



UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
Washington, D.C. 20230

OFFICE OF THE GENERAL COUNSEL

MAR 14 2019

MEMORANDUM

TO: Distribution

FROM: John Luce, NOAA General Counsel

SUBJECT: Restrictions on Communications Pertaining to Makah Indian Tribe's Request for Waiver of Moratorium on Take of Eastern North Pacific Gray Whales

This memorandum supersedes the March 3, 2015 memorandum from the NOAA General Counsel on this subject. Like the previous memorandum, this memorandum institutes restrictions on communications pertaining to NOAA Fisheries' consideration of the Makah Indian Tribe's (Tribe's) request to waive the Marine Mammal Protection Act's (MMPA's) take moratorium and issue regulations allowing for a tribal hunt of eastern North Pacific (ENP) gray whales. The restrictions apply both to communications with persons outside of NOAA and to communications between certain NOAA employees.

Subsequent to issuance of the 2015 memorandum, the NOAA Fisheries West Coast Region (WCR), which was delegated initial decision-making authority for this matter, developed a proposed waiver determination for ENP gray whales along with regulations to allow for a tribal hunt. Due to the anticipated commencement of a hearing on the WCR's proposed decisions in the near future, and in response to questions that have arisen regarding the scope of the restrictions, I am reissuing this memorandum to update and clarify the communication restrictions now applicable to this proceeding.

Because decision-making under the MMPA has been delegated to NOAA Fisheries, this memorandum is directed to those NOAA employees that have been participating or are expected to participate in the decision-making process for this matter. However, to the extent persons from other offices within NOAA become involved in this decision-making process, they may be subject to the restrictions set forth herein. Please refer any questions about the applicability of these requirements to the points of contact identified below.

The restrictions on communications fall into three categories, which are explained below, followed by background information regarding the development and implementation of these measures.



## Restrictions on Communications

### 1. External Communications by or to NOAA Employees

**Applies to:** Any NOAA employee who is or may reasonably be expected to be involved in the decision-making process (see attached non-exclusive list of covered employees).

**Restrictions:** *Ex parte* communications between covered employees and any interested person outside of the agency regarding the merits of the proceeding are prohibited.

**Effective Date:** Immediately.

**Explanation:** The APA imposes these restrictions beginning when the agency publishes the notice of hearing or has knowledge that it will be published. The purpose of these restrictions is to provide for transparent decision-making and ensure that all interested persons have access to the same information concerning the merits of the proceeding. Knowing violation of these restrictions by a party to the proceedings may adversely affect the party's claims or interests.<sup>1</sup>

- An *ex parte* communication means an oral or written communication that is not on the public record and for which notice to all parties to the proceeding has not been given.
- For this memorandum, the “proceeding” includes any agency activities related to preparation for and conduct of the agency hearing on the WCR’s proposed waiver and regulations and to subsequent final review and decision-making by NOAA Fisheries.
- An “interested person” includes any individual or entity, public or private, with an interest in the proceeding that is greater than the general interest of the public as a whole.
  - The term “interested person” is construed broadly and includes nonprofit or public interest organizations with a special interest in the subject matter of the proceeding.
  - Members of the public at large who make casual or general expressions of opinion about the proceeding are not considered “interested persons.”
  - When in doubt, treat the communication as one with an interested person.
- Restrictions apply only to communications regarding the merits of the proceeding, that is, whether or not, in whole or in part, or in what form, the proposed waiver should be granted and the proposed regulations promulgated. This includes issues related to the sufficiency or reliability of evidence pertaining to the proceeding.

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<sup>1</sup> See 5 U.S.C. § 557(d)(1).

- Communications unrelated to the merits of the proceeding are not restricted. Such communications may include, but are not limited to:
  - status reports;
  - procedural matters to ensure that the proceeding is carried out expeditiously;
  - public outreach, including communications with the public and media regarding the nature and status of the proceeding.
- Note that employees with the NOAA Office of Communications and the NOAA Office of Legislative and Intergovernmental Affairs are not expected to be involved in decision-making and are not subject to *ex parte* restrictions. Nevertheless, such employees should avoid communications that may be related to the merits of the proceeding.

**Note:** Any covered employee who makes or receives a communication that deviates from the above requirements must immediately document the communication and contact the NOAA Office of General Counsel (see list of contacts below).

## 2. Internal Communications between NOAA employees

**Applies to:** Any NOAA employee who is or may reasonably be expected to be involved in the decision-making process (see attached non-exclusive list of covered employees).

