

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

In re:)
) Docket No. 19-NMFS-0001
Proposed Waiver and Regulations Governing)
the Taking of Eastern North Pacific Gray) RIN: 0648-BI58 and
Whales by the Makah Indian Tribe) RIN: 0648-XG584
)

**THE NATIONAL MARINE FISHERIES SERVICE’S COMBINED RESPONSE
TO THE ANIMAL WELFARE INSTITUTE’S AND SEA SHEPHERD’S EXPEDITED
MOTIONS TO EXTEND WAIVER PROCEEDING SCHEDULE**

I. INTRODUCTION

The National Marine Fisheries Service (NMFS), proponent of the proposed waiver and regulations that are the subject of this proceeding, respectfully opposes the motions of the Animal Welfare Institute (“AWI”) and Sea Shepherd Legal/Sea Shepherd Conservation Society (“Sea Shepherd”) seeking to delay the hearing in this matter. As AWI and Sea Shepherd acknowledge, NMFS published *Federal Register* notices announcing its proposed decisions and the hearing date for this matter over a month ago, on April 5, 2019. AWI and Sea Shepherd offer no explanation for their 35-day delay in seeking to delay the schedule, which already provides twice the amount of time required per NMFS’s hearing regulations at 50 C.F.R. part 228.

With respect to AWI’s and Sea Shepherd’s request to extend the May 20, 2019, deadline for parties to submit direct testimony, the regulations that govern this proceeding state that the deadline for submission of direct testimony identified in the Federal Register is a “final” deadline

and do not provide for extension of that deadline. Regarding other deadlines, NMFS filed comprehensive declarations explaining the rationale for and substance of the proposed waiver and regulations, and any rebuttal testimony currently is not due until July 2, 2019, which provides AWI and Sea Shepherd nearly 90 days from the date this proceeding was announced to respond to NMFS's testimony and exhibits. Although NMFS believes that this is a reasonable and sufficient time period to respond to the materials that address the principal issues in the proceeding, particularly given that NMFS has the burden of proof, NMFS would not object to a short extension of the parties' time to submit rebuttal testimony provided the extension does not delay the August 12, 2019 hearing date. A delay of the hearing date could compromise NMFS's ability to efficiently conclude this matter due to agency budgeting and contracting procedures and would otherwise prejudice the orderly disposition of this matter. For these reasons, NMFS opposes the 90-day delay requested by AWI and Sea Shepherd.

II. BACKGROUND

A. Procedural Background

NMFS prepared the proposed waiver and regulations at issue under the authority of sections 101(a)(3)(A) and 103 of the Marine Mammal Protection Act (MMPA). *See* 16 U.S.C. §§ 1371(a)(3)(A), 1373. The waiver and regulations respond to a request by the Makah Indian Tribe, submitted to NMFS in February 2005, for authorization under the MMPA to conduct a ceremonial and subsistence tribal hunt for eastern North Pacific (ENP) gray whales in the coastal portion of the Tribe's usual and accustomed fishing grounds (U&A). *See* Declaration of Chris Yates (Docket No. 3) ¶ 5. After reviewing the Tribe's request, NMFS prepared a draft environmental impact statement (DEIS) under the National Environmental Policy Act (NEPA)

evaluating the Tribe's hunt proposal and a number of alternatives. Yates Decl. ¶ 10. This DEIS was released for public comment in May 2008.

Subsequently, new information relevant to the Tribe's request became available, leading NMFS to terminate that NEPA process and undertake scoping for a new DEIS, which NMFS released in March 2015. Yates Decl. ¶¶ 11-12. NMFS received over 57,000 public comments on the 2015 DEIS. *Id.* ¶ 12. After thoroughly considering these comments and after consulting with the Marine Mammal Commission,¹ NMFS developed the proposed waiver and regulations and published them, along with a notice of the hearing, on April 5, 2019. 84 Fed. Reg. 13,604 (2019) (Proposed Rule); 84 Fed. Reg. 13,639 (2019) (Notice of Hearing).

As part of the process of developing the proposed waiver and regulations, NMFS arranged for the "loan" of an administrative law judge (ALJ) from the United States Coast Guard to conduct the hearing, because NMFS does not have its own ALJs. Second Declaration of Chris Yates ¶ 2. This type of interagency loan requires consent from the loaning agency and from the Office of Personnel Management. *Id.* ¶ 2-4. NMFS's loan agreement with the Coast Guard and funding for the hearing expires September 30, 2019, the end of the 2019 fiscal year. Second Yates Decl. ¶ 3.

