From: Naomi Rose
To: MakahDEIS.nwr@noaa.gov;
cc: Tim Ragen;
Subject: 2008 Makah DEIS
Date: Friday, August 15, 2008 2:01:19 PM
Attachments: Makah DEIS 2008.pdf
Makah scoping notice - 2005a.doc

August 15, 2008

Steve Stone
NMFS Northwest Region
1201 NE Lloyd Blvd, Suite 1100
Portland, OR 97232
Eml: MakahDEIS.nwr@noaa.gov

RE: *73 FR 26375*, draft Environmental Impact Statement for the proposed authorization of a Makah whale hunt

Dear Mr. Stone:

On behalf of The Humane Society of the United States (HSUS) and its more than 10.5 million members and constituents, I am submitting comments on the draft Environmental Impact Statement (DEIS) for the proposed authorization of the Makah whale hunt (*73 FR 26375*). For the record, we would like to state that the timing of this comment period made a thorough review of the document difficult for many stakeholders, as it wholly overlapped with the lead-up to and duration of the annual meeting of the International Whaling Commission (IWC). Our review of the DEIS is consequently less detailed than we would have liked, and we reserve the right to revisit its content during future stages of the on-going regulatory and waiver process. Indeed, the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NMFS), regardless of the content of a final EIS, may subsequently need to produce a supplemental EIS, as events develop and research and investigatory results are published that may need to be incorporated into the environmental impact analysis.

Overview

While the DEIS is a considerable improvement over previous documentation prepared under the National Environmental Policy Act (NEPA) and an effort has been made to be responsive to the scoping comments submitted by The HSUS and others in October 2005 (HSUS comments attached), it is still a biased analysis that seems tailored to support a predetermined outcome. The HSUS considers the DEIS to be deficient in several respects:

1) Failure to fully consider all reasonable alternatives – the DEIS fails to consider a number of viable alternatives to the Makah's proposal to kill whales;

2) Characterization of the past and present political situation – the DEIS, as with previous NEPA documents prepared on the Makah request, inaccurately describes the political and administrative background of the Makah's effort to resume whaling;

3) Public safety – the DEIS fails to adequately clarify how those responsible for managing the hunt will prevent on-water interactions between whalers, officials (e.g., the Coast Guard), and protesters from becoming dangerous;

4) Effective management of the hunt – the DEIS does not adequately address the ramifications of an illegal hunt that occurred on September 8, 2007;

5) Future of the Eastern North Pacific (ENP) gray whale population – the DEIS does not adequately consider the cumulative impacts on the gray whale population from, e.g., global climate change, chemical and noise pollution, harmful algal blooms, and increased shipping;

6) Impact on individual gray whales – the DEIS does not adequately consider the impact of hunting methods on individual animals or whether those methods are "humane;" and

7) Effect on federally-protected areas – the DEIS does not adequately discuss how the hunt affects wilderness and other federally-designated protected areas.

An important reason why The HSUS opposes the Makah request (but see below for a discussion of our primary objection) is because the push to conduct this hunt, while perhaps understandable in the context of treaties and certainly culture (although we continue to assert it is not a subsistence hunt), is frankly inexplicable in the context of the modern situation in Puget Sound. As the DEIS makes clear, Puget Sound is far different today than it was up through the early 20th century when the Makah whale hunt ceased due, *inter alia*, to the commercial extinction of the gray whale and a focus by the Makah Tribe on other industries of the western economy, including sealing. In modern aboriginal whale hunts in remote regions such as northern Alaska or Chukotka, the use of dangerous weapons risks only the whalers (and the whales) and in more populated areas such as St. Vincent and the Grenadines, dangerous/explosive weapons are not used. It is simply not sensible to pursue this hunt, with this weaponry, in one of the most economically important and densely populated shipping and recreational regions of the United States.

The Makah are not being "good neighbors," as they insist on pursuing whaling in an area inhabited by many people and vessels, an activity that will interfere with the use of a protected area and that poses significant danger to all those involved, due to strong opposition to it. The Makah request has resulted in community divisions that will take a long time to heal (if they ever do), and in an enormous taxpayer and manpower drain.

The Makah accuse opponents of the hunt of pushing their cultural values on the Tribe, but in fact the same accusation can be made in the reverse – the Makah Tribe is forcing an entire region to adapt to its cultural values. The DEIS, unfortunately, downplays all of these elements of the situation when considering the impact of this hunt on the human environment.

In essence, while we appreciate the Makah's desire to preserve its cultural traditions, pursuing *this* tradition is simply not practicable from a wider social, economic, and safety standpoint. While this may not be fair from some perspectives, it is reality. Puget Sound today is a melting pot of many uses (business and recreational), cultures, values, and ideas, where the Makah tradition of whaling, especially when using modern weaponry and without a subsistence basis, does not and will not mix easily.

