

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

RINs: 0648-BI58; 0648-XG584

**AWI's COMBINED REPLY TO THE NATIONAL MARINE FISHERIES SERVICE'S
AND MAKAH INDIAN TRIBE'S RESPONSES TO
AWI'S EXPEDITED MOTION TO EXTEND WAIVER PROCEEDING SCHEDULE**

The Animal Welfare Institute (AWI) respectfully submits this Combined Reply to the National Marine Fisheries Service's (NMFS's) and the Makah Indian Tribe's Responses to AWI's Expedited Motion to Extend the Waiver Proceeding Schedule. In support of its motion, AWI also submits the Supplemental Declaration of DJ Schubert. NMFS filed its "Combined Response to the Animal Welfare Institute's and Sea Shepherd's Expedited Motions to Extend Wavier Proceeding Schedule" on the evening of May 15, 2019. The Makah Tribe filed its "Response to Expedited Motions to Extend Waiver Proceeding Schedule" on the same evening. Because none of NMFS's or the Tribe's arguments afford a basis for denying AWI's reasonable request for a modest extension, AWI is promptly submitting this reply while respectfully reiterating its request for expeditious consideration of its motion given the rapidly approaching (Monday, May 20th) deadline for direct testimony.

ARGUMENT

Many of the objections contained in NMFS's and the Makah Tribe's responses are misinformed, inaccurate, or are based on assumptions that are false. Below, AWI will address NMFS's and the Tribe's overlapping arguments together and the Makah Tribe's additional arguments separately.

A. AWI Has Good Cause for an Extension

1. AWI Has Acted Diligently

NMFS and the Makah Tribe have erroneously accused AWI of sitting on its hands and waiting until the eleventh hour to request an extension. In reality, nothing could be further from the truth. Both parties ignore the declaration of DJ Schubert, wherein he explains all of the actions he has taken since April 5 in response to the hearing notice and proposed regulations. As a matter of fact, Mr. Schubert *was* diligently reviewing a significant amount of new material, attempting to identify experts for direct testimony purposes, and much more. Schubert Decl. at p. 2-4. Indeed, the request for an extension was made in light of AWI's realization, based largely on Mr. Schubert's work since April 5, that there was no realistic way that AWI—or others opposing the proposed whale hunt—could participate effectively in the hearing *without* a reasonable extension of the schedule.

Respectfully, NMFS's and the Tribe's Responses also wrongly assume that Mr. Schubert, Dr. Naomi Rose, and other involved staff members, such as in-house counsel for AWI, either only work on Makah whaling, or have had the ability to drop all other campaigns, projects, and responsibilities to respond to the published notices—over which NMFS alone had control regarding its timing—in order to immediately work full-time on this matter. Just as NMFS's

employees presumably could not responsibly ignore all of their other tasks and activities at the drop of a hat, the same is true of an animal protection organization such as AWI. It is unfair in the extreme for NMFS to assume that AWI's employees can simply drop everything to work on Makah whaling in a six-week time span, particularly after NMFS took over 1,340 days between the end of the comment period on the Draft EIS, July 31, 2015, and its publication of the notice of hearing and proposed regulations on April 5, 2019. Within the context of what was feasible under the circumstances, AWI has in fact worked diligently and in good faith to address the matters in the April notice.¹

Indeed, AWI's purported "delay" in requesting an extension on the hearing schedule and associated deadlines submitted to Mr. Thom is indicative of the diligence that AWI engaged in to ensure that it understood the process, gathered all relevant materials, and engaged in internal and external discussions about the matter before seeking, for good cause, the extension so as to ensure that it, and other interested stakeholders, had a sufficient and fair opportunity to compile testimony for submission to Judge Jordan and to adequately prepare for the hearing. Schubert Decl. at p. 2-3. AWI's need for an extension here is an issue of a dedicated non-profit organization, with a small number of staff dedicated to this issue, doing everything it can to review an enormous amount of information, identify and contact potential experts, and prepare written testimony on an extremely truncated timeline. In short, NMFS and the Tribe's assertions

¹ While not previously explained because it seemed to be outside the scope of this proceeding, as AWI's wildlife biologist, Mr. Schubert has a host of other issues for which he is responsible. For example, he had to spend a considerable amount of time, before and after April 5, reviewing and analyzing several hundred species proposals and working documents that were to be discussed at the 18th meeting of the Conference of the Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora which was scheduled to begin in Colombo, Sri Lanka on May 23. Supplemental Decl. of DJ Schubert at p. 2-3. Due to the terrorist attacks that occurred in Sri Lanka on Easter Sunday (April 21, 2019), the CoP was postponed, with notification of that decision being published on April 26. See CITES website, Status update on the postponement of CoP18 (May 10, 2019), https://www.cites.org/eng/news/Status-update-on-the-postponement-of-CoP18_10052019.

of dilatoriness are utterly baseless and afford no justification for denying a reasonable request for a modest extension so that AWI (and others with a demonstrable interest in this matter) can meaningfully participate.

