



**RECORD OF DECISION**  
**for the**  
**FINAL ENVIRONMENTAL IMPACT STATEMENT**  
**on the**  
**MAKAH TRIBE REQUEST TO HUNT GRAY WHALES**  
**National Marine Fisheries Service**

**Introduction**

As required by the National Environmental Policy Act (NEPA), this record of decision (ROD) documents the decision made by the National Oceanic and Atmospheric Administration’s (NOAA’s), National Marine Fisheries Service (NMFS) to issue a waiver of the Marine Mammal Protection Act’s (MMPA’s) take prohibitions, to allow the Makah Indian Tribe of Neah Bay, Washington (Makah Tribe or Tribe) to conduct a limited hunt of Eastern North Pacific (ENP) gray whales (*Eschrichtius robustus*). NMFS prepared a Final Environmental Impact Statement (FEIS), which was published on November 17, 2023, that analyzed seven alternatives described below (NMFS 2023a). NMFS has determined it is appropriate to waive the MMPA moratorium on take of ENP gray whales to allow the Makah Indian Tribe to conduct a limited ceremonial and subsistence hunt in the coastal portion of the Tribe’s usual and accustomed fishing grounds (U&A), off the coast of Washington State (Figure 1). NMFS is also promulgating regulations to govern the issuance of hunt permit(s) and the hunt itself. This ROD is based on, and incorporates by reference, the FEIS and all other decision and analytical documents prepared for this action.

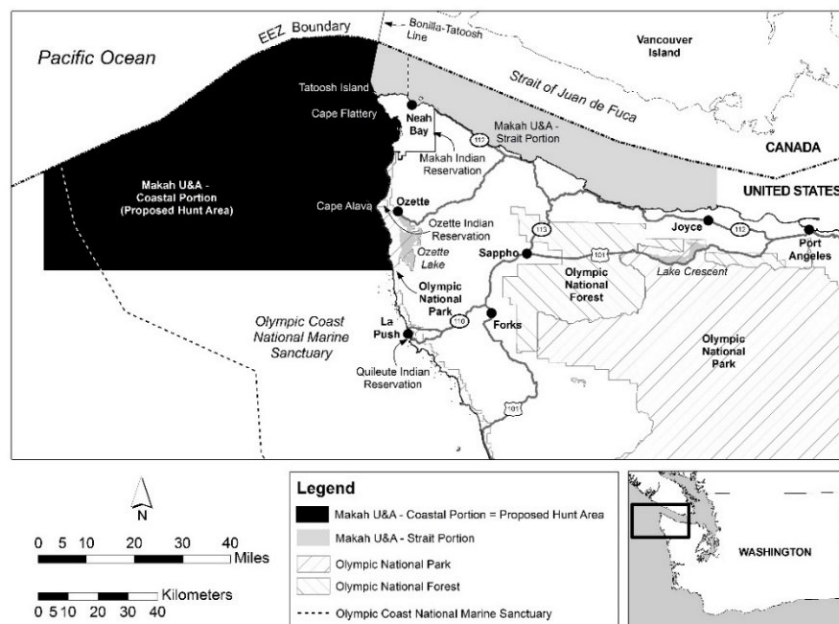


Figure 1: Action Area



## Background

In 2005, the Makah Tribe requested that NMFS waive the moratorium established by the MMPA on taking marine mammals and promulgate regulations to allow a limited ceremonial and subsistence hunt for ENP gray whales in waters off the northwest coast of Washington State. The Tribe also requested that NMFS authorize the making and sale of handicraft items from whales taken during tribal whaling. The Makah Tribe's whaling tradition is older than the United States by well over 1,000 years, and the Treaty of Neah Bay of 1855 secures the Makah's whaling tradition. In the Treaty, the Makah relinquished significant land holdings to the United States but expressly reserved the right to whale. However, in accordance with *Anderson v. Evans*, 371 F.3d 475 (9th Cir. 2004), the Makah Tribe must obtain a waiver from the take prohibitions to exercise that right.

### *Gray whales*

NMFS recognizes two stocks of gray whales in the North Pacific: (1) the ENP stock and (2) a western North Pacific (WNP) stock (Carretta *et al.* 2023). The ENP gray whale population migrates along the west coast of North America between Mexico and Alaska, and some whales are present year-round in the action area. Because of a suite of international and national protections, the ENP population recovered and, in 1994 were delisted under the U.S. Endangered Species Act (ESA) (59 FR 10 31094, June 16, 1994). The current estimated population size is 19,260 animals (Eguchi *et al.* 2024). Of those 19,260 animals, 212 are considered Pacific Coast Feeding Group (PCFG) whales, a feeding aggregation within the ENP stock (Harris *et al.* 2022). ENP gray whales have experienced two significant Unusual Mortality Events (UMEs) over the past 25 years: (1) the 1999-2000 UME, and (2) the 2019-2023 UME. The team of scientists investigating the 2019-2023 UME determined the preliminary cause was due to localized ecosystem changes, which included both access to and the quality of prey, in sub-Arctic and Arctic feeding areas leading to poor nutritional conditions of the whales, decreased birth rates, and, in several whales, death due to malnutrition. The UMEs caused significant reductions in the ENP population; however, it has remained abundant. The population rebounded after the prior declines, and we expect it will rebound similarly after the 2019-2023 UME. The most recent abundance estimate for the 2023/2024 season shows a 32.6 percent increase from the 2022/2023 season (Eguchi *et al.* 2024).