Failure to Consider All Reasonable Alternatives

Given these varying cultural values, NMFS's (and the Makah Tribe's) failure over the years of controversy to change the proposal to one that might be more acceptable to the wider community is difficult to fathom and violates NEPA's requirement to "rigorously explore and objectively evaluate all reasonable alternatives."[1] NMFS has never proposed a hunt that is pursued farther offshore in the migratory corridor, or that establishes a smaller annual quota that actually matches consumption commitments by tribal members (four or five whales in a year will no doubt result in meat going to waste, as not all tribal members want to eat it), rather than one that symbolically matches the historic villages of the Makah Nation[2]. Certainly a ritualized hunt or a ceremonial event that relies entirely on "calling a whale" to shore – the latter described in the DEIS as a valued cultural practice historically performed by the Makah chiefs – would address the concerns within the opposition, but none of these options are apparently acceptable to the Makah.

The HSUS rejects the rationale in the DEIS that these alternatives are not acceptable because they would not meet "the purposes and needs" of the Makah. Just because the Makah's intention was to reserve their right to kill whales when they signed the Treaty of Neah Bay in 1855 does not mean they still *must* kill whales to meet their purposes and needs. The Makah are free to interpret their purposes and needs however they wish, as long as that interpretation does not violate the law. The purposes and needs of the Makah are as flexible as their hunting methodologies – if they are free to modify and modernize the latter, they are certainly free to modify and modernize the former.

Characterization of the Past and Present Political Situation

The HSUS and numerous others, including Parties to the IWC, have opposed the Makah hunt proposal from the outset because it failed to conform to international standards of aboriginal subsistence whaling. The proposal threatened to create and has *de facto* created a new category of whaling – cultural whaling – that does not reflect a nutritional need and weakens the distinction between aboriginal subsistence whaling and commercial whaling.

The DEIS omits mention of our position entirely when discussing opposition to the Makah proposal; instead it implies that the only opponents are those who do not accept any killing of whales or who are concerned solely with the suffering of hunted whales. Certainly *some* opponents hold this latter position and it is an argument that is relatively easy for the government to counter and the DEIS spends some time doing so. But the government cannot defend its support for the Makah proposal by honestly addressing our reasons for opposing it, so it simply ignores us.

As the DEIS notes, the working definition of "aboriginal subsistence whaling" has been amended at the IWC, but it does not clarify that this change was spearheaded by the US delegation solely because of the Makah request[3]. The new definition is far weaker than the original, as it no longer includes the requirement to demonstrate a nutritional need; a requirement, incidentally, that the Alaska Natives expended considerable effort to meet in the 1970s and 1980s and that formed the basis for the opposition expressed by IWC Parties at the annual meeting in 1997 (see below).

By not including our position in the DEIS's description of the spectrum of opposition to the Makah proposal, the US government is able to avoid acknowledging actions it has taken to amend the aboriginal subsistence standards at the IWC and in domestic regulations to fit the Makah proposal rather than the other way around. Indeed, the DEIS avoids having to include a more thorough and culpable description of the actions the government has taken to push the proposal forward, which led to multiple court judgments ruling that these actions were illegal. Clearly the government would prefer to minimize reference to this history and the DEIS certainly does so! The precedent-setting nature of this request has led to political machinations on the part of the government that has made the world a less safe place for whales, no doubt never the Makah Tribe's intention, but unfortunately a principal result.

Regarding the events at the 1997 IWC meeting in Monaco, it is at best disingenuous, and at worst misleading, for the DEIS to suggest that "many" IWC delegates supported the US delegation's request on behalf of the Makah. It is also incorrect to suggest, through the use of the word "others" when referring to the opposition encountered, that this opposition was in the minority. Indeed, a majority of countries speaking in the plenary session at

the 1997 meeting opposed the US submission on behalf of the Makah Tribe on substantive grounds, including Australia, the Netherlands, Spain, the United Kingdom, Chile, New Zealand, Brazil, Mexico and Argentina.

The Verbatim Record for the Monaco meeting contains several statements clarifying that the vote by numerous Parties for the gray whale quota was in support of the Russian Federation's request on behalf of the Chukotkan people, whose subsistence needs had long since been recognized by the IWC, *not* in support of the Makah proposal. Nevertheless, the DEIS not only ignores these clearly stated caveats but offers another rationale for the opposition to the Makah request: "One reason for this opposition was that the United States did not ask the Russian Federation to share the existing [quota]…" Yet the Verbatim Record does not support this as an opposition rationale at all, although certainly Parties recommended that aboriginal groups share existing quotas rather than combine requests additively. The reason for the opposition was because the Makah request did not conform to the existing definition of aboriginal subsistence, full stop.

