

November 13, 2021

Ms. Janet Coit, Assistant Administrator
National Marine Fisheries Service
National Oceanic and Atmospheric Administration
1315 East-West Highway
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Silver Spring, MD 20910

Re: Comments on the Recommended Decision on the Proposed Waiver and Regulations Governing the Taking of Eastern North Pacific Grey Whales by the Makah Tribe, Docket No. 19-NMFS-0001

On behalf of Animal Welfare Institute (“AWI”) and its constituents, we are submitting comments on the Recommended Decision on the Proposed Waiver and Regulations Governing the Taking of Eastern North Pacific (“ENP”) Grey Whales by the Makah Tribe (“Tribe”), issued by Administrative Law Judge (“ALJ”) George J. Jordan on September 23, 2021, pursuant to formal rulemaking proceedings under the Marine Mammal Protection Act (“MMPA” or “Act”), 16 U.S.C. §§ 1361-1407. *See* 86 Fed. Reg. 53,949 (Sept. 29, 2021). In the Recommended Decision, Judge Jordan recommends granting the Tribe’s waiver request and promulgating the proposed regulations with minor alterations.¹

As discussed below, as well as in AWI’s Post-Hearing Brief, NMFS’s proposed waiver and regulations eschew the conservative, precautionary approach that the MMPA demands and, instead, prioritize the interests of the Tribe over marine mammals. Although the Recommended Decision includes some modifications to the regulations that purport to address these concerns, the changes do not fully address the waiver’s serious legal and factual deficiencies. To the contrary, the Recommended Decision violates the MMPA’s substantive and procedural requirements in several crucial respects. Accordingly, the Recommended Decision is not supported by substantial evidence, and a decision to issue the waiver and regulations would be arbitrary, capricious, not in accordance with law, and in excess of statutory jurisdiction.

¹ In these comments, the term “proposed waiver and regulations” refers to the initial proposal by the National Marine Fisheries Service (“NMFS”) to waive the MMPA’s moratorium and issue regulations to allow the proposed hunt and training activities. The term “Recommended Decision” refers to the ALJ’s recommendation that the Assistant Administrator issue the proposed waiver and regulations with certain modifications. It is AWI’s understanding that the Assistant Administrator will be making her final decision based upon the Recommended Decision, including the modified regulations. *See* 50 C.F.R. § 228.21(a) (providing that “[t]he Assistant Administrator’s decision may affirm, modify, or set aside, in whole or in part, the recommended findings, conclusions and decision of the presiding officer”).

Nevertheless, AWI feels compelled to point out its strong organizational commitment and dedication to environmental justice and civil rights matters generally and Native sovereignty issues specifically. While AWI fully appreciates the Tribe’s unique cultural heritage and its interest in hunting gray whales, at this time AWI does not view such a hunt as consistent with the best available science regarding the various gray whale populations that could be affected by the proposed hunt, nor the precautionary principle embodied in the MMPA. Additionally, AWI does not view the hunt as currently proposed as consistent with the MMPA's strict waiver criteria, and has serious concerns regarding the implications of NMFS's novel interpretations of statutory terms. Accordingly, AWI submits these comments through a law- and science-focused lens that is in no way intended to demean or diminish the Tribe’s significant interests in engaging in important cultural practices.

I. Statutory Background

A. Marine Mammal Protection Act

In 1972, Congress passed the MMPA in response to the public’s growing concern over the continued survival of marine mammals. *See* H.R. REP. NO. 92-707, at 12 (1971) (Conf. Rep.), *as reprinted in* 1972 U.S.C.C.A.N. 4144, 4145 (“The Committee was impressed by the wide support for the principle of broader and more adequate protection for marine mammals.”). As broadly stated in the House Conference Report, Congress passed the MMPA “to prohibit the harassing, catching and killing of marine mammals by U.S. citizens or within the jurisdiction of the United States, unless taken under the authority of a permit issued by an agency of the Executive Branch.” H.R. REP. NO. 92-707, at 12, 1972 U.S.C.C.A.N. at 4144.

To accomplish this ambitious goal, the statute imposes a strict “moratorium” on the taking of marine mammals, with limited exceptions. *See* 16 U.S.C. § 1371(a) (imposing the moratorium); *id.* § 1372(a) (declaring “it unlawful—for any person subject to the jurisdiction of the United States or any vessel or other conveyance subject to the jurisdiction of the United States to take any marine mammal on the high seas”). The Act provides that to “take” a marine mammal means to “harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.” 16 U.S.C. § 1362(12); 50 C.F.R. § 216.3 (same). The statute defines “harassment” as:

[A]ny act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild . . . ; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering.

16 U.S.C. § 1362(18)(A), (C), (D).²

² “Population stock” or “stock” is the fundamental unit of management under the MMPA, and is defined to mean “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).

The MMPA prohibits the take of any marine mammal without authorization. *See* Tab 101, 57:24-25 (NMFS expert agreeing that “[u]nauthorized take is prohibited by the [MMPA]”); *accord* 16 U.S.C. § 1372(a) (declaring it “unlawful” for any person “to take any marine mammal in waters or on lands under the jurisdiction of the United States” without prior authorization issued pursuant to one of the MMPA’s statutory exceptions to the take moratorium).³ “Take” can be broadly categorized as “directed” take, or “incidental” take. *See* Tab 101, 57:6-7. Directed take occurs where “the activity is a purposeful interaction with the protected animal for a specific purpose that may result in take.” NMFS, *Understanding Permits and Authorizations for Protected Species* (June 24, 2017) [hereinafter NMFS, *Understanding Permits*], <https://www.fisheries.noaa.gov/insight/understanding-permits-and-authorizations-protected-species>; *accord* NMFS, *Recovery Plan for the Cook Inlet Beluga Whale* III-19 (Dec. 2016) [hereinafter NMFS, *Beluga Recovery Plan*] (“Directed take’ occurs when an activity is intentionally harassing or harming the animals, such as occurs when conducting research on those animals.”). In other words, directed take occurs where the interaction with the marine mammal was the purpose of the activity. *See* NMFS, *Understanding Permits, supra*.⁴ In contrast, “incidental” take occurs where “the activity is unrelated to the protected species, but the protected species may still be affected,” rendering the take “unintentional.” *Id.*; *accord* NMFS, *Beluga Recovery Plan, supra*, at III-19 (“Incidental take’ occurs when an activity results in harassment or harm to animals that were not the intended target of an activity, such as may occur when a construction activity introduces loud noises into the water.”).⁵ “Before any marine mammal may be taken” under any exception, NMFS “must first establish general limitations on the taking, and must issue a permit which would allow that taking.” H.R. REP. NO. 92-707, at 18, 1972 U.C.C.C.A.N. at 4145. “The effect of this set of requirements is to insist that the management of the animal populations be carried out with the interests of the animals as the *prime consideration*.” *Id.* (emphasis added).

When certain factors are satisfied, the MMPA permits NMFS to waive the moratorium to allow the directed “tak[e] . . . of any marine mammal . . . and to adopt suitable regulations [and] issue permits.” 16 U.S.C. § 1371(a)(3)(A). The decision to waive the moratorium must be made “on the basis of the best scientific evidence available and in consultation with the Marine Mammal Commission” and must demonstrate “due regard” for the waiver’s effects on the affected stock’s “distribution, abundance, breeding habits, and times and lines of migratory movements of such marine mammals.” *Id.* § 1371(a)(3)(A); *accord* Tab 101, 15:11-14. NMFS

³ Citations to the record in these comments will follow the Recommended Decision’s practice of citing to the corresponding Tab numbers in the official docket record, as listed in Appendix A to the Recommended Decision. Citations will also include page, exhibit, and/or paragraph numbers, where applicable.

⁴ Statutory exceptions to the take prohibition that authorize directed take include: “Special Exception” permits for public display, scientific research, and photography, 16 U.S.C. § 1371(a)(1); and permits issued pursuant to a waiver of the moratorium, *id.* § 1371(a)(3).

⁵ Statutory exceptions to the take prohibition that authorize incidental take include: permits to incidentally take marine mammals in the course of a specified activity (other than commercial fishing), 16 U.S.C. § 1371(a)(5); and permits and authorizations to incidentally take marine mammals in the course of commercial fishing operations, *id.* § 1371(a)(2).

must also be “assured that the taking . . . is in accord with sound principles of resource protection and conservation,” as articulated in the MMPA’s purposes and policies. 16 U.S.C. § 1371(a)(3)(A); Tab 101, 15:14-17. Specifically, NMFS must ensure that the taking will not cause marine mammal stocks to diminish to the point where they “cease to be a significant functioning element in the ecosystem of which they are a part”; cause marine mammal stocks to diminish below their optimum sustainable population” (“OSP”); or affect the health or stability of the marine ecosystem. 16 U.S.C. §§ 1361, 1371(a)(3)(A).⁶

When proposing to waive the take moratorium, NMFS must also propose regulations that are “necessary and appropriate to insure that such taking will not be to the disadvantage of those species and population stocks and will be consistent with the purposes and policies” of the MMPA, as quoted above. 16 U.S.C. § 1373(a). NMFS interprets “‘disadvantage’ in relation to the impact of take on the stock’s OSP.” *Regulations Governing the Taking of Marine Mammals*, 84 Fed. Reg. 13,604, 13,605 (Apr. 5, 2019). In prescribing regulations, NMFS must “give full consideration to all factors which may affect the extent to which such animals may be taken,” including “existing and future levels of marine mammal species and population stocks”; “existing international treaty and agreement obligations of the United States”; “the marine ecosystem and related environmental considerations”; “the conservation, development, and utilization of fishery resources”; and “the economic and technological feasibility of implementation.” 16 U.S.C. § 1373(b). Both the decision to waive the moratorium, and the regulations to govern the taking, must be made on the record after an opportunity for an agency hearing. *Id.* § 1373(d).

Significantly, the MMPA prohibits the issuance of a permit for the taking of any marine mammal that is part of a population that has been designated as “depleted” unless the permit is issued for “scientific research purposes, photography for educational or commercial purposes, [] enhancing the survival or recovery of a species or stock,” or to allow takings incidental to specified activities other than commercial fishing. *Id.* § 1371(a)(3)(B). A marine mammal stock is designated as “depleted” when NMFS “determines that [the] species or population stock is below its [OSP]” or when “a species or population stock is listed as an endangered species or threatened species under the Endangered Species Act [“ESA”].” *Id.* § 1362.

⁶ OSP is defined to mean, “with respect to any population stock, the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element.” 16 U.S.C. § 1362. OSP is further defined by regulation to mean “a population size which falls within a range from the population level of a given species or stock which is the largest supportable within the ecosystem to the population level that results in maximum net productivity.” 50 C.F.R. § 216.3. In other words, OSP is “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.” *Regulations Governing the Taking of Marine Mammals*, 84 Fed. Reg. 13,604, 13,605 (Apr. 5, 2019). “Maximum net productivity” is defined by regulation to mean “the greatest net annual increment in population numbers or biomass resulting from additions to the population due to reproduction and/or growth less losses due to natural mortality.” 50 C.F.R. § 216.3.

The MMPA also permits NMFS to issue permits to allow the “incidental, *but not intentional*,” taking of marine mammals while engaging in a specified activity. *Id.* § 1371(a)(5) (emphasis added). Although “incidental” is not defined in the statute, the term is defined by regulation to mean “an accidental taking.” 50 C.F.R. § 216.103. The regulation further explains that “[t]his does not mean that the taking is unexpected, but rather it includes those takings that are infrequent, unavoidable or accidental.” *Id.*

I. FACTUAL BACKGROUND

A. Gray Whale Populations In The North Pacific

1. *North Pacific Gray Whale Stocks*

“Population stock” (“stock”) is the fundamental conservation and management unit under the MMPA. *See* Tab 2I at 4. The Act defines “stock” to mean “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). The 2016 Guidelines for Assessing Marine Mammal Stocks (“2016 GAMMS”) further explain that a stock is “a management unit that identifies a demographically independent biological population.” Tab 2I at 4. “Demographic independence” is defined to mean that “the population dynamics of the affected group is more a consequence of births and deaths within the group (internal dynamics) rather than immigration or emigration (external dynamics).” *Id.* Put differently, to constitute a “stock” under the MMPA, population growth must be due more to “calves born into the group (i.e., internal recruitment)” than to juveniles or adults (who are not the progeny of females within the stock) joining the group (i.e., external recruitment). Tab 3C at 38.

NMFS recognizes two population stocks of North Pacific gray whales: the Eastern North Pacific (“ENP”) stock and the Western North Pacific (“WNP”) stock. Tab 3 ¶ 7 (Weller Decl.). The two stocks exhibit significant differences in both their mitochondrial and nuclear DNA, and are also recognized as different management units by the International Whaling Commission (“IWC”) and the International Union for Conservation of Nature. 84 Fed. Reg. at 13,606.

Domestically, the MMPA protects North Pacific gray whales from commercial whaling and other forms of harassment and injury. *See* MMPA, Pub. L. No. 92-522, 86 Stat. 1027 (1972). Following the enactment of the ESA in 1973, the entire North Pacific gray whale species (encompassing both the WNP and ENP gray whale stocks recognized today) was listed as endangered, and was thus granted the benefit of the heightened protections afforded species listed under the ESA. *See* Tab 3 ¶ 6 (Weller Decl.); *see also* 16 U.S.C. §§ 1531-1544 (ESA). As a result of the protection from commercial exploitation, the ENP gray whale stock of gray whales recovered, and in 1994 was delisted under the ESA. *See* 59 Fed. Reg. 21,094 (June 16, 1994) (delisting the ENP gray whale stock). Today, the ENP gray whale stock winters as far south as Baja California, Mexico, and migrates north to its summer feeding grounds as far north as the Chukchi and Beaufort Seas. 84 Fed. Reg. at 13,607. Prior to the 2019 UME, the ENP gray whale stock was estimated to consist of approximately 27,000 gray whales, and was considered to be within its OSP range. Tab 1 ¶ 19 (Yates Decl.); *see also* Tab 101, 16:23-24 (NMFS expert Chris Yates noting that prior to the UME, the ENP gray whale stock’s abundance estimate was 26,960

whales). The most recent abundance estimate for ENP gray whales was published in January 2021 and is based on data collected in 2019-2020. *See* Stewart and Weller, 2021, Abundance of Eastern North Pacific Gray Whales 2019/2020, NOAA Technical Memorandum, NOAA-TM-NMFS-SWFSC-639. According to this estimate, the ENP gray whale population is estimated to consist of 20,580 whales.

The WNP gray whale stock did not similarly recover from commercial exploitation, and remains listed as endangered. *See* 59 Fed. Reg. at 21,094. As a result, the WNP gray whale stock is considered “depleted” under the MMPA, *see* 16 U.S.C. § 1362(1). Its abundance estimate is a mere 290 whales. Tab 59B at 13. Information regarding the distribution and migration patterns of the WNP stock is “incomplete.” Tab 3C at 17. The stock’s main feeding ground is believed to be in the Okhotsk Sea off the northeastern coast of Sakhalin Island, Russia, although some animals also occur off the coast of eastern Kamchatka and in other coastal waters of the northern Okhotsk Sea. *Id.* Its winter breeding grounds are “poorly known.” *Id.* The WNP stock has not been determined to be within its OSP range. *See* Tab 58 ¶ 27 (Yates 3d Decl.) (“NMFS currently does not have sufficient information to calculate carrying capacity or OSP levels for the WNP stock[.]”).

In light of its small population size, the WNP stock is particularly vulnerable to extinction, *cf.* 78 Fed. Reg. 73,726, 73,726 (Dec. 9, 2013) (“A population size of several hundred individuals is precariously small for any large whale or large mammal population.”), and threats to the stock have only increased. Ocean acidification “could reduce the abundance of shell-forming organisms” that form the basis of gray whales’ diet. Tab 59B at 14. With respect to more immediate impacts from human activities, “[n]ear shore industrialization and shipping congestion throughout the migratory corridors of the WNP gray whale stock represent risks by increasing the likelihood of exposure to pollutants and ship strikes as well as a general degradation of the habitat.” *Id.* An analysis of anthropogenic scarring on WNP gray whales found that the stock is also “significant[ly] threat[ened]” by incidental catches in coastal net fisheries. *Id.* Additionally, the summer feeding area off of Sakhalin Island is in a region characterized as “rich with offshore oil and gas reserves,” placing WNP gray whales at an increased risk of disturbance or injury from extractive activities. *Id.* Indeed, NMFS reports that “[t]wo major offshore oil and gas projects now directly overlap or are in near proximity to this important feeding area, and more development is planned in other parts of the Okhotsk Sea that include the migratory routes of these whales.” *Id.* Oil and gas operations of this nature are major sources of “underwater noise, including seismic surveys, increased shipping traffic, habitat modification, and risks associated with oil spills.” *Id.* Accordingly, the WNP gray whale stock faces a multitude of threats and disturbances as a result of human’s activities.

Although the WNP and ENP stocks had previously been thought to be geographically isolated from one another, recent studies have shown that some WNP whales migrate along the western coast of the United States, including through the proposed hunt area. Recommended Decision (“Rec. Dec.”) 110, 117. To date, at least fifty-four WNP whales—i.e., approximately 19% of the entire stock, assuming these are unique individuals—have been identified in the ENP range. Tab 62KK at 2. As the Recommended Decision acknowledges, “[i]t is possible scientists have not positively identified every WNP gray whale that migrates with the ENP stock, thus

more WNP than are currently known could be intermixed.” *Id.* at 110. In addition, “animals from the two stocks are generally indistinguishable by sight alone.” Rec. Dec. 117.

In addition to the two recognized stocks, NMFS recognizes a third group of gray whales known as the Pacific Coast Feeding Group (“PCFG”). These whales exhibit seasonal fidelity to feeding grounds off of the west coast of the United States and Canada, and are defined to include whales “that are photo-identified within the region between northern California and northern Vancouver Island during the summer feeding period of June 1 to November 30, in two or more years.” 84 Fed. Reg. at 13,607. The most recent population abundance estimate for PCFG whales is 232 animals. *See* Tab 96.

Site fidelity to this area is learned by offspring from their mothers. Weller Decl. Ex. 3-38 at 7. Studies on the genetics of North Pacific gray whales confirm that PCFG gray whales have significant differences in their mitochondrial DNA markers as compared to the larger ENP population. 84 Fed. Reg. at 13,607. Accordingly, internal recruitment plays a significant role in PCFG population dynamics. *See, e.g.*, Tab 3KK at 8-9. Experts generally agree that the proportion of internal recruitment to external recruitment is 50/50. Tab 102, 22:16. However, evidence suggests that at least some of the PCFG calves are not detected in their first year and, consequently, are incorrectly identified as “external” recruits when surveyed in subsequent years. Tab 3C at 27. Additionally, recent studies by gray whale scientists have suggested that the proportion of internal recruitment is actually much higher than the already notable previous figure of 50%. *See, e.g.*, Tab 3KK at 8-9 (concluding that significant differences in the mitochondrial DNA between the PCFG and ENP gray whales “suggest that groups of gray whales utilizing different (northern versus southern) feeding regions are demographically independent”); Tab 62P at 2 (citing a study finding that a majority (56%) of calves sighted in the PCFG range “were resighted in a year subsequent to their birth year,” and were thus considered to be internal recruits, and concluding that there is “a higher degree of internal recruitment to the PCFG than had been suggested by previous less complete data”); Tab 21C, Ex. M-0057 at 6-7 (finding that PCFG whales continue to associate with one another in mixed-sex groups during both the northbound and southbound migrations, “increas[ing] the potential for breeding with other whales from the same feeding group”).

NMFS last held a workshop to consider gray whale stock structure in 2012. Tab 3C at 9. Despite acknowledging the significant behavioral and genetic differences between PCFG gray whales and their ENP counterparts, *see* Tab 3C at 43-44, 46, NMFS ultimately declined to bestow “stock” status on PCFG gray whales because the data were not sufficient to *definitively* resolve all uncertainty surrounding the question, *see id.* at 48. Instead, NMFS considers PCFG gray whales to be a “feeding group” of the larger ENP stock. 84 Fed. Reg. at 13,607.

Management authority over PCFG gray whales is shared with Canada, as the population’s range extends into British Columbia. Tab 62I at 21. In 2017, in light of new evidence regarding population structure of North Pacific gray whales, the Committee on the Status of Endangered Wildlife in Canada (“COSEWIC”) reconsidered its previous assessment of

the ENP stock as a single “designatable unit.” *See id.* at xxi.⁷ In reaching this conclusion, COSEWIC examined the same recent studies on the PCFG gray whales as NMFS, yet reached the opposite conclusion—i.e., that PCFG gray whales are a distinct population of North Pacific gray whale. Citing recent studies finding that the PCFG and ENP stock exhibit statistically significant differences in mitochondrial DNA markers, and that photo-identification data “demonstrat[e] strong maternally directed fidelity to summer feeding grounds,” COSEWIC concluded that “it is reasonable to argue that the PCFG is genetically distinct . . . even though the differences . . . between PCFG and other ‘eastern’ Grey Whales are not large.” *Id.* at 10-11. Additionally, COSEWIC noted that while there “are no morphological or life history features that distinguish the two groups . . . a clear behavioural difference exists between them.” *Id.* at 11.

In March 2018, the Pacific Scientific Review Group (“Pacific SRG”), one of the three independent scientific advisory bodies established by the MMPA to advise NMFS on marine mammal science and management issues, 16 U.S.C. § 1386(d), recommended that NMFS “reconsider the characteristics and status of the [PCFG] gray whales and whether it should be recognized and managed as a full stock.” Tab 2L at 11. In response, NMFS restated its “belie[f]” that currently available information does not definitively establish that PCFG gray whales are a “full stock” under the MMPA. *Id.* To support its conclusion, NMFS noted that the two stock structure hypotheses determined to be most plausible do not “conflict[] with NMFS’s current characterization . . . of a single Eastern North Pacific (ENP) gray whale stock that includes the PCFG.” *Id.*⁸ NMFS suggested that the IWC’s terminology further supported its refusal to reexamine the PCFG’s stock status. *Id.* (noting that “the IWC continues to refer to the PCFG as a feeding ‘aggregation’ or ‘group’ within the eastern breeding stock of gray whales”).

