

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration****50 CFR Part 216**

[Docket No. 240604–0152]

RIN 0648–BI58

Regulations Governing the Taking of Marine Mammals

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: Following formal rulemaking proceedings including an on-the-record hearing before an administrative law judge, NMFS is waiving the Marine Mammal Protection Act (MMPA) moratorium on taking Eastern North Pacific (ENP) gray whales (*Eschrichtius robustus*) to allow the Makah Indian Tribe to conduct a limited ceremonial and subsistence hunt of up to 25 ENP gray whales over a 10-year period in accordance with the Treaty of Neah Bay of 1855 and the quota first established by the International Whaling Commission in 1997. NMFS is also promulgating regulations to govern the issuance of hunt permits and the hunt itself.

DATES:

Effective date: This rule is effective June 18, 2024.

Waiver period: The 10-year waiver period begins the first day of the first season after issuance of the initial hunt permit.

Expiration date: These regulations will expire 10 years after the effective date of the initial hunt permit specified under § 216.113(b), unless extended.

ADDRESSES: Copies of the Final Environmental Impacts Statement (FEIS) including the Record of Decision as well as supporting documents are accessible via the internet on the Makah Tribal Whale Hunt Chronology web page at: <https://www.fisheries.noaa.gov/west-coast/marine-mammal-protection/makah-tribal-whale-hunt-chronology> or you may request copies by email from ellen.keane@noaa.gov.

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I. List of Acronyms and Abbreviations

- Agency National Marine Fisheries Service
- ALJ Administrative Law Judge
- APA Administrative Procedure Act
- AS-IA Assistant Secretary—Indian Affairs, Department of the Interior
- AWI Animal Welfare Institute
- CFR Code of Federal Regulations
- COSEWIC Committee on the Status of Endangered Wildlife in Canada
- CZMA Coastal Zone Management Act
- DEIS Draft Environmental Impact Statement
- DPS Distinct Population Segment
- E.O. Executive Order
- Ecology State of Washington Department of Ecology
- EIS Environmental Impact Statement
- ENP Eastern North Pacific
- ESA Endangered Species Act
- FEIS Final Environmental Impact Statement
- FR Federal Register
- FWS U.S. Fish and Wildlife Service
- GAMMS Guidelines for Assessing Marine Mammal Stocks
- I Assistant Administrator for Fisheries
- ITA Incidental Take Authorization, which include incidental harassment authorizations and letters of authorization
- IWC International Whaling Commission
- LSIESP Laguna San Ignacio Ecosystem Science Program
- MMC Marine Mammal Commission
- MMPA Marine Mammal Protection Act
- MNPL Maximum Net Productivity Level
- MUA Makah Usual and Accustomed Fishing Grounds
- NCA–NBC Northern California through Northern Vancouver/British Columbia
- NEPA National Environmental Policy Act
- NFG Northern Feeding Group
- NMFS National Marine Fisheries Service
- NOAA National Oceanic and Atmospheric Administration
- OR–SVI Southern Oregon through Southern Vancouver Island
- OSP Optimum Sustainable Population
- PBR Potential Biological Removal
- PCFG Pacific Coast Feeding Group
- PCPW Peninsula Citizens for the Protection of Whales
- PSRG Pacific Scientific Review Group
- RD Recommended Decision from the Tribunal
- ROD Record of Decision
- RFA Regulatory Flexibility Act
- SARs Stock Assessment Reports
- SDEIS Supplemental Draft Impact Statement
- SRT Status Review Team
- Tab Tab number in the hearing record
- U&A Usual and Accustomed Fishing Grounds
- U.S.C. United States Code

- UME Unusual Mortality Event
- WCA Whaling Convention Act
- WCZMP Washington State's Coastal Zone Management Program
- WCR NMFS's West Coast Regional Office
- WFG Western Feeding Group
- WNP Western North Pacific

II. Introduction

On February 14, 2005, NMFS received a request from the Makah Indian Tribe of Neah Bay, Washington (Makah Tribe, Makah, or Tribe), to waive the moratorium in the MMPA on taking marine mammals and issue regulations allowing a Tribal hunt for ENP gray whales (*Eschrichtius robustus*) in waters of the northwest coast of Washington State. The Tribe has also requested that NMFS authorize the making and sale of handicraft items from whales taken during Tribal whaling.

In 1994, ENP gray whales were removed from the “endangered” species list under the ESA because the population successfully rebounded after the end of the commercial whaling era. ENP gray whales remain protected by the MMPA. The MMPA imposes a general moratorium on the taking of marine mammals but authorizes the Secretary of Commerce to waive the moratorium and issue regulations governing the take of marine mammals if certain statutory criteria are met. The decision to waive the moratorium and issue regulations is made on the record after an opportunity for an agency hearing on the proposed waiver and regulations. The Secretary has delegated the responsibility to determine whether the waiver application meets the MMPA's standards to the NOAA Administrator who then delegated this authority to the Assistant Administrator for Fisheries. As the Assistant Administrator for Fisheries, I am responsible for rendering the Final Decision in this matter. For the reasons set forth in this Final Decision, I have determined that the MMPA waiver should be granted and implementing regulations should be adopted to manage the hunt. The waiver and regulations I adopt in this document establish a framework for the Makah Tribe to exercise their treaty right to whale in accordance with the MMPA, but additional steps are necessary under the MMPA and the WCA before hunting resumes.

The waiver and accompanying final regulations (see section VI of this Final Decision) authorize a limited hunt for ENP gray whales over a 10-year period, during which no more than 25 ENP gray whales could be killed, in the coastal portion of the Makah's U&A. ENP gray whales will be harvested from the quota

already established by the IWC for the Makah and Chukotkan Natives. The IWC first adopted the joint request of the United States and the Russian Federation for an ENP gray whale catch limit in 1997. RD at 9. The Chukotkan are indigenous to the Russian Federation and harvested an average of 125 ENP gray whales from the Bering Sea per year from 2008–2017, when the average number that could be taken each year while remaining below the IWC catch limit was 124. Tab 60F at 6. In September 2018, the IWC approved the latest catch limit of 980 ENP gray whales, with an annual cap of 140 whales, for the Makah and Chukotka for the period 2019–2025. Tab 3 at 5.

A separate bilateral agreement between the United States and Russian Federation sets overall and annual limits for the two countries. Tab 3E through 3I. The Makah Tribe are entitled to harvest no more than 5 whales per year under the agreement with the Russian Federation which also specifies that any country's unused quota may be transferred to the other. RD at 9. In past years, the United States transferred its entire quota to Russian Federation for the Chukotkan hunt while NMFS completed the necessary steps under domestic law to consider the Tribe's request for a waiver from the MMPA. Tab 3 at 5–6. This practice will likely continue if the Makah are unable to hunt. Under these circumstances, the entire quota authorized by the IWC could be harvested by Chukotkan Natives regardless of whether the Makah Tribe conducts a hunt. While the number of whales the Chukotkan Natives take each year varies due to hunt management practices and their ability to successfully strike whales in a given year, they have exceeded the quota in some years. RD at 128. In addition, the level of take by the Makah Tribe is small relative to the abundance of ENP gray whales (see section VIII). Thus, the hunt authorized under the waiver and final regulations will likely have no effect on the overall population of ENP gray whales. By issuing this waiver, the Makah Tribe will be able to use their allotment for ENP gray whales, which has in past years been transferred to the Russian Federation.

Although the overall population of ENP gray whales is unlikely to be affected by the final waiver and regulations, additional management measures are necessary to protect the ENP gray whales' subpopulation known as the PCFG. Additional measures are also necessary to protect the separate WNP stock of gray whales, which is listed as endangered under the ESA. Accordingly, two key management goals

shaped many of the provisions in the proposed and final regulations: (1) ensuring that hunting does not reduce the PCFG abundance below recent stable levels and (2) limiting the likelihood that Tribal hunters would strike or otherwise harm a WNP gray whale.

Regarding the first management goal, the MMPA requires that I give due regard to, among other things, the distribution and abundance of the stock subject to the waiver and that the waiver is in accord with the purposes and policies of the MMPA, which include maintaining marine mammals as a functioning element of their ecosystem. 16 U.S.C. 1371(a)(3)(A). PCFG whales exhibit site fidelity during the feeding season to a unique area within the range of the ENP gray whale stock—the northern California current ecosystem, which is generally described as extending from Northern California to Vancouver Island and encompasses the hunt area. Tab 3 at 8–9, 29. The final regulations are designed to limit lethal and sub-lethal effects to PCFG whales to maintain their abundance and distribution within the PCFG range.

Regarding the second management goal, in adopting regulations to implement a waiver, I considered all factors that may affect the allowable level of take of ENP gray whales, which includes the extent to which hunting activities for ENP gray whales may inadvertently impact WNP gray whales. While uncommon, there are documented occurrences of WNP gray whales transiting the Makah U&A, and hunters may not be able to visually distinguish WNP whales from ENP whales during a hunt. The regulations are designed to minimize the risk of a WNP whale being struck or harmed over the duration of the waiver.

III. Background and History of the Proceeding

The Makah Tribe's whaling tradition is older than the United States by well over 1,000 years. RD at 7; Tab 24 at 46. The hunt and associated practices define who the Makah are, and harvesting a whale cannot be separated from the cultural aspects. Tab 24 at 78; Tab 103 at 5–37. Makah accounts and stories illustrate how whaling shaped their culture and identity. Tab 24 at 78. The traditions have important ceremonial and social functions for the Tribal community. Crew members undergo rigorous ceremonial and spiritual preparations prior to a hunt, and the community at large plays an important role in the hunt's success. Tab 103 at 5–37. Training encompasses a series of ceremonies to become

spiritually, emotionally, and physically ready and involve the whalers' families and community. Tab 103 at 8–9. These traditions have an important role in maintaining cultural identity and uniting the community. Tab 26 at 3–4.

The Treaty of Neah Bay of 1855 secures the Makah's whaling tradition. In the Treaty, the Makah relinquished significant land holdings to the United States but expressly reserved the right to whale. Section 4 of the Treaty specifically provides: "The right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States. . . ."

After signing the Treaty of Neah Bay, the Makah Tribe continued to hunt whales, but over time, they saw their whaling returns dwindle due to overhunting by non-native commercial whalers. Tab 90F–Appendix A at 8; Tab 24 at 191. As early as the 1850s, it was harder for the Makah Tribe to find whales. Tab 24 at 190. In 1928, the Makah Tribe voluntarily suspended their whaling activities. *Id.* at 191. Factors contributing to this decision included demographics (e.g., moving into other fields due to restricted access to fisheries), loss of whaling canoes and equipment due to a natural disaster, and, perhaps the most important factor, dwindling cetacean populations due to commercial whaling. *Id.* at 191–193. The Makah Tribe's decision to suspend whaling until whale numbers began to climb was chosen as a temporary conservation measure to allow whale populations to rebound. *Id.* at 193. The Makah took this conservation measure nearly 20 years before the United States and other governments signed the International Convention for the Regulation of Whaling in 1946, which established an international moratorium on the hunting of gray whales and right whales. Tab 1F at 44.

The MMPA, enacted in 1972, established a national policy to prevent marine mammal species and population stocks from declining beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part and enacted a moratorium on the taking and importing of marine mammals. 16 U.S.C. 1361(2), (6); 1371(a). "Take" is defined broadly and means to "harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal." 16 U.S.C. 1362(13).

The moratorium contains several exceptions. One exception authorizes the agencies that implement the MMPA to waive the moratorium as appropriate and adopt implementing regulations

governing the take of marine mammals. 16 U.S.C. 1371(a)(3)(A); 1373. Both the decision to waive the moratorium and adopt implementing regulations must be based on “the best scientific evidence available,” and NMFS must consult with the MMC in making these decisions. *Id.* In order to waive the moratorium for a stock of marine mammals, NMFS is required to give due regard to the distribution, abundance, breeding habits, and times and lines of migratory movements of such marine mammals. 16 U.S.C. 1371(a)(3)(A). NMFS must also be assured that the taking under the waiver is in accord with sound principles of resource protection and conservation as provided in the purposes and policies of the MMPA. *Id.* The purposes and policies of the MMPA include maintaining marine mammals as a significant functioning element of the ecosystem of which they are a part, maintaining the health and stability of the marine ecosystem, and obtaining and maintaining OSP for marine mammal stocks keeping in mind the carrying capacity of the habitat. 16 U.S.C. 1361(2), (6).

When prescribing regulations to implement a waiver, NMFS must insure the taking will be consistent with the purposes and policies of the MMPA and will not disadvantage the stock subject to take pursuant to the waiver. 16 U.S.C. 1373(a). NMFS must also fully consider all factors that may affect the extent of the authorized take, including existing and future levels of marine mammal species and population stocks; existing international treaty and agreement obligations of the United States; the marine ecosystem and related environmental considerations; the conservation, development, and utilization of fishery resources; and the economic and technological feasibility of implementation. 16 U.S.C. 1373(b).

In *Anderson v. Evans*, 371 F.3d 475, 501–02 (9th Cir. 2004), the U.S. Court of Appeals for the Ninth Circuit held that the Makah Tribe and NMFS must comply with the MMPA’s waiver process in order for the Tribe to exercise their right to whale pursuant to the Treaty of Neah Bay of 1855. The Court also held that NMFS must complete an EIS under the NEPA before authorizing a hunt. *Id.* at 494. In light of the decision in *Anderson*, in 2005 the Makah Tribe asked NMFS to waive the MMPA’s moratorium and authorize a limited ceremonial and subsistence hunt for ENP gray whales.

In 2015, the NMFS WCR published a DEIS analyzing several alternatives for the proposed hunt. On April 5, 2019, the WCR published a proposed waiver and regulations for a hunt (84 FR 13604)

in accordance with a delegation from the Assistant Administrator for Fisheries. The publication of the proposed regulations and waiver initiated a formal rulemaking process, which included a hearing before a tribunal overseen by an ALJ. The tribunal was responsible for issuing a recommended decision for the Assistant Administrator for Fisheries who is responsible for rendering a final decision.

The waiver and regulations proposed by the WCR would allow limited ceremonial and subsistence hunting for ENP gray whales over a 10-year period in the coastal portion of the Makah’s U&A. This area comprises approximately 1 percent of the lineal distance of the migratory range of ENP gray whales, which runs along the Pacific Coast of North America and encompasses feeding grounds in the Bering Sea, calving grounds in the Gulf of California, and a coastal migratory route between these areas. RD at 83, 91. During the 10-year waiver period, no more than 25 ENP gray whales could be killed, with an average annual mortality limit of 2.5 animals. The current population of ENP gray whales is 19,260 (Eguchi *et al.* 2024), but when the proposed regulations were issued the population was much higher at approximately 27,000 animals. RD at 95.

The proposed regulations included measures to protect endangered WNP gray whales and ensure that hunting does not reduce the abundance of the PCFG below recent stable levels. While uncommon, there are documented occurrences of endangered WNP whales transiting the U&A during the migratory season (December–May), creating a risk that a WNP gray whale could be inadvertently harmed in a hunt during the migratory season. RD at 110–111. The population of WNP gray whales is 290 animals (excluding calves). RD at 117; Tab 81L at 168.

Most ENP gray whales migrate north to the Bering Sea to feed during the summer and fall; however, a subgroup of ENP gray whales, known as the PCFG, do not make this full migration each year, stopping instead to feed in the waters off the Pacific Northwest. RD at 84–85. The IWC and NMFS consider whales to belong to the PCFG if they are photo-identified within the region between northern California and northern Vancouver Island (from 41° N latitude to 52° N latitude) during the summer feeding period of June 1 to November 30, in two or more years. *Id.* at 60–61. PCFG gray whales are part of the ENP stock but exhibit site fidelity to the northern California current ecosystem during the feeding season

(June–November). The PCFG abundance estimate was 243 animals at the time of the proposed regulations and 232 at the time of the hearing. *Id.* at 96. The PCFG is currently estimated at 212 animals and has been relatively stable over the last 20 years (Harris *et al.* 2022).

The proposed regulations included measures to protect PCFG and WNP gray whales, including alternating hunt seasons, ENP strike limits, PCFG strike limits, landing limits, and a PCFG abundance trigger. As proposed, the hunting would be divided between two alternating seasons. Winter/spring hunts (December 1 through May 31) would occur during the migration season to reduce risk to PCFG whales during their feeding season. Summer/fall hunts (July 1 through October 31) would occur during the feeding season to reduce risk to WNP whales, which only occur in the U&A during the migration season. Additional details on the proposed waiver and regulations and the rationale for the proposal may be found in the **Federal Register** notice for the proposed waiver and regulations (84 FR 13604, April 5, 2019).

Since waiving the moratorium and adopting implementing regulations requires formal rulemaking, NMFS held a 6-day hearing in November 2019. A United States Coast Guard ALJ presided over the tribunal. Six specific parties actively participated in the hearing: MMC, PCPW, AWI, Sea Shepherd Legal representing Sea Shepherd Conservation Society, the Makah Tribe, and the WCR. Each party was given the opportunity to present testimonial and documentary evidence and cross-examine the 17 witnesses who testified.

Before the hearing, NMFS, in consultation with the MMPA-mandated Working Group on Marine Mammal Unusual Mortality Events (Working Group), declared a UME for ENP gray whales on May 29, 2019, after several ENP gray whales died within a close time frame along the West Coast of North America from Mexico to Alaska. Tab 53F at 5–6. A UME is defined under the MMPA as “a stranding that is unexpected; involves a significant die-off of any marine mammal population; and demands immediate response.” 16 U.S.C. 1421h(9). The UME received considerable attention at the hearing and in the parties’ filings for the formal rulemaking. The UME continued for several years, with peak strandings occurring between December 17, 2018, and December 31, 2020, and was declared over as of November 2023.

Following the hearing, the public had the opportunity to submit comments to the ALJ, and the parties were entitled to submit post-hearing briefs and proposed

findings of fact and conclusions of law. During the public comment period following the hearing, NMFS announced its intention to prepare an SDEIS to satisfy NMFS's obligations under NEPA. The **Federal Register** notice announcing the planned SDEIS stated: "Because information concerning the ongoing 2019 UME was presented at the agency hearing but not expressly addressed in the 2015 DEIS, NMFS has determined that it would now benefit both the public and agency decision making to prepare a supplement to the DEIS." 85 FR 11347, February 27, 2020. On March 3, 2020, three of the parties to the formal rulemaking (AWI, Sea Shepherd Legal, and PCPW) jointly submitted a Motion to Stay the Waiver Proceeding. Tab 108. They argued that the SDEIS would include new information on the UME and the proceedings should be stayed to allow this information to be addressed in a recommended decision. The tribunal denied the motion, finding there was sufficient evidence in the record to determine whether the UME for ENP gray whales should preclude issuance of a waiver. The tribunal also determined that the arguments of harm to the moving parties were either speculative or premature and that further delay associated with the moving parties' proposed stay would prejudice the Makah. Tab 118 at 7–8.

On September 23, 2021, the tribunal issued a Recommended Decision (see Tab 121) and concluded "the best scientific evidence available supports a waiver of the MMPA's moratorium of the take of marine mammals to allow the Makah Tribe to engage in a limited hunt for ENP gray whales." RD at 155. The tribunal recommended that I grant the waiver with some changes to the proposed regulations. These recommendations included reorganizing the regulations for clarity, setting a low abundance threshold for ENP gray whales that would stop the hunt, expressly requiring the Makah to obtain authorization under other provisions of the MMPA for the take of WNP gray whales, and prohibiting approaches on calves and mother-calf pairs.

As required by MMPA regulations, NMFS published a notification in the **Federal Register** on September 29, 2021, announcing a 20-day public comment period on the Recommended Decision (86 FR 53949), which was extended until November 13, 2021. 86 FR 57639, October 18, 2021. Following the close of the comment period on the Recommended Decision, NMFS completed actions related to the Tribe's waiver request pursuant to NEPA, the CZMA, and the ESA. On July 1, 2022,

EPA announced the availability of the SDEIS (87 FR 39517) and, on July 5, 2022, NMFS announced a 45-day comment period (87 FR 39804), which was extended until October 14, 2022 (87 FR 50319, August 16, 2022), and then reopened from October 28, 2022, through November 3, 2022 (87 FR 64454, October 25, 2022). Pursuant to section 307(c)(3) of the CZMA, on June 2, 2023, the State of Washington Department of Ecology concurred with NMFS's determination that the hunt described in the Recommended Decision was consistent with the enforceable policies in Washington's Coastal Zone Management Plan. On March 15, 2023, NMFS concluded inter-agency consultation under section 7 of the ESA for species under the jurisdiction of the FWS when FWS issued a Letter of Concurrence to NMFS. On November 8, 2023, NMFS concluded intra-agency consultation under section 7 of the ESA for species under the jurisdiction of NMFS by issuing a Letter of Concurrence. A few days later, on November 17, 2023, NMFS released a FEIS under NEPA.

After making the Letters of Concurrence and FEIS publicly available, I solicited additional comments from the parties on November 27, 2023, so they would have an opportunity to address additional scientific analyses on the gray whale population that became available after the comment period on the SDEIS concluded in late 2022. This comment period also provided the parties with an opportunity to explain whether any other procedures should be implemented before this Final Decision. The parties' opportunity to comment ended on December 20, 2023, but was followed by an additional opportunity to respond to each other's comments. The response period closed on January 17, 2024. NMFS then developed this Final Decision, which will provide an overview of the tribunal's Recommended Decision followed by responses to comments, a summary of the final regulations, changes to the final regulations from the tribunal's recommendations, application of the statutory criteria, review of additional scientific information, required statements under the MMPA, ultimate findings and conclusions, and classifications.

IV. Overview of the Tribunal's Recommended Decision

Following is an overview of the Recommended Decision's key findings, analyses, and recommendations, which were issued on September 23, 2021. ([https://www.fisheries.noaa.gov/s3/](https://www.fisheries.noaa.gov/s3/2021-09/recommended-decision-19nmfs0001.pdf)

2021-09/recommended-decision-19nmfs0001.pdf) The first three sections of the tribunal's Recommended Decision provided an introduction and overview of the proceeding. Sections I and II described the proceeding, background information, and procedural history. Section III provided a summary of the findings in the Recommended Decision. Section IV described the substantive requirements of the MMPA and then analyzed several threshold issues, including the scientific evidence in the record, consultation with the MMC, and gray whale stock structure.

Section IV.B of the Recommended Decision described "the best scientific evidence available" standard, which governs the statutory analyses NMFS must conduct under sections 101(a)(3)(A) and 103(a) of the MMPA. The Recommended Decision highlighted several touchstones of the standard. First, NMFS cannot disregard "scientifically superior evidence" that does not support its position. RD at 31. Second, "a scientific inference or assertion" must be "derived by the scientific method" and "based on scientifically valid principles" but need not be proven with "absolute certainty." *Id.* Third, "agencies are only required to evaluate existing data and need not speculate on whether their conclusions would change if new or different evidence was adduced." *Id.* Indeed, as the tribunal explained, if "agencies were required to continually develop new data to supplement the information presented in a proceeding, there would be no end to the decision-making process." *Id.*

Section IV.B also evaluated the credibility of the scientific experts who testified at the hearing. The tribunal found NMFS's gray whale experts to be credible witnesses and gave their testimony "great weight" and a "great deal of weight." RD 35–38. The Makah's marine mammal biologist also testified in support of the waiver, and the tribunal accorded his testimony "substantial weight," noting that he conducts "independent, peer-reviewed research" and "his testimony relies on a broad range of sources, including those whose findings he disagrees with." *Id.* at 41–42. Conversely, the tribunal found that AWI's only witness was a less credible witness, explaining that his "opinions are based solely on literature reviews, as he does not conduct any independent research or produce scientific publications, and he appears to have relied heavily on a subset of the available literature that best supports AWI's position in this matter." *Id.* at 46.

After assessing the credibility of the scientific testimony offered at the hearing, the tribunal provided an overview of the studies and reports entered into evidence and the data collection methods used in gray whale research. The tribunal generally found peer-reviewed studies “more reliable scientific evidence than other studies” and that NMFS’s SARs developed in accordance with section 117 of the MMPA were “highly relevant and reliable sources of information.” RD at 48–49. The tribunal also noted that the findings of the IWC’s Scientific Committee, an international body of experts on whale biology, were “highly reliable,” and it was appropriate to give NMFS’s findings “great deference” if they were consistent with those of the IWC. *Id.* at 52.

Section IV.C of the Recommended Decision discussed consultation between the MMC and NMFS and concluded “[t]here is ample evidence in the record that NMFS sought comments from the MMC and made its determination in consultation with the MMC.” RD at 57.

Section IV.D of the Recommended Decision addressed gray whale stock structure. The tribunal began this section by addressing a dispute between the MMC and WCR regarding the extent to which the parties could challenge NMFS’s stock designations, as reflected in SARs, through the formal rulemaking proceeding. The dispute centered on the effect of section 117 of the MMPA, which provides detailed procedures for producing SARs and is the process NMFS uses to designate marine mammal stocks. WCR argued section 117 of the MMPA provides the exclusive mechanism for designating stocks, while the MMC argued SARs produced under section 117 are relevant but not determinative in a formal rulemaking proceeding considering a waiver. RD 58–59.

The tribunal determined that in order to make the required findings under the MMPA, it must make a threshold determination that NMFS’s stock structure for gray whales is “scientifically sound” and allowed the parties to challenge the stock determinations in the SARs in the formal rulemaking proceeding. RD at 59. However, if it were shown that NMFS’s stock assessments were inaccurate or outdated, the Recommended Decision concluded that the formal rulemaking proceeding is not the appropriate forum to make new stock assessments. *Id.* Rather, the proper procedure would be to deny the waiver and remand the case to NMFS to produce new SARs. *Id.* NMFS could then decide whether to

reinitiate the waiver after producing new stock assessments. *Id.*

The tribunal did not remand the case to NMFS to produce new stock assessments. The Recommended Decision concluded that the best available scientific evidence supports NMFS’s determination, as reflected in the SARs, that there are two stocks of gray whales—the ENP stock and the WNP stock—and that the PCFG is a feeding aggregation in the ENP stock. RD at 60–69. The tribunal cited uncertainty with respect to the origins of WNP gray whales but ultimately held that the best available scientific evidence supports NMFS’s conclusion that WNP gray whales “are distinct from the ENP stock as a whole,” noting the significant differences between the nuclear DNA found in ENP gray whales and WNP gray whales. *Id.* at 68–69.

Several parties argued that the PCFG gray whales should be considered a separate stock, but the tribunal disagreed. PCFG gray whales and other ENP gray whales have differences in their mitochondrial DNA, but there is no significant difference in their nuclear DNA. RD at 63–64. Both parents pass nuclear DNA to their offspring, but gray whales and other animals only inherit mitochondrial DNA from their mothers. *Id.* Some parties argued that the differences in mitochondrial DNA show demographic independence; others argued this distinction is only evidence of calves following their mothers to the feeding grounds for which the PCFG are named. *Id.* The tribunal weighed the evidence and arguments of the parties and determined that calves born to PCFG mothers support the PCFG population but external recruitment—that is, other ENP whales joining the PCFG—plays a role too. *Id.* On this point, the tribunal noted, “[w]hile the evidence on recruitment levels is not conclusive, it does convincingly show that external recruitment plays a major role in maintaining or increasing the size of the PCFG” and that this evidence “weighs strongly against demographic independence, a key assessment factor for stock status under the current stock assessment guidelines.” *Id.* at 65.

Regarding PCFG breeding, the tribunal explained “a determinative factor in making stock determinations is whether a population’s members interbreed when mature.” RD at 62. The tribunal found that the “the scientific evidence is still strong that PCFG gray whales have ample opportunity to mate with non-PCFG ENP whales, and in fact continue to do so.” *Id.* at 63. The tribunal also relied on the 2018 SAR, analysis by the IWC, and the testimony of other scientific experts in concluding

“the evidence strongly supports NMFS’s conclusion, and that of the IWC, the PCFG are a feeding aggregation and not a separate stock or management unit.” *Id.* at 65–66.

After summarizing the parties’ arguments for and against the waiver in section V of the Recommended Decision, section VI of the Recommended Decision analyzed the statutory factors set forth in section 101(a)(3)(A) of the MMPA. Section IV.A addressed the enumerated biological factors (distribution, abundance, breeding, and times and lines of migratory movements) and concluded that the proposed waiver and regulations gave due regard to these factors. Regarding distribution, the tribunal concluded: “Based on the best available scientific evidence, I find the hunt will not affect the overall distribution of the ENP gray whale stock, nor will it have a significant, lasting, or detrimental effect on the distribution of PCFG whales.” RD at 93. Regarding abundance, the tribunal concluded “at a population level, the removal of approximately 2.5 whales per year (assuming the Makah Tribe takes the full number of whales allowed) would not significantly affect the ENP stock.” *Id.* at 103. The tribunal also concluded “the best available scientific evidence is the UME should not preclude issuance of a waiver.” *Id.* However, it found “the regulations may warrant modification to further limit hunting activities during an active UME or if the stock does not rapidly recover from a UME.” *Id.* Regarding breeding, the tribunal concluded “there is no scientific evidence showing approaches or training harpoon throws would prevent whales from mating.” *Id.* at 106. Regarding migratory movements, the tribunal noted “there is no credible evidence that the whales encountered during a hunt will cease migration or change their migratory path in future years to avoid the hunt.” *Id.* at 111–112.

Section VI.B of the Recommended Decision next considered how the proposed waiver would affect the health and stability of the marine ecosystem and the functioning of marine mammals in their ecosystem. After reviewing the evidence related to ecosystem effects at various scales associated with the removal of 25 gray whales over 10 years, the Recommended Decision determined that it was “reasonable for NMFS to conclude that the health and stability of the ecosystems in which gray whales function will not be adversely affected by the proposed waiver and regulations.” RD at 116.

In section VI.C of the Recommended Decision, the tribunal conducted an

OSP analysis. OSP is defined by the MMPA as “with respect to any population stock, the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element.” 16 U.S.C. 1362(9). Citing section 2 of the MMPA, the Recommended Decision determined that when assessing a waiver, the “MMPA requires the Secretary to consider the ability of marine mammal ‘species and population stocks’ to attain and maintain OSP, when doing so is consistent with the Act’s primary objective of preserving the health of the marine ecosystem.” RD at 116. The tribunal determined that this inquiry is not limited to the “stock subject to the waiver.” *Id.* Rather, “NMFS must show that it considered not only the ENP stock’s ability to attain and maintain its OSP, but also the WNP stock’s ability to do so.” *Id.*

The tribunal concluded that the ENP stock has attained OSP and that it is likely to maintain OSP after the hunt contemplated by the proposed waiver and regulations. *Id.* With respect to WNP gray whales, the tribunal explained:

AWI argues the near-certainty of at least one WNP whale being approached at some point during the ten-year validity period of this waiver, and the minimal chance of one being struck, prevents NMFS from issuing the waiver. I disagree. A mere approach on a WNP gray whale, which is the most likely scenario under the proposed waiver and regulations, is not expected to have any effect on the stock’s ability to attain and maintain its OSP.