It is clear that the DEIS seeks to respond to previous criticism that the description of events at the IWC omitted the fact that there was opposition. However, rather than describing the opposition accurately, the DEIS ignores the facts and instead manufactures a rationale that allows the government to avoid admitting that, in essence, it forced a vote on subsistence quotas that put Parties in the position of having to vote for the gray whale quota if they wished to support the Chukotkans, even knowing that the United States had "done a deal" with the Russians that would allocate some of the whales to the Makah.

The DEIS is rife with sins of omission (see below), but this is one instance where the text is completely inaccurate. The US delegation manipulated the situation and damaged its integrity in order to get some form of approval for the Makah proposal at the IWC. The government's actions were wholly inappropriate and The HSUS strongly urges the US government to avoid recasting history. What is done is done – ignoring it or spinning it simply makes a bad situation worse.

NMFS's indiscriminate – and indeed illegal – support for the Makah proposal has weakened the US position on whaling domestically and

internationally and the need to avoid acknowledging this continues to result in an inaccurate portrayal of the opposition to the hunt, including from Parties to the IWC, and the actions taken by the US delegation at the IWC. Contrary to the DEIS's characterization, the IWC has *never* acted on the Makah request – the request (i.e., the needs statement) was withdrawn in 1996 and events transpired in 1997, as described above, that led to a vote on a gray whale quota (as required by the Schedule) that numerous Parties made clear was *not* to be taken as support for the Makah needs statement. Indeed, the US delegation, which had established a precedent when it acted on behalf of the Alaska Natives in the 1970s of submitting strong needs statements in order to demonstrate that subsistence quota requests were based on a clearly defined need, completely reversed its previous policy and insisted in 1997 that the IWC *cannot* act on aboriginal needs statements. The delegation argued that there was no mechanism at the IWC to recognize aboriginal needs, despite the considerably more diligent (and legal) efforts it went through on behalf of the Alaska Natives to accomplish that very recognition. Given this, for the DEIS to say that the IWC acted on the Makah request is not only incorrect, it is hypocritical.

The United States has established a dangerous precedent of Parties acting unilaterally or bilaterally to recognize aboriginal needs, as it did bilaterally with the Russian Federation in 1997, and to determine without IWC oversight which groups are eligible to take whales from stocks for which the IWC has assigned a quota.

We note that the DEIS, in Section 4.17.2.2, concludes that "...it is unlikely that NMFS' actions to either deny the Makah request (Alternative 1- No-action) or grant the Makah some level of hunting (Alternatives 2 through 6) would change the United States' position on commercial and scientific whaling or its ability to actively pursue its position." This statement is disingenuous. NMFS's actions have *already* changed the US position on commercial whaling and undermined its opposition to it, as outlined above.

The United States was once a leader at the IWC against commercial and scientific whaling, but is now trailing Australia, New Zealand, and the United Kingdom in this regard, all of whom opposed the Makah hunt proposal from the outset. The DEIS' argument that a Makah hunt would not weaken the US position against commercial whaling because US support for

the Alaska Native hunt has never done so (which in fact is questionable) entirely misses the point that the two hunts are not the same and that this is precisely why The HSUS, many IWC Parties, and others have opposed the Makah proposal.

Public Safety

Chapter Two describes "Public Safety Measures," but fails to clarify that these very measures were employed in the 1999 and 2000 hunts and nevertheless someone was seriously injured in 2000. The only way a guarantee of conducting a safe hunt can even be approached, let alone achieved to any satisfactory degree, in such a heavily populated region is by expending large sums of taxpayer money on Coast Guard escorts to enforce the RNA and MEZ and to be on hand should an emergency response be required. As noted above, this is simply *not* a good place to host a whale hunt today – this may not be fair from the Tribe's point of view, who never invited westerners to the Olympic Peninsula, but it is reality.