In the April 5th Notice of Hearing, in accordance with the hearing regulations, NMFS established the following dates for the hearing process:

- May 6, 2019 – deadline for interested persons to submit notice of their intent to participate in this proceeding as a party;
- May 20, 2019 – deadline for parties to submit initial direct testimony;

¹ See Yates Decl. (Docket No. 3) ¶¶ 71-76 for a discussion of NMFS's consultation with the Marine Mammal Commission.

- June 17, 2019 – date of prehearing conference;
- August 12, 2019 – date for hearing to commence.

84 Fed. Reg. at 13-639-40. AWI and Sea Shepherd both submitted their notices of intent to participate on May 6, 2019. Also on May 6, 2019, AWI submitted a Freedom of Information Act (FOIA) request to NMFS seeking 14 categories of records including records related to NMFS’s development of the proposed waiver, and AWI and Sea Shepherd separately sent letters to NMFS requesting that NMFS extend or ask this Court to extend all hearing deadlines by 90 days. Declaration of DJ Schubert ¶¶ 6-7; Declaration of Catherine Pruett. ¶ 7. NMFS replied to AWI’s and Sea Shepherd’s letters on May 9, 2019, informing them that NMFS did not believe a 90-day extension was warranted, and that, in any event, requests to delay the hearing would need to be made directly to the Court. Schubert Decl. ¶ 8; Pruett Decl. ¶ 10.

B. Legal Framework

Federal regulations at 50 C.F.R. part 228, and the Administrative Procedure Act, 5 U.S.C. §§ 556, 557, govern the conduct of this proceeding. Pursuant to the regulations, in the notice of hearing NMFS must include, among other things: “[i]ssues of fact which may be involved in the hearing”; “[t]he final date” for filing a notice of intent to participate; “[t]he final date for submission of direct testimony”; “the place and date of the hearing,” which “shall not be less than 60 days after publication of the notice of hearing”; and, “[t]he place and date of the pre-hearing conference.” 50 C.F.R. § 228.4(b)(2), (5), (9), (10), (12). The regulations do not provide set timeframes for these dates other than specifying a minimum of 60 days between the notice of hearing and the hearing. *Id.*

Under the regulations, NMFS must appoint a presiding officer to conduct the proceeding and issue a recommended decision. 50 C.F.R. § 228.5(b)(7)-(8). The presiding officer has the

power to: (1) change the time and place of the hearing; (2) evaluate direct testimony, make a preliminary determination of the issues, conduct a prehearing conference, and issue a final hearing agenda; (3) rule on motions and requests; (4) administer oaths and question witnesses; (5) modify or waive any rule (after notice) when determining that no party will be prejudiced; (6) receive written and oral arguments; (7) render a recommended decision, and (8) take any measures necessary for the efficient conduct of the proceeding. 50 C.F.R. § 228.6(b).

The regulations establish several different timelines for the submission of written testimony, which may include any relevant exhibits. NMFS is required to make its initial direct testimony available to the public on the date the notice of hearing is published. 50 C.F.R. § 228.7(f). Other parties wishing to submit direct testimony outside the scope of NMFS's testimony must do so by the date specified in the notice of hearing. 50 C.F.R. §§ 228.4(b)(10), 228.7(a). After the prehearing conference, the presiding officer issues a final hearing agenda that lists the issues to be addressed at the hearing. 50 C.F.R. § 228.12(b)(1). If the list of issues includes new issues that were not identified in NMFS's notice of hearing, the presiding officer must include in the final agenda a deadline for the submission of direct testimony on the new issues. 50 C.F.R. § 228.(b)(2). Finally, testimony to rebut the parties' initial direct testimony is due within 15 days of the prehearing conference or as otherwise specified by the presiding officer in the final agenda. 50 C.F.R. § 228.14(a).

III. ARGUMENT

AWI and Sea Shepherd assert a number of reasons for wanting a 90-day delay, including the need for more time to review NMFS's materials, conflict with the May meeting of the

International Whaling Commission (IWC),² AWI's desire for information through the Freedom of Information Act, and the existence of new scientific information, among others. AWI's Mot. at 2-3; Sea Shepherd Mot. for Extension at 2. Yet AWI and Sea Shepherd provide no explanation for their own delay in requesting an extension and in submitting a FOIA request regarding a matter that they have been closely involved with for many years. Because AWI's and Sea Shepherd's lack of diligence in seeking a delay suggests that their need for additional time is not urgent, and because the requested extensions are beyond the scope of the governing regulations and would prejudice the orderly disposition of this matter, the court should deny AWI's and Sea Shepherd's requests. Alternately, should the court determine that any delay is warranted, NMFS respectfully requests that any extension be limited so as to allow the hearing to proceed as scheduled on August 12, 2019.

