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Re: 73 FR 26375: DEIS for Proposed Authorization of the Makah Whale Hunt

Dear Mr. Stone:

Thank you for the opportunity to comment on the "Draft Environmental Impact Statement (DEIS) for Proposed Authorization of the Makah Whale Hunt", May 2008.

With respect, Cetacean Society International (CSI) urges the National Oceanic and Atmospheric Administration (NOAA) to review and correct the overwhelming number of DEIS deficiencies, whether inaccurate, misleading, unclear or omissions of fact. We have no doubt that many of these deficiencies will be presented to NOAA in public comments, and NOAA professionals are certainly aware of many of them. However, the unwieldy scale of the DEIS, and the overlapping of the comment period with many other priority issues of concern, likely will preclude even the most ardent reviewers from catching all deficiencies. CSI acknowledges that our best efforts could not review this document adequately, even with an extension period, and we reserve the right to revisit the document. The mechanism for these corrections may require an eventual Supplemental EIS (SEIS), but no matter how they are accomplished, they must be done.

To assist with making these corrections, CSI urges NOAA to pay particular attention to the DEIS-referenced critique by the Peninsula Citizens for the Protection of Whales. Their local expertise, exhaustive review of the DEIS, and long-term familiarity with the Makah Tribe is an incomparable asset that can help NOAA avoid even more complications in this arduous process.

Overall, this DEIS is the worst presentation of relevant material of any of the 23 EIS-related documents I have reviewed since 1976, beating out a US Navy DEIS for mid-frequency active sonar training that simply vanished after the public comment period. The reason the DEIS is so bad is that it could only be written by omitting and misrepresenting relevant facts, and the ultimate responsibility is NOAA's.

The Final EIS provides an opportunity for NOAA to award a contract for preparation of the NEPA document to an objective, disassociated and knowledgeable preparer, defusing a potential conflict because of the preparation of this DEIS by Parametrix Inc., under contract to NOAA. It is obvious to many that the flaws in this DEIS may be related to the connections between Parametrix and the Makah Tribe. These are so pervasive that the DEIS is irrevocably inadequate and biased, contrary to the intent of the National Environmental Policy Act (NEPA). Parametrix's conflict of interest

justifies intense scrutiny, and CSI believes this scrutiny will show, given the relationship between Tribe and company, that Parametrix could not have been objective or substantive in its preparation of the DEIS. Whether these flaws were intentional or not may be decided in court.

We do not know of any DEIS intentionally prepared by an entity with such an obvious conflict of interest as with Parametrix's long-term financial and contractual interest in aiding the Makah Tribe. For example, Parametrix profited from facilitating the Juan de Fuca Byway, and in 2002 supported the Tribe's attempted annexation of their reservation road into the Byway. Public opposition to the "whaling road" stopped the annexation, so in 2003 Parametrix had a Corridor Management Plan contract for the Makah Tribe's Cape Flattery Tribal Scenic Byway. Parametrix's motives were linked to helping the Tribe "interpret" whaling to tourists, and are clearly reflected in their self-interested emphasis on improved whaling-related tourism that they repeat several times in the DEIS text. At one point Parametrix writers blissfully say: "Overall, it is reasonable to expect more visitors would be drawn to the area than avoid the area as a result of a whale hunt." This is contrary to all of the demographic facts CSI is aware of; watching whales being killed or butchered is not on many tourists' itinerary, and is not offered by any tour-promoting services outside of Japan and Norway.

CSI is aware of other links between the DEIS preparer and the Tribe. For example, the Makah Tribe in 2006 selected TranTech to administer the ten million dollar paving of the Tribal Byway through Neah Bay. TranTech is linked to Parametrix. Parametrix is also linked to the Neah Bay wave energy project. NOAA was derelict for allowing this conflict of interest to happen.

If another example is necessary, Parametrix's self-serving DEIS discussion of the effects of whaling on tourism focuses improperly only on the Makah reservation, not surrounding Clallam County. While the DEIS states that there is "no evidence that calls for boycotts of Olympic Peninsula tourism had any negative economic impact on tourism in the area", locals believe there were economic impacts and the 2005 Scoping Report acknowledged the many comments about the need to analyze the effects of whale hunting on regional socioeconomics and tourism. While Parametrix serves itself best by downplaying the current regional, US, and worldwide public perception about whaling, there should be no question that the reaction will affect tourism and necessary support for real Makah needs. Countering its own text, the DEIS even dismisses boycotts as being probable no matter what whaling alternative is chosen.