RD at 120. Regarding WNP gray whales and OSP, the tribunal further explained that, “loss of a WNP whale due to a hunt-related strike would certainly have a deleterious effect on the stock due to its low abundance.” *Id.* However, it ultimately recommended that the waiver be granted, explaining that the waiver criteria in section 101(a)(3)(A) does not require NMFS to “conclusively rule out any possibility that an animal from a depleted stock could be taken.” *Id.* at 132. NMFS produced a risk analysis for gray whales (Moore and Weller 2018), which found there is “a 30% chance of an unsuccessful strike attempt on a WNP whale if all authorized attempts are made, which equates to one every 33 years” and “approximately 14 WNP whales would be approached over 10 years if all available approaches are used (essentially 100% probability).” *Id.* at 118. Moore and Weller (2019) updated this analysis “based on the

higher WNP abundance estimate in the 2018 SAR.” As described in the Recommended Decision, this was the best available science at the time of the hearing and showed a “0.5% chance of striking a WNP on any given strike” and “a probability over the entire hunt period of 7.4%.” *Id.* at 119.

The tribunal addressed the implication of *Kokechik Fishermen’s Ass’n v. Sec’y of Com.*, 839 F.2d 795 (D.C. Cir. 1988), on the proposed waiver and regulations in section IV.D of the Recommended Decision. In *Kokechik*, NMFS issued a permit to a federation of Japanese fishermen to take Dall’s porpoise incidentally while salmon fishing with gillnets. 839 F.2d at 799. The permit authorized the take of Dall’s porpoise only, even though it was foreseeable that other species of marine mammals would also be taken. *Id.* at 799–800. The court held that the permit NMFS issued “was contrary to the requirements of the MMPA in that it allowed incidental taking of various species of protected marine mammals without first ascertaining as to each such species whether or not the population of that species was at the OSP level.” *Kokechik*, 839 F.2d at 802. The tribunal concluded the holding in *Kokechik* applies to the permitting stage of the waiver process, which is not within its jurisdiction (RD at 123), and also noted that *Kokechik* is distinguishable, since it “involved a factual scenario where the killing of depleted marine mammals was ‘not merely a remote possibility but a certainty,’ and the court did not address other specific situations where a permit could possibly be issued,” such as under provisions of the MMPA addressing incidental take. RD at 122 quoting *Kokechik*, 839 F.2d at 802.

After considering the evidence in the record and the arguments of the parties, the tribunal ultimately recommended that NMFS grant the waiver, explaining:

NMFS has presented ample evidence, which the other parties have not rebutted, to show that the ENP stock of gray whales will not be disadvantaged by the issuance of a waiver here. The authorized take will not affect the ENP stock’s ability to maintain its OSP, and will not meaningfully affect its distribution, breeding, or migratory habits.

RD at 132.

The tribunal then turned to the implementing regulations in section VII of the Recommended Decision and analyzed them pursuant to section 103 of the MMPA. The tribunal’s analysis in section VII of the Recommended Decision largely focused on section 103(b) of the MMPA, which requires NMFS to fully consider “all factors which may affect the extent to which

such animals may be taken or imported” in promulgating regulations under this provision of the MMPA. The required consideration under section 103(b) includes, but is not limited to, the effect of the regulations on five enumerated factors:

- (1) Existing and future levels of marine mammal species and population stocks;
- (2) Existing international treaty and agreement obligations of the United States;
- (3) The marine ecosystem and related environmental considerations;
- (4) The conservation, development, and utilization of fishery resources; and
- (5) The economic and technological feasibility of implementation.

In consideration of the first factor, existing and future levels of marine mammals, the tribunal recommended requiring that the Makah obtain an ITA under section 101(a)(5) of the MMPA for WNP gray whales before hunting during the winter/spring season, which runs from December through May. RD at 136–137. The tribunal explained that doing so “will help assure any court that may review this rulemaking in the future that NMFS has fully considered the existing and future levels of the WNP stock and has drafted its regulations accordingly.” *Id.* at 137. The tribunal did not find it necessary to require incidental take authorizations for WNP gray whales during the summer/fall hunting period because WNP gray whales are not expected to be present in the hunt area during that time of the year. *Id.*

The Recommended Decision concluded that NMFS satisfied its burden under the other enumerated factors in section 103(b) of the MMPA. Under the second factor, international treaty and agreement obligations, the tribunal explained that “NMFS is not proposing to exceed the agreed-upon catch limits . . . and the IWC Scientific Committee’s Standing Work Group on Aboriginal Subsistence Whaling Management Procedures evaluated the proposed hunt and determined it would meet the IWC’s conservation objectives for ENP, WNP, and PCFG Whales.” RD at 137. The tribunal determined NMFS addressed the third factor, consideration of the marine ecosystem and related environmental considerations, as explained in section VI.B of the Recommended Decision and through its analysis in the DEIS. RD at 138. Under the fourth factor, the tribunal determined there would be no impact on “the conservation, development, and utilization of fishery resources” and noted that the hunt is unlikely to affect whale-watching businesses. RD at 138–139. Finally, the tribunal concluded the hunt was economically and

technologically feasible, although there may be some technical issues associated with obtaining clear and timely photographs of gray whales for monitoring. RD at 139–140.

Having considered the five required factors, in section VII.B the tribunal turned to a motion filed by the WCR to amend the regulations, which proposed amending the definition of strike to make clear that multiple strikes on the same whale only counted as a single strike for purposes of strike limits. RD at 140. The motion also proposed allowing the Makah to share edible whale products with non-Tribal members outside of their reservation. *Id.* The tribunal granted the motion. RD at 143.

In section VII.C, the tribunal recommended several key changes to the regulations. First, it proposed some structural changes to improve the organization and clarity of the regulations. RD at 146. Second, it recommended specific changes to ensure there is no hunting or training in the winter or spring unless and until the Makah Tribe obtains an ITA. *Id.* at 147–148. Third, citing the UME that was ongoing at the time of its deliberations, the tribunal recommended that NMFS set an abundance threshold for ENP gray whales but did not recommend a specific threshold. *Id.* at 150–151. Finally, the tribunal proposed to prohibit the Makah from approaching gray whale calves or gray whale mothers with their calves. *Id.* at 154.

The tribunal rejected several other proposals advanced by the parties. AWI took issue with the provisions of the proposed regulations that separate lethal and non-lethal hunting activities and argued the term hunt should be defined as any pursuit of a whale. The tribunal rejected this suggestion because it “would likely cause confusion, as it is unclear what other terminology NMFS could use to convey the different limitations on non-lethal training activities and potentially lethal hunting activities.” RD at 146.

MMC proposed adding a PCFG “dimmer-switch” to the regulations, which would reduce PCFG strike limits gradually if PCFG abundance declines, but the tribunal determined that NMFS already had authority to make such reductions if necessary under the proposed regulations. *Id.* at 150–151. PCPW raised concerns related to hunt safety, but the tribunal determined NMFS has discretion to defer its consideration of safety issues to the permitting phase of the process. RD at 151–152.

Section VIII of the Recommended Decision ultimately concluded that the

waiver should be approved and explained:

Having considered the evidence presented at the hearing and the briefs and comments received, I find that the best scientific evidence available supports a waiver of the MMPA’s moratorium of the take of marine mammals to allow the Makah Tribe to engage in a limited hunt for ENP gray whales. The takings authorized under the waiver will have only a negligible effect on the stock and will therefore not disadvantage the stock. In developing the proposed waiver, NMFS followed the dictates of the MMPA by considering the “distribution, abundance, breeding habits, and times and lines of migratory movements of such marine mammals,” the potential effects on the ecosystem, and the ability of stocks to attain and maintain their OSP.

RD at 155. The tribunal also concluded that NMFS adequately considered “the distribution, abundance, breeding habits, and times and lines of migratory movements of WNP gray whales in making this determination, and the regulations include adequate protections for the WNP stock.” *Id.* The tribunal further held that “NMFS’s determination that PCFG whales do not constitute a separate stock is supported by best scientific evidence currently available and that NMFS included adequate protections for PCFG whales in the proposed regulations.” *Id.*

In rendering the Recommended Decision, the tribunal gave no additional weight to the Treaty of Neah Bay of 1855. The Recommended Decision stated:

The Ninth Circuit held that the Makah Tribe’s proposed hunt must comply with the MMPA, notwithstanding its treaty rights, and acknowledged the possibility that NMFS would weigh the treaty rights in deciding whether to bring a waiver proceeding. NMFS has done so. (Tab 101 at 39:9–11 (Yates) (“Absent [the Makah’s] treaty right and absent that quota from the International Whaling Commission, we would not be moving forward with a MMPA waiver for gray whales.”). The remaining issues for decision are prescribed by statute, and do not include consideration of the treaty rights.

RD at 79. The tribunal emphasized that the Treaty “has no bearing on the specific statutory and regulatory issues I am tasked with deciding here.” RD at 137.

V. Responses to Comments on the Recommended Decision

On September 29, 2021, NMFS announced a 20-day comment period on the tribunal’s Recommended Decision. 86 FR 53949. This comment period was extended on October 18, 2021, providing an additional 25 days for public review and feedback. 86 FR

57639. NMFS received 186 comments with 62 supporting and 115 opposing the granting of the waiver. The remaining comments did not express support or opposition but provided specific comments. The Makah Tribe, Northwest Indian Fisheries Commission, Tulalip Tribes, Jamestown S’Klallam Tribe, Puyallup Tribe of Indians, Squaxin Island Tribe, Lower Elwha Klallam Tribe, Suquamish Tribe, Swinomish Indian Tribal Community, Washington Indian Gaming Association, Department of Interior’s Office of the Assistant Secretary-Indian Affairs (Office of the AS-IA), NMFS WCR, MMC, MORI-ko LLC, Sierra Club, and a number of individual commenters were generally supportive of the Recommended Decision. Opponents of the tribunal’s Recommended Decision included AWI, Marine Mammal Conservation of Mexico (COMARINO), Marine Connection, PCPW, and a number of individual commenters. Below, we summarize and respond to the relevant comments. Some comments were outside the scope of this action and are not addressed here.

Comments on the Requirements of Sections 101(a)(3)(A) and 103 of the MMPA

Comment 1: The WCR disagrees with the tribunal’s determination that NMFS must show it considered the WNP stock’s ability to obtain and maintain OSP under section 101(a)(3)(A) of the MMPA.

Response: In section 101(a)(3)(A), Congress granted the Agency the authority to waive the moratorium “so as to allow taking, or importing of any marine mammal, or marine mammal product, and to adopt suitable regulations, issue permits, and make determinations in accordance with sections 102, 103, 104, and 111 permitting and governing such taking and importing, in accordance with such determinations . . .” There are two provisos in section 101(a)(3)(A) following this grant of authority. The first proviso is relevant here and states that the Agency “must be assured that the taking of such marine mammal is in accord with sound principles of resource protection and conservation as provided in the purposes and policies of this Act” in making the determinations associated with waiving the moratorium. Sections 2(2) and (6) of the MMPA include “purposes and policies” related to obtaining and maintaining OSP for all marine mammal species and population stocks. However, the first proviso in section 101(a)(3)(A) does not refer to all marine mammal species and stocks. The proviso refers to “such

marine mammal.” The requirement to be assured that taking “is in accord with sound principles of resource protection and conservation as provided in the purposes and policies of this Act” only applies to the taking of “such marine mammal” under section 101(a)(3)(A).

The term “such” means “of a kind or character to be indicated or suggested.” <https://www.merriam-webster.com/dictionary/such> (last visited March 19, 2024). The term can also mean “[t]hat or those; having just been mentioned.” Black’s Law Dictionary (11th ed. 2019). The Oxford English Dictionary further provides: “Such is a demonstrative word used to indicate the quality or quantity of a thing by reference to that of another or with respect to the effect that it produces or is capable of producing. Thus, syntactically, such may have backward or forward reference. . . .” Oxford English Dictionary Online (last visited March 21, 2024). Likewise, a dictionary published a few years after the MMPA was adopted explains that “such” includes “of a kind or character about to be indicated, suggested, or exemplified” as well as “having a quality already or just specified.” Webster’s Third New International Dictionary (3rd ed. 1976). Thus, the phrase “such marine mammal” in the first proviso in section 101(a)(3)(A) refers to marine mammals “to be indicated” or marine mammals “having just been mentioned,” not marine mammals described in other sections of the Act.

The reference to “such marine mammal” in the first proviso of section 101(a)(3)(A) refers back to NMFS’s authority to allow taking of “any marine mammal.” Under section 101(a)(3)(A), NMFS has the authority to waive the moratorium for a single stock of marine mammals, as NMFS has proposed here. When NMFS chooses to exercise that discretion, the text of section 101(a)(3)(A) limits the analysis required by the first proviso of section 101(a)(3)(A) to the marine mammal stock subject to taking under the proposed waiver. Here, that is the ENP stock, not the WNP stock.

The tribunal construed the statute differently. Citing the purposes and policies in section 2 of the MMPA, the tribunal explained:

The MMPA requires the Secretary to consider the ability of marine mammal “species and population stocks” to attain and maintain OSP, when doing so is consistent with the Act’s primary objective of preserving the health of the marine ecosystem. 16 U.S.C. 1361. This is an overarching principle and does not focus

solely on the stock that is the subject of the waiver.

RD at 116. The WCR disagreed with this interpretation and explained in their comments on the Recommended Decision:

NMFS WCR does not agree with Judge Jordan’s statutory interpretation, that NMFS must consider both the ENP stock’s and WNP stock’s abilities to attain and maintain OSP levels in deciding whether to issue a waiver for ENP gray whales under MMPA section 101(a)(3)(A). See Recommended Decision at 116 (relying on MMPA section 2, Congressional findings and declaration of policy). While we agree that an overarching policy of the MMPA is to maintain all marine mammal stocks at or above OSP levels, here, the specific requirements of section 101(a)(3)(A), which govern issuance of waivers, control. Because NMFS is not proposing to waive the MMPA take moratorium with respect to the WNP gray whale stock, NMFS was not required to undertake an analysis of potential effects on the WNP stock’s OSP levels.

I agree with the WCR. The tribunal’s interpretation deprives the phrase “such marine mammal” in the first proviso of section 101(a)(3)(A) of its normal meaning. The overriding purposes and policies of the MMPA cannot alter the text of section 101(a)(3)(A).

Furthermore, the WCR’s interpretation is consistent with the structure of the statute. Section 103(b) requires a broader evaluation of the “effect of such regulations” implementing a waiver. Section 101(a)(3)(A) uses narrower language and requires only that “the taking of such marine mammal is in accord with the sound principles of resource protection and conservation as provided in the purposes and policies” of the Act. As explained above, “such marine mammal” refers to ENP gray whales, the stock subject to taking pursuant to the waiver. In any event, for the reasons explained in section VIII (*Risk to WNP Gray Whales*), any effects of the final waiver and regulations on WNP gray whales are not expected to impact the ecosystem or the ability of WNP gray whales to obtain or maintain OSP.

Comment 2: With respect to WNP gray whales, the WCR disagrees with the tribunal’s characterization of the disadvantage test in section 103(a) of the MMPA, citing discrepancies in the Recommended Decision. For example, page 117 of the Recommended Decision states: “any take of a WNP would necessarily disadvantage the stock,” whereas page 136 of the Recommended Decision states “not all takes of depleted stocks necessarily disadvantage those stocks.” Relatedly, the Makah Tribe comments that the Recommended Decision’s assertion that the removal of

one WNP whale would disadvantage the stock is contrary to the evidence in the record.

Response: The Recommended Decision uses the term “disadvantage” when discussing WNP gray whales and depleted marine mammals, raising questions about the application of the disadvantage test in section 103(a) to the endangered WNP stock. When implementing a waiver, section 103(a) of the MMPA provides: “The Secretary . . . shall prescribe such regulations with respect to the taking and importing of animals from each species of marine mammal (including regulations on the taking and importing of individuals within population stocks)” as the Secretary “deems necessary and appropriate to insure that such taking will not be to the disadvantage of those species and population stocks and will be consistent with the purposes and policies set forth in section 2 of this Act.” The disadvantage test in section 103(a) applies to “such taking” of “those species and population stocks.” “Such taking” under section 103(a) refers to the taking described earlier in the section, which is the regulated “taking and importing of animals from each species of marine mammal (including regulations on the taking and importing of individuals within population stocks). . . .” This text allows NMFS to regulate taking at the species-level or the stock-level. In this action, NMFS is waiving the moratorium and providing for the regulated taking of gray whales from the ENP stock only. Therefore, NMFS must satisfy the disadvantage test for the ENP stock. NMFS is not waiving the moratorium for WNP gray whales under section 101(a)(3)(A) or providing for regulated taking of this stock under section 103(a). Under these circumstances, NMFS is not required to comply with the disadvantage test for the WNP stock in this action.

The reference to “those species and population stocks” in section 103(a) expresses the idea that if taking is authorized at the species level, then the authorized taking cannot disadvantage the species. If the taking is authorized at the stock level, as NMFS has proposed in this case, then the taking cannot disadvantage the stock. This language does not require NMFS to apply the disadvantage test at the species level if NMFS is only proposing to waive the moratorium and regulate a single stock within a species that consists of multiple stocks. Accordingly, in reviewing the final regulations, I must “insure” that the take of marine mammals from the ENP stock will not disadvantage the ENP stock and will be

consistent with the purposes and policies of section 2 of the MMPA. 16 U.S.C. 1373(a).

Any ambiguity regarding the application of the disadvantage test to WNP gray whales in this case is resolved by the legislative history of the MMPA. When Congress first adopted the exception for incidental take in section 101(a)(5), the House Report for the Bill (H.R. 4084) stated: “Sections 103 and 104 of the Act do not apply to the taking of marine mammals occurring under the authority of section 101(a)(5).” House Report No. 97–228, at 13 (1981). Under the final regulations, any taking from the WNP stock that is anticipated during the permitting stage could only be authorized under section 101(a)(5) under the current circumstances. As such, the legislative history confirms that the disadvantage test in section 103(a) does not apply to WNP gray whales in this case.

Impacts to WNP gray whales are not properly addressed under sections 103(a) or 101(a)(3)(A) in this case, but that does not mean that impacts to WNP gray whales are irrelevant in NMFS’s evaluation of the waiver and implementing regulations. Section 103(b) addresses the regulations NMFS must adopt to implement a waiver and states: “In prescribing such regulations, the Secretary shall give full consideration to all factors which may affect the extent to which such animals may be taken or imported, including but not limited to the effect of such regulations” on five enumerated factors. The language of section 103(b) makes clear that these five factors are not exhaustive and focuses on the effect of the regulations implementing a waiver. Regulations implementing a waiver could affect marine mammals that are not subject to regulated taking under a waiver. In section 103(b), Congress required NMFS to consider these effects. In this case, the regulations implementing a hunt for ENP gray whales may incidentally take endangered WNP gray whales. I must give, and have given, full consideration to this issue under section 103(b).

In summary, the analyses required by sections 101(a)(3)(A) and 103(a) of the MMPA focus on the stock subject to regulated taking under a waiver, which is ENP gray whales. However, the broader language of section 103(b) requires consideration of the effects of the regulations on WNP gray whales. I address the effects of the regulations on WNP gray whales in section VIII of this Final Decision.

Comment 3: The WCR comments that whales are not fishery resources for the purposes of MMPA section 103(b) and

disagrees with the Recommended Decision that the whale watching industry falls within the scope of this factor of the MMPA.

Response: As described in section VIII of this Final Decision, I agree that impacts to whale watching should not be analyzed under section 103(b).

Comment 4: Several comments on the Recommended Decision suggest I must apply the precautionary principle when evaluating various aspects of the Makah’s waiver request.

Response: The statutory criteria that must be evaluated to grant the waiver and adopt implementing regulations are indeed protective, but if the criteria are satisfied, NMFS is not required to apply an additional measure of precaution to comply with the MMPA.

Comments on Gray Whale Stock Structure

Comment 5: The WCR comments that the MMPA’s detailed procedures in section 117 for identifying population stocks take precedence and govern stock determinations for other MMPA purposes, such as issuance of a waiver, and are not subject to *de novo* review in this formal rulemaking.

Response: Section 117 of the MMPA establishes the framework through which NMFS identifies marine mammal stocks and assesses their status. Through this process, which culminates in the publication of SARs, NMFS has identified two stocks of gray whales, the eastern and western North Pacific populations. The tribunal explained the role that SARs play in the waiver process as follows:

In order to make the requisite findings about the proposed waiver and regulations, I must make a threshold determination that the stock structure NMFS used is scientifically sound. While NMFS’s existing stock determinations, as contained in the SARs, are entitled to substantial deference, other parties may attempt to show the SARs rely on outdated or inaccurate scientific evidence. (See Tab 84 at 10; *Brower II*, 257 F.3d at 1067). However, if I were to determine NMFS’s current stock assessments are not based on the best available scientific evidence, this would not be the appropriate forum to make new assessments. Instead, the proper course of action would be to deny the waiver. NMFS would then have the opportunity to produce new stock assessments before deciding whether to propose a future waiver.

RD at 59. I agree with this assessment, which is consistent with the requirements under both sections 101(a)(3)(A) and 103(a) that I base my decision on the waiver and the implementing regulations on the “best scientific evidence available.”

SARs play a critical role in marine mammal management, but if Congress had intended for NMFS to give conclusive effect to the stock determinations in SARs when assessing a waiver application, it would have directed NMFS to do so. Other provisions of the MMPA specifically direct NMFS to use information from SARs. Sections 118(f)(5), (7), and (8) of the MMPA direct NMFS to use the PBR “established under section 117” for certain aspects of take reduction plans. This language clearly instructs NMFS to use information from SARs. There is no similar language related to stock designation in the provisions of the MMPA governing this proceeding. Rather, in both sections 101(a)(3)(A) and 103(a), Congress directed NMFS to use the “best scientific evidence available” when evaluating a waiver and implementing regulation which will often, but not always, be the scientific evidence in SARs. Because SARs are not constantly updated, the scientific information in a SAR can become outdated before the next SAR is published. Therefore, I agree with the tribunal’s decision to allow the parties to challenge the gray whale stock structure reflected in the 2017 and 2018 SARs (Tabs 2K; Tab 54D) during this formal rulemaking proceeding and its ultimate conclusion that the stock structure reflected in NMFS’s SARs is scientifically sound.

Comment 6: NMFS received a number of comments on whether PCFG gray whales should be considered a stock under the MMPA, with the Makah Tribe, MMC, and WCR region arguing that the PCFG are not a stock and AWI, Sea Shepherd, and PCPW arguing the opposite. Some parties and commenters argue that the PCFG must be designated as a stock pursuant to the purposes and policies of the MMPA and the precautionary principle.

Response: I agree with the tribunal’s determination that the PCFG is a feeding aggregation within the ENP stock for the reasons stated in section IV.D.1 of the Recommended Decision. The tribunal found that “the evidence strongly supports NMFS’s conclusion, and that of the IWC, that the PCFG are a feeding aggregation and not a separate stock or management unit.” RD at 65–66. Since the evidence is strong on this issue, NMFS’s determinations related to the PCFG’s status are consistent with the MMPA. Conservation of the PCFG is addressed through the numerous conservation measures in the final regulations that will ensure the hunt does not cause the PCFG to fall below recent levels, including PCFG abundance thresholds that prohibit

authorizing hunting if the PCFG population is below those thresholds.

Comment 7: AWI comments that the Recommended Decision primarily relies on recruitment levels in determining that the PCFG are a feeding aggregation within the ENP stock, rather than a separate stock.

Response: I disagree. The Recommended Decision relies on multiple lines of evidence in reaching the conclusion that the PCFG are a feeding aggregation with the ENP stock, including breeding habits, genetic information, and immigration into and emigration out of the group. RD at 62–67.

Comment 8: AWI argues that NMFS's failure to heed the recommendation of the PSRG and convene a workshop to address whether the PCFG should be considered a stock is arbitrary and capricious.

Response: AWI mischaracterizes the PSRG's recommendation. In 2018, the PSRG recommended that "NMFS reconsider the characteristics and status of the Pacific Coast Feeding Group (PCFG) of gray whales and whether it should be recognized and managed as a full stock" without requesting that the agency convene a workshop to address the issue. Tab 2L at 11. NMFS responded to the 2018 PSRG recommendation by explaining that the available information did not support classifying the PCFG as a "full stock" under the MMPA and that NMFS scientists keep apprised of new information pertaining to the PCFG and are actively engaged in field studies and gray whale assessments/workshops, including participation in four workshops convened by the IWC to review the range-wide status and structure of the North Pacific gray whales. Tab 2L at 11–12. NMFS scientists continue to be actively engaged in gray whale research and assessments. These assessments continue to support that the PCFG is a feeding aggregation of the ENP gray whale stock (see FEIS subsection 3.4.3).

While the PSRG is an important part of the process described in section 117 of the MMPA, they do not have a formal role in this proceeding and have not participated. Even if the PSRG had recommended establishing another workgroup to consider the status of the PCFG as a stock, I do not have the discretion to delay this proceeding to do so. The regulations governing this matter only allow me to make a final decision or remand this matter to the tribunal at this stage in the proceeding. 50 CFR 228.21(a).

Section 117 of the MMPA requires the development of SARs, based on the best

scientific information available, for all marine mammal stocks in U.S. waters. These reports are reviewed annually for "strategic stocks" and stocks for which significant new information is available and at least every 3 years for all other stocks. Through section 117 of the MMPA, NMFS regularly reviews the stock status of marine mammals, including gray whales, and will continue to do so.

Comment 9: MMC recommends that I address the implications for the waiver if the PCFG are designated a stock and include a contingency clause in the regulations that would suspend the authorization to conduct a whale hunt if the PCFG are determined to be a separate stock.

Response: If the PCFG are designated a stock at some future time, the same MMPA provisions that apply to waiving the take moratorium for the ENP stock would apply to a newly designated stock. The Tribe would need to apply for a waiver of the moratorium on take for the new stock, the request would be considered through the formal rulemaking process, and a decision rendered. If designated as a stock, PCFG whales could not be intentionally hunted unless a waiver is granted and implementing regulations are promulgated.

Comment 10: The Makah Tribe comments that it believes the WNP stock is not a listed species under the ESA because its essential attributes are "fundamentally different" from the stock that remained listed as endangered in 1994 when the ENP stock was delisted, and therefore the WNP stock should not be considered depleted under the MMPA.

Response: The entire gray whale population was first listed as endangered in 1970 (35 FR 18319, December 2, 1970), and it was both endangered under the ESA and depleted under the MMPA at that time. In 1994, the ENP stock was removed from the ESA's list of endangered and threatened species and no longer considered depleted under the MMPA because it had recovered. However, the WNP stock remained both endangered under the ESA and depleted under the MMPA because NMFS determined that the WNP gray whale population was geographically and reproductively isolated from the ENP population, remained small, and had not recovered. 59 FR 31094, June 16, 1994. Although it is now clear that the WNP and ENP gray whale populations are not geographically isolated (see section IX, Stock Structure), I agree with the Recommended Decision's determination that "the best available scientific

evidence" is that WNP gray whales are "distinct from the ENP stock as a whole." RD at 69. The tribunal noted uncertainty regarding the origins of the WNP gray whales but highlighted the "statistically significant" genetic differences between WNP gray whales and ENP gray whales. RD at 67–69. Analysis of photo-identification data, including data on mother-calf pairs, and paternity assessments, suggest that gray whales summering in the WNP may constitute a demographically self-contained subpopulation where mating occurs at least preferentially and possibly exclusively within the subpopulation. Several studies have found differences in the mitochondrial and nuclear DNA between ENP and WNP gray whales. RD at 67–69; Tab 59B at 12. I agree that these differences in the nuclear DNA found in ENP gray whales and WNP gray whales counsel in favor of treating the two stocks separately, even though it is now clear that their ranges overlap to some degree.

Comments on the Status of Gray Whales

Comment 11: Several comments address the status of the ENP gray whale stock. These include comments that the population should be considered endangered and not sustainable as well as comments that the population has fully recovered and a hunt would have negligible effects.

Response: ENP gray whales are not listed as endangered. The status of the ENP gray whale stock is addressed in sections IV–V and VII–IX of this Final Decision.

Abundance Threshold for ENP Gray Whales and the UME

Comment 12: The tribunal found that "the scientific evidence weighs in favor of an overall abundance threshold" for ENP gray whales and recommended I consider establishing one in the final regulations, "[p]articularly in light of the current UME." RD at 151. Several commenters addressed the tribunal's recommendation to include an abundance threshold in the final regulations and proposed specific population levels, ranging from 11,000 to 18,000, below which hunting would be prohibited. The Makah Tribe and the WCR believe an abundance threshold is not necessary but suggested thresholds should NMFS choose to implement one. MMC and PCPW support a low abundance threshold. AWI, while arguing that legal obstacles preclude adoption of the Recommended Decision, is generally supportive of a low abundance threshold.

Response: I have included requirements in the final regulation

setting an abundance threshold based on OSP. NMFS is required to confirm that the ENP gray whale stock is within OSP before issuing a hunt permit and ensure that the level of hunting under the hunt permit will not cause the stock to fall below its OSP. If the stock falls below OSP, NMFS must notify the Tribe and hunting is prohibited until NMFS notifies the Tribe that the stock is within OSP.

Comment 13: Several commenters suggest that the waiver should not be granted during a UME.

Response: The Working Group on Marine Mammal Unusual Mortality Events determined the most recent UME involving ENP gray whales was biologically over as of November 2023. There is no longer an ongoing UME for ENP gray whales. The population of ENP gray whales is known to experience large-scale fluctuations in abundance and has recovered from prior declines, including a prior UME that occurred over 20 years ago. The most recent abundance estimate for the 2023/2024 season shows a 32.6 percent increase from the 2022/2023 season (Eguchi *et al.* 2024). The abundance threshold for ENP gray whales in the final regulations addresses these fluctuations and concerns related to UMEs by prohibiting lethal hunting if the stock is not within its OSP.

PCFG Gray Whales

Comment 14: Some commenters suggest that the hunt will primarily impact the PCFG. Commenters also suggest that PCFG whales may not be able to recover from human-caused mortalities.

Response: The effects of the hunt were thoroughly evaluated at a range of scales, including the ENP, PCFG, OR-SVI (PCFG whales observed from southern Oregon to southern Vancouver Island survey areas), and Makah U&A (PCFG whales observed in north Washington or Strait of Juan de Fuca survey areas) whales (see FEIS Chapter 4). The regulations contain several protections for PCFG whales, including an alternating hunt season, limits on the harvest and mortality of PCFG whales, and low abundance thresholds for PCFG whales below which hunting would not be authorized.

Comment 15: PCPW and MMC recommend adopting a “dimmer switch provision” that would gradually reduce the harvest of gray whales before the abundance reaches the thresholds set in the regulations. Other commenters assert that this provision is unnecessary as the proposed regulations allow NMFS discretion to limit PCFG strikes below the full level through the hunt permit.

Response: The regulations include a number of measures to protect PCFG gray whales including a low abundance threshold. As noted in the Recommended Decision, NMFS also has discretion through the hunt permit process to grant less than the full number of strikes that would otherwise be allowed. If necessary, this discretion could be used to protect PCFG gray whales. RD 150–151. Given this, I have determined that a “dimmer switch” provision is not warranted.

Comment 16: PCPW comments that the accounting and identification methods (*e.g.*, photo-identification) for PCFG whales are not 100 percent reliable and that the assumptions in accounting for PCFG whales are “questionable formulas.” PCPW also asserts that the number of whales at a particular time is impossible to know and models used for estimating the PCFG abundance are full of “assumptions” and in the hands of “anonymous modelers.”