NMFS also rejected COSEWIC’s determination that the PCFG constituted a discrete unit. NMFS stated that “the information supporting [COSEWIC’s] decision to split the ENP stock has been reviewed by the NMFS,” yet dismissed its counterpart agency’s findings by arguing that the “discreteness and significance criteria” for designatable units are “not MMPA requirements.” *Id.* at 12. NMFS nevertheless insisted that COSEWIC’s conclusions—i.e., that there are “uncertainties in determining whether the PCFG is demographically discrete”; and that “the

⁷ To be considered a “designatable unit,” a population must “ha[ve] attributes that make it ‘discrete’ and evolutionarily ‘significant’ relative to other populations.” Tab 62I at 7. To be considered “significant,” the population must either “persist[] in an ecological setting unusual or unique to the species, such that it is likely or known to have given rise to local adaptations,” or occupy a unique ecosystem such that “its loss would result in an extensive disjunction in the range of the species in Canada that would not be recolonized by natural dispersal.” *Id.* at 11.

⁸ The first hypothesis posits that what was known as the western breeding stock of North Pacific gray whales has been extirpated, and the remaining eastern breeding stock consists of three “feeding sub-stocks”—the PCFG; a Northern feeding group, consisting of the whales NMFS identifies as the ENP stock; and the western group, consisting of the whales NMFS identifies as the WNP stock—that each show matrilineal fidelity to feeding grounds. *See* Tab 21C, Ex. M-0154 at 5, 17. The second hypothesis is the same as the first, except that the western breeding stock is presumed to be extant and mixes with the western feeding group of the ENP stock at Sakhalin. *See id.* at 5, 17-18. Under either hypothesis, the IWC notes that the western feeding group is “demographically independent” of the other two feeding groups. *See id.* at 17.

primary difference between the two ‘populations’ is largely behavioral (i.e., selection of different feeding areas),” as opposed to genetic distinctness—“are consistent with the NMFS Task Force findings.” *Id.*

2. *Unusual Mortality Events*

NMFS declared a UME for the ENP stock in 1999-2000 due to an unusually large number of dead gray whales stranding along the west coast of North America. Tab 53 ¶ 3 (Yates 4th Decl.). Specifically, the Working Group on Marine Mammal UMEs (“UME Working Group”) concluded that the gray whale strandings qualified as a UME because the whales “were stranding throughout their range, stranding rates had increased precipitously, animal behavior and body condition were different (emaciated) from those reported previously, and animals were stranding in areas where such events had not been historically noted (behavioral change).” *Id.* By the time the UME was declared “closed” on December 7, 2001, over 650 gray whales had stranded along the west coast of North America. *Id.* However, due to cryptic mortality—defined as “mortality that you do not see or document.” Tab 101, 63:25-64:1—these 650 whales represent only about 3.9% to 13% of the whales that actually died, Tab 101, 65:1-4, meaning that the actual number of deaths could be as high as approximately 16,600 whales. The cause of the UME was never determined, although nutritional stress was considered to be the likely dominant factor. Tab 53 ¶ 4 (Yates 4th Decl.).

In early 2019, sixty dead gray whales stranded in California, Oregon, Washington, and Alaska. Tab 53F ¶ 11 (Bettridge 3d Decl.). This was well above the eighteen-year average for the five-month period from January to May. *Id.* The stranded whales were observed to be “emaciated with moderate to heavy cyamid (whale lice) loads.” *Id.* NMFS requested formal consultation with the Working Group regarding the elevated number of gray whale mortalities. *Id.* ¶ 9. After evaluating the stranding data, the Working Group recommended that the mortalities be declared a UME due to the “marked increase in the magnitude . . . of morbidity mortality or strandings when compared with prior records,” and the “similar . . . general physical condition” of the stranded whales.” *Id.* ¶¶ 5, 10. Based on this recommendation, on May 29, 2019, NMFS declared a gray whale UME along the West Coast of North America. *Id.* ¶ 10.

At the time of the November 2019 hearing, 214 strandings had been attributed to the UME. Tab 101, 20:2-5. At least one stranded whale was positively identified as a member of the PCFG at the time of the hearing. Tab 101, 27:19-20. However, due to cryptic mortality, NMFS “presume[s] that somewhere between 1700 and 5500 whales may have died during the [UME] thus far,” as of November 2019. Tab 101, 20:9-15.

Two years later, the UME is ongoing. As of November 5, 2021, the number of gray whales who have stranded since 2019 has grown to 502. *See* NMFS, *2019-2021 Gray Whale UME Along the West Coast*, <https://www.fisheries.noaa.gov/national/marine-life-distress/2019-2021-gray-whale-unusual-mortality-event-along-west-coast-and> (last updated Nov. 5, 2021). Accounting for cryptic mortality, between 3800 and over 12,000 whales have likely died during the current UME. As of the date of these comments, NMFS has not yet determined the full extent of the impacts of the UME on the ENP stock. Tab 101, 20:6-8. Although NMFS published a new abundance estimate in January 2021, the UME has continued, with approximately 56 whales

stranding since the beginning of the year. Accounting for cryptic mortality, approximately 430 to 1400 ENP gray whales have died this year alone. However, NMFS's January 2021 abundance estimate of 20,580 for the ENP gray whale stock was based upon data collected in 2019 and 2020, and as such, likely does not reflect the current population during the ongoing UME.

NMFS concedes that it is “premature to speculate as to the potential causes, severity, or duration of the UME.” Tab 79 ¶ 4 (Yates 5th Decl.). Nor does NMFS know whether and to what extent the UME has affected the PCFG. Tab 101, 65:11-13. Although data collected after the 1999/2000 UME suggest that the PCFG increased as a result of the UME, each UME is different. Tab 101, 97:21 (NMFS expert noting that “each UME is unique. No two are the same.”). Thus, “it’s certainly possible” that the UME has affected—and is still affecting—the PCFG. Tab 101, 64: 17-25. The UME has not been declared to be over. *See* NMFS, *2019-2020 Gray Whale UME Along the West Coast, supra*.

B. The Makah Tribe’s Recent Attempts To Resume Whaling

The Tribe first sought to resume whaling in 1995, when NMFS agreed to “work with the Makah in obtaining an aboriginal subsistence quota from the IWC.” *Metcalf*, 214 F.3d at 1138.⁹ Twice, NMFS has attempted to authorize a hunt, and twice, the Ninth Circuit rejected NMFS’s decision for failing to comply with the environmental review processes required by law. *See generally Metcalf*, 214 F.3d 1135; *Anderson v. Evans*, 371 F.3d 475 (9th Cir. 2004).

In 2005, the Makah Tribe formally requested a waiver of the take moratorium under the MMPA to hunt gray whales. Rec. Dec. 10. As required by the court in *Anderson*, 371 F.3d at 494, and “[t]o assist in [NMFS’s] MMPA and [Whaling Convention Act] determinations,” NMFS prepared a Draft Environmental Impact Statement (“DEIS”) under NEPA. *Id.* NMFS published the first DEIS in 2008; however, in 2012, “NMFS terminated the 2008 DEIS because it was outdated.” Rec. Dec. 11. In 2015, NMFS issued a second DEIS. *Id.* Over four years later, in April 2019, NMFS issued a Federal Register Notice announcing its proposal to waive the take moratorium under the MMPA to allow the Makah Tribe to hunt ENP gray whales over a period of ten years. *See* 84 Fed. Reg. at 13,605. NMFS also announced that an administrative hearing on the proposed waiver and regulations would be held just over three months later, in August 2019. *Id.* at 13,604.

⁹ In 1855, the Tribe and the United States entered into the Treaty of Neah Bay, whereby the Tribe ceded their land in exchange for “[t]he right of taking fish and of whaling or sealing at usual and accustomed grounds and stations in common with all citizens of the United States.” *See Metcalf v. Daley*, 214 F.3d 1135, 1137 (9th Cir. 2000) (quoting Treaty of Neah Bay, 12 Stat. 939, 940 (1855)). However, “the MMPA, not the Tribe’s treaty right to hunt whales, [is] the controlling law on whether a hunt [can] proceed.” Rec. Dec. 10; *see also Anderson v. Evans*, 371 F.3d 475, 501 (9th Cir. 2004) (holding that “the MMPA is applicable to regulate any whaling proposed by the Tribe,” and as such, the Tribe must obtain a permit or waiver under the MMPA to engage in whaling).

C. The Proposed Waiver And Regulations

Pursuant to the Tribe's request, NMFS proposed to waive the take moratorium under the MMPA for a ten-year period to allow the Tribe to hunt ENP gray whales. 84 Fed. Reg. at 13,608. According to NMFS, its proposed waiver and regulations were shaped by two key management goals: first, "[l]imiting the likelihood that [T]ribal hunters would strike or otherwise harm a WNP gray whale"; and second, "ensuring that hunting does not reduce PCFG abundance below recent stable levels." *Id.* To meet these management goals, NMFS proposed authorizing alternating hunt seasons in even and odd years, with even-year hunts occurring during the winter/spring migration season—purportedly to reduce the risk to PCFG whales—and odd-year hunts occurring during the summer/fall feeding season—purportedly to reduce the risk to WNP whales. *Id.* at 13,608.

NMFS's proposed regulations define the various activities that would be authorized pursuant to the waiver.¹⁰ "Hunt" is defined as "to pursue, strike, harpoon, shoot, or land a gray whale under a hunt permit . . . or to attempt any such act." 84 Fed. Reg. at 13619. "Strike" is defined to mean "to cause a harpoon, darting gun, or other weapon, or a projectile from a rifle or other weapon, to penetrate a gray whale's skin or an instance in which a gray whale's skin is penetrated by such a weapon or projectile during hunting." Tab 86A at 5. "Unsuccessful strike attempt" is defined as "any attempt to strike a gray whale while hunting that does not result in a strike." 84 Fed. Reg. at 13,619. "Hunt" is further defined to exclude the acts of "hunting approaches, training approaches, or training harpoon throws." *Id.* A "training approach" means "to cause, in any manner, a training vessel to be within 100 yards of a gray whale." *Id.* A "training harpoon throw" is defined to mean "an attempt to contact a gray whale with a blunted spear-like device that is incapable of penetrating the skin of a gray whale." *Id.*

NMFS proposed limiting the number of "strikes" to three in even-year hunts, and two in odd-year hunts. *Id.* NMFS further proposed limiting the number of strikes of PCFG whales to sixteen for the duration of the ten-year waiver period, and implementing "PCFG abundance triggers," which would require the hunt to cease if PCFG abundance falls below 192 whales, or if the PCFG minimum abundance estimate falls below 171 whales. *Id.* at 13,609. In addition, acknowledging that approaches and training exercises fall within the ambit of the take prohibition, NMFS proposed limits on such "non-lethal" hunt activities. *Id.* at 13,610. The proposed waiver and regulations would also authorize up to 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." *Id.* Training approaches and training harpoon throws would be authorized at any time during even-numbered years. In odd-numbered years, training activities

¹⁰ Although it is AWI's position that *all* activities that would be authorized by the proposed decision—including so-called "non-lethal hunt activities" or training activities—constitute "hunting," solely for clarity, these comments will distinguish between the lethal "hunt" activities and the non-lethal "training" activities. Accordingly, the term "hunt activities" refers to lethal hunt activities. The terms "non-lethal hunt activities" or "training activities" refers to the non-lethal elements of the hunt, including the approach and pursuit of gray whales, and training harpoon strikes. The term "waiver activities" encompasses all activities that would be authorized by the Recommended Decision.

would be restricted to the hunting season (July to October). The Tribe would be allowed eighteen unsuccessful strike attempts during even-year hunts, and twelve during odd-year hunts. *Id.* Training harpoon throws would count as unsuccessful strike attempts. *Id.*

The regulations further provide for the identification and accounting of gray whales. During even-year hunts, if a whale subjected to a take cannot be positively identified as a PCFG or a WNP whale, it will be presumed to be a PCFG whale in accordance with the proportion of PCFG whales in the hunt area during the month of the take. During odd-year hunts, whales that cannot be identified as a WNP whale will be counted as a PCFG whale.

The proposed waiver would not authorize the take of an endangered WNP whale. *See* 84 Fed. Reg. at 13,608 (noting that the Tribe has not requested a waiver for WNP gray whales). However, because WNP whales are known to migrate through the Makah U&A and because it is impossible to visually distinguish between WNP and ENP whales in a training or lethal hunt scenario, NMFS determined that there is a risk that WNP whales would be taken by the waiver activities. *See* 84 Fed. Reg. at 13,608. Accordingly, NMFS scientists conducted multiple risk assessments to determine the probability of a WNP whale being subjected to an approach, unsuccessful strike attempt, or strike. *See* Tab 61D at 12. In the most recent risk assessment, NMFS determined that at least one WNP whale will be subjected to an approach over the ten-year waiver period. *See id.* at 12 (probability of 100 percent). In fact, the waiver is almost certain (83 percent) to result in the approach of a WNP whale in any one year of the waiver period. *Id.* NMFS further determined that there is a reasonable chance that a WNP whale will be subjected to an unsuccessful strike attempt (36.7 percent, with an upper confidence interval of 48.3 percent), and a non-zero chance that at least one WNP whale will be lethally struck (7.3 percent) during the ten-year waiver period. *Id.* NMFS viewed the risk of a WNP whale being struck as high enough to require a contingency in the regulations, stating if a WNP whale is killed, “all hunting would cease unless and until . . . measures [are] taken to ensure that no additional WNP gray whales [are] struck during the waiver period.” 84 Fed. Reg. at 13,608.

D. Procedural History

On the same day that NMFS announced the hearing on the proposed waiver and regulations, the agency filed on the ALJ’s electronic docket four declarations, including exhibits, to support its factual assertions. *See* Tabs 1-4. Together with the exhibits, NMFS’s materials—some of which were not previously publicly available—numbered approximately 4900 pages of information. *See* Tab 13 at 1. In light of the voluminous record and difficulties securing experts, AWI moved to delay the hearing. *See id.* This motion was denied, *see* Tab 25, and a prehearing conference was held on June 17, 2019, *see* 84 Fed. Reg. 37,837, 37,837 (Aug. 2, 2019).

At the prehearing conference, several Parties again requested that the hearing date be changed due to issues concerning the availability of witnesses and counsel. *See* 84 Fed. Reg. 30,088, 30,092 (June 26, 2019). Judge Jordan ordered briefing on this issue and determined a continuance was warranted. *Id.* After consulting with the parties during a second prehearing conference on July 23, 2019, Judge Jordan determined that the hearing would begin on November 14, 2019. *Id.* A final hearing agenda setting forth the issues of fact to be addressed at

the hearing was issued on June 26, 2019. *See id* at 30,089. The agenda identified a new issue—the 2019 UME—that had not previously been included in the hearing materials. *Id.* at 30, 092. The hearing began on November 14, 2019, and lasted for six days.

On January 29, 2020, NMFS published the full transcript and requested public comment on the proposed waiver and regulations. *See* 85 Fed. Reg. 5196 (Jan. 29, 2020). Approximately one month later, on February 24, 2020, NMFS emailed the Parties to inform them for the first time that NMFS had decided to prepare a Draft Supplemental Environmental Impact Statement (“DSEIS”) “to evaluate information related to the 2019 UME as well as any other appropriate updated information,” including information regarding the impacts of the even/odd year hunt proposal on North Pacific gray whale populations. *See* AWI’s Expedited Mot. to Stay Proceeding Pending Completion of Suppl. Tab 108, Attach. A. Neither Judge Jordan nor his chambers were included on this email, despite the obvious relevance of the DSEIS to the waiver proceeding. *Id.* A Federal Register Notice announcing that NMFS “is preparing” the DSEIS to assess “additional relevant information” not presented at the hearing was published on February 27, 2020. *See* 85 Fed. Reg. 11,347, 11,347-38 (Feb. 27, 2020).

On March 3, 2020, AWI, Sea Shepherd Legal, and Peninsula Citizens for the Protection of Whales (hereafter “The Conservation Parties”) submitted a Motion to Stay the Waiver Proceeding pending NMFS’s completion of the DSEIS process. *See generally* Tab 108. The Conservation Parties explained that the analyses that will be contained in the DSEIS are not a part of the record in the Waiver Proceeding, yet are material to the factual and legal issues that will be decided. Accordingly, to the extent that NMFS relies on these new analyses in its final decision to issue (or not issue) a waiver, that decision is procedurally invalid. The Conservation Parties thus concluded that a stay pending the completion of the DSEIS was necessary to “ensure that the procedural and substantive mandates of the MMPA and the Administrative Procedure Act (“APA”) are satisfied, and [] promote administrative efficiency and fairness in this decisionmaking process.” *See id.* at 10. The ALJ denied the motion, asserting that there was “sufficient evidence in the record . . . to make a determination about whether the UME would preclude issuance of a waiver.” Rec. Dec. 13.

On March 22, 2021, AWI submitted its Post-Hearing Brief and Proposed Findings of Fact. In its brief, AWI argued that because the waiver and regulations indisputably will result in the unauthorized take of endangered WNP gray whales, NMFS could not lawfully issue the waiver as proposed. AWI also argued that NMFS’s proposed waiver and regulations refusal to consider the PCFG to be a “stock” under the MMPA resulted in a proposal that ignores the best available science, is contrary to the policies and purposes of the MMPA, and risks disproportionate impacts on PCFG gray whales that will have long-term impacts on its recovery and survival. In addition, AWI explained that NMFS’s decision to proceed with the administrative process for issuing a waiver while the North Pacific gray whale populations are undergoing a UME contravened the conservative precautionary approach that the MMPA demands, and prioritized the interests of the Tribe over those of marine mammals. Finally, AWI reiterated its objection to NMFS’s decision to proceed with the waiver process while concurrently preparing a DSEIS under the National Environmental Policy Act (“NEPA”) to analyze “additional . . . information” relevant to the waiver proceeding, in clear violation of the substantive and procedural requirements of the MMPA and APA, 5 U.S.C. §§ 556, 557. AWI

concluded that in light of the clear violations of the substantive and procedural requirements of the MMPA, as well as the APA, the proposed waiver should be denied. Once again, AWI urged NMFS to, at the bare minimum, defer acting on the waiver request until the UME concludes, its causes disclosed to the public, its effects to North Pacific gray whales (including PCFG and WNP gray whales) fully understood, and the evidence concerning these issues presented to the Parties and the ALJ in accordance with the requirements of the MMPA and the APA.

E. The Recommended Decision

On September 23, 2021, Judge Jordan issued the Recommended Decision concluding recommending that NMFS grant the Tribe's waiver request and promulgate the regulations largely as proposed, and suggesting certain modifications to clarify the meaning of select terms and ostensibly to better protect the WNP gray whale stock. Rec. Dec. 6. The Recommended Decision accepted NMFS's proposed management goals of limiting the likelihood that the hunt would injure or lethally take a WNP whale, and ensuring that the hunt does not reduce the PCFG below recent stable levels. Rec. Dec. 134. The Recommended Decision did not grapple with AWI's arguments concerning the risk that the waiver will result in the unauthorized take of endangered WNP whales. Instead, the Recommended Decision essentially deferred the issue to a later phase, insisting that questions regarding the take of WNP whales applied (and need be resolved) only at the subsequent permitting stage. In addition, the Recommended Decision determined that NMFS's decision to consider the PCFG whales as part of the larger ENP stock was reasonable based on the evidence in the record. Rec. Dec. at 62-67. The Recommended Decision further determined that although the UME "should not preclude issuance of a waiver, . . . the regulations may warrant modification to further limit hunting activities during an active UME or if the stock does not rapidly recover from a UME." *Id.* at 103.

The Recommended Decision suggested several modifications to the regulations. For example, the Recommended Decision proposed modifying the definition of "strike" to clarify that once the skin of a gray whale is penetrated by a weapon used in the hunt, "subsequent penetrations of the same whale's skin during the hunt for the purpose of killing or landing that whale are considered to be part of the initial strike." Rec. Dec. 144. Additionally, recognizing that the even-year hunts take place at the time when endangered WNP whales are present in the Makah Usual & Accustomed ("U&A") hunting area, the Recommended Decision proposes that the regulations prohibit even-year hunts until the Tribe obtains an incidental take authorization. Rec. Dec. 148. The Recommended Decision determined that "this approach most adequately minimizes the risks to both PCFG whales—which will still be hunted only in odd years—and WNP whales, which may not be taken by separate authorization." *Id.* The Recommended Decision likewise determined that training approaches—which under NMFS's proposed waiver were allowed at any time of the year—"should not be permitted to occur during migratory periods when WNP's may be present in the Makah U&A" until the Tribe obtains an incidental take authorization. *Id.* at 149. Finally, the Recommended Decision suggested that NMFS "set[] an overall abundance threshold" for the ENP gray whale stock. Rec. Dec. 151. According to the Recommended Decision, such a threshold was particularly warranted in light of the ongoing UME, and "would provide additional assurance that the hunt will not continue if the ENP population begins to decline at rates that spark alarm in the scientific community." *Id.*

DISCUSSION

I. THE WAIVER PROCEEDING SHOULD HAVE BEEN STAYED PENDING NMFS'S COMPLETION OF THE SUPPLEMENTAL DRAFT EIS.

On March 3, 2020, the Conservation Parties moved to stay the waiver NMFS's completion of the DSEIS process. *See generally* Tab 108. The ALJ denied the motion, asserting that there was "sufficient evidence in the record . . . to make a determination about whether the UME would preclude issuance of a waiver." Rec. Dec. 13.

The Recommended Decision demonstrates the value of staying the waiver process until the completion of the DSEIS process. With respect to the UME, the Recommended Decision acknowledged that "the full extent of the UME is unknown." Rec. Dec. 101. However, the DSEIS will analyze "additional relevant information" regarding the ongoing UME and the impacts of the even/odd year hunt proposal on North Pacific gray whales. 85 Fed. Reg. 11,347, 11,348 (Feb. 27, 2020) (emphasis added). Indeed, NMFS itself acknowledges that the process will "benefit both the public and agency decision making." *Id.* (emphasis added). Thus, the updated analyses and new information are undoubtedly relevant to the waiver proceeding. Yet, the agency announced that it will issue the DSEIS only after the Recommended Decision is issued. *Id.* (reporting that the DSEIS "will take into consideration the Administrative Law Judge's recommended decision"). The DSEIS is still pending.