A. AWI and Sea Shepherd Have Not Established Good Cause for Delay

AWI and Sea Shepherd argue that the Court should apply a "good cause" standard in evaluating their motions for delay. AWI Mot. to Extend at 2 (citing Fed. R. Civ. P. 16(b)(4)); Sea Shepherd Mot. for Extension at 4. Assuming this to be the applicable standard, to demonstrate good cause, the moving party must show that the deadline cannot be met despite the movant's diligence and provide an adequate explanation for the delay. *DRK Photo v. McGraw-Hill Glob. Educ. Holdings, LLC*, 870 F.3d 978, 988-89 (9th Cir. 2017), *cert. denied*, 138 S. Ct. 1559 (2018); *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 609 (9th Cir. 1992); Fed. R. Civ. P. 16 advisory committee's notes (1983 amendment). The primary consideration for the

² The IWC and its role in managing aboriginal subsistence whaling is explained in the Declaration of Dr. David Weller (Docket No. 5) ¶¶ 4-9.

court is the diligence of the party seeking amendment. *Johnson*, 975 F.2d at 609. AWI's and Sea Shepherd's requests do not satisfy this standard.

1. AWI and Sea Shepherd Fail to Establish Diligence

At the outset, AWI and Sea Shepherd fail to show good cause for a schedule delay due to their lack of diligence. Both parties waited until the last possible day to submit their notices of intent to participate, May 6, 2019. They filed their motions to extend the schedule on May 10, 2019, 35 days after the Notice of Hearing was published and 10 days before the deadline for submission of direct testimony. This lack of diligence undermines their claims of prejudice and does not support a finding of good cause. *DRK Photo*, 870 F.3d at 988-89 (central inquiry under Fed. R. Civ. P. 16(b)(4) is whether the requesting party was diligent in seeking the amendment); *Johnson*, 975 F.2d at 609 (“If that party was not diligent, the inquiry should end.”).

AWI and Sea Shepherd also fail to establish that they are unable to meet the schedule established by NMFS. As explained above, the regulations governing this proceeding call for a minimum of 60 days between publication of a notice of hearing and the hearing. 50 C.F.R. § 228.4(b)(2). In order to allow interested persons a meaningful opportunity to participate, NMFS has established a hearing schedule that provides twice as much time as provided for in the regulations. *See* 84 Fed. Reg. at 13,639-40. Under the current schedule, AWI and Sea Shepherd have 30 days to submit their notices of intent to participate, 45 days to prepare and submit any direct testimony, and nearly 90 days to prepare any rebuttal testimony. *Id.* NMFS disagrees that this schedule is “breakneck” or “rushed.” *See* Sea Shepherd's Mot. for Extension at 9; AWI's Motion to Extend at 2.

Both AWI and Sea Shepherd acknowledge that they have long familiarity with the subject matter of this proceeding and participated in the associated NEPA process. *See* Pruet

Decl. ¶ 3 (“Sea Shepherd has extensively reviewed materials relevant to the waiver issue, including . . . associated case law.”); Schubert Decl. ¶ 2 (“I have been involved in proceedings related to the request of the Makah Tribe to resume whaling since 1996-97.”); *id.* ¶ 3 (“I have attended every meeting of the International Whaling Commission (IWC) since 2006”). Given AWI’s and Sea Shepherd’s extensive knowledge of the underlying subject matter, the current schedule allotting 45 days for any direct testimony and 90 days for rebuttal testimony is reasonable. In particular, since NMFS bears the burden of proof (*see* 5 U.S.C. § 556(d)) and the principal issues that are the subject of this proceeding are reflected in NMFS’s initial direct testimony, the bulk of any response from AWI and Sea Shepherd should be reflected in their rebuttal submissions, which are not due until July 2, 2019, at the earliest. In light of the above, AWI’s and Sea Shepard’s explanations fail to justify the need for an additional 90-day delay. *See Husky Ventures, Inc. v. B55 Investments, Ltd.*, 911 F.3d 1000, 1019-20 (10th Cir. 2018) (knowledge of subject matter before deadline “fatally undercuts [movant’s] ability to demonstrate good cause”).