Another categorical reason this DEIS is inadequate, biased and flawed, contains comments that appear to be misleading, arbitrary and capricious, and does not satisfy requirements of the NEPA includes NOAA's failure to make public material relevant to the DEIS. For example, CSI is not aware of any public release of the agency investigation into the September, 2007 illegal whaling event. We are aware that several people have tried and failed to see it. A review of that investigation is mandatory for an adequate review of the DEIS, because the event and aftermath demonstrate several fundamental reasons why permitted Makah whaling will be akin to letting an uncontrollable genie out of the bottle.

The fundamental DEIS pretense that permitted Makah whaling can be effectively regulated was destroyed by the illegal whaling event. In brief, four men avoided all pretext of cultural whaling, subsistence need, and humane methods to try to kill a whale simply because they wanted to. It

is inconceivable that, within the insular and small Makah community, the Makah leadership and enforcers were not aware of or alert to the potential whaling. If they truly were unaware then they are inadequate to the responsibilities implied in the DEIS. However, additional evidence suggests that Makah Tribe officials were aware of the impending and illegal hunt in September, 2007, in addition to one convicted whaler's court testimony to that effect. Whether or not Makah authorities were aware, the whaling event demonstrated that these authorities lack the will or capacity to constrain unpermitted whaling.

The Makah Tribal Court, for another example, is unable or unwilling to enforce the law. The Court had initial jurisdiction over the event, and in bringing the whalers to trial declared that the defendants would face punishment on tribal charges, to the fullest extent of the law, of a year in the Neah Bay jail, $5,000 fines and temporary suspension of their treaty right to hunt and fish. However, after considerable trouble empanelling a jury, tribal judge Stanley Myers agreed to waive any punishment and drop all tribal charges against the whalers in return for a year's good behavior. Myers was dismissed later.

The DEIS and Needs Statement arguments for Tribe's ceremonial and spiritual needs were mocked by the illegal whaling, which obliterated all the forced connections between modern whaling and Makah whaling lore, tradition and social structure. It clarified that, to some Makah whalers, whaling is like any other hunting. To them the Tribe's ritualized ceremonies, and whaler crew selection, celibacy, preparation and special training in dedicated canoes is for museums, and the whole Makah hierarchy from whaling captains down to slaves is meant for the tourists.

In fact, the illegal whaling demonstrated a fundamental flaw in the DEIS and Needs Statement: While many Makah may want to be proud of their heritage and history, they do not want to live as their forefathers did. This has as much to do with the demand for social equality for all Makah as US citizens as with the conveniences and comfort of modern living. Some American values have been accepted by the Makah, at least the many living in poverty, or from low-ranking families; no one wants to be a slave. The Makah who illegally whaled showed distain for the Tribe's heritage, custom, and hierarchy, and declared that they had a right to whale when and how they wished.

The illegal whaling also demonstrated that the humane aspect of killing whales is not reinforced or regulated adequately in the DEIS or US policy. The DEIS expresses some concerns that any hunted whale be killed as humanely and quickly as possible, but the rogue whaling clarifies that it is not enough to require Makah whalers to be trained and proficient in the use of weapons, and it is not enough to give them adequate weapons. No one can deny that the wounded gray whale suffered unnecessarily for many hours before it finally died. One of the rogue whalers was a trained whaling captain, and the four men had the best equipment at their disposal, stolen or not. Nevertheless, their performance was so inept, despicable and ludicrous that the whale's time-to-death rivaled the worst cases the IWC is aware of. NOAA must find some way to ensure that Makah whaling does not cause undue suffering, and the DEIS must state how that will happen.

The illegal whaling event adds to the evidence that the Needs Statement conclusions are not supported by evidence from the current lifestyles of the Makah, and their use of whale products over more than a decade. CSI contends that the Makah Needs Statement makes erroneous

conclusions based on the assumption that the Makah really want to live the old way. To verify our contention we need to review the full data set behind those conclusions, but they have not been made available to the public for review. This is another example of how NOAA has made adequate public review of the DEIS unnecessarily, perhaps illegally difficult.