Quite frankly, it is almost a guarantee that someone who is not a whaler *will* eventually be injured or killed during a Makah whale hunt if one is authorized. The dangers inherent in whaling, which in other aboriginal whaling situations are faced only by the whalers (as is appropriate), are being shared by others in this case (e.g., the protesters, the media, even the NMFS observers and the Coast Guard). One could argue that the protesters and reporters are facing these risks voluntarily but that would be a glib response. The protesters have their beliefs too and the reporters are simply doing their job, just like federal agency personnel. The DEIS implies that familiarity will breed contempt and eventually the circus that has surrounded previous hunts (in 1998, 1999, and 2000) will die down, but while it may be true that eventually only a core group of protesters and reporters will remain, they *will* remain. NMFS and the Makah – and the DEIS authors – simply refuse to acknowledge the reality that a whale hunt is incompatible with the Puget Sound region. The public safety discussion is, in essence, a fantasy, one that ignores that the previously established safety measures did not work in 2000 and arguably did not work in 2007 either, since the illegal whalers were able to go out onto the water with a large caliber rifle that was supposed to be under lock and key and discharge it several times without taking any of the precautions the Makah management plan requires.

Effective Management of the Hunt

The DEIS' treatment of the illegal September 2007 hunt by several Makah tribal members is shallow and inappropriately dismisses its significance in the context of a future hunt authorization. The US delegation failed to report this breach as an infraction at the 2008 annual meeting of the IWC[4]. The federal government did successfully prosecute the illegal whalers, but in its efforts to prevent the illegal hunt from derailing the current regulatory process, the government has once again cut corners at the IWC (see HSUS scoping comments and above discussion on the characterization of the political situation), further weakening its overall policy and position on whaling.

In addition, the public has not had access to all of the details surrounding the investigations into the illegal hunt and there have been allegations made by the perpetrators about Makah Tribal Council involvement that must be resolved. We strongly urge NMFS to include a thorough discussion of these issues in the final EIS, to include details so far kept from the public (in the NMFS and Coast Guard reports on their investigations) and to resolve any unanswered questions that were raised at the trials. If events continue to develop, a supplemental EIS may eventually be required.

Interestingly, no mention is made in the DEIS of the fact that the leader of the illegal hunt was the 1999 whaling captain, Wayne Johnson. The very man selected by the Makah system to lead the whaling crew did not hesitate to break the law and, according to media quotes, was proud of having done so. In addition, and aside from any allegations of involvement, the Tribal Council failed to fulfill its promises to punish these actions fully and definitively. These facts beg the question of how the Makah Tribe will manage the hunt adequately in the future, which includes the process for selecting the whaling crew. Indeed, the DEIS contends that the established tribal management system will suffice for the future. The HSUS strongly disagrees with this contention and urges that the final EIS address how the proposed hunt regulations and the associated Marine Mammal Protection Act (MMPA) permit will be effectively enforced in the future, given the tribal system's failure to stop or prosecute the illegal hunt.

Future of the ENP Gray Whale Population

While the present status of the gray whale population is much improved from the early 20th century, its long-term viability is very much in question and the DEIS does not adequately address this. Swartz et al. (2008)[5] noted an on-going decline in numbers of whales of various age classes in Laguna San Ignacio, one of the main breeding lagoons in Mexico. While this may simply indicate a shift in distribution, it may also reflect a true decline in breeding ground numbers, yet the DEIS does not even mention this work. Indeed, the DEIS assumes the gray whale population is at or within its Optimum Sustainable Population size, but in fact this is merely speculative and there are other scientific opinions on this.

For example, Alter et al. (2007)[6] conducted a genetics analysis that suggested a historic population size several times larger than currently assumed. The DEIS mentions this paper, but mostly in the context of saying additional evaluation of its analysis is needed. This again argues that a supplemental EIS may eventually be required. Alter et al.'s analysis suggests that either the current ENP gray whale population is far from its historical K value or that K has significantly declined in the past 100 years. If the former is true, then the precipitous drop in population in 1999/2000 is of deep concern (since it is not related to reaching carrying capacity, as the DEIS supposes). If the latter is true, then the gray whale's habitat has been severely altered or damaged in the past few decades, again an issue of deep concern. Regardless, the DEIS should have discussed these possibilities thoroughly, even if the eventual conclusion was to discount them – yet it does not. The final EIS must rectify this omission.

As noted above, the DEIS blithely dismisses the 1999/2000 population decline as a mere "blip" in a population fluctuating around its carrying capacity. But this is only a hypothesis and there could be other, more troubling explanations for this decline, including (as the DEIS itself suggests) that a loss of sea ice in the Arctic somehow reduces foraging success for gray whales. If this latter hypothesis is correct, then global climate change and loss of sea ice bodes very ill for the gray whale, yet the DEIS barely addresses this. While the discussion of the gray whale's natural

history and status is much improved over earlier NEPA documents, there is still inadequate consideration of the on- going perturbations in the Arctic due to global warming. Measurable and predicted impacts from global warming in the Arctic have led another agency, the US Fish and

Wildlife Service, to list the polar bear as threatened under the Endangered Species Act. Yet global climate change is not even mentioned by the DEIS in any substantive way until Chapter 5 and then encompasses only two paragraphs – the review of the threats facing the gray whale in Chapter 3 does not have a separate discussion on global climate change at all. This is a gross omission by the authors of the DEIS and absolutely must be corrected in the final EIS.

