

collection, make your comments as specific as possible, confine them to issues pertinent to the proposed regulations, and explain the reason for any changes you recommend. Where possible, your comments should reference the specific section or paragraph that you are addressing. The Service will consider all comments that are received by the close of the comment period (see **DATES**).

Comments, including names and street addresses of respondents, will become part of the administrative record. Before including your address, telephone number, email address, or other personal identifying information in your comment, be advised that your entire comment, including your personal identifying information, may be made publicly available at any time. While you can ask us in your comments to withhold from public review your personal identifying information, we cannot guarantee that we will be able to do so.

Dated: March 27, 2019.

**Karen Clark,**

*Acting Regional Director.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 216

[Docket No. 190212104-9261-01]

RIN 0648-BI58

### Regulations Governing the Taking of Marine Mammals

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

**ACTION:** Proposed rule.

**SUMMARY:** On February 14, 2005, NMFS received a request from the Makah Indian Tribe for a waiver of the Marine Mammal Protection Act (MMPA) moratorium on take of Eastern North Pacific (ENP) gray whales (*Eschrichtius robustus*). The Tribe requested that NMFS authorize a tribal hunt in the coastal portion of the Tribe's usual and accustomed fishing area (U&A) for ceremonial and subsistence purposes, and authorize the making and sale of handicrafts. 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 must be made on the record after an opportunity for an agency hearing on both the waiver and regulations. The hearing is governed by agency regulations, which call for the appointment of a presiding officer and prescribe other procedures. This notice announces the proposed waiver and regulations. A related notice announcing a hearing on the proposed waiver and regulations is published elsewhere in this issue of the **Federal Register**.

**DATES:** NMFS has scheduled a hearing before an Administrative Law Judge at 9:30 a.m. PDT on August 12, 2019, to consider the issuance of a waiver of the take moratorium and the regulations (see **ADDRESSES**). Parties interested in participating in the hearing process should consult the related notice of hearing published elsewhere in this issue of the **Federal Register**.

**Filing deadlines:** Any person desiring to participate as a party in the hearing must notify the Regional Administrator (see **ADDRESSES**), by certified mail, postmarked on or before May 6, 2019. Interested parties should consult the related notice of hearing and regulations at 50 CFR part 228 for additional deadlines and hearing procedures.

**ADDRESSES:** The hearing before Administrative Law Judge George J. Jordan will be held beginning at 9:30 a.m. PDT on August 12, 2019, at the Henry M. Jackson Federal Building, 915 Second Avenue, 4th Floor Auditorium, Seattle, WA 98174.

Information related to the hearing and the Draft Environmental Impact Statement (DEIS), a complete list of references cited in this rulemaking, and background on the Makah Tribe's waiver request will be available on the NMFS website at: <https://www.fisheries.noaa.gov/action/formal-rulemaking-proposed-mmpa-waiver-and-hunt-regulations-governing-gray-whale-hunts-makah>.

**FOR FURTHER INFORMATION CONTACT:** Michael Milstein, NMFS West Coast Region, 1201 NE Lloyd Blvd., Suite 1100, Portland, OR 97232-1274; 503-231-6268.

**SUPPLEMENTARY INFORMATION:** The following table of contents is intended as an aid to readers:

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### I. List of Acronyms

AWMP Aboriginal Whaling Management Plan  
 CFR Code of Federal Regulations  
 DEIS Draft Environmental Impact Statement  
 ENP Eastern North Pacific  
 ESA Endangered Species Act  
 E.O. Executive Order  
 ICRW International Convention for the Regulation of Whaling  
 IWC International Whaling Commission  
 K Carrying Capacity

MMC Marine Mammal Commission  
 MMPA Marine Mammal Protection Act  
 NEPA National Environmental Policy Act  
 NMFS National Marine Fisheries Service  
 OSP Optimum Sustainable Population  
 PBR Potential Biological Removal  
 PCFG Pacific Coast Feeding Group  
 SAR Stock Assessment Report  
 U&A Usual and Accustomed Fishing Area  
 (of the Makah Tribe)  
 U.S.C. United States Code  
 WCA Whaling Convention Act  
 WNP Western North Pacific

## II. Background

On February 14, 2005, the Makah Indian Tribe, consistent with its treaty right to hunt whales as defined in the 1855 Treaty of Neah Bay and with the International Convention for the Regulation of Whaling (ICRW), submitted a request seeking authorization under the MMPA for a whale hunt. The Tribe requested a waiver of the MMPA take moratorium to authorize a tribal hunt for ENP gray whales in the coastal portion of the Tribe's U&A in northwest Washington State for ceremonial and subsistence purposes and to allow the making and sale of handicrafts.

The Tribe submitted its 2005 request to the Assistant Administrator of NMFS, who delegated to the Northwest Region (now the West Coast Region) of NMFS authority to complete an analysis under the National Environmental Policy Act (NEPA) and make the initial waiver determination under the MMPA (NMFS, 2005; Makah Tribe, 2006). On May 9, 2008, we, the West Coast Region of NMFS, released a DEIS. We later terminated that DEIS because of new scientific information, published a notice of intent to prepare a new DEIS, and opened a scoping process (77 FR 29967, May 21, 2012). On March 13, 2015, we released a new DEIS (80 FR 13373). The Tribe's request is included as an attachment to the DEIS. After full consideration of the detailed information found in the 2015 DEIS (NMFS, 2015), public comments on our NEPA analysis, consultation with the Marine Mammal Commission (MMC), and information obtained during our review of the Tribe's request, we are proposing to issue a waiver and regulations that would authorize a limited Tribal hunt for ENP gray whales over a 10-year period. The proposed waiver and regulations also reflect our consultation with the Makah Tribe pursuant to Executive Order 13175 (see Section VI).

### A. Relevant MMPA Provisions

The primary objective of marine resource management under the MMPA is to maintain the health and stability of

the marine ecosystem (16 U.S.C. 1361). The MMPA states that species and population stocks of marine mammals should not be permitted to diminish beyond the point at which they cease to be a significant functioning element of the ecosystem, and they should not be permitted to diminish below their optimum sustainable population (OSP). The MMPA defines the term "population stock" or "stock" as a group of marine mammals of the same species or smaller taxa in a common spatial arrangement, that interbreed when mature (16 U.S.C. 1362(11)). OSP is defined in the MMPA and NMFS regulations as a population size that is within a range from the carrying capacity of the ecosystem (abbreviated as K) down to the number of animals that results in the maximum productivity of the population or the species.

The MMPA requires NMFS (or the U.S. Fish and Wildlife Service) to prepare a stock assessment report (SAR) for each marine mammal stock occurring in waters under U.S. jurisdiction (16 U.S.C. 1386(a)). The SAR must, among other things, describe the stock's geographic range, estimate its minimum abundance (Nmin) and productivity, estimate human-caused mortality, and estimate the potential biological removal (PBR) for the stock. In most cases, Nmin is the lower 20th percentile of the distribution of the most recent abundance estimate and is the value selected by Wade (1998) in developing the PBR methodology. The MMPA defines PBR as 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 OSP and includes a formula for calculating PBR (16 U.S.C. 1362(20)).

The MMPA establishes a moratorium on the taking and importing of marine mammals (16 U.S.C. 1371(a)). "Take" 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 is not absolute. One exception allows NMFS to waive the take moratorium from time to time (16 U.S.C. 1371(a)(3)(A)), adopt suitable regulations governing that take (16 U.S.C. 1373), and issue permits authorizing the take (16 U.S.C. 1374), if certain criteria are met. The Makah Tribe has requested that NMFS waive the take moratorium and issue regulations allowing a tribal hunt for ENP gray whales and the making and sale of handicrafts. If a waiver is granted and regulations are promulgated, then the Tribe must separately seek an

MMPA permit to implement a hunt (16 U.S.C. 1374).

A decision to waive the MMPA take moratorium must: Be based on the best scientific evidence available; be made in consultation with the MMC; and have due regard to the distribution, abundance, breeding habits, and times and lines of migratory movements of the marine mammal stock subject to take. Also, in order to waive the moratorium, NMFS must be assured that the taking is in accord with sound principles of resource protection and conservation as provided in the purposes and policies of the MMPA (which include maintaining marine mammals 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 an optimum sustainable population keeping in mind the carrying capacity of the habitat) (16 U.S.C. 1371(a)(3)(A)).

A decision to waive the take moratorium must be accompanied by regulations governing the take. Regulations to implement a waiver must ensure that the taking will not be to the disadvantage of the stock and will be consistent with the purposes and policies of the MMPA (16 U.S.C. 1373(a)). NMFS has interpreted "disadvantage" in relation to the impact of take on the stock's OSP (e.g., 45 FR 72178, 72185, October 31, 1980).

In prescribing regulations, NMFS must give full consideration to all factors that may affect the extent to which the stock may be taken, including but not limited to: 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 (in this case, fishery resources will not be affected); and the economic and technological feasibility of implementation (16 U.S.C. 1373(b)). The regulations may restrict, among other things, the number, age, size, and sex of animals taken and the season, manner, and location of the taking (16 U.S.C. 1373(c)). Regulations are subject to periodic review and modification to carry out the purposes of the MMPA (16 U.S.C. 1373(e)).

The MMPA (16 U.S.C. 1373(d)) provides that an agency decision to waive the take moratorium and issue regulations governing the take of marine mammals must be made on the record after an opportunity for an agency hearing. Agency regulations govern the conduct of the agency hearing, call for the appointment of a presiding officer,

and prescribe other procedures (50 CFR part 228). Either before or concurrent with the public notice of our intention to issue regulations, we must make available to the public:

1. A statement of the estimated existing levels of the species and population stocks of the marine mammal concerned;
2. A statement of the expected impact of the proposed regulations on the OSP of such species or population stock;
3. A statement describing the evidence before the agency that forms the basis for the regulations; and
4. Any studies made by or for the agency or any recommendations made by or for the agency or the MMC that relate to the establishment of the regulations.

16 U.S.C. 1373(d). These statements are provided in Section V below.

If NMFS waives the MMPA take moratorium for ENP gray whales and issues regulations governing a tribal hunt, the Makah Tribe would have to obtain a permit from NMFS prior to taking any whales. The permit process includes the opportunity for public notice and comment (16 U.S.C. 1374). Under the MMPA, the permit applicant must demonstrate that the taking of marine mammals under the permit would be consistent with the purposes and policies of the MMPA and the applicable regulations. A permit must specify the following:

1. The number and kinds of animals authorized to be taken;
2. The location and manner (which the Secretary must determine to be humane) in which they may be taken;
3. The period during which the permit is valid; and
4. Other terms or conditions that the Secretary deems appropriate.