For several reasons, the ALJ's decision to issue the Recommended Decision without the benefit of the information and analyses in the DSEIS was contrary to the procedural mandates of the APA, 5 U.S.C. §§ 556, 557, and the procedural and substantive mandates of the MMPA and its implementing regulations, 16 U.S.C. § 1371(a)(3)(A); 50 C.F.R. pt. 228. First, despite containing evidence that is clearly relevant to the Recommended Decision—and further, will clearly be relevant to the Assistant Administrator's decision—the Parties to the waiver proceeding will not have an opportunity "to submit rebuttal evidence" or "conduct such cross examination as may be required," and will thus be deprived of their procedural right to ensure "a full and true disclosure of the facts." 5 U.S.C. § 556(d). Such a result is highly prejudicial and contravenes the clear intent of the APA to provide for fair and impartial agency decisionmaking. *Cf. Kisor v. Wilkie*, 139 S. Ct. 2400, 2421 (2019) (noting that "the ideas of fairness and informed decisionmaking" are "the core of the APA"). Moreover, because the Recommended Decision was issued in the absence of such vital evidence, it was not based on a fully developed factual record, and thus fails to comply with the basic strictures of the APA. *See* 5 U.S.C. § 556(d) (requiring that rules only issue "on consideration of the whole record . . . and supported by . . . substantial evidence).

Second, the MMPA requires that a decision to waive the moratorium be based on the best available science. 16 U.S.C. § 1371(a)(3)(A). By acknowledging that significant new information bearing on the agency's decision requires additional analysis, *cf.* 40 C.F.R. § 1502.9 (requiring the preparation of a supplemental EIS when there are "significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts"), NMFS effectively conceded that the record as it exists before Judge Jordan does *not* represent the best available science. Accordingly, the Recommended Decision based on that

record—as well as any action by the Assistant Administrator to adopt it—violates this statutory command. Likewise, it is clear that the new information NMFS purports to analyze in the DSEIS bears directly on factual matters that are at issue in the waiver proceeding. *See* 84 Fed. Reg. at 59,360-61 (listing the UME and the impacts of even/odd-year hunts on North Pacific gray whales as issues of fact to be addressed at the hearing). Further development of these factual matters would enable the public and the agency to better assess whether NMFS has demonstrated “due regard” for the “distribution, abundance, breeding habits, and times and lines of migratory movements” of the gray whales, and whether the proposed waiver “is in accord with sound principles of resource protection and conservation,” as required by the MMPA. 16 U.S.C. § 1371(a)(3)(A).

Third, the Recommended Decision fails to comply with NMFS’s hearing regulations. The regulations clearly contemplate that the environmental analyses contained in the draft EIS will serve as an important factual basis for the agency’s decision. *See* 50 C.F.R. § 228.16 (providing that at the commencement of the hearing, the presiding officer is to introduce into the record the draft EIS, including public comments and the agency’s responses). Indeed, NMFS’s Final Rule promulgating the original hearing regulations explicitly state that the draft EIS “will be considered when the [agency] determines the issues of fact published in the [initial] notice of hearing.” 40 Fed. Reg. 10,182, 10,183 (Mar. 5, 1975), *withdrawn*, 60 Fed. Reg. 39,271 (Aug. 2, 1995), *reinstated in full* 65 Fed. Reg. 39,560 (June 27, 2000). Thus, the draft EIS and its environmental analyses, including public comments and the agency’s responses, must be completed *prior* to the hearing so that they may inform the presiding officer’s recommended decision. *See* 50 C.F.R. §§ 228.16(a), .20(a) (directing the presiding officer to make a recommended decision based on the record—which includes the draft EIS—and transmit the decision to NMFS). The regulations further provide that NMFS may “affirm, modify, or set aside, in whole or in part,” the recommended decision, *or* it may “remand the hearing record to the presiding officer for a fuller development of the record.” 50 C.F.R. § 228.21. Accordingly, if NMFS believes that the record is deficient—as it does here, as evidenced by its decision to prepare a DSEIS—its own regulations require that the record be remanded to the presiding officer for further proceedings. The Assistant Administrator cannot unilaterally consider extra-record evidence in making her waiver decision that was not subject to rebuttal or cross-examination at a formal hearing before the presiding officer.

Logically, the hearing is the *culmination* of the fact-finding process. NMFS’s belated decision to prepare a DSEIS that will provide updated analyses and new information pertaining to facts that are material to the waiver proceeding turns the entire process on its head. Because the information and analyses in the DSEIS bear directly on the facts at issue in the waiver proceeding, there is a significant risk that the Recommended Decision will be superseded in whole or in part by the DSEIS and the facts and analysis contained therein. In that case, the entire hearing process would have been a pointless expenditure of financial and administrative resources. The Recommended Decision should have been based on *all* of the relevant facts to ensure both the integrity of the decisionmaking process, and compliance with the MMPA and APA.

Finally, it must be noted that NMFS’s belated concession that new information pertaining to the UME requires additional analysis shows that the agency’s contrary statements throughout

this proceeding were disingenuous. Throughout the waiver process, AWI maintained that the precautionary approach and conservation principles embodied by the MMPA demanded that NMFS delay the hearing until more information about the causes and impacts of the UME could be obtained and evaluated. *See, e.g.*, Tab 81 ¶ 7 (Schubert UME Rebuttal Decl.) (insisting that the “precautionary principle and conservative bias . . . embraced by the MMPA” demands that NMFS wait until data regarding the UME can be collected and fully analyzed); Tab 101, 67:5-8 (cross-examination of NMFS witness Dr. Yates asking whether gathering new information about the UME would be “more consistent with the precautionary approach of the MMPA”). In response, NMFS insisted that it had *already* evaluated the possibility of a UME in its Draft EIS, and accordingly, no additional analysis was necessary. *See* Tab 101, 34:10-35:7 (NMFS witness Dr. Yates relying on the agency’s analysis in the Draft EIS to insist that NMFS adequately considered the possibility of a UME in developing the waiver). Now that the waiver proceeding is nearly concluded and AWI has no further opportunity to rebut the agency’s evidence or cross-examine its witnesses, NMFS has announced its belated plans to unilaterally supplement the record with new information that bears on facts that are material to the Assistant Administrator’s decision. This apparent bait-and-switch suggests that, in light of the rebuttal evidence and new information that has become available post-hearing, NMFS views its proposed waiver and regulations—and by extension, the Recommended Decision recommending that the Assistant Administrator grant the proposed waiver and issue slightly modified regulations—as highly vulnerable. However, instead of requesting that the hearing be stayed or the record re-opened for further factual development by *all* parties to the proceeding, NMFS speciously couched its decision as solely arising under its NEPA obligations so that the agency could unilaterally examine these matters and issue DSEIS that lacks any opportunity for criticism on cross-examination. *See* 85 Fed. Reg. at 11,349.¹¹

In so doing, NMFS deprived AWI and the other Parties of their procedural rights under the APA, and undermined the integrity of the entire waiver process. NMFS’s decision not to release the DSEIS until after the Recommended Decision—despite repeated calls by AWI and other Parties *during* the hearing to gather more information on the UME before making any final recommendations or decisions regarding the waiver—only reinforces this conclusion. Indeed, delaying the release of the DSEIS in this way allows NMFS to stack the deck in its favor by

¹¹ The environmental analyses contained in the draft EIS provide an important factual basis for the presiding officer and agency in making the decision to waive the moratorium. *See* 50 C.F.R. § 228.16. Accordingly, the draft EIS must be completed *prior* to the hearing on the waiver and regulations. NMFS’s contrary position—i.e., that the hearing on the waiver and regulations may proceed pending completion of the SDEIS—is further belied by its own acknowledgement that the information and analyses in the SDEIS will “benefit . . . agency decision makers” evaluating whether the decision to grant the waiver request is supported by substantial evidence, 85 Fed. Reg. at 11,349, and by agency policy providing for the consolidation of NEPA documents with other environmental requirements, *see* Nat’l Oceanic & Atmospheric Admin., *Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities* 22 (Jan. 13, 2017) (noting that in accordance with NEPA regulations, NEPA documents should be “prepared concurrently with and integrated with environmental impact analyses and related surveys and studies required by other federal statutes), *available at* <https://www.nepa.noaa.gov/docs/NOAA-NAO-216-6A-Companion-Manual-03012018.pdf>.

providing the agency an additional opportunity to supplement the record, with an apparent eye towards rebutting criticisms of the Recommended Decision, post-hearing briefs, and comments on the Recommended Decision, but without affording AWI or any of the Parties the opportunity to which they are “entitled” to rebut such evidence or even reply to it in written briefs. 5 U.S.C. § 556(d). In the interest of ensuring a fair and impartial decisionmaking process, the Assistant Administrator should remand the Recommended Decision pending the issuance of the DSEIS and the Parties’ opportunity to review and comment on the analyses therein, and reopen the record for further factual development in accordance with the MMPA and APA. *See* 50 C.F.R. § 228.21(a).

II. THE RECOMMENDED DECISION MUST BE REJECTED BECAUSE IT WILL RESULT IN THE ILLEGAL TAKE OF AT LEAST ONE WNP GRAY WHALE

Under NMFS’s proposed waiver and regulations, the even-year hunts would occur during the winter/spring migration season, when WNP whales are known to be present in the hunt area. *Id.* at 13,608. Additionally, during even-year hunts, training approaches would be permitted at any time of the year. *Id.*

Although the proposed waiver and regulations expressly would not authorize the take of an endangered WNP whale, *see* 84 Fed. Reg. at 13,608, NMFS nevertheless determined that the take of at least one WNP whale by the waiver activities over the course of the proposed waiver is a certainty. *See* Tab 61D at 12. Perhaps recognizing that the unauthorized take of WNP whales threatened to derail the waiver process, NMFS attempted to minimize any potential impacts to whales that are approached, pursued, or subjected to training harpoon throws by insisting that “[u]nsuccessful strike attempts and approaches may or may not constitute a ‘take,’ depending on the nature of the event and whether it causes a disruption of the subject whale’s behavior.” Tab 58 ¶ 29 (Yates 3d Decl.). NMFS further suggested that any such take could be authorized by an incidental harassment authorization issued during the permitting process. *See* Tab 101, 58:14-18. According to NMFS, because the Tribal hunter would not *intend* to take a WNP whale, any take of a WNP whale would be incidental to the waiver. *See id.*

As AWI explained in its Post-Hearing Brief, *see* AWI Post-Hearing Br. 36-44, the take of a WNP whale during the course of the proposed waiver “is not merely a remote possibility but a certainty.” *Kokechik Fishermen’s Ass’n v. Sec’y of Commerce*, 839 F.2d 795, 801 (D.C. Cir. 1988). Taking the “systemic view of the [proposed] activity’s effect on marine mammals” that the MMPA requires, NMFS may not authorize the take of the ENP stock unless the take of WNP whales can also be authorized. *Id.* Because NMFS cannot authorize the directed take of a WNP whale without running afoul of the MMPA—i.e., because the take of a whale from the “depleted” WNP stock cannot be authorized by waiver—nor can the take of a WNP whale be authorized by an incidental take authorization, the agency cannot issue the requested waiver or proposed regulations.

Acknowledging that an approach of a WNP whale is “nearly certain to occur” over the course of the waiver period, Rec. Dec. 136, the Recommended Decision recognizes that “the even-year hunts” are “problematic” in the absence of an authorization for the take of WNP whales. The Recommended Decision concedes that NMFS “has no authority under [the MMPA]

to allow even a ‘de minimis’ taking of a stock which is not at its OSP,” and acknowledges that the waiver and regulations as proposed “risk[] doing exactly that” by authorizing activities that will result in the take of WNP gray whales. Rec. Dec. 148. However, despite acknowledging that “any take of a [depleted] WNP would necessarily disadvantage the stock,” *id.* at 117, the Recommended Decision reaches the counterintuitive conclusion that the waiver may issue as proposed, as long as the regulations require the Tribe to obtain an incidental take authorization for WNP whales prior to undertaking the waiver activities (including both lethal and non-lethal activities) during the months when WNP whales are expected to be present. *See id.* at 136-37, 147-48.

As a practical matter, the Recommended Decision’s treatment of the WNP whale issue is not functionally different from that of the proposed waiver and regulations. Indeed, NMFS’s proposed regulations would have required the Tribe to “obtain[] any relevant incidental take authorization for other marine mammals” expected to be taken in the course of the hunt. 84 Fed. Reg. at 13620. NMFS’s own risk analysis determined that the take of WNP whales by waiver activities is a certainty. Moreover, at the hearing, NMFS conceded that the activities that it proposes to authorize pursuant to the waiver and regulations—including, e.g., pursuit, approach, and throwing objects such as harpoons and training spears at gray whales—have, at the very least, the potential to disturb marine mammals by causing disruption of behavioral patterns. *See* Tab 101, 55:3-17; *cf.* Tab 102, 10:10-12 (admitting that in his “decades” of experience approaching gray whales for research purposes, NMFS expert Dr. Weller observed “highly variable” responses ranging from little to no response to a “middling” response to a “more direct[]” response). NMFS thus effectively conceded that such activities constitute, at the very least, take by “harassment,” and as such, can only be conducted pursuant to a lawfully issued authorization.¹²

¹² In declarations and at the hearing, NMFS insisted that “[u]nsuccessful strike attempts and approaches may or may not constitute a ‘take,’ depending on the nature of the event and whether it causes a disruption of the subject whale’s behavior.” Tab 58 ¶ 29 (Yates 3d Decl.). NMFS thus appeared to suggest that because some whales may not react to the disturbance, or may exhibit an “ephemeral” response, such acts might not constitute “take.” *See id.*; Tab 101, 60:17-20; Tab 102, 13:14-17. As AWI explained in its Post-Hearing Brief, NMFS’s attempt to carve out a *de minimis* exception to the take prohibition is contrary to the plain language of the MMPA and its strict liability scheme, and therefore cannot withstand scrutiny. Moreover, NMFS’s position that “ephemeral” responses may not constitute “take” impermissibly conflates the concept of take with the negligible impact determination applicable to incidental harassment authorizations. *See Cook Inletkeeper v. Raimondo*, 2021 WL 1214496, at *11, --- F. Supp. 3d --- (D. Alaska Mar. 30, 2021). The magnitude of the effect of the take on individuals and populations is relevant to determining whether the proposed activity will have a “negligible impact” such that it can be authorized pursuant to an incidental take authorization; it has no impact on whether the take occurred. *See id.* Rather, to constitute “harassment” (and therefore “take”) under the MMPA, an act must only have the “potential” to injure a marine mammal or disrupt behavioral patterns. *See O’Barry*, No. SE960112FM/V, 1999 WL 1417459 (NOAA June 8, 1999) (“[U]nder the MMPA, liability attaches upon a showing that an act caused injury or had the potential to cause injury to a marine mammal.”); *accord* Tab 101, 55:3-7 (NMFS expert conceding that harassment “encompasses such acts that have the potential to disrupt behavioral patterns”). Thus, whether

Accordingly, under the proposed regulations, the Tribe would have been required to obtain an incidental take authorization prior to undertaking such activities when WNP whales are known to be in the hunt area. The Recommended Decision merely makes this implied requirement an express condition of obtaining a hunt permit; it does not impose any additional restrictions or obligations on the proposed hunt. Consequently, the Recommended Decision fails to cure the substantial and extensive legal deficiencies that were fatal to the proposed waiver. Accordingly, the Assistant Administrator cannot adopt it as proposed.

A. The Recommended Decision Unlawfully Authorizes The Directed Take Of A Depleted Marine Mammal Stock

The MMPA defines “take” to mean “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.” 16 U.S.C. § 1362(13). “Take” is broadly categorized as “directed” take, or “incidental” take. *See* Tab 101, 57:6-7. The MMPA prohibits NMFS from waiving the moratorium for the directed take of marine mammals designated as depleted, except for photography, research, or enhancement purposes. 16 U.S.C. § 1371(a)(3)(B).¹³ Like the proposed waiver and regulations, the Recommended Decision also violates this prohibition by authorizing the directed take of depleted WNP whales, either by hunting or by harassment.

As explained below, all of the activities that will be authorized by the Recommended Decision (e.g., approaches, pursuits, strikes, and strike attempts) constitute directed take, whether by hunting or by harassment. Because the MMPA expressly prohibits the issuance of a waiver for the directed take of depleted marine mammals by such activities, *id.*, the Assistant Administrator must reject the Recommended Decision, 50 C.F.R. § 228.1. Alternatively, the Assistant Administrator must modify the Recommended Decision to ensure the risk of directed take of a WNP whale is essentially eliminated. *See id.*

the whale is actually disturbed by the activity is “academic” and legally irrelevant to whether such acts are prohibited without prior authorization. *See Patterson*, 2 O.R.W. 249 (NOAA 1980). Indeed, it is well established that even where marine mammals are not permanently displaced from an area—and even where they return soon after a disturbance—these activities nevertheless constitute prohibited take in the absence of lawful authorization. *See, e.g.*, 83 Fed. Reg. 8841, 8846 (Mar. 1, 2018) (noting that take by harassment occurs when an act causes a pinniped to move as little as two body lengths along a beach, or if already moving, to change direction greater than ninety degrees); *Creighton*, 2005 WL 1125361 (finding a violation of the MMPA where respondent walked onto beach where seals were hauled out, causing twenty-nine seals to flush into the water, despite the fact that seals returned to the beach approximately six and a half hours later).

¹³ NMFS may also issue a permit for the incidental take of depleted species in the course of activities other than commercial fishing. 16 U.S.C. § 1371(a)(3)(B). However, as discussed below, the take of WNP whales in the course of the activities that would be authorized by the Recommended Decision is not “incidental,” and thus, cannot be authorized under this provision. *See infra* Section II.B.3.

1. The Recommended Decision Will Result In The Hunting Of WNP Whales In Violation Of The MMPA

As originally proposed, NMFS insisted that the waiver and regulations only authorized the “hunting” of ENP gray whales, Tab 58 ¶ 41 (Yates 3d Decl.), despite the fact that the proposed hunt will result in the take of WNP whales, *see* Tab 61D at 12. According to NMFS, WNP gray whales are only likely to be subjected to “non-lethal hunt activities,” which under the proposed regulations, do not constitute “hunting.” *See* 84 Fed. Reg. at 13,619 (defining “hunt” and “hunting” to exclude hunting and training approaches, as well as training harpoon throws). Interpreting “hunt” to exclude “non-lethal” activities has enormous legal consequence. The MMPA prohibits the waiver of the moratorium for the hunting of depleted species. *See* 16 U.S.C. § 1371(a)(3)(B); *see also* Tab 101, 52:8-10 (NMFS expert acknowledging that “[i]t would not” be possible for NMFS to issue a waiver for the WNP gray whale stock). Consequently, if the activities that will be authorized pursuant to the waiver will likely result in the “hunting” of even a single WNP gray whale, the MMPA precludes NMFS from issuing the waiver.

As AWI explained in its Post-Hearing Brief, AWI Post-Hearing Br. 32-36, NMFS’s attempt to circumvent the MMPA’s heightened protections for the depleted WNP gray whale stock by narrowly defining “hunt” to exclude “non-lethal” hunting activities such as hunting and training approaches, and training harpoon throws is disingenuous and flunks any common-sense interpretation of the MMPA’s provisions. With the MMPA, Congress broadly prohibited the “take” of marine mammals, which is defined to encompass the “hunt[ing]” and “kill[ing]” (as well as the attempted “hunt[ing]” and “kill[ing]”) of marine mammals. 16 U.S.C. § 1362(13). By breaking the term “hunt” down into its constituent “lethal” and “non-lethal” parts—i.e., “kill,” “approach,” and “strike”—and defining “hunt” to exclude “non-lethal hunt activities,” NMFS’s proposed regulations unlawfully render “hunt” synonymous with “kill,” thereby stripping “hunt” from its independent utility and ordinary meaning. Such a reading that “does not give effect to all of the words used by Congress” must be avoided. *Nevada v. Watkins*, 939 F.2d 710, 715 (9th Cir. 1991); *see also TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (noting that it is “a cardinal principle of statutory construction” that a statute should be construed, if possible, so that “no clause, sentence, or word shall be superfluous, void, or insignificant” (internal quotation marks and citation omitted)). Instead, where, as here, terms are connected by the disjunctive “or,” they must be given separate meanings. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (noting that under principles of statutory construction, “terms connected by a disjunctive [should] be given separate meanings” (citation omitted)); *In re Espy*, 80 F.3d 501, 505 (D.C. Cir. 1996) (per curiam) (“[A] statute written in the disjunctive is generally construed as ‘setting out separate and distinct alternatives.’” (citation omitted)).

Properly interpreted, “hunt” necessarily encompasses lethal and non-lethal elements, including the pursuit, approach, and striking of the target animal. Congress clearly viewed the ultimate success of the hunt—i.e., whether the hunt resulted in a kill—as legally irrelevant to whether the hunter’s actions constituted “hunt[ing],” which the MMPA strictly prohibits. Indeed, giving the term its “ordinary, contemporary, common meaning,” *FTC v. Tarriff*, 584 F.3d 1088, 1090 (D.C. Cir. 2009), “hunt” is defined as “to pursue for food or in sport,” Webster’s New Collegiate Dictionary 405 (7th ed. 1971). Accordingly, when the Tribal hunters pursue, approach, or strike, or attempt to pursue, approach, or strike, a whale that they are “pursu[ing]

for food or [for] sport,” that whale is being “hunted” within the meaning of the “take” prohibition, even if the whale is not actually killed and even if these activities are merely “training” exercises to prepare for later pursuing whales to kill for food. *See* 16 U.S.C. § 1362(12) (defining “take” to include the *attempt* to hunt). Because NMFS does not have the “power to revise clear statutory terms,” *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 327 (2014) (citing *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 462 (2002)), its definition of “hunt” must fail under basic canons of statutory construction and common sense.

Although the Recommended Decision recognizes that “hunting” broadly applies to activities where the “ultimate goal is to catch *or* kill” a wild animal or game, Rec. Dec. 145 (emphasis added), it nevertheless accepts NMFS’s illusory distinction between “lethal” and “non-lethal” hunt activities. The Recommended Decision insists that non-lethal training activities do not constitute hunting because “there is a clear difference in intent between training activities, which are not intended to harm whales, and hunting, where the goal is to kill and land a whale for use and consumption.” Rec. Dec. 145. In other words, the Recommended Decision asserts that the distinguishing factor between hunting activities and training activities is that hunting aims to kill the target whale. Rec. Dec. 145.

Courts that have considered similarly worded take prohibitions have consistently rejected arguments that “hunting” requires the actual capturing or killing of the target animal. To the contrary, where the statute’s take prohibition consists of “broad language” that makes a “distinction between ‘hunting’ and ‘killing,’” it is clear that “one need not actually kill, wound, or capture an animal to be ‘hunting.’” *United States v. Jarrell*, 143 F. Supp. 2d 605, 607-08 (W.D. Va. 2001). Rather, the term “hunting” also includes the general search for and pursuit of wild animals or game. *See, e.g., United States v. Sanford*, 547 F.3d 1085, 1091 (9th Cir. 1976); *United States v. Spann*, 963 F. Supp. 2d 1198, 1208 (D. Kansas 2013). This interpretation is consistent with the word’s ordinary meaning. *See Webster’s New Collegiate Dictionary* 405 (7th ed. 1971). Indeed, even the Recommended Decision recognizes that “hunting” encompasses activities aimed at “catch[ing] or kill[ing]” gray whales. Rec. Dec. 145. Taking into account the broad wording and purposes of the MMPA, the term “hunting” must refer to both “lethal” hunt activities, where the purpose is to kill the target whale, and “non-lethal” hunt activities, where the purpose is to search for and approach the target whale. Accordingly, any effort to narrowly construe the term “hunt” under the proposed regulations to exclude the search for and pursuit of gray whales must be rejected.