Response: I have kept the requirement that the Tribal hunt observer collect digital photographs for identification but have modified it slightly to specify the Tribal hunt observer “must make every reasonable attempt” to collect digital photos. The regulations at § 216.115 specify the methods used to account for a whale that cannot be affirmatively identified. These methods are based on the best available scientific information. The PCFG abundance estimate is based on data derived from photo-identification surveys and catalog data. These estimates and the methods to derive them are fully described in peer reviewed, published literature. See, for example, Tabs 3AA, 3HH. The survey and catalog data will also be used as the basis for projecting PCFG abundance estimates into future hunting.

Comment 17: A commenter suggests the UME had a disproportionate effect on PCFG gray whales.

Response: There is no evidence that the UME had a disproportionate effect on PCFG gray whales. Since declaring a UME in May 2019, NMFS worked with partners in Canada and Mexico to review data and sample stranded gray whales. RD at 99. Only one whale has been matched by photo-identification to the PCFG. Genetic analysis of samples collected from stranded whales has not been completed. Although the abundance estimate for the ENP stock declined significantly from the 2015/2016 to the 2022/2023 abundance surveys, the PCFG abundance estimate has not experienced a proportional decline from pre-UME levels to 2020 (Harris *et al.* 2022).

Comment 18: Two commenters note inconsistencies in the statement in the Recommended Decision describing PCFG as occurring “in the PCFG range between April 1 and November 30 of two consecutive years.” RD at 85. April 1 should read June 1. While a whale must be sighted in 2 or more years to be designated a PCFG whale, these sightings do not need to be in consecutive years.

Response: I agree that the statement is inconsistent with the definition of the PCFG and correct this error in section VIII of this Final Decision.

Comment 19: PCPW comments that human-caused mortalities, including mortalities related to the hunt, are likely to exceed PBR for PCFG gray whales in some years, notes uncertainty in abundance estimates, and questions how NMFS will determine and respond if PBR is exceeded. PCPW also compares the PCFG to other marine mammal species with small population sizes as a caution about the impacts of human actions on these species.

Response: While PCFG whales are not a stock or prospective stock under the MMPA, the SARs include estimates of abundance, human-caused, mortality, and PBR for informational purposes. The estimates reflect the best available scientific information as required by the MMPA. The regulations include a number of measures to minimize the effects of the hunt on the PCFG specifically, including strike limits, low abundance thresholds, and reporting and accounting requirements. To the extent that the informational PBR for PCFG raises management concerns, there are processes for addressing those concerns in the regulations. The regulations provide that the Regional Administrator will notify the Tribe of the maximum number of PCFG whales, including females, that may be struck during the upcoming hunting season, providing a mechanism to respond to and adaptively manage based on the best available information.

WNP Gray Whales

Comment 20: Several commenters maintain that the approval of the waiver is inappropriate in terms of conservation of endangered WNP gray whales.

Response: I disagree. The effects of a Tribal hunt on WNP gray whales have been fully considered. The regulations are designed to minimize the risk of a WNP whale being struck or harmed over the duration of the waiver. Approaches, the most likely type of interaction with a WNP gray whale, are not lethal, nor are approaches likely to cause more disturbance than close approaches

associated with typical biopsy sampling for research purposes. RD at 123.

Comment 21: Several commenters address the tribunal's recommendation that I expressly require the Makah Tribe to obtain an ITA for WNP gray whales during the winter/spring season (December through May) when the WNP gray whales might be present in the Makah U&A. The MMC supports the tribunal's recommendation expressly requiring an ITA, commenting: "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." The Makah Tribe questions whether an express requirement for an ITA for WNP gray whales is necessary, arguing that the regulations include significant protections for WNP gray whales and pointing to provisions in the proposed regulations requiring NMFS to determine that relevant incidental take authorization for other marine mammals have been obtained before a hunt permit can be issued.

Response: The final regulations require NMFS to evaluate whether the hunting proposed by the Makah Tribe in their permit application will result in the take of WNP gray whales. If the take of WNP gray whales is anticipated by NMFS, then NMFS must include measures in the hunt permit requiring a separate take authorization for those whales during the winter/spring season. Depending upon what the latest science shows, additional measures that could prevent anticipated take of WNP gray whales may include, for example, limiting the number of hunting and training days, restricting the location of hunting and training, or banning hunting and training during the winter/spring season if other measures are not effective.

Comment 22: AWI and another commenter assert that the Recommended Decision must be rejected because the take of WNP gray whales during the course of a hunt for ENP gray whales cannot be authorized under the MMPA's exception for incidental take.

Response: I disagree. For the reasons explained below, if NMFS determines that the take of WNP gray whales is anticipated during the permitting process, the Makah could qualify for an ITA under section 101(a)(5) for the "incidental, but not intentional, taking" of WNP gray whales during the course of their hunt for ENP gray whales. To respond to this comment, I will first summarize the requirements for ITAs and relevant legislative history and then

explain how the Makah could meet the threshold requirements for an ITA.

Section 101(a)(5) describes two types of ITAs for non-military activities that are relevant here. One type allows NMFS to issue an incidental harassment authorization for up to 1 year. 16 U.S.C. 1371(a)(5)(D). The other allows NMFS to issue regulations and a letter of authorization that would allow incidental take for up to 5 years. 16 U.S.C. 1371(a)(5)(A). Collectively, I will refer to these two exceptions as an ITA. Only U.S. citizens "who engage in a specified activity (other than commercial fishing) within a specified geographical region" can apply for an ITA. 16 U.S.C. 1371(a)(5)(A), (D). Taking marine mammals under an ITA must be "incidental, but not intentional, taking." *Id.* NMFS can authorize take of only "small numbers" of marine mammals, and the authorized take can have only a "negligible impact" on the species or stock. *Id.* The take cannot have an "unmitigable adverse impact" on the availability of marine mammals for subsistence uses, and NMFS must prescribe "means of effecting the least practicable adverse impact on such species or stock and its habitat." *Id.*

Several important terms are further defined by regulations implementing section 101(a)(5). The terms "[i]ncidental harassment, incidental taking and incidental, but not intentional, taking all mean an accidental taking." 50 CFR 216.103. The regulatory definition makes clear that "[t]his does not mean that the taking is unexpected, but rather it includes those takings that are infrequent, unavoidable or accidental." *Id.*

The definition of "incidental, but not intentional, taking" closely tracks relevant legislative history. Congress first adopted the incidental take exception for specified activities in the 1981 amendments to the MMPA. The 1981 amendments to the MMPA also included a similar exception for incidental takes committed during commercial fishing. Regarding these new exceptions, the House Report for the Bill explained:

Both sections 101(a)(4) and (5) authorize the incidental, but not the intentional, taking of small numbers of marine mammals. The phrase "incidental, but not intentional" is intended to mean accidental taking. The words "not intentional" should not be read to mean that persons who know there is some possibility of taking marine mammals incidental to commercial fishing operations or other specified activities are precluded from proceeding under the authority of sections.

House Report No. 97–228, at 13 (1981). Referring to the new incidental

take exceptions, the House Report for the 1981 amendments to the MMPA further explained: "The Committee intends that these provisions be available for persons whose taking of marine mammals is infrequent, unavoidable, or accidental." *Id.*

Implementing regulations also define the term "specified activity," which means "any activity, other than commercial fishing, that takes place in a specified geographical region and potentially involves the taking of small numbers of marine mammals." 50 CFR 216.103. The House Report to the 1981 amendments to the MMPA explains:

It is the intention of the Committee that both the specified activity and the specified region referred to in section 101(a)(5) be narrowly identified so that the anticipated effects will be substantially similar. Thus, for example, it would not be appropriate for the Secretary to specify an activity as broad and diverse as outer continental shelf oil and gas development. Rather, the particular elements of that activity should be separately specified as, for example, seismic exploration or core drilling.

House Report No. 97–228, at 13 (1981). Congress intended for NMFS to articulate specified activities with particularity, as this approach would allow NMFS to more carefully analyze the effects of the activity on marine mammals.

With the relevant authorities and the legislative history in mind, I will now consider whether the Makah Tribe could satisfy the threshold requirements for an ITA under section 101(a)(5). I cannot determine in this proceeding whether an ITA for WNP gray whales would be appropriate, as such a determination requires separate procedures, but nothing about the Makah's activities under the waiver would prevent them from satisfying the threshold requirements.

Under section 101(a)(5), there are three threshold requirements that must be met before NMFS can consider issuing an ITA. First, there must be a request from a citizen of the United States. 16 U.S.C. 1371(a)(5)(A), (D). Members of the Makah Tribe are U.S. citizens and could make such a request.

Second, U.S. citizens must be engaged in a "specified activity (other than commercial fishing) within a specified geographical region." 16 U.S.C. 1371(a)(5)(A), (D). The Makah are proposing a ceremonial and subsistence hunt for ENP gray whales, which is a specified activity other than commercial fishing. Activities under the waiver will occur in the coastal portion of the Makah Tribe's U&A, which is a specified geographic region. Hunting and training activities under the waiver

involve a specific set of actions directed at ENP gray whales. The legislative history for section 101(a)(5) suggests that the specified activity should be “narrowly identified.” House Report No. 97–228, at 13 (1981). A “narrowly identified” activity is consistent with the common meaning of the term “specified,” which is the past tense of “specify” and means to “mention or name in a specific or explicit manner: tell or state precisely or in detail.” Webster’s Third New International Dictionary (3rd ed. 1976). Considering hunting and training activities directed at a single stock of marine mammals in an ITA is consistent with the meaning of the term “specified.”

The final threshold requirement is that taking authorized under section 101(a)(5) must be “incidental, but not intentional, taking.” NMFS has defined the phrase “incidental, but not intentional, taking” to mean “an accidental taking.” 50 CFR 216.103. Consistent with legislative history surrounding this exception, “accidental taking . . . does not mean that the taking is unexpected, but rather it includes those takings that are infrequent, unavoidable or accidental.” *Id.*

Here, a highly conservative analysis forecasts at most 18 approaches of WNP gray whales and a small but real risk of an unsuccessful strike attempt over the 10-year waiver period. Tab 61D. To the extent that each approach represents a take, these takes would be infrequent compared to the 3,530 approaches authorized over the waiver period for ENP gray whales. To the extent that a WNP is present in the U&A during hunting or training activities, approaches may be unavoidable because it is difficult to distinguish between the two gray whale stocks visually in a hunt scenario. In light of the differing statuses of the two stocks, Makah hunters would be targeting ENP gray whales, so any taking of a member of the WNP stock would be accidental.

Pursuing the wrong type of animal in a hunt can be an accident. An analogy helps illustrate this. A hunter enters the field to hunt whitetail deer during whitetail deer season. There are whitetail deer and mule deer in the area, but whitetail deer outnumber mule deer 100 to one. The hunter sees an animal with antlers in the distance and stalks it. Unbeknownst to the hunter, the animal is a mule deer. The mule deer catches the scent of the hunter and flees.

Common sense suggests that when the hunter stalked and thereby hunted the mule deer it was an accident. This is because the hunter intended to hunt whitetail deer, was authorized to hunt

whitetail deer, and reasonably thought the mule deer was a whitetail deer based on its general appearance and the fact that mule deer are rare in the area. Likewise, it would be an accident if Makah whalers approach or throw a harpoon near a WNP gray whale during the course of their hunting and training activities directed at ENP gray whales.

Nevertheless, AWI and some other commenters argue that hunting is always intentional and cannot qualify for an ITA. This argument is not consistent with the text of the MMPA. Under section 101(a)(5), an ITA is available for “incidental, but not intentional, taking.” Taking is the present participle of take, which means “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.” 16 U.S.C. 1362(13). If the statutory criteria are met, NMFS is required to allow citizens to incidentally, but not intentionally “harass, hunt, capture, or kill . . . any marine mammal” when engaged in specified activities. *Id.* If Congress had only intended for an ITA to be available for harassing, capturing, or killing—but not hunting—it would not have used the term “taking” in section 101(a)(5).

For all these reasons, if necessary Makah whalers can apply for an ITA under section 101(a)(5) to cover any incidental take of WNP gray whales that is anticipated during the winter/spring hunt.

Comment 23: The MMC comments that it agrees with the statement in the Recommended Decision that the “best available scientific evidence shows that removal of a WNP whale would be detrimental to the stock.” RD at 19. MMC asserts that this statement would preclude NMFS from making the negligible impact determination necessary to authorize the incidental killing of a WNP gray whale under section 101(a)(5).

Response: If the Makah apply for an ITA under section 101(a)(5)(A), NMFS will evaluate their application along with the best available science. I have not affirmed the statement the MMC references from the Recommended Decision related to WNP gray whales since it is premature to speculate on what a potential future analysis would show.

Comment 24: AWI’s comments on the Recommended Decision contend that the taking of WNP gray whales is a certainty under NMFS’s own risk analysis and therefore the Recommended Decision “must be rejected because it will result in the illegal take of WNP gray whales.” Referring to WNP gray whales, AWI further comments that “[t]he

Recommended Decision unlawfully authorizes the directed take of a depleted marine mammal stock” citing guidance from NMFS’s Permits and Conservation Division within the Office of Protected Resources that references two categories: authorizations for incidental take of marine mammals under the MMPA and permits for directed take of species protected under the MMPA and/or ESA.

Response: AWI points to the 18 approaches forecasted in the 2019 Moore and Weller analysis (see Tab 61D) to support their argument that take of WNP gray whales is a certainty. However, this analysis unrealistically assumes that all approaches (hunting and training) occur during the winter/spring period when WNP whales may be present, even though a substantial number of approaches will likely occur outside this period during the summer/fall season when ocean conditions are more favorable for hunting. The Moore and Weller analysis shows that there is a potential risk to WNP gray whales, not that take is inevitable. The risk identified in the Moore and Weller analysis calls for management, not denial of the waiver.

The regulations I adopt in this document include significant protections for WNP gray whales. Before issuing a hunt permit for ENP gray whales, NMFS is required to determine, based on the best available science, whether the activities described in the Makah Tribe’s hunt permit application would result in the take of WNP gray whales. If the activities would result in the take of WNP gray whales, the Makah must have separate authorization for takes of WNP gray whales to hunt or train during the winter/spring season.

The Makah Tribe has at least three options to address concerns related to WNP gray whales; none of which would result in the illegal take of WNP gray whales. First, the Makah may choose not to hunt or train during the winter/spring. Second, the Tribe may propose additional restrictions in their application for a hunt permit that would lead NMFS to conclude take of WNP gray whales is not anticipated during the winter/spring season. Finally, the Makah could obtain an ITA under section 101(a)(5) to cover the take of WNP gray whales.

Regarding AWI’s comment about “directed take,” many of the permits NMFS issues for protected species fall within the incidental or directed take categories, but this proceeding presents a unique permitting scenario, and the definition of “directed take” on the portion of NMFS’s website referenced by the commenter has no bearing on

whether an incidental take authorization could be issued under section 101(a)(5) for WNP gray whales.

Comment 25: AWI comments that the Recommended Decision will result in the hunting of WNP gray whales, which is a violation of the MMPA because this stock is depleted.

Response: Although section 101(a)(3)(B) of the MMPA generally prevents NMFS from issuing permits for the take of WNP gray whales because the stock is depleted, an exception allows NMFS to issue ITAs for animals from depleted stocks. The final regulations and the waiver authorize hunting only ENP gray whales. If NMFS anticipates the hunting of ENP gray whales may result in the take of WNP gray whales, under the final regulations the agency would need to authorize this take separately. As explained in response to comment 22, characterizing the take of WNP gray whales as “hunting,” does not preclude issuance of an ITA under section 101(a)(5) of the MMPA.

Comment 26: AWI comments that the definition of hunt in the proposed regulations, which does not include non-lethal activities, is inconsistent with the plain meaning of the term and has enormous legal significance.

Response: The tribunal addressed this argument in section VII.B.3.b of the Recommended Decision. I agree with that analysis. As the tribunal explained:

I find AWI's reading of the regulations overly formalistic. Moreover, it would likely cause confusion, as it is unclear what other terminology NMFS could use to convey the different limitations on non-lethal training activities and potentially lethal hunting activities. Therefore, I see no need to amend the definition of “hunt” or of the related training activities.

RD at 146. WNP gray whales are designated as “depleted” under the MMPA in addition to their “endangered” status under the ESA, and the moratorium has not been waived for the WNP stock. Under these circumstances, permits cannot be issued for the take of WNP gray whales, except for scientific research, photography, enhancement or incidental take under section 101(a)(5) of the MMPA. 16 U.S.C. 1371(a)(3)(B). As discussed in response to comment 22, characterizing the activities associated with the waiver as hunting WNP gray whales does not preclude issuance of an ITA for this stock, if needed.

Comment 27: AWI comments that the Recommended Decision authorizes harassment of WNP gray whales in violation of the MMPA.

Response: In light of the potential for activities authorized by the waiver and

final regulations to result in the take of WNP gray whales, I have adopted final regulations that manage this risk by ensuring hunting and training does not occur during the winter/spring season without an ITA if the agency determines during the permitting process that take of WNP gray whales is anticipated. Although the Makah are eligible to apply for an ITA, issuance of an ITA is not guaranteed and will be evaluated pursuant to the applicable statutory and regulatory requirements should the Makah choose to apply.

Comment 28: AWI comments that training activities are inconsistent with the purposes and policies of the MMPA and should not be authorized under the waiver.

Response: The Makah have sought a waiver to hunt ENP gray whales and train for that hunt. I have applied the criteria set forth in the MMPA for evaluating the waiver request and implementing regulations and have determined that the training activities authorized in the final rule are consistent with the MMPA. Training is critical to ensure the hunt is safe and humane. NMFS will address issues related to safety and the humaneness of the hunt more specifically during the permitting process. To the extent that training activities authorized under a hunt permit are anticipated to result in take of WNP gray whales, such takes can be authorized and managed in accordance with section 101(a)(5) of the MMPA.

Comment 29: AWI and another commenter argue that *Kokechik Fishermen's Ass'n v. Sec'y of Com.*, 839 F.2d 795 (D.C. Cir. 1988) prohibits issuance of a waiver because the waiver will result in the take of WNP gray whales. WCR, MMC, and the Makah Tribe disagree.

Response: In *Kokechik*, NMFS granted a waiver under section 101(a)(3)(A), adopted regulations under section 103, and issued a permit pursuant to sections 101(a)(2) and 104 authorizing the incidental take of Dall's porpoise in the Bering Sea by the Federation of Japan Salmon Fisheries Cooperative Association (Federation). 839 F.2d at 797–801. NMFS issued the permit in *Kokechik* knowing the Federation would incidentally kill other marine mammal species for which OSP had not been determined. *Kokechik*, 839 F.2d at 799–800. NMFS did not authorize those other takes and limited the authorization to the take of Dall's porpoise. *Id.* Consequently, the take of other marine mammals would have inevitably occurred without authorization under the MMPA. *Id.* at 801. The court held “that the permit, as

granted to the Federation, is contrary to the requirements of the MMPA in that it allowed incidental taking of various species of protected marine mammals without first ascertaining as to each such species whether or not the population of that species was at the OSP level.” *Kokechik*, 839 F.2d at 802.

Kokechik is distinguishable from the present case for at least three reasons. First, *Kokechik* involved section 101(a)(2) of the MMPA, which provides that “it shall be the immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate.” The court in *Kokechik* relied on the zero mortality and serious injury rate goal to reach its holding, quoting it twice. 839 F.2d at 801–02. Since that provision is not applicable in the present case, which does not involve commercial fishing, *Kokechik* is distinguishable.

Second, *Kokechik* involved the unauthorized serious injury or mortality of marine mammals that was “not merely a remote possibility but a certainty.” *Kokechik*, 839 F.2d 801–02. For example, the ALJ in *Kokechik* anticipated and recommended that NMFS allow the Federation to kill or seriously injure 45 Northern fur seals from the Commander Island stock. 52 FR 19874, 19877, May 28, 1987. Conversely, the tribunal in this case recognized, and I agree, that the risk of a lethal strike on a WNP is quite low. RD at 135–136. NMFS has produced an extremely precautionary risk analysis that shows a remote risk that a WNP gray whale could be killed or seriously injured. As explained by the tribunal:

The modeling suggests, if the Makah Tribe utilizes every available strike during the 10-year waiver period, there is a 5.8% chance of striking at least one WNP whale and a 30% chance of an unsuccessful strike attempt on a WNP whale. If the hunt continued into perpetuity, using the existing hunt management scheme and other variables, a WNP whale would be struck approximately once every 135 years. (Tab 61 at ¶ 8).

RD at 111. In *Kokechik*, the court suggested several times that the case might have been decided differently if the takes at issue were a “remote possibility.” *Kokechik*, 839 F.2d 801–02. A chance of striking a whale and causing a lethal take once every 135 years (RD at 111) is a remote possibility.

Third, *Kokechik* is distinguishable because the Federation was not eligible to apply for a separate ITA for anticipated takes. In *Kokechik*, it was “foreseeable that takes of northern fur seals, northern sea lions, harbor

porpoises, Pacific white-sided dolphins, and killer whales will occur,” but only the take of Dall’s porpoise was authorized. 839 F.2d at 800. Because the taking of any of “these other marine mammals without a permit is absolutely prohibited by the MMPA,” the court called the legitimacy of the permit for Dall’s porpoise into question. *Id.* In *Kokechik*, the take of northern fur seals, northern sea lions, harbor porpoises, Pacific white-sided dolphins, and killer whales by the Japanese Federation incidental to their commercial fishing operation was “absolutely prohibited,” meaning there was not a separate legal pathway for the Japanese Federation to seek authorization for the incidental take of these animals. This is because the members of the Japanese Federation were not U.S. citizens. The court cited section 101(a)(4) of the MMPA, which (at the time) set a separate “narrow exception for incidental, but not intentional, takings having a negligible impact on the species involved ‘by citizens of the United States while engaging in commercial fishing operations’” and explained this exception did not apply to the Japanese Federation. *Kokechik*, 839 F.2d at 802. Unlike members of the Japanese Federation, as U.S. citizens seeking to pursue a “specified activity (other than commercial fishing) within a specified geographical region,” 16 U.S.C. 1371(a)(5)(A), (D), members of the Makah Tribe can seek separate authorizations for incidental take of WNP gray whales under the incidental take exception in section 101(a)(5), if needed. This option, which does not require an assessment of OSP, was not available to the Japanese Federation in *Kokechik*.

For all these reasons, the holding in *Kokechik* is largely limited to the facts of that case in that NMFS authorized the taking of one species of marine mammal knowing that another species would be killed in violation of the law. The regulations I adopt in this document, by contrast, involve an extremely remote risk of lethal take and require legally-available authorization for any takes of WNP gray whales anticipated during the permitting process.

Comment 30: AWI comments that the Assistant Administrator must determine whether the take of a WNP gray whale can be authorized prior to issuing the waiver.

Response: The take of WNP gray whales cannot be authorized in this proceeding, but the take of WNP gray whales may be authorized under other provisions of the MMPA. To the extent that AWI contends that I must consider effects on WNP gray whales, I have done

so in accordance with section 103(b) of the MMPA. In conjunction with this review, I have concluded that the Makah are not prohibited from applying for an ITA under section 101(a)(5) of the MMPA for the incidental take of WNP gray whales, if necessary.

Comment 31: AWI comments that NMFS cannot rely on the subjective intent of the Tribal hunters to transform deliberate take into incidental take and that doing so would impose a *mens rea* or mental state requirement in the statute that does not exist.

Response: As explained in response to comment 22, there are exceptions in section 101(a)(5) for “incidental, but not intentional taking” that meets certain criteria and has been authorized by NMFS. The statute uses the phrase “not intentional” in these exceptions. The intent of Makah whalers is most certainly relevant to whether their actions are “not intentional.”

That mental state is not an element of civil violations of the take provision has no bearing on whether the exceptions for “incidental, but not intentional, taking” in section 101(a)(5) of the MMPA apply. Mental state is relevant to the exceptions for “incidental, but not intentional, taking,” but need not be proven to establish a *prima facie* violation of the take prohibition. AWI’s comment conflates the distinction between the elements of a civil violation of the take prohibition and the requirements associated with certain exceptions.

Comment 32: AWI cites two decisions, *Black v. Pritzker*, 121 F.Supp.3d 63 (D.D.C. 2015) and *Pacific Ranger v. Pritzker*, 211 F.Supp.3d. 196 (D.D.C. 2016), from the U.S. District Court for the District of Columbia involving NOAA enforcement actions against purse seine fishing vessels that were unlawfully taking marine mammals and comments that NMFS’s position regarding the incidental take of WNP gray whales is inconsistent with its position in those cases.

Response: NMFS’s position with respect to the Makah waiver and implementing regulations differs from the positions it took in *Black* and *Pacific Ranger* because those cases involved facts and law that are very different from the circumstances here. Both cases involved respondents in NOAA civil administrative penalty cases who appealed to the district court after an ALJ found they intentionally encircled marine mammals with purse seine nets while tuna fishing. *Pacific Ranger*, 211 F. Supp. 3d at 221; *Black*, 121 F. Supp. 3d at 101–102. In both cases, the court rejected the respondents’ arguments that the exception in section 118 of the

MMPA for incidental take of marine mammals during commercial fishing operations authorized their conduct. *Pacific Ranger*, 211 F. Supp. 3d at 221; *Black*, 121 F. Supp. 3d at 87–88, 101–102.

Makah whaling is not commercial fishing and does not involve the exception to the MMPA’s take prohibition that was at issue in *Black* and *Pacific Ranger*. Hunting and training activities under the final waiver and regulations involve the exception in section 101(a)(3)(A) that allows NMFS to waive the moratorium and authorize intentional take of ENP gray whales. NMFS may also utilize the exception in section 101(a)(5) for specified activities other than commercial fishing for “incidental, but not intentional, taking” to authorize the incidental take of WNP gray whales, if needed.

If a hunt permit is issued, the Makah will be authorized to hunt ENP gray whales and intentionally take these animals. Depending upon what activities are authorized under a hunt permit, the Makah may accidentally pursue the wrong type of whale (WNP gray whales, as opposed to ENP gray whales) during the course of authorized hunting and training. Such accidental take would be “incidental, but not intentional, taking” of WNP gray whales and could be authorized under section 101(a)(5).

Black and *Pacific Ranger* did not involve a situation where the purse seiners were authorized to encircle one type of marine mammal and accidentally encircled the wrong type. The respondents in *Black* and *Pacific Ranger* were not authorized to intentionally encircle any marine mammal. When they did, NMFS’s position remains that they violated the MMPA and could not avail themselves to the incidental take exception for commercial fishing under section 118 of the MMPA. Makah whaling involves different circumstances and separate exceptions under the MMPA.

Comment 33: AWI comments that the disadvantage test is inapplicable to the take of WNP gray whales. They contend that the relevant inquiry is whether take of WNP gray whales can be authorized under one of the MMPA’s exceptions to the take moratorium.

Response: I agree that the disadvantage test does not apply to WNP gray whales in this proceeding. The plain language of section 103(a) makes clear that the disadvantage test only applies to take regulated under section 103(a). Section 103(a) confers authority on NMFS to regulate taking at the species level or the stock level. NMFS must then “insure that such

taking will not be to the disadvantage of those species and population stocks.” 16 U.S.C. 1373(a). This means that if the takings are regulated at the stock level, then the take must not disadvantage the stock. Conversely, if takes are regulated at the species level, the takes must not disadvantage the species. Here, NMFS has prescribed regulations at the stock level governing the take of ENP gray whales. Therefore, the disadvantage test applies to this stock only. The mere fact that other takes are considered, pursuant to NMFS’s obligations under section 103(b), does not subject these takes to the disadvantage test or the other requirements associated with waiving the moratorium.

Hunt and Training Activities

Comment 34: Several comments were received on the recommendation that the regulations prohibit an approach on a calf or an adult accompanying the calf, including concerns related to identifying a calf or cow-calf pair from a whaling canoe, impairing training activities, risk of inadvertent non-compliance, and the effects of an approach.

Response: I have adopted the recommended provision with modifications to prohibit approaches on calves or adult gray whales accompanying calves *only after* a calf or adult accompanying a calf has been identified. This will maintain the intent of the modification while ensuring the regulations do not set unrealistic expectations and result in inadvertent non-compliance.

Comment 35: Several commenters expressed concern about safety risks associated with the hunt.

Response: Safety concerns are thoroughly addressed in the FEIS and will be further evaluated at the hunt permit stage.

Comment 36: A number of comments were received on the humaneness of the hunt.

Response: Section 3(4) of the MMPA defines “humane” as “that method of taking which involves the least possible degree of pain and suffering practicable to the mammal involved.” Section 104(b)(2)(B) of the MMPA then provides that, before issuing a permit, NMFS must determine that the hunting method is “humane.” Issues related to the humaneness of the hunt will be addressed at the permitting stage.

Comment 37: AWI contends that the tribunal recommended, and AWI supports, that the regulations be amended to provide that hunt permits be issued on a yearly basis, citing RD at 147

Response: This comment mischaracterizes the tribunal’s Recommended Decision, which states:

NMFS proposes to limit the duration of an initial hunt permit to no more than three years, and the duration of any subsequent permit to no more than five years. § 216.113(a)(1). However, a permit can be granted for as little as one year. This will allow for adaptive hunt management, since NMFS would take into account the results of previous hunts when determining whether to issue subsequent permits. This proposal is reasonable and clearly in accordance with the conservation objectives of the MMPA.

RD at 147. While the Recommended Decision notes that permits can be issued for a duration of 1 year, the tribunal did not recommend that the regulations be amended. Rather, the tribunal supported the structure proposed by NMFS, as the regulations recommended in Appendix B to the Recommended Decision maintain the structure proposed by NMFS. Tab 121B.

Comment 38: AWI suggests including requirements for determining the proportion of WNP gray whales in the hunt area presumed to be WNP whales for the purposes of accounting for takes of gray whales under the hunt management requirements and restrictions.

Response: If takes of WNP gray whales are anticipated, the Tribe may apply for an ITA under the MMPA. An ITA application must include specific information, including “the suggested means of accomplishing the necessary monitoring and reporting” 50 CFR 216.104. Under section 101(a)(5) of the MMPA, NMFS must set forth requirements pertaining to the monitoring and reporting of any take. The nature of those requirements, including whether or how to account for the proportion of WNP present in the hunt area, would be determined as part of the ITA process.

Comment 39: Some commenters suggest that only traditional hunting methods should be permitted.

Response: The Makah Tribe proposes to use both traditional and modern methods for hunting whales to balance the preservation of traditional cultural methods with safety and the need for increased hunting efficiency. Section 104 of the MMPA requires that if the take moratorium is waived and animals are killed, the method of killing must be “humane,” which the MMPA defines as “that method of take which involves the least possible degree of pain and suffering practicable to the mammal involved.” 16 U.S.C. 1362(4). The use of modern technologies (e.g., support vessel, rifle) will help ensure that the

hunt is humane by reducing the time to death over using traditional measures.

Ecosystem and Cumulative Effects

Comment 40: One commenter suggests that the effects of the action should have been considered at a different ecosystem scale.

Response: As noted in the Recommended Decision, NMFS considered ecosystem impacts at several levels, and it was “reasonable for NMFS to conclude that the health and stability of the ecosystems in which gray whales function will not be adversely affected by the proposed waiver and regulations.” RD at 116.

Comment 41: Several commenters comment on the range of anthropogenic threats that gray whales face and the importance that these threats be considered in combination.

Response: Gray whales face many threats, including entanglement, marine debris, vessel strike, whale watching disturbance, ocean noise, and climate change. NMFS is working to address threats to gray whales and other marine mammals. While a cumulative effects analysis is not an express requirement for the MMPA waiver process, NMFS considered the cumulative effects of natural mortality and anthropogenic effects to whales as part of the NEPA analysis.