2. Additional Time to Review NMFS’s Materials Is Not Warranted

Both AWI and Sea Shepherd cite to the number of pages included in NMFS’s direct testimony as a reason for delay. However, the vast majority of the materials relied on by NMFS were included as references in the 2015 DEIS. *See* Second Yates Decl. ¶ 6, NMFS Ex. 1-18. NMFS made all of the 2015 DEIS references available to the public on NMFS’s website, at public meetings, and upon request. *Id.* Only 62 “new” documents total are cited in the Proposed Rule and the NMFS declarations. *Id.* Of these 62, only 38 were published after the 2015 DEIS, and many of these documents are previous IWC, NMFS, or gray-whale related reports, that would have been readily available to AWI and Sea Shepherd. *Id.* As AWI and Sea Shepherd

point out, the 2015 DEIS was released for public comment almost four years ago, providing ample time for an interested person to become familiar with the contents. *See* AWI's Mot. to Extend at 2; Sea Shepherd's Mot. for Extension at 8. NMFS believes it is reasonable to expect that AWI and Sea Shepherd, given their expertise in the subject matter, would be able to review 38 exhibits in the time provided under the current schedule, especially given the nearly 90 days to submit rebuttal testimony. Second Yates Decl. ¶ 6.

AWI's and Sea Shepherd's arguments regarding the NEPA alternatives also fail to establish good cause, because they are factually inaccurate. The parties' assert that the proposed waiver represents a "new alternative" "different from any scheme previously proposed." *See* AWI's Mot. to Extend at 3; Sea Shepherd's Mot. for Extension at 6. However, the proposed waiver and regulations consist of a combination of elements from different alternatives in the 2015 DEIS, all of the environmental effects of which were fully evaluated. For example, Alternatives 2, 3, and 6 from the 2015 DEIS examine a winter/spring hunt, similar to the even-year hunt proposed in the waiver and regulations, Alternative 4 examines a summer/fall hunt similar to the proposed odd-year hunt, and the strike limits proposed in the waiver and regulations are intermediate to the effects of the strike limits that were fully evaluated in the DEIS alternatives. *See* 2015 DEIS at 2-5, Ch. 4.³ As mentioned, the 2015 DEIS was issued four years ago, so there should be no need for additional time merely because the proposed waiver combines elements from different alternatives. "[T]he good cause standard is not satisfied when the proposed amendment rests on information that the party knew, or should have known, in advance of the deadline." *Enzymotec Ltd. v. NBTY, Inc.*, 754 F. Supp. 2d 527, 536 (E.D.N.Y. 2010) (quotations omitted).

³ The 2015 DEIS is available online at <http://www.regulations.gov>, Docket I.D.: NOAA-NMFS-2012-0104.

3. The IWC Meeting Does Not Provide Good Cause

Both AWI and Sea Shepherd claim that they need additional time, particularly to prepare their direct testimony, due to a meeting of the International Whaling Commission on May 10-22, which AWI's expert is attending. While both parties assert that the May 10-22 IWC meeting constitutes grounds for delay, they do not explain why the prior 35-day period (April 5 – May 10) was insufficient for the preparation of direct testimony, particularly given such testimony only pertains to issues beyond the scope of the testimony submitted by NMFS. *See* Declaration of Naomi Rose ¶ 7; Sea Shepherd Mot. for Extension at 7. Because both parties waited until May 10th, the date of the alleged meeting conflict, to file their motions for an extension, they fail to establish that they diligently tried to comply with the hearing schedule and therefore fail to meet the “good cause” standard. *See Alioto v. Town of Lisbon*, 651 F.3d 715, 720 (7th Cir. 2011) (finding a lack of good cause for schedule modification where moving party “acted with insufficient diligence” by waiting until the last day to file a response to a motion to dismiss).

4. AWI's FOIA Request Does Not Support an Extension

On the same day AWI submitted its notice of participation as a party, AWI also submitted an 11-page FOIA request to NMFS requesting 14 categories of information. *See* AWI's Mot. to Extend at 2-3; Schubert Decl. Ex. 1. AWI asserts that this information is necessary to allow AWI to fully prepare for the hearing, however it is not apparent how the requested material will address the questions of fact and law at issue in this matter. NMFS's proposed waiver and regulation are supported by published literature, which is readily available to AWI, and much of which NMFS made available on its website as early as 2015. *Second Yates Decl.* ¶ 6. AWI's FOIA, in contrast, seeks tangential and irrelevant material, for example, all internal and external communications NMFS representatives had with anyone regarding

preparation of the proposed waiver and regulations, including the decision of whether to prepare a supplemental DEIS. Neither deliberative materials nor legal issues under NEPA has any relevance to this MMPA formal rulemaking. *See In re Subpoena Duces Tecum Served on Office of Comptroller of Currency*, 156 F.3d 1279, 1279-80 (D.C. Cir. 1998) (agency's action is judged in accordance with its stated reasons; agency deliberations are immaterial).