The MMPA defines “humane” as that method of taking which involves the least possible degree of pain and suffering practicable to the mammal involved (16 U.S.C. 1362(4)). NMFS has worked within the IWC to improve the humaneness of whale-killing methods in aboriginal subsistence whaling, focusing on reducing the length of time to death of a whale (*i.e.*, reducing the amount of time between the strike and the death) to improve humaneness (IWC, 2004; IWC, 2007; IWC, 2012) as well as to address hunting efficiency. The Makah Tribe proposed to use a toggle point harpoon as the weapon for striking whales and a .50 caliber rifle as the weapon for killing whales. The DEIS describes the detailed analyses commissioned by NMFS and others to examine the suitability of using a .50 caliber rifle to dispatch a gray whale and the conclusions of the reviewers

that a .50 caliber rifle is capable of quickly killing a gray whale (DEIS Subsection 3.4.3.5.4, Method of Killing and Time to Death). A determination regarding whether the Tribe’s proposed method of hunting is humane and meets the other requirements listed above for issuance of a permit would be decided through the permit process (16 U.S.C. 1374). The permit process is subsequent to and separate from the waiver process and therefore not part of this proceeding. The permit process is described here and discussed elsewhere in this proposed rule to provide context for the proposed regulations. In addition to a NMFS-issued permit, the Tribe would establish a separate process for the issuance of tribal whaling permits by the Makah Tribal Council (Makah Tribe, 2005; Makah Tribe, 2013).

#### B. Whaling Convention Act

Because the Tribe’s request involves a large whale species, the Tribe would need to obtain authorization from NMFS in accordance with the Whaling Convention Act (WCA), which implements the United States’ obligations under the ICRW. The ICRW establishes the International Whaling Commission (IWC), an inter-governmental organization whose purpose is the conservation of whales and the management of whaling. The ICRW includes a legally binding document called the “Schedule,” which, among other things, sets out catch limits for aboriginal subsistence whaling.

Since 1997, the Russian Federation and the United States have regularly submitted a joint proposal to the IWC for an aboriginal subsistence whaling catch limit for ENP gray whales on behalf of Chukotkan natives and the Makah Tribe, respectively. In response, the IWC has repeatedly established catch limits for ENP gray whales. At its September 2018 meeting, the IWC approved a new catch limit of 980 ENP gray whales for the period 2019–2025 with an annual cap of 140 whales. This catch limit became effective December 29, 2018 (IWC, 2018a). A bilateral agreement between the United States and Russian Federation sets overall and annual limits for the two countries (Fominykh and Wulff, 2018), with the Makah Tribe entitled to a maximum of 5 whales per year. This agreement also specifies that any quota unused by one country may be transferred to the other. In past years, the United States has transferred its entire quota to Russia for use by the Chukotkan hunters (*e.g.*, Ilyashenko and Hogarth, 2007; Ilyashenko and DeMaster, 2012;

Fominykh and Smith, 2016; Fominykh and Wulff, 2017).

If NMFS waives the MMPA take moratorium for ENP gray whales and issues regulations governing a tribal hunt, the Makah Tribe and NMFS would need to complete procedures established in the WCA and implementing regulations at 50 CFR part 230 to allocate a domestic catch limit for ENP gray whales to the Makah Tribe consistent with the IWC Schedule and the bilateral agreement. This would include publishing those catch limits and entering into a cooperative agreement with the Tribe. Those processes are subsequent to and separate from the MMPA process of waiving the take moratorium and issuing regulations.

#### C. North Pacific Gray Whales

The life history, status, and distribution of North Pacific gray whales are described in detail in the DEIS (Subsection 3.4, Gray Whales). We summarize that information here and discuss the ENP gray whale stock in more detail in a companion biological report (NMFS, 2019a), which we incorporate by reference.

NMFS recognizes two stocks of gray whales, one from the western North Pacific (WNP stock) and one from the eastern North Pacific (ENP stock). Through the SAR process, NMFS concluded that the best scientific information available consists of genetic information showing significant mitochondrial and nuclear genetic differences between the WNP and ENP stocks (Carretta *et al.*, 2017). The IWC also manages the two stocks separately (IWC, 2018a), and the International Union for Conservation of Nature recognizes them as two subpopulations (Reilly *et al.*, 2008).

Commercial whaling from the mid-nineteenth through early twentieth centuries dramatically reduced the abundance of the gray whale, leading to its protection by a suite of international agreements and federal laws including the WCA and MMPA. The gray whale was listed as an endangered species under the Endangered Species Act (ESA) and its predecessor statute beginning in 1970 (35 FR 8495, June 2, 1970). As a result of protection from commercial exploitation, the ENP gray whale stock recovered and in 1994 was removed from the ESA’s list of endangered and threatened wildlife (59 FR 21094, June 16, 1994). It currently numbers approximately 27,000 animals (Durban *et al.*, 2017). NMFS has continued monitoring the population since its delisting (Carretta *et al.*, 2017). The WNP stock remains listed as

endangered (50 CFR 223.102) and numbers approximately 200 non-calf animals (Cooke, 2018).

The ENP gray whale stock spends the winter as far south as the Baja California Peninsula and Gulf of California in northwestern Mexico and migrates north to summer feeding areas as far as the Chukchi and Beaufort Seas. A small group of ENP whales, referred to as the Pacific Coast Feeding Group (PCFG) exhibits seasonal fidelity to feeding grounds off the West Coast of the United States and Canada. Whales that are photo-identified within the region between northern California and northern Vancouver Island (from 41°N lat. to 52°N lat.) during the summer feeding period of June 1 to November 30, in two or more years, are defined by the IWC as belonging to the PCFG (IWC, 2011a; IWC, 2011b; IWC, 2011c). NMFS has adopted this definition (Carretta *et al.*, 2017).

Scientists have studied the PCFG for several decades, and NMFS has monitored the PCFG for more than 15 years. The size of the group has remained relatively stable at about 200 animals since 2002 and is recently increasing (Calambokidis *et al.*, 2017).

NMFS scientists and others have examined genetic and other information to determine whether the PCFG should be considered a separate stock under the MMPA (Frasier *et al.*, 2011; Lang *et al.*, 2011b). They found that sampled whales that meet the definition of the PCFG have small but significant differences in the diversity of mitochondrial DNA (mtDNA), which is inherited only from the mother, compared to whales on the northern feeding grounds of the Bering, Chukchi, and Beaufort Seas. However, no significant differences were found between these two groups when nuclear microsatellite data, which represent the DNA inherited from both parents, were analyzed. Similar results were found by other researchers (D'Intino *et al.*, 2013) despite different sample collections used to represent the PCFG and the larger ENP stock. These results indicate that calves likely follow their mothers to feeding areas and to some extent return to those feeding areas in subsequent years. Whales that frequent one feeding area, however, are not necessarily reproductively isolated from whales that frequent other feeding areas.

NMFS considered whether the PCFG warrants designation as a stock under the MMPA through the SAR process. NMFS has issued several SARs addressing this issue (78 FR 19446, April 1, 2013; 79 FR 49053, August 19, 2014; 80 FR 50599, August 20, 2015). NMFS continues to find that the

existing information does not support a conclusion that the PCFG is a stock. This finding is based in part on the deliberations of a NMFS task force that found the evidence equivocal as to whether the population dynamics of the PCFG are more a product of internal recruitment (calves coming to the area with mothers) versus external recruitment (whales recruiting to the area who are not calves of PCFG mothers) (Weller *et al.* 2013). The current SAR (Carretta *et al.*, 2017) represents NMFS' determination on this issue, although NMFS will continue to evaluate through the SAR process any new science on this issue as it does for the identification of marine mammal stocks in general. Accordingly, this waiver process applies at the level of the ENP gray whale stock as a whole (which includes whales in the PCFG).

In the 2012 SAR, NMFS determined that the ENP gray whale stock was within its OSP range (Carretta *et al.*, 2013). It has remained within OSP since that time. The most recent ENP gray whale SAR notes that abundance will continue to fluctuate in response to human and natural factors affecting carrying capacity, consistent with a population approaching carrying capacity (K) (Carretta *et al.*, 2017). The SAR calculates the PBR for the ENP gray whale stock to be 624 whales per year (Carretta *et al.*, 2017). The primary source of human-caused mortality is the Chukotkan hunt, which took 127 whales per year on average from 2008 to 2012 (Carretta *et al.*, 2017). Other sources of human-caused mortality in U.S. waters, such as ship strikes and entanglement in fishing gear, result in about 6 ENP gray whale deaths per year. The SAR does not calculate a separate PBR for ENP gray whales in U.S. waters, or report on human-caused mortality outside of U.S. waters except for ENP gray whales killed in the Chukotkan hunt. NMFS guidance on preparing stock assessments (NMFS, 2016) advises calculating a PBR for U.S. waters for transboundary stocks when there is no international conservation regime in place and it is reasonable to do so.

Although NMFS does not recognize the PCFG as a separate stock, the 2012 SAR (Carretta *et al.*, 2013) and subsequent SARs have reported on population parameters and calculated an informational PBR for the PCFG, because the PCFG appears to be a feeding aggregation and may warrant consideration as a stock in the future. The term "feeding aggregation" is used by biologists in the scientific literature to describe concentrations of whales that forage in a specific area but the term is not intended to signify that such

whales constitute a stock as that term is defined under the MMPA. The SAR notes that calculating this separate PBR allows NMFS to assess whether levels of human-caused mortality are a management concern for this group. (The SAR uses the term "local depletion," which is not defined in agency regulations or guidelines, so we have not adopted that concept here.) It is unknown whether the PCFG, if it were eventually designated a stock, would be within OSP due to uncertainties in population parameters such as emigration and immigration rates, bycatch mortality, and recruitment (Punt and Moore, 2013).

The most recent (2015) abundance estimate of PCFG whales (Calambokidis *et al.*, 2017) is 243 whales with an Nmin of 228. Calambokidis *et al.* (2017) note that PCFG abundance estimates show a high rate of increase in the late 1990s and early 2000s and now appear to be relatively stable since 2002. The most recent SAR (Carretta *et al.*, 2017) reports human-caused mortality of PCFG whales in U.S. waters as 0.25 whales per year, based on data from 2008 through 2012. As with most SARs, this is a minimum estimate because not all whales killed as a result of human actions are documented. Similar to the analysis for the entire ENP stock, the SAR does not calculate a separate informational PBR for PCFG whales in U.S. waters, or report on human-caused mortality outside of U.S. waters.

Concerns for ENP gray whales identified in the SAR include injuries due to fisheries interactions, ship strikes, and marine debris, as well as a number of habitat concerns such as industrialization, pollution, and shipping congestion throughout the nearshore migratory corridors. Climate change is likely to affect the availability of habitat and prey species, but species such as the gray whale (which feed on both benthic and pelagic prey) have been predicted in some studies (*e.g.*, Bluhm and Gradinger, 2008) to adapt better than trophic specialists. Human exploration and development activities (*e.g.*, for oil and gas deposits) are also expected to increase in the Arctic and elsewhere, which in turn could increase risks to whales from spills, ship strikes, and anthropogenic noise. The SAR does not indicate that these factors are a threat to the OSP status of the ENP stock at this time.

### III. Proposed Regulations

The Tribe has requested a waiver allowing the harvest of 20 ENP gray whales every 5 years and a limit of 7 strikes per hunting season, with the presumption that a struck whale would

die. The Tribe proposes hunting only in the coastal portion of their U&A. Its request included provisions to satisfy IWC requirements, avoid local depletion of PCFG whales, safeguard public and hunter safety, and preserve cultural aspects of the hunt while promoting humaneness. The Tribe is also requesting authorization to use non-edible whale products for the making and sale of handicrafts.

Our proposed waiver and regulations respond to the Tribe's request by authorizing a more limited hunt for ENP gray whales for a 10-year period and allowing for the making and sale of handicrafts. Our proposed regulations adopt the Tribe's proposals to limit hunting to the coastal portion of the Tribe's U&A (the hunt area) and to presume that any struck whale will die.