Comment 42: MMC commented that in considering cumulative impacts, the tribunal’s Recommended Decision took an overly narrow reading of the statutory requirements of section 103 of the MMPA in finding that “the MMPA does not mandate separate consideration of these factors during formal rulemaking proceeding.”

Response: Hunting cannot be authorized or occur if the ENP gray whale stock is below its OSP. This provision ensures hunting in combination with other threats to ENP gray whales will not disadvantage the stock.

Comment 43: A number of comments describe the role that whales play in the ecosystem; the interdependency of animal, human, and environmental health; and the importance to ensure the health and stability of the ecosystem.

Response: Maintaining marine mammal stocks as a significant functioning element in the ecosystem of which they are a part and maintaining the health and stability of the marine ecosystem is a purpose and goal of the MMPA. The effects of a limited hunt of 25 whales over a 10-year period have been fully evaluated, and ENP gray whales are expected to continue to be a significant and functioning element of the ecosystem. The health and stability

of the ecosystem will be maintained under the final waiver and regulations.

Comment 44: One commenter suggests that all reports on waiver activities should be made available for public review.

Response: Per the regulations, the hunt report, annual approach report, and annual handicraft report will be maintained and made available for public review by NMFS. Other documentation may be available in accordance with the Freedom of Information Act and other Federal law.

The Treaty of Neah Bay of 1855

Comment 45: Several groups, government agencies, and private citizens commented on the Recommended Decision supporting the Makah's treaty right to whale. Commenters note that the tribunal's Recommended Decision is consistent with the Federal trust responsibility. Others wrongly claimed that the Treaty is obsolete or irrelevant.

Response: I support the Makah's treaty right and am adopting a final waiver and regulations that will allow the Tribe to exercise their right, in accordance with the MMPA.

Comment 46: The Tribe notes their disagreement with the Recommended Decision's discussion of the Treaty of Neah Bay of 1855, which contends that the application of the Treaty is merely academic and not the controlling law. The Makah maintain that the "because the MMPA did not abrogate the Treaty, the MMPA and Treaty must be harmonized in evaluating whether the hunt may proceed."

Response: I have not adopted the parts of the Recommended Decision that found the Treaty of Neah Bay of 1855 is not relevant. This waiver and accompanying regulations enable the Tribe to exercise their treaty right in full compliance with the MMPA. To the extent the Tribe concludes that the regulations are not in accord with their treaty right, I have provided a process through which the Tribe may request a modification to the final regulations. Modifying the regulations through informal rulemaking may be possible and could be carried out in conjunction with permitting to streamline the process.

Comment 47: Several commenters suggested that the Makah should not be permitted to use modern equipment when whaling.

Response: The Treaty of Neah Bay does not prescribe particular whaling methods. In similar situations, courts have recognized that Tribes may use modern technology when exercising their treaty rights. *See, e.g., United*

States v. Washington, 384 F. Supp. 312, 407 (W.D. Wash. 1974). Allowing modern hunting techniques will also promote a safe and humane hunt.

Procedural Comments

Comment 48: AWI and others comment that the tribunal's decision to issue the Recommended Decision before NMFS issued the SDEIS deprived them of their right to conduct cross-examination and submit rebuttal evidence.

Response: To fulfill its obligations under NEPA, NMFS developed an SDEIS, which was completed after the tribunal issued the Recommended Decision. The prospect that additional information on gray whales may be generated after the hearing did not deny any rights under the APA to conduct cross-examination or submit rebuttal evidence.

The right to conduct cross-examination under the APA is not absolute. The parties to the hearing were entitled to present their "case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts." 5 U.S.C. 556(d). The procedural regulations governing this matter provide: "Any party shall be given an opportunity to appear, either in person or through an authorized counsel or representative, to cross-examine witnesses." 50 CFR 228.18(b). The term "witness" is defined in relevant parts as "any person who submits written direct testimony on the proposed regulations." 50 CFR 228.2(b). AWI had the right and the opportunity to cross-examine every witness that submitted direct testimony during the hearing. No witnesses testified after the hearing. This process allowed for a full and true disclosure of the facts in accordance with NMFS's regulations and the APA.

AWI had an opportunity to submit rebuttal evidence at the hearing. After the hearing, AWI had an opportunity to submit rebuttal evidence multiple times, including during the comment period for the parties from November 27, 2023, to December 20, 2023. AWI submitted their comments after the deadline. I then provided the parties with an opportunity to respond to the comments of the other parties. This response period ran from December 20, 2023, to January 17, 2024, and provided an opportunity to rebut information submitted by the other parties. AWI took advantage of this opportunity. This process afforded AWI ample opportunity to submit rebuttal evidence in accordance with the APA.

Comment 49: AWI comments that NMFS's decision to prepare an SDEIS after the formal rulemaking hearing shows that the tribunal's decision was not based on the best available science.

Response: On February 27, 2020, NMFS explained in its Notice of Intent to prepare an SDEIS that "[b]ecause information concerning the ongoing 2019 UME was presented at the agency hearing but not expressly addressed in the 2015 DEIS, NMFS has determined that it would now benefit both the public and agency decision making to prepare a supplement to the DEIS." 85 FR 11347. Because the 2015 DEIS did not include the subsequent scientific information that was available and presented to the tribunal at the formal rulemaking hearing in 2019, it was prudent for NMFS to prepare an SDEIS with that information. It was also prudent for NMFS to notify the public that the SDEIS would include "additional relevant information and will take into consideration the Administrative Law Judge's recommended decision." *Id.* at 11348. NMFS regularly updates its marine mammal population estimates pursuant to the SAR process. NMFS could not ignore those estimates in the SDEIS and comply with its NEPA obligations. Recognizing that the tribunal's Recommended Decision may require additional analysis to satisfy NEPA obligations, NMFS gave notice that it would also take the Recommended Decision into account in the SDEIS. The tribunal's decision also included a recommendation that NMFS set a low abundance threshold for ENP gray whales. This recommendation warranted additional analysis under NEPA, and so it was appropriate for NMFS to give notice to the public that the SDEIS would consider the tribunal's Recommended Decision.

Comment 50: AWI and another commenter contend that NMFS violated its hearing regulations and the MMPA by not completing the environmental analyses in the SDEIS before the formal rulemaking hearing.

Response: None of the procedural regulations governing this matter expressly reference supplemental draft environmental impact statements or require that this document be a part of the record before a presiding officer issues a recommended decision. The procedural regulations do reference draft environment impact statements in two places. First, NMFS was required to publish a notice of hearing under 50 CFR 228.4. In addition to other statements, the notice must state: "If a draft Environmental Impact Statement is required, the date of publication of the

draft and the place(s) where the draft and comments thereon may be viewed and copied.” 50 CFR 228.4(b)(6). NMFS complied with this requirement on April 5, 2019. 84 FR 13604. Second, under 50 CFR 228.16(b), the tribunal was required to introduce the “the draft Environmental Impact Statement” into the record at the “commencement of the hearing.” 50 CFR 228.16(b). The tribunal did this. Tab 101 at 11–12.

I do not interpret the term “draft Environmental Impact Statement” in 50 CFR 228.16(b) and 228.4(b)(6) to apply to any document other than a “draft Environmental Impact Statement.” The DEIS and SDEIS are separate documents. The DEIS was issued on March 13, 2015. 80 FR 13373. The SDEIS was issued on July 1, 2022. 87 FR 39517. That the title of the SDEIS includes the term “draft” does not mean the SDEIS and the DEIS are one and the same for the purposes of the hearing. Indeed, NEPA’s implementing regulations describe draft, final, and supplemental environmental impact statements separately. 40 CFR 1502.9. Since an SDEIS is not the same as a DEIS, the tribunal was not required to make this document a part of the record before rendering the Recommended Decision.

Furthermore, the commenters’ argument is not consistent with the structure of the procedural regulations. Sections 228.16(b) and 228.4(b)(6) of the procedural regulations apply at specific junctures in the waiver process. These provisions do not impose an ongoing obligation on NMFS to remand a case whenever NMFS supplements its environmental analyses in accordance with NEPA.

Section 103(d) of the MMPA is similar and only applies at a specific juncture in the waiver process. This section requires NMFS to “publish and make available to the public” certain scientific statements and studies “either before or concurrent with the publication of notice in the **Federal Register** of his intention to prescribe regulations under this section.” 16 U.S.C. 1373(d). Section 103(d) does not impose additional publication requirements on NMFS after the notice in the **Federal Register** announcing proposed regulations. NMFS complied with the requirements in section 103(d), by issuing a **Federal Register** notification on April 5, 2019. 84 FR 13604. This **Federal Register** notification also included the statements required by section 103(d). Nothing further is required.

The commenters are misconstruing specific procedural requirements that do not apply at this stage in the process

with the question of whether a remand is warranted. I explain why a remand is not warranted in section IX of this Final Decision.

Comment 51: Citing 40 CFR 1502.9(c)(4) (1978), one commenter contends that NEPA regulations required NMFS to publish an SDEIS before the hearing.

Response: The 1978 NEPA regulations provide that agencies shall “shall prepare, circulate, and file a supplement to a statement in the same fashion (exclusive of scoping) as a draft and final statement unless alternative procedures are approved by the Council.” 40 CFR 1502.9(c)(4). This language means that the same NEPA procedures applied to the development of the SDEIS as applied to the development of the DEIS. In accordance with this requirement, NMFS prepared an SDEIS, filed the SDEIS with the EPA, published the SDEIS, and sought public comment on the SDEIS. 87 FR 39517, July 1, 2022; 87 FR 39804, July 5, 2022.

Comment 52: AWI comments that the “Assistant Administrator cannot unilaterally consider extra record evidence in making her waiver decision that was not subject to rebuttal or cross examination at a formal hearing before the presiding officer.”

Response: All evidence forming the basis for my decision was on the record as provided by the governing APA provisions and implementing regulations. I explained how AWI’s rights to submit rebuttal evidence and conduct cross examination under the APA were vindicated in response to comment 48. NMFS published additional documents related to this rulemaking after the hearing was held pursuant to obligations under NEPA, the ESA, and other Federal law and provided opportunities for comment. AWI has taken advantage of all the opportunities for comment that were available after the hearing, and I have taken their comments into consideration.

Comment 53: AWI comments that in “the interest of a fair and impartial hearing process,” the Assistant Administrator should have remanded the Recommended Decision to the tribunal until the SDEIS was completed “and reopen the record for further factual development in accordance with the MMPA and APA.”

Response: As explained in section IX of this Final Decision, I considered whether a remand was warranted and have decided not to remand the case because the additional information developed after the hearing is not significant enough to compel different conclusions than those I have reached

based on the evidence in the record assembled by the tribunal.

Comment 54: One commenter suggests that the Recommended Decision is at odds with the fundamental requirement of NEPA to lead to informed decision because it was not rendered based on the information in the SDEIS.

Response: As explained in my responses to comments 50 and 51, the SDEIS was not required to be part of the record before the tribunal. As noted in section IX of this Final Decision, the SDEIS and FEIS informed my decision on whether a remand was warranted. Using the SDEIS and FEIS in this way is consistent with NEPA.

Comment 55: Citing sections 101(a)(3)(A) and 103(d), one commenter suggests that the parties are entitled to request a hearing to consider the new evidence in the SDEIS.

Response: Nothing in these sections of the MMPA specifically address rehearings or remands for additional evidence. For the reasons I explain in section IX of this Final Decision, a remand is not warranted.

Comments on the Implementing Regulations

Comment 56: A number of comments were received on specific changes to the proposed regulations. This included, among others, comments on restructuring and clarifying the regulations, an abundance threshold for ENP gray whales, data availability, prohibitions, and hunt management.

Response: I have addressed changes to the regulations in section VII of this Final Decision. A low abundance threshold for ENP gray whales is addressed in comment 12. Comments not specifically addressed in section VII of this Final Decision are addressed in this section.

Comment 57: Commenters expressed concern that the Makah Tribe would commercialize the hunt, noting there is a market for whale meat. Another comment indicated that the Recommended Decision’s provisions on the use of edible and non-edible parts clearly identify how gray whale products can be used and by whom.

Response: The regulations issued in this document prohibit selling, offering for sale, or purchasing any gray whale products, except Makah Indian handicrafts that have been marked and certified.

Comment 58: One commenter suggests a clause requiring that the United States and Canadian management teams communicate gray whale data to ensure an accurate gray whale count. Another commenter noted

the tribunal's Recommended Decision does not acknowledge that ENP gray whales are transboundary, is written as if the United States has unilateral authority over the management of gray whales, and disregards the assessment by COSEWIC.

Response: NMFS works closely with our international partners on marine mammal management and science to help ensure the best scientific data are available. This close collaboration obviates the need for a requirement to communicate in these regulations. The Recommended Decision acknowledges that gray whales are transboundary stock within multiple management jurisdictions (see, for example, RD at IV.D.1.b, VI.A.2), and it reflects the assessment by COSEWIC (see RD at 62–67).

Comment 59: AWI recommends that the Assistant Administrator consider imposing geographic restrictions on where consumption is allowed and ensure that law enforcement jurisdictions are properly educated on the regulations. AWI recommends NMFS consider limiting the geographic scope to Washington State given the Recommended Decision accepted NMFS's assertion that NOAA Office of Law Enforcement agents or Washington Department of Fish and Wildlife officers would be available to enforce these provisions.

Response: I disagree that further restrictions are needed to facilitate enforcement. The NOAA Office of Law Enforcement has jurisdiction beyond Washington State and works closely with states through joint enforcement agreements throughout the country to help ensure compliance with laws administered by NMFS.

Comment 60: AWI suggests amending § 216.116 to specify that the 2 pound per person limit applies to all circumstances in which edible whale products may be consumed outside of reservation boundaries.

Response: There is no 2-pound limit at Tribal members' residences to accommodate storage of edible gray whale products.

Comment 61: AWI suggests that § 216.113 should specify that if the Tribe has not complied fully with the regulations and all prior permit terms and conditions, a hunt permit should not be issued.

Response: The regulations specify the "Regional Administrator must determine that the Makah Indian Tribe has complied with the requirements of these regulations and all prior permit terms and conditions, or if the Makah Indian Tribe has not fully complied, that it has adopted measures to ensure

compliance." The appropriate response to non-compliance depends on the nature of the infraction and will be addressed if an infraction occurs.

Comment 62: AWI suggests adding "will be reported as an infraction to the International Whaling Commission" to § 216.115(b)(4) Unauthorized strikes.

Response: I disagree that this language is necessary. NMFS will comply with all reporting requirements of the IWC should an unauthorized strike occur.

Comment 63: One commenter suggests that § 216.118(a)(1) be amended to specify "For every whale struck, the tribal hunt observer must make every reasonable attempt to collect samples for genetic sampling as quickly as possible without compromising the safety of the hunt."

Response: As described in section VII of this Final Decision, I have clarified that individuals authorized to collect biological samples for identification must make every reasonable attempt to do so without compromising the safety of the hunt.

Other Comments

Comment 64: Several commenters suggest that the Tribe does not have a cultural or subsistence need for whale products and non-lethal alternatives should be considered to maintain the cultural connection to marine mammals. Other commenters recognize the relationship between the Tribe and whales, their cultural traditions, and the importance of resuming a whale hunt.

Response: I defer to the Tribe on their cultural and subsistence needs. Although whaling may seem outdated to some people, the Makah Tribe, as a sovereign nation, decides which cultural traditions it pursues, within the bounds of applicable law. In the Treaty of Neah Bay of 1855, the Makah Indian Tribe secured the right to hunt whales. Treaties with Indian Tribes are Federal law, coequal with all other Federal law. Pursuant to obligations under NEPA, NMFS considered non-lethal alternatives in the FEIS and, for the reasons described therein, rejected those alternatives.

Comment 65: Some commenters suggest that the issuance of a waiver will affect international relations and potentially have precedential effects on whaling in the United States and worldwide.

Response: The decision to waive the take moratorium is specific to the request submitted by the Makah Tribe and is consistent with the approval they already received from the IWC, first approved in 1997, to hunt ENP gray whales. For roughly 20 years, the Makah Tribe has not been able to use their

portion of the IWC quota due to the need to comply with MMPA procedures, and as a result, the Makah's quota was temporarily provided to Chukotkan Natives in the Russian Federation. Section 103(b)(2) requires NMFS to consider international treaties and agreements, not international relations, in making a determination to waive the moratorium on take. NMFS did examine the potential for authorization of a gray whale hunt to have precedential effects on hunts for marine mammals in the United States and whaling worldwide in the DEIS. Tab 90F at 4:260–273.

Comment 66: Several commenters express concern about the safety of consuming whale meat and the danger consumption poses to public health.

Response: The FEIS presents the available information regarding the nutrients and contaminants found in gray whale products. This information is available to the Makah Tribe for consideration when assessing the potential risks of consuming gray whale blubber.

Comment 67: PCPW comments that the WNP and PCFG are similar "whale stocks" (e.g., small population size, different migratory patterns and feeding habits, genetic differences) but are viewed and managed differently.

Response: WNP gray whales are a depleted stock under the MMPA and listed as endangered under the ESA; PCFG gray whales are a feeding aggregation within the more abundant ENP stock (see RD at IV.D). While both the WNP and PCFG populations are small relative to the overall abundance of ENP gray whales, there are a number of differences that warrant different management.

Comment 68: One commenter notes that the phrase "best available science" is used repeatedly throughout the tribunal's Recommended Decision, that the term needs to be defined, and the term "independent" should perhaps be part of that.

Response: Sections 101(a)(3)(A) and 103(a) of the MMPA require the use of the best scientific evidence available in this proceeding. The Recommended Decision describes this standard, the available scientific information, and how it was considered (see RD IV.B.). I agree with the discussion of these issues in section IV.B of the Recommended Decision.

Comment 69: PCPW references a United Nations' report that recognized the importance of animal culture in conservation, indicating that the report finds that different social groups within a species deserve special protection. PCPW suggest that the PCFG are more

than a feeding group and are a cultural group.

Response: It is not clear what report PCPW is referencing, and no report was provided. Under the MMPA, the PCFG are a feeding aggregation within the ENP stock of gray whales. The regulations include a number of measures to minimize impacts to the PCFG.

Comment 70: PCPW comments that NMFS “speculates” on the behavior of whales in different locations, and conditions, and questions the evidence used to support the conclusions drawn.

Response: NMFS has drawn reasonable conclusions and adopted a conservative management framework for the Makah hunt based on the best available scientific evidence. The parties opposing the hunt have had numerous opportunities to rebut the evidence NMFS relied on in support of the waiver and implementing regulations but have failed to provide better scientific information that undermines the data and analysis on which NMFS relies.

Comment 71: A number of individual commenters expressed general disagreement with the Recommended Decision. PCPW and AWI are generally opposed to the Recommended Decision.

Response: I have largely affirmed the Recommended Decision. Sections VII through VIII of this Final Decision describe where I have/have not affirmed the Recommended Decision.

Comment 72: A number of commenters noted that the requirements for a waiver have been satisfied, expressed general support for the Recommended Decision, and commented that it was based on the best available science. WCR, MMC, and the Makah Tribe generally support the Recommended Decision.

Response: I have generally affirmed the Recommended Decision and adopted it as part of this Final Decision, except as explained herein.

Comment 73: Commenters note that more recent information has been published (e.g., ENP abundance) since the Recommended Decision. Another commenter notes that estimates of the OSP range may have changed.

Response: Additional scientific information and analysis developed following the Recommended Decision is discussed in section IX of this Final Decision.

VI. Measures in the Final Regulations

This section provides a general overview of the regulations governing the hunt. As described in Section II of this Final Decision, two key management goals shaped many of the provisions in the proposed and final

regulations: (1) ensuring that hunting does not reduce the ENP gray whales' PCFG abundance below recent stable levels and (2) limiting the likelihood that Tribal hunters would strike or otherwise harm a WNP gray whale.

Management measures in the final regulations include:

- *Alternating Hunt Seasons:* Winter/spring hunts would occur during the migration season (December 1 through May 31) to reduce risk to PCFG whales, which are more prevalent in the U&A in the summer and fall during their feeding season. Summer/fall hunts would occur during the feeding season (July 1 through October 31) to reduce risk to WNP whales, which are only known to occur in the U&A during the migratory season. There would be a 1-month gap after a summer/fall hunt and a 13-month gap after a winter/spring hunt.

- *Maximum Annual Strike Limits:* A maximum of three strikes may be authorized during winter/spring hunts and two during summer/fall hunts. Thus, up to 25 whales may be struck or struck and lost over the 10-year waiver. Unsuccessful strikes are not counted against this limit.

- *Maximum Struck and Lost Limits:* A hunt permit may authorize no more than three gray whales to be struck and lost in any calendar year.

- *Maximum PCFG Mortality Limits:* Over the 10-year waiver period, no more than 16 PCFG whales may be struck. Of these, no more than 8 may be female PCFGs. NMFS will, taking into account the abundance of PCFG whales, notify the Tribe prior to the beginning of a hunt season of the maximum number of PCFG whales, including females, that may be struck during the upcoming hunting season.

- *Maximum Annual Landing Limits:* A hunt permit may authorize landing (i.e., bringing a gray whale or any products thereof onto the land) no more than three whales during winter/spring hunts and one whale during summer/fall hunts. That is, no more than 20 whales can be landed over the waiver period.

- *Maximum Annual Limits on Unsuccessful Strike Attempts:* Unsuccessful strike attempts are any attempt, including training harpoon throws, to strike a gray whale while hunting that does not result in a strike. A hunt permit may authorize no more than 18 unsuccessful strike attempts during winter/spring hunt and no more than 12 unsuccessful strike attempts during summer/fall hunts.

- *Maximum Annual Approach Limits:* A hunt permit may authorize no more than 353 approaches, including both hunting and training approaches,

each calendar year, of which no more than 142 may be on PCFG whales.

- *PCFG Abundance Trigger:* No hunting will be authorized for an upcoming season if the most recent PCFG population estimate or the projected estimate for the upcoming hunt season is less than 192 whales or the most recent or projected minimum abundance estimate is less than 171 whales.

- *ENP Low Abundance Thresholds:* Hunting ceases if the ENP abundance falls below the stock's OSP.

- *Take of WNP whales:* Prior to permitting hunt activities in the winter/spring hunt season, NMFS must determine if take of WNP whales is anticipated and, if so, must include a condition in the permit requiring separate take authorization for WNP gray whales during the winter/spring hunt. If a WNP whale is accidentally killed during a hunt, hunting must cease until measures are put in place to prevent any further activity that could result in another lethal take of a WNP gray whale.

- *Accounting and Identification of Gray whales:* The final regulations establish procedures to determine whether a gray whale approached or struck is a WNP, PCFG, or non-PCFG gray whale, or cannot be identified. If a gray whale cannot be identified, the regulations include measures for presuming the whale to be a PCFG whale.

- *Management of Handicrafts:* The final regulations include marking and certification requirements for handicrafts as well as measures to regulate when handicrafts may be shared, bartered, traded, or sold.

- *Monitoring, Reporting, and Recordkeeping:* Certified Tribal hunt observers must accompany each hunt and maintain hunt logs, including information on approaches, attempted strikes, and strikes. The Tribe is required to submit an incident report within 48 hours of a gray whale being struck, a hunt report at the end of each season, an annual approach report, and an annual handicraft report. After receiving an incident report documenting that eight gray whales have been struck, NMFS will evaluate the photo-identification and notification requirements and the humaneness of the hunt.

VII. Changes to Final Regulations

The tribunal recommended changes to the proposed regulations, which are described in the Recommended Decision and Appendix B to the Recommended Decision. Changes made to the regulations described in

Appendix B to the Recommended Decision are described in this section of this Final Decision.

In sections V.II.B to C of the Recommended Decision, the tribunal recommended certain modifications to the proposed regulations and addressed an unopposed motion to amend the regulations to clarify the definition of strike and expand certain off-reservation use of edible gray whale products. I agree with and affirm the recommendations in sections V.II.B to C of the Recommended Decision as part of this Final Decision, with the exceptions noted below.

Section 216.112 Definitions

I redefined the odd-year hunt as the summer/fall hunt and the even-year hunt as the winter/spring hunt. This change was made to allow the initial hunt permit to start in either season regardless of whether the permit was issued in an odd or an even year, providing flexibility in the timing of the initial hunt season. Use of the “odd-year”/“even-year” language might inadvertently and unnecessarily restrict the time that a hunt could commence upon receipt of all necessary authorizations. This change maintains the alternating year structure of the regulations but allows for a hunt permit to be issued at the earliest possible time. This change does not affect the hunt structure (e.g., number of hunts that may be permitted, months in which hunting can occur, and the gap between hunt seasons) and, therefore, has no impact beyond what was considered in the proceedings. This is also consistent with the tribunal’s recommendation that the odd-year (summer/fall) hunts be allowed to commence at the soonest appropriate time. RD at 148.

I slightly modified the definitions of “strike” and “struck” for clarity. Prior to the hearing, WCR filed a motion to clarify, in response to AWI’s argument that the definition was ambiguous, that multiple strikes on the same whale would count as a single strike. Tab 86. The tribunal recommended that the regulations adopt WCR’s amendments and also specify “Once a whale is struck, subsequent penetrations of the same whale’s skin during the hunt for the purpose of killing or landing that whale are considered to be part of the initial strike.” RD at 141. I have adopted this recommendation with a slight modification. In their comments on the Recommended Decision, the Makah Tribe questioned whether this additional sentence may create confusion, and they believe it is unnecessary. They noted that it is unclear whether subsequent harpoon

strikes to attach floats to keep the whale at surface would be “for the purpose of killing or landing the whale.” The Tribe recommended the language be simpler, such as “Multiple strikes on the same whale are considered a single strike.” I agree with the Makah Tribe and have adopted their recommendation.

I have added definitions of “export” and “share.” The regulations recommended by the tribunal include provisions related to export of and sharing of gray whale products; therefore, I added a definition of export and share to provide clarity. “Export” in the regulations mean “the act of sending goods from one country to another.” The definition of share includes “gift” and is similar to how gift was defined in the preamble to the proposed regulations (i.e., voluntarily transfer to another person without compensation). 84 FR 13604, April 5, 2019. Therefore, I changed instances of the term “gift” to “share” in the final regulations for consistency.

Section 216.113 Issuance and Duration of Permits

I have added a requirement at § 216.113(a) that the Makah Tribe specify the proposed duration of the permit in its application. The duration of the initial permit and subsequent permits can be up to 3 years and 5 years, respectively. This addition will provide clarity on the permit duration sought by the Tribe. I have also added requirements that the Makah Tribe, in its application for a hunt permit, must include any permit conditions they propose and a justification for the proposed conditions. In addition, if the Tribe is seeking a modification from any of these regulations, the Tribe must specify the modification and the justification for that modification. Modifying the regulations through informal rulemaking may be possible and could be carried out in conjunction with permitting.

I have specified at § 216.113(b)(2) that the Regional Administrator may not authorize hunting, hunting approaches, training approaches, or training harpoon throws from December 1 through May 31 unless: (1) the Tribe has obtained separate authorization under the MMPA or (2) the Regional Administrator, in consultation with the Office of Protected Resources, has determined take of WNP gray whales is not anticipated. My rationale for adding this provision is described in section VIII of this Final Decision. The tribunal recommended that the final regulations include provisions that require that the Tribe obtain an ITA prior to authorizing hunt activities when WNP gray whales may

be present. RD at 136–137. However, the Tribe may include in their permit application a hunt plan that avoids the take of WNP whales, in which case an ITA is not necessary. This change provides flexibility for NMFS to evaluate the Tribe’s permit application and make the determination whether or not an ITA is needed based on the best available science at the time, rather than the information presented during the formal rulemaking hearing in 2019.

The tribunal concluded that the evidence weighs in favor of an overall abundance threshold and recommended the Secretary consider setting one in the final regulations. RD at 150–151. I have included an abundance threshold at § 216.113(b)(3) prohibiting lethal hunting unless the stock is within its OSP and requiring the Regional Administrator to ensure the stock is within OSP before issuing a hunt permit. The Regional Administrator is also required to ensure that the level of hunting authorized under the permit will not cause the stock to fall below its OSP.

Section 216.114 Hunt Management Requirements and Restrictions

Where appropriate, I have added “ENP” before gray whales to clarify that the hunt permit may only authorize take of ENP gray whales. The two hunt seasons (described as odd- and even-year hunts in the proposed rule and the Recommended Decision) are carried over into the final rule and have been renamed to summer/fall and winter/spring. I have provided additional clarity on the alternating hunt structure under § 216.114(a) by articulating when hunts may be authorized based on whether the initial hunt season permitted is a summer/fall or winter/spring.

Unsuccessful strike attempt limits at § 216.114(b) are carried over from the proposed rule and Recommended Decision, and training harpoon throws continue to count against the unsuccessful strike attempt limits. Under the Recommended Decision, training harpoon throws could be authorized between July 1 and October 31 in odd-number years and in any month in even-number years. The final regulations maintain the alternating pattern but decouple it from the even and odd year framework.

The final regulations specify that training harpoon throws may be authorized between July 1 and October 31 in years of summer/fall (previously odd-year) hunts and at any time during winter/spring hunts as well as the subsequent 7 months of the calendar year in which those winter/spring

(previously even-year) hunts occur. Under the proposed regulations, as an artifact of the even/odd year structure, training harpoon throws could not be authorized in December of the winter/spring hunt. There could be unsuccessful strike attempts in December, but those unsuccessful strike attempts could not be training throws. The final regulations allow training throws to be included within the unsuccessful strike attempts in December without changing the unsuccessful strike attempt limits. Unsuccessful strike attempts could occur in December of winter/spring hunts under the Recommended Decision, so this change does not change the impacts to gray whales or other ecosystem components. Rather, these changes provide flexibility when authorizing hunt seasons and training harpoon throws while maintaining the intent of the structure of the Recommended Decision.

I have also added a requirement, specified at § 216.114(d), that hunting must cease when the Makah Tribe is notified in writing that the ENP gray whale stock has fallen below its OSP. Hunting may not resume until the Tribe is notified in writing that the stock has obtained OSP. This provision is consistent with the tribunal's recommendation to specify a low abundance threshold below which hunting would cease. RD at 150–151.

Section 216.115 Accounting and Identification of Gray Whales

AWI commented on the importance of identifying gray whales subjected to hunt activities and suggested adding a provision that every reasonable effort should be made to collect genetic samples. Accounting and identification of gray whales are important to monitoring the hunt and, as such, the WCR included requirements for accounting and identification of gray whales in the proposed rule. As specified in § 216.115(b), genetic data may be used in the identification and accounting of gray whales. Thus, I have specified in § 216.115(a) that personnel authorized by NMFS to collect biological samples must make every reasonable attempt to collect samples for genetic testing from struck whales without compromising the safety of the hunt. This addition makes clear that such personnel should make every reasonable effort to collect biological samples but should not put themselves or the Tribal hunters in an unsafe situation.

Section 216.116 Use of Edible and Non-edible Whale Products

I added “shared for” before “consumption” in § 216.116(a)(1)(ii)(A) to clarify this requirement. I added “transport” to § 216.116(a)(1)(iii) as this omission was an oversight and the change aligns the authorization with the corresponding prohibitions in § 216.117.