The DEIS ignores evidence that the Makah people were so unenthused with dealing with an actual whale carcass that the butchering was left to visitors, as related in comments by an Alaska Native whaler in a DEIS-ignored video. The DEIS also ignores evidence that Makah whale meat has been improperly distributed to non-Native Americans, and even transported to Canada. In spite of the ritualized token sharing of whale meat to tribal members, many didn't like the taste, and most people seemed to have quietly thrown their token share away. To compare the Makah "need" to that of the Alaska Natives is an insult to a people living in a harsh environment where the shared meat is essential to their social values and diet, and the whaling has never paused for hundreds of generations. The DEIS and Needs Statement do not demonstrate that the Makah need whale products for subsistence.

Nor does the DEIS discuss the machinations with US policy, and the resultant affect on the US's relationship with other nations and treaty organizations, as NOAA attempted (and unfortunately succeeded) to have the IWC downgrade the definition of aboriginal subsistence to meet their goal of including the Makah.

The science within the DEIS is biased. Overall threats to the Eastern North Pacific (ENP) gray whale population are not presented in accordance with the full spectrum of modern research. While scientists disagree on the numbers, affects and trends, the DEIS focuses mostly on the data supportive of killing whales. However, many scientists have been arguing that the ENP gray whale population may not be as recovered as NOAA wants us to think, often citing chaotic and accelerating trends towards climate change. Scientific evidence of significant pressures from pollution, collapse of habitat resources, high calf mortality, oil and seismic developments, ship traffic, and anthropogenic acoustical impacts have been minimized, while controversial data on the population's "recovery" numbers have polarized some professionals. If NOAA is not aware that the 2008 gray whale population using San Ignacio lagoon was perhaps the lowest number in decades it is because NOAA has not invested in gray whale population research since 1999, and prefers to cite references and exaggerated numbers that are dismissed by most experts, including NOAA scientists.

The DEIS obviously stresses positive data so as to justify the Makah Tribe's "need" to take 840 gray whales every five years, primarily from Level A and B harassment. Within that five year period 20 whales could be killed and brought to shore, and 35 whales could be struck and lost. But the DEIS fails to emphasize that, due to the in-shore nature of the recent and intended whaling, and the documented evidence of individual whales that prefer that habitat returning year after year, there is a weighted potential for the impact from the takes to be mostly on one sub-population, not the total ENP gray whale population. To be adequate, the science must quantify the probability of repeat takes and subsequent impact on this subpopulation. This quantification must also predict the probability that the struck and lost whales would either die from injury or be reproductively lost to the population.

In contrast, the IWC has expressed concerns for the impacts of strikes on small populations, as related in a DEIS footnote (1-23) that: "The annual quota from this feeding aggregation (Greenland bowhead) shall only become operative when the Commission has received advice from The Scientific Committee (IWC) that the strikes are unlikely to endanger the stock."

Regarding CSI's concern that the Makah will primarily hunt within a subpopulation, CSI is puzzled that the DEIS doesn't do more to argue for the Alternative to "Hunt outside areas frequented by identified whales". As suggested by many, this should be more clearly labeled as a "Hunt offshore in the actual migratory corridor". We assume the Makah don't want to venture as far to sea in power boats, with safety gear and escorts, as their forefathers did in unprotected canoes, but the DEIS support for April and May whaling in near-shore feeding sites as "designed to avoid any intentional harvest of gray whales that have been identified within the PCFA Survey area" contradicts NOAA's concern for targeting "resident" whales and the mothers and calves. This period coincides with these whales arriving in the area. NOAA knows of the public's concern for shooting "resident" whales, and harassing mothers and calves. The DEIS's dismissal of the potential for significant impacts on the public as well as on these subsets of the ENP population is simplistic and unrealistic.

The DEIS is inadequate and misleading by evading full disclosure of the conflict of interest expressed by the personal relationships to the Tribe of two cited "experts". Renker, cited many times as an authority on the Makah's "need" to whale, is the wife of a Makah whaler. Sepez, cited many times as an authority on Makah culture and subsistence use of foods, has had a long-term relationship to a Makah whaler.