In addition, the Recommended Decision’s reliance on the “clear difference in intent” to distinguish “lethal” hunt activities from “non-lethal” hunt activities threatens to impose a *mens rea* requirement on the MMPA’s take prohibition that does not exist in statute. The MMPA is “in the nature of a strict-liability provision.” *Pac. Ranger, LLC v. Pritzker*, 211 F. Supp. 3d 196, 214 (D.D.C. 2016); *see also id.* (“The prohibited act of taking a marine mammal is a strict-liability offense that is broadly defined.”). Because “it is the doing of the act that results in culpability,” *id.*, “the motivations behind [a] Respondent[’s] actions are irrelevant” to a finding that a take occurred, *Kai Paloa, LLC*, No. PI 1402055, 2017 WL 6268521, at *16 (NOAA Nov. 22, 2017). Thus, whether the Tribal hunters subjectively intended to kill the target whale is irrelevant to whether their conduct constitutes “hunting.” *See id.* at *21 (“[I]ntentions are irrelevant given the strict liability nature of the MMPA.”). Rather, the relevant inquiry is whether the conduct in

question falls within the meaning of the term under applicable law. *See id.*; *cf. Spann*, 963 F. Supp. 2d at 1207 (“[A]s a matter of law, hunting is not limited to the precise act of pulling the trigger on a gun or using a bow and arrow to shoot at wildlife. Rather, hunting has been defined as searching for or pursuing wildlife.”). As explained, the acts of searching for, approaching, and pursuing gray whales—whether during a “hunt” as currently defined in the regulations, or during so-called “non-lethal” hunt or training exercises—are clearly encompassed within the term “hunt” as used in the MMPA.

An examination of the plain language of the proposed regulations illustrates the absurdity of the Recommended Decision’s continued insistence that “hunting” does not include training activities. “Hunt” is defined to mean “to pursue, strike, harpoon, shoot, or land a gray whale . . . or to attempt any such act.” Tab 121B at 2. However, Recommended Decision, “hunt” does *not* include “hunting approaches, training approaches, or training harpoon throws.” *Id.* “Hunting approach” is defined to mean “to cause, in any manner, a vessel to be within 100 yards of a gray whale during a hunt.” *Id.* Thus, the approach, “in *any manner*,” of “a gray whale *during a hunt*” does not constitute hunting under the Recommended Decision. In other words, according to NMFS, while the approach of a whale *during a hunt* does not constitute “hunting,” the pursuit or strike (or attempted pursuit or strike) of a whale is hunting. Setting aside the fact that it defies common sense to assert that the approach of a whale during a hunt somehow does not constitute hunting, these definitions are inherently contradictory. To harmonize these definitions, “hunting” under the proposed regulations must require that the target whale be subjected to a strike or attempted strike. In other words, “hunting” under the proposed regulations requires that the target whale be killed, or attempted to be killed.¹⁴ By accepting NMFS’s definition of “hunt” to require the “kill[ing]” of the target marine mammal, the Recommended Decision impermissibly renders Congress’s inclusion of both terms in its list of prohibited acts—hunt and kill—superfluous. *See TRW Inc.*, 534 U.S. at 31 (noting that it is “a cardinal principle of statutory construction” that a statute should be construed, if possible, so that “no clause, sentence, or word shall be superfluous, void, or insignificant” (internal quotation marks and citation omitted)).

Once “hunt” is understood to include all activities authorized under the waiver (including “non-lethal” training activities), it is clear that the waiver will result in the “hunting” of WNP whales in violation of the MMPA, contrary to Congress’s clear intent in prohibiting all take (hunting or otherwise) of depleted species. The activities authorized by the Recommended Decision are indisputably “purposeful interaction[s] with the protected animal.” NMFS *Understanding Permits*, *supra*. In fact, the “interaction with the marine mammal was the purpose of the activity.” *See id.* Accordingly, the waiver activities constitute directed take. Pursuant to the MMPA, directed take of a depleted species is only permitted for the purposes of research, photography, or stock enhancement activities. 16 U.S.C. § 1371(a)(3)(B). However, NMFS’s own risk analysis—which the Recommended Decision determined was “scientifically sound,” Rec. Dec. 117—concluded that it is *certain* (i.e., a 100 percent probability) that at least one WNP whale will be approached by the Tribe if the Recommended Decision is adopted. Tab 61D at 12. Indeed, the Recommended Decision recognizes that “[a]s animals from the two stocks are

¹⁴ Indeed, the Recommended Decision concedes as much, asserting that the distinguishing factor between hunting activities and training activities is that the ultimate aim of hunting is to “kill and land a whale for use and consumption.” Rec. Dec. 145.

generally indistinguishable by sight alone, it is reasonable to assume WNP could be approached during training activities and struck during a hunt.” Rec. Dec. 117; *see also* Tab 101, 59:18-20 (NMFS expert conceding that members of the WNP stock are not “readily distinguishable” from members of the ENP stock); Tab 103, 121:8-9 (Makah expert Dr. Jonathan Scordino conceding that the Tribal hunters will not be able to tell the difference between ENP, WNP, and PCFG whales by sight). In other words, the Recommended Decision will result in the directed take of at least one WNP gray whale by waiver activities (including “non-lethal” hunt activities). Thus, any assertion that a waiver authorizing the hunting of ENP whales does not also authorize the hunting of gray whales that are in the same area and are functionally identical to the target stock defies logic and law. *Cf. Kokechik Fishermen’s Ass’n*, 839 F.2d at 801 (holding that NMFS may not issue a permit for one marine mammal stock when the unauthorized take of another marine mammal stock is likely to occur as a consequence of the permitted activity). Accordingly, notwithstanding NMFS’s and the Recommended Decision’s assertions to the contrary, the Recommended Decision functionally recommends waiving the moratorium to allow the hunting of WNP whales, a result the MMPA expressly prohibits. *See* 16 U.S.C. § 1371(a)(3)(B). For this reason alone, the Recommended Decision must fail.

2. *At The Very Least, The Recommended Decision Authorizes Harassment Of WNP Whales In Violation Of The MMPA*

Even if the illusory and insupportable distinction between “lethal” and “non-lethal hunt activities” is adopted by the Assistant Administrator, the “non-lethal hunt activities” still constitute take by harassment. “Harassment” is defined as “*any act* of pursuit, torment, or annoyance which (i) has the *potential* to injure a marine mammal . . . or (ii) has the *potential* to disturb a marine mammal . . . by causing disruption of behavioral patterns, including but not limited to, migration, breathing, nursing, . . . [or] feeding.” 16 U.S.C. § 1362(18)(A), (C), (D). Giving the undefined statutory terms their “ordinary, contemporary, common meaning,” *Tarriff*, 584 F.3d at 1090, “pursue” means “to follow in order to overtake, capture, kill, or defeat,” Webster’s New Collegiate Dictionary at 694 (7th ed. 1971), “torment” means “to cause worry or vexation to,” *id.* at 933, and “annoy” means to “irritate esp[ecially] by repeated acts,” *id.* at 36.

The Recommended Decision will authorize the pursuit and approach of gray whales, as well as strikes and attempted strikes on targeted individuals. Thus, Tribal hunters will (or will attempt to) “follow” gray whales “in order to catch or attack them,” and will “cause vexation to” and “irritate” gray whales by approaching or throwing objects at them. At the hearing, NMFS conceded that these activities have at the very least the potential to disrupt gray whale behavior, such as migration, breathing, or feeding. *See* Tab 101, 55:8-17; *see also* Tab 102, 14:3-17 (providing that in Dr. Weller’s professional opinion, gray whales will “likely” exhibit behavioral responses when subjected to an unsuccessful strike attempt or training harpoon throw); Tab 102, 10:7-12 (admitting that in his “decades” of experience approaching gray whales for research purposes, Dr. Weller observed “highly variable” responses ranging from little to no response to a “middling” response to a “more direct[]” response).¹⁵ Accordingly, these acts indisputably fall

¹⁵ Indeed, vessel approaches to within 100 yards are known to have the potential to cause behavioral disturbances and thus have long been formally considered by NMFS to constitute harassment. *See, e.g.*, 66 Fed. Reg. at 29,508 (noting that prohibiting all vessels—including

within the expansive definition of “harassment.” *Cf. Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008) (“[R]ead naturally, the word ‘any’ has an expansive meaning, that is, ‘one or some indiscriminately of whatever kind.’” (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997))). In fact, the Recommended Decision concedes as much, noting that “training activities are . . . likely to be construed as ‘harassment.’” Rec. Dec. 146.

As explained above, the Recommended Decision (even if the Assistant Administrator adopts the recommendations contained therein) cannot escape the fact that it functions to authorize the hunting of depleted WNP whales, which the MMPA expressly forbids. The same reasoning applies here to support the determination that the Recommended Decision (again, even if the Assistant Administrator adopts the recommendations contained therein) operates to authorize the harassment of WNP whales in the course of waiver activities, which the MMPA likewise forbids. The training activities authorized by the Recommended Decision—which constitute harassment as that term is defined in the MMPA—are indisputably “purposeful interaction[s] with the protected animal.” *NMFS, Understanding Permits, supra*. Indeed, the “interaction with the marine mammal was the purpose of the activity.” *See id.* Accordingly, the training activities constitute directed take.

Pursuant to the MMPA, directed take of a depleted species is only permitted for the purposes of research, photography, or stock enhancement activities. 16 U.S.C. § 1371(a)(3)(B). Indeed, as the Recommended Decision concedes, NMFS “has no authority under [the MMPA] to allow even a ‘de minimis’” taking of a stock which is not at its OSP.” Rec. Dec. 148. However, there is “essentially [a] 100 [percent] probability” of at least one WNP whale being approached over the course of the waiver. *Id.* at 118. In other words, at least one WNP whale will be subjected to a directed take, at the very least, by harassment. *See* 16 U.S.C. § 1362 (defining

kayaks—from approaching humpback whales to within 100 yards “will provide protection from harassment”); 84 Fed. Reg. at 13,610 (“The 100-yard limit is consistent with permit conditions NMFS imposes for research vessels on large cetaceans . . . as well as guidelines for *all motorized and non-motorized vessels*.” (emphasis added)); *id.* at 13,612 (“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*.” (emphases added)). Moreover, at the hearing, when asked to describe gray whales’ reaction to being approached by research vessels, Dr. Weller admitted not only that many whales do in fact react, but that such reaction “is often related to the behavior of the boat and how it is operated.” Tab 102, 10:10-14. Thus, it stands to reason that a gray whale that has been targeted by Tribal hunters and subjected to an approach and pursuit in a hunt scenario may react quite strongly. But even so, all that is required for an act to constitute “harassment”—and therefore a “take”—under the MMPA is for the act to have the “*potential* to disturb” a marine mammal. 16 U.S.C. § 1362(18)(A) (emphasis added). As Dr. Weller conceded, approaches of gray whales (even for much more benign purposes such as research or photography) have been demonstrated to disturb gray whales, and as such, constitute take by harassment and are prohibited without prior legal authorization. *See* Tab 3 ¶ 46 (Weller Decl.) (conceding that “[i]ndividual vessel approaches are likely to elicit a range of reactions from whales, from showing no response to whales diving, exhaling underwater and exposing only their blowholes, fluke slapping, or changing direction and speed”).

take); *NMFS Understanding Permits, supra*. As explained above, “[a]s animals from the two stocks are generally indistinguishable by sight alone.” Rec. Dec. 117. Thus, any assertion that a waiver authorizing the directed take (by hunting or by harassment) of ENP whales in the course of training activities does not also authorize the directed take (by hunting or by harassment) of gray whales that are in the same area and are functionally identical to the target stock defies logic and law. Accordingly, at the very least, the Recommended Decision (even if the Assistant Administrator adopts the recommendations contained therein) functionally authorizes the directed take of WNP whales by harassment in the course of training activities. However, training activities, by definition, do not constitute research, photography, stock enhancement activities. Accordingly, the MMPA precludes the adoption of the Recommended Decision.¹⁶

3. *The MMPA Precludes The Issuance Of A Waiver For Training Activities*

The precautionary principle enshrined in the MMPA bars the issuance of a waiver for so-called “non-lethal” training activities. The MMPA “insist[s] that the management of the animal populations be carried out with the interests of the animals as the prime consideration.” H.R. REP. NO. 92-707, at 18, 1972 U.C.C.C.A.N. at 4145. Applying that demand here, it is clear that authorizing the intentional, directed take by harassment of gray whales is antithetical to the policies and purposes of the MMPA. Take exceptions are intended to exempt only a narrow slice of actions. *Cf. Pac. Ranger*, 211 F. Supp. 3d at 214 (noting that the MMPA exceptions for “incidental” takes are narrowly construed). Widening those exceptions to allow non-essential takes in the course of a hunt cannot be squared with Congress’s clear intent to protect marine mammals from *all* disturbances and intrusions. *See* H. R. Rep. No. 92–707, at 18, 1972 U.C.C.C.A.N. at 4145. This is particularly true when there is a reasonable alternative that does not involve the directed take of marine mammals. For example, the Tribe could use a motorized vessel to pull a log or other object to mimic a whale for target practice.

Permitting training activities that involve the approach, pursuit, harassment, and potential striking of a protected species is highly anomalous. Indeed, AWI could not find any other situation where a federal or state wildlife management authority permitted the intentional approach or shooting of large game with blunted arrows or spears to train and/or practice hunting. Nor do other Alaska Native groups that participate in subsistence whaling engage in such training activities. Accordingly, the Assistant Administrator should amend the Recommended Decision’s regulations to disallow training activities on live whales.

B. The Recommended Decision Unlawfully Covers Only One Of The Stocks That Will Be Taken

Although the fact that the Recommended Decision authorizes the directed take of members of the depleted WNP gray whale stock for prohibited purposes is sufficient to defeat the proposal, the Recommended Decision also suffers from the same fatal flaw as the proposed

¹⁶ As discussed below, *see infra* Section II.B.3, the suggestion that the harassment of WNP whales that will result from the waiver can be excused as “incidental” is insupportable by logic and law.

waiver and regulations: namely, it does not cover all of the marine mammal stocks that *will* be taken as a result of the waiver. And this is true even if the Assistant Administrator adopts the recommendations contained in the Recommended Decision, because the Recommended Decision paves a path for the Tribe to seek and obtain authorization under the MMPA to take at least one WNP gray whale, which, as a matter of law, is not legally permissible.

As AWI explained in its Post-Hearing Brief, it is well-established that NMFS cannot issue an MMPA take authorization that only covers *some* of the species that are likely to be taken. AWI Post-Hearing Br. 36-44. In *Kokechik Fishermen's Ass'n*—the seminal case on this issue—the D.C. Circuit resolved the question of whether NMFS may legally issue a waiver and permit “allowing [] taking of one protected marine mammal species knowing that other protected marine mammal species will be taken as well.” 839 F.2d at 801. As the court held, the limited exceptions to the moratorium “clearly evidence [Congress’s] concern with the relationship between the activity engaged in and its effect on marine mammals and their ecosystem.” *Id.* To authorize the take of only some of the marine mammal species or stocks that will be taken by an activity would “allow—subject to the civil penalty price—illegal takings of other protected marine mammals,” thereby sanctioning likely (or, in this case, *certain*) violations of federal law. *Id.* “This is a result that the MMPA does not countenance.” *Id.* Rather, the MMPA requires NMFS to take a “systemic view of the activity’s effect” on *all* of the marine mammals that are likely to be affected by the activities authorized pursuant to the take authorization. *Id.* at 802. If NMFS cannot lawfully waive the moratorium for all affected stocks, the request must be denied.

Despite acknowledging that the proposed waiver will result in the take of WNP whales, the Recommended Decision nevertheless recommends granting the waiver without any additional meaningful safeguards to protect WNP whales.¹⁷ For the reasons below, the Recommended Decision cannot withstand legal scrutiny.

1. *The Assistant Administrator Must Determine Whether The Take Of A WNP Gray Whale Can Be Authorized Prior To Issuing A Waiver*

In recommending that the waiver be granted, the Recommended Decision avoided the issue of unauthorized take of WNP whales by dismissing AWI’s arguments as not applicable to the waiver proceeding and asserting instead that those arguments would only apply at later stages of the proceeding when take permits or authorizations are issued, as well as by misconstruing the applicable law. However, common sense and law dictate that the question of whether the Recommended Decision will result in unauthorized take of nontarget stocks is plainly relevant to the waiver proceeding.

As an initial matter, the Recommended Decision’s conclusion that *Kokechik* “applies to the permitting process rather than the issuance of a waiver,” Rec. Dec. 123, is wrong on the law

¹⁷ The Recommended Decision suggested that the Assistant Administrator prohibit even-year hunting and training activities, which would occur during the time of year that WNP whales are known to be in the hunt area, until the Tribe obtains an incidental take authorization. However, as explained above, *see supra* at 19-20, this requirement was already implied in the regulations as proposed.

and the facts. Legally, *Kokechik* recognizes that NMFS “has no authority, *by regulation* or any other action, to issue a permit that allows conduct prohibited by th[e] [MMPA].” 839 F.2d at 802 (emphasis added). Thus, *Kokechik* is plainly relevant to situations where NMFS’s proposed waiver and regulations would “allow—subject to the civil penalty price—illegal takings of other protected marine mammals,” thereby sanctioning likely violations of federal law. *Id.* Factually, *Kokechik* involved a challenge to NMFS’s decision to waive the moratorium and “establish[] *regulations* to govern the taking of marine mammals incidental to . . . salmon fishing.” 52 Fed. Reg. 19,874 (May 28, 1987) (emphasis added). Although the decision promulgating the final rule also attached a permit issued under those regulations, NMFS’s compliance with the MMPA’s permit issuance criteria was not at issue in the case. Rather, the principal issue was whether NMFS made the determinations required under the *same provisions* applicable here—i.e., that requested waiver would be consistent with the policies and purposes of the MMPA, and that the waiver would not disadvantage the affected species and population stocks. *See Kokechik Fishermen’s Ass’n*, 839 F.2d at 801-02. As the D.C. Circuit recognized, the MMPA requires that these determinations be made “*in conjunction with the formal rulemaking proceedings*” and further, “are an *absolute requirement* for . . . waiver of the MMPA.” *Id.* Thus, contrary to the Recommended Decision’s assertions, *Kokechik* controls the outcome here.¹⁸

Moreover, the Recommended Decision’s dismissal of AWI’s arguments as “arguing against the issuance of a hunt permit” and thus, not relevant at this stage of the waiver proceeding, misconstrues AWI’s arguments. Rec. Dec. 75. AWI does not argue that a hunt permit cannot be issued under the proposed regulations. Rather, AWI argues that the proposed waiver and regulations unlawfully fail to cover all of the stocks that are certain to be taken by waiver activities, in clear violation of the MMPA. *See Kokechik Fishermen’s Ass’n*, 839 F.2d at 801-02. Whether the waiver and regulations will result in unauthorized take—and thus, violate the MMPA—is clearly relevant to the waiver proceeding. Indeed, regulations “that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement” must be rejected. *Fed. Election Comm’n v. Democratic Senatorial Campaign Comm’n*, 454 U.S. 27, 32 (1981); *see also Texas v. EPA*, 726 F.3d 180, 195 (D.C. Cir. 2013) (“[A] valid statute always prevails over a conflicting regulation, and a regulation can never trump the plain meaning of a statute.” (citations and internal quotation marks omitted)). Accordingly, the Recommended Decision’s refusal to engage with AWI’s arguments and its failure to determine whether *all* takes that will result from the waiver and regulations can be authorized by NMFS *in the final waiver and regulations* cannot pass legal muster.

For the same reasons, the Recommended Decision’s assertion that the waiver proceeding “is not the appropriate time and place to parse the meaning of ‘incidental take’” must also fail. The plain language and purposes of the MMPA require that the Assistant Administrator ensure

¹⁸ The Recommended Decision conspicuously ignores the fact that prior to 1994, the general permits authorizing the incidental taking of marine mammals during commercial fishing operations were governed in part by *the same statutory provisions* applicable to the Tribe’s requested waiver. *See, e.g.*, 52 Fed. Reg. 19,874 (May 28, 1987). Accordingly, the Recommended Decision’s attempt to confine *Kokechik* to situations involving the incidental take of marine mammals during the course of commercial fishing operations makes little sense and must be rejected.

that all take that is certain to result can be authorized *prior* to issuing a waiver and regulations. *See Kokechik Fishermen's Ass'n*, 839 F.2d at 801-02. This is especially true here, where it is undoubtedly possible to structure the waiver and regulations to eliminate the risk to WNP whales while also protecting the unique PCFG population. *See infra* Section II.C. Such a result would harmonize the proposed waiver with the MMPA's policies and purposes, including its strict prohibition against taking a depleted species. However, the Recommended Decision takes the opposite approach. Faced with the reality that the take of WNP whales cannot lawfully be authorized under *any* MMPA take exception, the Recommended Decision avoids the issue entirely, presuming—incorrectly—that the inevitable take of WNP whales can be authorized pursuant to the MMPA's incidental take provision. As a result, the Recommended Decision thus threatens to allow by regulation conduct that is contrary to law. In addition, by kicking the proverbial can down the road, the Recommended Decision abdicates its statutory obligation to ensure that NMFS's proposal complies with the MMPA. Thus, contrary to the Recommended Decision's assertion, determining whether the inevitable take of WNP whales can be excused as incidental is plainly relevant to the waiver proceeding and the absence of such a determination is an arbitrary, capricious, and unlawful defect that fatally infected the Recommended Decision.