Two key management goals shaped many of the provisions in the proposed regulations: (1) Limiting the likelihood that tribal hunters would strike or otherwise harm a WNP gray whale and (2) ensuring that hunting does not reduce PCFG abundance below recent stable levels. Regarding the first management goal, in adopting regulations to implement a waiver, NMFS must consider all factors that may affect the allowable level of take (16 U.S.C. 1373(b)). Although the Tribe has not requested a waiver of the take moratorium for WNP gray whales, we determined that potential effects of a hunt on WNP whales are a relevant consideration. While uncommon, there are documented occurrences of WNP whales transiting the Makah U&A, and hunters would 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.

Regarding the second management goal, the MMPA requires that in waiving the take moratorium we give due regard to, among other things, the distribution and times and lines of migratory movements of the stock subject to waiver, and that the waiver be in accord with the purposes and policies of the MMPA, which include maintaining marine mammals as a functioning element of their ecosystem. PCFG whales exhibit site fidelity during the feeding season to the northern California current ecosystem, a unique area within the range of the ENP gray whale stock. The proposed regulations would limit lethal and sub-lethal effects to PCFG whales to ensure that hunting does not reduce their abundance and distribution within the PCFG range.

Measures in the proposed regulations to achieve these two management goals include:

- *Alternating Hunt Seasons.* Even-year hunts would occur during the migration season (December 1 of an odd-numbered year through May 31 of the subsequent even-numbered year) to reduce risk to PCFG whales. Odd-year hunts would occur during the feeding season (July 1 through October 30 of odd-numbered years) to reduce risk to WNP whales.
- *Strike Limits.* 3 strikes during even-year hunts and 2 strikes during odd-year hunts.
- *PCFG Strike Limits.* 16 strikes over 10 years.
- *Landing Limits.* 3 whales in even-year hunts and 1 whale in odd-year hunts.
- *PCFG Abundance Trigger.* Hunting ceases if PCFG abundance falls below 192 whales (or the PCFG minimum abundance estimate falls below 171 whales).

Other management measures in the proposed regulations are described in Subsection III(C) below.

#### *A. Measures To Limit the Likelihood That Tribal Hunters Would Strike a WNP Whale*

The Tribe originally proposed a hunting season of December 1 through May 31, when most ENP gray whales are migrating to and from northern feeding grounds (the migration season), to minimize the potential that a PCFG whale would be killed. Scientists subsequently observed WNP whales in the ENP, including in the Tribe's U&A, during the migration season (Mate *et al.*, 2015). Although the risk is very small (there are about 200 WNP whales and about 27,000 ENP whales), this creates the possibility that a tribal hunt at that time could strike a WNP whale that is mixed in with ENP whales. To limit the risk of a WNP whale being struck, the proposed regulations would authorize a hunt during the migration season with two important restrictions: (1) Hunting would only be allowed every other year, proposed for even years, and (2) only three whales could be struck in an even-year hunt. The proposed regulations would also authorize a hunt in odd years during the feeding season (July 1 through October 31), when WNP whales would be feeding in the western North Pacific. Because WNP whales are not expected to be in the Tribe's U&A during the feeding season, authorizing a hunt at this time would avoid impacts to WNP whales.

During an even-year hunt, the regulations would allow only one strike in a 24-hour period as a precaution

against striking multiple WNP gray whales that might be travelling together in a group (Weller *et al.*, 2012). Also, once a whale were landed, the Tribe could not hunt again until NMFS notified the Tribe whether the landed whale was a WNP whale. In the unlikely event the Tribe did strike a WNP whale (in either an even- or odd-year hunt), all hunting would cease unless and until the Regional Administrator determined that measures were taken to ensure that no additional WNP gray whales were struck during the waiver period. In addition to limits on strikes, the regulations would impose limits on approaches, hunt training activities, and unsuccessful strike attempts, as explained in Subsection III(C) below. Finally, the regulations would not allow hunting in the month preceding and the month following the migration season (*i.e.*, November and June) to provide extra protection against striking or otherwise harming a WNP whale.

#### *B. Measures To Maintain PCFG Abundance by Limiting Lethal Impacts*

The proposed regulations contain a number of restrictions to limit PCFG mortality, with the goal of maintaining ENP gray whale distribution and functioning within the PCFG feeding area. Consistent with the Tribe's proposal, the regulations would prohibit hunting in the portion of the Tribe's U&A within the Strait of Juan de Fuca, in part as a human safety measure, but also because during the migration season there is a higher proportion of PCFG whales in the Strait. Also, the regulations would allow only 2-strikes during odd-year (summer/fall) hunts, when PCFG whales are most likely to be present in the hunt area. As an additional protection, the regulations would impose a limit of one landed whale in odd-year hunts, creating the potential for a single strike.

The proposed regulations would include a cumulative limit of 16 strikes on PCFG whales over the 10 years of the regulations (for an average of 1.6 whales per year), of which no more than 8 could be females. The strike limit for PCFG females is a precautionary measure given recent evidence that PCFG whales may be recruited through maternally directed site fidelity (Frasier *et al.*, 2011; Lang *et al.*, 2011b). The regulations would also limit approaches, training activities, and unsuccessful strike attempts on PCFG whales, as discussed in Subsection III(C) below, to minimize the risk that the hunt would cause PCFG whales to avoid the PCFG feeding area.

Under the proposed regulations, strikes and unsuccessful strike attempts

would be counted against the PCFG strike limits in various ways depending on the season and whether the whale's identity (PCFG or non-PCFG) could be determined through photographic or genetic matching. The regulations propose that any whale struck (landed or struck and lost) during odd-year (summer/fall) hunts would count as a PCFG whale, unless identified as a WNP gray whale. This method of accounting is conservative, as PCFG whales are currently estimated to comprise about 48 percent of gray whales in the hunt area during this time (Calambokidis *et al.*, 2017). During even-year (winter/spring) hunts, a struck whale identified as a PCFG whale would be counted against the PCFG strike limit, while a whale not identified as PCFG would not count against that limit. Struck whales for which identification could not be performed due to lack of a useable photograph or tissue sample would be counted in proportion to the estimated percentage of PCFG whales in the hunt area during the month of the strike, based on the best available information (the current estimate is that about 28 percent of whales in the hunt area during the migration season are PCFG whales (IWC, 2018b)). Females are currently estimated to comprise 50 percent of the PCFG (A. Lang, NMFS, personal communication, 2017), which would be factored into the accounting for struck and lost whales if the animal's sex was unknown.

Finally, in addition to these limits, the proposed regulations would not allow hunting in a given year if the estimated PCFG abundance for that year were below 192 whales or the Nmin were below 171 whales (low abundance triggers). The purpose of this additional measure is to ensure that, in the event PCFG abundance declines, for whatever reason, the hunt would not exacerbate the decline. Given that recent PCFG abundance estimates are around 240 whales with an overall increasing trend and the proposed strike limits would result in PCFG mortality of 1.6 whales per year on average, a reduction on this scale would likely be due to some cause unrelated to the hunt. Because published population estimates typically lag one or more years behind the most currently available survey data, estimates for an upcoming hunting season would be projected using a population forecast model fit to the time series of data. The threshold values of 192 and 171 represent the best and minimum (20th percentile) estimates of abundance for the PCFG in 2007. We selected these levels as the low-abundance triggers because they are the

lowest values estimated for the population during the recent period of stability starting in 2002 (Calambokidis *et al.*, 2017).

The Tribe's request, as well as some of the DEIS alternatives, used PBR-based approaches to manage impacts on PCFG whales instead of the combination of PCFG strike limits and low-abundance triggers that we are now proposing. After considering the best available scientific information, including the Tribe's proposal, public and MMC comments on the DEIS, and recommendations from the MMC, we chose the current approach for a number of reasons. First, some public comments and the MMC suggested that a PBR approach should account for total human-caused mortality, including deaths and serious injuries that occur outside U.S. waters. As noted above, the SAR for ENP gray whales (Carretta *et al.*, 2017) calculates an informational PBR overall for the PCFG, not an allocation of PBR for U.S. waters, and reports only human-caused mortality in U.S. waters. Though future SARs might attempt such estimates, we currently lack sufficient information to do so.

Second, the PBR approach establishes a precautionary way (use of PBR achieves the abundance goals in 95 percent of model runs) to manage marine mammal stocks for which relatively little population data exist, such as imprecise and infrequent abundance estimates or little information on trends and productivity, as is often the case for cetaceans and other marine mammals (Taylor *et al.*, 2000; Wade, 1998). For the PCFG, population dynamics are well understood (for example population size and growth are measured accurately and frequently), allowing us to make informed management decisions using other tools. Over 20 years of annual photo-identification surveys have been conducted for the PCFG, yielding relatively precise abundance estimates compared to other cetacean populations. These estimates allow us to employ the population forecast model mentioned above to assist in making more timely decisions for managing PCFG mortality (NMFS, 2019a). This approach is appropriate for the PCFG, where population information is readily available and abundance has been stable over a period of nearly 15 years.

Third, the PBR approach was developed for "closed" populations, where the maximum rate of recruitment is determined in part by the number of births that are biologically possible. In the case of the PCFG, new recruits come from immigration as well as births, and whales leave the population by

emigration as well as death. While the informational PBR in the SAR represents a useful tool for the agency to monitor the stability of the PCFG, it may not reflect actual population dynamics because recruitment for an open population is not limited by reproductive biology. Given these considerations, we concluded that reliance on the informational PCFG PBR was not the best available tool for managing the proposed hunt and that the PCFG strike limits and low-abundance triggers would provide a more robust and timely mechanism for achieving our management goal of maintaining PCFG abundance.

### C. Additional Management Considerations

In addition to the management goals stated above, the management considerations described below informed our proposed waiver and regulations.

#### 1. Use of Marine Mammal Products

The proposed regulations would allow the Makah Tribe to use edible and nonedible ENP gray whale products with certain restrictions. Tribal members would be able to use, share or gift (*i.e.*, voluntarily transfer to another person without compensation), and barter (*i.e.*, noncommercial exchange for items other than money) edible whale products with other members, both within and outside the reservation. Tribal members could also share edible products with non-members within the reservation, but could only share them with non-members outside the reservation as part of a gathering sanctioned by the tribal council where limited quantities were served. This would allow Makah tribal members wide use of edible products within the reservation, including sharing with non-tribal members. Limitations on use outside the reservation are intended to prevent opportunities for commercial exchange. No person would be allowed to sell or purchase edible ENP gray whale products.

For non-edible products, permissible uses would depend on the type and location (on or off the reservation) of the product. The regulations identify three types of non-edible products: Unaltered products (those that have not been fashioned into handicrafts), handicrafts that have been marked and certificated by the Tribe, and handicrafts that have not been marked and certificated. Only handicrafts made by tribal members and marked and certificated by the Tribe could be sold or be possessed off-reservation by non-tribal members. The regulations would allow tribal members

to freely exchange unaltered products with one another for personal use or for later fabrication into handicrafts and would allow tribal members to share their handicrafts with non-members without going through the marking and certification process, however possession of non-certificated handicrafts by non-tribal members would be allowed only within the reservation boundaries. To ensure compliance with these provisions, the Tribe would be required to maintain an official record of all articles of Makah Indian handicraft certificated by the Tribe.