The DEIS also inadequately considers the impact of the proposed hunt on Pacific Coast Feeding Aggregation (PCFA) and Oregon to Southern Vancouver Island (ORSVI) gray whales. The Ninth Circuit expressly rejected NMFS's 2001 Environmental Assessment on the Makah hunt proposal because it failed to adequately discuss the impact on PCFA whales [7]. The court noted the importance of discussing the impacts on local populations because "gray whales disappear[ing] from the area of the Strait of Juan de Fuca, the Marine Sanctuary, or both" would have a significant impact on the environment, regardless of the hunt's effect on the wider gray whale population.

The current DEIS also fails to adequately address this issue. Here, the DEIS sets an annual Potential Biological Removal (PBR) level for ORSVI whales of 2.49 whales, or 12.45 whales over a 5-year period. It acknowledges that Alternatives 2 and 4 would exceed that 5-year PBR by 2.5 whales, and Alternatives 3 and 6 would exceed the 5-year PBR by 22.5 whales. It also acknowledges that the PBR calculation *only* includes ORSVI whales "landed" and would not include those "struck and lost." However, the DEIS does not explain why struck and lost whales should not count toward the hunt's portion of the PBR. More importantly, the DEIS does not explain how exceeding PBR – particularly when "struck and lost" whales are not even counted – will affect the PCFA or ORSVI whales.

We also wish to note that the discussion of the potential impacts of the various alternatives on the whales found in the Makah U&A is highly

speculative and frankly not precautionary. The discussion assumes that the appearance of new whales in the photo-ID catalog reflects the wide range in movements of whales in the Makah U&A and in fact parallels recruitment into this group of animals; that is, it assumes that this is a relatively open population, with new whales entering it from the larger ENP population all the time. The DEIS's discussion treats this working hypothesis as a fact, but the truth is that this hypothesis does not yet have data that clearly support it – the continuing appearance of new whales in the catalog could merely reflect the increased photo-ID work being undertaken by researchers, who have expanded their efforts throughout the PCFA and ORSVI survey areas. It is the lack of precaution in this discussion that we wish to emphasize – the DEIS responded to the court order to focus more attention on the PCFA whales and the hunt's potential impacts on it, but the subsequent discussion is thin on fact and rich on speculation, perhaps unavoidable but not a license to ignore uncertainty.

Chapter Five, Cumulative Effects, appears to have entirely missed the point of a cumulative effects analysis. For each element under analysis (e.g., water quality, other wildlife, economics), the DEIS appears to have considered how a Makah hunt would affect that element cumulatively with other activities already having, or predicted to have in the future, an effect on that element. But a cumulative effects analysis ought to analyze how human activities, especially those clearly identified as threats, interact to have cumulative effects on the environment and, in this case, the ENP gray whale population. This section should have a discussion on cumulative and synergistic impacts already facing the gray whale and how the hunt will add to these. For example, a cornerstone of the cumulative effects chapter should have been how global warming is affecting and is predicted to affect the gray whale and its habitat and how the effects of other human activities, such as (obviously) aboriginal subsistence hunts, shipping, chemical discharge, and noise production, are working and will work together with global warming impacts to affect the gray whale. The section-by-section presentation of how the hunt will add to effects on one element at a time is *not* a cumulative effects analysis.

As written, the cumulative effects chapter is merely a rehash of the earlier discussions found in Chapters Three and Four – for example, the conclusion that any oil spill from whaling-related vessels would not appreciably

increase the risks associated with potential oil spills because tankers already in the region would wreak much greater havoc if they spilled their much larger volumes of oil is a conclusion already discussed in earlier chapters. Clearly a cumulative effects chapter is meant to consider *more* or *other* issues, such as, e.g., how impacts from oil spills might interact or already be interacting with, *inter alia*, global warming, noise, industrial fishing, chemical pollution, harmful algal blooms, and (of course) aboriginal whaling to affect the gray whale. In addition, concluding that the activity being analyzed will have a negligible impact and therefore will not add appreciably to one other activity with a large impact is a fallacy into which agencies that have attempted to conduct cumulative effects analyses have fallen too often. All activities with impacts must be considered *together*. NMFS must reconsider this chapter in the final EIS and at a minimum consider how the multiple threats faced by gray whales might interact to negatively affect the ENP gray whale population in ways not anticipated when considered separately or in pair-wise only combinations.