The distribution and migration patterns of gray whales in the western North Pacific are less clear. WNP gray whales were thought to all migrate south in autumn to wintering areas off Asia, but recent information suggests that some animals migrate east, to coastal waters off the West Coast of the United States and Baja Mexico during winter. WNP gray whales are listed as endangered under the ESA. In 2016, there were an estimated 290 animals (excluding calves) in the population (Cooke *et al.* 2017; Carretta *et al.* 2023)

## Legal Framework

Subsection 1.2 of the FEIS includes a detailed description of the legal framework for this action. Here, we include brief summaries of the MMPA, the Whaling Convention Act (WCA), and NEPA.

### *Marine Mammal Protection Act*

The MMPA of 1972 established a national policy to prevent marine mammal species and population stocks from declining beyond the point where they ceased to be significant functioning elements of the ecosystems of which they are a part and established a moratorium on the taking and importing of marine mammals. The moratorium contains several exceptions. One of which authorizes NMFS to waive the moratorium from time to time and adopt implementing regulations governing the take of marine mammals. When prescribing regulations to implement a waiver, NMFS must ensure that the taking will be consistent with the purposes and policies of the MMPA and will not disadvantage the stock subject to take pursuant to the waiver. NMFS must also fully consider all factors that may affect the extent of the authorized take, including existing and future levels of marine mammal species and population stocks; existing international treaty and agreement obligations of the United States; the marine ecosystem and related environmental considerations; the conservation, development, and utilization of fishery resources; and the economic and technological feasibility of implementation.

### *Whaling Convention Act*

Congress enacted the WCA in 1949 to implement the obligations of the United States under the International Convention for the Regulation of Whaling (ICRW). The ICRW is an international treaty signed on December 2, 1946, to “provide for the proper conservation of whale stocks and thus make possible the orderly development of the whaling industry” (ICRW, Dec. 2, 1946, 161 United Nations Treaty Series 72). The ICRW established the International Whaling Commission (IWC) whose charge is to adopt regulations for the conservation and utilization of whale resources. The IWC governs aboriginal subsistence whaling by setting catch limits for certain whale stocks after considering requests from contracting governments and/or after consulting with the Scientific Committee, consisting of approximately 200 of the world’s leading whale biologists. Contracting governments request catch limits on behalf of aborigines in their respective nations.

The IWC set the ENP gray whale catch limit in response to a joint request from the United States, the Russian Federation, Denmark on behalf of Greenland, and St. Vincent and the Grenadines. The seven-year (2019-2025) ENP gray whale catch limit is allocated through a bilateral agreement between the United States and the Russian Federation as five strikes per year for the Makah Tribe and 135 strikes per year for the Chukotka Natives.

### *National Environmental Policy Act*

Congress enacted NEPA in 1970 to create and carry out a national policy designed to encourage harmony between humankind and the environment. While NEPA neither compels particular results nor imposes substantive environmental duties upon federal agencies it does require that they follow certain procedures when making decisions about any proposed major federal action that may affect the environment. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 333 (1989). These procedures insure that an agency has the best possible information before it to make an informed decision regarding the environmental effects of any proposed action. This FEIS applies the Council on Environmental Quality’s (CEQ) 1978 NEPA regulations because review of the Makah Tribe’s waiver request began on May 21, 2012 (77 FR 29967), which

preceded the effective date of CEQ's 2020 NEPA regulations (September 14, 2020). *See* 40 C.F.R. § 1506.13.

Following the Tribe's request in 2005, NMFS published a notice of intent to conduct scoping and prepare an Environmental Impact Statement (EIS) (71 FR 9781, February 27, 2006). Scoping is an open process that agencies must conduct under NEPA to determine the range and significance of the issues to be analyzed in depth in an EIS. Subsequent to releasing a Draft Environmental Impact Statement (DEIS) in May 2008 (73 FR 26375, May 9, 2008), NMFS terminated the 2008 DEIS, announced its intent to prepare a new DEIS, and opened another public scoping period from May 21 through August 13, 2012 (77 FR 29967, May 21, 2012). NMFS received 11 comment letters. On March 13, 2015, NMFS published the new Draft Environmental Impact Statement on the Makah Tribe's Request to Hunt Gray Whales (2015 DEIS), analyzing several alternatives for the proposed hunt, and accepted public comments through July 31, 2015 (80 FR 13373). The 2015 DEIS considered a new set of alternatives from those analyzed in the 2015 DEIS. NMFS received more than 57,000 comments over the course of the 140-day comment period.

### **Waiver Process: 2019-Present**

On April 5, 2019, NMFS published a proposed waiver and regulations for a hunt. Waiving the moratorium of take under the MMPA and adopting implementing regulations requires formal rulemaking. Accordingly, on November 14, 2019, Administrative Law Judge (ALJ) James J. Jordan presided over a six-day hearing on the proposed waiver and implementing regulations. Six parties actively participated in the hearing: The Marine Mammal Commission, Peninsula Citizens for the Protection of Whales, Animal Welfare Institute, Sea Shepherd Legal, the Makah Tribe, and the NMFS West Coast Region (WCR).

Following the hearing, the public had the opportunity to submit comments during a 45-day period to the tribunal, and the parties were entitled to submit post-hearing briefs, proposed findings of fact, and conclusions of law. New circumstances and information presented at the 2019 hearing before the tribunal led NMFS to conduct a second internal scoping process in January 2020 through which NMFS determined that supplementing the 2015 DEIS was appropriate. During the public comment period following the hearing, NMFS announced its intention to draft a Supplemental DEIS (SDEIS) (85 FR 11347, February 27, 2020). Public comments received on the 2015 DEIS and consultation with the Makah Tribe following its publication also led NMFS to formulate a seventh, "composite" alternative using various elements of the five action alternatives in the 2015 DEIS. Although the formulation of this alternative itself did not warrant the development of the SDEIS, NMFS determined during scoping that it may be beneficial to include the composite alternative (Alternative 7 in the SDEIS and FEIS) as well.

