

ARGUMENT

AWI and Sea Shepherd have undertaken a flurry of last-minute actions to attempt to delay this proceeding. However, they have not demonstrated even minimal diligence in preparing for the hearing. Notably, they do not acknowledge that they were aware (or should have been aware) of information relating to the proposed waiver and associated regulations through publicly available documents and websites for over six months, if not an entire year, prior to the Federal Register notices published by NMFS on April 5, 2019.

At the most recent meeting of the International Whaling Commission (IWC), held in early September 2018 in Florianopolis, Brazil, the IWC approved catch limits for a number of aboriginal subsistence hunts, including the Makah Tribe's catch limit of Eastern North Pacific (ENP) gray whales shared with the Chukotka Natives of the Russian Federation. Prior to the IWC's vote to approve the catch limits, several animal rights organizations, including AWI, made an "intervention" on the floor of the plenary session, expressing opposition to the catch limit for the Makah Tribe. In that intervention, which was provided to the Tribe by AWI's DJ Schubert, AWI stated, in part:

[W]e recognize that the Makah Tribe and the US government have developed a new management plan in an attempt to reduce the impact of a hunt on the critically endangered Western North Pacific gray whale and the Pacific Coast Feeding Aggregation gray whales

Declaration of Patrick DePoe ¶ 2 & Ex. 1. The "new management plan" that AWI and Mr. Schubert were referring to was the alternating season hunt that NMFS has now proposed in the Federal Register and which is the subject of the August 12, 2019, hearing. Mr. Schubert was aware of that proposed management plan because it was openly discussed at the IWC meeting in Brazil, and had been reviewed extensively by the IWC's Scientific Committee earlier in the year at its annual meeting. Declaration of Brian C. Gruber Ex. 1 (excerpts of the Report of the 2018

Scientific Committee meeting relevant to the Makah hunt proposal); *see also* Gruber Decl. Ex. 2 (excerpts of Annex E of the 2018 Scientific Committee Report). These documents were publicly available no later than May 25, 2018, almost one year ago. Gruber Decl. ¶ 4 & Ex. 3.

The IWC committed to a new, more transparent approach to addressing requests for aboriginal subsistence whaling catch limits at the 2018 meeting, including posting on its website at least 90 days in advance of the meeting detailed information about each of the hunts. Accordingly, the Makah Tribe submitted information that was posted online by the middle of June 2018, which described several aspects of the proposed hunt – the Tribe’s treaty right, its cultural and subsistence need to hunt and utilize whales, and the Tribe’s hunting methods and proposed hunt management. The Description of the Makah Hunt provides a detailed summary of the proposed alternating season hunt and was available for AWI and Sea Shepherd (and anyone else) to review nearly 10 months before the Federal Register Notice. DePoe Decl. ¶ 3 & Ex. 2 at 6. The Description of the Hunt also explained that the Scientific Committee’s extensive review of the proposed Makah hunt determined that the IWC’s conservation objectives would be achieved for all affected populations of gray whales, including Western North Pacific gray whales and the Pacific Coast Feeding Group, the two groups about which AWI expressed concerns. DePoe Decl. Ex. 2 at 7.

AWI fails to acknowledge these facts or that it failed to act on widely available public information about the proposed hunt plan which is now the subject of the hearing. Most egregiously, while highlighting Mr. Schubert’s extensive experience at IWC, Declaration of DJ Schubert ¶ 3, AWI never acknowledges the intervention in which it referred to the very proposal it now claims to require more time to study and seek information on. Indeed, AWI’s Naomi Rose states that she has attended IWC Scientific Committee meetings since 2000 and has worked

for decades opposing Makah whaling. Declaration of Naomi A. Rose, Ph.D. ¶ 6. It is difficult to imagine that a scientist with a long record of tracking the Makah whaling issue was completely unaware of the Scientific Committee’s extensive review of the Makah hunt plan (or the Report of the Scientific Committee that described this work in great detail) which took place at least a year ago.

Rather than act on the information that Mr. Schubert or Dr. Rose in fact had, or reasonably had access to, AWI waited until a month after the Federal Register notice to inform NMFS of its interest in participating in the hearing, to request that NMFS delay the hearing schedule, and then to file an expedited, last-minute motion for such a delay. Indeed, AWI appears to have been more preoccupied by coordinating an opposition campaign among other animal rights organizations, Schubert Decl. ¶ 4, and submitting a massive document request to NMFS, *id.* ¶ 7 & Ex. 2 (FOIA request dated May 6, 2019), than by reviewing the scientific information and testimony provided by NMFS in support of the proposed waiver and regulations on April 5.