Section 216.117 Prohibited Acts

The tribunal recommended prohibiting approaches on gray whale calves or adult gray whales accompanying calves, in addition to the proposed prohibitions on strikes and training throws. RD at 154. Accurately identifying a calf at 100 yards (91.5 m) can be complicated by the whale's behavior, the observer's experience, and the environmental conditions. The Makah Tribe commented, in part, that this recommendation, if adopted, could lead to an inadvertent violation of regulations. To address this recommendation while ensuring the regulations do not set unrealistic expectations on the whaling crew or result in inadvertent noncompliance, I have amended the regulations at § 216.117(a)(6) and (7) to prohibit approaches on calves or adult gray whales accompanying calves only after a member of the whaling crew has identified a calf or adult accompanying a calf.

I have also added a prohibition at § 216.117(a)(14) on hunting after notification by the Regional Administrator that the ENP gray whale population has fallen below OSP. This addition aligns the requirements under § 216.113(b)(3) and is consistent with the tribunal's recommendation to include a low abundance threshold. RD at 150–151.

To the exceptions on prohibited use at § 216.117(a)(19)(ii), I clarified that “a product that has been fashioned into a Makah Indian handicraft” includes both products that have been marked and certificated per the regulation and those that have not. I clarified the language in § 216.117 related to the use of edible and non-edible gray whale parts. I changed “gift” to “share” for consistency.

I added “consume” to § 216.117(b)(2) as this omission was an oversight and the change aligns the prohibition with the corresponding authorization in § 216.116(a)(3). In § 216.117(b)(6), I clarified the exception by referring to § 216.116(a)(2)(iii) and (iv), which corresponds to the use authorizations for handicrafts for any person who is not an enrolled member of the Makah Indian Tribe.

I have clarified § 216.117(b)(6) by removing the text “unless the product has been fashioned into a Makah Indian handicraft and was shared by or with, or bartered from or to, an enrolled member of the Makah Indian Tribe” and, instead referencing § 216.116(a)(2)(iv).

Section 216.118 Requirements for Monitoring, Reporting, and Recordkeeping

I amended § 216.118(a)(1) to clarify that the certified Tribal hunt observer *must make every reasonable attempt* to collect digital photographs of every whale approached in response to comments on the Recommended Decision. This change makes clear that hunt observers are not required to put themselves or the Tribal hunters in an unsafe situation to collect digital photographs.

Section 216.119 Expiration and Amendment

I clarified that the waiver period begins the first day of the first season after issuance of the initial hunt permit. I also added a provision to allow for a split hunt season. If the initial hunt season is not authorized for the full duration (either December 1 through May 31 if a winter/spring hunt or July 1 through October 31 if a summer/fall hunt), the remainder of the season may be authorized during the final year of the waiver period. This provision will allow flexibility if the initial permit is issued part way through a hunt season.

VIII. Application of the Statutory Criteria to the Final Waiver and Regulations

The final regulations and waiver maintain the core elements included in the proposed regulations (84 FR 13604, April 5, 2019) and Recommended Decision. These include the alternating hunt season to minimize impacts to WNP and PCFG gray whales; limits on the number of whales harvested, struck, and struck and lost; additional limits on harvest and mortality of PCFG whales; a hunt permit structure that allows for adaptive hunt management; limiting the waiver to only 10 years; and numerous monitoring requirements. The Recommended Decision suggested several modifications to the proposed regulations. The most significant suggestions included specifying an abundance threshold for ENP gray whales below which hunting would not be permitted and requiring that the Tribe obtain an ITA for WNP gray whales prior to permitting winter/spring hunt activities. Other recommendations included reorganizing the structure of

the regulations, clarifying definitions, and explicitly prohibiting approaches on gray whale calves or adult gray whales accompanying calves.

The final regulations maintain the core elements from the proposed waiver and regulations and the Recommended Decision and adopt the tribunal's recommendation regarding a low abundance threshold for ENP gray whales. Based on the tribunal recommendations, the final regulations also include protections for gray whale calves and adults accompanying calves and provisions to ensure that take of WNP whales, if it is anticipated during the permitting process, is separately authorized. The specific changes from the proposed regulations are described in detail in section VII of this Final Decision.

The Final Decision on the waiver and implementing regulations “may affirm, modify, or set aside, in whole or in part, the recommended findings, conclusions and decision of the presiding officer” and must include “[f]indings on the issues of fact with the reasons therefor; and [r]ulings on issues of law.” 50 CFR 228.21(a) and (b). The final waiver and regulations are largely consistent with the proposed regulations and the Recommended Decision. Therefore, I affirm the findings on issues of fact and rulings on issues of law described in the Recommended Decision as part of this Final Decision, except as set forth herein.

Threshold Determinations

As part of the Recommended Decision, the tribunal made findings and rulings regarding the best scientific evidence available standard, the credibility and utility of the scientific evidence in the record, consultation with the MMC, and gray whale stock structure. The tribunal also summarized the parties' arguments and public comments. I agree with the Recommended Decision's treatment of these issues in section IV.B through D and section V. Accordingly, I affirm these sections of the Recommended Decision for the reasons explained therein as part of this Final Decision. I also find that additional consultation with the MMC occurred through the public comment period on the Recommended Decision, which ran from September 29 to November 31, 2021, and the additional comment and response period for the parties from November 27, 2023, to January 17, 2024.

I am not affirming sections I through III, the beginning of section IV (pages 25–27), or section VI.A of the Recommended Decision. Sections I and II of the Recommended Decision

provide a Statement of the Proceeding, Background, and Procedural History. I have addressed these issues in sections I and II of this Final Decision. Section III of the Recommended Decision is a summation of findings included in sections IV through VIII of the Recommended Decision. I have not adopted the summations in section III; rather I have adopted the actual findings in sections IV through VIII of the Recommended Decision as appropriate.

I am not affirming the beginning of section IV, which provides an overview of MMPA requirements, because this Final Decision explains the relevant requirements. I am also not adopting section IV.A of the Recommended Decision because it discusses the tribunal's jurisdiction in rendering the Recommended Decision. Although I agree with the tribunal's assessment of its jurisdiction, it is different from my jurisdiction in rendering this Final Decision. Finally, I am not adopting the Recommended Decision's statements (quoted above at the end of section IV) suggesting that the Treaty of Neah Bay of 1855 has no bearing on this proceeding.

Due Regard for the Biological Factors

Section 101(a)(3)(A) of the MMPA requires NMFS to give due regard to the “distribution, abundance, breeding habits, and times and lines of migratory movements” of the stock under consideration—here, ENP gray whales. The tribunal concluded that NMFS satisfied that requirement, and I agree.

Distribution

The tribunal determined the distribution for ENP and PCFG gray whales would not be affected by the waiver and proposed regulations. RD at 88–93. It found the hunt will not have a significant, lasting, or detrimental effect on the distribution of PCFG whales. RD at 93. It based that determination, in part, on the facts that the hunt area comprises approximately 1 percent of the lineal distance of the whole ENP range; approximately 4 percent of the lineal range of the designated PCFG range; that there is no evidence that the hunt activities will prevent the ENP stock from maintaining its distribution, including during migration; and that the majority of ENP individuals may never encounter a Makah hunter. *Id.* at 91. I agree with section VI.A.1 of the Recommended Decision and affirm it as part of this Final Decision with one minor exception. On page 85 of the Recommended Decision, the month of April should be substituted with the month June and the term “consecutive”

should be deleted for the following statement to be accurate: “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.”

Abundance

The tribunal analyzed the impact of the hunt on the abundance of ENP and PCFG gray whales. RD at 103–105. The Recommended Decision explains: “A successful hunt will inevitably reduce the number of living gray whales. However, at a population level, the removal of approximately 2.5 whales per year (assuming the Makah Tribe takes the full number of whales allowed) would not significantly affect the ENP stock.” *Id.* at 103. Regarding the effect of the Chukotkan hunt, the tribunal explained:

Under the most recent IWC quota for aboriginal subsistence hunting, 980 gray whales may be taken by Russia and the United States over seven years, which equates to 140 whales per year. Either country may yield their share of the quota to the other if it is unused. (*Id.* at 92:18–24). Consequently, regardless of whether the Makah hunt goes forward, the overall number of ENP whales taken under the IWC catch allowance is unlikely to be significantly affected.

Id. at 95. Addressing the effects of the UME, the tribunal concluded: “the best available scientific evidence is the UME should not preclude issuance of a waiver,” but also found “the regulations may warrant modification to further limit hunting activities during an active UME or if the stock does not rapidly recover from a UME.” *Id.* at 103.

I agree with section VI.A.2 of the Recommended Decision for the reason explained therein and affirm it as part of this Final Decision. However, I will expand on and clarify the role of some of the findings in my Final Decision. In the Recommended Decision, the tribunal found:

The 2018 SAR estimated the population of ENP gray whales to be 26,960. (Tab 54D at 3; *see also* Tab 101 at 90:20–21; Tab 1H at 13). While the population estimates are subject to a certain level of uncertainty, researchers believe with 95% certainty that the true abundance in 2015/2016 was between 24,000 and 30,000 whales. Most recently, the ENP stock is estimated at 85% of carrying capacity, with an 88% likelihood that the stock is above its MNPL (*Id.*). The PBR for the ENP stock is 801 animals, and in 2018 the number of human-caused mortalities among the stock was estimated at 139 animals. (Tab 101 at 91:9–11).

RD at 95. These findings clearly show that the ENP gray whales population is capable of attaining OSP. Looking at the population trends since 1994, it is also

clear that the population is subject to significant periodic declines in its abundance and has experienced two UMEs. Tab 1H at 15; Tab 117 at 5–6.

In giving due regard to abundance, I have focused on the stock's long-term population dynamics, rather than the specific abundance estimate in any given year. Since 1967, NOAA has conducted surveys of the ENP gray whale populations. Tab 3 at 11. These surveys show the ENP gray whale population experiences periods of significant decline followed by population growth. Significant declines occurred in the late 1980s, and multi-year UMEs were declared in 1999 and 2019 due to increased strandings. Tab 1H at 15; RD at 98. The population also experiences periods of growth, including rebounds in the population following each of the prior declines. For example, the abundance estimate of 26,960 in 2015/16 represents a 22 percent (5970 whales) increase in the 5 years since the 2010/11 estimate of 20,990. Tab 1H at 15. Overall, the population nearly doubled in size over the first 20 years of monitoring and has fluctuated for more than 30 years. Tab 62B at 163.

I agree with the tribunal that the removal of 2.5 ENP gray whales, on average, would not significantly affect the population. RD at 103. It is improbable that the removal of such a small fraction of a percentage of the stock's abundance would have an appreciable effect on the ENP gray whales abundance or rate of growth. This level of removals would have no effect on the ENP gray whale abundance related to OSP. Furthermore, it is likely that the net effect to ENP gray whale abundance is the same with or without a Makah Tribal hunt. It is important to remember that under a bilateral agreement with the Russian Federation, the United States has routinely transferred its unused IWC quota for ENP gray whales to the Russian Federation. Tab 3 at 5. Chukotkan hunters have used and, at times, exceeded the IWC quota. Tab 60 at 6. While it cannot be known with certainty that the Chukotkan Natives would harvest the entire quota of 140 ENP gray whales per year, they have harvested as many as 143 whales in a year. Tab 60 at 6–7. With this waiver, the Makah Tribe can use their allotment for ENP gray whales rather than transfer it to the Russian Federation, and there will be no change in the number of ENP whales that can be harvested under the quota authorized by the IWC.

Breeding Habits

The tribunal determined the breeding habits for ENP and PCFG gray whales would not be meaningfully disrupted by the waiver and proposed regulations. RD at 132. The tribunal found no evidence to suggest that the hunt will prevent whales from breeding. *Id.* at 106–107. It noted any disruptions to whales “would be limited in scope” due to the relatively small area the U&A encompasses and that “there was no evidence to suggest approaches or training harpoon throws would prevent whales from mating.” *Id.* I agree with section VI.A.3 of the Recommended Decision and affirm it as part of this Final Decision.

Time and Lines of Migratory Movements

The tribunal determined that the times and lines of migratory movement for ENP and PCFG gray whales would not be meaningfully affected by the waiver and proposed regulations. RD at 132. It based that determination on the facts that “only a few migrating whales would encounter Makah hunters on any given day” during their southbound migration and that “there is no credible evidence that the whales encountered during a hunt will cease migration or change their migratory path in future years to avoid the hunt.” RD at 111–112. The tribunal found that northbound whales may be more likely to encounter Makah hunters for several reasons, but the evidence does not show that the hunt will cause northbound non-PCFG ENP whales to slow, halt, or otherwise vary their migration. *Id.* at 112. The tribunal further explained: “There is also no evidence gray whales will desert the Makah U&A entirely as a result of the hunt, particularly bearing in mind that it will only occur during the feeding season in alternate years.” *Id.* at 112. I agree with section VI.A.4 of the Recommended Decision and affirm this section as part of this Final Decision.

Conclusion on Biological Factors

The tribunal concluded that NMFS has complied with its duties under the MMPA to consider the hunt's effects on the ENP stock's distribution, abundance, breeding, and times and lines of migratory movement and relied on the best available scientific evidence. RD at 112. I agree with and affirm section VI.A.5 of the Recommended Decision as part of this Final Decision.

Required Assurances

In addition to giving due regard to the enumerated biological factors, I must also be “assured” that the taking of ENP gray whales under the final waiver and regulations “is in accord with sound

principles of resource protection and conservation as provided in the purposes and policies of this chapter.” 16 U.S.C. 1371(a)(3)(A). Section 2 of the MMPA describes purposes and policies of the Act. These include maintaining marine mammal stocks as a significant functioning element in the ecosystem of which they are a part, maintaining the health and stability of the marine ecosystem, and obtaining and maintaining an optimum sustainable population for marine mammal stocks keeping in mind the carrying capacity of the habitat. 16 U.S.C. 1361.

The Marine Ecosystem

For the reasons explained in section VI.B of the Recommended Decision, I am assured and find that ENP gray whales will continue to be a significant and functioning element of the ecosystem and that the health and stability of the ecosystem will be maintained under the final waiver and regulations. As the tribunal noted, NMFS has considered impacts at several levels including the California Current ecosystem, the northern California Current ecosystem, and the local environment. RD at 115–116. The tribunal concluded that the waiver will not result in gray whales ceasing to be a significant functioning element of the northern California Current ecosystem or the environment of the northern Washington coast given that these habitats are shaped by dynamic, highly energetic, large-scale processes, that the role of ENP gray whales in structuring these habitats is limited, and that the waiver and regulations are unlikely to result in an appreciable decrease in the numbers of gray whales present in the northern California Current ecosystem or the northern Washington coastal environment. *Id.* at 113–116. I agree with section VI.B of the Recommended Decision and affirm this section as part of this Final Decision.

OSP

I am assured and find that the final waiver and regulations are in accord with sound principles of resource protection and conservation related to obtaining and maintaining OSP for ENP gray whales. This is because the level of hunting authorized under the final waiver is so low that it will not have an appreciable effect on the overall population dynamics of ENP gray whales. Therefore, it will not affect the ability of the stock to obtain and maintain OSP. The waiver and final regulations could result in the death of a maximum of two whales in the summer/fall season and three whales in the winter/spring season, followed by a

13-month gap in hunting. Thus, the highest number of whales that could be killed, on average each year, over the 10-year waiver is 2.5. Under this structure, no more than 25 gray whales could be killed during the 10-year waiver period.

In evaluating a waiver application, it is appropriate to look at the abundance of the stock over time, including its lowest levels of abundance. Abundance surveys have been conducted since the late 1960s. Tab 3 at 11. During this time series, the lowest abundance estimate for ENP gray whales was roughly 11,000 animals in 1971/1972. Tab 1H at 15. Even if the stock drops to around 11,000 animals, hunting could still occur without affecting the ability of the stock to maintain OSP. If the stock were to drop to 11,000, the loss of 2.5 whales per year from the ENP stock would represent an average annual reduction of 0.02 percent. Twenty-five whales represent less than 0.3 percent of the population at 11,000. This level of mortality is a very small fraction of the annual variability of the stock's abundance (approximately 16,000 to 27,000 between the mid-1990s and 2019). Tab 3 at 19.

Under the MMPA, PBR is a key management measure that is useful in evaluating the effect of the hunt on OSP. PBR is "the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population." 16 U.S.C. 1362(20). The formula for PBR is set forth in the MMPA as the product of the following factors: "(A) The minimum population estimate of the stock. (B) One-half the maximum theoretical or estimated net productivity rate of the stock at a small population size [R_{max}]. (C) A recovery factor of between 0.1 and 1.0 [F_r]." *Id.*

Using the lowest abundance in the time-series (11,079 animals), an R_{max} of 0.062 and an F_r of 1, PBR would be 343. At an abundance of 11,000, PBR would be 341. However, there is uncertainty around the estimate of 11,079 from Laake *et al.* (2012). Tab 23LL at 15; Tab 1H at 15. The formula for the minimum population estimate in the GAMMs (see Tab 23TT) was used to account for this uncertainty, providing a more conservative estimate of the minimum population size. Laake *et al.* (2012) estimated the abundance of gray whales to be 11,079 animals (CV=0.093) in the 1971/72 season. Using this information and the formula for calculating the minimum population size in the GAMMs, the minimum population would be 10,246, and PBR would be

318. In both cases (*i.e.*, using the lowest abundance in the time series and then accounting for uncertainty in that value), the annual average mortality estimated from the Makah Tribe's hunt (2.5 individuals) is well below the number of animals that may be removed while allowing that stock to reach or maintain its OSP. The IWC quota shared between the United States and the Russian Federation (140 animals) is also significantly lower than PBR even at an abundance of 11,000.

Levels of human-caused mortality remain low relative to PBR. Estimates of human-caused mortality and serious injury, based on data from 2006–2018 and as reported in the SARs, averaged 127 to 139 ENP gray whales per year. Greater than 90 percent of the mortalities were from the Chukotkan hunt. Tabs 2F at 1; 2G at 14; 21M–0064 at 8; 54D at 163. PBR ranged from 558 to 801. Tabs 2F at 6; 2G at 10; 21M–0064 at 4; 54D at 160. That is, the number of human-caused mortalities and serious injuries are substantially less than the number that may be removed from the stock while allowing that stock to reach or maintain OSP.

Furthermore, the Russian Federation and the United States share the IWC quota for ENP gray whales, meaning any whales the Makah do not harvest will likely be harvested by Chukotkan Natives. Whether ENP gray whales are taken by the Makah or the Chukotka has no effect on the ability of the stock to attain and maintain OSP. The Russian Federation and the United States have submitted joint proposals to the IWC for an aboriginal subsistence whaling catch limit for ENP gray whales for the Chukotkan and the Makah since 1997, and the IWC has repeatedly established catch limits. Tab 90F at section 1.4.1.2.2; Tab 3 at 5. In September of 2018, the IWC approved the latest catch limit of 980 ENP gray whales for the period 2019–2025 with an annual cap of 140 whales. Tab 3 at 5. A separate bilateral agreement between the United States and Russian Federation sets overall and annual limits for the two countries. *Id.* The Makah Tribe are entitled to harvest no more than 5 whales per year under the agreement with the Russian Federation. This agreement also specifies that any country's unused quota may be transferred to the other. In past years, the United States has transferred its entire quota to the Russian Federation while NMFS completes the necessary steps under domestic law to consider the Makah Tribe's request for a waiver. *Id.* at 5–6. This practice would likely continue if the Makah do not harvest the whales set aside for them. For these

reasons, if ENP gray whales are not harvested by the Makah Tribe, they will most likely be harvested by Chukotkan Natives, meaning the hunt authorized under the waiver and final regulations will have likely no effect on the overall population of ENP gray whales and therefore no effect on the ability of the stock to obtain and maintain OSP.

The ENP stock has also proven highly resilient to sustained hunting. RD at 104, 116. The IWC reports 3,787 gray whales harvested from annual aboriginal subsistence hunts from 1985 to 2016, which includes struck and lost whales. The estimated population size of ENP gray whales increased during this same period. Tab 59B at 7. From 2012–2016, Chukotkan hunters harvested an average of 128 gray whales annually. Tab 81B at 162. This is approximately 51 times the projected average annual harvest of 2.5 whales that will occur under the Makah Tribe's hunt. The ENP gray whale population has already demonstrated resilience to decades of hunting by Chukotkan Natives, growing to approximately 27,000 individuals in 2016. Tab 3 at 11. This reinforces the determination that a Makah Tribal hunt, even when viewed in combination with the Chukotkan Native hunt, will not impact the ability of the ENP gray whale stock to attain and maintain OSP.

I have not adopted the tribunal's analysis in section VI.C of the Recommended Decision to provide the necessary assurance that the waiver is consistent with the purposes and policies of the MMPA related to attaining and maintaining OSP, except I agree with the statement that "the ENP have attained OSP and are likely to maintain it even if a limited number of whales are removed due to the Makah Tribe's hunt." RD at 116. The remainder of section VI.C of the Recommended Decision addresses issues related to WNP gray whales and PCFG gray whales. For the reasons explained in response to comment 1, an OSP analysis is not required for WNP gray whales to satisfy the statutory factors under section 101(a)(3)(A) of the MMPA. Nevertheless, I agree with certain aspects of the discussion in section VI.C of the Recommended Decision related to WNP gray whales and will adopt some of the findings to satisfy other statutory criteria, as set forth below in section VIII (*Risk to WNP Gray Whales*) of this Final Decision. Although issues related to PCFG gray whales are relevant under certain provisions of section 101(a)(3)(A) of the MMPA when evaluating a waiver application, an OSP analysis is not required for the PCFG in order to obtain the necessary assurance

that the waiver is in accord with the purposes and policies of the MMPA related to obtaining and maintaining OSP for marine mammal stocks because the PCFG is not a stock.

For the reasons explained in this section of the Final Decision, I am assured that the taking authorized under the final waiver and regulations will not affect the ability of the ENP gray whale stock to obtain and maintain OSP. Therefore, I am assured that the taking under the waiver is in accord with sound principles of resource management and protection in the purposes and policies of the MMPA related to attaining and maintaining OSP.

Consistency With the Section 101(a)(3)(A) of the MMPA

The tribunal addressed other concerns raised by the parties (including the implications of the decision in *Kokechik*, climate change, and impacts on scientific research) before concluding that NMFS has satisfied the statutory factors set forth in section 101(a)(3)(A) and that the waiver should be granted. I agree with sections VI.D–E of the Recommended Decision and affirm the findings and rulings contained therein as part of this Final Decision, except I am not affirming section VI.D.1, which addresses the decision in *Kokechik*. My views on the implications of *Kokechik* in this matter are described in the response to comment 31.

The Final Regulations

The final regulations implementing a waiver must satisfy additional criteria set forth in section 103 of the MMPA. Some of these requirements are quite similar to the requirements related to the waiver determination under section 101(a)(3)(A). For example, both the regulations and waiver require consultation with the MMC, a decision based on the best available scientific evidence, and an evaluation of the purposes and policies in section 2 of the MMPA.

Under section 103(a), I must “insure” regulations implementing taking under a waiver will not disadvantage the ENP stock—a requirement often referred to as the disadvantage test. NMFS’s long-standing interpretation of the disadvantage test is that it relates to the impact of take on OSP. 45 FR 72185, October 31, 1980.

Pursuant to section 103(b), I must also give full consideration to all factors that may affect the extent to which the ENP stock may be taken. This includes five enumerated considerations: (1) existing and future levels of marine mammal species and population stocks; (2)

existing international treaty and agreement obligations of the United States; (3) the marine ecosystem and related environmental considerations; (4) the conservation, development, and utilization of fishery resources; and (5) the economic and technological feasibility of implementation. 16 U.S.C. 1373(b). Section 103(b) also requires an assessment of impacts to WNP gray whales in this case, given the remote risk to WNP gray whales associated with the regulated taking of ENP gray whales under the final waiver and regulations.

Disadvantage Test

The final regulations will not disadvantage the ENP stock because no lethal hunting can occur unless the stock is within its OSP and NMFS determines that the level of hunting authorized by permit will not cause the stock to dip below its OSP. This insures that ENP whales are only removed from the population when the stock is within a population range representing the “the maximum productivity of the population . . . keeping in mind the carrying capacity of the habitat and the health of the ecosystem” and insures the taking under the waiver will not disadvantage the ENP stock. 16 U.S.C. 1362(9).

Consistency With the Purposes and Policies of the MMPA

Section VIII of this Final Decision discusses the Marine Ecosystem, OSP, and the Disadvantage Test and explains how the final regulations insure the taking authorized under the waiver is consistent with the purposes and policies of the MMPA.

Existing and Future Levels of Marine Mammal Species and Population Stocks

In the first paragraph of section VII.A.1, the tribunal concluded that NMFS thoroughly considered both the existing and future abundance levels for the ENP, including the PCFG, and WNP stocks; that the methodology was robust; and that no credible evidence was presented that the analysis relied on incorrect assumptions or reached implausible results. RD at 135. I concur and affirm the first paragraph of section VII.A.1 as part of this Final Decision. The remainder of section VII.A.1 discuss issues related to WNP gray whales and the *Kokechik* decision. I address issues related to *Kokechik* in response to comment 29 and issues related to WNP gray whales later in section VIII of this Final Decision (*Risk to WNP Gray Whales*).

Existing International Treaty and Agreement Obligations of the United States

I agree with the tribunal’s analyses in the first paragraph of section VII.A.2 of the Recommended Decision and affirm this paragraph as part of this Final Decision. The tribunal concluded, and I agree, that the main international agreement relevant to this waiver determination is the International Convention for the Regulation of Whaling, RD at 137.

I set aside the remainder of section VII.A.2, which discuss the Treaty of Neah Bay of 1855 and some of the parties’ arguments suggesting that the waiver may have impacts on international relations. Section 103(b)(2) of the MMPA requires NMFS to consider international treaties and agreements, not international relations. Accordingly, the discussion in the last paragraph of section VII.A.2 is not necessary and is set aside. Although the Treaty of Neah Bay is relevant to this proceeding, it is not relevant to the analysis under section 103(b)(2) because it is not an international treaty or international agreement. I address the implications of the Treaty of Neah Bay in response to comments 45 and 46.

The Marine Ecosystem and Related Environmental Conditions

I agree with the tribunal’s analyses in section VII.A.3 of the Recommended Decision and affirm this section as part of this Final Decision. The record contains ample evidence that in prescribing these regulations, NMFS has fully considered the effect of the regulations on the marine ecosystem and environmental considerations.

The Conservation, Development, and Utilization of Fishery Resources

I agree with the tribunal’s analyses in section VII.A.4 of the Recommended Decision and affirm this section as part of this Final Decision, with one exception. The tribunal determined that the proposed regulations would have no effect on the conservation, development, or utilization of fishery resources. I agree but do not believe that impacts to whale watching should be analyzed under this factor. The MMPA defines “fishery” to mean: “(A) one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics; and (B) any fishing for such stocks.” 16 U.S.C. 1362(16). Section 103(b)(4) of the MMPA concerns fish stocks, not marine mammals and,

therefore, does not contemplate consideration of effects to whales or the whale watching industry. Therefore, I affirm the tribunal's ultimate conclusion in section VII.A.4 as part of this Final Decision but do not adopt its analysis of impacts due to whale watching.

The Economic and Technological Feasibility of Implementation

I agree with the tribunal's analyses in section VII.A.5 of the Recommended Decision and affirm this section as part of this Final Decision. The only technical concern the tribunal noted was potential minor difficulties in obtaining usable photographs for every approached whale and whether photo-identification for all whales within 24 hours is achievable, noting that the latter seems likely but not certain. RD at 139. The regulations I am issuing in this document include measures to help ensure these challenges can be overcome. For example, the Regional Administrator must determine that there are adequate photo-identification catalogs and processes available to allow for the identification of WNP gray whales and PCFG whales prior to issuing a hunt permit. In addition, NMFS has developed a protocol for identifying gray whales encountered during the hunt. Tab 1J.

Risk to WNP Gray Whales

Section 103 of the MMPA requires consideration of the risk to WNP gray whales in this case. The WNP population is approximately 290 animals, increasing at an annual rate of around 2 to 5 percent. RD. at 117. PBR for the WNP stock is 0.12 per year, or one whale every 8 years. *Id.* WNP gray whales are also protected as an endangered species under the ESA.

Whales from the WNP stock occasionally migrate along with ENP gray whales to the breeding grounds in North America with the best available scientific evidence showing a mixing proportion of at least 0.37. RD 18–19. WNP gray whales have not been documented in the ENP range from June through November. *Id.* at 110. Given that Tribal hunters may encounter a WNP gray whale migrating through the hunt area during the winter/spring season, NMFS conducted an analysis to estimate the risk to WNP gray whales from a Tribal hunt. The Recommended Decision reviewed NMFS's analysis of the risk to gray whales and found that NMFS produced a scientifically sound calculation of the risk. *Id.* at 117. The risk analysis adopted a conservative approach, and the risk to WNP is likely lower. Conservative assumptions included: (1) migrating WNP and ENP

gray whales are evenly mixed; (2) all approaches authorized under the regulations would occur during the winter/spring season; (3) the mixing proportions of ENP and WNP gray whales (*i.e.*, the proportion used in the analysis likely overstates the number of WNP gray whales likely to be present); and (4) all authorized strikes and approaches would be used during the waiver period. RD at 111, 118. However, it is unlikely many of the training activities would occur during the winter months when ocean conditions are unfavorable. *Id.* at 118.

The analysis of risk to WNP gray whales was updated at the beginning of the hearing in 2019. Tab 61D. The risk analysis conducted by Moore and Weller (Tab 61D) analyzed the probability of approaching, unsuccessfully striking, and striking a WNP gray whale during a Tribal hunt. Over the 10-year waiver period, a maximum of 15 whales could be struck in winter/spring hunts that could have some probability of being a WNP gray whale. While Tribal hunters may encounter a WNP gray whale, the likelihood of a strike remains a remote possibility. Moore and Weller (2019) estimate that for an individual strike on a gray whale, the expected probability of it being a WNP whale is 0.5 percent. Tab 61D. If all three strikes are used in a winter/spring hunt, up to 0.015 of those strikes would be on a WNP gray whale. That is, we would expect one WNP whale to be struck every 67 years if the hunt were to continue in perpetuity and using the conservative assumptions in the risk analysis. *Id.* The probability of at least one WNP whale being subject to an unsuccessful strike attempt (which includes those associated with training) over the 10-year waiver period was estimated at 3.7 percent. *Id.*

In estimating the number of approaches, Moore and Weller (2019) assumed that all approaches (hunting and training) would occur during the winter/spring season when WNP gray whales may be present. *Id.* This is a very conservative assumption, as some proportion of approaches are likely to occur in the summer/fall season when environmental conditions are better. RD at 118. Assuming that the maximum number of approaches (353) is achieved every year during the waiver period, up to 18 WNP whales could be approached (0.5 percent times 3,530 approaches). However, it is likely that less than 18 WNP gray whales would be approached given that a substantial number of approaches are expected to occur during summer/fall when conditions are more favorable. Neither approaches nor training harpoon throws are lethal, nor

are they likely to cause more disturbance than approaches or biopsy sampling for research purposes. *Id.* a 123. An approach on a WNP gray whale, the most likely scenario, is not expected to have any effect on the stock's ability to attain and maintain OSP. *Id.* at 120.

The regulations I am issuing in this document contain a number of protections for WNP gray whales to manage the remote risk associated with the hunt. These include: (1) an alternating hunt season to minimize risk to WNP gray whales; (2) requirements that the Tribe obtain separate authorization for WNP gray whales for the winter/spring season if take is anticipated; (3) a limit of one strike within a 24-hour period during a winter/spring hunt as a precaution against striking multiple WNP gray whales that might be traveling together; and (4) measures to insure that the processes are available to allow for the identification of WNP gray whales. In addition, the hunt must cease if NMFS determines that a WNP gray whale is struck during the hunt and no further hunt permits may be issued unless and until measures to prevent any additional strikes on WNP gray whales are implemented.