On September 23, 2021, the tribunal issued a Recommended Decision and concluded "the best scientific evidence available supports a waiver of the MMPA's moratorium of the take of marine mammals to allow the Makah Tribe to engage in a limited hunt for ENP gray whales." It recommended that the NMFS grant the waiver with some changes to the proposed regulations.

On September 29, 2021, NMFS announced a public comment period on the tribunal's Recommended Decision. NMFS received 186 comments during the 45-day comment period.

NMFS issued a SDEIS on July 1, 2022 and opened a 45-day public comment period (87 FR 39517). This comment period was extended through October 14, 2022 and reopened from October 28, 2022 through November 3, 2022. NMFS received 47 comments on the SDEIS. After carefully reviewing the comments received on the DEIS and SDEIS, NMFS updated information and analysis in the FEIS to include the most recent information available. The FEIS, analyzing a no action alternative and six action alternatives, was published on November 17, 2023. In early 2024, NMFS reviewed a new paper (Bierlich et al. 2023) on gray whale morphology and an expanded time series of wind speed and wave height data (which are used to predict the number of scouting, training, and hunting days). NMFS concluded that the new information is not significant information that would have a bearing on the proposed action or its impacts (Memorandum from Trevor Spradlin, NMFS, to the Record, March 22, 2024).

Subsections 1.2.1 and 1.5 of the FEIS describe the NEPA process in detail. Appendices C through F in the FEIS include the responses to public comments. The NEPA documents and the Recommended Decision can be found at <https://www.fisheries.noaa.gov/west-coast/marine-mammal-protection/makah-tribal-whale-hunt-chronology>.

### **Decision to be Made**

The decision on whether to waive the MMPA moratorium on the take of ENP gray whales and promulgate implementing regulations or remand this case to the tribunal is informed by a FEIS published in the *Federal Register* on November 17, 2023, and documented and explained in this ROD. This ROD includes (1) a statement of the decision made, (2) a description of the proposed action, (3) a synopsis of alternatives considered and the factors evaluated in selecting an alternative, (4) a statement that all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted, (5) a summary of comments received on the FEIS, and (5) a discussion of permits and other authorizations. Included in the synopses of alternatives is identification of the selected alternative and the environmentally preferred alternative.

This ROD is issued pursuant to NEPA (42 U.S.C. §§ 4321 et seq.), CEQ NEPA regulations at 40 C.F.R Parts 1500-1508), and NOAA's procedures for implementing NEPA set forth in NOAA Administrative Order 216-6A and its Companion Manual.

### **Alternatives Considered in the FEIS**

The FEIS describes and analyzes a range of alternatives informed by the Makah Tribe's proposal, scoping input, published data, the record from the ALJ hearing, and input from commenters. In the FEIS, NMFS considered the No-action Alternative and six action alternatives. The six action alternatives would allow the Makah Tribe to conduct limited ceremonial and subsistence hunting of ENP gray whales.

- **Alternative 2** reflects the Tribe's proposal.

- **Alternative 3 (Offshore Hunt)** differs from the Tribe’s proposal in the area where hunting would be allowed and in the approach to managing impacts to the PCFG.
- **Alternatives 4 (Summer/Fall Hunt) and 5 (Split-Season Hunt)** have a different hunting season than the Tribe proposed, with the intention of avoiding impacts to WNP whales and also have a different approach to managing impacts to the PCFG.
- **Alternative 6 (Different Limits on Strikes and PCFG Mortality, and Limited Duration of Regulations and Permits)** would have the same time and area as the Tribe’s proposal, but a lower limit on strikes, a different approach to managing impacts to the PCFG, regulations that terminate in 10 years, and a limit of 3 years for permits.
- **Alternative 7 (Composite; Preferred)** combines various elements of the other five action alternatives to meet the goals of limiting the likelihood that tribal hunters would strike or otherwise harm a WNP gray whale and of ensuring that hunting does not reduce PCFG abundance below recent stable levels.

All action alternatives would include the following elements:

- MMPA waiver, regulations, and any necessary permits;
- WCA quota publication and execution of a cooperative agreement;
- Hunting of ENP gray whales only (no other marine mammal would be targeted);
- No hunting of a whale calf or whale accompanied by a calf;
- Restrictions on ENP gray whale product use and distribution;
- Public safety measures and enforcement;
- Training, certification, and permit process for tribal whalers and whaling captain;
- Makah Fisheries Management and NMFS hunt observers;
- Tribal enforcement of tribal whaling ordinance, NMFS enforcement of federal regulations;
- Monitoring of the hunt with adjustments for adaptive management;
- Ongoing gray whale management and monitoring at the national and international levels;
- Method of hunt

The alternatives differ in timing and area of the hunt, in approaches to managing impacts to WNP and PCFG whales, limits on strikes and approaches, and limits on the permit and waiver periods. The primary differences between the alternatives are summarized in Table 1.

NMFS also considered but eliminated from detailed analysis seven other alternatives. These consist of:

- Non-lethal hunt.
- Subsistence use of drift whales.
- Set a mortality limit for PCFG whales relying on other MMPA provisions or management goals.
- Hunt other marine mammal species traditionally hunted by the Tribe.
- Change the hunt location.
- Employ different hunting methods.
- Alternative compensation to the Makah Tribe.

In addition, NMFS did not carry forward several alternatives from the 2008 DEIS. These included alternatives that would

- Require the Tribe to hunt outside 200 yards of any rocks or islands.
- Authorize hunting in the Strait of Juan de Fuca.
- Authorize hunting year-round.
- Set lower limits than those proposed by the Tribe on whales struck, struck and lost, and harvested.