Impact on Individual Gray Whales

Whenever NMFS issues a take permit pursuant to the MMPA, the permit "shall" specify "the location and manner (*which manner must be determined by the Secretary to be humane*)" of take (emphasis added)[8]. While the DEIS describes the hunting methods that may be used in Chapter Two, it never discusses the impact these methods will have on individual animals, or the "degree of pain and suffering" that individual whales may face. Instead, in its "Environmental Consequences" section, it states that "[w]elfare effects on...whales are considered at the scale of the ENP gray whale stock and of whales that use local survey areas." The DEIS must discuss the pain and suffering the hunt will cause *individual* animals, as well as a full analysis of which method, if any, can be deemed "humane" under the MMPA.

Effect on Federally-Designated Protected Areas

The hunt is proposed in or near federally-designated protected areas, including the Olympic Coast National Marine Sanctuary; the Washington Islands National Wildlife Refuges, including the Quillayute Needles, Flattery Rocks, and Copalis Refuges, which are almost entirely designated as

Wilderness Areas; the Olympic National Park; and the Olympic Biosphere Reserve. NMFS must fully account for any possible effects the proposed hunt will have on the values intended to be protected by these areas.

For example, the 2007 Washington Islands National Wildlife Refuge Comprehensive Conservation Plan contains a voluntary 200-yard boat exclusion zone, intended to protect the wilderness character of the refuge, as well as the sea birds and other wildlife on and near the islands. Only Alternative 4 requires compliance with this 200-yard protective zone. This exclusion zone should be required in each alternative. In addition, most of the Washington Islands Refuges are also designated wilderness areas. In recognition of this, the US Fish and Wildlife Service's "Vision Statement" for the three refuges states that: "The more than 600 rocks, reefs, and islands known as Flattery Rocks, Copalis, and Quillayute Needles National Wildlife Refuges, are designated wilderness (except Destruction Island), and all will continue to be preserved in a natural condition with *minimal human intrusion*" (emphasis added). Also, the Wilderness Act of 1964 requires that the "agency administering any area designated as wilderness shall be responsible for preserving the wilderness character of the area."[9] The DEIS fails to describe how allowing a whale hunt that will include multiple vessels within 200 yards of a designated Wilderness Area will promote that area's wilderness values.

In fact, in the Makah's comments on the 2007 Comprehensive Conservation Plan, the Tribe noted the potential inconsistency between its use of fish and wildlife resources in the area and the Refuge's "minimal human intrusion" and wilderness goals. Instead of resolving the issue, the Fish and Wildlife Service promised to issue a "Memorandum of Understanding" with the Makah over the dispute. The DEIS does not mention this issue, or the result of the Memorandum with the Tribe, despite NEPA's requirement that the agency fully address "[p]ossible conflicts between the proposed action and the objectives of Federal…policies and controls."[10]

Miscellaneous

There are a number of minor (and perhaps not so minor) points in the DEIS that lead to a biased account of the elements surrounding the Makah whale

hunt proposal and the previous hunts. These minor issues, when added together, lead to a more positive picture of the issues than reality warrants. For one example, the DEIS does not mention the presence of an Alaska Native at the 1999 butchering of the whale on Front Beach until well into Chapter 3 and then only in passing. In fact, this individual was videotaped by a bystander very late the night the whale was towed into the beach, expressing dismay that everyone (meaning the Makah whaling crew and the butchering team) had already gone home and left him to deal with the remaining tasks alone. No mention is made of this footage, which was sent to NMFS after the hunt. The only rationale for this omission seems to be that it does not reflect well on the Makah involved in processing the whale and detracts from the DEIS's portrayal of the 1999 hunt as an overwhelmingly positive, well-ordered and well-attended event.

For another example, the DEIS describes the 2000 incident where a protester on a jet ski collided with a Coast Guard vessel (see above, "Public Safety"), but places the blame on the protester for "running into" the Coast Guard ship. This is not how the protester recalls it – she considers that the Coast Guard vessel ran over her craft. Regardless of perspective, there is also no mention of the seriousness of her injuries – she continues to suffer pain in her back and shoulders eight years later and receives periodic medical treatment for it. The biased presentation of both of these details minimizes the incident, presumably in order to support the DEIS's dubious contention that public safety will be adequately protected under the hunt regulations and Coast Guard rules.