Although the tribunal determined that an ITA was necessary during the winter/spring hunt, my decision is that the risk to WNP gray whales should be managed in a more adaptive way based on an assessment of the risk to WNP gray whales associated with the hunting authorized under a permit. The actual hunting authorized under a permit will provide a more realistic and accurate picture of the risk to WNP gray whales than the WNP risk assessment published by Moore and Weller (2019) which includes some unrealistic assumptions regarding hunting activity in the winter/spring. Moore and Weller (2019) show that there is a risk to WNP that needs to be managed, but whether an ITA is required should be based on the actual levels of hunting that are authorized. Accordingly, under the final regulations, the Regional Administrator is required to assess, in conjunction with the NOAA Office of Protected Resources, whether take is anticipated based on the hunting proposed in the Makah's permit application. If take of WNP gray whales is anticipated, the permit must include a condition requiring separate authorization for the winter/spring hunt.

This approach is a middle ground between the Recommended Decision and the proposed regulations. Under the Recommended Decision, an ITA is necessarily required to hunt during the winter/spring season, even if the

information available during the permitting process indicates that the actual hunting authorized under the hunt permit will not result in the take of WNP gray whales. The proposed regulations would require the Makah to obtain “relevant incidental take authorization for other marine mammals.” This language does not specifically require any further analysis related to WNP gray whales at the permitting stage, even though the best scientific evidence presented at the hearing shows there is a risk of take. The final regulations I adopt in this document require NMFS to address risks to WNP gray whales by ensuring that any anticipated take of WNP gray whales is separately authorized before a winter/spring hunt.

Based on Moore and Weller (2019), the lethal take of a WNP is a remote possibility under the final waiver and regulations. The sub-lethal accidental takes forecasted in this analysis (which would need to be separately authorized and evaluated) will not impact WNP fitness, as any effects are expected to be minor and temporary—similar to the impacts associated with scientific research activities and whale watching. RD at 120. These sub-lethal takes are not expected to have any impacts on the ecosystem. Finally, although this finding is not required by the MMPA in this case, the sub-lethal takes forecasted by Moore and Weller (2019) are not expected to impact the WNP stock’s ability to obtain or maintain its OSP. *Id.*

Conclusion on the MMPA Statutory Criteria

Based on the proposed waiver and regulations, the Recommended Decision, the record assembled by the tribunal, and the comments of the parties submitted in accordance with 50 CFR 228.20(d), I have determined that a waiver should be granted and implementing regulations should be adopted as set forth herein. I agree with and affirm the tribunal’s conclusion in section VIII of the Recommended Decision as part of this Final Decision, with the following exceptions. Although I agree that NMFS has adequately considered the distribution, abundance, breeding habits, and times and lines of migratory movements of WNP gray whales, these specific determinations are not required for the WNP stock under section 101(a)(3)(A) of the MMPA because the waiver is limited to the ENP stock. I also disagree with the conclusion that an incidental take permit is necessarily required during periods when WNP gray whales might migrate through the Makah U&A.

IX. Scientific Information and Analysis Developed After the Recommended Decision

After the tribunal issued the Recommended Decision, NMFS completed an SDEIS on the Makah Tribe’s Request to Hunt Gray Whales. The SDEIS was issued on July 1, 2022 (88 FR 80300), and, on the same day, NMFS opened a 45-day public comment period, which was subsequently extended until October 14, 2022. 87 FR 50319, August 16, 2022. On November 17, 2023, NMFS issued an FEIS. 88 FR 80300.

As gray whales are well studied, new scientific research is published regularly, and the SDEIS and FEIS include additional scientific evidence and analyses that were not available at the time of the hearing before the tribunal. There is updated information on the abundance of ENP gray whales (Stewart and Weller, 2021a; Eguchi *et al.* 2022a; Eguchi *et al.* 2023a, Eguchi *et al.* 2024), abundance of PCFG gray whales (Harris *et al.* 2022), calf production (Stewart and Weller, 2021b, Eguchi *et al.* 2022b, Eguchi *et al.* 2023b), potential impacts to WNP gray whales (Moore *et al.* 2023), factors affecting the abundance and distribution of ENP whales (Perryman *et al.* 2021; Joyce *et al.* 2022; Stewart *et al.* 2023), carrying capacity (Stewart *et al.* 2023), gray whale morphology (Bierlich *et al.* 2023), and gray whale stock structure (IWC 2021, NMFS 2023; Weller *et al.* 2023). Under NMFS’s procedural regulations, I have discretion to “remand the hearing record to the presiding officer for a fuller development of the record.” 50 CFR 228.21(a). The additional information on gray whales developed after the hearing raises the question of whether a remand is warranted.

Following the issuance of the FEIS, I provided the parties with an opportunity to submit comments. The parties were able to comment on recent scientific information and on whether any additional procedures were necessary in this formal rulemaking. Some parties argued a remand was warranted. Others noted that the comment period provides adequate due process consistent with the procedures in section 556(e) of the APA, which provides that when “an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary.”

My decision on the waiver and the regulations rests on the material facts in the record assembled by the tribunal in support of the Recommended Decision,

the proposed waiver and regulation, and the comments submitted in accordance with 50 CFR 228.20(d). I considered additional information to evaluate whether that information warranted a remand. In making this assessment, I considered whether the new information would compel changes to my determinations. As described in greater detail below, the new information does not compel changes. The recent scientific information is largely consistent with the information available at the time of the hearing, and the final waiver and regulations include processes to address new information through the permitting process.

ENP Abundance

Since 1967, NMFS has conducted abundance surveys of ENP gray whales and regularly (annually in recent years) updates the estimates of ENP abundance and calf production. In addition, abundance estimates for the PCFG have been updated (Harris *et al.* 2022). It is expected that these estimates will change over time. When the hearing was held in 2019, the abundance of ENP gray whales was estimated to be 26,960 individuals. RD at 14. After the hearing, these estimates were updated (Stewart and Weller 2021a; Eguchi *et al.* 2022a; Eguchi *et al.* 2023a, Eguchi *et al.* 2024) using the same modeling approaches that generated the estimates considered in the Recommended Decision. At the time of the comment and response period, which ran from November 27, 2023, to January 17, 2024, the ENP abundance was estimated at 14,526 whales, a decline of approximately 46 percent from 2016 to 2023 (Eguchi *et al.* 2023a). In March 2024, Eguchi *et al.* (2024) published an estimated abundance of 19,260. This estimate represents a 32.6 percent increase from the 2022/2023 season. This updated estimate is consistent with the previously observed pattern of fluctuating abundance (Eguchi *et al.* 2024). That is, observed declines are followed by an increase in population.

While the ENP population experienced a significant decline in abundance, fluctuations in abundance were anticipated based on the long-term data sets that were included in the record before the tribunal. Tab 1H at 15. The tribunal recommended a low abundance threshold based, in part, on the most recent UME. RD at 151. Large-scale fluctuation in the population abundance occurred from the 1987/1988 abundance surveys to the 1992/1993 abundance surveys (approximately a 40 percent decline) and from the 1997/1998 abundance surveys to 2001/2002 abundance surveys (approximately a 24

percent decline). Tab 1H at 15. UMEs occurred in 1999–2000 and again in 2019–2023. RD at 98.

While the year-over-year decline from 2016 to 2023 represented a novel pattern (Eguchi *et al.* 2023a), the most recent estimate shows an increase in the ENP population, indicating population-level resilience in ENP gray whales (Eguchi *et al.* 2024). I expect the population to continue to rebound from the current decline as it has done following each of the prior declines. Eguchi *et al.* (2023) notes that “despite occasional declines in abundance since the time-series of data began in 1967, the population has recovered.” Eguchi *et al.* (2024) notes that “the population has shown a generally increasing trend since the time-series of data began in 1967.” Even before the latest abundance estimate, there were hints of a turnaround in the most recent decline: strandings decreased, calf counts increased, and the body condition of gray whales in the breeding lagoons improved (Eguchi *et al.* 2023b; LSIESP 2023; NMFS 2023a). Consistent with the tribunal’s recommendation, the final regulations include an abundance threshold to protect the ENP stock if the abundance of the stock falls below OSP. NMFS also plans to closely monitor the population with regular surveys to estimate abundance, calf production and body condition of gray whales (Eguchi *et al.* 2024).

The estimate of PCFG abundance was 232 individuals in 2017. RD at 96; Tab 96 at 33. Harris *et al.* (2022) updated the PCFG abundance using the modeling framework in Calambokidis *et al.* (2019; Tab 96) to maintain continuity with past estimates. As with Calambokidis *et al.* (2019), the researchers evaluated the abundance at three nested spatial scales: (1) NCA–NBC (*i.e.*, the definition of the PCFG range); (2) OR–SVI, which is within the NCA–NBC; and (3) the Makah U&A (MUA), which is within the OR–SVI. Calambokidis *et al.* (2019) estimated 232 whales in NCA–NBC region; 196 in the OR–SVI region, and 117 in the MUA region in 2017. Tab 96. Harris *et al.* (2022) estimated 212 whales in the NCA–NBC region, 199 in the OR–SVI region, and 119 in the MUA region in 2020. These most recent abundance estimates, though declining slightly from an observed peak in abundance in 2015, continue to indicate that the PCFG population has been stable over the last 20 years (Harris *et al.* 2022). Harris *et al.* (2022) found mixing rates for PCFG and non-PCFG individuals between December and May were similar to Calambokidis *et al.* (2019) and recommended referring to Calambokidis *et al.* (2019) for mixing

rates estimates. In addition, the PCFG estimate remains above the abundance thresholds considered in the proposed regulation, and carried over to the final regulations, and the analyses. Thus, the new information on the PCFG abundance is not significantly different from the information considered in the Recommended Decision.

I have determined that the updated information on ENP abundance, including the PCFG abundance, does not warrant a remand. The PCFG population remains stable and the recent decline in the ENP population is similar to previous declines in abundance from which the stock has recovered. All this is consistent with the evidence before the tribunal and does not compel a different result. Rather, the decline shows the wisdom of the tribunal’s recommendation to set an abundance threshold for ENP gray whales as well as the proposed regulations allowing for reductions in PCFG strike limits. I have included both these measures in the final regulations.

Factors Affecting Gray Whale Abundance and Distribution

Several recent studies have examined factors affecting gray whale abundance and distribution on the northern feeding grounds. Gray whales use various feeding techniques including suction feeding on prey that lives on or just above the seafloor and engulfing/skimming prey in the water column and at the surface. Tab 90F at 22. As described in the DEIS (Tab 90F at 3–98 to 3–99) and FEIS, a number of studies (*e.g.*, Grebmeier *et al.* 2006; Moore *et al.* 2003; Moore 2005; Moore *et al.* 2007; Stafford *et al.* 2007) suggest that gray whales are shifting their foraging areas in the Pacific Arctic where their diet is dominated by benthic amphipods (Moore *et al.* 2022). The food web in the Pacific Arctic is dependent on sea ice, and the Arctic is now characterized by warmer conditions with less sea ice coverage. Tab 90F at 3–99. Sea ice retreat occurs earlier in the season, resulting in increased productivity in the water column but reducing the amount of organic carbon reaching the seafloor (Grebmeier *et al.* 2006). Algae growing on the underside of the sea ice dies and falls to the bottom, fertilizing the benthic sediments that amphipods depend on. In addition, the lack of sea ice increases currents, washing away the fine sediments that are habitat needed for tube-building amphipods. These tube-building amphipods have a high lipid content (Grebmeier *et al.* 2006; Grebmeier *et al.* 2010). While abundance has remained constant, crustacean biomass has decreased. The

decline in biomass is most likely associated with species distribution shifts of benthic amphipods and other crustaceans. The decrease in organic carbon reaching the seafloor and the increased current speed are conditions that favor smaller, less nutritious amphipods (Stewart *et al.* 2023).

Stewart *et al.* (2023) found that the combined effect of sea ice cover and benthic productivity on gray whale population dynamics has driven major boom-bust cycles, including two modern booms in abundance that may have exceeded pre-exploitation levels. They found gray whale population dynamics were strongly linked to prey access and biomass, meaning that in years with low prey biomass and low access to prey (*i.e.*, high ice cover), ENP gray whales experienced major mortality events. While previous work has suggested that early sea ice retreat may benefit gray whales by increasing access to their prey base (Tab 90F at 3–86), Stewart *et al.* (2023) found that changing sea ice extent also affects benthic and pelagic communities in ways that may negatively impact higher trophic species in the Arctic. When low prey biomass coincided with high ice cover, ENP gray whales experienced large-scale declines in abundance.

Joyce *et al.* (2023) found a negative relationship between gray whale counts and ice concentration in the northeast Chukchi Sea, along with absence of gray whales in foraging hot spots during years with delayed ice break-up and during periods of dense ice cover. Further, the authors found that the onset of acoustic detection of gray whales had a strongly positive relationship with ice break-up date, meaning that gray whales arrive later to the foraging grounds when sea ice break-up is later (Joyce *et al.* 2023). In various locations throughout the Bering and Chukchi Seas, Moore *et al.* (2022) found that gray whale calls were associated with winter sea ice retreat, and that gray whale distribution correlated with prey abundance and wind patterns that influence prey abundance.

Perryman *et al.* (2021) noted the high interannual variability in calf production between 1994 and 2016 and found that environmental indices (the Pacific Decadal Oscillation and the North Pacific Index) in combination with ice cover in the Bering and Chukchi Seas during the early phase of gestation are important factors in explaining the observed variability. They concluded that access to prey early in the gestation period is critical to reproductive success in the ENP population (Perryman *et al.* 2021).

In their review of reported climate change effects on gray whales and described in the DEIS and FEIS, Salvadeo *et al.* (2013; see Tab 90F at 3–197) cited a number of likely gray whale responses to global warming. Some of these have been realized in recent years coinciding with the recent UME, including fewer whales in the Gulf of California, reduced number of whales in the breeding lagoons (LSIESP 2023), and shifting occurrence in feeding areas (Moore *et al.* 2022; Joyce *et al.* 2023).

The record assembled by the tribunal considered large-scale fluctuations in abundance with significant declines experienced during three mortality events. Tab 1H at 15. Two of these mortality events were declared UMEs. RD at 98. The recent research supports that gray whales are sensitive to dynamic and changing conditions due to climate change. Stewart *et al.* (2023) suggest that changes in benthic biomass in the future will likely drive changes in the carrying capacity of gray whales. These recent studies provide us with a better understanding of the mechanisms driving the fluctuations in the population. They do not contradict our conclusions that the removal of 25 ENP gray whales over 10 years, an average of 2.5 gray whales per year, would have no appreciable effect on the population or its ability to remain within OSP and be a functioning part of the ecosystem.

Calf Production

Since 1994, counts of female gray whales with calves have been conducted nearly annually from the Piedras Blancas Lighthouse Station in central California. Tab 90F at 3–73. Both the survey methods and the analytical approach used to estimate total annual calf production remained consistent through the 2019 survey (Perryman *et al.* 2021). In 2021, Stewart and Weller introduced a new Bayesian modeling approach to account for uncertainty during unsampled periods (*i.e.*, evenings, weekends, and unworkable weather). In general, scientific models and analyses are refined and updated as new information and improved techniques become available. Stewart and Weller (2021b) describe the advantages to the updated calf production model, including that the updated approach provides a more complete accounting of the uncertainty associated with unobserved periods.

Using this Bayesian modeling approach, Eguchi *et al.* (2022b) and Eguchi *et al.* (2023b) estimated calf production since 1994. While the Bayesian approach generally resulted in greater estimates than the earlier method by Perryman *et al.* (2002), the

trends in calf production were almost identical when compared to estimates under the previous approach (Stewart and Weller 2021b).

Eguchi *et al.* (2022b) found a linear relationship between estimated abundance and estimated calf production, suggesting that the factors driving or mediating rates of ENP gray whale fecundity and mortality may be similar. Coinciding with the onset of the current UME, calf production has been low since 2019 (Stewart and Weller 2021b; Eguchi *et al.* 2022b; Eguchi *et al.* 2023b). While still lower than many estimates in the time series, calf production in 2023 (412 calves) was nearly double the estimate in 2002 (Eguchi *et al.* 2023b).

Based on the long-term data series, periodic declines in calf production are expected to occur. The population experienced decreased production from 1999 to 2001 and from 2007 to 2010. Tab 90F at 3–75. From 2018 to 2022, the population again experienced decreased production (Eguchi *et al.* 2023b). The earlier declines in calf production generally lasted 3–4 years followed by increased production (see Weller and Perryman 2017; Tab 52O). This suggests that the current pattern may be typical of ENP gray whale population dynamics (Stewart and Weller 2021b), and we anticipate that calf production will increase following this most recent decline.

As described above, the trends using the Bayesian modeling approach were almost identical when compared to estimates under the previous modeling approach. Thus, Stewart and Weller (2021b) did not anticipate the updated approach leading to significant reinterpretations of calf estimates for management purposes. I agree and find that the new calf estimates are consistent with the estimates in the record before the tribunal.

UME

The tribunal considered the UME that began in 2019 in the Recommended Decision. RD at 98–103. It found that a waiver could still be granted despite the UME and provided recommendations related to this (see responses to comments 12 and 13 for my consideration of these recommendations). As described above, elevated gray whale strandings occurred along the west coast of North America from Mexico through Alaska beginning in 2019. The Working Group on Marine Mammal Unusual Mortality Events determined the recent UME ended as of November 2023.

NMFS documented 690 strandings during the 2019–2023 UME ([\[www.fisheries.noaa.gov/national/marine-life-distress/2019-2023-gray-whale-unusual-mortality-event-along-west-coast-and\]\(https://www.fisheries.noaa.gov/national/marine-life-distress/2019-2023-gray-whale-unusual-mortality-event-along-west-coast-and\), accessed March 17, 2024\) with peak strandings occurring from December 17, 2018, to December 21, 2020. From the 2015/2016 survey season to the 2022/2023 survey season, the abundance estimate for the ENP stock declined approximately 46 percent \(Eguchi *et al.* 2023a\). However, the PCFG abundance estimate did not experience a proportional decline from pre-UME levels to 2020 \(Harris *et al.* 2022\). To date, only one stranded whale during the UME has been matched by photo-identification to the PCFG. Genetic analysis on samples collected from stranded whales has not yet been completed.](https://</p></div><div data-bbox=)

As described above, the ENP gray whale population is known to undergo large-scale, periodic fluctuations in abundance, including during a prior and similar UME in 1999–2000 in which 651 gray whales stranded. Oceanographic factors that limited food availability for gray whales were identified as likely causes of the UME (Stewart *et al.* 2023).

Based on ecosystem conditions observed from 2010 to 2019, research found changes in the gray whale distribution and feeding behaviors as well as changes in gray whale prey associated with ecosystem changes in the sub-Arctic and Arctic feeding areas (Moore *et al.* 2022). The population model by Stewart *et al.* (2023), which focused on localized feeding areas in northern Bering and Chukchi seas, linked the 1999–2000 UME and the 2019–2023 UME to changes in sea ice cover and in the amount of gray whale prey. The team of scientists investigating the 2019–2023 UME determined the preliminary cause was localized ecosystem changes, which included both access to and the quality of prey in sub-Arctic and Arctic feeding areas, leading to poor nutritional conditions of the whales, decreased birth rates, and, in several whales, death due to malnutrition (<https://www.fisheries.noaa.gov/national/marine-life-distress/2019-2023-eastern-north-pacific-gray-whale-ume-closed>, accessed May 3, 2024).

Both the 1999–2000 UME and the 2019–2023 UME caused significant reductions to the ENP population; however, the population remains abundant and at a level where the effect of the limited hunt (25 whales over 10 years) on the population is so low that it is not appreciable. The gray whale population has demonstrated its resiliency in recovering from its endangered status caused by historical commercial whaling, being delisted

from the ESA 30 years ago in 1994, and recovering after each of the prior drops in its abundance. For example, scientists documented a healthy rebound of the ENP population after the 1999–2000 UME to about 27,000 whales in 2015/2016, and we predict it will rebound similarly from the 2019–2023 UME. NMFS will continue to monitor the population to track changes. The most recent abundance estimate shows an increase in abundance from the 2022/2023 season to the 2023/2024 season (Eguchi *et al.* 2024). Scientists have also documented that calf counts have increased and the body condition of gray whales has improved (Eguchi *et al.* 2023b).

The additional information that has emerged since the UME does not change my decision to adopt the tribunal's finding that a waiver may be granted during a UME. The 2019–2023 UME ended as of November 2023, and information on the UME that has emerged since the hearing suggests that ENP gray whales will recover from the 2019–2023 UME.

Carrying Capacity

As with abundance and calf production, it is expected that carrying capacity estimates will change over time. RD at 95. Stewart *et al.* (2023) constructed a demographic model of the ENP gray whale population using long-term datasets, as well as detailed temporal data on sea ice cover and crustacean (prey) biomass in the Arctic summer feeding grounds. The researchers estimated that the long-term average carrying capacity is 22,062 (18,967 to 24,725), which is lower than the median of the annual carry capacity values (24,500, 95 percent CI 21,771 to 27,797). The authors found that gray whale population dynamics were strongly linked to prey access and biomass, meaning that in years with low prey biomass and low access to prey (*i.e.*, high ice cover), gray whales experienced major mortality events. While the estimate in Stewart *et al.* (2023) is lower than the estimate in Punt and Wade (2012) that was available at the time of the hearing, this information is consistent with the hearing record as it is expected that carrying capacity will change over time (see Tab 102 at 29 to 31).

Carrying capacity is the upper bound of OSP. I have included precautions in the regulations to ensure that the stock is within OSP before a hunt is authorized and have required that hunting cease if the stock falls below the lower bounds of OSP. These measures are based on the tribunal's recommendation to set an abundance

threshold and the requirements of section 103(a) of the MMPA.

Stock Structure

The IWC Scientific Committee conducted annual (2014–2018) range-wide workshops on the status of North Pacific gray whales to identify plausible stock hypotheses consistent with the data available. At the time of the hearing, the two primary hypotheses deemed most plausible considered two separate “breeding stocks” or biological populations (western and eastern).

Hypothesis 3a assumes that the western breeding stock is extirpated, whales show maternal feeding ground fidelity, and the eastern breeding stock includes three feeding aggregations: PCFG, NFG, and a WFG. Hypothesis 5a assumes that both breeding stocks are extant, that the western breeding stock feeds in the western North Pacific, and whales feeding off Sakhalin include individuals from the western and eastern breeding stock. RD at 68; Tab 80B at 41.

More recently, the IWC identified hypotheses 4a and 7a as high priority for inclusion in the modeling framework used for assessing stock status of North Pacific gray whales (IWC 2021).

Hypothesis 4a considers two breeding stocks characterized by maternal feeding ground fidelity. The eastern breeding stock consists of the NFG and PCFG whales. The second, unnamed breeding stock includes the western feeding group whales that breed with each other on the migration route to Mexico for overwintering. Hypothesis 7a considers three breeding stocks characterized by maternal feeding ground fidelity: (1) the eastern breeding stock consists of NFG and PCFG whales that overwinter in Mexico, (2) the western breeding stock consists of whales that feed in the western North Pacific and overwinter in the Vietnam-South China Sea sub-area, and (3) an unnamed breeding stock consists of whales that feed in the western North Pacific and breed with each other on the migration route to Mexico for overwintering (IWC 2021). Neither of these hypotheses conflicts with NMFS's characterization in the SARs that the ENP gray whale stock includes the PCFG.

In 2018, NMFS initiated a 5-year review of the endangered WNP gray whale under the ESA and solicited information from the public. 83 FR 4032, January 29, 2018. A 5-year review is a periodic analysis of a species' status conducted to ensure that the ESA-listing classification of a species is accurate. The WNP gray whale is listed under the ESA as a DPS. For the purpose of the ESA review, WNP gray whales were defined as “gray whales that spend all

or part of their lives in the western North Pacific.” Given that this definition for evaluating WNP gray whale DPS status differed fundamentally from the 1993 listing language (58 FR 3121, January 7, 1993), an SRT was convened. The SRT found that the definitions of ENP and WNP gray whales provided in the Notice of Determination to Delist the Eastern North Pacific Stock (58 FR 3121, January 7, 1993) and in the Final Rule to Remove the Eastern North Pacific Population of the Gray Whale From the List of Endangered Wildlife (59 FR 31094, June 16, 1994) did not accurately describe how gray whales utilize and partition their habitat in the North Pacific and those definitions were no longer valid based on the best available scientific evidence (Weller *et al.* 2023).

The SRT found that three gray whale groups or “units” met the ESA DPS policy criteria for discreteness and significance: (1) gray whales that spend their entire lives in the WNP (termed the “WNP-only unit”); (2) gray whales that feed in the WNP in the summer and fall and migrate to the ENP (including Mexico) in the winter (“WNP–ENP unit”); and (3) a single unit consisting of both the WNP-only and WNP–ENP units (Weller *et al.* 2023). Given this, they considered two mutually exclusive options for a recommended DPS listing: (1) WNP-only and WNP–ENP units are separate DPSs or (2) WNP-only and WNP–ENP are single DPS. The SRT recommended that the combined units be used to designate a single DPS given that it is not possible to readily assign whales to either unit and, thus, not scientifically practicable to assess the status of each unit separately (Weller *et al.* 2023).

Based on the review of the best available scientific and commercial information, NMFS determined that the WNP gray whale population meets the discreteness and significance criteria of the DPS (NMFS 2023b). The SRT team concluded that the evidence supporting the discreteness of a WNP-only and the combined unit from gray whales that spend their entire lives in the ENP was “very strong” (Weller *et al.* 2023). The 5-year review also recommended that the WNP DPS remain classified as endangered (NMFS 2023b). The status and 5-year reviews do not provide new information that would change my determination regarding the stock definitions for gray whales under the MMPA.

Body Condition

One party commented that a recent study by Lemos *et al.* (2020) provides new information that must be added to

the record. Lemos *et al.* (2020) is described in the FEIS (NMFS 2023a). Using drone photogrammetry, Lemos *et al.* (2020) applied an index of body area to measure and compare body condition of ENP gray whales foraging off the coast of Oregon between 2016 and 2018. Similar to the body mass index for humans, the body area index (BAI) is a continuous, unitless metric to measure and compare whale body condition. Lemos *et al.* (2020) found that BAI varied with age, sex, and reproductive status, with calves and pregnant females displaying the highest BAI followed by resting females, mature males, and, finally, lactating females. That is, lactating females are one of the most depleted groups; pregnant females are one of the most robust groups. Body condition was significantly better in 2016 than in 2017 and 2018, which was associated with 2 prior years of poor local upwelling conditions that may have caused reduced prey availability (Lemos *et al.* 2020). That there are fluctuations in gray whale body condition based on sex, age, reproductive status, seasonality and environmental conditions, including prey availability, is not a novel concept that would change any of my determinations.

Gray Whale Morphology

Bierlich *et al.* (2023) investigated morphological differences (length, skull, and fluke span) and compared length-at-age growth curves for ENP and PCFG whales. The researchers analyzed estimated morphological measurements of PCFG whales from 2016–2022 using drone-based measurement techniques. The length-at-age data on ENP gray whales was obtained from prior studies using stranding, whaling, and photogrammetry data (1926–1997); fluke and skull measurements were from data collected during scientific whaling from 1959–1969. PCFG and ENP whales were found to have similar growth rates, while PCFG whales reached shorter asymptotic lengths (about 8.3 percent shorter for females and 3.8 percent for males). The authors also found that PCFG gray whales have significantly smaller skulls (about 2 percent smaller) and flukes (about 1 percent smaller) than historical ENP gray whales.

The authors suggest several reasons as to why PCFG whales are smaller, including (1) differences in phenotypic plasticity and (2) differences in foraging tactics. Phenotypic plasticity is the capacity of a single genotype to exhibit alternate phenotypes depending on the environment. The IWC Stock Definition and DNA Testing Working Group reviewed the research. They noted that

the morphometric differences could reflect ecological divergence driven by selection for a smaller body size in PCFG whales due to prey resource limitations or aspects of the foraging niche. However, this pattern could also develop if whales with small body sizes are more likely to recruit into the PCFG rather than making the full migration to the Arctic feeding grounds (IWC 2023). The Working Group also found that the existing photo-identification and genetic data (citing to Lang *et al.* 2012, Lang *et al.* 2019, Calambokidis *et al.* 2019) suggest a degree of external recruitment into the PCFG, and that the morphological data collected on the PCFG range could contain a mixture of animals from either of these two groups (external versus internal recruits).

The results in Bierlich *et al.* (2023) must be viewed cautiously given the disparate data sets, differences in measurement methodologies, and lack of temporal overlap in the PCFG and non-PCFG ENP data being compared. While the researchers documented differences in morphology, the underlying causes for these differences are not known and may be driven by processes not related to population structure.

Morphological data is one factor that can be considered in delineating demographically independent populations (DIPs). However, the DIP handbook cautions against its use to compare groups of animals when, among other conditions (1) data collection methods differ between investigators and (2) differences between groups could be explained by phenotypic plasticity (Martien *et al.* 2019). In this case, Bierlich *et al.* (2023) rely on data collected using different methods and during different time periods for the two groups being compared. In addition, they acknowledge the genetic similarity between the ENP and PCFG and propose phenotypic plasticity as an explanation for the differences found. Phenotypic plasticity is common in animal populations and in itself is not a criterion for stock designation (NMFS 2019; NMFS 2023c).

Other lines of evidence support the conclusion that the PCFG is a feeding group within the ENP stock. For example, external recruitment to the PCFG continues to be an important influence in maintaining or increasing the size of the PCFG population, and the PCFG do not differ from other ENP gray whales with respect to nuclear DNA markers. RD at 65, 106. The conclusions about the PCFG belonging to the broader ENP stock are not changed due to Bierlich *et al.* (2023).

Similarly, IWC reviewed this research and found: “In considering new information indicating that morphological differences exist between whales feeding on the PCFG feeding ground and those that migrated past central California, the Committee noted that, given evidence of immigration into the PCFG, morphological data collected from PCFG whales may contain a mix of internally and externally recruited individuals.” They concluded that no changes were needed to the current gray whale stock structure hypotheses or their modeling approach in which PCFG whales belong to a feeding group within the ENP stock (IWC 2023).

Based on the information above, I have concluded that the ENP gray whale morphology paper (Bierlich *et al.* 2023), the WNP status review (Weller *et al.* 2023), and the WNP 5-year review (NMFS 2023b) do not present significant new information necessitating a remand. The information presented is consistent with the information in the record of the ALJ proceeding that there are two stocks of gray whales, ENP and WNP, and the PCFG are a feeding group within the ENP stock.

Impacts to WNP Gray Whales

In 2023, Moore *et al.* updated the estimates of the probability of approaching, unsuccessfully striking, or striking a WNP gray whale during the proposed Makah hunt. The re-estimate of the probability of striking a WNP was based on the updated population estimate and the likelihood of ENP and WNP gray whale occurrence in the hunt area. The same model used in 2018 and 2019 analyses (see Tab 61D) was used to generate the new estimates (Moore *et al.* 2023).

