way or the other. The Commission agrees with Judge Jordan that this is an issue appropriately considered at the stage when the incidental take authorization is being considered rather than as part of the waiver rulemaking.

For purposes of this rulemaking, it is sufficient for the regulations to require that the taking of ENP whales not be allowed if there is a high enough likelihood that *unauthorized* taking of WNP whales will also occur. This is the approach recommended by the Commission and which Judge Jordan has endorsed. In proposed sections 216.113(b)(1) and 216.114(b) of the revised regulations, hunting or conducting training activities at times when WNP might be taken are made contingent on obtaining the necessary take authorizations for WNP whales. To do otherwise would run afoul of the ruling in *Kokechik*. The Commission therefore recommends that NMFS retain these provisions in the final rule.

Regulations

The recommended decision proposes some general restructuring of the regulations “to improve [their] clarity and comprehensiveness,” as well as amendments to specific provisions. The Commission agrees that splitting section 216.113 (take authorizations) into three separate sections (issuance and duration of permits, hunt requirements and restrictions, and usage of whale products) makes sense and would make the regulations more digestible and understandable. The Commission recommends that the suggested restructuring of the regulations be adopted. The Commission also supports the ALJ’s recommended revisions to the regulatory definition of the term “strike.”

As discussed in greater detail above, the Commission supports the inclusion of new regulatory provisions that would preclude NMFS from authorizing even-year hunts and training activities during months in which WNP whales are expected to be in the Makah usual and accustomed fishing grounds (Makah U&A), absent the Tribe obtaining the necessary take authorizations for WNP gray whales under other provisions of the MMPA. The Commission notes a subtle difference in the proposed language of the hunting provision (§ 216.113(b)(1)) and the training provision (§ 216.114(b))—the former uses the phrase “when WNPs *might be present* in the Makah U&A” and the latter uses “when WNPs *are expected to be* in the Makah U&A.” The Commission presumes that this difference is intentional and that the hunting provision is intended to be more expansive given the heightened risk of killing a WNP during hunting activities. Although section 216.114(a), as modified in the recommended decision, already explicitly precludes

conducting even-year hunts without the necessary incidental take authorization for WNP gray whales, section 216.113(b)(1) would be applicable to both even- and odd-year hunts and would address the situation in which new information indicating that WNP whales might be in the Makah U&A during other months as well becomes available.

The Commission supports the approach recommended in Appendix B of the recommended decision and, with one technical correction, recommends its adoption by NMFS. That correction has to do with the difference between “permits,” which are issued under section 104 of the MMPA, and other authorizations. Technically, incidental take authorizations issued under section 101(a)(5)(A) and (D) are not permits. As such, the Commission recommends that the phrase “incidental take permit is authorized” in section 216.113(b)(1) be revised to read “incidental take authorization is issued.” Similarly, the phrase “incidental take permit” in the first sentence of section 216.114(b) should be revised to read “incidental take authorization” and the word “permit” in the second sentence should be replaced with “authorization.”

The Commission also recommends that the following changes be made to the regulations as set forth in Appendix B of the recommended decision—

- in section 216.114(c)(2), the penultimate sentence should be revised by inserting the phrase “If authorized under a permit issued in accordance with section 216.113...” before “training harpoon throws may occur....”
- in section 216.118(a)(6)(ii)(A), the reference to the “number of strikes and attempted strikes” no longer makes sense given the proposed revisions to the definition of “strike.” That is, if, after the initial strike, all subsequent strikes are considered part of the initial strike, the number reported always would be one. Different terminology is needed—perhaps “the number of deployments or attempted deployments of harpoons, darting guns, other weapons, or projectiles....”
- in section 216.118(a)(6)(ii)(B), the reporting requirements include a description of “the disposition of all specimen samples collected....” The Commission notes that under section 216.115(a) sample collection is not limited to the Tribe, but includes “persons designated by NMFS.” Does NMFS intend the report to track the disposition of all samples collected or just those collected by the Tribe or Tribal representatives? This should be clarified.

Specific Comments

Page 19, proposed finding of fact I.B.2.b.—In discussing the effects on WNP gray whales, the ALJ stated that “The best available scientific evidence shows that removal of a WNP whale would be detrimental to the stock.” The Commission agrees with this conclusion and notes that this would preclude making a finding under section 101(a)(5) that incidentally killing a WNP whale while hunting for Eastern North Pacific gray whales would have a negligible impact on the WNP stock.

Page 21, proposed finding of fact II.A.3.b.—In discussing the need to consider cumulative impacts, the ALJ determined that, while consideration of such factors is required under the National Environmental Policy Act, “the MMPA does not mandate separate consideration of these factors during the formal rulemaking proceeding.” In one respect he is correct; section 103 of the MMPA

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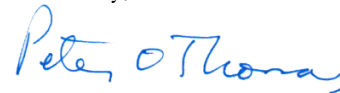
does not explicitly require that cumulative effects be evaluated or factored into the decision. However, this is an overly narrow reading of the statutory requirements. For example, determining that the proposed taking will not disadvantage the affected marine mammal species and stocks requires not only consideration of the direct effects of the proposed taking, but also the context in which that taking will occur, which includes the cumulative effects of other stressors on the population. In fact, the recommended decision addressed one of the enumerated factors, climate change.

Page 85, first full paragraph—The first sentence in this paragraph states that “In order for a whale to be designated as part of the PCFG, it must be identified as being in the PCFG range between April 1 and November 30 of two consecutive years.” This is inconsistent with the proposed definition of a PCFG whale set forth in section 216.122 of the proposed regulations. Under that definition, the applicable period runs from June 1 to November 30 and the sightings need to be made in two or more years, although those years need not be consecutive. To avoid possible confusion, the misstatement on page 85 should be corrected.

Page 101, second paragraph—The first sentence of this paragraph states that, during the previous Unusual Mortality Event, the ENP gray whale population fell to approximately 16,000, but that this was still to be considered to be within its optimum sustainable population (OSP) range. While that might have been the thinking at that time, estimates of the OSP range (from maximum net productivity level to carrying capacity) may have increased since then. It is not readily apparent that an abundance of 16,000 would still be considered to be within the OSP range for the ENP stock.

Thank you for taking these additional comments and recommendations from the Commission into account as you review the ALJ’s recommended decision and adopt final regulations.

Sincerely,



Peter O. Thomas, Ph.D.
Executive Director