For its part, Sea Shepherd at least acknowledges that the “proposed Makah hunt was a major topic of discussion in last year’s [Scientific Committee] proceedings.” Sea Shepherd Motion at 7. Yet, despite the awareness of the proposed hunt plan and Sea Shepherd’s interest in (and opposition to) Makah whaling since at least 2015, Declaration of Catherine Pruett ¶¶ 3-4, Sea Shepherd also cannot show reasonable diligence in obtaining more information about the proposal over the past year that such information has been available. In fact, Sea Shepherd, like AWI, waited until the last possible day to provide notice of its intent to participate in the hearing and to ask NMFS for a delay in the schedule. This dilatory approach should not be accepted as a rationale for delaying the hearing.

Both AWI and Sea Shepherd argue that the timing of the IWC's 2019 Scientific Committee meeting in Nairobi, Kenya, from May 10 to 22 makes it difficult to review the information accompanying the April 5 Federal Register notices or to contact and work with potential expert witnesses who may be attending the meeting. AWI Motion at 4-5; Sea Shepherd Motion at 7. Several factors diminish the hardship this allegedly creates for preparing initial direct testimony by the May 20 deadline. First, as NMFS pointed out in its May 9, 2019, response to AWI and Sea Shepherd, Schubert Decl. Ex. 3, the hearing regulations provide for rebuttal testimony after the pre-hearing conference, which could be submitted in early July (over six weeks from now) or possibly later if the hearing officer extends the deadline for such testimony. *See* 50 C.F.R. 228.14(a). This provides a reasonable time to provide testimony rebutting NMFS's four primary witnesses and any other testimony submitted by the May 20 deadline, including testimony the Tribe intends to submit based on the existing schedule.

Sea Shepherd claims a hardship in trying to identify and work with potential witnesses who may be attending the Scientific Committee meeting. However, Sea Shepherd fails to explain why the period from April 5 to early May, prior to the Nairobi meeting, was not sufficient time to work with potential expert witnesses and develop initial direct testimony for the hearing, or why the time after the meeting is not sufficient to prepare rebuttal testimony with such witnesses based on materials available since April 5. Moreover, Sea Shepherd fails to mention that it worked with Dr. James Sumich in preparing comments on the 2015 Draft EIS, or that Dr. Sumich does not appear to be attending the meeting in Nairobi. Gruber Decl. Ex. 4. Likewise, AWI fails to adequately explain why it could not reasonably have prepared initial direct testimony in the month following the Federal Register notice, or why the extended period of time following this year's Scientific Committee meeting is not sufficient for it to develop

rebuttal testimony, regardless of whether it decides to work with Dr. Rose to provide such testimony or other scientists who may be more willing to modify previously scheduled work travel.

Both AWI and Sea Shepherd point to the voluminous materials supporting the proposed waiver and regulations. AWI Motion at 3; Sea Shepherd Motion at 5. NMFS has provided substantial scientific support for its proposal and the hearing will provide ample opportunities for interested parties to thoroughly vet that information and any other testimony that is submitted. A closer look at the materials, however, further suggests that AWI and Sea Shepherd have not been diligent in tracking or otherwise reviewing scientific information relevant to gray whales and the proposed Makah hunt, much of which has been available for years. Indeed, of the approximately 83 scientific papers attached as exhibits to the Declaration of Dave Weller, no more than six are from 2018 or 2019. And over 900 of the pages NMFS submitted are the 2008 Draft EIS (Ex. 1-5 to the Declaration of Chris Yates), which has been superseded by the 2015 Draft EIS.

AWI and Sea Shepherd argue that an additional 90 (or more) days continuance would not prejudice the Tribe but in fact would benefit the process as a whole. While this indifference to the Tribe is disappointing, it is not unsurprising coming from longstanding opponents of Makah's effort to exercise its treaty whaling rights. They fail to recognize or acknowledge that it is exactly these kinds of seemingly harmless, short-term delays that have added up to a 14-year wait for the Tribe since it submitted its waiver request in February 2005. The harm to the Tribe from not being able to hunt whales in that time – or even longer since its last hunt in 2000 – has been significant. DePoe Decl. ¶¶ 4-5. In those nearly two decades, Makah elders have passed away and an entirely new generation of Makah youth have grown to adulthood without experiencing a hunt or the many cultural, spiritual, and subsistence benefits that whaling and the

use of whale products provides to the Makah Tribe. DePoe Decl. ¶ 4.

The Tribe has worked very hard to prepare testimony by the NMFS-announced deadline of May 20. This deadline – and the schedule for the hearing – should be maintained. The waiver hearing is one step among many in an administrative process that has already dragged on for over a decade, and will extend beyond a final decision by NMFS on the proposed waiver and regulations if that decision is favorable to the Tribe. The process should move forward so the Tribe can obtain a final answer to its waiver request. Denying the motions and retaining the current schedule would be a positive step in that direction.

Respectfully submitted, this 15th day of May, 2019.

ZIONTZ CHESTNUT



Brian C. Gruber
Marc D. Slonim
Wyatt F. Golding

Attorneys for the Makah Indian Tribe