Table 1. Primary differences among the Alternatives.

| Whale Hunting Components   |        | Alternatives   |  |   |   |  |  |  |
|--|--------|----------------|--|---|---|--|--|--|
|  |        | 1<br>No-action | 2<br>Tribe's<br>Proposed Action  | 3<br>Offshore Hunt  | 4<br>Summer/Fall Hunt   | 5<br>Split Season<br>Hunt  | 6<br>Different Limits<br>on Strikes and<br>PCFG, and<br>Limited Duration<br>of Regulations and<br>Permits  | 7<br>Composite – Preferred   |
| Hunt timing  |        | None           | December 1 through<br>May 31   | Same as Alternative 2   | June 1 through<br>November 30   | December 1<br>through December<br>21; May 10<br>through May 31                               | Same as<br>Alternatives 2 and 3  | Summer/fall hunts and<br>hunting approaches will be<br>authorized from July 1<br>through October 31, and<br>winter/spring hunts and<br>hunting approaches will be<br>authorized from December 1<br>through May 31. Only one<br>hunt season may be<br>authorized in a calendar year;<br>however, the first month<br>(December) of a winter/spring<br>hunt would fall in the same<br>calendar year as a summer/fall<br>hunt. |
| Hunt area  |        | None           | U&A west of<br>Bonilla-Tatoosh<br>line; no whale may<br>be struck within 200<br>yards (183 m) of<br>Tatoosh Island or<br>White Rock during<br>the month of May | Same as Alternative<br>2, except at least 5<br>miles (8 km) from<br>shore | Same as Alternative 2,<br>except no whale may be<br>struck within 200 yards<br>(183 m) of Tatoosh<br>Island or White Rock<br>during any month | Same as<br>Alternative 2   | Same as<br>Alternatives 2 and 5  | U&A west of Bonilla-Tatoosh<br>Line, with other site and time<br>restrictions possible to protect<br>Olympic Coast National<br>Marine Sanctuary resources  |
| Maximum limit for<br>harvested, struck,<br>and struck and lost<br>whales | Annual | 0              | Up to 5 harvested, 7<br>struck, and 3 struck<br>and lost   | Up to 5 harvested, 6<br>struck, and 2 struck<br>and lost                  | Up to 5 harvested, 7<br>struck, and 3 struck and<br>lost; harvest, struck,<br>and struck and lost<br>limited by PCFG limit<br>(see below)     | Up to 5 harvested;<br>struck and struck<br>and lost limited by<br>PCFG limit (see<br>below)  | Up to 4 harvested (7<br>over 2 years); up to<br>4 struck (7 over 2<br>years); struck and<br>lost limited by<br>strike limit or PCFG<br>limit (see below) | In winter/spring hunts, up to 3<br>harvested, struck, or struck<br>and lost. In summer/fall hunts,<br>only 1 harvested and 2 struck<br>or struck and lost.   |
|  | 6-year | 0              | Up to 24 harvested,<br>42 struck, and 18<br>struck and lost  | Up to 24 harvested,<br>36 struck, and 12<br>struck and lost               | Up to 24 harvested, 42<br>struck, and 18 struck<br>and lost; harvest,<br>struck, and struck and<br>lost limited by PCFG<br>limit (see below)  | Up to 24<br>harvested; struck<br>and struck and lost<br>limited by PCFG<br>limit (see below) | Up to 21 harvested,<br>21 struck; struck<br>and lost limit<br>dictated by PCFG<br>limit (see below)  | Up to 12 harvested, and 15<br>struck or struck and lost  |



|   |         |     |  |   |  |  |   |  |
|---|---------|-----|--|---|--|--|---|--|
|   | 10-year | 0   | Up to 40 harvested, 70 struck, and 30 struck and lost  | Up to 40 harvested, 60 struck, and 20 struck and lost   | Up to 40 harvested, 70 struck, and 30 struck and lost; harvest, struck, and struck and lost limited by PCFG limit (see below)  | Up to 40 harvested; struck, and struck and lost limited by PCFG limit (see below)  | Up to 35 harvested, 35 struck; struck and lost limited by PCFG limit (see below)  | Up to 20 harvested, and 25 struck, or struck and lost  |
| ENP Population Abundance Threshold  |         | N/A | N/A  | N/A   | N/A  | N/A  | N/A   | The impacts of the Preferred Alternative are analyzed without an ENP population abundance threshold. However, three thresholds are considered as Sub-alternatives. Under the Sub-alternatives, hunting would cease if the abundance estimate (N) of the ENP gray whale stock dropped below: a) N=11,000, b) N=16,000, or c) N=18,000 |
| Additional limits on harvest or mortality of PCFG whales. Estimated limits are based on current conditions and could change based on updated information. The descriptions in the table are summaries. Please refer to the narrative for full details, and Subsection 3.4.2.1.3, for background on the potential biological removal (PBR) approach. |         | N/A | Tribe's bycatch proposal (apply PBR-based formula, with Rmax of 4% and Recovery Factor same as for ENP (1.0) and Nmin of OR-SVI) results in about 3.0 whales/year; struck but not landed do not count as PCFG; no carry-over of unused limit | Total mortality limit set at PBR (as reported in NMFS's stock assessment report); additional female mortality limit set based on proportion of females in PCFG (results in about 2.7 males and 1.6 females); all struck but not landed count as PCFG whales in proportion to presence of PCFG whales; no carry-over of unused limit | Mortality limit set to achieve or maintain 80% of carrying capacity (PBR-based formula with recovery factor of 0.35), minus other human-caused mortality (results in 1 whale); approach only known ENP males; all strikes count as PCFG; no carry-over of unused limit unless it's between 0.5 and 1.0 | Mortality limit set at 10% of PBR (results in about 1 whale/4 years); struck but not landed count as PCFG in proportion to presence of PCFG whales; carry-over of unused limit used to calculate hunt hiatus | Mortality limit set at PBR minus other human-caused mortality (results in about 2 whales/year); all struck but not landed count as PCFG in proportion to presence of PCFG whales; no carry-over of unused limit | Mortality limit set at 16 PCFG whales over 10 years, no more than 8 of which may be females. Hunting would be prohibited if the forecasted abundance of the PCFG falls below 192 whales, or the minimum abundance falls below 171 whales   |
| Waiver and permit duration and additional regulations   |         | N/A | Unlimited waiver period; permits for maximum of 5 years; no additional regulations   | Same as Alternative 2   | Same as Alternatives 2 and 3   | Same as Alternatives 2, 3, and 4   | Waiver period ends after 10 years; permits for maximum of 3 years   | Waiver period ends after 10 years; initial permit for maximum of 3 years followed by permits up to 5 years   |