**Restrictions:** (1) Communications regarding the merits of the proceeding between those agency individuals and offices serving as “advocates” and those serving as “decision-makers” are prohibited. (2) If any agency individual involved as a “decision-maker” withdraws from participation, that individual must thereafter recuse himself or herself from involvement as an “advocate,” and vice versa.

**Effective Date:** Ongoing.

**Explanation:** The NOAA General Counsel implemented these restrictions after receipt of the Tribe’s waiver request to ensure organized and impartial decision-making. See the Background discussion below for additional information.

- “Advocates” are those WCR personnel and others involved in initial review of the Tribe’s request, development of the proposed waiver decision and regulations, and conduct of the agency hearing. “Decision-makers” are the NOAA Assistant Administrator for Fisheries and others involved in making a final waiver decision after the hearing has been completed. A list identifying those individuals and offices participating in this proceeding as “advocates” and as “decision-makers” is attached.
- See Category 1 above for an explanation of what constitutes a communication “regarding the merits” of the “proceeding.”
- In addition, the following types of communications are not considered related to the merits of the proceeding for purposes of this memorandum:

- budget requests or approvals involving agency funding;
- technical assistance, written or oral, to identify, explain, analyze, or summarize information contained in the hearing record, provided such assistance does not include personal opinion, recommendations, or advice;
- communications related to peripheral agency processes necessary to support a final decision on the proposed waiver and regulations, for example, evaluation under the Endangered Species Act or National Environmental Policy Act.

### 3. External Communications to Certain NOAA Officials

**Applies to:** Chris Oliver, Assistant Administrator for Fisheries

Samuel D. Rauch, III, Deputy Assistant Administrator for Regulatory Programs

Donna Wieting, Director, Office of Protected Resources.<sup>2</sup>

**Restrictions:** All communications directed to the subject officials from persons outside the agency, whether oral or written, involving any procedural or substantive issue related to the proceeding are deemed *ex parte* communications. Such communications must be documented, be made available to the public, and be excluded from the record for decision.

**Effective Date:** Date of publication of the *Federal Register* notice announcing the hearing for the proceeding.

**Explanation:** NOAA Fisheries' regulations that govern the hearing impose this requirement,<sup>3</sup> which goes beyond the restrictions required by the APA. This provision must be read in concert with the restrictions described in Category 1 above and with other applicable laws and regulations. See the clarifications below.

- The above-named officials must document any communications they receive from persons outside of the agency regarding procedural or substantive issues. Please promptly provide any such documentation to the NOAA Office of General Counsel attorneys identified below, preferably within 24 hours of the communication.
- Communications regarding “substantive issues” are the same as communications “regarding the merits” discussed under Category 1 above – that is, any communication pertaining to whether or not, in whole or in part, or in what form, the proposed waiver should be granted and the proposed regulations promulgated, including issues related to the sufficiency or reliability of evidence.
- Except as noted below, the restrictions in Category 1 above apply to communications regarding substantive issues to the above-named officials, *i.e.*, substantive

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<sup>2</sup> NOAA Fisheries' regulations (50 C.F.R. § 228.10) identify the “Chief of the Marine Mammal Division,” as one of the positions subject to the Category 3 restrictions. This position no longer exists within NOAA Fisheries, and the associated responsibilities are now assigned to the Office of Protected Resources.

<sup>3</sup> 50 C.F.R. § 228.10.

communications are prohibited. Any communication inadvertently received regarding substantive issues must be documented and made available to the public.

- Communications regarding procedural issues are not prohibited but must be documented and made available to the public.
- Except as noted below, communications in this category must be excluded from the record for decision, meaning they may not be relied on or considered in the decision-making process.
- Exception: After the conclusion of the hearing, the following categories of communications are permissible and will be included in the record for decision:
  - communications submitted in response to opportunities for public comment, for example, pursuant to 50 C.F.R. § 228.20(d) (allowing for public comment on the hearing officer's recommended decision) or the National Environmental Policy Act;
  - communications submitted by the parties to the proceeding pursuant to 50 C.F.R. § 228.20(c) (allowing all parties opportunity to comment on the recommended decision).