In addition, the DEIS does not adequately analyze the impacts from the significant taxpayer expenditures that have been associated with conducting the Makah hunt, in contrast to the relatively minor outlay for the Alaska Native whale hunt. In the past, there have been direct subsidies to the Makah Tribal Council in support of the hunt (see previous HSUS comments). Even if such subsidies have ceased, the hunt is conducted in a densely populated area with significant vessel traffic and therefore the Coast Guard must mobilize to protect the safety of mariners and the whalers. It is simply inescapable that the Makah hunt will cost more in public money than the Alaska Native hunt. The DEIS only speculates on the cost of potential future hunts under the various alternatives, with minimal impacts analysis – it does not address the issue of previous expenditures, including the costs of

lobbying at the IWC for the Makah request. Again, this omission seems geared toward minimizing the negative and emphasizing the positive – yet few of the postulated benefits to the Tribe have actually been confirmed, such as improved health, but are merely speculative for now.

There are other examples, including (as noted above) the failure of the DEIS to include an accurate description of The HSUS's position on the hunt, but the overall issue is the subtle, persistent effort by the DEIS's authors to present the Makah whale hunt proposal and its history in the best possible light. There has been less outright misstatement of fact than in previous NEPA documents and more "sins of omission," but the result is similar – the past has been adjusted, if not revised, to portray the hunt proposal as a reasonable alternative and the actions of the opposition as unreasonable and even irrational.

The HSUS will not dwell on these minor and not so minor points in these comments, as they merely draw attention from the major arguments we have against this proposal, but we did want to remark on their existence.

Conclusion

The HSUS does not support any activity that causes animals to suffer – and it is our belief that all whaling, for whatever purpose, is inherently inhumane. Indeed, the DEIS discussion on killing methods and welfare merely reinforces The HSUS's contention that whales cannot be killed humanely. *Average* times to death for aboriginal hunts (and even commercial hunts with far more sophisticated technology) are in the region of tens of minutes and maximum times can be more than an hour. Therefore, we cannot support aboriginal subsistence whaling. However, we do not oppose such whaling, as we accept subsistence need as a rationale for killing wildlife; rather, we hold that such whaling must be conducted in as humane a manner as possible (which in most cases it currently is not) and *must* be for nutritional as well as cultural/traditional needs. Finally, there can be no argument that all such whaling must be conducted in accordance with domestic and international law. We oppose the Makah hunt proposal, but not other subsistence hunts, because the request has always been for a cultural rather than a subsistence hunt. It has never fit the definitions and requirements of domestic and international management regimes. It will

require a waiver from the Marine Mammal Protection Act (MMPA). It creates a novel category of whaling at the international level that all too easily could be used by pro-whaling nations to justify killing more whales. The DEIS's dismissal of these concerns in Chapter Four is unconvincing and misleading – the support the US delegation has consistently shown the Makah proposal has already shifted the dynamics at the IWC, for the worse as far as whale protection is concerned.

We repeat: The hunt proposal did not meet the previously-set standards for aboriginal subsistence. The US government instead went about re-writing the rules, making them weaker, and undermining previously strong policy positions. The world is now less safe for whales and has lost a strong and unequivocal champion against commercial whaling, developments in which this proposal has played a large role. Support for the Alaska Native bowhead hunt has also promoted these developments, but not by weakening the definition of aboriginal subsistence whaling. Thirty years ago the US delegation worked to ensure that the aboriginal subsistence category of whaling at the international level had rigorous standards and was clearly distinct from commercial whaling. Twenty years later, it at best undermined and at worst reversed this position and worked to weaken these standards, cutting corners so severely that it actually broke the law. This can in no way be seen as good for whales, although it has certainly been good for whalers.

From the start, NMFS has mishandled the Makah Tribe request to revive its whale hunt. If the agency had handled the application for this take in a manner consistent with US laws, policy, and international treaty obligations in the first instance, The HSUS would have found it far more difficult to raise objections when the Makah Tribe brought its request to the IWC in 1996. However, from the outset, NMFS has been so anxious to "get the job done" that it has consistently failed to "do the job right" and the courts have agreed with us. The agency's efforts to promote and approve the Makah request – apparently at any cost – have consistently resulted in legal short cuts and questionable policy positions that have weakened domestic and international whale protection. The government has been so anxious to get to the finish line – to approve the Makah request – that it has repeatedly bent and broken the rules, the most recent example being its effort to avoid reporting the illegal September 2007 hunt as an infraction at the 2008 IWC meeting. All the stakeholders in this process are the poorer for this

mishandling and dangerous precedents have been set.

Regarding the MMPA waiver process, we strongly urge that if the agency eventually grants the waiver, it should narrowly tailor it, to minimize the chances that other parties will come through the door that issuing a waiver to the Makah will open. While other waivers have been granted, none have remained in place, in some instances because the courts ruled they were illegal. This waiver, if it is granted and used as intended, should be narrowly defined as much as possible, so it will be a "one-off" event.