## **Environmentally Preferable Alternative**

As required by CEQ's 1978 NEPA implementing regulations, NMFS shall identify the "alternative or alternatives which were considered to be environmentally preferable" (40 C.F.R. § 1505.2(b) (1978)). NMFS has determined that, overall, **Alternative 7** represents the environmentally preferable alternative when considering the balance of environmental effects that might accrue from the action of granting the waiver and implementing the associated regulations, while preserving and protecting cultural resources, honoring the Tribe's treaty right, and fulfilling the U.S. Government's Tribal Trust Responsibility. As described below, the final regulations include an alternative low abundance threshold for ENP gray whales below which hunting would cease; alternative provisions to the incidental take authorization requirements; and a process by which the Tribe can request an exemption to the regulations.

Alternative 7 in the FEIS is based on the proposed regulations published in 2019 (84 FR 13604, April 5, 2019), as modified by the tribunal's Recommended Decision. It limits the waiver period to 10 years in order to provide an opportunity for adaptive management and to insure that ceremonial and subsistence hunting by the Tribe does not result in unanticipated adverse effects. It also limits an initial hunt permit to no more than 3 years, with subsequent permits lasting no more than 5 years.

The hunt area is limited to the portion of the Makah Tribe's U&A west of the Bonilla-Tatoosh Line and may also incorporate additional site restrictions via the hunt permitting process to protect Olympic Coast National Marine Sanctuary resources. Alternative 7 includes an alternating hunt season scheme wherein winter/spring hunts would occur during the migration season (December through May) to reduce the risk to PCFG whales, and summer/fall hunts would occur during the feeding season (July through October) to reduce risk to the WNP stock. Only one hunt season may be authorized each year; however, the winter/spring hunts may start in the same calendar year as a summer/fall hunt. This would result in a 1-month gap (November) between the end of a summer/fall hunt and the start of a winter/spring hunt, and a 13-month gap between the end of a winter/spring hunt and the start of the next summer/fall hunt, and so on.

Alternative 7 also imposes strike and landing limits on ENP gray whales and further limits on PCFG gray whales, includes low abundance thresholds for ENP and PCFG gray whales below which hunting would cease, and prohibits hunting on a gray whale calf or a whale accompanied by a calf.

### *Final Agency Decision*

After a lengthy environmental review process, NMFS has made an affirmative decision to waive the MMPA moratorium on the take of ENP gray whales for 10 years in response to the Makah Tribe's request to resume a limited ceremonial and subsistence hunt. With the waiving of the MMPA moratorium, NMFS is issuing implementing regulations to govern the issuance of hunt permits and the hunt itself. Additional steps are necessary under the MMPA and the WCA before hunting resumes.

Alternative 7 considers a hunt with no low abundance threshold for ENP gray whales and three sub-alternatives that consider low abundance thresholds of 11,000, 16,000, and 18,000 individuals. Hunting would cease if the estimated abundance fell below the threshold. The final regulations also include a low abundance threshold. This threshold is not fixed but rather a requirement that the abundance must be equal to or above the lower bounds of the optimum

sustainable population (i.e., equivalent to the Maximum Net Productivity (MNPL)). An optimum sustainable population is defined by Section 3(9) of the MMPA, with respect to any population stock, as the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element. Identifying a low abundance threshold based on the optimum sustainable population allows for consideration of the best available information at the time of issuance of the hunt permit rather than on the information that is available at this time.

Alternative 7 also includes a requirement that, in order to receive a permit for a winter/spring hunt, the Tribe must obtain an Incidental Take Authorization (ITA) for WNP gray whales. In contrast, the final regulations require that the Regional Administrator may not authorize hunt activities for a winter/spring hunt unless: (1) the Tribe has obtained an ITA under the MMPA, or (2) the Regional Administrator, determines that the take of WNP gray whales is not anticipated. If the take of WNP gray whales is anticipated by NMFS, then NMFS must include measures in the hunt permit requiring an incidental take authorization during the winter/spring season. This change provides flexibility for NMFS to evaluate conditions in hunt plans, assess whether take of WNP gray whales is anticipated, and make a determination whether or not an ITA is needed. This provides the opportunity to consider best available information at the time a hunt permit is issued but does not affect the impacts identified under Alternative 7 in the FEIS, which assumes that all necessary authorizations for a winter/spring hunt will be obtained.

The final regulations also allow the Tribe to seek modification of the final regulations. As it is not known whether the Tribe would pursue any modifications, they are not assessed through this NEPA review.

The additional steps remaining before a hunt could occur include steps under the Whaling Convention Act and under the MMPA. Under the MMPA, the Tribe applying for a hunt permit. In determining whether to issue a hunt permit, NMFS will determine what, if any, additional NEPA process may be needed.

