

UNITED STATES OF AMERICA
DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

In re:

**Proposed Waiver and Regulations
Governing the Taking of
Eastern North Pacific Gray Whales
by the Makah Indian Tribe**

Administrative Law Judge
Hon. George J. Jordan
Docket No. 19-NMFS-0001

EXPEDITED MOTION TO EXTEND WAIVER PROCEEDING SCHEDULE

The Animal Welfare Institute (AWI), an animal protection organization with a longstanding interest in the proposed whale hunt at issue in this proceeding, has filed for party status in the above-referenced matter, and insofar as we know is now to be considered a party. For the reasons set forth below, AWI respectfully submits this Expedited Motion to Extend the Waiver Proceeding Schedule. In support of this motion, AWI hereby submits to the ALJ the Declaration of Naomi A. Rose, PhD and the Declaration of DJ Schubert. AWI respectfully requests expeditious consideration of this motion given the rapidly approaching deadline for direct testimony.

Just over one month ago, the National Marine Fisheries Service (NMFS) announced an agency hearing to be convened before this administrative law tribunal, involving a proposed waiver under the Marine Mammal Protection Act (MMPA), to commence on August 12, 2019, with a pre-hearing conference slated for June 17, 2019. 84 Fed. Reg. 13,639 (Apr. 5, 2019). Simultaneously, NMFS published proposed regulations governing the hunting of eastern North Pacific (ENP) gray whales by the Makah Indian Tribe in northwest Washington State. 84 Fed. Reg. 13,604 (Apr. 5, 2019). Through the ALJ hearing portal, NMFS filed four declarations,

including exhibits, which, in total, contain approximately 4,900 pages of information, including new information, material that may not have been previously available to the public, and several reports and published studies used to support the claims made by the NMFS declarants. See Declaration of DJ Schubert (Schubert Decl.) at 3.

While AWI understands waiver hearing procedures are governed by 50 CFR Part 228, these regulations are silent on the issue of filing a motion for an extension of the waiver proceeding schedule. Looking to the Federal Rules of Civil Procedure by way of analogy, AWI assumes that the scheduling order for the proceeding may be modified on a showing of good cause. Fed. R. Civ. P. 16(b)(4). For the reasons set forth below and discussed further in the two declarations supporting this motion, good cause does exist to extend the waiver proceeding schedule – including the May 20 written testimony deadline, and the hearing start date of August 12, by at least 90 days. If granted, this would mean the deadline for submission of direct, written, testimony would be rescheduled to no earlier than August 20, 2019, and the hearing would begin no earlier than November 12, 2019.

AWI has several compelling reasons for filing this motion to extend the waiver proceeding schedule. First, despite the passage of nearly 3.75 years since the closure of the comment period on the 2015 DEIS, NMFS now appears to be rushing to conduct the administrative law hearing and publish the proposed regulations. Schubert Decl. at 5. This poses an enormous hardship on AWI's ability to participate, especially in light of the enormous amount of information, including new information, materials that may not have been available to the public, and a number of reports and studies, released by NMFS on April 5, 2019 along with the filing of declarations by four of its employees. See Docket No. 19-NMFS-0001, Entry Nos. 3, 4,

5, 6.¹ AWI requires some additional time to review these voluminous materials before preparing direct testimony and participating in further proceedings, including the hearing itself. Moreover, NMFS has proposed a whaling scheme that is different from any scheme previously proposed, including because it would involve odd and even year hunts – something that was *not* included in the now four-year-old (and arguably stale) DEIS, and something that until the publication of the proposed regulations, AWI did not and could not have known exactly what NMFS was planning. AWI needs more time to properly review and analyze that information in order to prepare written testimony to submit to the ALJ. In the absence of additional time, AWI will be severely prejudiced in its ability to effectively participate in the proceeding.

Second, AWI is awaiting the results of a Freedom of Information Act request submitted to NMFS (via www.foiaonline.gov) for records that AWI needs to be able to fully prepare for and participate in the administrative law hearing. Exhibit 1 to Schubert Decl. AWI has requested records including, but not limited to: the development of the proposed waiver, proposed regulations, the new even-odd year whaling scheme, consideration of designating the Pacific Coast Feeding Group of gray whales as a management stock, the precedential impacts of the NMFS decision, the geographic scope of the NMFS analysis, a waiver request for Western North Pacific gray whale stock, and data on gray whale migration and mortality. Upon submission of the request, AWI received confirmation that its request had been received, which included a tracking number. According to foiaonline.gov, the request is currently “under agency review” and has a due date of June 6, 2019.