Some of the proposed definitions and concepts regarding the use of marine mammal products are similar to those governing the take of marine mammals by Alaska Natives. For example, the definition for barter is consistent with agency regulations at 50 CFR 216.3 pertaining to subsistence use of marine mammals by Alaskan Natives, and the definition for Makah Indian handicrafts is largely based on the agency's definition of authentic native articles of handicrafts in 50 CFR 216.3. Additionally, similar to regulations in 50 CFR 216.23 on Alaska Native exceptions to the marine mammal take moratorium, the proposed regulations provide for different uses of edible and non-edible products, and restrict the location and types of transactions that may occur.

## 2. Humane Killing

As explained in Section II, if NMFS issues a waiver and regulations allowing a tribal hunt, the Tribe would be required to follow a separate MMPA process to obtain a permit before carrying out a hunt (16 U.S.C. 1374). Prior to issuing any MMPA permit, NMFS must determine, among other things, that the proposed method of taking is "humane," as defined in the MMPA (16 U.S.C. 1362(4), 1374(b)). To ensure that advances in science and methodology addressing efficiency and humaneness are incorporated in a timely fashion, NMFS would regularly review this issue through the permit process. The proposed regulations provide that NMFS will convene a team of experts to evaluate hunt humaneness and effectiveness after 8 gray whales have been struck, to inform any subsequent hunt permits.

## 3. Approaches, Unsuccessful Strike Attempts, and Hunt Training Provisions

Recognizing that actions by tribal hunters short of killing a gray whale may affect whales and may constitute a take under the MMPA, the proposed regulations would limit the number of

approaches and unsuccessful strike attempts, including those associated with hunt training. The regulations define a "hunting approach" as causing a vessel to be within 100 yards of a gray whale during a hunt. The 100-yard limit is consistent with permit conditions NMFS imposes for research vessels on large cetaceans (*e.g.*, 60 FR 3775, January 19, 1995; 66 FR 29502, May 31, 2001), as well as guidelines for all motorized and non-motorized vessels as defined in NMFS' "Be Whale Wise" guidelines that recommend staying 100 yards (91 m) from all marine mammals, noting that there is a regulation prohibiting approaches closer than 200 yards (183 m) for killer whales in inland waters of Washington (50 CFR 224.103(e)).

The regulations would authorize no more than 353 approaches of ENP gray whales (including both hunting and training approaches) each calendar year, of which no more than 142 could be of PCFG whales. As with strikes, approaches would be accounted for proportionally in even-year (winter/spring) hunts and presumed to all be PCFG whales in odd-year (summer/fall) hunts. These values were analyzed in the DEIS and are maximum estimates based on observations during the Tribe's hunt in 2000 (Gearin and Gosho, 2000). The purpose of this provision is to limit the extent to which WNP and PCFG whales may be encountered and possibly disturbed in the hunt area.

The proposed regulations would authorize no more than 18 unsuccessful strike attempts during even-year hunts and 12 unsuccessful strike attempts during odd-year hunts. These limits are based on experience gained from Makah gray whale hunts conducted in 1999 and 2000 and, as described in the DEIS, rely on a 6:1 ratio of unsuccessful strike attempts to successful strikes. Each training harpoon throw would count as an unsuccessful strike attempt because the level of impact on whales is expected to be similar. Training harpoon throws could occur in any month in even-numbered years but would be restricted to the hunting season (July through October, when WNP whales are not expected in the hunt area) in odd-numbered years to reduce the risk of encountering WNP whales over the waiver period. All training harpoon throws would count against the unsuccessful strike attempt limit in effect during the calendar year of the throw. Similar to the limit on approaches, the purpose of these provisions is to limit the risk of non-lethal impacts, particularly to WNP and PCFG whales.

The proposed regulations recognize training as an important component of the management of a tribal hunt. The proposed regulations define training vessels as those not carrying hunting weapons; training approaches as those made by training vessels; and a training harpoon throw as the use of a blunted spear incapable of penetrating a whale's skin. The proposed regulations would authorize training approaches at any time but would limit the times when training harpoon throws could occur as described above.

## 4. NMFS Oversight

Although we expect the Makah tribal government to manage any hunting by tribal members, the proposed regulations anticipate an ongoing oversight role by NMFS through the Regional Administrator for the West Coast Region. The regulations include a number of provisions that facilitate NMFS' oversight. For example, the Tribe must provide NMFS advance notice of hunts; hunt parties must accommodate a NMFS observer on hunt expeditions if requested; and the Tribe must allow NMFS to sample and photograph landed whales. The first hunt permit must be limited to a 3-year term (as opposed to the 5-year maximum under the MMPA) to allow for adjustments in future years if areas for improvement are identified.

## 5. Identification of Individual Gray Whales

The regulations include provisions for photographic (or genetic) identification of WNP and PCFG gray whales. For PCFG whales, we expect most identifications would be performed by the Cascadia Research Collective (Cascadia), which has maintained photo-identification catalogs for many years. Cascadia receives some but not all of its catalog funding for gray whales from NMFS. Several researchers participate in Cascadia's photo-identification program and provide photographs to Cascadia. Photographs taken by researchers under NMFS funding are also provided to the NMFS Marine Mammal Lab in Seattle, Washington. For WNP gray whales, there are currently two catalogs maintained by Russian researchers. The IWC is currently facilitating the development of a unified WNP catalog and related database to be held under the auspices of the IWC (IWC, 2017). Once developed, we expect that Cascadia will have access to this unified catalog and be able to provide identifications of WNP gray whales to NMFS via a contractual agreement.



To ensure that the photo-ID requirements can be effectively implemented, the regulations would require that, before issuing a hunt permit to the Tribe, the Regional Administrator determine that there are adequate photo-identification catalogs and processes available to allow for the identification of PCFG and WNP whales. In addition to the quality of the catalogs, there must be reliable processes in place for making identifications. Currently Cascadia provides this service for the PCFG catalog and has demonstrated an ability to make matches within 24 hours (J. Calambokidis, Cascadia Research Collective, personal communication, 2017). As with the PCFG catalog, Cascadia and curators of the WNP catalogs are able to rapidly compare newly obtained photographs of whales with existing photographs in the WNP catalogs to look for individual matches (J. Calambokidis, Cascadia Research Collective, and Dave Weller, NMFS, personal communication 2019). NMFS will either develop a contractual mechanism or in-house expertise prior to issuing permits to ensure adequate catalogs for PCFG and WNP whales are maintained and matches can be quickly made. Also, we have developed a protocol that describes the requirements for adequate catalogs and for photo and genetic identification processes (NMFS, 2019b).

#### 6. Impacts to Species Other Than ENP Gray Whales

Under the proposed regulations, any hunt permit issued by the Regional Administrator could require that hunters avoid specified areas to prevent and/or reduce the risk of disturbance to Olympic Coast National Marine Sanctuary resources such as seabirds and pinnipeds. This provision is intended to protect other living resources in the hunt area. Also, if a hunt for ENP gray whales is expected to result in the incidental take of other marine mammals, the regulations require that the Tribe obtain separate MMPA authorizations for such take, as determined necessary by the Regional Administrator, before a hunt permit may be issued.

#### IV. Consistency With MMPA Requirements

Relying on the best available scientific evidence and the statutory factors related to gray whale biology and ecosystem considerations, this section presents our determination that the proposed waiver and the proposed regulations are consistent with MMPA requirements.

##### *A. The Proposed Waiver Is Consistent With the MMPA*

As discussed above, the MMPA requires that any decision to waive the MMPA take moratorium be based on the best scientific evidence available; be made in consultation with the MMC; and have due regard to the distribution, abundance, breeding habits, and migratory movements of the marine mammal stock subject to take. Also, we must be assured that the taking is in accord with sound principles of resource protection and conservation as provided in the purposes and policies of the MMPA (16 U.S.C. 1361, 1371(a)(3)(A)).

##### 1. The Proposed Waiver Is Based on the Best Scientific Evidence Available

In developing the proposed waiver, we relied on the best available scientific evidence related to the statutory requirements, including the following: the most recent SARs for ENP and WNP gray whales (Carretta *et al.*, 2017); the 2015 DEIS (NMFS, 2015); the NMFS gray whale stock identification workshop (Weller *et al.*, 2013); the NMFS analysis estimating the probability of encountering WNP gray whales during a Makah hunt (Moore and Weller, 2018); IWC modeling of our proposed regulations relative to IWC conservation objectives for North Pacific gray whales (IWC, 2018b); and the NMFS biological report (NMFS, 2019a). We incorporate by reference those documents and the documents cited in those reports.

##### 2. The Proposed Waiver Was Made in Consultation With the MMC

Subsection V(D) describes the consultation we completed with the MMC.

##### 3. The Proposed Waiver Demonstrates Due Regard for the Distribution, Abundance, Breeding Habits, and Times and Lines of Migratory Movements of ENP Gray Whales

The biological report (NMFS, 2019a) provides a detailed description of our consideration of the distribution, abundance, breeding habits, and migration of ENP gray whales. Below we summarize our assessment of those criteria.

##### Distribution

The proposed waiver is unlikely to have an appreciable effect on the distribution of ENP gray whales through mortality of PCFG whales or disturbance of migrating whales or feeding whales. The proposed waiver and regulations demonstrate due regard for the possibility that hunting could result in

changes in distribution by including provisions limiting mortality of PCFG whales and limiting interactions with ENP whales in general and PCFG whales in particular. No more than 25 whales could be struck, and only 16 of the strikes could be PCFG whales (average 1.6/year), with a limit of 8 strikes (average 0.8/year) of PCFG females. Unsuccessful strike attempts would be limited to 18 during even-year hunts and 12 in odd-year hunts, and approaches within 100 yards would be limited to 353 (142 PCFG) per year. In addition, the PCFG low abundance triggers would require that hunting cease if PCFG abundance declined below recent stable levels.

Through hunt-related mortality, the proposed waiver may reduce the abundance of PCFG whales by up to 16 whales over a 10-year period. The proposed waiver demonstrates due regard for this possibility by including provisions to maintain PCFG abundance. We conclude that these measures will ensure that the waiver does not reduce range-wide distribution of the ENP stock, including distribution within the PCFG range, based on the following considerations: (1) Agency modeling indicates that the PCFG is likely to grow in the future with or without a tribal hunt (NMFS 2018a). The proposed regulations include protections in the event the PCFG declines rather than increases; (2) If PCFG abundance continues to be stable, removal by hunting of 16 PCFG whales over 10 years is projected to result in an abundance of around 227 whales, which is well above the lowest abundance level observed during the recent period of stability. That level was 192 whales in 2007, and by 2015 the population had grown 25 percent to 243 animals; (3) From 2002 through 2015, the PCFG grew from 197 to 243 animals, which is a total of 46 whales, or an average annual increase of 3.5 whales over 13 years. At that rate of increase, the PCFG would grow by an additional 35 animals over the 10 years of the proposed waiver. That number is twice the maximum number of PCFG whales that could be killed (16) under the proposed regulations; and (4) If PCFG abundance declines, the low abundance trigger would ensure that no hunting will occur if abundance falls below the levels observed during a recent 14-year stable period, specifically 192 animals or an Nmin of 171 animals. Also, the inclusion of an Nmin trigger provides a safeguard against incomplete or lagging abundance estimates.