### **Rationale for and factors considered in selecting the Preferred Alternative**

CEQ NEPA regulations require agencies to not only state the outcome of the decisions but also to discuss how the decision was affected by the preferences among alternatives and to identify and discuss all factors that led to the decision (40 C.F.R. § 1505.2(b) (1978)). In making a decision regarding granting the waiver and issuing implementing regulations, NMFS considered the tribunal's Recommended Decision, the analysis of alternatives contained within the FEIS, associated environmental impacts, the extent to which the impacts could be mitigated, and the agency's consideration of the objectives of the final action as they relate to the MMPA and the Tribe's treaty rights. NMFS has also considered the public, parties, and agency comments received during the NEPA, proposed rule, and tribunal comment periods as well as the hearing record.

In order to waive the moratorium for a stock of marine mammals, NMFS must be assured that the taking under the waiver is in accord with sound principles of resource protection and conservation as provided in the purposes and policies of the MMPA. The purposes and policies of the MMPA include maintaining marine mammals as a significant functioning element of the ecosystem of which they are a part, maintaining the health and stability of the marine ecosystem, and maintaining an optimal sustainable population (OSP), keeping in mind the carrying capacity

of the habitat. 16 U.S.C. §§ 1361(2), (6). When prescribing regulations to implement a waiver, NMFS must also ensure that the taking will be consistent with the purposes and policies of the MMPA and will not disadvantage the stock subject to take pursuant to the waiver. 16 U.S.C. § 1373(a).

NMFS's purpose for undertaking this action is to implement the laws and treaties that apply to the Tribe's request, including the Treaty of Neah Bay, the MMPA, and the WCA. NMFS's need for this action is to implement its federal trust responsibilities to the Makah Tribe with respect to the Tribe's reserved whaling rights under the Treaty of Neah Bay. In meeting this need, NMFS must also comply with the requirements of the MMPA and the WCA. Section 101(a)(3) of the MMPA requires, in part, NMFS (1) make its decision based on the "best scientific evidence available," (2) make its decision in consultation with the Marine Mammal Commission, (3) give "due regard to the distribution, abundance, breeding habits, and times and lines of migratory movements of such marine mammals," and (4) be "assured that the taking of such marine mammal is in accord with sound principles of resource protection and conservation as provided in the purposes and policies of this chapter." Under the WCA, NMFS must regulate whaling in accordance with the ICRW and IWC regulations.

Based on the best scientific information available, the issuance of the waiver and adoption of the final regulations will not affect the abundance, distribution, breeding habits, or migratory movements of ENP gray whales. While all of the action alternatives are likely to increase the risk of adverse impacts on individual whales, none are likely to increase the risk of adverse impacts on the ENP gray whale stock as a whole. The limited number of ENP whales taken in a tribal hunt would not prevent the population from achieving OSP or increase the risk that the population will fall below its OSP. The issuance of the waiver would not disadvantage the stock. In addition, as described in the FEIS, NMFS expects that any unused portion of the IWC quota may be transferred to the Russian Federation and that Chukotka Natives would harvest any unused Makah allocation.

Two management goals helped define the proposed regulations and the Preferred Alternative in the SDEIS and FEIS. These goals have been maintained through the final regulations. These goals include: (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. While uncommon, there are documented occurrences of endangered WNP whales transiting the hunt area, and hunters would not be able to visually distinguish WNP whales from ENP whales during a hunt. The alternating season under Alternative 7 is designed to minimize the risk of a WNP whale being struck or harmed over the duration of the waiver and to minimize impacts to PCFG whales. Other measures under Alternative 7 would also mitigate impacts to ensure that hunting does not reduce their abundance and distribution within the PCFG range. These include strike and harvest limits on PCFG whales and an abundance threshold whereby hunting would cease if the PCFG falls below the threshold.

Alternative 7 also supports a robust, adaptive management approach. Adaptive management is an intentional approach to decision-making that allows for adjustment in response to new information. The initial permit duration is limited to 3 years, subsequent permits are limited to 5 years, and the waiver is limited to 10 years. Limiting the hunt permit durations and waiver period provides an opportunity for adaptive management to ensure that the limited hunt by the Tribe does not result in unanticipated adverse effects. The FEIS (see Subsection 4.1.7.6) notes that the low abundance thresholds considered in Alternative 7's sub-alternatives do not represent an

adaptive management approach that would account for current environmental conditions and the stock status relative to carrying capacity. The ENP low abundance threshold included in final regulations is based on MNPL, which allows for consideration of the best available science at permit issuance and helps insure that no hunting occurs if the population falls below its OSP. This allows for consideration of current conditions and stock status. The reporting and monitoring requirements implemented in the final regulations also provide for review of the action and adaptive management.

NMFS also considered its obligations under the following environmental statutes:

*Endangered Species Act (ESA)*: NMFS Office of Protected Resources concluded consultation under Section 7 of the ESA with U.S. Fish and Wildlife Service and NMFS WCR on March 15, 2023 and November 8, 2023, respectively. These ESA consultations concluded that the proposed action may affect but are not likely to adversely affect any ESA-listed species, including WNP gray whales, or designated critical habitat.

*Magnuson-Stevens Fishery Conservation and Management Act (MSA)*: NMFS WCR reviewed the proposed action for potential effects on Essential Fish Habitat (EFH) pursuant to section 305(b) of the MSA. NMFS WCR concluded that the action would not adversely affect EFH and consultation under MSA was not required.

*Clean Water Act*: NMFS shared the 2015 DEIS with Washington State Department of Ecology (Ecology) for its review under the Clean Water Act.