**Points of Contact:** Any communication that may be subject to the above restrictions from persons outside of the agency should be directed to:

For the West Coast Region and Alaska and Southwest Fisheries Science Centers  
Michael Milstein, 503-231-6268 / [michael.milstein@noaa.gov](mailto:michael.milstein@noaa.gov)  
Public Affairs Officer, NOAA Fisheries West Coast Region

For all other NOAA offices and Headquarters  
Laurel Bryant, 301-427-8032 / [laurel.bryant@noaa.gov](mailto:laurel.bryant@noaa.gov)  
External Affairs Director, NOAA Fisheries

Questions regarding the applicability of the restrictions should be directed to:

For "advocates"  
Laurie Beale, Attorney-Advisor, 206-526-6327 / [laurie.beale@noaa.gov](mailto:laurie.beale@noaa.gov), or  
Caitlin Imaki, Attorney-Advisor, 206-526-6159 / [caitlin.imaki@noaa.gov](mailto:caitlin.imaki@noaa.gov)  
NOAA Office of General Counsel, Northwest Section

For "decision-makers"  
Rod Vieira, Deputy Section Chief, 301-628-1605 / [rod.vieira@noaa.gov](mailto:rod.vieira@noaa.gov)  
NOAA Office of General Counsel, Fisheries and Protected Resources Section

## Background

The MMPA prohibits any “take”<sup>4</sup> of marine mammals with certain exemptions and exceptions. One exception allows the Secretary of Commerce, who has delegated authority to NOAA Fisheries, to waive the take moratorium and issue regulations allowing for take of marine mammals, if certain requirements are met.<sup>5</sup> An agency decision to waive the take moratorium and issue regulations must be made “on the record after opportunity for an agency hearing.”<sup>6</sup> Hearings under this provision are subject to requirements of the Administrative Procedure Act (APA) and to regulations promulgated by NOAA Fisheries.<sup>7</sup>

The APA and NOAA Fisheries’ regulations applicable to an MMPA waiver set forth a two-step decision-making process. First, the agency must provide public notice of the proceeding and hold an agency hearing in which interested persons may participate. At the hearing, the parties may present and cross-examine witnesses, submit evidence, file legal briefs, and propose findings of facts and conclusions of law. After the hearing, the presiding officer issues a recommended decision, findings, and conclusions, based on the hearing record. The record is then transmitted to the Assistant Administrator for Fisheries to make a final decision. The Assistant Administrator may affirm, modify, or set aside, in whole or in part, the presiding officers’ recommendation, findings, and conclusions.

In February 2005, the Tribe, whose reservation is located in Washington State, submitted a request to NOAA Fisheries seeking an MMPA waiver to allow for a tribal hunt of ENP gray whales.<sup>8</sup> NOAA Fisheries treated the request as a petition for rulemaking and subsequently delegated authority to the WCR (formerly the Northwest Region) to carry out initial evaluation and NEPA review of the Tribe’s request.<sup>9</sup>

Given the bifurcated nature of the required process and to ensure an organized framework for agency decision-making, NOAA designated certain offices and positions to serve as “advocates” and other offices and positions to serve as “decision-makers” for this matter. The advocates are responsible for making a preliminary decision whether to waive the take moratorium for ENP gray whales and, if the decision is positive, drafting proposed regulations and carrying out an agency hearing. The decision-makers are to provide support to the Assistant Administrator in making a final decision based on the presiding officer’s

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<sup>4</sup> “Take” means to harass, hunt, capture, or kill or to attempt any such conduct. 16 U.S.C. § 1362(13).

<sup>5</sup> 16 U.S.C. § 1371(a)(3)(A).

<sup>6</sup> 16 U.S.C. § 1373(d).

<sup>7</sup> 5 U.S.C. §§ 553, 555–557; 50 C.F.R. §§ 228.1 *et seq.*

<sup>8</sup> A 2004 ruling by the Ninth Circuit Court of Appeals held that the Tribe must obtain authorization under the MMPA in order to exercise its treaty right to hunt whales. *Anderson v. Evans*, 371 F.3d 475 (9th Cir. 2004).

<sup>9</sup> Memorandum from William T. Hogarth, Assistant Administrator, NMFS, to D. Robert Lohn, Regional Administrator, NWR, April 22, 2005.

recommendations and the hearing record. To ensure fair and impartial decision-making, the NOAA General Counsel implemented certain restrictions on communications between the advocates and the decision-makers and with persons outside the agency

The NOAA General Counsel's memorandum implementing restrictions on communications was first issued in 2005 and was updated in 2008, 2010, and 2015 with essentially the same requirements.<sup>10</sup> Since that time, the advocates have completed an evaluation of the Tribe's request, and they are now preparing *Federal Register* notices that will announce a proposed waiver decision and regulations and a hearing before an administrative law judge. At this stage, additional restrictions on communications will apply. These are described under Categories 1 and 3 above. The restrictions in Category 1 are required by the APA<sup>11</sup> and update previous restrictions implemented per agency guidelines and best practices. The restrictions in Category 2 were implemented through the 2005 memorandum and are ongoing. Although not legally mandated for this formal rulemaking process, these measures are intended to ensure impartial decision-making. The restrictions in Category 3 must be implemented when the Notice of Hearing is published, per NOAA's regulations that govern formal rulemakings under the MMPA.<sup>12</sup>

The restrictions described above are required to ensure the fairness and impartiality of the decision-making process and to ensure completeness of the administrative record. Please direct any questions to the points of contact identified above.