Though hunt-related activities might cause ENP gray whales to alter their distribution in the hunt area



temporarily, it is unlikely that ENP gray whales will exhibit noticeable redistribution during either the migration or feeding seasons. Even-year hunts and training exercises conducted from December through May would encounter mostly migrating whales that must pass through the ocean portion of the Makah U&A during their lengthy north- and southbound transits. These whales are slow but steady swimmers that often exhibit directed swimming and predictable breathing and dive patterns (Jones and Swartz, 2002). Whales travelling at 3–6 miles per hour (5–10 km per hour; Jones and Swartz, 2002) would be able to transit the widest portion of the Makah U&A (approximately 32 miles or 51 km north-south) in several hours. During migration, gray whales generally remain close to shore (especially where the continental shelf is narrow) and the best available information indicates that most northbound and southbound whales migrate within 27 miles (43 km) of shore (Pike, 1962; Green *et al.*, 1992; Green *et al.*, 1995). Some researchers have suggested that gray whales alter their migration distance from shore in response to vessels and other human activity (Rice, 1965; Hubbs and Hubbs, 1967; Wolfson, 1977; Schulberg *et al.*, 1989; Mate and Urbán-Ramirez, 2003), however the ENP population has also demonstrated a tolerance and resiliency to decades of active hunting by Chukotkan natives (Borodin *et al.*, 2012; IWC, 2016).

During even-year hunts, adverse weather conditions in the Makah U&A in winter and early spring coupled with shorter periods of daylight would keep most hunts and training exercises close to shore and of shorter duration than during the summer. There would be only a few vessels associated with the hunt (generally 5 or less). Chukotkan hunters typically use a similar number of motorized vessels to pursue individual whales (IWC, 2018c). Since the 1950s, Chukotkan hunters have landed, on average, over 100 ENP gray whales per year (Borodin *et al.*, 2012), and an average of 126 whales per year during the past decade (IWC, 2016). During that decade the majority of whales have consistently been killed in the Chukotsky region with no apparent change in the distance offshore that whales are killed (IWC, 2016). Given these considerations, it is reasonable to expect that most of the roughly 27,000 ENP whales would be subject to little or no hunting pressure in the Makah U&A. Those animals subject to hunting and hunt training activities would experience them as temporary and

localized nearshore events within the vast area of the Pacific Ocean. We therefore expect that whales traveling through the Makah U&A during the migration season will not change their migration patterns and avoid the area.

Odd-year hunts during July through October would likely encounter whales exhibiting feeding behavior, including milling in small, localized areas close to shore and typically within 3 miles (5 km) of shore (Brueggeman *et al.*, 1992; Darling, 1984; Sumich, 1984; Mallonée, 1991; Dunham and Duffus, 2001; Scordino *et al.*, 2011). Some animals have been seen clustering relatively far offshore (12–16 miles or 19–26 km) but these sightings are considered unusual (Calambokidis *et al.*, 2009). During summer hunts and training exercises most whales would be found in the PCFG range from northern California to northern Vancouver Island, within which the Makah U&A is a relatively small portion (less than 5 percent of the coastline in the PCFG range). Whales are known to focus on specific areas within this range but also move extensively in search of food (Calambokidis *et al.*, 1999; Calambokidis *et al.*, 2004; Calambokidis *et al.*, 2014). Odd-year hunts would result in fewer whales being struck (1 or 2 per year) than in even-year hunts (up to 3 per year). As noted above, despite hundreds of whales being hunted and killed in Chukotkan hunts (many of which are killed during the summer months) there has not been a discernible change in the availability and location of hunted whales (IWC, 2016).

The proposed waiver allows for over 350 approaches of gray whales each year, most of these approaches would likely involve paddle-driven canoes that, compared to the motorized vessels used in Chukotkan hunts, have much less speed and maneuverability to pursue and maintain close contact with approached whales. This is a very small number of approaches compared with what NMFS authorizes for research permits. Activities that employ vessel approaches on large whales are regularly reviewed by NMFS under the MMPA. When issuing permits under the MMPA, NMFS generally limits the number of approaches within defined distances (typically 100 yards or less for large cetaceans) because of the potential for such approaches within those limits to affect or disrupt whale behavior. For example, NMFS Permit #15569 for ENP gray whales (77 FR 35657, June 14, 2012) authorized 5,000 approaches of gray whales over the course of 5 years. While this is a large number of authorized approaches, the NEPA analysis prepared for that permit found

that approaches during research have not been shown to result in long-term or permanent adverse effects on individual animals or their behavior regardless of the number of times the activity occurs because the frequency and duration of the activities allows adequate time for animals to recover from any potential adverse effects such that additive or cumulative effects of the action on its own are not expected. That analysis further notes that no measurable effects on population demographics are anticipated because any sub-lethal effects are expected to be short-term, and the proposed action is not expected to result in mortality of any animals. Given these considerations, we expect that animals exposed to approaches and hunt training activities within the Makah U&A would experience the encounter as a temporary and localized nearshore event that would be insufficient to discourage them from a known source of food. As a result, we do not expect the proposed waiver to cause PCFG whales to abandon the Makah U&A or to otherwise affect ENP gray whale distribution.

#### Abundance

The proposed waiver and regulations are unlikely to have an appreciable effect on the ENP gray whale stock's abundance. The proposed waiver would result in a maximum of 3 strikes/deaths per even year hunt and 2 strikes/deaths per odd year hunt, or an average of 2.5 deaths per year. Two and a half animals represent 0.009 percent of the population of 27,000 animals. This level of mortality is a small fraction of the annual variability in the stock's abundance (~16,000–27,000 animals since the mid-1990s) and well below the PBR level (624 whales per year) for the ENP gray whale stock (Carretta *et al.*, 2017). This small number of removals would not have an appreciable effect on the stock's abundance, especially given that any portion of the IWC quota for ENP gray whales that is not harvested by the Makah Tribe is likely to be allocated to Chukotkan hunters, based on recent practice and as articulated in a joint U.S.-Russia monitoring agreement (*e.g.*, Fominykh and Wulff, 2017). If that practice continues, the total harvest of ENP gray whales would be the same with or without the waiver.

#### Breeding Habits

Male and female gray whales are thought to be promiscuous breeders and copulate repeatedly with more than one mate (Jones and Swartz, 1984). Mating occurs throughout the southward migration in the migratory corridor with a mean conception date of December 5

(Rice and Wolman, 1971). Females that have not successfully bred may enter a second estrous cycle within 40 days (Rice and Wolman, 1971). Hunting or hunt training is most likely to overlap with gray whale breeding in December–January. As described in the DEIS Subsection 3.15.3.2.2, Description of Weather and Sea Conditions in the Project Area, NMFS expects that few if any hunt activities would occur in December–January due to inclement weather (NMFS, 2015). While it is possible that hunt activities could occur in December–January and could encounter mating whales, we do not expect adverse biological effects due to the small portion of the migration corridor where hunt activities could occur. The limited level of hunt activity likely to occur, and the fact that whales can mate repeatedly throughout the migration, suggests that any whales disturbed by hunt activities would have additional opportunities to breed.

#### Times and Lines of Migratory Movements

Based on the analysis above regarding effects on distribution of ENP gray whales, the proposed waiver is not expected to affect the times and lines of migratory movements of ENP gray whales.

#### 4. NMFS Is Assured That the Proposed Waiver Is in Accord With the MMPA's Purposes and Policies

The purposes and policies of the MMPA 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 an optimum sustainable population keeping in mind the carrying capacity of the habitat (16 U.S.C. 1361). Thus we considered the effects of the proposed waiver on both the ecosystem and on the ENP stock and documented those findings in the Biological Report (NMFS, 2019a). We summarize those findings below.

##### (a) Effect of the Proposed Waiver on the Role of ENP Gray Whales in Their Ecosystem, and on the Health and Stability of That Ecosystem

The MMPA does not specify a geographic scale for identifying marine mammal ecosystems. Because of their long migration route, ENP gray whales occupy multiple large marine ecosystems at different times. The hunt area is located within what oceanographers call the California Current System (Sherman and Alexander, 1989) or Province (Longhurst, 1998), a part of the North

Pacific Gyre that moves cool ocean waters south along the western coast of North America, beginning off British Columbia, flowing southward past Washington, Oregon and California, and ending off Baja California. Within that province, scientists regularly study and predict physical and biological features and processes in the northern California Current ecosystem, which is generally described as extending from northern California to Vancouver Island (*e.g.*, Field *et al.*, 2001; Field *et al.*, 2006; Hickey and Banas, 2008; Sydeman and Elliott, 2008; Harvey *et al.*, 2017; Wells *et al.*, 2017), though some studies extend only to the U.S.–Canada border in the north because of differing management regimes between the two countries (Field *et al.*, 2001; Field *et al.*, 2006). For purposes of the MMPA analysis, we took a precautionary approach of examining the impact of the proposed waiver and regulations on the smaller northern California Current ecosystem. This area also corresponds to the seasonal range of the PCFG.

The entire range of the ENP gray whale stock is vast and crosses many large marine ecosystems, including the Pacific Central American Coast, California Current, Gulf of Alaska, and Bering and Chukchi Seas (Longhurst, 1998; Sherman and Alexander, 1989). The proposed waiver could result in the removal of up to 2.5 whales annually, on average, from the hunt area. This level of removal is an order of magnitude less than the natural variability of the population, which numbered nearly 27,000 individuals in 2016, and would not have an appreciable effect on the functioning of ENP gray whales as an element of these large ecosystems, or on the health of the ecosystems themselves. To the extent approaches and attempted strikes affect whales, those actions would do so in a very small portion of one of these large ecosystems and would therefore be unlikely to result in a change in gray whale use of any of these large ecosystems.

Also, the proposed waiver will not result in gray whales ceasing to be a significant functioning element of the smaller northern California Current ecosystem or the environment of the northern Washington coast for at least two reasons. First, these habitats are shaped by dynamic, highly energetic, large-scale processes, and the role of ENP gray whales in structuring these habitats is limited. Second, the proposed waiver and regulations are unlikely to result in an appreciable decrease in the numbers of whales present in the northern California Current ecosystem or the northern

Washington coastal environment because of the limits on ENP and PCFG strikes.

Based on the best available evidence as summarized in the Biological Report, we conclude that the proposed waiver and regulations would not cause ENP gray whales to cease to be a significant functioning element in the ecosystem of which they are a part.

To summarize:

- ENP gray whales annually traverse five large marine ecosystems;
- Average annual removal by Makah hunters of up to 2.5 ENP gray whales from a population of approximately 27,000 individuals would not have an appreciable effect on the functioning of ENP gray whales in any of these large marine ecosystems or on the ecosystems themselves;
- The northern California Current ecosystem is the smallest recognized marine ecosystem that encompasses the area of the proposed hunt;
- ENP gray whales play a limited role in structuring the northern California Current ecosystem, which is shaped by dynamic, highly energetic, large-scale ecosystem processes;
- There will continue to be approximately 27,000 ENP gray whales migrating along the coast through the northern California Current ecosystem, thus the functioning of ENP gray whales in that ecosystem will not change;
- Although it is not considered a separate ecosystem, even at the scale of the northern Washington coast (the coastal portion of the Makah U&A) we would not expect the proposed waiver to have any meaningful effects on the marine environment, because ENP gray whales play a limited role in structuring the habitat, which is shaped by dynamic, highly energetic, large-scale ecosystem processes;
- The best available evidence indicates the proposed waiver would not cause gray whales to abandon the hunt area as a summer feeding area or interfere with the PCFG being a significant functioning element of their ecosystem during the summer feeding period in the PCFG range.