2. AWI Has a Genuine and Compelling Need for More Time to Review NMFS's New Alternative and Associated Documentation

NMFS further opposes AWI's motion by claiming the new alternative for Makah whaling contained in the proposed regulations is not new at all, but merely combines elements of alternatives evaluated in the DEIS. This is factually incorrect. While there is some degree of overlap between the new and previously evaluated alternatives, they are simply not the same. Some of the previously reviewed alternatives proposed a summer/fall hunt, others proposed a winter/spring hunt, and only one, Alternative 5, proposed a bifurcated winter (December) and spring (May) hunt structure which in total would have permitted on 42 hunt days far below the number of hunt days provided for in the new alternative. In addition, none of the alternatives contemplated training approaches or training harpoon throws as included in the new alternative. Consequently, the new alternative, as a package, raises additional concerns about potential environmental impacts not previously disclosed or evaluated in the DEIS. As AWI will explain further as this matter proceeds, had NMFS subjected its new alternative to NEPA review, including providing an opportunity for public comment – as the law requires – it would have been aware of how its new alternative raises distinct issues and concerns that had not been considered in the DEIS.

Equally important for present purposes, NMFS's own exhibit to the Yates Declaration demonstrates that many of the scientific and other documents NMFS is relying on to support its new alternative – at least **62** of them – were **not** mentioned in the DEIS; the same exhibit

demonstrates that most of these were not even easily accessible or, in some cases, even available to the public. As a matter of basic fairness and integrity of the adjudicatory process, AWI and other parties and stakeholders must have a reasonable opportunity to review these never previously disclosed materials **before** submitting direct testimony. A reasonable extension in the schedule is therefore warranted on this basis alone.

NMFS erroneously claims that additional time to prepare direct testimony and to prepare for the hearing is not warranted because there were *only* 62 new documents made available by NMFS and that AWI, given its history and expertise in this matter, should somehow have been able to access and review these new materials while meeting the current hearing deadlines. This might be plausible if AWI was aware of the new documents, if it had the titles or links to the documents to be able to access them, and if it knew that NMFS was going to rely on these documents in supporting the proposed waiver and proposed regulations. However, neither AWI nor anyone else outside of NMFS (except, perhaps, the Tribe) knew the specific documents upon which NMFS would rely to support its findings. While the Makah whaling issue is of immense importance to AWI, and has been for decades, NMFS's notion that Mr. Schubert and others at AWI should have somehow been able to predict on their own which new documents would be relied on by NMFS to support a new alternative approach to gray whale hunting, and hence they do not now need a reasonable opportunity to scrutinize dozens of new scientific and other materials, borders on the absurd and, in any event, does not afford a legitimate basis for denying AWI's reasonable extension request.

Furthermore, contrary to NMFS's contention, the fact that there will always be new information is not a valid reason to deny a request that the waiver proceeding be adequately timed to take fully into consideration the new information that *does* exist – such as the very

recent spike in reports of dead gray whales that relates directly to the viability of the gray whale populations, including WNP and PCFG gray whales, that would be affected by the requested waiver of MMPA protections. Regrettably, in vehemently opposing an eminently reasonable request for a modest extension so that opposing parties can meaningfully address such new information and participate in an adjudicatory proceeding in light of it, NMFS is making the very same kind of mistakes that resulted in the agency losing two prior Ninth Circuit rulings on this very issue. One would hope that NMFS's past experience would lead it to the conclusion that it should make every effort to **accommodate** public input rather than cut legal and procedural corners—as it did in violating NEPA twice before and the MMPA once before. Instead, the agency is making abundantly clear that it wants this proceeding to be rammed through as rapidly as possible precisely so that groups with longstanding, legitimate interests are *not* able to participate in an informed and effective manner. But even if NMFS is determined to repeat its past mistakes, that does not mean that this Court must do so by failing to recognize that there are compelling reasons for granting AWI's request for some additional time to effectively participate.

Indeed, in analogous judicial proceedings, parties typically build in many months to prepare opening expert reports, and then many more months to prepare rebuttal expert reports. For examples of stipulated schedules in cases alleging violations of the Endangered Species Act and that turn on expert testimony, *see e.g.* Minute Order, *Cascadia Wildlands et al v. Decker et al*, Civ. No. 12-00961 (D. Or. July 16, 2012), ECF No. 35 (enlarging discovery period in ESA section 9 case to 11 months); *Wild Equity Institute et al v. City and County of San Francisco et al*, Civ. No. 11-00958 (N.D. Cal. June 28, 2011), ECF No. 48 (discovery schedule for ESA section 9 case lasting 12 months). What AWI is requesting is minor by comparison.