Renker's two commissioned surveys do not prove that that Makah whaling is supported by the majority of Makah. The surveys merely found that a majority of respondents supported whaling. Only 163 of the total households responded in 2001 and only 152 responded in 2007. This correlates with an effort by a core whaling group to quell dissent by using tactics like threatening to "banish" aged members from the Tribe. The whaling faction has so intimidated everyone that few openly speak against the hunt. If someone's honest answer will bring trouble why respond to a survey, particularly if the survey is conducted not by an objective Ph.D. but by the wife of a whaler? The DEIS and Needs Analysis cannot help being inadequate by stressing selective and potentially misleading data from the two Makah household surveys, and without discussing the social and economic pressures on Makah who are either neutral or anti-whaling.

Regarding the permitted use of regulated whale meat the DEIS fails to define precisely what "inedible parts" can be distributed, what constitutes "authentic articles", and how off-reservation distribution and use of whale meat will be monitored and regulated. The definitions of acceptable sharing of meat based on "familial, social, cultural, or economically tied" categories require significant rewording to prevent wholesale illegal misuse of the meat. As written it is full of loopholes. To be blunt, this is the type or wording that has consistently resulted in events leading to lawsuits against NMFS for failure to enforce laws, followed by NMFS's lament that such lawsuits absorb a significant amount of human and financial resources. This self inflicted wound should not be made worse just to satisfy the Makah entrepreneurs.

The discussion of potential public injury is particularly deficient in the DEIS. Not only has the over-zealous Coast Guard caused unnecessary public injury, but the DEIS seems to ignore

expert testimony regarding the lethal range of the .50 caliber weapon the Makah would use. Comparative data shows alarming overlaps between the near-shore hunting the Makah have conducted and will conduct, the public use of shoreline areas for camping, the lethal range of the weapons, and the documented evidence that the whalers are not very good with their aim.

CSI has commented on this DEIS in good faith, with no ill will against the Makah Tribe or its people. We feel we are correct to argue for the whales, in part because we believe that the Makah will suffer no harm by not killing whales. Many other aspects of their historic culture have adapted to the modern era: They do not keep slaves; they do not live and suffer as aboriginal people; and despite inefficient and blundering government services that leave the Tribe isolated and impoverished, the Makah do have constitutional rights and freedoms.

However, the Makah have suffered harm, harm caused by the US government's continuous assertions that whaling was right and guaranteed in spite of decades of strengthening political and public perceptions that whaling is inherently wrong. From the initial efforts of the Makah to reinvigorate their culture by whaling, coinciding with considerations for the ENP gray whale to be delisted as an Endangered Species, NOAA has made every effort to assist the Makah. That effort has not always been legal, resulting in a chain of lawsuits. We have no doubt that, perhaps earlier than 1996, some misguided NOAA or BIA agents were reassuring the Makah that the Tribe would go whaling with little delay. The frustration vented by some Makah last September is well understood in this context; they have been led into this mess by their government.

The ultimate question CSI requests to see addressed in the final EIS is why the US has acted in a manner that has not only brought Native Americans into conflict with their American culture and alienated them further from the wider society, but has denigrated our nation in the eyes of the international community. Within the IWC context alone, policies driven by the contrived need to achieve Makah whaling have cost the US any claim to reliably supporting, much less leading the anti-whaling movement. At IWC 60 the US vote for Greenland whaling, the misrepresentation of the 2007 Makah whaling to the Infractions Committee, and the Chair's desperate efforts to keep the Makah whaler's sentencing from the IWC media added to a long chain of misguided efforts to make believe that Makah whaling was the same as Alaska Native whaling.

It is not. The Alaska Native subsistence need has little in common with the contrived Makah cultural whaling. CSI has not opposed Alaska Native whaling, tacitly accepting that the inhumane aspects of their hunt had to be balanced against issues of community survival. By aggressively rewriting the rules to allow Makah whaling as if it were the same thing, the US has knowingly aided whaling nations seeking any form of whaling they could get away with.

Many long-time observers would characterize the convoluted process to enable Makah whaling, including this DEIS, as a combination of two unlikely bedfellows: Perhaps fewer than 40 Americans who wanted to kill whales found eager support from government employees, economists and strategists concerned with larger implications from emerging treaty-right issues. This odd coalition has maneuvered the entire nation into a demeaning situation that has not served the national interest, and has polluted the nation's influence.

CSI urges NOAA to attempt to fix the DEIS deficiencies with an objective, factual, reliable and legal final EIS.

Thank you for considering these comments.

Sincerely,

William W. Rossiter
President
Cetacean Society International