##### (b) Effect of the Proposed Waiver on the Status of the ENP Gray Whale Stock Relative to OSP

The proposed waiver would result in a maximum of 3 strikes/deaths per even year hunt and 2 strikes/deaths per odd year hunt, or an average of 2.5 deaths per year. Two and a half animals represent 0.009 percent of the population of 27,000 animals. This number of removals would not have a discernable effect on the status of the ENP stock relative to OSP. Moreover,

any portion of the IWC quota for ENP gray whales that is not harvested by the Makah Tribe is likely to be allocated to Chukotkan hunters, based on recent practice and as articulated in joint U.S.-Russia monitoring agreements dating back to the IWC catch limit set in 2003 (e.g., Ilyashenko and Hogarth, 2007; Ilyashenko and DeMaster, 2012; Fominykh and Smith, 2016; Fominykh and Wulff, 2017). Assuming this practice continues, the proposed waiver would have no net effect on ENP gray whale abundance or OSP.

#### *B. The Proposed Regulations Are Consistent With the MMPA*

The MMPA directs NMFS to adopt regulations implementing an MMPA waiver that NMFS deems necessary and appropriate to insure that the taking will not be to the disadvantage of the affected stock and will be consistent with the purposes and policies of the MMPA (16 U.S.C. 1373(a)). Regulations must be based on the best scientific evidence available and consultation with the MMC. NMFS must give full consideration to all relevant factors affecting the extent to which the marine mammals may be taken, including but not limited to: Existing and future levels of marine mammal stocks; 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 addition to these factors, we have considered the potential effects of the proposed regulations on the WNP stock.

##### *1. The Proposed Regulations Are Based on the Best Scientific Evidence Available and Consultation With the Marine Mammal Commission*

See Subsections IV(A)(1) and IV(A)(2) above.

##### *2. The Proposed Regulations Will Not Disadvantage the ENP Gray Whale Stock*

Because the proposed regulations will not affect the status of the ENP gray whale stock relative to its OSP, we conclude that the proposed regulations will not disadvantage the ENP gray whale stock.

##### *3. The Proposed Regulations Are Consistent With the Purposes and Policies of the MMPA*

These findings are described above in Subsection IV(A)(4) above.

##### *4. We Have Fully Considered the Effects of the Proposed Regulations on the Statutory Factors*

###### *(a) Existing and Future Levels of Marine Mammal Species and Population Stocks*

The proposed regulations are unlikely to have any effect on the future levels of ENP gray whales, as described above under Subsection IV(A)(4)(b), *Effect of the proposed waiver on the status of the ENP gray whale stock relative to OSP*.

###### *(b) Existing International Treaty and Agreement Obligations of the United States*

The proposed regulations limit the harvest of ENP gray whales consistent with the ICRW Schedule, Article 13, and the U.S.-Russia bilateral agreement. In March 2018 the U.S. requested that the IWC Scientific Committee (specifically the Standing Work Group on Aboriginal Subsistence Whaling Management Procedures or AWMP) evaluate a potential Makah gray whale hunt under the proposed regulations. The goal of the AWMP's review was to determine if the aboriginal harvest of gray whales under hunt proposals by the U.S. and the Russian Federation would meet the IWC's conservation objectives. Those objectives focus on ensuring that aboriginal hunt requests (1) do not seriously increase risks of extinction (highest priority), (2) enable hunts "in perpetuity," and (3) maintain stocks at the highest net recruitment level (and if below that, ensure they move towards it). After modeling the available data (i.e., biology, ecology, abundance and trends, removals including direct hunting, ship strikes and bycatches), the AWMP agreed (and the Scientific Committee supported) that the proposed hunt management plan for a Makah tribal hunt meets the IWC conservation objectives for ENP gray whales as well as for PCFG and WNP gray whales (IWC, 2018b).

###### *(c) The Marine Ecosystem and Related Environmental Considerations*

The biological report (NMFS, 2019a) describes our consideration of effects on the marine ecosystem and Subsection IV(A)(4)(a) describes our conclusion regarding ecosystem function and health. The DEIS (NMFS, 2015) describes our consideration of other elements of the marine environment.

###### *(d) The Conservation, Development, and Utilization of Fishery Resources*

The proposed regulations would have no effect on the conservation, development, or utilization of fishery resources.

###### *(e) The Economic and Technological Feasibility of Implementation*

Subsection 4.6.2.5 of the DEIS analyzes the economic costs of hunt management and law enforcement. NMFS' costs would primarily involve the continuation of longstanding whale surveys and photo-identification work, with additional funding of approximately \$2,000 per day of hunting needed to support NMFS monitoring and enforcement personnel. As noted in the DEIS, the annual NMFS budget for marine mammal management in the West Coast Region is over \$700,000, so such costs are feasible to obtain and are not expected to affect NMFS' ability to regulate a hunt. The Tribe's 1999 gray whale hunt successfully demonstrated the economic and technological feasibility of prosecuting a hunt according to the proposed regulations. Also, the Tribe has a detailed Tribal Whaling Ordinance in effect, which demonstrates the Tribe's ability to regulate a tribal ceremonial and subsistence whale hunt (Makah Tribe, 2013). The proposed regulations include provisions for matching photographs of killed whales to those of known whales, a procedure which is technologically feasible (Calambokidis *et al.*, 2017; NMFS, 2019b). The proposed regulations include provisions for marking and tracking handicrafts made from harvest whale parts, which is technologically feasible.

#### *C. The Proposed Waiver and Regulations Appropriately Manage Risk to WNP Gray Whales*

In evaluating the Tribe's waiver request, we determined that the potential effect of the proposed hunt on the WNP stock was an additional relevant factor that should be considered in the proposed regulations. To evaluate the risk to WNP gray whales we considered both: (1) The probability of encountering a WNP gray whale (exposure) during an ENP gray whale hunt or training; and (2) the likelihood that an encounter would kill or otherwise harm a WNP whale. To address the first question and to reduce the risk of encountering WNP gray whales during an ENP hunt, the regulations include several important restrictions: (1) Hunting would only be allowed every other year (proposed for even-numbered years) during the migration season when WNP gray whales may be present; (2) only three whales could be struck in an even-year hunt; (3) training harpoon throws would be restricted to the non-migration season in odd-numbered years; and (4)

if a WNP is confirmed to be struck in any year, the hunt will cease until steps are taken to ensure such an event will not recur.

To address the second question, we considered the biological impact of strikes, strike attempts, and approaches on WNP whales. Striking a WNP gray whale has the potential to kill or injure it. An unsuccessful strike attempt, training harpoon throw, or approach of a WNP gray whale might or might not harm a whale by disrupting its behavior, depending on the reaction of the whale to the encounter.

With hunting at the time of year when WNP gray whales may be present limited to every other year and strikes limited to 3 (and thus limited to 15 over the 10-year regulation period), there is about a 6 percent probability of hunters striking one WNP gray whale over the 10 years of the regulations (Moore and Weller, 2018). This probability is the most likely point estimate; the 95 percent confidence interval ranges from 3.0 percent to 9.3 percent. Stated another way, the most likely point estimates indicate that one in 17 10-year hunt periods (*i.e.*, one year out of 170) would result in an individual WNP gray whale being struck by Makah hunters, if the Tribe made the maximum number of strike attempts allowed in even-year hunts and if ENP and WNP population sizes and migration patterns remained constant (Moore and Weller, 2018). If the 95 percent confidence interval is considered, the expectation is that one WNP whale would be struck out of every 108 years of hunting. By comparison, the PBR for WNP gray whales reported in the current SAR is 0.06 WNP gray whales per year, or approximately 1 whale every 17 years. Based on this analysis, we conclude that the risk of a lethal take or injury to WNP gray whales posed by the proposed regulations is slight.

With unsuccessful strike attempts during even-year hunts limited to 18, there is about a 30 percent probability (95 percent confidence interval, range from 17 percent to 44 percent) that one WNP whale would be subjected to an unsuccessful strike attempt over the 10 years of the regulations (Moore and Weller, 2018), or one such encounter every 33 years if the Tribe made the maximum number of strike attempts allowed in even-year hunts and if ENP and WNP population sizes and migration patterns remained constant (Moore and Weller, 2018). If the 95 percent confidence interval is considered, the expectation is that one WNP whale would be subjected to an unsuccessful strike attempt every 23 years. Making an unsuccessful strike

attempt or training harpoon throw on a WNP gray whale is a concern but would not result in death or injury and would likely elicit a response similar to that observed in whales that are tagged or biopsied for research purposes (DEIS Subsection 4.4.3.3.2, Change in Abundance and Viability of the WNP Gray Whale Stock). As summarized above in Subsection III(C)(3), the best available scientific evidence suggests that such encounters would be unlikely to have a lasting effect on the health or behavior of the affected animal because there is no mortality associated with unsuccessful strike attempts and impacts associated with such an event are temporary.

Based on the best available information and as observed during the Chukotkan hunt, gray whales would likely display a range of reactions to hunting- or training-related approaches, and it is uncertain whether any of the approaches would disrupt normal whale behavior. However, to be precautionary we believe it is reasonable to conclude that some of those approaches have the potential to disrupt whale behavior, so the regulations limit the number of approaches. The geographical area where the approaches might occur is not known to be biologically important for WNP gray whales and the very limited number of likely approaches on WNP whales does not create the magnitude, frequency (repetitive, chronic), and duration of encounter that might cumulatively disrupt their behavior (NMFS, 2015). Actual approach distances are not possible to predict. However, as was the case in the Tribe's 1999 and 2000 hunts, even-year hunts would occur during a time when gray whales are migrating, which may further limit close and sustained approaches on gray whales and chronic, repeated, or cumulative exposure to individual whales. Also, some of the approaches could be made during training exercises involving only paddle-driven canoes that have limited ability to pursue and maintain close contact with whales that are actively migrating.

Our risk analysis predicts that approximately 14 WNP gray whales would be approached within 100 yards over the duration of the waiver period (Moore and Weller, 2018). This analysis assumed that all 353 approaches would be made each year, and all of them, including all training approaches, would be made between December 1 and May 31, when WNP gray whales could be present in the hunt area. These conservative assumptions are a useful management tool for understanding the maximum potential impacts to WNP gray whales, but present an unlikely

scenario given that hunting in odd-numbered years may also be authorized during the summer and fall when weather and ocean conditions are more suitable for hunting and training. In our 2015 DEIS, we estimated that there would be almost twice as many suitable days for hunting and training during odd-year hunts as during even-year hunts. So, for example, if half of the allowed number of approaches were made during even-year hunts, we would expect that less than one WNP gray whale (0.7) would be approached per year.

Even if all approaches were made between December 1 and May 31, potentially exposing 1.4 WNP gray whales per year to an approach, we consider any risks to such whales to be slight because there is no mortality associated with approaches, some approaches may be so far away as to be undetectable by the whales, and any reactions by approached whales would likely be temporary and not interfere with the whales' active migration.