2. *The Recommended Decision Must Be Rejected Because It Does Not—And, As A Matter Of Law, Cannot—Authorize The Take Of WNP Whales That Will Occur In The Course Of Proposed Waiver Activities*

It is clear that the Recommended Decision—like the proposed waiver and regulations—is inconsistent with the MMPA and must be rejected. It is beyond dispute that the Recommended Decision is likely to (and *will*) result in the “taking” of at least one WNP gray whale during duration of the initial waiver period, whether by harassment, hunting, or killing. The Recommended Decision concedes as much, admitting that “it is reasonable to assume WNPs could be approached during training activities and struck during a hunt.” Rec. Dec. 117; *accord* Tab 101, 60:21-23 (NMFS expert admitting that the proposed regulations do not eliminate the risk that WNP whales will be subjected to waiver activities); Tab 101, 29:6-8 (NMFS expert Mr. Yates conceding that it is “possible that even with the[] [protective] measures, a WNP whale could be struck by hunters”).¹⁹ The Recommended Decision also acknowledges that the proposed waiver and regulations have “essentially [a] 100 [percent] probability” that WNP whales will be approached over the course of the waiver. Red. Dec. 118; *accord* Tab 61D at 12 (reporting that at least one WNP whale will be subjected to an approach over the course of the

¹⁹ In fact, NMFS believes the risk of striking and landing a WNP whale to be sufficiently likely to require a contingency built into the regulations. Tab 101, 28:24-29:5. NMFS has previously acknowledged that “[a] population size of several hundred individuals is precariously small for any large whale or large mammal population.” *See* 78 Fed. Reg. at 73,726. Thus, if a WNP whale is struck and landed, NMFS will stop the hunt until it is “able to contemplate a hunt that would have no potential of striking [WNP] animals.” Tab 101, 29:2-5. However, the conservative bias built into the MMPA, *see* H.R. REP. NO. 92-707, at 15, 1972 U.C.C.C.A.N. at 4148, as well as its command that “the management of the animal populations be carried out with the interests of the animals as the prime consideration,” H.R. REP. NO. 97-707 at 18, 1972 U.C.C.C.A.N. at 4151, together demand that NMFS's goal from the outset should have been to contemplate a hunt that would have no potential for striking a depleted species.

waiver, and that there is an 83% chance that a WNP whale will be approached in any given year). Such approaches “may cause” behavioral changes in targeted whales, *id.* at 18, and thus, at the very least, fall squarely within the MMPA’s expansive definition of “harassment.” Indeed, the Recommended Decision confirms that so-called “non-lethal hunt activities” “*are considered ‘takes.’*” *Id.* at 23. The law is clear that the Assistant Administrator “must face up to the taking of other marine mammals the record shows will also inevitably occur” if the hunt is authorized. *Kokechik Fishermen’s Ass’n*, 839 F.2d at 802. Thus, taking the “systemic view” of the proposed hunt as the MMPA demands, *Kokechik Fishermen’s Ass’n*, 839 F.2d at 802, because both ENP and WNP gray whales are likely to be taken by the activities authorized by the waiver, any waiver authorizing such activities must cover both stocks.

The Recommended Decision’s contention that *Kokechik* applies only to situations where *lethal* take is certain fails as a matter of law and fact. Rec. Dec. 135-56. The plain language of the MMPA broadly prohibits “take,” with no distinction between lethal and non-lethal take. *See* 16 U.S.C. §§ 1362, 1371, 1372. Indeed, Congress has been “extraordinarily rigid” in reaffirming its commitment to protecting marine mammals from any act that has the potential to disturb their behavior, no matter how “ephemeral and short-term” the response. *See Ala. Power Co. v. Costle*, 636 F.2d 323, 360-61 (D.C. Cir. 1979) (providing that an agency may be able to imply *de minimis* authority to provide exception “[u]nless Congress has been extraordinarily rigid” in its command). Take is take, regardless of whether actual or significant disturbance occurs. *See Patterson*, 2 O.R.W. 249 (NOAA 1980) (recognizing that whether the acts in question in fact cause a behavioral disturbance is “academic” and legally irrelevant to whether such acts are prohibited without prior authorization); *O’Barry*, 1999 WL 1417459 (“[E]ven where the injury is minimal, it is insufficient to absolve one of liability under the MMPA.”). NMFS cannot ignore the clear directions of Congress, nor can it “rewrite clear statutory terms to suit its own sense of how the statute should operate.” *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 328 (2014).²⁰

²⁰ Following a 1993 Ninth Circuit ruling interpreting the term “harassment” to require “a direct and significant intrusion” upon a marine mammal’s natural state, *see United States v. Hayashi*, 22 F.3d 859, 864 (9th Cir. 1993), in 1994, Congress amended the MMPA to define “harassment” in a much broader manner to encompass “any act” that has the mere “potential” to injure or disturb a marine mammal, thereby signaling an extremely low threshold for establishing harassment under the MMPA. *See City of Sausalito v. O’Neill*, 386 F.3d 1186, 1224 (9th Cir. 2004) (recognizing that the 1994 amendments abrogated *Hayashi*). By significantly expanding the definition of “harassment,” Congress clearly expressed its intent that the MMPA’s take prohibition be broadly construed to prohibit not only those acts that cause “direct and significant intrusion[s],” but also those acts that may cause minor or seemingly insignificant disturbances to these protected animals. Congress reaffirmed the broad application and intent of this statutory term nine years later when it expressly rejected NMFS’s effort to effectively rewrite the definition of “harassment” to require that the MMPA cause actual and significant disturbance to constitute “take.” In response to an application by the U.S. Navy to take marine mammals incidental to operation of low-frequency sonar, NMFS proposed defining “harassment” to require that the act “actually cause[] a significant behavioral change or significant behavioral response in a biologically important behavior or activity.” *NRDC, Inc. v. Evans*, 279 F. Supp. 2d 1129, 1154 (N.D. Cal. 2003). A federal district court found NMFS’s heightened standard arbitrarily and capriciously ignored Congress’s express definition of “harassment,” “which

Accordingly, the approach, pursuit, and striking of whales—acts that NMFS *concede* have, at the very least, the *potential* to disturb gray whales, *see* Tab 101, 55:3-17; cf. Tab 102, 10:10-12—clearly constitute take irrespective of whether the targeted whale reacts, and can only be conducted pursuant to a lawfully issued waiver or take authorization.

As a matter of law, NMFS cannot issue a waiver for the take of the WNP gray whale stock in the course of waiver activities. As discussed above, *see infra* at Section II.A, the MMPA prohibits NMFS from waiving the moratorium for the directed take of marine mammals designated as depleted, except for photography, research, or enhancement purposes. 16 U.S.C. § 1371(a)(3)(B). The WNP gray whale stock is designated as “depleted” under the MMPA. *Id.* § 1362(1)(C); *see also* Tab 1 ¶ 21 (Yates Decl.). The proposed waiver and regulations authorize hunt and training activities—including approaches, strike attempts, and strikes—which by definition, are not “scientific research, photography, or enhancement purposes.” Accordingly, the MMPA precludes NMFS from issuing a waiver for the directed take by waiver activities of the depleted WNP gray whale stock. 16 U.S.C. § 1371(a)(3)(B). Because NMFS cannot lawfully issue a waiver for both affected stocks, the inevitable legal conclusion is that the waiver as proposed must be denied.

The Recommended Decision’s attempts to avoid this result reflect a fundamental misunderstanding of the MMPA and NMFS’s obligations concerning marine mammals. For example, rejecting the argument that the MMPA precludes the issuance of a waiver that only covers one stock that is likely to be taken, the Recommended Decision insists that “[a] mere approach on a WNP gray whale, which is the most likely scenario under the proposed waiver and regulations, is not expected to have any effect on the stock’s ability to attain and maintain its OSP.” Rec. Dec. 120. This language mirrors the disadvantage test, which requires NMFS to

considers an act to be harassing if it ‘has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns,’ even if the disruption does not actually occur.” *Id.* In response to this decision, Congress amended the MMPA to “provid[e] a new definition of ‘harassment’ applicable only to military readiness activities . . . and scientific research activities by or on behalf of the Federal Government.” H.R. REP. NO. 108-354, at 668-69 (2003) (Conf. Rep.), *reprinted in* 2003 U.S.C.C.A.N. 1407, 1446-47. “When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.” *Pierce County v. Guillen*, 537 U.S. 129, 145 (2003). Congress clearly understood the implications of its decision to amend the MMPA to carve out a narrow exception for military and federal scientific activities, while leaving the broader prohibition applicable to all other activities intact. *Cf. Gross v. FBL Financial Servs., Inc.*, 557 U.S. 167, 175 (2009) (“When Congress amends one statutory provision but not another, it is presumed to have acted intentionally.”). Thus, in the case of military or federal scientific research activities, “harassment” requires that the act “injure[] or ha[ve] the significant potential to injure” a marine mammal, or “disturb[] or [be] likely to disturb a marine mammal . . . to a point where [] behavioral patterns are abandoned or significantly altered.” National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, § 319, 117 Stat. 1392, 1443 (2003) (amending 16 U.S.C. § 1362(18)). However, importantly, in all other cases, “harassment” continues to require only that the act have “the potential to disturb”—i.e., a much lower standard. *See* 16 U.S.C. § 1362.

determine the proposed taking's impact on the OSP of affected species. *See* 51 Fed. Reg. at 29,675. Thus, in essence, the Recommended Decision appears to assert that the proposed waiver can be issued because the taking of WNP whales by waiver activities will not disadvantage the WNP stock. However, the Recommended Decision puts the cart before the horse. The “disadvantage test” requires NMFS to ensure that any waiver of the moratorium does not operate to the disadvantage of affected stocks, and is thus relevant when promulgating regulations to govern the taking of marine mammals pursuant to a waiver. It is inapplicable here because the proposed waiver and regulations expressly do not purport to authorize the take of WNP whales. Instead, the relevant inquiry is: whether the take of a WNP whale can be authorized under one of the exceptions to the MMPA's take moratorium. As explained, the MMPA does not authorize such take, whether by hunting, killing, or harassment. The Recommended Decision failed to meaningfully grapple with this threshold question, and as a result, “allow[s]—subject to the civil penalty price—illegal takings of other protected marine mammals.” *Kokechik Fishermen's Ass'n*, 839 F.2d at 802. Because the Recommended Decision sanctions likely (or, in this case, certain) violations of federal law, it cannot lawfully be issued. *Id.*

Moreover, even if the disadvantage test were relevant here, the plain language of the MMPA requires NMFS—not the ALJ—to determine that the proposed waiver and taking are consistent with the MMPA's policies and purposes, and to “insure that such taking will not be to the disadvantage of [affected] species and population stocks.” 16 U.S.C. §§ 1371(a)(3)(A), 1373(a); *accord Kokechik Fishermen's Ass'n*, 839 F.3d at 801 (noting that the MMPA requires NMFS to determine that the waiver proponent “has carried its burden of proving that the taking sought does not disadvantage the species involved and is consistent with the policies and purposes of the Act”). No matter how “thorough and detailed” NMFS's analysis of the proposed hunt's impact on the WNP gray whale stock, Rec. Dec. 122, the fact remains that at no point in the record did NMFS make these findings with respect to the take of WNP gray whales in the course of waiver activities that is certain to occur. To the contrary, NMFS strenuously maintains that its waiver only authorizes the “hunting” of ENP gray whales, *see* Tab 58 ¶ 41 (Yates 3d Decl.). Thus, even if the MMPA did permit the issuance of a waiver for the take of WNP whales in the course of waiver activities—which again, it does not—NMFS nevertheless failed to make the required determinations for a stock that will be taken as a result of authorized activities. This failure is fatal to the Recommended Decision.

In any event, the Recommended Decision's implication that the taking of WNP gray whales in the course of waiver activities satisfies the MMPA's strict waiver requirements does not comport with the evidence in the record. As NMFS acknowledged in the 2015 DEIS for the proposed hunt, in light of the WNP gray whale stock's population of 290 individuals, “[t]he loss of a single whale, particularly if it were a reproductive female, would be a conservation concern for this small stock.” DEIS at 3-93 to 3-94. Accordingly, especially in light of Congress's clear intention that the MMPA “be administered for the benefit of the protected species rather than for the benefit of [] exploitation,” *Comm. for Humane Legislation, Inc. v. Richardson*, 540 F.2d 1141, 1148 (D.C. Cir. 1976), NMFS cannot demonstrate that even the “low but real possibility” of a strike on a WNP gray whale, Rec. Dec. 123, is in the interests of a depleted stock. Moreover, the take of WNP gray whales by sublethal training activities (e.g., approaches and training throws) is a certainty. The record demonstrates that such non-lethal take, including by approach and vessel noise, can displace marine mammals from important feeding or breeding areas,

causing “significant” impacts on individuals and populations. *See* 83 Fed. Reg. 19,711, 19,722-23 (May 4, 2018) (discussing marine mammal behavioral responses to underwater sound, including vessel noise); *see also* Villegas-Amtmann Decl. ¶¶ 9-10; Villegas-Amtmann Decl. at Ex. 3 at 1 (finding that “[a]n annual energetic loss of 4% during the year in which she is pregnant, would prevent a female from successfully producing/weaning a calf”); Villegas-Amtmann Decl. Ex. 4 at 1 (noting that long-term yearly energy loss of less than 30% “would reduce population growth due to lower reproductive rates”); *cf.* Rec. Dec. 46 (finding Dr. Villegas-Amtmann “a credible expert in her field,” which includes “the physiology and ecology of marine mammals and [] whale bioenergetics”).²¹ When additional stressors such as the impacts of climate change, ship strikes, bycatch, coastal pollution, and other anthropogenic disturbances such as seismic surveys and vessel noise, the threat to both individual WNP gray whales and the stock as a whole posed by even “short-term” disturbances is laid plain. *Accord* Tab 3WW at 5 (NMFS expert explaining that “[r]egardless of the cause, the loss of even a few whales (especially reproductive females) . . . will greatly hinder population growth and ultimately prevent its recovery”).

Brushing away these threats, the Recommended Decision likens the short-term disturbances that will result from non-lethal training activities to those resulting from permitted research activities or whale watching vessels. However, these are false equivalences and, therefore, are unavailing. As explained, the MMPA expressly allows the waiver of the moratorium for the take of depleted stocks by research activities. However, the approach of whales by whale watching vessels is illegal. *See* 61 Fed. Reg. 21,926, 21,927 (May 10, 1996) (“With regard to whale watching, there is no statutory exception provided for observational cruise activities, however, such activities can be conducted carefully without harassing marine mammals. Therefore, NMFS will continue to inform prospective vessel operators of guidelines to follow in an effort to avoid harassment.”). Thus, if anything, the Recommended Decision’s comparison of impacts underscores the fact that approaches of WNP whales constitute takes that *must* be authorized by a lawful permit in order for the waiver to be issued.²² However, as explained, such authorization cannot be issued consistent with the MMPA.

²¹ Indeed, evidence suggests that whales that are subjected to multiple approaches by vessels may result in the abandonment of preferred feeding areas. *See* 81 Fed. Reg. 62,010, 62,013 (Sept. 8, 2016). In other situations, whales may become habituated to human activity, making them more susceptible to physical injury from vessel strikes. *Id.* at 62,014. An increase in vulnerability to vessel strikes is a concern for both ENP and WNP gray whales, which frequent waters with high vessel traffic. Tab 59B at 7 (“Ship strikes are a source of mortality and serious injury for [ENP and PCFG] gray whales.”); *id.* at 14 (noting that “shipping congestion throughout the migratory corridors of the WNP whale stock represent risks by increasing the likelihood of . . . ship strikes”). Accordingly, even short-term, non-lethal disturbances can have detrimental impacts to an individual whale’s survival if the disturbances cause the whale to abandon the foraging area. *Cf.* Tr. vol 5, 153:8-13 (reporting that although occasional foraging outside of feeding grounds occurs, it is not “substantial enough to be able to sustain the energetic needs of the whales to be able to accomplish all of the phases of their reproductive cycle”).

²² It must also be noted that the definition of harassment that applies to permitted federal research activities requires that the act “injure[] or ha[ve] significant potential to injure” a marine mammal, or “disturb[] or [be] likely to disturb a marine mammal . . . to a point where []

Finally, the Recommended Decision suggests that “*Kokechik* allows for the possibility that, even if a taking could not be authorized [by waiver], it could be authorized under other provisions of the MMPA,” including the provision authorizing incidental take. Rec. Dec. 122. However, as discussed below, the take of WNP gray whales in the course of proposed waiver activities cannot lawfully be excused or characterized as “incidental.” *See supra* at Section II.B.3. Accordingly, the Recommended Decision to issue the waiver will indisputably result in the unpermitted take of WNP gray whales. Because NMFS “has no authority, by regulation or any other action, to issue a permit that allows conduct prohibited by th[e] [MMPA],” the agency must reject the Recommended Decision. *Id.*

3. *The Recommended Decision Must Be Rejected Because The Take Of WNP Whales That Will Occur In The Course Of Proposed Waiver Activities Cannot Be Authorized Under The MMPA’s Exception For Incidental Take*

During the waiver proceeding, NMFS maintained that to the extent the take of WNP whales in the course of waiver activities was relevant, such take could be authorized under the MMPA’s narrow exception for incidental take. According to NMFS, because the Tribal hunter would not *intend* to take a WNP whale, any take of a WNP whale would be incidental to the Tribe’s lawful hunt of ENP whales. *See* Tab 101, 58:14-18.

In its Post-Hearing Brief, AWI explained that NMFS’s construction of the incidental take exception to excuse the take of WNP whales was fatally flawed. AWI explained that the MMPA’s plain language, purpose, and legislative and regulatory history all make clear that the term “incidental” only applies to acts that are non-intentional or accidental. AWI Post-Hearing Br. 44-54. Accordingly, the authorization for incidental take cannot be applied to excuse the deliberate, intentional approach, pursuit, hunting, or killing of either WNP or ENP gray whales. AWI also explained that NMFS’s reliance on the subjective intent of Tribal hunters to transform deliberate take into incidental take was contrary to the MMPA’s plain language and strict liability scheme, as well as to NMFS’s own long-standing interpretation of incidental take. Accordingly, NMFS’s position that the take of WNP whales can be authorized as incidental was legally groundless.

The Recommended Decision nevertheless recommends that the Assistant Administrator grant the waiver and require that the Tribe obtain an incidental take authorization prior to engaging in waiver activities when WNP whales are, or may be, present in the hunt area. However, the Recommended Decision determined that questions regarding the availability and scope of the incidental take exception were not relevant to the waiver proceeding, and consequently did not address AWI’s arguments regarding the exception’s applicability here. However, as explained above, because NMFS “has no authority, by regulation or any other action, to issue a permit that allows conduct prohibited by th[e] [MMPA],” *Kokechik*

behavioral patterns are abandoned or significantly altered.” 16 U.S.C. § 1362. In contrast, under the definition of harassment applicable to the Tribe’s waiver request, the act must only have “potential to disturb.” *Id.* Accordingly, any comparison of “non-lethal” training activities” to permitted federal research activities is seriously misplaced.

Fishermen's Ass'n, 839 F.2d at 802, whether the take of WNP whales that will occur as a result of waiver activities is plainly relevant to the waiver proceeding.

For the reasons explained in AWI's Post-Hearing Brief and reiterated and expanded below, the take of WNP whales cannot be excused as incidental to the waiver activities that would be authorized by the waiver. Because the inevitable take of WNP whales over the course of the waiver cannot be authorized under any provision of the MMPA, the Assistant Administrator must reject the Recommended Decision.²³

i. The Deliberate Acts That The Recommended Decision Will Authorize Clearly Fall Outside The Definition Of Incidental Take.

The MMPA speaks in categorical terms, imposing a blanket moratorium on the taking of marine mammals. The safe harbor for "incidental" take exempts only a narrow slice of the takes that are otherwise proscribed, i.e., those that are "incidental, *but not intentional*" while engaging in a specified activity. See 16 U.S.C. § 1371(a)(5); cf. *Pac. Ranger, LLC v. Pritzker*, 211 F. Supp. 3d 196, 214 (D.D.C. 2016) (noting that the MMPA exceptions for "incidental" takes are narrowly construed). Although "incidental" is not defined in statute, the term is defined by regulation as "an accidental taking." 50 C.F.R. § 216.103. The regulation further explains that "[t]his does not mean that the taking is unexpected, but rather it includes those takings that are infrequent, unavoidable or accidental." *Id.*

It is axiomatic "that words of statutes or regulations must be given their 'ordinary, contemporary, common meaning.'" *Tarriff*, 584 F.3d at 1090 (quoting *Williams v. Taylor*, 529 U.S. 420, 431 (2000)). Black's Law Dictionary defines accidental to mean "[n]ot having occurred as a result of anyone's purposeful act[.]" while "intentional" means "[d]one with the aim of carrying out the act." Black's Law Dictionary 18, 932 (10th ed. 2014). These definitions conform to the common meaning of "incidental," defined as "occurring merely by chance or without intention or calculation." Webster's New Collegiate Dictionary 423 (7th ed. 1971).

Applied to the "take" context, the term "accidental" plainly does not describe the deliberate acts that the Recommended Decision will authorize pursuant to the waiver, including harassing, hunting, approaching, pursuing, and striking whales, or the attempt to engage in such activities. NMFS concedes—as it must—that the Tribe is proposing to take marine mammals by hunting or by attempting to hunt. Tab 101, 56:24-57:1. NMFS further concedes that hunting is not an "accidental" act. Tr. vol 1, 56:16-18 ("I would posit not. I wouldn't anticipate that hunting would be an accidental act."). Rather, hunting and its constituent acts—e.g., the pursuit of a whale over the course of a hunt, the approach and harassment of whales during waiver activities, and the throwing of harpoons at whales—are purposeful and deliberate acts "[d]one with the aim of carrying out the act" of pursuing and killing a whale for food or sport. In other words, such acts are *intentional*. Accordingly, such acts fall outside the scope of "incidental, *but not intentional*" take, and cannot be excused or authorized under Section 1371(a)(5) or any other

²³ The exception for incidental take is the only statutory exception that would appear to apply to this situation.

provision of the MMPA. *Accord* Tab 101, 57:17-58:6 (agreeing that intentional harassment, pursuit, and hunting fall outside of the scope of “incidental”).²⁴

ii. NMFS Cannot Rely On The Subjective Intent Of The Tribal Hunters To Transform Deliberate Take Into Incidental.