NMFS has clearly set forth the basis for its proposed waiver and regulations in its Proposed Rule and submitted testimony and exhibits. This is all the information AWI needs to respond to the agency, which carries the burden of proof here. AWI's FOIA request is not likely to contribute relevant information and does not provide an appropriate basis for delaying the hearing. *See United States v. United States District Court, Central District of California*, 717 F.2d 478, 481 (9th Cir. 1983) (FOIA was not intended as a device to delay ongoing litigation); *North v. Walsh*, 881 F.2d 1088, 1094 (same). Moreover, AWI submits no reason why it waited until the midst of this proceeding to seek information dating back as far as 2005 regarding a matter that AWI has been closely tracking since the late 1990s. *See Shubert Decl.* ¶ 2 & Ex. 1.

2. Accordingly, the Court should not delay the hearing schedule due to AWI's FOIA request. *Cf. In re Environmental Protection Serv., Inc.*, 2003 WL 1919591, at *2 (April 17, 2003) (denying motion for a stay of administrative proceedings pending resolution of a FOIA action, because the respondent offered no explanation for delay in pursuing its FOIA request in the first place).

5. An Extension to Obtain Additional Scientific Information Is Not Warranted

Finally, both AWI and Sea Shepherd argue that good cause exists for delay because additional scientific reports related to gray whale science will be made available through the IWC meeting discussed above. AWI Mot. to Extend at 4; Sea Shepherd Mot. for Extension at 8.

Sea Shepherd further argues that a delay is necessary based on increased gray whale strandings off the West Coast this year. Sea Shepherd Mot. for Extension at 10. Neither AWI nor Sea Shepherd, however, identify any particular study, report, or line of research that is significantly different from the information already contained in the record. As explained in the Weller Declaration (Docket No. 5, ¶ 21), the ENP gray whale stock is routinely studied and monitored, so studies and reports regarding the stock will continue to be generated. *See* Second Yates Decl. ¶ 7. If NMFS were required to delay this matter on the basis of new reports, the hearing could potentially be delayed indefinitely. *Id.*; *cf. Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 373 (1989) (“an agency need not supplement an EIS every time new information comes to light after the EIS is finalized. To require otherwise would render agency decisionmaking intractable, always awaiting updated information only to find the new information outdated by the time a decision is made.”).

With respect to the 2019 IWC meeting, the IWC completed an evaluation of the proposal for a Makah tribal hunt as set forth in the Proposed Rule (Docket No. 2) in 2018. *See* Weller Decl. ¶ 42. As explained in the Second Yates Declaration, the IWC has not announced plans to re-evaluate the hunt proposal at the 2019 meeting. Second Yates Decl. ¶ 8. Also, the IWC’s implementation review for North Pacific gray whales, originally scheduled for 2019, has been postponed until 2020. *Id.* Accordingly, AWI and Sea Shepherd have not satisfied their burden of showing good cause for a hearing delay based on the alleged need information that does not appear likely to inform the issues to be addressed at the hearing.

For the same reasons, the number of gray whale deaths this year do not provide an appropriate basis to delay the hearing. As explained in NMFS’s declarations, ENP gray whale stock abundance has fluctuated for the last 30 years, with a recent increase to over 26,000

whales. Second Yates Decl. ¶ 9; Weller Decl. ¶¶ 22, 25. The proposed waiver and regulations would allow, at most, removal of 2.5 gray whales per year, which represents 0.009 percent of the stock. Weller Decl. ¶ 39. Carrying capacity for this stock is likely to fluctuate along with environmental changes, especially those related to the productivity of arctic feeding grounds. While we have yet to determine the cause of the increased strandings in 2019, with gray whales at record numbers in recent history it would not be unexpected to see increasing whale densities translate into higher mortality / strandings and lower calf production and survival. Second Yates Decl. ¶ 9. Should the mortalities this year later prove to be significant new information, AWI and Sea Shepherd would have an opportunity to present that information for consideration during the final decision-making and preparation of an Final Environmental Impact Statement for this matter. 50 C.F.R. §§ 228.19(b), 228.20(d). At this time, however, the parties have not met their burden of showing good cause based on recent information that is consistent with the information already in the record for this proceeding. *See, e.g.*, Weller Decl. ¶ 22 (discussing 1999/2000 unusual mortality event for the ENP stock and stock’s recovery from the temporary decline); *Marsh*, 490 U.S. at 373 (agency decision-making would be intractable if the agency was required to supplement its analysis every time new information came to light).