To summarize, under the proposed regulations, there is a 6 percent probability of killing a gray whale over the 10-year waiver period (put another way, it is likely that one WNP whale would be killed every 170 years), which we consider to be a remote risk. There is a 30 percent probability of an unsuccessful strike attempt on at least one WNP gray whale (or one every 33 years) and a near 100 percent probability of a WNP gray whale being approached (average of 1.4 whales per year), based on conservative assumptions, over the 10-year period of the regulations (Moore and Weller, 2018). We find that this constitutes an acceptable level of risk for management purposes and under the MMPA. In addition, prior to issuing final regulations, NMFS would be required to ensure, pursuant to the consultation requirements of ESA section 7(a)(2), that the hunt would not be likely to jeopardize the WNP stock (16 U.S.C. 1376(a)(2)).

## V. Required Statements Related to the Intention To Issue Regulations

The MMPA requires that, either before or concurrent with publication of our notice of intent to prescribe regulations, we publish certain statements (16 U.S.C. 1373(d)). This section includes those statements.

### A. A 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 proposed waiver and regulations and

are recognized as a population stock under the MMPA (Carretta *et al.*, 2017). The most recent population assessment by Durban *et al.* (2017) estimates the abundance of the ENP gray whale stock at 24,420 to 29,830 whales, with a point estimate of 26,960 and resultant minimum abundance estimate, used for calculating PBR, of 25,849.

*B. A Statement of the Expected Impact of the Proposed Regulations on the Optimum Sustainable Population of Such Species or Population Stock*

The proposed regulations will not have a discernible effect on the ENP gray whale stock relative to its OSP (see Subsection IV(B), *The Proposed Regulations are Consistent with the MMPA*).

*C. A Statement Describing the Evidence Before the Agency That Forms the Basis for the Regulations*

In proposing the waiver and regulations, we relied on the references cited in the March 2015 Draft Environmental Impact Statement on the Makah Tribe Request to Hunt Gray Whales (NMFS, 2015). We also list relevant references to the scientific literature in a separate biological report (NMFS, 2019a), which identifies other and more recent studies not included in the DEIS. We incorporate by reference the 2015 DEIS and the Biological Report and their associated references. The proposed regulations were also informed by the public comments on the DEIS and our consultation with the MMC.

*D. Any Studies or Recommendations Made By or For the Agency or the MMC That Relate to the Establishment of the Regulations*

Relevant studies made by or for NMFS include those on gray whale abundance and stock structure (Punt and Wade, 2012; Weller *et al.*, 2013; Calambokidis *et al.*, 2017), estimation of potential biological removal levels and human caused mortalities (Carretta *et al.*, 2017), forecasting PCFG abundance estimates (NMFS, 2019a), estimating the probability of encountering WNP gray whales (Moore and Weller, 2018) and modeling the proposed regulations relative to IWC conservation objectives for North Pacific gray whales (IWC, 2018b). Also, the DEIS (NMFS, 2015) analyzes the principle components of a Makah gray whale hunt.

Regarding recommendations by the Marine Mammal Commission, the MMC submitted comments on the 2015 DEIS and provided written advice in response to two NMFS requests for consultation in 2017. We first requested consultation

with the MMC on May 12, 2017, and shared a preliminary draft of our proposed waiver determination and regulations along with supporting rationale. The MMC replied to our request with a letter dated July 11, 2017, endorsing our plan to issue a waiver determination and recommending several issues for further consideration. After further evaluation and review, and based on comments from the MMC and others on the DEIS related to managing impacts to PCFG whales, we modified our proposal to adopt a non-PBR framework for the PCFG and presented it to the MMC for continued consultation on December 19, 2017. On March 13, 2018, the MMC replied with a second letter expressing support for our modified regulations and encouraging flexibility in hunt management so as to give due regard to the Tribe's identified subsistence and cultural needs. The following summarizes the MMC's advice contained in those consultation letters.

MMC Consultation Letter Dated July 11, 2017:

1. The MMC believed that the draft documents lay out a *prima facie* case that the requirements for granting a waiver under the MMPA have been met and recommended that NMFS proceed with issuing a proposed rule and scheduling an administrative hearing in accordance with the requirements of section 103 of the MMPA and sections 554, 556, and 557 of the Administrative Procedure Act.

2. The MMC noted that its primary concern has been the need to avoid, to the maximum extent practicable, the accidental taking of gray whales from the endangered WNP stock, and secondarily, to avoid taking that could disadvantage the PCFG regardless of whether it is considered a stock. The MMC acknowledged that the design of an odd year/even year hunting pattern is key to both controlling the harvest of PCFG whales and minimizing any take of WNP gray whales.

3. The MMC recommended that NMFS clarify what the implications would be if the PCFG were recognized as a separate stock, especially whether hunting would be allowed to continue under this rule or if new rulemaking would be necessary to consider the status of PCFG whales relative to OSP before the taking of PCFG whales could be authorized.

4. The MMC recommended that the ability to distinguish between WNP and ENP gray whales be addressed in the rulemaking, either by including mechanisms to ensure that current survey and cataloging efforts are

maintained or by making hunting during the specified season contingent on having available and reliable means of distinguishing WNP or PCFG whales (as relevant) from other whales.

5. The MMC recommended that NMFS review the proposed numbers of takes that would be authorized for approaches and attempted strikes, and suggested that NMFS consider separate authorizations for attempted strikes and approaches depending on whether they occur during hunting or training exercises. The MMC further noted that it would be unfortunate, and perhaps counterproductive to achieving an effective and efficient hunt, to limit the level of training because of the specified caps.

6. The MMC recommended that NMFS revise the provisions of the draft rule to allow training activities to be conducted throughout the year, subject to appropriate limitations, despite one of the take limits for hunting activities (*e.g.*, strikes or landings) having been reached.

7. The MMC recommended that NMFS discuss with the Makah Tribe provisions related to how whale meat and non-edible products can be used and distributed by Tribal members to determine whether there are any proposed restrictions on the use and distribution of whale products to which the Tribe objects and, if there are, request that the Tribe suggest alternatives for consideration as part of the rulemaking.

8. The MMC recommended that NMFS consider building some flexibility into the regulations to allow a small increase in the numbers of whales that can be struck and landed in odd-year hunts should it become necessary to close the even-year hunt.

9. The MMC recommended that NMFS address whether there are circumstances (*e.g.*, a die-off of gray whales) that would prompt it to revisit or revise the regulations before the end of their anticipated lifetime.

MMC Consultation Letter Dated March 13, 2018

1. The MMC reiterated its earlier primary concerns regarding the need to avoid, to the maximum extent practicable, the accidental taking of gray whales from the endangered WNP stock, and secondarily, to avoid taking that could disadvantage PCFG whales regardless of whether they are considered a separate stock. The MMC noted that our modified proposal (compared to our initial request for consultation) is not expected to have any negative effect on the possibility that WNP gray whales will be taken and,

as such, the MMC stands by its earlier comment that the risk of killing or seriously injuring a WNP gray whale appears to be sufficiently low that it should not present an insurmountable obstacle to NMFS moving forward with a proposed rule to authorize the Makah Tribe to take whales from the ENP stock.

2. The MMC agreed that, given the availability of reliable information on the abundance, trends, and rates of recruitment for the PCFG, there is no reason to manage removals under a PBR framework. Further, the MMC believed that setting the allowable strike limit at 16 PCFG whales over a 10-year period should provide reasonable certainty that the proposed level of hunting PCFG whales will not have adverse impacts on this group of animals.

3. The MMC noted that proposed harvest levels (no more than one whale landed per year during odd-year hunts and up to three whales landed per year during even-year hunts) falls well short of the Makah Tribe's identified subsistence need and the Tribe's initial waiver request, and encouraged NMFS to assess the relationship between the adopted harvests levels and the Tribe's subsistence and cultural needs as part of the final environmental impact statement on this action.

4. The MMC concurred—from a biological standpoint—with NMFS' proposal to limit strikes on female PCFG whales, but noted that the strike limit may cause additional shortfalls in meeting the Tribe's subsistence needs. Therefore, the MMC recommended that NMFS and other appropriate experts work with the Tribe to develop hunting methods that minimize the chances that the female strike limit will be reached early in any 10-year period.

5. The MMC agreed that setting such minimum abundance thresholds for the PCFG is appropriate and that the values proposed are good starting points for examination in the course of the rulemaking. However, the MMC also noted that this approach was akin to an on-off switch and suggested that NMFS explore whether strikes might be reduced more gradually using intermediate abundance thresholds.

## VI. Classification

### *National Environmental Policy Act*

NMFS has prepared a DEIS under the requirements of NEPA and published a notice of availability on March 20, 2015 (80 FR 14912). NMFS believes that a waiver of the MMPA take moratorium along with federally approved hunt regulations for gray whales constitutes a major federal action subject to the requirements of NEPA. Therefore, these

proposed regulations will not be finalized until a final Environmental Impact Statement has been issued and a Record of Decision is made.

### *Endangered Species Act*

The ESA provides for the conservation of endangered and threatened species of fish, wildlife, and plants. The program is administered jointly by NMFS (for most marine species) and the U.S. Fish and Wildlife Service (for terrestrial and freshwater species). The ESA requires federal agencies to consult with NMFS or the U.S. Fish and Wildlife Service to ensure that activities authorized, funded, or carried out by federal agencies are not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. Prior to issuance of final regulations, NMFS will fulfill its obligations under section 7(a)(2) of the Endangered Species Act for the ESA-listed species and designated critical habitat in the project area.

### *Regulatory Flexibility Act*

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) (RFA) requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice of proposed rulemaking requirements under the Administrative Procedure Act 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 only affects a single tribe. Tribes are not considered small entities under the RFA. Accordingly, an attorney acting on behalf of the Chief Counsel for Regulation of the Department of Commerce, in accordance with the RFA, has reviewed this proposed rule and certifies that it will not have a significant economic impact on a substantial number of small entities. Therefore, neither the RFA nor any other law require a regulatory flexibility analysis, and none has been prepared.

### *Paperwork Reduction Act*

This proposed rule does not contain a collection-of-information requirement for purposes of the Paperwork Reduction Act of 1980, because the Paperwork Reduction Act does not apply to record-keeping requirements of a single tribe.

### *Executive Orders 12866—Regulatory Planning and Review, 13771—Reducing Regulation and Controlling Regulatory Costs, and Executive Order 13563—Improving Regulation and Regulatory Review*

Executive Order (E.O.) 12866 provides that significant regulatory actions be submitted for review to the Office of Information and Regulatory Affairs, and OMB. E.O. 13771 provides that it is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with federal regulations. Toward that end, E.O. 13771 directs that for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process. In accordance with 16 U.S.C. 1373(d), the regulations proposed here are subject to 50 CFR 228.3, which provides that this proceeding will be governed by 5 U.S.C. 556 and 557 of the Administrative Procedure Act. Executive Order 12866 per Section 3(d) does not apply to regulations issued in accordance with the formal rulemaking procedures of 5 U.S.C. 556, 557, thus the regulatory action is not considered significant under E.O. 12866. Executive Order 13771 only applies to regulatory actions that are defined as significant under E.O. 12866. Therefore, this proceeding is exempt from review under E.O. 12866 and E.O. 13771.

Executive Order 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. Executive Order 13563 emphasizes that regulations must be based on the best available science and that the rulemaking process must allow for public participation. We have developed this rule in a manner consistent with these requirements.

### *Executive Order 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 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 DEIS and in more recent analyses (Ylitalo *et al.*, 2018) and communicated those findings to the Makah Indian tribe.