### **Distribution**

Distribution to all individuals listed in the table below.

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<sup>10</sup> Memorandum from James R. Walpole, General Counsel, to Distribution, Aug. 26, 2005; Memorandum from Jane C. Luxton, General Counsel, to Distribution, Jan. 9, 2008; Memorandum from Lois J. Schiffer, General Counsel, to Distribution, June 29, 2010; Memorandum from Lois J. Schiffer, General Counsel, to Distribution, Mar. 3, 2015.

<sup>11</sup> 5 U.S.C. § 557(d).

<sup>12</sup> 50 C.F.R. § 228.10 (governing *ex parte* communications with designated agency officials).

**NOAA Employees Subject to Restrictions on Communications**

The following NOAA individuals and offices are expected to be involved in the decision-making process regarding this matter and are subject to the restrictions on communications discussed above. If any NOAA or Department of Commerce individual or office not on this list becomes involved in the decision-making process, such persons may be subject to the restrictions set forth herein. Direct any questions to the points of contact identified above.

Advocates	Decision-Makers
NOAA	
	Dr. Neil Jacobs, Assistant Secretary of Commerce for Environmental Observation and Prediction, performing the duties of Under Secretary of Commerce for Oceans and Atmosphere Timothy Gallaudet, Ph.D., Rear Admiral, U.S. Navy (Ret.), Assistant Secretary of Commerce for Oceans and Atmosphere Stuart Levenbach, Chief of Staff Kevin Wheeler, Deputy Chief of Staff for Policy Brandon Elsner, Senior Policy Advisor, NOAA
NOAA Fisheries	
Barry Thom, Regional Administrator Scott Rumsey, Deputy Regional Administrator West Coast Region	Chris Oliver, Assistant Administrator for Fisheries
Chris Yates, Assistant Regional Administrator, Steve Stone, Fishery Biologist Nancy Young, Fishery Biologist Protected Resources Division, West Coast Region	Samuel Rauch III, Deputy Assistant Administrator for Regulatory Programs
Shannon Bettridge, Chief, Marine Mammal and Sea Turtle Conservation Division, Office of Protected Resources	Ned Cyr, Director, Office of Science and Technology
Amy Sloan, Deputy Chief, Permits and Conservation Division, Office of Protected Resources	Donna Wieting, Director Catherine Marzin, Deputy Director Office of Protected Resources

<p>Greg Busch, Assistant Director          Michael Killary, Deputy Special Agent in Charge          West Coast Enforcement Division          Office of Law Enforcement</p>	
<p>Bob Delong, Supervisory Research Wildlife Biologist          Pat Gearin, Research Wildlife Biologist,          Marine Mammal Laboratory, Alaska Fisheries Science Center</p>	
<p>Cisco Werner, Chief Science Advisor for NOAA Fisheries</p>	
<p>Kristen Koch, Science and Research Director          Newell (Toby) Garfield, Acting Deputy Science and Research Director, Southwest Fisheries Science Center</p>	
<p>Lisa Ballance, Division Director          John Durban, Marine Population Ecologist          Aimée Lang, NRC Postdoctoral Research Associate          Jeffrey Moore, Research Wildlife Biologist          Dave Weller, Research Wildlife Biologist,          Marine Mammal and Turtle Division,          Southwest Fisheries Science Center</p>	
<p>NOAA Office of General Counsel</p>	
<p>Kristen Gustafson, Deputy General Counsel (Fisheries and Protected Resources)</p>	<p>John Luce, General Counsel</p>
<p>Caroline Park, Deputy Section Chief, Fisheries and Protected Resources Section</p>	<p>Jeff Dillen, Deputy General Counsel (Enforcement and International)</p>
<p>Chris McNulty, Section Chief          Sheila Lynch, Deputy Section Chief          Laurie Beale, Attorney-Advisor          Caitlin Imaki, Attorney-Advisor          Brittany Pugh, Paralegal Specialist          Northwest Section</p>	<p>Adam Issenberg, Section Chief          Rod Vieira, Deputy Section Chief          Fisheries and Protected Resources Section</p>
<p>Paul Ortiz, Attorney-Advisor          Enforcement Section</p>	