MARINE MAMMAL COMMISSION
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14 August 2008

Mr. Steve Stone
National Marine Fisheries Service
Northwest Region
1201 NE Lloyd Boulevard, Suite 1100
Portland, OR 97232

DEPARTMENT OF COMMERCE
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NATIONAL MARINE FISHERIES SERVICE

Dear Mr. Stone:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the Draft Environmental Impact Statement (DEIS) for Proposed Authorization of the Makah Whale Hunt. The National Marine Fisheries Service has previously prepared two environmental assessments related to the hunting of gray whales by the Makah Tribe. The Service prepared the present document to address the ruling of the Ninth Circuit Court of Appeals in *Anderson* v. *Evans* that an environmental impact statement was needed to meet the agency's responsibilities under the National Environmental Policy Act. In particular, the court was concerned about the need for additional analyses on three different issues: the impact of the proposed hunting on the whales that remain in the waters of the Pacific Northwest throughout the summer (referred to as the Pacific coast feeding aggregation), public safety concerns, and the proposed hunt's precedential effect on possible hunting by other tribes in the United States or within other countries that are parties to the International Whaling Commission.

The Commission believes that the DEIS meets the requirements of the National Environmental Policy Act. The Service has been particularly thorough in soliciting public input on the scope of the DEIS and in the breadth of issues addressed in that document. Also, the range of alternatives considered in the DEIS is appropriate, given the purpose and nature of the tribe's request for a waiver under the Marine Mammal Protection Act and the constraints established by the International Whaling Commission in authorizing subsistence whaling of gray whales. In summary, the Commission believes that the DEIS does a good job of analyzing the environmental consequences of the various issues that participants and decision-makers will need to consider in the course of a rulemaking under the Marine Mammal Protection Act to authorize a proposed hunt.

If the Service decides to proceed with a rulemaking to waive the Marine Mammal Protection Act's moratorium and authorize the Makah Tribe to take gray whales, the Commission and others will have sufficient opportunity to make substantive recommendations about the selection of a preferred alternative from among those considered in the DEIS. As such, the Commission sees no need to make recommendations concerning the selection of alternatives at this stage. In any future reviews, we will consider not only the impact of the proposed hunting on the gray whale stock and on the Pacific coast feeding aggregation but also ways to improve hunting efficiency (e.g., to minimize the number of struck and lost whales) and to ensure that any taking is humane.

Because of the length of the DEIS, we are not now providing specific drafting suggestions or identifying areas where clarification would be useful but not substantively important. There is, however, one threshold issue that we believe the Service should address more directly than it has. This issue concerns the requirement under section 103(a) of the Marine Mammal Protection Act

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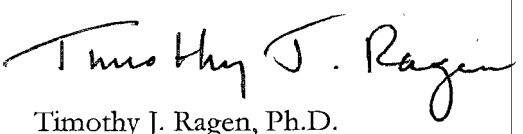
that regulations issued to waive the moratorium on taking or importing marine mammals ensure that the taking will not be to the disadvantage of the affected stock and will be consistent with the purposes and policies of the Act. Discussion in the DEIS suggests that this "disadvantage test" will be met as long as the stock would not be reduced below its optimum sustainable population (OSP) level by the authorized taking. Although this is one possible interpretation of the requirement, support can be found in the recommended decisions from previous rulemakings under section 103 for an alternative view, which is that allowing a healthy stock to decline to the point where it has been reduced to its maximum net productivity level (the lower bound of the OSP range) would be inconsistent with the statutory requirement that taking not disadvantage the stock. It does not appear that the levels of taking being considered in this instance are likely to disadvantage the stock under either interpretation. However, because this is fundamental issue of statutory interpretation that may have implications beyond the current proceeding, a more complete discussion would be useful.

The Commission looks forward to working with the Service as it continues to evaluate the Makah Tribe's rulemaking request.

Sincerely,



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