#### *Executive Order 13132—Federalism*

Executive Order 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 policymaking 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 Executive Order. We do not foresee that the rule would affect significantly the distribution of power and responsibilities among the various levels of government or limit the policymaking discretion of the States.

#### *Executive Order 13175—Consultation and Coordination With Indian Tribal Governments*

Executive Order 13175, the American Indian and Alaska Native Policy of the U.S. Department of Commerce (March 30, 1995), and the Tribal Consultation and Coordination Policy of the U.S. Department of Commerce (May 21, 2013) outline the responsibilities of NMFS in matters affecting tribal interests. These directives require that NMFS have an accountable process to ensure meaningful and timely input by tribal officials in developing policies that have tribal implications. Executive Order 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.

We developed these proposed regulations in response to the Makah Indian Tribe's request on February 14, 2005 for a waiver of the MMPA's take moratorium. Consistent with the Executive Order directives we consulted with the Makah Indian Tribe in developing the proposed regulations. The Makah Indian Tribe and members of other tribes submitted comments in response to the DEIS; we will provide responses to those comments at the hearing for this matter.

#### *Consultation With State and Local Government Agencies*

In keeping with the intent of the Administration and Congress to provide continuing and meaningful dialogue on issues of mutual state and federal interest, NMFS shared the release of the DEIS with 26 state and local government agencies and various elected officials and governmental committees.

#### References Cited

A complete list of all references cited in this rulemaking is available on our website and upon request from the NMFS office in Portland, Oregon (see ADDRESSES).

#### List of Subjects in 50 CFR Part 216

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

Dated: March 27, 2019.

**Barry A. Thom,**

*Regional Administrator, West Coast Region,  
National Marine Fisheries Service.*

For the reasons set out in the preamble, 50 CFR part 216 is proposed to be 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 Take authorizations.

216.114 Accounting and identification of gray whales.

216.115 Prohibited acts.

216.116 Applications for hunt permits.

216.117 Requirements for monitoring, reporting, and recordkeeping.

216.118 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 MMPA take moratorium pursuant to 16 U.S.C. 1371(a)(3).

#### **§ 216.111 Scope.**

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

#### **§ 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 these regulations 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*).

*Even-year hunt* means a hunting season spanning six consecutive months



from December 1 in an odd-numbered year to May 31 in the following even-numbered year.

*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(a), or to attempt any such act, but does not include hunting approaches, training approaches, or training harpoon throws. A “hunt” 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 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; and are significantly altered from their natural form and which 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 PCFG gray whales is the lower 20th percentile of the PCFG population estimate;

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

*Odd-year hunt* means a hunting season spanning four consecutive months from July 1 to October 31 in an odd-numbered year.

*Pacific Coast Feeding Group (PCFG) gray whale* or *PCFG whale* means an ENP gray whale photo-identified during two 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.

*Strike* or *struck* means to cause a harpoon or other device to penetrate a gray whale's skin or an instance in which a gray whale's skin is penetrated by a harpoon or other device while hunting.

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

*Training approach* means to cause, in any manner, a training vessel to be within 100 yards 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.

*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.

#### § 216.113 Take authorizations.

(a) 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.

(1) Hunt permit duration. The duration of the initial hunt permit may not exceed three years from its effective date, and thereafter the duration of a hunt permit may not exceed five years.

(2) Hunting seasons. Even-year hunts and hunting approaches will only be authorized from December 1 of an odd-numbered year through May 31 of the following even-numbered year. Odd-year hunts and hunting approaches will only be authorized from July 1 through October 31 in an odd-numbered year.

(3) Training period. Hunt permits may authorize training approaches in any month and training harpoon throws in any month, except as provided in § 216.113(a)(4)(ii).

(4) Limits on the number of gray whales approached, subjected to unsuccessful strike attempts, struck, struck and lost, and landed.

(i) Approaches. 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.

(ii) Unsuccessful strike attempts and training harpoon throws. A hunt permit may authorize no more than 18 unsuccessful strike attempts during even-year hunts and no more than 12 unsuccessful strike attempts during odd-year hunts. Training harpoon throws may occur at any time during

even-numbered years and between July 1 and October 31 in odd-numbered years. Each training harpoon throw will count against the unsuccessful strike attempt limit in effect during the calendar year that the throw is made.

(iii) Strikes. A hunt permit may authorize no more than three strikes in an even-year hunt and no more than two strikes in an odd-year hunt. In an even-year hunt, no more than one strike may be authorized within the 24-hour period commencing at the time of strike. The Regional Administrator may authorize the full number of strikes in the initial hunt permit and will adjust strikes downward in subsequent permits if necessary to ensure that strikes on PCFG whales do not exceed 16 over the waiver period, of which no more than 8 strikes may be on PCFG females.

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

(v) Landings. A hunt permit may authorize no more than three gray whales to be landed in an even-year hunt and no more than one gray whale to be landed in an odd-year hunt; the number of 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 U.S. share of the catch limit established by the International Whaling Commission.

(vi) PCFG whales. 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 § 216.114(a)(1) of this subpart, that either of the following conditions applies:

(A) 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

(B) 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.

(vii) 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 are 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.

(5) 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.

(6) Hunt permit terms and conditions. Each hunt permit will specify:

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

(ii) The limits established under paragraph (a)(4) of this section;

(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 § 216.115(a)(7), 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 Sanctuary Act;

(iv) 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 or training approaches, or training harpoon throws;

(v) 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;

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

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

(7) Required determinations. 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 these regulations;

(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 § 216.114(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; and

(vii) The Makah Indian Tribe has obtained any relevant incidental take authorization for other marine mammals.

(viii) 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 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.

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

(1) *Edible products of ENP gray whales*—(i) 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. Within the Tribe's reservation boundaries, enrolled members of the Makah Indian Tribe may share edible ENP gray whale products with any person. Outside the Makah Indian Tribe's reservation boundaries, enrolled members of the Makah Indian Tribe may share edible ENP gray whale products with any person attending a tribal or intertribal gathering sanctioned by the Makah Tribal Council, so long as there is not more than two pounds of such edible product per person attending the gathering.

(ii) 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 and consume edible gray whale products 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 § 216.113(b)(2)(iii), 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 § 216.113(b)(2)(iii) 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 § 216.113(b)(2)(iii), 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.

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

#### **§ 216.114 Accounting and identification of gray whales.**

(a) Notifications—(1) Thirty days prior to the beginning of a hunting season specified in § 216.113(a)(2), 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(a)(4)(vi) and the number of strikes made on PCFG whales as described under § 216.113(a)(4)(iii).

(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 and January 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 subsection § 216.114(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.

(b) Identification and accounting of gray whales—(1) Even-year hunts. Based on the best available evidence, the Regional Administrator will determine in writing whether a gray whale that is struck in an even-year 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(a)(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(a)(2) will be applied.

(2) Odd-year hunts. Based on available evidence, the Regional Administrator will determine in writing whether a gray whale that is struck in an odd-year 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(a)(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(a)(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 these regulations and will be counted against the U.S. share of any applicable catch limit established by the International Whaling Commission.

#### **§ 216.115 Prohibited acts.**

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

(1) Take any gray whale except as authorized by a hunt permit issued under § 216.113(a) or by any other provision of part 216.

(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 § 216.117(a)(6)(i).

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

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

(7) Hunt outside the geographic area identified in § 216.113(a)(6)(iii), unless in pursuit of a gray whale that has already been struck within that area.

(8) 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(a)(4)(i) through (v).

(9) Hunt if the limit on PCFG whales or PCFG females that may be struck is less than one as a result of accounting per § 216.114(b)(1) through (3).

(10) Hunt after the Makah Indian Tribe has been notified in writing by the Regional Administrator under § 216.114(a)(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 § 216.113(a)(4)(vi).

(11) Hunt after a gray whale has been landed and before the Makah Indian Tribe has received notification from the Regional Administrator in accordance with § 216.114(b).

(12) Sell, offer for sale, purchase, or export any gray whale products, except Makah Indian handicrafts that have been marked and certificated per § 216.113(b)(2)(iii).

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

(14) 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 with persons attending a tribal or intertribal gathering sanctioned by the Makah Tribal Council, so long as there is not more than two pounds of edible product per person attending the gathering per § 216.113(b)(1)(i).

(15) 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 § 216.113(b)(2)(iii).

(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.

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

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

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

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

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

(21) 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.

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

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

(2) Possess or transport edible gray whale products except products shared by an enrolled Makah Indian tribal member and possessed or transported within the Makah Indian Tribe's reservation boundaries, or possessed outside the Makah Indian Tribe's reservation boundaries as part of a tribal or intertribal gathering sanctioned by the Makah Tribal Council.

(3) Purchase, sell, export, or offer to purchase, sell, or export nonedible gray whale products except Makah Indian handicrafts that are marked and certificated per § 216.113(b)(2)(iii).

(4) Outside the Makah Indian Tribe's reservation boundaries, possess, transport, gift, or barter nonedible gray whale products except Makah Indian handicrafts that are marked and certificated per § 216.113(b)(2)(iii).

(5) Within the Makah Indian Tribe's reservation boundaries, possess, transport, gift, or barter any nonedible gray whale product other than a Makah Indian handicraft that is marked and certificated per § 216.113(b)(2)(iii), 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.

#### **§ 216.116 Applications for hunt permits.**

(a) 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:

(1) The maximum number of gray whales to be subjected to hunting or training approaches, struck, landed, and subjected to unsuccessful strike attempts;

(2) A demonstration that the proposed method of taking is humane;

(3) A demonstration that the proposed taking is consistent with these regulations;

(4) A copy of the currently enacted Makah Indian tribal ordinance governing whaling by Makah Indian tribal members; and

(5) 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.

(b) 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 § 216.116(a) and the following information and statements:

(1) A description of how the Makah Indian Tribe has complied with the requirements of these regulations and previously issued hunt permits;

(2) 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

(3) 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.

(c) 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.

(d) After receipt of a complete application, and the preparation of any 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.

#### **§ 216.117 Requirements for monitoring, reporting, and recordkeeping.**

(a) In addition to the reporting provisions described in 50 CFR 230.8, 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 will 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 § 216.117(a)(1) and (2) 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, the Makah Indian Tribe must provide NMFS with 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. After striking a gray whale, the Makah Indian Tribe must submit an incident report within 48 hours to NMFS. A report may address multiple gray whales so long as the Tribe submits the report within 48 hours of the first gray whale being struck. For any gray whale(s) struck and lost, the report must contain the information in paragraph (a)(1) of this section and for any gray whale(s) struck and landed the report must contain the information in paragraph (a)(2) of this section:

(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 the Makah Indian Tribe must submit a report to NMFS 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 § 216.117(a)(6)(ii)(A).

(B) Struck and landed gray whale(s): The report must contain the information specified in § 216.117(a)(6)(ii)(B).

(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, the Makah Indian Tribe must submit a report to NMFS 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, the Makah Indian Tribe must submit a report to NMFS which 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) 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 § 216.117(a)(6)(ii) documenting that 8 gray whales have been struck, the Regional Administrator will evaluate:

(1) The photo-identification and notification requirements described in § 216.113(a)(7)(iv) and § 216.114. 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)(7)(i). 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.

**§ 216.118 Expiration and amendment.**

(a) These regulations will expire 10 years after the effective date of the initial hunt permit specified under § 216.113(a)(1), unless extended.

(b) These regulations may be periodically reviewed and modified as provided in 16 U.S.C. 1373(e).

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