The HSUS is aware of detailed comments prepared by the Peninsula Citizens for the Protection of Whales (PCPW). Many of the PCPW's concerns regarding the DEIS, particularly how it refers to the PCFA whales and issues related to potential conflicts of interest among those who prepared the DEIS and conducted research on Makah culture and subsistence needs, are shared by The HSUS and we wish to endorse these portions of the PCPW's comments.

Thank you for the opportunity to comment on this precedent-setting and important issue.

Sincerely,

Naomi A. Rose, Ph.D.
Marine Mammal Scientist

Cc: Tim Ragen, executive director, Marine Mammal Commission

---

[1] See 50 CFR §1502.14(a).

[2] Alternative 5 does propose a smaller quota, but it is *still* not based on actual consumption commitments; it is an arbitrary number and the exchange for this smaller

number is less protection for resident whales. And of course, the Makah do not accept it and their own proposal continues to be for up to five whales a year.
[3] The original IWC working definition of aboriginal subsistence whaling, developed by the Ad Hoc Technical Working Group in 1981, was as follows:

- Aboriginal subsistence whaling means whaling, for purposes of local aboriginal consumption carried out by or on behalf of aboriginal, indigenous or native peoples who share strong community, familial, social and cultural ties related to a continuing traditional dependence on whaling and on the use of whales.
- Local aboriginal consumption means the traditional uses of whale products by local aboriginal, indigenous or native communities in meeting **their nutritional, subsistence and cultural requirements** [emphasis added]. The term includes trade in items which are by-products of subsistence catches.
- Subsistence catches are catches of whales by aboriginal subsistence whaling operations.

The new definition, adopted by consensus by the Parties in 2004, is as follows:

- The personal consumption of whale products **for food, fuel, shelter, clothing, tools, or transportation** by participants in the whale harvest [emphasis added].
- The barter, trade, or sharing of whale products in their harvested form with relatives of the participants in the harvest, with others in the local community or with persons in locations other than the local community with whom local residents share familial, social, cultural, or economic ties. A generalized currency is involved in this barter and trade, but the predominant portion of the products from each whale are ordinarily directly consumed or utilized in their harvested form within the local community.
- The making and selling of handicraft articles from whale products, when the whale is harvested for the purposes defined in (1) and (2) above.

It is important to note that the requirement for nutritional need has been eliminated (see, *inter alia*, use of the conjunction ‘or’ rather than ‘and’ in the first bullet of the 2004 definition). In addition, this definition could be interpreted to mean that anyone with whom the Makah conduct business (persons outside the local community with whom the Makah share ‘economic ties’) could receive whale products in trade – this is disturbingly open language and may not preclude commercial trade.
[4] The rationale provided by the US delegation for not reporting the illegal hunt as an infraction is not satisfactory. Various international agreements (e.g., Article 27 of the Vienna Convention of the Law of Treaties, internal law and observance of treaties, states “A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”) contain language clarifying that activities allowed by the agreement must be conducted in accordance with domestic law. Any illegal action is thus an infraction of the agreement. NMFS and the US IWC delegation apparently reject this interpretation and contend that only takes in excess of the IWC quotas (or other specific Schedule provisions, such as the taking of a mother/calf pair) are infractions. This sets a disturbing precedent.
[5] Swartz, S.L., Urban-R, J., Gomez-Gallardo U., A., Gonzalez C., Troyo V., B., and

Najera C., M. 2008. Preliminary comparison of winter counts of gray whale in Laguna San Ignacio, B.C.S., Mexico from 1978 to 2008. Document submitted to the International Whaling Commission Scientific Committee, SC/60/BRG30.
[6] Alter S.E., Rynes E., and Palumbi S.R. 2007. DNA evidence for historic population size and past ecosystem impacts of gray whales *Proc. Natl. Acad. Sci USA* 104:15162-15167 – incidentally, this important reference is missing from the references list in the DEIS, although it is cited in the text.
[7] *Anderson v. Evans*, 314 F.3d 1006 (9th Cir. 2002).
[8] 16 USC §1374(b)(2)(B).
[9] 16 USC §1133(b).
[10] 50 CFR §1502.16(c).

Naomi A. Rose, Ph.D.
Senior Scientist
International Policy
Humane Society International
700 Professional Drive
Gaithersburg, MD 20879 USA
Ph 301 258 3048
Fax 301 258 3082
Eml nrose@hsi.org
http://www.hsi.org
http://www.hsus.org

NOTICE: This message is intended for the use of the individual or entity to which it is addressed and may contain information that is privileged, confidential, and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient, or the employee or agent of the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited. If you have received this communication in error, please notify me immediately at the telephone number above. Thank you.