Throughout the waiver proceeding, NMFS has maintained that the take of WNP whales by the intentional acts that would be authorized by the proposed waiver could be excused as incidental because the purpose of the hunt is to take ENP whales and not WNP whales. However, this conclusion is legally groundless. “[B]ecause the [MMPA’s] statutory take prohibition makes no reference to any required *mens rea*, it is in the nature of a strict-liability provision.” *Pac. Ranger*, 211 F. Supp. 3d at 214; *see also id.* (“The prohibited act of taking a marine mammal is a strict-liability offense that is broadly defined.”). Accordingly, as NMFS has long construed the MMPA in its own enforcement cases, “[w]hether a respondent appreciates the consequences of his or her actions is irrelevant since voluntary actions are sufficient to constitute a violation of the MMPA” *Creighton*, No. SW030133, 2005 WL 1125361 (NOAA Apr. 20, 2005). Because “it is the doing of the act that results in culpability,” *id.*, “the motivations behind [a] Respondent[’s] actions are irrelevant” to a finding that a take occurred, *Kai Paloa, LLC*, No. PI 1402055, 2017 WL 6268521, at *16 (NOAA Nov. 22, 2017). Thus, contrary to NMFS’s newly articulated position, the subjective intent of the Tribal hunters is irrelevant to whether an act can be immunized as “incidental.” *See id.* at *21 (“[I]ntentions are irrelevant given the strict liability nature of the MMPA.”). Rather, the relevant touchstone is whether the Tribal hunters’ actions taken pursuant to the waiver fall within the definition of “incidental.” *Accord Pac. Ranger*, 211 F. Supp. 3d at 217 (holding that the term “incidental” as used in the incidental take exception for commercial fisheries “has a clear meaning that does not excuse deliberate, knowing conduct”).

In light of the fact that the Tribe’s explicit purpose for seeking the waiver is to *intentionally* pursue, hunt, and kill whales (and to engage intentionally in training exercises to do the same)—especially where everyone agrees that WNP whales will likely be taken and it is impossible to visually differentiate between WNP and ENP whales—there is no legal or logical basis for characterizing any of these deliberate acts as non-intentional or incidental. In fact, in the preamble to the rules governing incidental takes under Section 1371(a)(5), NMFS *specifically rejected* a definition of “incidental” that would include deliberate acts, even where such acts would prevent mortality. *See Regulations Governing Small Takes of Marine Mammals Incidental*

²⁴ NMFS’s current position that the take of WNP whales could be authorized as incidental take is further belied by its own guidance on MMPA authorizations. As defined by NMFS, a “take” is “incidental” if “the activity is unrelated to the protected species, but the protected species may still be affected,” rendering the take “unintentional.” *NMFS, Understanding Permits, supra*. Examples include commercial fishing operations, oil and gas development, seismic surveys, and construction projects. *Id.* In contrast, “directed take” occurs where “the activity is a purposeful interaction with the protected animal for a specific purpose that may result in take.” *Id.* Examples include invasive scientific research on marine mammals, photography and filming of marine mammals, and treatment of sick and injured marine mammals. *Id.* Thus, where, as here, marine mammals are the object at which the act is directed—which is no different (albeit likely more harmful) than photographing or filming a marine mammal—the take is not incidental.

to Specified Activities, 47 Fed. Reg. 21,248, 21,250 (May 18, 1982). In response to comments on the proposed regulations suggesting that “the definition of incidental taking include activities such as directed harassment to accommodate situations where directed harassment could prevent accidental mortality,” NMFS noted that the House Report accompanying the MMPA amendments specified “that the phrase ‘incidental, but not intentional’ is intended to mean *accidental taking*.” *Id.* Accordingly, as demonstrated by NMFS’s contemporaneous understanding of its regulations (and the statute the regulations implement), directed take—even to prevent injury or death—cannot be lawfully authorized under this exception. *See Gardebring v. Jenkins*, 485 U.S. 415, 430 (1988) (holding that an agency’s interpretation of its own regulations is owed no deference if that interpretation is inconsistent with the agency’s “intent at the time of the regulation’s promulgation”); *Wy. Outdoor Council v. U.S. Forest Serv.*, 165 F.3d 43, 53 (D.C. Cir. 1999) (noting that “the preamble to a regulation is evidence of an agency’s contemporaneous understanding of its proposed rules”).

Moreover, an interpretation that would deem all takes ‘incidental’ except those that are purposeful must be rejected because it effectively renders the first part of the definition of “incidental”—i.e., whether the taking was “accidental”—a nullity. Hence, if NMFS could excuse *any* taking—even those that result from deliberate and intentional actions—so long as the taking was not the purpose of the activity and instead was a mere consequence of the otherwise lawful activity, the only relevant question would be the second half of the incidental definition—whether the take was “infrequent, unavoidable *or* accidental.” 50 C.F.R. § 216.103 (emphasis added). The threshold question of the first part of the definition—i.e., whether the take was “accidental” in the first place—would be functionally excised and would have no practical utility in the regulatory scheme. It is well established that statutory or regulatory interpretations that produce surplusage are disfavored, *see, e.g., Nat’l Ass’n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 668–69 (2007) (applying canon against surplusage in interpretation of regulation); *Nat’l Wildlife Fed’n v. NMFS*, 524 F.3d 917, 932 (9th Cir. 2008) (“As a general rule applicable to both statutes and regulations, textual interpretations that give no significance to portions of the text are disfavored.”), particularly “when the term occupies so pivotal a place in the [regulatory] scheme,” *Duncan v. Walker*, 533 U.S. 167, 174 (2001). NMFS has not—nor can it—explain why the agency specified that to be incidental, the take must be accidental if the only relevant inquiry is whether the take can be authorized as infrequent or unavoidable. NMFS cannot escape the broad reach of the take prohibition by engaging in artful interpretation, especially where this new construction conflicts with decades of agency practice, enforcement proceedings, regulatory interpretations, and common sense.

As a practical matter—and as NMFS itself has argued in analogous cases—“there is an obvious distinction between” engaging in an otherwise lawful activity “with the mere *expectation* that doing so could incidentally harass marine mammals . . . and *intentionally*” engaging in acts that harass marine mammals, “which is prohibited.” *See* Defs.’ Combined Opp’n to Pls.’ Mot. for Summ. J. & Mem. in Supp. of Cross-Mot. for Summ. J., 21, *Pac. Ranger*, 211 F. Supp. 3d 196.²⁵ Here, the Tribal hunters’ intent is to pursue, hunt, and kill a whale. It is

²⁵ Although this case involved the incidental take exception for commercial fisheries, the definition of “incidental” under that exception is highly analogous to the one here at issue. *Compare* 50 C.F.R. § 216.103, *with* 50 C.F.R. § 229.2. Indeed, as explained in the preamble to

impossible to distinguish ENP gray whales from WNP gray whales in a hunt scenario. Tab 101, 59:18-20 (conceding that members of the WNP stock are not “readily distinguishable” from members of the ENP stock).²⁶ Thus, the identification of whales taken over the course of the waiver will occur only *after* the taking has occurred, and then only *if* photographs of the whale subjected to the taking are of sufficient quality to positively identify the individual, Tab 101, 60:1-16, or if sufficient tissue is obtained from the harpoon tip or the dead whale’s carcass for genetic matching, *see* Tab 58 ¶ 38 (Yates 3d Decl.) (noting that genetic samples will not be obtained from every whale subjected to an unsuccessful strike attempt). Accordingly, when the Tribal hunters engage in waiver activities on a particular gray whale, they will be deliberately *and intentionally* targeting *that whale* by “harass[ing], hunt[ing], captur[ing], or kill[ing]” it, or “attempt[ing]” to do so. To argue that a case of mistaken identity somehow brings this conduct under the umbrella of “incidental, *but not intentional*” take defies logic and reason. As the Supreme Court observed in an analogous context, “[n]o one could seriously request an ‘incidental’ take permit to avert [] liability for direct, deliberate action against a member of [a protected] species.” *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687, 700-01 (1995). Because the incidental take exception “does not apply to ‘deliberate action,’” it cannot excuse take where a hunter mistakenly injured or killed a protected species in the course of a hunt because the hunter “deliberately shot the [animal]; he did not kill it unintentionally in the course of some other activity.” *United States v. McKittrick*, 142 F.3d 1170, 1177 (9th Cir. 1998); *see also Pac. Ranger*, 211 F. Supp. 3d at 217 (holding that the term “incidental” as used

the proposed regulations implementing the incidental take exception for commercial fisheries, “[t]he phrase ‘incidental, but not intentional’ is intended to mean *accidental taking*.” 60 Fed. Reg. 31,666, 31,675 (June 16, 1995). Likewise, in the preamble to the regulations governing incidental take authorizations for specified activities, NMFS reported “that the phrase ‘incidental, but not intentional’ is intended to mean *accidental taking*.” 47 Fed. Reg. at 21,250.

²⁶ Even worse, NMFS admitted that “every effort would be made to take photographs during the hunt, but not necessarily during training approaches or other related [activities].” Tab 102, 108:21-22. Nor will genetic material be obtained from every whale subjected to an approach or unsuccessful strike attempt. *See* Tab 102, 108:25-109:5 (NMFS expert Dr. Weller noting that efforts to secure genetic samples from targeted whales for genetic matching with WNP and PCFG gray whales catalogs would be made only for those whales that are struck and lost (if skin or blubber can be recovered from the harpoon) or those killed and landed). Because photo-identification and genetic matching are the only method of differentiating between known WNP, ENP, and PCFG gray whales, this means that takes of a WNP whale will go undetected over the course of “training approaches or other related [activities].” Tab 102, 108:18-20; *accord* Yates 3d Decl. ¶ 38 (acknowledging that “[i]t may be difficult in a hunt situation to obtain photographs of sufficient quality for identifying whales”). Accordingly, NMFS will not definitively know whether or to what extent the hunt has resulted in the take of a WNP whale, and as such, cannot ensure that the waiver will not “disadvantage” the WNP stock. The inability to positively identify *every single whale* that will be subjected to take by hunting, harassment, capture, or the attempt to hunt, harass, or capture raises serious questions about NMFS’s ability to ensure that the waiver is in accord with the MMPA’s sound principles of conservation and management.

in the MMPA “has a clear meaning that does not excuse deliberate, knowing conduct”). Yet, that is precisely what NMFS is proposing to allow the Tribe to do here.²⁷

NMFS’s attempt to radically transform take that results from deliberate, intentional acts into “incidental take” by relying on the subjective intent of the actor flies in the face of statutory design. The MMPA reflected Congress’s profound concern with the impact of “man’s activities” on marine mammal populations. H.R. REP. NO. 92-707, at 12, 1972 U.S.C.C.A.N. at 4145 (declaring that the MMPA “takes the strong position that marine mammals and the marine ecosystems upon which they depend for survival require additional protection from man’s activities”). The primary purpose of the MMPA is to ensure that *all* marine mammals are “protected and encouraged to develop to the greatest extent feasible.” 16 U.S.C. § 1361(6). That is why, as correctly construed by NMFS in its own enforcement cases, “[t]he prohibited act of taking a marine mammal is a strict-liability offense that is broadly defined.” *Pac. Ranger*, 211 F. Supp. 3d at 214. The MMPA thus provides all those “subject to the jurisdiction of the United States” with a legal incentive to avoid actions that may harm or harass marine mammals. *See Pac. Ranger*, 211 F. Supp. 3d at 226 (explaining that the “strict-liability [MMPA provision] prohibits ‘takes’ (broadly defined)” to “place the onus” on those subject to its jurisdiction “to adjust their behavior when they encounter protected species”). Imposing a *mens rea* requirement that does not exist in statute would remove this incentive and, in so doing, subvert the express purposes of the MMPA. Indeed, by limiting liability to only those who target specific marine mammals (and excusing take of all other marine mammals that look identical to those targeted by the actor), NMFS’s construction “would effectively transform the incidental-take authorization into a blanket of immunity” for any person “who would rather not be bothered with the wellbeing of marine mammals” while engaging in disruptive marine activities, “and thereby perversely shifts the significant costs of risky [] behavior . . . onto the animals themselves.” *Pac. Ranger*, 211 F. Supp. 3d at 216.

Moreover, requiring that Tribal hunters know the stock of the animal in order to be liable for a take comes perilously close to requiring specific intent, which is in stark contrast to Congress’s imposition of a lesser *mens rea* to support criminal offenses under the MMPA. Specific intent offenses are reflected by requiring a *mens rea* of willfulness, meaning that the alleged respondent knew his conduct was unlawful. *Bryan v. United States*, 524 U.S. 184, 192 (1998); *United States v. Mousavi*, 604 F.3d 1084, 1092 (9th Cir. 2010). In contrast, general intent offenses are reflected by requiring a *mens rea* of knowingly, meaning that the alleged respondent knew the facts, though not necessarily the law, that constituted the offense. *Morissette v. United States*, 342 U.S. 246, 254 (1952). The MMPA, like other wildlife protection statutes, imposes a standard of “knowingly” for criminal violations and thus, requires only a general intent for liability to attach. Under this standard, “[t]he critical issue is whether the act was done knowingly, not whether the [respondent] recognized what he was shooting.” *United States v.*

²⁷ Again, because NMFS will not definitively know whether or to what extent the hunt has resulted in the take of a WNP whale, the proposed waiver and regulations do not ensure that the taking is consistent with the policies and principles of the MMPA, or that the waiver will not disadvantage the WNP stock. *See* 16 U.S.C. §§ 1371(a)(3)(A), 1373.

McKittrick, 142 F.3d 1170, 1177 (9th Cir. 1998) (citing *United States v. St. Onge*, 676 F. Supp. 1044, 1045 (D. Mont. 1988); *United States v. Billie*, 667 F. Supp. 1485, 1493 S.D. Fl. 1987)).²⁸

By interpreting “incidental” to encompass the take of WNP whales in the course of activities targeting ENP whales, NMFS departs from the presumptive *mens rea* requirement of knowing the facts that constitute the offense. The MMPA requires only that the respondent engaged in the conduct that resulted in the take, and that the animal subjected to the take turned out to be protected by the statute; proof that the respondent knew that the animal in question was a member of a protected stock is not required. However, NMFS’s novel interpretation of “incidental” requires a *mens rea* of willfulness—i.e., proof that Tribal hunters specifically intended to take a WNP whale—before liability attaches to conduct constituting a take. In other words, NMFS’s interpretation immunizes knowing conduct from liability under the MMPA by imposing a higher scienter requirement that does not exist in statute. Accordingly, NMFS’s construction must be rejected as contrary to law. *Cf. Chase Bank USA, N.A. v. McCoy*, 562 U.S. 195, 210 (2011) (“When the statute is clear, the text controls and no deference is extended to an agency’s interpretation in conflict with the text.”).

In analogous contexts involving similarly worded takings prohibitions, courts have consistently rejected the argument that liability only attaches upon proof that the actor knew the precise biological identity of the species taken. *See, e.g., McKittrick*, 142 F.3d at 1177; *United States v. St. Onge*, 676 F. Supp. 1044, 1045 (D. Mont. 1988); *Billie*, 667 F. Supp. at 1493. To the contrary, courts have held that the burden for any mistake necessarily falls on the hunter. This proposition comports with the general rule that criminal penalties attached to regulatory statutes intended to protect public health, safety, or welfare should be construed to effectuate their regulatory purpose. *See United States v. Johnson & Towers, Inc.*, 741 F.2d 662, 666 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985). So too here. The MMPA is a regulatory statute, enacted to conserve and protect marine mammals. *See* 16 U.S.C. § 1361; H.R. REP. NO. 92-707, at 12, 1972 U.S.C.C.A.N. at 4144. To effectuate these purposes, the burden of making a mistake—i.e., targeting an endangered WNP whale—must fall on the Tribal hunter. However, NMFS’s construction of incidental as requiring specific intent eviscerates the MMPA’s purposes because, as NMFS concedes, it is nearly impossible to prove that Tribal hunters can differentiate between the stocks of whales subjected to waiver activities.

It is particularly telling that NMFS has twice successfully *defeated* in federal district court the very position that it now seeks to adopt for the first time in this waiver proceeding.²⁹ In *Black* and *Pacific Ranger*, alleged violators of the MMPA argued in enforcement cases that the incidental take exception authorized the take of marine mammals “even where the taking is a virtual certainty, and even intentional” as long as the purpose of the activity was to engage in

²⁸ Although *McKittrick* addressed the intent element for violations of the ESA, the Ninth Circuit’s discussion of the degree of intent required under the ESA’s criminal penalty provision is equally applicable to the MMPA’s criminal penalty provision because both statutes require a *mens rea* of knowingly before liability attaches to conduct constituting a taking, and therefore require a showing of general intent.

²⁹ As discussed above, the definition of “incidental” under the take exception for commercial fisheries is analogous to the definition at issue here. *See supra* note 25.

some other lawful activity and not to take marine mammals—i.e., in other words, the phrase “incidental, but not intentional” immunizes anyone who deliberately conducts activities that result in a take, unless taking the marine mammals is his subjective goal. *Black v. Pritzker*, 121 F. Supp. 3d 63, 88-89 (D.D.C. 2015); *see also Pac. Ranger*, 211 F. Supp. 3d at 217-18 (reporting respondents’ position to be that the incidental-take authorization immunizes anyone who knowingly conducts activities that result in a take—there, setting a purse seine set on a school of fish intermixed with whales—unless harassing the whales is his subjective goal). In both cases, NMFS vigorously (and successfully) disputed this interpretation—which is functionally identical to the interpretation it now seeks to adopt in this proceeding—relying on Congress’s intent in passing the MMPA and the plain language of the statute and regulation to argue that the regulatory definition of “incidental” is limited to non-intentional or accidental acts.³⁰ Both courts upheld NMFS’s interpretation, squarely rejecting respondents’ position that the phrase “incidental, but not intentional” could include deliberate acts. NMFS cannot now advance the very interpretation that the agency itself has repeatedly rejected before other tribunals and upon which those tribunals have made binding adjudicatory determinations. *Cf. Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) (“Deference to what appears to be nothing more than an agency’s convenient litigating position would be entirely inappropriate.”); *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (noting that “where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position”).

Not only would the agency’s sudden reversal of its construction of “incidental” violate the basic tenants of administrative law, *see, e.g., Fox Television Studios, Inc.*, 556 U.S. at 515 (requiring that agencies at least “display awareness that it is changing position” and “show that there are good reasons for the new policy”), it would also raise serious questions regarding the legitimacy and fundamental fairness of the law. NMFS has successfully argued that the term “incidental” as defined in regulation satisfies due process because it “plainly requires that the act to be excused must be ‘non-intentional’ or ‘accidental[.]’ 50 C.F.R. § 229.2, which means that deliberate/knowing takes . . . are unquestionably outside the safe harbor.” *Pac. Ranger*, 211 F. Supp. 3d at 218 (relying on the fact that its definition of “incidental” “states a rule that is more than sufficient to provide such actors with fair notice of the expected conduct”). Accordingly, NMFS has imposed substantial civil penalties on parties for takes resulting from deliberate acts,

³⁰ In *Pacific Ranger*, NMFS strenuously argued that, “consistent with common sense – the regulatory scheme leaves no doubt that intentionally setting a purse seine net around a whale does not qualify as a permissible, incidental taking.” Defs.’ Combined Opp’n to Pls.’ Mot. for Summ. J. & Mem. in Supp. of Cross-Mot. for Summ. J., 20, *Pac. Ranger*, 211 F. Supp. 3d 196. Likewise, in *Black*, NMFS cited to the plain meaning of “incidental” as “occurring merely by chance or *without intention or calculation*” to argue that its “regulatory definition of ‘incidental’ as limited to a non-intentional or accidental act is consistent with the ordinary meaning of the term and should be upheld on that basis alone.” Defs.’ Combined Opp’n to Pls.’ Mot. for Summ. J. & Mem. in Supp. of Cross-Mot. for Summ. J., 50, *Black*, 121 F. Supp. 3d 63 (emphasis in original). Thus, in a highly analogous context, NMFS insisted, “consistent with common sense” and the “plain meaning” of “incidental,” that the exception cannot encompass intentional, deliberate acts. NMFS cannot now change its tune because it finds the clear statutory terms inconvenient.

even though such takes were not the subjective purpose of the conduct. Now, when it serves the agency, NMFS proposes to adopt the exact opposite interpretation—which it strenuously argued against when defending its enforcement actions—without any explanation. “A long line of precedent has established that an agency action is arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently.” *Cnty. of L.A. v. Shalala*, 192 F.3d 1005, 1022 (D.C. Cir. 1999); *see also Nat’l Cable & Telecomm’ns Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 981 (2005) (holding that “[u]nexplained inconsistency” in agency policy is “a reason for holding an interpretation to be an arbitrary and capricious change from agency practice”). Accordingly, for this reason as well, NMFS’s newly minted position cannot be sustained.

In sum, NMFS’s position—accepted by the Recommended Decision—that an *incidental* take permit can cover the *direct* and deliberate take of WNP whales completely distorts the incidental take provision, reaches an absurd result, and flouts Congressional intent. Accordingly, it must be rejected. Consequently, the inevitable take of WNP whales over the course of the waiver cannot be authorized—either by waiver or by incidental take authorization. Because the waiver as currently proposed will result in the unauthorized take of at least one WNP whale—a point that is *not* in dispute—the MMPA precludes its issuance. Thus, the Assistant Administrator cannot accept the Recommended Decision as currently formulated.

C. At The Very Least, The MMPA Demands That The Assistant Administrator Prohibit Waiver Activities During The Spring Migration Season.

With the MMPA, Congress weighed the interests of marine mammals and the interests of those who would exploit marine mammals for various reasons, and came down in favor of the animals. *See Kokechik Fishermen’s Ass’n*, 839 F.2d at 802 (“The MMPA does not allow for a Solomonic balancing of the animals’ and fisheries’ The interest in maintaining healthy populations of marine mammals comes first.”). Far from attempting to “balance” the risks to depleted species, the MMPA demands that NMFS refuse to allow the directed take of any marine mammals unless it can be assured that such take will not disadvantage any marine mammal stock. “If that burden is not carried —and it is by no means a light burden—the permit may not be issued.” H. R. Rep. No. 92–707, at 18, 1972 U.C.C.C.A.N. at 4145 (emphases added). By accepting NMFS’s attempt to “balance” the risks of the proposed waiver to depleted species, the Recommended Decision places the interests of the Tribe over those of the WNP whales, in direct contravention of the MMPA’s clear command. The risk to WNP whales, contrary to NMFS’s protestations, is not “small,” Tab 101, 61:4-5, as the unauthorized take of a WNP whale is a certainty.³¹ This is a result the MMPA does not countenance.

³¹ In fact, given that it is “likely” that not all of the WNP whales that migrate through the ENP gray whale range have been identified, Tab 102, 57:1-4, the risk to WNP whales may be far greater than accounted for in risk assessments based on available data. If there are more WNP whales in the ENP gray whale range than were accounted for in NMFS risk assessment (which is likely the case), and/or if the migration of WNP gray whales through the Makah U&A was delayed for any reason, then the probability that a WNP gray whale will be subjected to waiver activities up to and including lethal take increases proportionally.