Moore *et al.* (2023) estimated that for a single interaction with a gray whale, the expected probability of it being a WNP whale is 0.8 percent to 1.2 percent, assuming an ENP abundance between approximately 16,000 to 11,000 animals. This is up slightly from the estimate of 0.5 in 2019. Tab 61D. This change is largely driven by using a lower abundance estimate for ENP population size. A population of 16,000 to 11,000 animals is below the most recent abundance estimate of 19,260 (95 percent CI = 17,500–21,300.5), animals (Eguchi *et al.* 2024). As described in section III of this Final Decision and the Response to comment 13, the UME was closed as of November 2023, and there are signs that the population is recovering. Increases in abundance were seen following previous periods of decline and in the most recent abundance estimate would be expected

to result in a decline in the risk to WNP whales.

According to Moore *et al.* (2023) and using abundance of between 16,000 and 11,000 animals, the probability of striking one WNP gray whale over the 10-year waiver period is between 11.1 and 16.3 percent, assuming all fifteen winter/spring strikes are used. Applying those percentages to a population estimate of 11,000 to 16,000 results in 0.12 to 0.18 WNP gray whales struck over the waiver period; in other words, one WNP gray whale struck every 61 to 90 years. There may also be 0.71 to 1.06 unsuccessful harpoon throws over the course of the waiver. However, it is unlikely that all of the assumptions of the analysis will be met. If 3,530 approaches are made during the 10-year waiver, we would expect up to 27.7 to 41.6 WNP whales to be approached. As described above, the analysis of risk to WNP gray whales is conservative and likely overestimates the risk. In addition, the most recent abundance estimate (Eguchi *et al.* 2024) is higher than the estimates used in the Moore *et al.* (2023) risk analysis. Given the likelihood of this analysis overestimating the risk to WNP gray whales and the slight increase in the likelihood of striking a WNP gray whale, the new information represents similar risk levels to those in the earlier estimates. Thus, Moore *et al.* (2023) does not present significant new information that would change my determinations. There remains a remote risk to WNP gray whales that calls for management. In light of this risk, NMFS must assess whether take is anticipated at the permitting stage. If take of WNP gray whales is anticipated, separate take authorization will be required for the winter/spring hunt.

Summary of New Information

For the reasons discussed above, the additional scientific information developed after the hearing does not warrant a remand because the additional information is consistent with or confirms the record developed in the ALJ proceeding and would not change any of my determinations. NMFS and external researchers developed and I reviewed additional information related to gray whales following the hearing. I used this information to assess whether a remand was warranted and provided the parties with ample opportunity to comment on the information.

On July 1, 2022, NMFS issued a SDEIS and announced a 45-day comment period on the SDEIS, which was extended until October 14, 2022, and then reopened from October 28

through November 3, 2022. After NMFS released its FEIS, I provided the parties with an opportunity to submit comments on what, if any, procedural steps may be necessary prior to rendering a final decision on the waiver and regulations. I also informed the parties that they could utilize the comment period to address new analyses on gray whales that emerged since the comment period on the SDEIS ended. The comment period began on November 27, 2023, and ended December 20, 2023. I then gave the parties an opportunity to respond to the comments of other parties by January 17, 2024.

No parties made a strong showing that remand was warranted during the final comment and response period or explained why the trial-type proceedings associated with a remand were justified. In supporting the need for additional process steps, AWI and PCPW focused much of their comments on the recent study by Bierlich *et al.* (2023) described above. That study found significant morphological differences between PCFG and ENP gray whale. Based on Bierlich *et al.* (2023), PCPW suggests that NMFS must convene a task force to reassess the status of PCFG whales; AWI contends that remand is warranted given this new information. NMFS's hearing regulations guiding the permissible procedures in this process do not provide for convening a scientific workgroup.

The commenters contend that the study suggests internal recruitment of PCFG whales dominates, assert that NMFS has not recently revisited the question of ENP stock structure, and suggest that the morphology data is an additional line of evidence supporting designation of the PCFG as a stock. Commenters also note that the authors conclude their results encourage re-evaluating the population management designation of ENP gray whales to consider the PCFG as a separate management unit.

While morphological data is a consideration in stock delineation, the DIP delineation handbook cautions against such use when, as is the case here, data collection methods differ and differences in between the groups can be explained by phenotypic plasticity. The authors of the study acknowledge the genetic similarity between ENP and PCFG whales and propose phenotypic plasticity as a plausible explanation (Bierlich *et al.* 2023). The underlying causes for the differences in PCFG and ENP morphology was not identified through this study and may be driven by processes not related to stock structure.

Other lines of evidence continue to support that the PCFG is a feeding aggregation within the ENP. The PCFG do not differ from other ENP gray whales with respect to nuclear DNA. RD at 106. In addition, external recruitment and breeding between PCFG and ENP gray whales continues to occur. RD at 63, 65. The IWC in reviewing Bierlich *et al.* (2023) concluded that "given the evidence of immigration into the PCFG, morphological data collected from PCFG whales may contain a mix of internally and externally recruited individuals" (IWC 2023). The information in Bierlich *et al.* (2023) does not represent significant new information that warrants revisiting the determinations made by the tribunal related to gray whale stock structure. NMFS regularly reviews the status of the ENP gray whale stock through its SARs developed under section 117 of the MMPA. The most recent SAR (NMFS 2021) for ENP gray whales continues to consider the PCFG as a feeding aggregation within the ENP. In addition, the regulations include measures specific to the PCFG to ensure they maintain their current stable population status, which ensures the hunt will not preclude the PCFG from being designated a stock in the future, if warranted.

IX. Required Statements Related to Final Regulations

The MMPA requires that either before or concurrent with the publication of these regulations I make certain statements. 16 U.S.C. 1373(d). This section includes those statements.

Statement of the Estimated Existing Levels of the Species and Population Stocks of the Marine Mammal Concerned

ENP gray whales are the subject of the waiver and regulations. The ENP gray whale abundance estimate is 19,260 (95 percent CI =17,500–21,300.5), and the resultant minimum abundance estimate is 18,430.

Statement of the Expected Impact of the Proposed Regulations on the OSP of Such Species or Population Stock

Punt and Wade (2012) estimated the 2009 population to be at 85 percent of the carrying capacity (posterior mean of 25,808) and at 129 percent of MNPL. Based on data in Punt and Wade (2012), MNPL was approximately 16,000 whales at that time. This and the most recent abundance of gray whales (19,260) (Eguchi *et al.* 2024) suggest the stock is above MNPL (*i.e.*, within OSP). Analyses that are more recent suggest that the carrying capacity of the ENP stock has changed. Stewart *et al.* (2023)

estimate long-term average carrying capacity at 22,062. In the absence of direct measurements, a model-derived value of 60 percent of carrying capacity can be used to estimate MNPL, which is the lower bound of OSP. Using this approach, the data in Stewart *et al.* (2023) suggests that MNPL is 13,237 animals. This also suggests the ENP stock is currently within OSP. Because the level of hunting is so low and because hunting can only occur if the stock is within OSP and will not cause the stock to fall below OSP, the regulations have no effect on the OSP of ENP gray whales.

Statement Describing the Evidence Before the Agency That Forms the Basis for the Regulations

In developing the waiver and regulation, I relied on the proposed waiver and regulations, the record assembled by the tribunal, the Recommended Decision, and the public comments submitted in accordance with 50 CFR 228.20(d). After the Recommended Decision was issued, I considered additional information in assessing whether a remand was warranted as described in section IX of this Final Decision.

Any Studies/Recommendations Made by or for the Agency or the MMC That Relate to the Establishment of the Regulations

The record assembled by the tribunal includes numerous studies and recommendations relevant to the establishment of these regulations. Additional studies since the hearing are considered in section IX. Based on these studies, I determined a remand was not warranted. As described in section VIII, NMFS consulted with the MMC and considered their recommendations in developing the proposed and final regulations.

X. Ultimate Findings and Conclusions

The waiver and the implementing regulations are based on the best scientific evidence available. In making this Final Decision, NMFS considered the voluminous scientific record assembled by the tribunal. After the comment period closed on the Recommended Decision, I evaluated the latest scientific information and determined that a remand to the tribunal was not warranted. NMFS has consulted with the MMC on numerous occasions. The MMC submitted comments on the 2015 DEIS and provided written advice in response to two NMFS requests for consultation in 2017. Tabs 1I, 1K, 1L, 1O, 1P. The MMC also provided proposed findings of fact

and conclusions of law in March 2020. Tab 114. In October 2021, I sent a letter to the Executive Director of the MMC welcoming further consultation during the public comment period on the Recommended Decision. The MMC submitted comments on the Recommended Decision during the public comment period. The MMC also submitted comments on the SDEIS and provided a response to other parties' comments in January 2024.

In issuing this waiver, I have given due regard to the effect of the waiver on the distribution of ENP gray whales, including their distribution within the PCFG range; abundance; breeding habits; and times and lines of migratory movements of the ENP gray whale stock. Consistent with the tribunal's determinations, I find that the effect of the hunt on all four factors is minimal. RD at 112. The waiver is in accord with sound principles of resources protection and conservation as provided in the MMPA's purposes and policies, and the regulations are consistent with the MMPA's purposes and policies. The tribunal found it "reasonable for NMFS to conclude that the health and stability of the ecosystems in which gray whales function will not be adversely affected by the proposed waiver and regulations," and I agree. RD at 116. The ENP stock is well studied and capable of obtaining and maintaining OSP despite decades of hunting at far greater levels than I am authorizing. To insure that the taking under the regulations will not disadvantage the stock, hunting is not permitted unless the stock is within its OSP.

I have fully considered the effect of the regulations on existing and future levels of the ENP and WNP gray whale stocks, the marine ecosystem and related environmental considerations, and existing international and treaty obligations of the United States. I have also fully considered the economic and technological feasibility of the implementation of the proposed regulations. I have determined the regulations will not affect the conservation, development, and utilization of fishery resources. Risk to WNP gray whales from the implementation of the regulations is an additional factor that I have fully considered in promulgating the regulations.

I have given full consideration to all relevant factors and, for the reasons described herein, am issuing the waiver and the regulation to provide a framework for a limited ceremonial and subsistence hunt for ENP gray whales by the Makah Indian Tribe in accordance with their reserved whaling rights under

the Treaty of Neah Bay of 1855 and the MMPA.

XI. Classification

Rulemaking Authority

I have waived the MMPA take moratorium pursuant to 16 U.S.C. 1371(a)(3)(A) to allow for a limited hunt on ENP gray whales by the Makah Tribe and promulgated regulations to govern the issuance of hunt permits and the hunt itself pursuant to 16 U.S.C. 1373.

NEPA

NMFS prepared an FEIS for this action. The FEIS was filed with the Environmental Protection Agency on November 10, 2023. A notice of availability was published on November 17, 2023. 88 FR 80300. NMFS issued a ROD identifying the selected alternative. A copy of the ROD is available from NMFS (see **ADDRESSES**) and at <https://www.fisheries.noaa.gov/west-coast/marine-mammal-protection/makah-tribal-whale-hunt>.

Tribal Impact Statement (E.O. 13175)

E.O. 13175 of November 6, 2000, Presidential Memoranda of April 29, 1994; November 5, 2009; and January 26, 2021 (titled Memorandum on Government-to-Government Relations with Native American Tribal Governments; Presidential Memorandum on Tribal Consultation; and Tribal Consultation and Strengthening Nation-to-Nation Relationships, respectively), Department of Commerce Administrative Order 218-8: Consultation and Coordination with Indian Tribal Governments (April 26, 2012), Department of Commerce Tribal Consultation and Coordination Policy (May 21, 2013), and NOAA's Procedures for Government to Government Consultation with Federally Recognized Indian Tribal Governments (November 2013, amended June 2023) outline the responsibilities of NMFS in matters affecting Tribal interests. Section 161 of Public Law 108-199 (188 Stat. 452), as amended by section 518 of Public Law 108-447 (118 Stat. 3267), extends the consultation requirements of E.O. 13175 to Alaska Native corporations. E.O. 13175 requires that NMFS: (1) Have regular and meaningful consultation and collaboration with Indian Tribal governments in the development of Federal regulations that significantly or uniquely affect their communities; (2) reduce the imposition of unfunded mandates on Indian Tribal governments; and (3) streamline the applications process for and increase the availability of waivers to Indian Tribal governments.

Under the E.O., Presidential Memoranda, and Agency policies, NMFS must ensure meaningful and timely input by Tribal officials in the development of regulatory policies that have Tribal implications. Section 5(b)(2)(B) of E.O. 13175 requires NMFS to prepare a Tribal summary impact statement as part of the final rule. This statement must contain: (1) a description of the extent of the agency's prior consultation with Tribal officials; (2) a summary of the nature of their concerns; (3) the agency's position supporting the need to issue the regulation; and (4) a statement of the extent to which the concerns of Tribal officials have been met.

Prior Consultation With Tribal Officials

NMFS developed these regulations in response to a request from the Makah Tribe, received on February 14, 2005. The Tribe requested a waiver of the MMPA's take moratorium to allow a limited ceremonial and subsistence hunt of ENP gray whales. Consistent with the E.O. directives, NMFS consulted with the Makah Tribe in developing the proposed waiver and regulations that were published on April 5, 2019. 84 FR 13604. As described above, publication of the proposed waiver and regulations initiated a formal rulemaking proceeding.

Six parties, including the Makah Indian Tribe, participated in the proceedings, including a trial-type hearing in November of 2019. The hearing concluded after 6 days of testimony from 17 witnesses. Hearings under this formal rulemaking process are subject to requirements of the APA and regulations promulgated by NMFS. 5 U.S.C. 556–557; 50 CFR 228.1 through 228.21. The APA imposes certain restrictions on communication regarding the merits of the proceedings during formal rulemaking. These restrictions begin when the agency publishes the notice of hearing or has knowledge that it will be published and remain in place until the formal rulemaking process is complete.

On April 5, 2019, NMFS published a notice of hearing on this matter. 84 FR 13639. Given the APA's restrictions, we have not engaged in government-to-government consultation with the Makah Indian Tribe since the formal proceedings were initiated. We will conduct further government-to-government consultation on the related processes following publication of this Final Decision on the waiver and the regulations.

That we have not engaged in government-to-government consultation

since initiation of the formal proceedings does not mean that we have not heard the Makah's support for and concerns related to this action. In accordance with the rules governing the proceeding, the parties, including the Makah Tribe, submitted direct and rebuttal testimony, along with supporting exhibits, in advance of the hearing. Following the hearing, the Makah Tribe submitted post-hearing briefs and proposed findings of fact and conclusions of law as well as comment on the tribunal's Recommended Decision. The Makah Tribe submitted comments on the DEIS and its supplement. The Tribe also submitted comments and rebuttal during the party comment period following the publication of the FEIS.

We received additional comments in support of the waiver from the Northwest Indian Fisheries Commission, Tulalip Tribes, Jamestown S'Klallam Tribe, Puyallup Tribe of Indians, Squaxin Island Tribe, Lower Elwha Klallam Tribe, Suquamish Tribe, Swinomish Indian Tribal Community, and the Washington Indian Gaming Association. We have summarized the Tribal concerns below. In addition, comments and our responses on the tribunal's Recommended Decision are addressed above, and comments on the DEIS/SDEIS are included in the appendices to the FEIS.

Summary of the Nature of Tribal Concerns

This action is being taken in response to a request from the Makah Tribe to conduct a limited ceremonial and subsistence harvest of ENP gray whales. The Makah Tribe has at least a 1,000-year-old whaling tradition and reserved an express right to take whales in the Treaty of Neah Bay of 1855. The Tribe agreed with the tribunal that NMFS had satisfied all the requirements for the waiver and that the tribunal's recommendation to issue the waiver and promulgate final regulations relied on the best available science and appropriately weighted the supporting materials and conclusions presented. The Tribe also supported NMFS's pre-hearing proposed revisions to the proposed regulations, including clarifying that members of the Tribe living off-reservation may share edible products at their residences with non-Makah family members and guests.

The Tribe's concerns with the tribunal's recommended decision centered around four themes: (1) the Treaty of Neah Bay of 1855; (2) specifying low abundance thresholds; (3) training approaches on calves and adult whales accompanying a calf; and

(4) consideration of WNP whales. The Makah Tribe notes that the Recommended Decision asserted that the MMPA and not the Treaty of Neah Bay is the controlling law on whether a hunt may proceed. The Tribe believes that because the MMPA did not abrogate the Treaty, the Treaty and the MMPA must be harmonized in evaluating whether the hunt may proceed.

With respect to abundance thresholds, the Tribe did not object in principle to the tribunal's recommendation to set a low abundance threshold for the ENP populations but did not think it is necessary. Described in more detail in their comment letter, the Tribe concluded that "establishing an abundance threshold that would suspend the hunt is not necessary to protect the ENP population as a whole in light of its long-term abundance trend, the limited number of strikes that would be authorized, the practice of transferring unutilized whales to the Russian Federation and the IWC Scientific Committee's conclusion that the proposed hunt—without such a threshold—will meet all applicable IWC conservation objectives." If a low abundance threshold is included, the Makah Tribe recommended that a threshold of 15,788, MNPL based on Punt and Wade (2012), would be appropriate until NMFS conducts an updated analysis.

The Tribe expressed concern about including a prohibition on all approaches of calves or adults accompanying calves given (1) an asserted lack of scientific evidence presented that demonstrated an adverse effect from these approaches; (2) a broad prohibition would impair training regarding avoidance of calves and cow-calf pairs during a hunt; and (3) the difficulties of identifying a calf or cow-calf pair from the whaling canoe leading to inadvertent violation of the proposed regulations.

The Makah Tribe conveyed a number of concerns related to the consideration of WNP gray whales during the proceedings and in the Recommended Decision. First, the Tribe does not support the tribunal's recommendation to add a separate requirement that the Tribe obtain an ITA for the take of WNP gray whales prior to the issuance of a hunt permit. The Tribe does not agree with this recommendation but noted that should NMFS adopt it, it should be limited to non-lethal approaches of WNP gray whales as all other forms of take are a very remote possibility and will be adequately addressed under § 216.113(a)(7)(vii) of the proposed regulations.

Second, the Tribe maintains that the WNP stock is not a listed species under the ESA, and therefore, is not a depleted stock under the MMPA. They argue that the WNP stock's essential attributes are fundamentally different from those of the stock that remained listed in 1994. They also assert that there is no evidence that the non-lethal approaches of WNP gray whales that would occur over the waiver period would be detrimental to, much less disadvantage, the stock by affecting its ability to attain or maintain OSP.

Comments from other Tribal Nations supported the Tribe's efforts to exercise its Treaty rights, encouraged granting the waiver in a timely manner, and encouraged government-to-government consultation with the Makah Tribe. They also noted that the Recommended Decision relied on an extensive scientific record and that the proposed waiver complies with all requirements under the MMPA.

Agency's Position Supporting the Need To Issue the Regulation

The Makah Tribe reserved the right to hunt whales through the Treaty of Neah Bay of 1855. Section 4 of the Treaty specifically provides: "The right of taking fish and of whaling or sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States." In *Anderson v. Evans*, 371 F.3d 475 (9th Cir. 2004), the U.S. Court of Appeals for the Ninth Circuit held that the Makah Tribe and NMFS must comply with the MMPA's waiver process in order for the Tribe to exercise their right to whale.

In light of the decision in *Anderson*, in 2005 the Makah Tribe asked NMFS to waive the MMPA's moratorium and authorize a limited ceremonial and subsistence hunt for ENP gray whales. This action is consistent with the United States Government's obligations to the Tribe under the Treaty of Neah Bay of 1855 and the Federal trust responsibility and aims to fulfill the Tribe's cultural and subsistence needs. This action is consistent with E.O. 13175; Presidential Memoranda of April 29, 1994; November 05, 2009, and January 26, 2021; Department of Commerce's Tribal Consultation Policy (Administrative Order 218-8 of April 26, 2012 and Tribal Consultation and Coordination Policy of the U.S. Department of Commerce); and NOAA's Tribal Consultation Policy.

Statement of the Extent to Which the Concerns of Tribal Officials Have Been Met

NMFS carefully considered the concerns of the Makah Indian Tribe in developing the final regulations. The Makah maintain that "because the MMPA did not abrogate the Treaty, the MMPA and Treaty must be harmonized in evaluating whether the hunt may proceed." I have not adopted the sections of the Recommended Decision that suggest the Treaty of Neah Bay is not relevant (see comment 46). I have also provided a process through which the Tribe may request a modification to the final regulations (see comment 46).

We agree with several of the concerns that the Tribe raised with respect to approaches on calves and adults with calves (see comment 34). To address these concerns, I have modified the requirements in the Recommended Decision to prohibit approaches on these animals only after a member of the whaling team has identified a calf or an adult with a calf.

The Makah Tribe did not support the recommendation to include a requirement that an ITA be obtained prior to permitting winter/spring hunt activities. Although the tribunal determined that an ITA was necessary during the winter/spring hunt, the final regulations adopt a more adaptive approach based on an assessment of the risk to WNP gray whales associated with the hunting authorized under a permit. Under the final regulations, NMFS is required to assess whether take of WNP gray whales is anticipated based on the hunting proposed in the Makah's permit application. If take is anticipated, then separate authorization is required during the winter/spring hunt. This approach requires NMFS to address risks to WNP gray whales by ensuring that anticipated takes are authorized but allows for consideration of the hunt structure proposed in the permit application and the best available scientific information at that time (see comment 21 and section VIII, *Risk to WNP Gray Whales*).

While the Makah Tribe did not object in principle to the tribunal's recommendation to set a low abundance threshold for the ENP populations, they do not think it is necessary. The Tribe further recommended a low abundance threshold, if included, of 15,788, MNPL based on Punt and Wade (2012). MNPL is the lower bound of OSP. The regulations specify that the ENP gray whale population must be within its OSP to authorize hunt activities, which is consistent with the Tribe's suggestion to base the low abundance threshold on

MNPL but provides for consideration of the best available information at the time of the issuance of a hunt permit (see comment 12) and ensures consistency with section 103(a) of the MMPA.

The Makah Tribe also provided comments on gray whale stock structure and the disadvantage test with respect to WNP gray whales. Those comments are fully addressed in section V of this Final Decision.

E.O. 12866 and E.O. 13563—Improving Regulation and Regulatory Review

E.O. 12866 provides that significant regulatory actions be submitted for review to the Office of Information and Regulatory Affairs, and the Office of Management and Budget. Section 3(d)(1) of E.O. 12866 provides that regulations "issued in accordance with the formal rulemaking provisions of 5 U.S.C. 556 and 557" are not regulations covered by that E.O. In accordance with 16 U.S.C. 1373(d) and 50 CFR 228.3, these regulations were developed in accordance with the formal rulemaking procedures of 5 U.S.C. 556 and 557 and are thus exempt from review under E.O. 12866.

E.O. 13563 reaffirms the principles of E.O. 12866 while calling for improvements in the Nation's regulatory system to promote predictability, to reduce uncertainty, and to use the best, most innovative, and least burdensome tools for achieving regulatory ends. The E.O. directs agencies to consider regulatory approaches that reduce burdens and maintain flexibility for the public where these approaches are relevant, feasible, and consistent with regulatory objectives. It also emphasizes that regulations must be based on the best available science and that the rulemaking process must allow for public participation. NMFS has developed this rule in a manner consistent with these requirements.

RFA

The RFA (5 U.S.C. 601 *et seq.*) requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice of proposed rulemaking requirements under the APA unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. The RFA defines small entities, in pertinent part, as small businesses, small organizations and small governmental jurisdictions. This rule affects only a single tribe. Tribes are not considered small entities under the RFA. The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel

for Advocacy of the Small Business Administration during the proposed rule stage that this action would not have a significant economic impact on a substantial number of small entities. No comments were received regarding this certification. As a result, a regulatory flexibility analysis was not required and none was prepared.

Paperwork Reduction Act

This final rule contains no information collection requirements subject to the Paperwork Reduction Act.

CZMA

To the extent that the enforceable policies of the WCZMP apply, NMFS determined that this action will be implemented in a manner that is consistent, to the maximum extent practicable, with the enforceable policies of WCZMP. This determination was submitted for review to the State of Washington under section 307 of the CZMA. On June 2, 2023, the State of Washington, through its Department of Ecology, agreed with NMFS's determination that this action is consistent with the enforceable policies of WCZMP.

E.O. 13132—Federalism

E.O. 13132 sets forth principles and criteria that agencies must adhere to in formulating and implementing policies that have federalism implications, that is, regulations that have substantial direct effects on the states, on the relationship between the National Government and the states, or on the distribution of power and responsibilities among the various levels of government. Federal agencies must examine the statutory authority supporting any action that would limit the policy-making discretion of the states, and to the extent practicable, must consult with state and local officials before implementing any such action. This rule does not have substantial direct effects on the states and therefore does not have the type of federalism implications contemplated by the E.O. We do not foresee that the rule would significantly affect the distribution of power and responsibilities among the various levels of government or limit the policy-making discretion of the states.

ESA

Informal consultations under section 7 of the ESA were concluded with FWS and NMFS West Coast Regional Office March 15, 2023, and November 8, 2023, respectively. As a result of the informal consultation, the FWS and NMFS WCR determined that activities conducted

under this rule are not likely to adversely affect endangered or threatened species or critical habitat under their jurisdiction.

E.O. 12898—Environmental Justice

Under E.O. 12898, each Federal agency must conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures that those programs, policies, and activities do not have the effect of excluding persons from participation in, denying persons the benefits of, or subjecting persons to discrimination under such programs, policies, and activities because of their race, color, or national origin. Section 4–4, Subsistence Consumption of Fish and Wildlife, of E.O. 12898, requires Federal agencies to ensure protection of populations with differential patterns of subsistence consumption of fish and wildlife and to communicate to the public the human health risks of those consumption patterns. NMFS has evaluated the data available on contaminant loads in ENP gray whales and has summarized this information in the FEIS. NMFS communicated this information to the Makah Indian Tribe prior to issuing the proposed rule and will provide any updated information included in the FEIS to the Tribe.

References and Literature Cited

A complete list of all references cited in this rulemaking is available on our website and upon request.

List of Subjects in 50 CFR Part 216

Administrative practice and procedure, Exports, Fish, Imports, Indians, Labeling, Marine mammals.

Dated: June 5, 2024.

Janet Coit,

Assistant Administrator, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 216 is amended as follows:

PART 216—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

■ 1. The authority citation for part 216 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*, unless otherwise noted.

■ 2. Subpart J is added to read as follows:

Subpart J—Taking of Eastern North Pacific (ENP) Gray Whales (*Eschrichtius robustus*) by the Makah Indian Tribe Off the Coast of Washington State

Sec.

216.110 Purpose.

216.111 Scope.

216.112 Definitions.

216.113 Issuance and duration of permits.

216.114 Hunt management requirements and restrictions.

216.115 Accounting and identification of gray whales.

216.116 Use of edible and nonedible whale products.

216.117 Prohibited acts.

216.118 Requirements for monitoring, reporting, and recordkeeping.

216.119 Expiration and amendment.

§ 216.110 Purpose.

The purpose of this subpart is to establish regulations governing the take of whales from the Eastern North Pacific (ENP) gray whale (*Eschrichtius robustus*) stock by the Makah Indian Tribe and its enrolled members in accordance with the Secretary's determination to issue a waiver of the Marine Mammal Protection Act (MMPA) take moratorium pursuant to 16 U.S.C. 1371(a)(3).

§ 216.111 Scope.

This subpart authorizes the taking of ENP gray whales only by enrolled members of the Makah Indian Tribe only.

§ 216.112 Definitions.

In addition to the definitions provided in the MMPA, for purposes of this subpart, the following definitions apply:

Barter means the exchange of parts from gray whales taken under this subpart for other wildlife or fish or their parts or for other food or for nonedible items other than money if the exchange is of a noncommercial nature.

Bonilla-Tatoosh Line means the line running from the western end of Cape Flattery (48°22'53" N lat., 124°43'54" W long.) to Tatoosh Island Lighthouse (48°23'30" N lat., 124°44'12" W long.) to the buoy adjacent to Duntze Rock (48°28'00" N lat., 124°45'00" W long.), then in a straight line to Bonilla Point (48°35'30" N lat., 124°43'00" W long.) on Vancouver Island, British Columbia.

Calf means any gray whale less than 1 year old.

Enrolled member or *member* of the Makah Indian Tribe means a person whose name appears on the membership roll maintained by the Makah Tribal Council.

ENP gray whale means a member of the Eastern North Pacific stock of gray whales (*Eschrichtius robustus*).

Export means the act of sending goods from one country to another.

Gray whale means a member of the species *Eschrichtius robustus*.

Harpooner means a member of the Makah Indian Tribe who has been certified by the Tribe as having demonstrated the qualifications commensurate with the duties and responsibilities of harpooning a gray whale.

Hunt and hunting mean to pursue, strike, harpoon, shoot, or land a gray whale under a hunt permit issued under § 216.113(b) or to attempt any such act, but does not include hunting approaches, training approaches, or training harpoon throws. As a noun, *hunt* also means any act of hunting.

Hunt permit means a permit issued by NMFS in accordance with 16 U.S.C. 1374 and this subpart.

Hunting approach means to cause, in any manner, a vessel to be within 100 yards (91.5 m) of a gray whale during a hunt.

Land and landing mean bringing a gray whale or any products thereof onto the land in the course of hunting.

Makah Indian handicrafts means articles made by a member of the Makah Indian Tribe that contain any nonedible products of an ENP gray whale that was obtained pursuant to a permit issued under this subpart, are significantly altered from their natural form, and are produced, decorated, or fashioned in the exercise of traditional Makah Indian handicrafts without the use of pantographs, multiple carvers, or similar mass copying devices. Makah Indian handicrafts include, but are not limited to, articles that are carved, beaded, drawn, or painted.

Makah Indian Tribe or Tribe means the Makah Indian Tribe of the Makah Indian Reservation as described in the list of federally recognized Indian tribes maintained by the U.S. Department of the Interior.

Minimum population estimate for Pacific Coast Feeding Group (PCFG) gray whales is the lower 20th percentile of the PCFG population estimate.

NMFS means the National Marine Fisheries Service.

NMFS hunt observer means a person designated by NMFS to accompany and observe a hunt.

Pacific Coast Feeding Group (PCFG) gray whale or PCFG whale means an ENP gray whale photo-identified during 2 or more years between June 1 and November 30 within the region between northern California and northern Vancouver Island (from 41° N lat. to 52°

N lat.) and entered into a photo-identification catalog(s) recognized by the Regional Administrator.

PCFG population estimate means an abundance estimate based on data derived from photo-identification surveys and catalog(s) recognized by the Regional Administrator. Such data will also be the basis for projecting PCFG population estimates in future hunting seasons.

Recordkeeping and reporting mean the collection and delivery of photographs, biological data, harvest data, and other information regarding activities conducted under the authority of this subpart.

Regional Administrator means the Regional Administrator of NMFS for the West Coast Region.

Rifleman means a member of the Makah Indian Tribe who has been certified by the Tribe as having demonstrated the qualifications commensurate with the duties and responsibilities of shooting a gray whale.

Safety officer means a member of the Makah Indian Tribe who has been certified by the Tribe as having demonstrated the qualifications commensurate with the duties and responsibilities of evaluating hunt conditions including, but not limited to visibility, target range and bearing, and sea condition.

Share means to voluntarily transfer or gift edible or nonedible parts from gray whales taken under this subpart to another person without compensation.

Strike or struck means to cause a harpoon, darting gun, or other weapon, or a projectile from a rifle or other weapon, to penetrate a gray whale's skin or an instance in which a gray whale's skin is penetrated by such a weapon or projectile during hunting. Multiple strikes on the same whale are considered a single strike.