*Coastal Zone Management Act (CZMA)*: NMFS consulted with Ecology under the CZMA. Ecology concurred with NMFS's determination that the proposed action is consistent with Washington's Coastal Zone Management Program.

*National Marine Sanctuary Act*: NMFS consulted with NOAA's National Ocean Service Olympic Coast National Marine Sanctuary on the proposed action.

NMFS is assured that the taking authorized through this waiver 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). NMFS believes that Alternative 7 (which is based on the tribunal's Recommended Decision) with the minor modifications described above (e.g., a low abundance threshold pegged to OSP, ITA provisions) offers the best option for achieving the purpose and need of the action, is consistent with applicable law, and represents the environmentally preferred alternative.

### **Mitigation measures and monitoring**

CEQ NEPA regulations require that agencies identify in the ROD whether all practical means to avoid or minimize environmental harm from the alternative selected have been adopted, and if not, why. The regulations further state that a monitoring and enforcement program shall be adopted and summarized where applicable for any mitigation. Mitigation measures are the practical means to avoid, minimize, and reduce impacts, and to compensate for unavoidable impacts.

In accordance with 40 C.F.R. § 1505.2(c) (1978), NMFS has adopted all practical means to avoid or minimize environmental harm from the alternative selected. With the implementation of specific management measures, no significant environmental harm is expected to result from granting the waiver. These specific management measures include:

#### *Mitigation*

- Alternating hunt season to minimize impacts to PCFG and WNP gray whales.
- Approach, strike, and harvest limits on ENP whales.
- Additional harvest limits on PCFG whales.
- Measures to stop hunt activities if the ENP or the PCFG populations fall below low abundance thresholds.
- Measures to stop hunt activities if a WNP gray whale is killed.
- Limits on permit duration and waiver period to provide for adaptive management.
- Certification requirements for hunt participants.

#### *Monitoring*

- Collection requirements for photos and genetic samples to be used in identification.
- Presence of observers during hunts.
- Maintenance of logbooks and reporting requirements. Reports include certification reports, incident reports, and hunt reports that will be publicly available.
- Periodic review by NMFS of the photo-identification catalogs to ensure their continued utility in identifying individuals.
- Periodic review by a team convened by NMFS of the humaneness of the authorized manner of hunting.

Violations of the regulations implementing the mitigation and monitoring requirements are subject to enforcement action under the MMPA.

#### **Remand to the Tribunal Not Justified**

The SDEIS and FEIS include new scientific evidence and analyses that were not available at the time of the hearing before the tribunal. The new information included (1) updated estimates of ENP abundance (Stewart and Weller 2021a; Eguchi *et al.* 2022a; Eguchi *et al.* 2023a); (2) updated estimates of PCFG abundance (Harris *et al.* 2022); (3) updated estimates of calf production (Stewart and Weller 2021b, Eguchi *et al.* 2022b, Eguchi *et al.* 2023b); (4) studies on factors affecting the population dynamics of the ENP gray whale stock (Perryman *et al.* 2021, Moore *et al.* 2022, Joyce *et al.* 2023, Stewart *et al.* 2023), (5) estimates of carrying capacity (Stewart *et al.* 2023); (6) information on stock structure (IWC 2021, NMFS 2023b, Weller *et al.* 2023); and (7) updated estimates of the impacts on WNP gray whales (Moore *et al.* 2023). Decision makers utilized the SDEIS and FEIS in assessing whether a remand to the tribunal was justified, but determined that was not warranted.

#### **Response to Public Comment on the FEIS**

During the 30-day cooling off period following the publication of the Notice of Availability for the FEIS, comments were received from two individuals. These individuals believe that there should not be a hunt. Similar comments were received on the DEIS and are addressed in NMFS's responses to those comments.

## Conclusion

After careful review of the proposed action, the associated analyses, the tribunal's Recommended Decision, and the party and public comments that NMFS received, NMFS is granting the waiver to the MMPA and adopting the measures to allow for a limited hunt of ENP gray whales. This final action honors the Makah Indian Tribe's treaty rights, upholds the U.S. Government's Tribal Trust Responsibilities, and implements the provisions of the MMPA and WCA. During the 10-year waiver period, the Tribe may apply for permits to conduct a limited ceremonial and subsistence hunt of ENP gray whales. NMFS has determined the preferred alternative will promote the national environmental policy as discussed in Section 101 of NEPA. NMFS also concludes that all practical and legally justifiable means to avoid, minimize, or compensate for environmental harm from the final action have been adopted.

NMFS has considered all applicable public comments received on NEPA analysis. Responses to all comments on the DEIS and SDEIS are available as an appendix to the FEIS. Further information concerning this Record of Decision may be obtained by contacting Ellen Keane, [ellen.keane@noaa.gov](mailto:ellen.keane@noaa.gov), NMFS Office of Protected Resources, 1315 East-West Highway 13th Floor Silver Spring, MD 20910, (301) 427-8400.