B. The Requested Extensions Are Beyond the Scope of the Governing Regulations and Would Prejudice the Orderly Disposition of this Matter

1. The Governing Regulations Do Not Provide for Extension of the Deadline for Initial Direct Testimony

As explained above, the hearing regulations enumerate the presiding officer’s powers, which include the power to “[c]hange the time and place of the hearing.” 50 C.F.R. § 228.6(b)(1). The regulations also expressly vest the presiding officer with authority to establish dates for the submission of direct testimony on any new issues of fact and for the submission of

rebuttal testimony. 50 C.F.R. §§ 228.12(b)(2), 228.14(a). Per basic canons of interpretation, the presiding officer’s powers are limited to those expressly enumerated. *See Wheeler v. City of Santa Clara*, 894 F.3d 1046, 1054 (9th Cir. 2018) (“doctrine of expression unius est exclusio alterius ‘as applied to statutory interpretation creates a presumption that when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions.’”) (citation omitted). This interpretation is reinforced by section 228.7 of the regulations, which states:

Unless otherwise specified, *all direct testimony*, including accompanying exhibits, *must be submitted* to the presiding officer in writing *no later than the dates specified in the notice of the hearing* (§ 228.4), the final hearing agenda (§ 228.12) [for new issues of fact], or within 15 days after the conclusion of the prehearing conference (§ 228.14) [rebuttal testimony], as the case may be.

50 C.F.R. § 228.7(a) (emphasis added). Thus, according to the plain language of the regulations, “all [initial] direct testimony . . . must be submitted . . . no later than the dates specified in the notice of hearing,” meaning that the extension of the May 20th date for testimony sought by AWI and Sea Shepherd is outside the scope of the presiding officer’s authority and must therefore be denied. *See* 5 U.S.C. § 556(b) (“This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute.”); *id.* at § 556(c) (“Subject to published rules of the agency and within its powers, employees presiding at hearings may” exercise the enumerated powers).

2. A 90-Day Delay Would Prejudice the Orderly Disposition of This Matter

Finally, although it is not incumbent upon the non-moving party to establish prejudice, a 90-day delay of the hearing schedule would prejudice the agency’s interest in bringing this matter to conclusion as efficiently as possible. *Johnson*, 975 F.2d at 609 (“Although the

existence or degree of prejudice to the party opposing the modification might supply additional reasons to deny a motion, the focus of the inquiry is upon the moving party's reasons for seeking modification.”). The 1983 advisory committee note to FRCP 16 explains, “among the aims of Rule 16 are to prevent parties from delaying or procrastinating and to keep the case ‘moving toward trial.’” *Alioto v. Town of Lisbon*, 651 F.3d 715, 720 (7th Cir. 2011). Also, as explained in the Second Yates Declaration, NMFS’s current contract with and funding for ALJ services expires at the end of September, 2019, so that a continuance of the hearing beyond the end of September would require contract amendments and OPM authorization, creating some uncertainty as to when the hearing could be rescheduled. Second Yates Decl. ¶ 4. Also, a 90-day extension would move the hearing to the fall-winter holiday season, potentially creating scheduling problems for all parties and their witnesses. *Id.* For these reasons, NMFS opposes a 90-day delay.

IV. CONCLUSION

For the reasons explained above, NMFS opposes the requests to extend the hearing schedule by 90 days. Should the Court determine that extension of any deadlines is necessary, NMFS requests that it be limited so as to maintain the August 12 hearing date set for this matter.

Respectfully submitted this 15th day of May, 2019.

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CERTIFICATE OF SERVICE

I hereby certify that on May 15, 2019, I filed the foregoing document via email to Administrative Law Judge George J. Jordan at *aljseattle@uscg.mil* and emailed the same to the following parties at the email addresses below:

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On the same date, I served the foregoing document to the following party by placing it in first class mail to the address below:

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