Struck and lost refers to a gray whale that is struck but not landed.

Summer/fall hunt means a hunting season spanning 4 consecutive months from July 1 to October 31.

Training approach means to cause, in any manner, a training vessel to be within 100 yards (91.5 m) of a gray whale.

Training harpoon throw means an attempt to contact a gray whale with a blunted spear-like device that is incapable of penetrating the skin of a gray whale.

Training vessel means a canoe or other watercraft used to train for a hunt that does not carry weapons ordinarily used by a harpooner or rifleman to strike a gray whale.

Tribal hunt observer means a Tribal member or representative designated by the Tribe who has been certified by the Tribe as having demonstrated the qualifications commensurate with the duties and responsibilities of monitoring and reporting on a hunt.

U&A or Makah Indian Tribe's U&A means the Tribe's usual and accustomed fishing grounds, which area consists of the United States waters in the western Strait of Juan de Fuca west of 123°42'17" W long. and waters of the Pacific Ocean off the mainland shoreline of the Washington coast north of 48°02'15" N lat. (Norwegian Memorial) and east of 125°44'00" W long.

Unsuccessful strike attempt means any attempt to strike a gray whale while hunting that does not result in a strike.

Western North Pacific (WNP) gray whale means a member of the Western North Pacific stock of gray whales (*Eschrichtius robustus*).

Whaling captain means a member of the Makah Indian Tribe who has been certified by the Tribe as having demonstrated the qualifications commensurate with the duties and responsibilities of leading a hunt and is authorized by the Makah Indian Tribe to be in control of the whaling crew.

Whaling crew means those members of the Makah Indian Tribe taking part in a hunt under the control of a whaling captain, not including the Tribal hunt observer.

Winter/spring hunt means a hunting season spanning 6 consecutive months from December 1 to May 31 of the calendar year following a summer/fall hunt.

§ 216.113 Issuance and duration of permits.

(a) *Application.* (1) To obtain an initial hunt permit, the Makah Indian Tribe must submit an application to the Regional Administrator signed by an official of the Makah Tribal Council that contains the following information and statements:

- (i) The proposed duration of the permit;
- (ii) The maximum number of gray whales to be subjected to hunting or training approaches, struck, landed, and subjected to unsuccessful strike attempts;
- (iii) A demonstration that the proposed method of taking is humane;
- (iv) A demonstration that the proposed taking is consistent with this subpart;
- (v) A copy of the currently enacted Makah Indian Tribal ordinance governing whaling by Makah Indian Tribal members;
- (vi) A description of the certification process for whaling captains, riflemen,

harpooners, Tribal hunt observers, and safety officers, including any guidelines or manuals used by the Tribe to certify such persons;

(vii) Any additional hunt permit conditions proposed by the Tribe and a justification for the proposed conditions; and

(viii) Any modification to this subpart sought by the Tribe and a justification for the proposed modification.

(2) To obtain subsequent hunt permits, the Makah Indian Tribe must submit an application to the Regional Administrator, signed by an official of the Makah Tribal Council, that contains the information required in paragraph (a)(1) of this section and the following information and statements:

(i) A description of how the Makah Indian Tribe has complied with the requirements of this subpart and previously issued hunt permits;

(ii) A description of circumstances associated with gray whale(s) struck and lost under the most recently issued hunt permit, a description of the measures taken to retrieve such whale(s), and a description of measures taken by the Makah Indian Tribe to minimize future incidents of struck and lost gray whales; and

(iii) A description of products obtained from gray whales landed under the most recently issued hunt permit, including a description of the disposition of any gray whale products deemed unsuitable for use by Makah Indian Tribal members.

(3) The Regional Administrator will notify the Makah Indian Tribe of receipt of the application and will review the application for completeness. Incomplete applications will be returned with explanation. If the Makah Indian Tribe fails to resubmit a complete application within 60 days, the application will be deemed withdrawn.

(4) After receipt of a complete application and the preparation of any National Environmental Policy Act (NEPA) documentation that the Regional Administrator has determined to be necessary, the Regional Administrator will publish a notice of receipt in the **Federal Register** and review the application as required by 16 U.S.C. 1374.

(b) *Issuance.* (1) The Regional Administrator may issue hunt permits to the Makah Indian Tribe authorizing hunting of ENP gray whales, as well as hunting approaches, training approaches, and training harpoon throws by enrolled members in accordance with 16 U.S.C. 1374 and the requirements of this subpart.

(2) The Regional Administrator may not authorize hunting, hunting approaches, training approaches, or training harpoon throws from December 1 through May 31 unless:

(i) The Tribe has obtained separate authorization to take WNP gray whales under any applicable provision of the MMPA; or

(ii) The Regional Administrator determines, in consultation with the NMFS Office of Protected Resources, that take of WNP gray whales is not anticipated.

(3) The Regional Administrator may not authorize hunting unless the population of the ENP gray whale stock is within its Optimum Sustainable Population (OSP) and the hunting authorized under the permit would not cause the stock to diminish below OSP.

(4) The duration of the initial hunt permit may not exceed 3 years from its effective date, and thereafter the duration of a hunt permit may not exceed 5 years.

(5) Each hunt permit will specify the following terms and conditions:

(i) Those terms required by 16 U.S.C. 1374(b);

(ii) The limits established under § 216.114(c);

(iii) The area where hunts, hunting approaches, training approaches, and training harpoon throws are allowed, which will be limited to the waters of the Makah Indian Tribe's U&A west of the Bonilla-Tatoosh Line except as provided in § 216.117(a)(9), and any site and time restrictions to protect Olympic Coast National Marine Sanctuary resources pursuant to consultation under 16 U.S.C. 1434(d) of the National Marine Sanctuaries Act;

(iv) The beginning and ending dates in each calendar year when the Makah Tribe may engage in hunting activities, as described in § 216.114(a), and training activities, as described in § 216.114(b);

(v) The type and timing of notice that the Makah Indian Tribe must provide to NMFS before issuing a Tribal whaling permit authorizing a hunt, hunting approaches, training approaches, or training harpoon throws;

(vi) Measures to be taken by the hunt permit holder to provide for the safety of the whaling crew, the public, and others during a hunt;

(vii) That the hunt permit authorizes only the take of ENP gray whales and not the take of any other marine mammals; and

(viii) Such other provisions as the Regional Administrator deems necessary.

(6) Before issuing a hunt permit, the Regional Administrator must make the following determinations:

(i) The authorized manner of hunting is humane;

(ii) The Makah Indian Tribe has enacted a Tribal ordinance governing hunting that is consistent with this subpart;

(iii) The Makah Indian Tribe has in place certification procedures for whaling captains, riflemen, harpooners, Tribal hunt observers, and safety officers and a process to ensure compliance with those procedures;

(iv) There are adequate photo-identification catalogs and processes available to allow for the identification of WNP gray whales and PCFG whales as described in § 216.115(b);

(v) The most recent PCFG population estimate is at least 192 whales and the associated minimum population estimate is at least 171 whales;

(vi) The PCFG population estimate for the first hunting season covered by the permit is projected to be at least 192 whales and the associated minimum population estimate is projected to be at least 171 whales;

(vii) Whether take authorization for WNP gray whales is required by the permit for the winter/spring hunt, or, if not, that the Regional Administrator, in consultation with the Office of Protected Resources, has determined that take of WNP gray whales is not anticipated;

(viii) The population of the ENP gray whale stock is within its OSP and the hunting authorized in the permit will not cause the stock to diminish below OSP; and

(ix) Except for the initial hunt permit, before issuing a hunt permit the Regional Administrator must determine that the Makah Indian Tribe has complied with the requirements of this subpart and all prior permit terms and conditions, or if the Makah Indian Tribe has not fully complied, that it has adopted measures to ensure compliance.

§ 216.114 Hunt management requirements and restrictions.

(a) *Hunting seasons.* Summer/fall hunts and hunting approaches will only be authorized from July 1 through October 31, and winter/spring hunts and hunting approaches will only be authorized from December 1 through May 31 of the following calendar year, provided that:

(1) Throughout the duration of the waiver, the authorized hunting dates will alternate between winter/spring hunts and summer/fall hunts, with winter/spring hunts starting in December of the same calendar year as a summer/fall hunt and summer/fall

hunts starting in the calendar year following the year in which a winter/spring hunt has ended;

(2) If the start date in the initial hunt permit falls within a winter/spring hunt period, the subsequent summer/fall hunt will commence in the calendar year following the ending date of said winter/spring hunt; and

(3) If the start date in the initial hunt permit of the initial hunt season falls within a summer/fall hunt period, the subsequent winter/spring hunt will commence in December of the same calendar year as said summer/fall hunt.

(b) *Training period.* Hunt permits may authorize training approaches in any month and training harpoon throws in any month, except as provided in paragraph (c)(2) of this section and provided all necessary authorizations have been obtained. The authorized training period shall be specified in the permit, as provided in § 216.113(b)(5)(iv).

(c) *Hunting and training limits.* The following limits on the number of ENP gray whales approached, subjected to unsuccessful strike attempts, struck, struck and lost, and landed apply.

(1) A hunt permit may authorize no more than 353 approaches, including both hunting and training approaches, each calendar year of which no more than 142 of such approaches may be on PCFG whales. Any hunting approach on a gray whale that has already been struck will not count against these limits.

(2) A hunt permit may authorize no more than 18 unsuccessful strike attempts during winter/spring hunts and no more than 12 unsuccessful strike attempts during summer/fall hunts. Any unsuccessful strike attempt on a gray whale that has already been struck will not count against these limits. Training harpoon throws may be authorized between July 1 and October 31 in years of summer/fall hunts and at any time during winter/spring hunts as well as the subsequent 7 months of the calendar year in which those winter/spring hunts end. Each training harpoon throw will count against the unsuccessful strike attempt limit during the calendar year in which the harpoon throw is made.

(3) A hunt permit may authorize no more than three ENP gray whales to be struck in a winter/spring hunt and no more than two ENP gray whales to be struck in a summer/fall hunt. Multiple strikes on the same whale will count as a single strike. In a winter/spring hunt, a hunt permit may authorize no more than one ENP gray whale to be struck within the 24-hour period commencing at the time of the initial strike against the whale. The Regional Administrator

may authorize the full number of ENP gray whales to be struck in the initial hunt permit and will adjust strikes downward in subsequent permits if necessary to ensure that no more than 16 PCFG whales are struck over the waiver period, of which no more than 8 struck whales may be PCFG females.

(4) A hunt permit may authorize no more than three ENP gray whales to be struck and lost in any calendar year.

(5) A hunt permit may authorize no more than three ENP gray whales to be landed in a winter/spring hunt and no more than one ENP gray whale to be landed in a summer/fall hunt; the number of ENP gray whales that the hunt permit may authorize to be landed in any calendar year will not exceed the number agreed between the United States and the Russian Federation as the United States' share of the catch limit established by the International Whaling Commission.

(d) *Limits on PCFG whales.* (1) Thirty days prior to the beginning of a hunting season specified in paragraph (a) of this section, the Regional Administrator will notify the Makah Indian Tribe in writing of the maximum number of PCFG whales, including females, that may be struck during the upcoming hunting season. The limit will take into account the abundance of PCFG whales relative to the conditions specified under § 216.113(b)(6)(v) and (vi) and the number of strikes made on PCFG whales as described under paragraph (c)(3) of this section.

(2) By November 1 of each year, the Regional Administrator will notify the Makah Indian Tribe in writing of the proportion of gray whales in the hunt area that will be presumed to be PCFG whales and the proportion of PCFG whales that will be presumed to be females for each month of the upcoming calendar year. The presumed proportion of PCFG whales will be based on the best available evidence for the months of December through May and will be 100 percent for the months of June through November. The presumed proportion of female PCFG whales will be based on the best available information for each month. These proportions will be used for purposes of accounting for PCFG whales that are not otherwise identified or accounted for as provided under § 216.115(b).

(3) The Regional Administrator will notify the Makah Indian Tribe in writing when the Tribe has reached the limit of PCFG whales that may be struck in any hunting season.

(4) Notwithstanding the limits specified in this section, no hunting will be authorized for an upcoming season if the Regional Administrator determines,

and notifies the Makah Indian Tribe pursuant to paragraph (d)(1) of this section, that either of the following conditions applies:

(i) The most recent PCFG population estimate, based on photo-identification surveys, is less than 192 whales or the associated minimum population estimate is less than 171 whales; or

(ii) The PCFG population estimate for the upcoming hunting season is projected to be less than 192 whales or the associated minimum population estimate is projected to be less than 171 whales.

(e) *ENP gray whales.* If the Regional Administrator determines and notifies the Makah Indian Tribe in writing that the population of the ENP gray whale stock has fallen below OSP, hunting must cease until the Regional Administrator notifies the Tribe in writing that the stock has obtained OSP.

(f) *WNP gray whales.* The hunt permit will provide that in the event the Regional Administrator determines a WNP gray whale was struck during a hunt, the Regional Administrator will notify the Makah Indian Tribe in writing and require that the Tribe cease hunting for the duration of the permit unless and until the Regional Administrator determines that measures have been taken to ensure no additional WNP gray whales will be struck during the duration of the permit. No further hunt permits will be issued unless and until the Regional Administrator determines that measures have been taken to prevent additional WNP gray whale strikes during the remainder of the waiver period.

§ 216.115 Accounting and identification of gray whales.

(a) *Images and samples.* NMFS hunt observers, Tribal hunt observers, and members of the Makah Indian Tribe may collect still or motion pictures as needed to document hunting and training approaches, strikes (successful and unsuccessful attempts), and landings. Persons designated by NMFS and by the Makah Indian Tribe may also collect, store, transfer, and analyze specimen samples from struck gray whales. Such designated personnel should make every reasonable attempt to collect genetic samples from struck whales without compromising the safety of the hunt.

(b) *Identification and accounting of gray whales—(1) Winter/spring hunts.* Based on the best available evidence, the Regional Administrator will determine in writing whether a gray whale that is struck in a winter/spring hunt is a WNP gray whale or a PCFG whale or neither, or cannot be identified

due to a lack of photographs or genetic data useful for making identifications. A whale affirmatively identified as a PCFG whale will be counted accordingly. A whale that cannot be identified will be presumed to be a PCFG whale in accordance with the proportions specified in § 216.114(d)(2) and will be counted accordingly. If the sex of a whale that is counted, in whole or in part, as a PCFG whale cannot be identified, the proportions specified in § 216.114(d)(2) will be applied.

(2) *Summer/fall hunts.* Based on available evidence, the Regional Administrator will determine in writing whether a gray whale that is struck in a summer/fall hunt is a WNP gray whale or cannot be identified due to a lack of photographs or genetic data useful for making identifications. A gray whale that cannot be identified as a WNP gray whale will be counted as a PCFG whale. If the sex of a whale that is counted as a PCFG whale cannot be identified, the proportions specified in § 216.114(d)(2) will be applied.

(3) *Hunting and training approaches.* Gray whales subjected to hunting or training approaches are presumed to be PCFG whales in accordance with the proportions specified in § 216.114(d)(2).

(4) *Unauthorized strikes.* If a Tribal member strikes an ENP gray whale without authorization under this subpart, the strike will be counted against the total number of strikes allowed under this subpart and will be counted against the United States' share of any applicable catch limit established by the International Whaling Commission.

§ 216.116 Use of edible and nonedible whale products.

(a) Gray whales landed under a hunt permit may be utilized as follows:

(1) *Edible products of ENP gray whales.* Enrolled members of the Makah Indian Tribe may possess, consume, and transport edible whale products and may share and barter such products with other enrolled members, both within and outside the Makah Indian Tribe's reservation boundaries, subject to the following restrictions:

(i) Within the Tribe's reservation boundaries, enrolled members of the Makah Indian Tribe may share edible ENP gray whale products with any person.

(ii) Outside the Makah Indian Tribe's reservation boundaries, enrolled members of the Makah Indian Tribe may share edible ENP gray whale products:

(A) At the Tribal member's residence with any person, provided the products are shared for consumption at the Tribal member's residence; or

(B) With any person attending a Tribal or intertribal gathering sanctioned by the Makah Tribal Council, so long as there is not more than 2 pounds of such edible product per person attending the gathering.

(iii) Any person who is not an enrolled member of the Makah Indian Tribe may possess, consume, and transport edible ENP gray whale products within the Makah Indian Tribe's reservation boundaries so long as the products are shared by an enrolled member of the Makah Indian Tribe. Outside the Tribe's reservation boundaries, any person who is not an enrolled member of the Makah Indian Tribe may possess, consume, and transport edible gray whale products only at a Tribal member's residence or at a Tribal or intertribal gathering sanctioned by the Makah Tribal Council if such products are shared by an enrolled member of the Makah Indian Tribe and the person consumes the products at the gathering.

(2) *Nonedible products of ENP gray whales.* (i) Enrolled members of the Makah Indian Tribe may possess nonedible whale products that have not been fashioned into Makah Indian handicrafts and Makah Indian handicrafts that have not been marked and certificated per paragraph (a)(2)(iii) of this section, may transport such products, and may share and barter such products with other enrolled members both within and outside the Makah Indian Tribe's reservation boundaries.

(ii) Enrolled members of the Makah Indian Tribe may share or barter Makah Indian handicrafts that have not been marked and certificated per paragraph (a)(2)(iii) of this section with any person within the Tribe's reservation boundaries.

(iii) Any person may possess, transport, share, barter, offer for sale, sell, or purchase a Makah Indian handicraft in the United States, provided the handicraft is permanently marked with a distinctive marking approved by the Makah Tribal Council, and is accompanied by a certificate of authenticity issued by the Makah Tribal Council or its designee and entered in the Tribe's official record of Makah Indian handicrafts. Such handicrafts may be delivered, carried, transported, or shipped in interstate commerce.

(iv) Within the Makah Indian Tribe's reservation boundaries, any person who is not an enrolled member of the Makah Indian Tribe may possess and transport Makah Indian handicrafts that have not been marked and certificated per paragraph (a)(2)(iii) of this section, provided the handicraft was shared by or bartered from an enrolled member.

Within the Makah Indian Tribe's reservation boundaries, persons not enrolled as a member of the Makah Indian Tribe may share or barter such handicrafts only with enrolled members.

(b) The Makah Indian Tribe is responsible for managing all activities of any Makah Indian Tribal member carried out under this section.

§ 216.117 Prohibited acts.

(a) It is unlawful for the Makah Indian Tribe or any enrolled member of the Makah Indian Tribe to:

(1) Take any gray whale except as authorized by a hunt permit issued under § 216.113(b) or by any other provision of this part.

(2) Participate in a hunt while failing to carry onboard the vessel at all times a hunt permit issued by NMFS and a Tribal whaling permit issued by the Makah Indian Tribe, or an electronic copy or photocopy of these permits.

(3) Make a training approach or a training harpoon throw while failing to carry onboard the training vessel at all times an electronic copy or photocopy of the hunt permit issued by NMFS and a training logbook approved by the Makah Indian Tribe for recording training approaches and training harpoon throws.

(4) Participate in a hunt as a whaling captain, rifleman, harpooner, Tribal hunt observer, or safety officer, unless the individual's name is included in a Tribal certification report issued under § 216.118(a)(6)(i).

(5) Violate any provision of any hunt permit issued under § 216.113(b).

(6) Make an approach on a calf or an adult gray whale accompanying a calf after a member of the whaling crew has identified the presence of a calf.

(7) Fail to remain at least 100 yards (91.5 m) away from a calf or an adult accompanying a calf after a member of the whaling crew has identified the presence of a calf.

(8) Hunt or make a training harpoon throw on a calf or an adult gray whale accompanying a calf.

(9) Hunt outside the geographic area identified in § 216.113(b)(5)(iii) unless in pursuit of a gray whale that has already been struck within that area.

(10) Hunt, make a hunting or training approach, or make a training harpoon throw after reaching the limits specified in the hunt permit per § 216.113(b)(5)(i) through (viii).

(11) Hunt if the limit on PCFG whales or PCFG females that may be struck is less than one as a result of accounting per § 216.115(b)(1) through (3).

(12) Hunt after the Makah Indian Tribe has been notified in writing by the

Regional Administrator under § 216.114(d)(3) that the limit of PCFG whales that may be struck has been reached or that the PCFG abundance is below the limits specified in § 216.114(d)(4).

(13) Hunt after a gray whale has been landed and before the Makah Indian Tribe has received notification from the Regional Administrator in accordance with § 216.115(b).

(14) Hunt after the Makah Tribe has been notified by the Regional Administrator under § 216.114(e) that the ENP gray whale population has fallen below OSP.

(15) Sell, offer for sale, or purchase any gray whale products, except Makah Indian handicrafts that have been marked and certificated per § 216.116(a)(2).

(16) Export any gray whale products.

(17) Barter edible gray whale products with any person not enrolled as a member of the Makah Indian Tribe.

(18) Share edible gray whale products outside the Makah Indian Tribe's reservation boundaries with any person not enrolled as a member of the Makah Indian Tribe, except at a Tribal member's residence or with persons attending a Tribal or intertribal gathering sanctioned by the Makah Tribal Council, so long as there is not more than 2 pounds of edible product per person attending the gathering per § 216.116(a)(1)(ii)(B).

(19) Share or barter nonedible gray whale products:

(i) Outside the Makah Indian Tribe's reservation boundaries with any person not enrolled as a Makah Indian Tribal member, except Makah Indian handicrafts that are permanently marked and certificated per § 216.116(a)(2).

(ii) Within the Makah Indian Tribe's reservation boundaries with any person not enrolled as a Makah Indian Tribal member except a product that has been fashioned into a Makah Indian handicraft whether or not it has been marked and certificated per § 216.116(a)(2)(iii).

(20) Make a false statement in an application for a hunt permit or in a report required under this subpart.

(21) Transfer or assign a hunt permit issued under this subpart.

(22) Fail to submit reports required by this subpart.

(23) Deny persons designated by NMFS access to landed gray whales for the purpose of collecting specimen samples.

(24) Fail to provide required permits and reports for inspection upon request by persons designated by NMFS.

(25) Allow anyone other than enrolled Makah Indian Tribal members to be part of a whaling crew or to allow anyone other than such members or Tribal hunt observers to be in a training vessel engaged in hunt training.

(26) Hunt, or engage in hunting approaches, training approaches, or training harpoon throws without additional authorization to take WNP gray whales, if the Regional Administrator has notified the Tribe that additional authorization is required for the take of WNP gray whales.

(b) It is unlawful for any person who is not an enrolled member of the Makah Indian Tribe to:

(1) Share barter, purchase, sell, export, or offer to share, barter, purchase, sell, or export edible gray whale products.

(2) Possess, consume, or transport edible gray whale products except:

(i) Within the Makah Indian Tribe's reservation boundaries, when such products have been shared by an enrolled Makah Indian Tribal member;

(ii) At the residence of a Tribal member, whether or not the residence is within the Tribe's reservation boundaries; and

(iii) At Tribal or intertribal gatherings sanctioned by the Makah Tribal Council, whether or not the gathering is within the Tribe's reservation boundaries.

(3) Purchase, sell, or offer to purchase or sell nonedible gray whale products except Makah Indian handicrafts that are marked and certificated per § 216.116(a)(2).

(4) Export any gray whale products.

(5) Outside the Makah Indian Tribe's reservation boundaries, possess, transport, share, or barter nonedible gray whale products except Makah Indian handicrafts that are marked and certificated per § 216.116(a)(2)(iii).

(6) Within the Makah Indian Tribe's reservation boundaries, possess, transport, share, or barter any nonedible gray whale product except as provided in § 216.116(a)(2)(iii) and (iv).

§ 216.118 Requirements for monitoring, reporting, and recordkeeping.

(a) In addition to the reporting provisions described in § 230.8 of this chapter, the Makah Indian Tribe will:

(1) Ensure a certified Tribal hunt observer accompanies each hunt. The Tribal hunt observer will record in a hunting logbook the time, date, and location (latitude and longitude, accurate to at least the nearest second) of each hunting approach of a gray whale, each attempt to strike a gray whale, and each gray whale struck. For each gray whale struck, the Tribal hunt

observer will record whether the whale was landed. If not landed, the Tribal hunt observer will describe the circumstances associated with the striking of the whale and estimate whether the animal suffered a wound that might be fatal. For every gray whale approached by the whaling crew, the Tribal hunt observer must make every reasonable attempt to collect digital photographs useful for photo-identification purposes.

(2) Ensure that each vessel involved in a training approach has onboard a training logbook for recording the date, location, and number of gray whales approached and the number of training harpoon throws. Each training approach and training harpoon throw must be reported to the Tribal hunt observer within 24 hours.

(3) Maintain hunting and training logbooks specified in paragraphs (a)(1) and (2) of this section and allow persons designated by NMFS to inspect them upon request.

(4) Ensure that each whaling captain allows a NMFS hunt observer to accompany and observe any hunt.

(5) Maintain an official record of all articles of Makah Indian handicraft, including the following information for each article certified by the Makah Tribal Council or its designee: the date of the certification; the permanent distinctive mark identifying the article as a Makah Indian handicraft; a brief description of the handicraft, including artist's full name, gray whale product(s) used, and approximate size; and at least one digital photograph of the entire handicraft. A copy of the official record of Makah Indian handicrafts must be provided to NMFS personnel, including NMFS enforcement officers, upon request.

(6) Ensure that the following reports are filed electronically with the NMFS West Coast Region's office in Seattle, Washington, by the indicated date:

(i) *Tribal certification report.* Thirty days prior to the beginning of a hunting season, a report that includes the names of all Tribal hunt observers and enrolled Makah Indian Tribal members who have been certified to participate in a hunt as whaling captains, riflemen, harpooners, and safety officers. The Tribe may provide additional names during the hunting season.

(ii) *Incident report.* An incident report must be submitted within 48 hours after striking a gray whale. The report may address multiple gray whales so long as the Tribe submits the report within 48 hours of the first gray whale being struck. An incident report must contain the following information:

(A) Struck and lost gray whale(s): The whaling captain's name; the Tribal hunt observer's name; the date, location (latitude and longitude, accurate to at least the nearest second), time, and number of strikes and attempted strikes if any; the method(s) of strikes and attempted strikes; an estimate of the whale's total length. The report will describe the circumstances associated with the striking of the whale and estimate whether the animal suffered a wound that might be fatal. The report will include all photographs taken by a Tribal hunt observer of gray whales struck and lost by the whaling crew. The report may also contain any other observations by the Makah Indian Tribe concerning the struck and lost whale(s) or circumstances of the hunt.

(B) Struck and landed gray whale(s): The whaling captain's name; the Tribal hunt observer's name; the date, location (latitude and longitude, accurate to at least the nearest second), time, and number of strikes and attempted strikes if any; the method(s) of strikes and attempted strikes; the whale's body length as measured from the point of the upper jaw to the notch between the tail flukes; an estimate of the whale's maximum girth; the extreme width of the tail flukes; the whale's sex and, if female, lactation status; the length and sex of any fetus in the landed whale; photographs of the whale(s), including the entire dorsal right side, the entire dorsal left side, the dorsal aspect of the fluke, and the ventral aspect of the fluke. All such photographs must include a ruler to convey scale and a sign specifying the Makah Indian Tribe's name, whaling captain's name, whale species, and date. The report must also describe the time to death (measured from the time of the first strike to the time of death as indicated by relaxation of the lower jaw, no flipper movement, or sinking without active movement) and the disposition of all specimen samples collected and whale products, including any whale products deemed unsuitable for use by Makah Indian Tribal members. The report may also contain any other observations by the Makah Indian Tribe concerning the landed whale or circumstances of the hunt.

(iii) *Hunt report.* Within 30 days after the end of each hunting season, a report that describes the following information for each day of hunting:

(A) Struck and lost gray whale(s): The report must contain the information specified in paragraph (a)(6)(ii)(A) of this section.

(B) Struck and landed gray whale(s): The report must contain the information specified in paragraph (a)(6)(ii)(B) of this section.

(C) Hunting approaches and unsuccessful strike attempt(s): For each gray whale approached or subjected to an unsuccessful strike attempt(s), the report must contain: The whaling captain's name; the Tribal hunt observer's name; the date, location (latitude and longitude, accurate to at least the nearest second), time, and number of approaches and unsuccessful strike attempts; the method of attempted strikes; an estimate of the total length of any whale subjected to an unsuccessful strike attempt; and all photographs taken by a Tribal hunt observer of gray whales approached by the whaling crew. The report may also contain any other observations by the Makah Indian Tribe concerning the whale(s) approached or subjected to unsuccessful strike attempts or circumstances of the hunt.

(iv) *Annual approach report.* By January 15 of each year, a report containing the dates, location, and number of gray whales subjected to hunting approaches, training approaches, and training harpoon throws during the previous calendar year. The report may also contain any other observations by the Makah Indian Tribe concerning the approached whales or circumstances of the approaches and training harpoon throws.

(v) *Annual handicraft report.* By April 1 of each year, a report that describes all Makah Indian handicrafts certified by the Makah Tribal Council or its designee during the previous calendar year. The report must contain the following information for each handicraft certified: The date of the certification; the permanent distinctive mark identifying the article as a Makah Indian handicraft; a brief description of the handicraft, including artist's full name, gray whale product(s) used, and approximate size; and at least one digital photograph of the entire handicraft.

(vi) *Availability of reports.* The hunt report, annual approach report, and annual handicraft report collected pursuant to this section will be maintained and made available for public review in the NMFS West Coast Region's office in Seattle, Washington.

(b) Upon receiving an incident report specified in paragraph (a)(6)(ii) of this section documenting that eight gray whales have been struck, the Regional Administrator will evaluate:

(1) The photo-identification and notification requirements described in §§ 216.113(b)(6)(iv) and 216.115. The evaluation will address the status of gray whale photo-identification catalogs used to manage gray whale hunts authorized under this subpart, the survey efforts employed to keep those catalogs updated, the level of certainty associated with identifying cataloged WNP gray whales and PCFG whales, the role of ancillary information such as genetic data during catalog review, and any other elements deemed appropriate by the Regional Administrator. The evaluation will be made available to the public no more than 120 days after receiving the subject incident report.

(2) The humaneness of the authorized manner of hunting as specified in § 216.113(a)(1)(iii). To evaluate humaneness, NMFS will convene a team composed of a veterinarian, a marine mammal biologist, and all Tribal hunt observers and NMFS hunt observers who were witness to the strikes described in the incident reports required by this section. The team's evaluation will address the effectiveness of the hunting methods used by the Makah Indian Tribe, the availability and practicability of other such methods, and the time to death of hunted whales, and any other matters deemed appropriate by the Regional Administrator and the team. The team's evaluation will be made available to the public no more than 120 days after receiving the subject incident report.

(c) The NMFS West Coast Region's Seattle office is located at 7600 Sand Point Way NE, Seattle, WA 98115-0070.

§ 216.119 Expiration and amendment.

(a) The 10-year waiver period begins the first day of the first season after issuance of the initial hunt permit. The waiver and this subpart will expire 10 years after the effective date of the initial hunt permit specified under § 216.113(b), unless extended.

(b) If the initial permit begins during a hunt season, resulting in only a partial season being authorized, the Regional Administrator may authorize a partial season that is equivalent in duration to the difference between the partial season in the first hunt year and the full season. This second partial season can only be authorized in the final calendar year during the waiver period.

(c) This subpart may be periodically reviewed and modified as provided in 16 U.S.C. 1373(e).

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