---

Janet Coit, Assistant Administrator

---

Date

## Literature Cited

- Carretta, J.V., E.M. Oleson, K.A. Forney, D.W. Weller, A.R. Lang, J. Baker, A.J. Orr, B. Hanson, J. Barlow, J.E. Moore, M. Wallen, and R.L. Brownell Jr. 2023. U.S. Pacific marine mammal stock assessments: 2022. U.S. Department of Commerce, NOAA Technical Memorandum NMFS-SWFSC-684. <https://doi.org/10.25923/5ysf-gt95>.
- Cooke, J.G., Weller, D.W., Bradford, A.L., Sychenko, O.A., Burdin, A.M., Lang, A.R. and Brownell, R.L. Jr. 2017. Population assessment update for Sakhalin gray whales, with reference to stock identity. Paper SC/67a/NH/11 presented to the International Whaling Commission.
- Cooke, J.G., Taylor, B.L. Reeves, R. and Brownell Jr., R.L. 2018. *Eschrichtius robustus* (western subpopulation). The IUCN Red List of Threatened Species 2018.
- Eguchi T., A.R. Lang, and D.W. Weller. 2022a. Abundance and migratory phenology of Eastern North Pacific gray whales 2021/2022. U.S. Department of Commerce, NOAA Technical Memorandum NMFS-SWFSC-668. Available at <https://swfsc-publications.fisheries.noaa.gov/publications/CR/2022/2022Eguchi2.pdf>.
- Eguchi T., A.R. Lang, and D.W. Weller. 2022b. Eastern North Pacific Gray Whale Calf Production 1994- 2022. U.S. Department of Commerce, NOAA Technical Memorandum NMFS-SWFSC-667. Available at <https://repository.library.noaa.gov/view/noaa/46436>.
- Eguchi, T., A.R. Lang, and D.W. Weller. 2023a. Abundance of eastern North Pacific gray whales 2022/2023. U.S. Department of Commerce, NOAA Technical Memorandum NMFS-SWFSC680. <https://doi.org/10.25923/n10e-bm23>.
- Eguchi, T., A.R. Lang, and D.W. Weller. 2023b. Eastern North Pacific gray whale calf production 1994- 2023. U.S. Department of Commerce, NOAA Technical Memorandum NMFS-SWFSC-685. <https://doi.org/10.25923/e9at-x936>.
- Eguchi, T., A.R. Lang, and D. W. Weller. 2024. Abundance of eastern North Pacific gray whales 2023/2024. U.S. Department of Commerce, NOAA Technical Memorandum NMFS-SWFSC-695. <https://doi.org/10.25923/n5qa-0y54>
- Harris, J., J. Calambokidis, A. Perez, J. Laake, and P.J. Mahoney. 2022. Recent trends in the abundance of seasonal gray whales (*Eschrichtius robustus*) in the Pacific Northwest, 1996-2020. AFSC Processed Rep. 2022-05, 22 p. Alaska Fish. Sci. Cent., NOAA, Natl. Mar. Fish. Serv., 7600 Sand Point Way NE, Seattle, WA 98115.
- International Whaling Commission (IWC). 2021. 2021 Report of the Scientific Committee. Cambridge, United Kingdom, June 31, 2021. IWC/SC/68C.
- Joyce, T.W., M.C. Ferguson, C.L. Berchok, D.L. Wright, J.L. Crance, E.K. Braen, T. Eguchi, W.L. Perryman, and D.W. Weller. 2023. The role of sea ice in the distribution, habitat use, and phenology of eastern North Pacific gray whales. *Marine Ecology Progress Series* 709: 141-158.
- Moore, S.E., J.T. Clarke, S.R. Okkonen, J.M. Grebmeier, C.L. Berchok, and K.M. Stafford. 2022. Changes in gray whale phenology and distribution related to prey variability and ocean biophysics in the northern Bering and eastern Chukchi seas. *Plos one* 17(4): e0265934.
- Moore, J.E., D.W. Weller, and A.R. Lang. 2023. Estimates of the probability of striking a western North Pacific gray whale during the proposed Makah hunt: 2023 update. U.S.



Department of Commerce, NOAA Technical Memorandum NMFS-SWFSC-682.  
<https://doi.org/10.25923/hxhv-sb94>.

NMFS [National Marine Fisheries Service]. 2023a. Final Environmental Impact Statement on the Makah Tribe Request to hunt gray whales. Available at  
<https://s3.amazonaws.com/media.fisheries.noaa.gov/2023-11/makah-waiver-feis-110923.pdf>.

NMFS [National Marine Fisheries Service]. 2023b. Gray Whale, Western North Pacific Distinct Population Segment (*Eschrichtius robustus*) 5-Year Review: Summary and Evaluation. Office of Protected Resources, Silver Spring, Maryland. Available at  
<https://www.fisheries.noaa.gov/resource/document/western-north-pacific-dps-gray-whale-5-year-review>. <https://doi.org/10.25923/7ggf9817>.

Perryman, W.L., T. Joyce, D.W. Weller, and J.W. Durban. 2021. Environmental factors influencing Eastern North Pacific gray whale calf production 1994–2016. *Marine Mammal Science*, 37(2): 448–62. <https://doi.org/10.1111/mms.12755>

Stewart, J.D. and D.W. Weller. 2021a. Abundance of Eastern North Pacific Gray Whales 2019/2020. U.S. Department of Commerce, NOAA Technical Memorandum, NMFS-SWFSC-639. 5 pp.

Stewart, J.D. and D.W. Weller. 2021b. Estimates of eastern North Pacific gray whale calf production 1994-2021. U.S. Department of Commerce, NOAA Technical Memorandum NMFS-SWFSC653. 8 pp.

Stewart J.D., T.W. Joyce, J.W. Durban, J. Calambokidis, D. Fauquier, H. Fearnbach, J.M. Grebmeier, M. Lynn, M. Manizza, W. Perryman, M.T. Tinker, D.W. Weller. 2023. Boom-bust cycles in gray whales associated with dynamic and changing Arctic conditions. *Science* 382:207–211. DOI: 10.1126/science.adi1847.

Weller, D. W., R. Anderson, B. Easley-Appleyard, G. Ferrara, A. R. Lang, J. Moore, P. E. Rosel, B. Taylor, and N. C. Young. 2023. Distinct population segment analysis of western North Pacific gray whales (*Eschrichtius robustus*) under the Endangered Species Act. U.S. Department of Commerce, NOAA Technical Memorandum NMFS-SWFSC-679.  
<https://doi.org/10.25923/7ggf9817>.