Although AWI appreciates that the Recommended Decision recognizes that the take of WNP whales by waiver activities is a serious concern that must be expressly addressed by the waiver and regulations, it is clear that the Recommended Decision does not go far enough to satisfy the MMPA's strict mandate to protect depleted marine mammal stocks. Accordingly, to the extent the Recommended Decision authorizes activities that will result in the take of WNP whales, the Assistant Administrator cannot adopt it.³²

If the Assistant Administrator insists on moving forward with the issuance of a waiver to authorize the hunt, the MMPA demands that she modify the Recommended Decision to eliminate the risk that WNP whales will be taken in the course of waiver activities. The Recommended Decision would prohibit even-year hunts (and associated training activities) until the Tribe obtains separate authorization for the take of WNP whales; however, such an authorization cannot lawfully be issued. Thus, like the proposed waiver, the Recommended Decision threatens to authorize activities that will result in unlawful take. To avoid this legal problem, the Assistant Administrator must take the additional step of prohibiting by regulation any waiver activities during the winter/spring migration season, when WNP whales are known to be present in the hunt area. Under this scenario, the Assistant Administrator would authorize only the odd-year hunts, retaining the biennial scheme and other measures already determined necessary to adequately protect the unique PCFG population. For example, waiver activities would only be authorized during the summer/fall feeding season in odd-numbered years. NMFS would be obligated to determine in writing whether every whale subjected to waiver activities is a member of the WNP gray whale stock using the WNP photo catalog and genetic sampling (where available). Any whale taken by waiver activities that was not identified as a WNP whale would be counted as a member of the PCFG. The Tribe would be limited to two strikes per hunt, for a total of ten strikes during the waiver period (i.e., two during every odd year of the ten-year waiver period). Additionally, the Tribe would be authorized to undertake up to 142 training approaches per hunt year, and twelve unsuccessful strike attempts. The same PCFG abundance triggers would apply.

It must also be noted that current data indicate that WNP whales are not expected to be present in the hunt area during the summer/fall feeding season. However, the proposed waiver and regulations acknowledge the possibility that WNP gray whales may be within the Makah U&A during the odd-year summer/fall hunt season. *See* 84 Fed. Reg. at 13,621 (requiring NMFS to proactively determine whether whales subjected to takes during odd-year hunts are members of the WNP stock). The Recommended Decision likewise acknowledge this possibility, accepting NMFS's proposed regulation to count whales subjected to a take during odd-year hunts as members of the PCFG unless they could be identified as WNP whales. If WNP whales

³² Indeed, the Recommended Decision itself appears to recognize that the risk of take of WNP gray whales in the even-year hunts may preclude such hunts from moving forward. *See* Rec. Dec. 148 (noting that prohibiting even-year hunts and training activities until the Tribe obtains separate take authorizations for the WNP gray whale stock "creates a possibility that the Makah Tribe may only be allowed to hunt every other year during this waiver's validity," but finding that this approach "most adequately minimizes the risks to both PCFG gray whales—which will still be hunted only in odd years—and WNP gray whales, which may not be taken without separate authorization").

are identified in the hunt area during the summer/fall feeding season, the same concerns extensively detailed above regarding the risk of take would apply to preclude the authorization of the odd-year hunts.

To be clear, AWI has serious concerns regarding other aspects of the Recommended Decision, including, e.g., its treatment of the PCFG gray whales and the UME. *See infra* Sections III & IV. However, modifying the Recommended Decision to reduce to insignificant levels the risk to WNP whales would largely address one such concern. Accordingly, AWI strongly recommends that if the Assistant Administrator decides to adopt the Recommended Decision, she consider structuring the regulations to reduce to insignificant levels the risk of take of depleted WNP gray whales.

III. THE RECOMMENDED DECISION'S REFUSAL TO TREAT THE PCFG AS A FULL STOCK CANNOT BE SQUARED WITH THE POLICIES AND PURPOSES OF THE MMPA.

In its Post-Hearing Brief, AWI explained that NMFS's conclusion regarding the PCFG's stock status rests on a highly selective reading of the available literature that runs counter to the sound principles of resource protection and conservation that must inform all management decisions under the MMPA. AWI also argued that NMFS's refusal to consider the PCFG a stock ignores new evidence that has emerged since the last Gray Whale Stock Identification Workshop ("2012 Workshop") was held nearly ten years ago. AWI thus concluded that NMFS failed to consider the best available science with respect to whether the PCFG should be considered a stock, and consequently, failed to demonstrate that the waiver criteria are satisfied with respect to PCFG whales.

Although AWI agrees that "to make the requisite findings about the proposed waiver and regulations, [the Recommended Decision] must make a threshold determination that the stock structure NMFS used is scientifically sound," Rec. Dec. 59, it is clear that, like NMFS's proposed waiver, the Recommended Decision fails to ensure that NMFS's decision to consider the PCFG as part of the larger ENP stock comports with the policies and purposes of the MMPA. The Recommended Decision concluded that the PCFG's status as a feeding aggregation of the larger ENP stock was reasonable. Rec. Dec. 62. Although the Recommended Decision briefly discusses the evidence concerning PCFG genetics, behaviors, and distribution on both sides of the issue, it primarily bases its determination on recruitment levels. Acknowledging that "the proportion of recruits is a matter of considerable dispute between the parties," *id.* at 64, and that the "evidence . . . is not conclusive," *id.* at 65, the Recommended Decision nevertheless concludes that such inconclusive evidence "convincingly show[s] that external recruitment plays a major role in maintaining or increasing the size of the PCFG," *id.* The Recommended Decision did not address whether the PCFG's stock status comports with the MMPA's purposes.

As an initial matter, the Recommended Decision fails at the outset because it accepts NMFS's fundamentally flawed determination that the PCFG does not constitute a stock. As explained, "stocks must be identified in a manner that is consistent with the[] goals" of the MMPA, which include restoring and maintaining stocks within their OSP level and ensuring that marine mammals remain a significant functioning element in the ecosystem. Tab 2I at 4.

Consistent with these objectives, since 1995, NMFS has recognized that “a risk-averse strategy” that *begins* with “a definition of stocks based on small groupings” should be used. *See* NMFS, *Guidelines for Assessing Marine Mammal Stocks: Report of the GAMMS III Workshop*, NMFS-OPR-47, at 17 (ed. Jeffrey E. Moore & Richard Merrick 2011), *available at* <https://repository.library.noaa.gov/view/noaa/4022>. However, in the 2012 Workshop, NMFS flipped this guidance on its head, framing the question as whether existing data were “sufficient to advise that the PCFG be recognized as a population stock.” Tab 3C at 5. In other words, instead of beginning with smaller, geographically discrete stocks and requiring “compelling evidence” to “lump[]” stocks together, *see GAMMS III Workshop Rep.* at 17—an appropriately “risk-averse” stock identification approach that ensures marine mammal management achieves the goals of the MMPA, *see id.*—NMFS started with the amalgamated stock and required “compelling evidence” to break the large-scale grouping apart. *See* Tab 3C at 48 (noting that because the 2012 Workshop did not provide “definitive advice” as to whether the PCFG gray whale population qualifies as a stock, NMFS will continue to recognize the PCFG as part of the larger ENP gray whale stock); Tab 3 ¶ 20 (Weller Decl.) (same). Thus, the 2012 Workshop implemented a stock identification strategy that NMFS’s own experts have explained “fail[s] to meet the MMPA objective[s].” *GAMMS III Workshop Rep.* at 17; *cf.* Tab 3MM at 7 (“[T]he recognition of such seasonal subpopulations [PCFG] as separate management units is recommended, and common, for baleen whales.” (citing A. E. Dizon, et al., *Rep. of the Workshop on the Analysis of Genetic Data to Address Problems of Stock Identity as Related to Management of Marine Mammals*, 1997 Soc’y for Marine Mammalogy 3)).

The Recommended Decision’s unquestioning acceptance of NMFS’s stock identification strategy and determination cannot be squared with the MMPA’s purpose or legislative history. When identifying stock structure, the conservative bias that is built into the MMPA, H.R. REP. NO. 92-707, at 15, 1972 U.C.C.C.A.N. at 4148, requires that the “interest in maintaining healthy populations of marine mammals come[] first,” *Kokechik Fishermen’s Ass’n*, 839 F.2d at 802 (footnote omitted). Contrary to this clear instruction, the Recommended Decision resolved all uncertainties in favor of exploitative interests, and contrary to marine mammal conservation. For example, with respect to the recruitment issue, the Recommended Decision acknowledges that “evidence on recruitment levels is not conclusive,” yet insists that the evidence nevertheless “convincingly show[s]” that external recruitment “plays a major role” in PCFG population levels. Rec. Dec. 65. However, the fact that external recruitment plays a role in maintaining or growing the PCFG population does not preclude the designation of the PCFG as a stock. Indeed, the 2016 GAMMS require that stocks exhibit demographic independence, which requires only that population dynamics be “*more* a consequence of births and deaths within the group (internal dynamics) rather than immigration or emigration (external dynamics).” Tab 2I at 4 (emphasis added). With respect to the PCFG, the majority of experts attending the 2012 Workshop concluded that the ratio of internal recruitment to external recruitment was at least roughly equivalent. *See* Tab 3C at 45. Since the 2012 Workshop, additional studies have only strengthened the evidence that internal recruitment plays a significant role in PCFG population dynamics, *See, e.g.*, Tab 3KK at 8-9 (study on the genetics of PCFG and ENP gray whale populations concluding that “the significant differences in [mitochondrial] DNA haplotype frequencies . . . suggest that groups of gray whales utilizing different (northern versus southern) feeding regions are demographically independent”); Tab 21C, Ex. M-0174 at 16-17 (reporting results of genetic analysis of PCFG gray whales and finding that “it is plausible that the PCFG

represents a demographically independent group and suggest that caution should be used when evaluating the potential impacts of the proposed Makah harvest”), as evidenced by the Pacific SRG’s recommendation that NMFS convene another workshop to reexamine whether the PCFG merits stock designation. *See* Tab 2L at 11. The growing body of evidence concerning the PCFG’s status under the MMPA has led some experts to conclude that there is “a higher degree of internal recruitment to the PCFG than had been suggested by previous less complete data.” Tab 62P at 2. Accordingly, there can be no doubt that strong evidence exists for designating the PCFG as a stock. Yet, the Recommended Decision discounts such new evidence by accepting NMFS’s self-serving assertion that “none of the new information affects the [2012 Workshop’s] conclusion.” Rec. Dec. at 66. The Recommended Decision thus failed to apply the MMPA’s conservative bias, which dictates that any uncertainties in the data should have been resolved in favor of protecting the PCFG. The Recommended Decision’s failure to do so contravenes the MMPA’s clear command to prioritize the interests of marine mammals.

The Recommended Decision likewise entirely failed to consider whether the PCFG’s status comports with the MMPA’s policies and purposes. Because site fidelity to the feeding area “is passed on from mothers to offspring,” “detrimental impacts (e.g., ‘takes’) to these whales will not have a ‘random’ impact on the population at large, but will instead primarily impact these matriline specifically.” Tab 3MM at 7. “Potential impacts could include the loss of knowledge of these feeding areas from this population, and localized extirpation.” *Id.* Given that NMFS acknowledges that PCFG whales seasonally occupy a different ecosystem than their ENP counterparts, Tab 3C at 48, it is clear that the removal of even a few PCFG whales could impact the stability of the ecosystem, a result the MMPA flatly forbids. Accordingly, in light of the protective purpose of the MMPA, the scales should have tipped in favor of protecting the PCFG using the most conservative management approach.

Additionally, the Recommended Decision misconstrues AWI’s arguments regarding the proposed waiver’s treatment of the PCFG issue. Contrary to the Recommended Decision’s assertion, AWI does not argue that “stock status should be conclusively determined before the hunt is allowed to proceed.” Rec. Dec. 66. Rather, AWI asserts that NMFS’s continued refusal to reexamine the PCFG stock issue *against the recommendation of its own experts* is arbitrary and capricious. *See W. Watersheds Proj. v. Kraayenbrink*, 632 F.3d 472, 492 (9th Cir. 2011) (holding that an agency conclusion that is in “direct conflict with the conclusion of its own experts” is arbitrary and capricious). The Pacific SRG, NMFS’s advisory group with direct expertise in delineating marine mammal stocks, recommended that NMFS convene another workshop to reexamine whether the PCFG merits stock designation. *See* Tab 2L at 11. In response, NMFS stated simply that the new information “does not . . . change the conclusion of the task force.” Tab 102, 56:6-7; *see also* Tab 2L at 11-12. Despite acknowledging that COSEWIC, the Canadian entity with jurisdiction over these same whales, relied on the *exact same evidence* regarding the status of the PCFG as an independent management unit to reach the *exact opposite conclusion*—i.e., that a conservative approach demanded that the PCFG be managed as a distinct population in light of the genetic and behavioral differences exhibited by the population, and its small size—NMFS relied on purported differences in management criteria to explain the discrepancy. Yet, paradoxically, NMFS justified its refusal to reexamine the PCFG stock issue in part by relying on the IWC’s criteria for identifying and managing stocks, *see* Tab 2L at 11-12,

despite the fact that those criteria are also “not the same as those used by NMFS under the MMPA,” Tab 3 ¶ 8 (Weller Decl.).

As AWI explained—and the Recommended Decision failed to address—NMFS’s reasons for rejecting the Pacific SRG’s recommendation cannot withstand scrutiny. In particular, NMFS relied on the IWC’s use of the term “feeding aggregation”—as opposed to “breeding stock”—to describe the PCFG. *See* Tab 2L at 11-12. To be considered a “stock” under the MMPA, internal recruitment must only be *higher* than external recruitment; the fact that external recruitment occurs does not preclude stock status. *See* Tab 2I at 4. In contrast, the IWC’s North Pacific gray whale model “considers two populations or ‘breeding stocks’” of gray whales and assumes that “there is no interchange between breeding populations.” Tab 21C, Ex. M-0151 at 7. Accordingly, under the IWC’s model, to be designated a “breeding stock,” there can be no external recruitment. The IWC model subdivides each “breeding stock” into “feeding sub-stocks” or “feeding aggregations”—both terms are used interchangeably—which are defined as “part of a single breeding stock and may be associated with several sub-areas with respect to feeding and migration.” Scordino Decl. Ex. M-0152 at 7. Thus, the IWC’s categorization of the PCFG as a “feeding sub-stock” or “feeding aggregation” was not based on whether “the population dynamics . . . [were] more a consequence of births and deaths within the group (internal dynamics) rather than immigration or emigration (external dynamics).” *Compare id.*, with Tab 2I at 4. Rather, the IWC’s classification is based on the fact that there is at least *some* interchange between the PCFG and the larger ENP stock. *See* Tab 21C, Ex. M-0150 at 14 (concluding that from a conservation standpoint, the PCFG should be considered a “separate feeding sub-stock”; however, the PCFG should not be considered a separate breeding stock in light of some interbreeding between PCFG whales and those from other feeding areas). In fact, the IWC considers “the hypothesis of a *demographically distinct* PCFG [to be] plausible.” Tab 3II at 18. Accordingly, it is clear that NMFS’s reliance on the IWC rangewide review to support its decision not to revisit the PCFG stock issue is seriously misplaced. As a practical matter, the material differences between the IWC and MMPA’s use of terms renders the IWC’s terminology irrelevant to NMFS’s compliance with the MMPA. As a legal matter, by relying on IWC management terminology to dismiss the new evidence related to PCFC stock status under the MMPA, NMFS failed to “consider[] the relevant factors,” “examine the relevant data,” and “articulate a satisfactory explanation for its action.” *State Farm*, 463 U.S. at 43.

NMFS’s failure to meaningfully consider whether new evidence in fact requires NMFS to bestow stock status on the PCFG constitutes a failure to “consider an important aspect of the problem,” rendering NMFS’s decision to consider the PCFG as part of the ENP stock—and ultimately, its decision in this waiver proceeding—arbitrary and capricious. *See State Farm*, 463 U.S. at 43; *see also High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 3d 1174, 1189-93 (D. Colo. 2014) (finding that the agency’s failure to use social cost of carbon protocol to qualify greenhouse gas emissions from coal lease modifications was arbitrary and capricious); *Zinke*, 900 F.3d at 1068 (although an agency has discretion to rely on expert opinions of its choosing “it cannot ignore available . . . data”); *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1030 (9th Cir. 2011) (finding that the agency cannot ignore evidence “pointing in the opposite direction” from its conclusions). This is especially true in light of the 2012 Workshop’s actual finding that it “was unable to provide definitive advice as to whether the

PCFG is a population stock under the MMPA.” Tab 3C at 47.³³ For the Recommended Decision to now portray the 2012 Workshop’s conclusion as an absolute finding that the PCFG should not be a stock under the MMPA is disingenuous and a clear overstatement of the group’s conclusions. When placed in context, NMFS’s conclusory assertion of agency “expertise” fails to offer a meaningful explanation for NMFS’s decision to reject its expert body’s recommendation, and as such, deserves no deference. *See, e.g., Am. Tunaboat Ass’n v. Baldrige*, 738 F.2d 1013, 1016–17 (9th Cir. 1984) (finding that NMFS’s decision under the MMPA was not supported by substantial evidence where agency ignored data that was product of “many years’ effort by trained research personnel”); *Sierra Club v. U.S. Army Corps of Eng’rs*, 701 F.2d 1011, 1030 (2d Cir. 1983) (“[C]ourt may properly be skeptical as to whether an EIS’s conclusions have a substantial basis in fact if the responsible agency has apparently ignored the conflicting views of other agencies having pertinent experience.” (internal citations omitted)). While NMFS does not have to “delay this proceeding indefinitely due to a possible . . . future change in stock status,” Rec. Dec. 67, now that new evidence “has emerged, the [agency] cannot take a full-speed ahead, damn-the-torpedos approach” to the waiver proceeding, especially given the MMPA’s precautionary principle. *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1030 (9th Cir. 2011) (rejecting agency’s failure to explore information concerning threats to protected grizzly bears that emerged decades into the delisting process as arbitrary and capricious).

The Recommended Decision does not cure these defects. To the contrary, the Recommended Decision finds the IWC’s Rangewide Workshops to be “more thorough and better reasoned” than the COSEWIC report, and affords them “significantly more weight.” Rec. Dec. 66. At no point does the Recommended Decision address NMFS’s refusal to convene a new task force despite its own expert body’s recommendation and statutory obligations under the MMPA. Nor does the Recommended Decision critically examine NMFS’s reliance on the IWC’s management criteria to avoid meeting those obligations. The Recommended Decision’s conclusion that NMFS’s determination regarding PCFG status is reasonable is “unsupported by substantial evidence,” and is “arbitrary, capricious, . . . or otherwise not in accordance with law.” 5 U.S.C. § 706(2). The Assistant Administrator cannot adopt the decision until NMFS addresses the emerging evidence and expert recommendations.

It is clear that the Recommended Decision merely rubberstamps NMFS’s result-oriented approach to delineating gray whale stock structure. In so doing, the Recommended Decision ignores the plain language and legislative history of the MMPA, which command that “[t]he Act . . . be administered for the benefit of the protected species rather than for the benefit of [] exploitation.” *Comm. for Humane Legislation*, 540 F.2d at 1148. In the context of a precautionary and protectionist statute such as the MMPA, it is arbitrary to refuse adopting a conservative approach to protecting at-risk species and to further refuse even to revisit the newest scientific evidence calling into serious question the ongoing failure to protect such species. *Cf. H.R. REP. NO. 92-707*, at 15, 1972 U.C.C.C.A.N. at 4148 (finding that in light of the “certain knowledge that [marine mammals] are almost all threatened in some way, it seems elementary common sense . . . that legislation should be adopted to require that we act conservatively—that no steps should be taken regarding these animals that might prove to be

³³ Indeed, the experts “ranged in their opinions from strongly agreeing to strongly disagreeing,” with at least some experts remaining “neutral.” Tab 3C at 45, 47-48.

adverse or even irreversible in their effects until more is known.”); *id.* (“As far as could be done, we have endeavored to build such a conservative bias into the [MMPA].”); *Comm. for Humane Legislation v. Richardson*, 414 F. Supp. 297, 314 (D.D.C. 1976) (“[T]he people of this country, speaking through their Congress, declared that porpoise[s] and other marine mammals must be protected from the harmful and possibly irreversible effects of man's activities.”), *aff'd* 540 F.2d 1141 (D.C. Cir.). Accordingly, the Recommended Decision must be rejected. *See Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 859 (9th Cir. 2005) (noting that agency officials cannot “rubber-stamp . . . administrative decisions that [are] . . . inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.” (alterations in original) (citation omitted)).

IV. ISSUING A WAIVER FOR A SPECIES UNDERGOING AN UNUSUAL MORTALITY EVENT WOULD CONTRAVENE THE PRECAUTIONARY PRINCIPLE BUILT INTO THE MMPA.

As AWI explained in its Post-Hearing Brief, the MMPA reflected Congress’s concern that marine mammals “are, or may be, in danger of extinction or depletion as a result of man’s activities.” 16 U.S.C. § 1361(1). In the House Conference Report accompanying the legislation, Congress observed that “when to these hazards,” including environmental contamination and degradation, overfishing, and harassment by boats, “there is added the additional stress of deliberate taking, it becomes clear that many marine mammals may indeed be in urgent need of protection.” H.R. REP. NO. 92-707, at 15, 1972 U.C.C.C.A.N. at 4147-48. Although “[m]an’s taking alone, without these factors, might be tolerated by animal species or populations, [] in conjunction with them, it could well prove to be the proverbial straw added to the camel’s back.” H.R. REP. NO. 92-707, at 15, 1972 U.C.C.C.A.N. at 4148. Thus, it would violate the spirit and intent of the MMPA to permit the deliberate taking of members of a stock that is currently undergoing a UME.

Tacitly recognizing this point, the Recommended Decision determined that the UME should not halt proceedings, but regulations may warrant modification to further limit hunting activities during an active UME or if the stock does not rapidly recover from a UME. Rec. Dec. 103. Although AWI maintains, as articulated above, that significant legal obstacles preclude the adoption of the Recommended Decision, it generally supports setting low-abundance triggers for the ENP stock. Even in that scenario, however, setting such triggers does not address the key issue: considering that “[t]he Act was to be administered for the benefit of the protected species rather than for the benefit of [] exploitation,” *Comm. for Humane Legislation*, 540 F.2d at 1148, the MMPA precludes the issuance of a waiver to take a stock that is currently undergoing an indefinite and potentially devastating UME.