¹ Available at <https://www.uscg.mil/Resources/Administrative-Law-Judges/Decisions/ALJ-Decisions-2016/NOAA-Formal-Rulemaking-Makah-Tribe/>.

Third, a major conflict exists between the deadline for submission of written testimony (May 20) and the annual meeting of the IWC's Scientific Committee (May 10-22 in Nairobi, Kenya). Declaration of Naomi Rose, PhD (Rose Decl.) at 3-4; Schubert Decl. at 6. Many of the world's leading cetacean experts, including Dr. Naomi Rose, who is AWI's marine mammal scientist and who intends to participate in this proceeding as a witness, attend this 12-day long meeting.² They prepare papers on cetacean management, scientific study of cetaceans, threats to cetaceans and their habitat, cetacean species stock structure, and a wide variety of other cetacean-related subjects for submission and consideration by their peers. One of the Scientific Committee's subcommittees has focused on bowhead, right, and gray whales, and a current subcommittee focuses on stocks subject to aboriginal subsistence whaling, including the North Pacific gray whales. There have been papers submitted to the meeting directly relevant to gray whales and to the administrative hearing. Several such papers have been posted over the past few days and others may be posted today. According to IWC Scientific Committee Handbook on Working Methods of the IWC's Scientific Committee (IWC/67/FA/20),³ these papers, which may be preliminary or exploratory, are not supposed to be cited outside the context of an IWC meeting until "the author (is notified) at least six weeks before it is cited to ensure that it has not been superseded or found to contain errors." If AWI elects to cite or refer to any of these papers in its written testimony, it will not be able to comply with this policy unless the May 20 deadline is extended. Schubert Decl. at 6. Moreover, in addition to Dr. Rose, other experts who AWI may want to identify as witnesses for the purpose of the administrative hearing are attending the

² Additionally, between travel for the IWC Scientific Committee meeting this month and several other work trips before and after, Dr. Rose has been and will be unavailable to begin reviewing any of the new material until at least June 17. Rose Decl. at 4.

³ Available at <https://archive.iwc.int/pages/view.php?ref=7670&k=>.

Scientific Committee meeting and are thus unable to review and analyze information relevant to the hearing and to prepare substantive testimony by the May 20 deadline. Rose Decl. at 3-4.

Finally, while there are compelling reasons to extend the schedule for the proceeding by a reasonable time so that AWI and its expert(s) can participate in a meaningful manner, there can be no serious argument that the Makah or anyone else would be prejudiced by such an extension. To the contrary, it is a near certainty that extending and resetting associated deadlines would benefit, not harm, all stakeholders interested in this issue, regardless of their perspective. A fair and transparent formal rulemaking process is what was intended by 50 C.F.R. Part 228 and the Administrative Procedure Act, 5 U.S.C. §§ 553, 555–557. Given that three decades have passed since the last time an MMPA waiver hearing took place, it is of vital importance for all parties to take the time needed for a fair proceeding in which all parties can participate in an effective and informed manner.

For the record, on May 6, 2019, AWI submitted a letter (Exhibit 2 to Schubert Decl.) to Mr. Barry Thom, Regional Administrator at the West Coast Regional office of NMFS requesting that NMFS work with Judge Jordan to delay the administrative law hearing and associated deadlines by at least 90 days. NMFS responded to this letter on May 9 as requested (Exhibit 3 to Schubert Decl). The five issues included in the letter to NMFS – combined with AWI’s responses to NMFS’s May 9 reply to AWI’s letter – serve as the basis for AWI’s motion. In its response, NMFS indicated that “any requests to delay the hearing” should be submitted to Judge Jordan. It also explained that the hearing schedule provided all parties with 45 days to prepare initial direct testimony and 120 days to prepare for the hearing “which is twice the amount of time required by agency regulation. 50 C.F.R. § 228.4(b)(2).” This regulation, however, only establishes a requirement that the hearing date be no less than 60 days after notice of the hearing

is published in the Federal Register. It is silent on the time parties should be allotted to prepare initial direct testimony and the 60-day requirement only establishes a restriction on how early a hearing can be held, not how late it could be scheduled to provide all parties with an adequate opportunity to compile substantive testimony and prepare for the hearing. Finally, NMFS claims that “issues proposed to be addressed at the hearing were evaluated in our Draft Environmental Impact Statement (DEIS) on this matter” when, in fact, there is an abundance of new information bearing, e.g., on the status of the affected whale populations, that was not addressed in the DEIS and, moreover, the Makah whaling alternative identified in the proposed regulations is new and was not disclosed or analyzed in the DEIS.

WHEREFORE AWI respectfully requests that the ALJ grant this motion as set forth above.

Presented on this 10th day of May, 2019, by:

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