The Recommended Decision acknowledges that “the full extent of the UME is unknown,” yet ultimately concludes that “NMFS considered the possible occurrence of a UME when developing the waiver and regulations.” Rec. Dec. 102. Setting aside the inherent contradiction in the assertion that the agency can fully consider the impacts of an event that is still ongoing, issuing a waiver during an ongoing UME obviates the purpose of the waiver proceeding. To obtain a waiver, the applicant must demonstrate that the proposed taking will not disadvantage affected stocks and is consistent with the policies and purposes of the MMPA. This

is not a pro forma exercise. Obtaining a waiver of the moratorium is intended to be a burdensome process, *see* H. R. Rep. No. 92–707, at 18, 1972 U.C.C.C.A.N. at 4145 (“If that burden is not carried—and it is by no means a light burden—the permit may not be issued.”), and the MMPA does not permit NMFS to issue a waiver now and ask questions concerning its impacts later. Accordingly, the Recommended Decision errs by accepting NMFS’s assertion that it can account for the UME by “adjust[ing] hunt permit conditions accordingly, at the appropriate time.” Rec. Dec. 102. The appropriate time is now. While the permitting stage provides additional safeguards to ensure that the proposed take satisfies the MMPA’s strict requirements, as well as additional opportunity for public review of the specifics of the proposed take, such as the methods of take and the consistency of the proposed take with applicable regulations, NMFS must also rigorously review the impacts of the proposed activity at the waiver stage. In other words, the MMPA demands that NMFS look before it leaps.

It is clear that the Recommended Decision fails to satisfy this requirement. The UME is ongoing. NMFS does not yet know whether or to what extent the UME is affecting the ENP, PCFG, or WNP gray whale populations. Tab 101, 64:14-19 (NMFS expert Mr. Yates agreeing that NMFS does not know whether or how the UME has affected the PCFG). At the hearing, NMFS reported that at least one stranded whale has been positively identified as a member of the PCFG. *See* Tab 101, 27:7-8. Accordingly, as the Recommended Decision acknowledges, “it is possible the low abundance trigger for PCFG has already been met or exceeded if the current UME is affecting the PCFG.” Rec. Dec. 101. As of November 5, 2021, 502 gray whales have stranded along the coast of Mexico, the United States, and Canada. This represents between 3.9 and 13% of actual mortality, *id.* at 101, meaning that between 3800 and over 12,700 whales have likely died during the current UME. This would reduce the population from an abundance of 27,000 whales to an abundance between 14,300 and 23,200 individuals. At the height of the coronavirus pandemic when states imposed quarantines and public shutdowns, it is likely that fewer stranded whales were found and reported, and consequently, that actual mortality is underestimated. Thus, it is at least *possible* that the ENP stock has fallen out of its OSP range. In that case, *no waiver for the ENP stock can issue*. Notably, if those same cryptic mortality statistics are applicable to PCFG gray whales (and there is no reason to suggest they would not be) then only 1.5 to 5 PCFG gray whales would have had to succumb due to the current UME in order to reduce the most recently PCFG gray whale abundance estimate of 232 individuals to below the minimum abundance threshold to allow a hunt. Thus, it is clear that the Assistant Administrator cannot issue a waiver before the full extent of the UME is known.

The Recommended Decision accepts NMFS’s argument that it fully evaluated the risk of a UME. However, NMFS’s own statements belie any assertion that the agency fully evaluated the risk of a UME. First, any arguments that the UME has been fully considered are directly contradicted by NMFS’s decision—several months after the hearing and only weeks from the deadline to submit comments, post-hearing brief, and proposed findings of facts and conclusions of law—to prepare a DSEIS that will analyze “*additional relevant information*” regarding the 2019 UME and its impacts on North Pacific gray whales. 85 Fed. Reg. at 11,348 (emphasis added). NMFS further acknowledged that the process will “benefit both the public and agency decision making.” *Id.* (emphasis added). By acknowledging that significant new information bearing on the agency’s decision requires additional analysis in a DSEIS, *cf.* 40 C.F.R. § 1502.9 (requiring the preparation of a supplemental EIS when there are “significant new circumstances

or information relevant to environmental concerns and bearing on the proposed action or its impacts”), NMFS conceded that the record upon which the Recommended Decision is based does not represent the best available science, 16 U.S.C. §§ 1371(a)(3)(A), 1373. Second, the suggestion that NMFS can satisfy its obligation to evaluate the impacts of *this* UME by making comparisons to the 1999/2000 UME defies logic because, as NMFS concedes, “each UME is unique. No two are the same.” Tab 101, 96:17. “They vary in terms of the duration, in terms of the cause and in terms of the species that are affected.” Tab 101, 109:19-21. Accordingly, the causes of the two events “absolutely” could be different and thus have disparate impacts on individual whales as well as populations and the broader ecosystem. Tab 101, 65:3-5. Moreover, there is a legal and factual distinction between the agency’s obligation to evaluate the *possibility* of a future UME occurring, and the MMPA’s command that the agency fully evaluate the proposed waiver’s impacts on affected stocks that are currently undergoing a UME. The Recommended Decision cannot avoid this by pointing to past discussions of possible future impacts once those impacts are real.

Congress has already weighed the interests of marine mammals against the interests of those who would exploit marine mammals for various reasons, and decided squarely in favor of prioritizing the animals. To that end, Congress built into the MMPA a conservative bias that was intended to prevent the taking of any “steps . . . regarding these animals that might prove to be adverse or even irreversible in their effects until more is known” regarding the causes of mortality and other threats. H.R. REP. NO. 92-707 at 15, 1972 U.C.C.C.A.N. at 4148. When considered against this backdrop, permitting the directed take of gray whales in the midst of a UME clearly flouts the MMPA’s “primary objective of [marine mammal] management,” which is “to maintain the health and stability of the marine ecosystem.” 16 U.S.C. § 1361(6). A UME is a clear indication that the ecosystem is, by definition, *not* in balance. A UME is “a stranding event that is [of] unusual magnitude” that involves an “[un]usual number of animals.” Tab 101, 95:18-20. It is simply not in accordance with this objective to issue a waiver for the directed take of marine mammals while that population is undergoing a UME. Nor is issuing such a waiver in accordance with the MMPA’s demand that marine mammal management decisions be made with caution and only after all of the relevant information has been gathered and analyzed to ensure that the removal of individuals will not have unintended or detrimental consequences. Considering that the causes and duration of the UME are unknown, and the ultimate level of harm to the species uncertain, the Recommended Decision’s dismissal of the potential significance of the UME to gray whales is misplaced and premature. The Assistant Administrator cannot blindly authorize the deliberate lethal take of marine mammals simply because the applicant is frustrated by the length of the administrative process that was put in place specifically to prevent uninformed and careless action that may be the “proverbial straw in the camel’s back” for marine mammal species and stocks. *See* H.R. REP. NO. 92-707, at 15, 1972 U.C.C.C.A.N. at 4148.

Over fifteen years have passed since the Tribe first applied for a waiver of the MMPA. DEIS at 1-2. Delaying a final determination pending the conclusion of the UME would constitute only a modest delay of the overall process, and would allow NMFS to gather new information that bears directly on whether the proposed hunt satisfies the waiver criteria. Ideally, NMFS should also delay publication of the DSEIS until the MMPA-required report on the UME is published. However, when asked about the prospects of such a delay at the hearing, NMFS

responded that “modest is in the eye of the beholder.” Tab 101, 66:13-14. In a sense, NMFS is correct. Focusing, as we must, on the interests of the marine mammals, a modest delay would allow for a fully informed decision made on the basis of new information that supersedes the now outdated population information that pre-dated the UME. Accordingly, the Assistant Administrator is precluded from adopting the Recommended Decision during the UME since Congress long ago mandated that the whales’ interests are paramount and cannot be trumped by the private interests of the Tribe or anyone else.³⁴

V. SUMMARY OF AWI’S POSITION ON THE RECOMMENDED DECISION’S SUGGESTED MODIFICATIONS TO NMFS’S PROPOSED REGULATIONS

- Recommendation to condition the issuance of a hunt permit for even-year hunts on the Tribe’s obtaining an incidental take authorization for WNP gray whales taken in the course of waiver activities. Rec. Dec. 136-37.
 - AWI supports the general proposition that all take of marine mammals that is expected to result from a proposed activity must be authorized *prior* to engaging in the activity. However, as exhaustively detailed in AWI’s Post-Hearing Brief and above, as a matter of law, the Tribe *cannot* obtain an incidental take authorization for the directed, deliberate action that will result take of WNP gray whales by waiver activities because such take is not “incidental” to those activities. Accordingly, this condition fails to cure the Recommended Decision’s fatal defect: that the Recommended Decision will result in the unauthorized take of depleted WNP gray whales. Accordingly, to comply with the MMPA, the Assistant Administrator must modify the regulations to ensure that any waiver issued eliminates the risk of take to WNP gray whales.
- Recommendation to only allow waiver activities in odd years until the Tribe obtains an incidental take authorization for WNP gray whales. Rec. Dec. 147-48.
 - AWI supports this recommendation in part. As explained, the Tribe cannot lawfully obtain an incidental take authorization for WNP gray whales. Accordingly, the Tribe cannot lawfully hunt or conduct training activities during the time of year when WNP gray whales are known to be present in the hunt area. However, under the proposal, during odd years, waiver activities would only occur during the time of year when WNP gray whales are not known to be in the

³⁴ For this reason, Mr. Yates’s statement in his Third Declaration that “taking too many [whales] for a few years would not [be a problem]” must be rejected as contrary to Congress’s clear intent in passing the MMPA. Tab 58 ¶ 23 (Yates 3d Decl.). “[T]he people of this country, speaking through their Congress, declared that porpoise[s] and other marine mammals must be protected from the harmful and possibly irreversible effects of man’s activities.” *Comm. for Humane Legislation*, 414 F. Supp. at 314, *aff’d* 540 F.2d 1141 (D.C. Cir.). NMFS “may not ‘avoid the Congressional intent clearly expressed in the text simply by asserting that its preferred approach would be better policy.’” *Friends of Earth, Inc. v. EPA*, 446 F.3d 140, 145 (D.C. Cir. 2006) (quoting *Engine Mfrs. Ass’n v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996)).

hunt area. Accordingly, authorizing waiver activities only during the odd-year summer/winter feeding season may largely (although not certainly) avoid the thorny issue of unauthorized take. *Solely with respect to the issue of the take of WNP gray whales*, AWI believes that this is the only scenario in which a proposed waiver could begin to comply with the MMPA, with three important caveats. First, as explained in more detail below, AWI opposes authorizing any non-lethal hunt or training activities on gray whales. Notwithstanding the legal obstacles to adopting the Recommended Decision, given the MMPA's emphasis on protecting marine mammals and limiting take, authorizing the intentional, directed harassment of gray whales is antithetical to the policies and purposes of the statute. AWI therefore believes that all references to training approaches and training harpoon throws should be stricken from the proposed regulations. Second, the odd-year waiver activities authorized under this scenario must retain the important limitations deemed necessary to protect PCFG gray whales. Third, eliminating waiver activities during even years does not address AWI's remaining substantive, procedural, and scientific concerns regarding the Recommended Decision and its impact on North Pacific gray whales and the ecosystem.

- Recommendation to amend and clarify the definitions of “strike” and “struck.” Rec. Dec. 140-42, 144.
 - AWI supports this recommendation.
- Recommendation to make certain changes to the restrictions on the use of whale meat and other whale parts. Rec. Dec. 142, 152-53.
 - AWI does not oppose the recommended changes. However, AWI notes that proper controls must be placed on such use to ensure the waiver and regulations harmonize the Tribe's asserted cultural and ceremonial need for the whale meat and parts with the MMPA's management and enforcement goals. The Assistant Administrator should consider imposing geographic limits on the areas where consumption is allowed, and ensure that state and local law enforcement jurisdictions are properly educated on the possession and allowable uses of whale meat and other products. The Recommended Decision accepted NMFS's assertion that NOAA Office of Law Enforcement agents or Washington Department of Fish and Wildlife enforcement officers who have been deputized to enforce federal laws and regulations would be available to enforce such provisions. Rec. Dec. 153. Therefore, limiting the geographic scope of this regulation to Washington state should be considered.
- Recommendation to amend the regulations to prohibit the export of handicrafts. Rec. Dec. 142-43.
 - AWI supports this recommendation and strongly recommends that the Assistant Administrator also prohibit the export of all edible and non-edible gray whale

products.

- Recommendation to restructure the proposed regulations. Rec. Dec. at 146.
 - AWI supports this recommendation.
- Recommendation to amend the regulations to provide that hunt permits be issued on a yearly basis. Rec. Dec. 147.
 - AWI supports this recommendation. AWI believes that ensuring that the impacts of the proposed hunts are reviewed on a yearly basis allows for more nimble management responses to a rapidly changing ocean environment. Requiring hunt permits on a yearly basis will also ensure that the impacts of the hunt properly take into account the myriad threats facing the North Pacific gray whale stocks, and will allow NMFS to take into account the results and best management practices of previous hunts when authorizing new hunts. Additionally, yearly hunt permits will allow NMFS to better monitor the impacts to the PCFG and quickly respond to changes in the group's stock status.
- Recommendation to amend the regulations to establish an abundance threshold for ENP gray whales. Rec. Dec. 151.
 - AWI generally supports this recommendation. AWI reminds the Assistant Administrator that when establishing an abundance threshold, the MMPA demands that NMFS take a conservative and precautionary approach that errs on the side of conserving and protecting the ENP stock. In addition, NMFS should consider taking an approach similar to the “dimmer switch” applied to the PCFG.
- Recommendation to amend the regulations to prohibit approaches on gray whale calves and accompanying adults. Rec. Dec. 154.
 - AWI supports this recommendation.

VI. ADDITIONAL RECOMMENDED CHANGES TO THE REGULATIONS TO REDUCE THE PROPOSED HUNT'S HARASSMENT OF GRAY WHALES AND TO OTHERWISE PROMOTE CLARITY IN THE MEANING AND INTERPRETATION OF SPECIFIC REGULATORY PROVISIONS

In addition to its arguments regarding the Recommended Decision as a whole, AWI provides the following comments on specific provisions of the Recommended Decision's regulations, as set forth in Appendix B to the Recommended Decision.

A. General Comment On Propriety Of Training Activities, Including Approaches And Practice Harpoon Throws

As explained above, placing “the interests of the [gray whales] as the prime consideration,” as required by the MMPA, H.R. REP. NO. 92-707, at 18, 1972 U.C.C.C.A.N. at 4145, it is clear that authorizing the intentional, directed harassment of gray whales is antithetical to the policies and purposes of the statute. This is particularly true when there is a reasonable alternative that does not involve the directed take of marine mammals (e.g., using a motorized vessel to pull a log or other mock whale). Permitting training activities that involve the approach, pursuit, harassment, and potential striking of a protected species is highly anomalous. Indeed, AWI could not find any other situation where a federal or state wildlife management authority permitted the intentional approach or shooting of large game with blunted arrows or spears to train and/or practice hunting. Nor do other Alaska Native groups that participate in subsistence whaling engage in such training activities. Accordingly, the Assistant Administrator should amend the Recommended Decision’s regulations to disallow training activities on live whales.

B. Sec. 216.113 Issuance And Duration of Permits

Amend Section 216.113(b)(4)(vii) to read:

(vii) 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.~~

Either the Tribe is in compliance with the requirements of the regulations or it is not. If not, a hunt permit should not be issued. Providing a mechanism where the Tribe, even if not in compliance with the regulations, can obtain a permit is illogical and not consistent with the requirements of the MMPA.

C. Sec. 216.114 Hunt Management Requirements And Restrictions

As extensively explained above, the Assistant Administrator cannot lawfully issue a waiver and regulations that will result in the take of WNP gray whales. However, solely for the purposes of this discussion, if the Assistant Administrator insists on authorizing waiver activities when WNP whales are in the hunt area—which again, would be unlawful—the regulations should be amended to account for the presence of WNP whales in the hunt management provisions. As NMFS acknowledged at the hearing, there is a chance that not every whale subjected to a take will be identified. *See* Tab 101, 60:1-16; Tab 58 ¶ 38 (Yates 3d Decl.). In light of the precautionary principle embodied in the MMPA, the Assistant Administrator and NMFS must account for the possibility that there are WNP whales present in the hunt area, and continue to collect observational data regarding the proportions of WNP, ENP, and PCFG gray whales in the hunt area. Accordingly, Section 216.114(d)(2) should be amended to read:

(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 and WNP whales and the proportion of PCFG and WNP whales that will be presumed to be females for each month of the upcoming calendar year. The presumed proportion of PCFG and WNP whales will be based on the best available evidence for the months of December and January through May, and, for PCFG whales, will be 100 percent for the months of June through November. The presumed proportion of female PCFG and WNP whales will be based on the best available information for each month. These proportions will be used for purposes of accounting for PCFG and WNP whales that are not otherwise identified or accounted for as provided under subsection § 216.115(b).

D. Sec. 115 Accounting And Identification Of Gray Whales

As extensively explained above, the Assistant Administrator cannot lawfully issue a waiver and regulations that will result in the take of WNP gray whales. Accordingly, because the even-year hunts and associated training activities will occur when WNP whales are known to be in the hunt area, such activities cannot be authorized. However, solely for the purposes of this discussion, if the Assistant Administrator insists on authorizing waiver activities when WNP whales are in the hunt area—which again, would be unlawful—the regulations should be amended to account for the presence of WNP whales in the accounting and identification provisions. As NMFS acknowledged at the hearing, there is a chance that not every whale subjected to a take will be identified. *See* Tab 101, 60:1-16; Tab 58 ¶ 38 (Yates 3d Decl.). In light of the precautionary principle embodied in the MMPA, the Assistant Administrator and NMFS must account for the possibility that there are WNP whales present in the hunt area, and continue to collect observational data regarding the proportions of WNP, ENP, and PCFG gray whales in the hunt area. Accordingly, Section 216.115(b)(1) should be amended to read:

(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 and WNP whale in accordance with the proportions specified in § 216.114(d)(2) and will be counted accordingly. If the sex of a whale that is counted, in whole or in part, as a PCFG and WNP whale cannot be identified, the proportions specified in § 216.114(d)(2) will be applied.

Separately, Section 216.115(b)(4) should be amended to read:

(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, will be reported as an infraction to the International Whaling Commission, and will be counted against the U.S. share of any applicable catch limit established by the International Whaling Commission.

This proposed revision makes clear the requirement that, should an unauthorized strike occur, that it be reported to the International Whaling Commission as an infraction.

E. Sec. 216.116 Use Of Edible And Non-Edible Whale Products

Amend the text of Section 216.116(a)(1) to read:

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

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

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

(A) at the tribal member’s residence within the state of Washington with any person provided the products are shared for consumption at the tribal member's residence, as long as there is not more than two pounds of such edible product per person, or

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

This proposed revision applies the two pound per person limit to all circumstances in which edible whale product may be consumed outside of the Tribe’s reservation boundaries. Additionally, the proposed insertion of “within the state of Washington” will facilitate enforcement of these regulations.

F. Sec. 216.117 Prohibited Acts

Amend Section 216.117(15) to read:

(15) Share edible gray whale products outside the Makah Indian Tribe’s reservation boundaries with any person not enrolled as a member of the Makah Indian Tribe, except at a tribal member's residence within the state of Washington, or 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 at the residence or attending the gathering per § 216.116(a)(1)(ii)(B).

This proposed amendment to the regulation is to provide geographic limitations to the sharing of edible whale products to facilitate enforcement of the regulations and to make clear that the two pounds of edible product per person is applicable to both products consumed at a tribal

member's residence and at a tribal or intertribal gathering sanctioned by the Makah Tribal Council.

Additionally, amend Section 216.117(b)(2) to read:

(2) Possess or transport edible gray whale products except

- (i) within the Makah Indian Tribe's reservation boundaries, when such products have been shared by an enrolled Makah Indian tribal member;
- (ii) at the residence of a tribal member within the state of Washington, whether or not the residence is within the Tribe's reservation boundaries; and
- (iii) at tribal or intertribal gatherings sanctioned by the Makah Tribal Council, whether or not the gathering is within the Tribe's reservation boundaries.

This proposed revision is intended to limit the geographical scope of where edible gray whale products can be consumed outside the Makah Tribe's reservation boundaries to facilitate law enforcement efforts.

G. Sec. 216.118 Requirements For Monitoring, Reporting, And Recordkeeping

Amend Section 216.118(a)(1) to read:

(1) Ensure a certified tribal hunt observer accompanies each hunt. The tribal hunt observer will record in a hunting logbook the time, date, and location (latitude and longitude, accurate to at least the nearest second) of each hunting approach of a gray whale, each attempt to strike a gray whale, and each gray whale struck. For each gray whale struck, the tribal hunt observer will record whether the whale was landed. If not landed, the tribal hunt observer will describe the circumstances associated with the striking of the whale and estimate whether the animal suffered a wound that might be fatal. For every gray whale approached by the whaling crew, the tribal hunt observer must make every attempt to collect digital photographs useful for photo-identification purposes. For every whale struck, the tribal hunt observer must make every reasonable attempt to collect samples for genetic sampling as quickly as possible without compromising the safety of the hunt.

Considering the importance of identifying each gray whale that is approached, particularly to determine if the animal is a WNP or PCFG gray whale, tribal hunt observers should be required to make every reasonable attempt to obtain photographs sufficient for photo-identification purposes of every whale subjected to a take by waiver activities. The proposed revision also requires the tribal hunt observer to obtain a genetic sample for testing from each struck whale as quickly as possible without compromising the safety of the hunt to minimize the potential that struck whales that are subsequently lost are unable to be identified.

Additionally, amend Section 216.118(a)(6)(vi) to read:

(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 by the NMFS West Coast Region's office in Seattle, Washington.

All reports on waiver activities should be made available for public review proactively by the NMFS West Coast Region's office. Ideally, all reports would be posted on the internet as frequently requested records under the Freedom of Information Act, 5 U.S.C. § 552(a)(2)(D).

CONCLUSION

In light of the significant substantive and procedural flaws in the Recommended Decision, the Assistant Administrator must reject the Recommended Decision and deny the waiver request. At the bare minimum, the Assistant Administrator must remand the hearing record to the ALJ for fuller development. In that case, in accordance with the requirements of the APA and the MMPA, the Assistant Administrator must instruct the ALJ to defer holding a hearing until the DSEIS has issued and can be entered into the record, and the UME has concluded and its effects fully understood.

Sincerely,

/s/Elizabeth L. Lewis

Elizabeth L. Lewis
Associate Attorney