3. AWI's Concerns Related to the Timing of the IWC Scientific Committee are Significant

NMFS and the Tribe reject AWI's concern about the conflict between the May 20 deadline for submitting written testimony and the dates of the IWC's Scientific Committee meeting claiming, wrongly, that AWI had sufficient time during the 35 days between April 5 and May 10 (the date the IWC meeting started) to prepare and submit its testimony. This again ignores the reality that Dr. Rose and Mr. Schubert have portfolios that extend far beyond Makah whaling, and hence that they could not simply ignore other urgent matters when NMFS opted to publish its notice in April. As for Dr. Rose, as she is attending the IWC meeting, as NMFS concedes, she had to expend considerable time preparing for the meeting as well as tending to many other campaigns, projects, and responsibilities. As explained, while Mr. Schubert did not have to spend time preparing for the IWC meeting, he had and continues to have other projects and campaigns that have required his attention since NMFS's notice was issued.² Supplemental Schubert Decl. at p. 2-3.

NMFS and the Tribe also object to AWI's request to extend the hearing schedule based on its interest in potentially citing to papers presented to the ongoing IWC Scientific Committee meeting, claiming that AWI did not "identify any particular study, report, or line of research that is significantly different from the information already contained in the record." AWI did not provide that level of detail as it would have violated the IWC Scientific Committee Handbook - Working Methods of the IWC's Scientific Committee (IWC/67/FA/20) policy related to citing or using papers submitted to the Scientific Committee, which as previously noted, states "these

² The fact that AWI filed its Motion on May 10, the same date as the IWC meeting, was merely coincidence and was selected so as to provide NMFS with sufficient time to respond to AWI's May 6 letter requesting an extension in the hearing schedule and resetting of associated deadlines. As AWI noted previously, NMFS responded to that request on May 9.

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.’” Schubert Decl. at p. 6. Indeed, there are at least three papers submitted to the IWC meeting, including Zharikov et al. 2019 (SC/68a/ASW 03), Urban et al. 2019 (SC/68a/CMP 11 Rev 1), and Urban et al. 2019 (SC/68a/CMP 12 Rev 1), that provide information or raise questions pertinent to the issues associated with the proposed waiver and proposed regulations including about ENP gray whale calf counts, the condition of gray whales in their wintering area, the number of WNP gray whales in the gray whale wintering lagoons in Mexico, and possible changes in the availability or accessibility of whales in the Russian hunt. Schubert Decl. at p. 6; Supplemental Schubert Decl. at p. 3. AWI is not seeking an indefinite delay in the hearing schedule and associated deadlines but, instead, only a 90-day delay which, if granted, would allow AWI to incorporate the findings of these papers in to its direct testimony.

4. AWI’s FOIA Request is Not for “Tangential and Irrelevant Materials”

NMFS argues against AWI’s request for an extension so that it can obtain records responsive to its May 6 FOIA request, claiming that the records requested were “tangential and irrelevant” to the proposed waiver and proposed regulations. In fact, each of the fourteen categories of records contained in the AWI FOIA request are directly relevant to the proposed waiver and proposed regulations, as AWI has no interest in – nor does it have the spare time to spend on – “tangential and irrelevant materials.” Supplemental Schubert Decl. at p. 3. The submission of the FOIA request on May 6 was not the product of a purposeful delay but, rather, reflects the time invested in studying the proposed regulations and some of the associated information before compiling the FOIA request so that AWI would not request “tangential and

irrelevant” materials. Furthermore, while there is information about this issue on the NMFS website, AWI is not familiar with any NMFS webpage that provide access to all of the information cited in the DEIS and/or where the records AWI sought via FOIA are made available to the public. Supplemental Schubert Decl. at p. 3.

B. NMFS’s and the Makah Tribe’s Reasons for Opposing an Extension of the Hearing Date are Baseless

While AWI’s request for a modest extension is eminently reasonable, neither NMFS nor the Makah have presented any valid argument for why they or anyone else would be prejudiced through such an extension. To begin with, NMFS’s claim that the deadline for the submission of direct, written testimony (May 20) is final and unalterable—evidently, for any reason no matter how compelling—pursuant to the regulations at 50 CFR Part 228, is baseless. According to the regulations, the notice of hearing shall state “the place and date of the hearing,” with “the date shall not be less than 60 days after publication of notice of the hearing.” 50 C.F.R. 228.4(2). No maximum timeline is established. Nothing in the regulations compels that counterintuitive conclusion and, indeed, in his response to AWI’s request to extend the hearing schedule and reset the associated deadlines, Mr. Thom of NMFS did not state that the May 20 deadline could not be modified for any reason whatsoever, but, instead, suggested that AWI seek the desired extension and adjustment to the associated filing deadlines from this Court. It now appears as though NMFS told AWI to ask Judge Jordan to extend the hearing schedule and reset the associated deadline, only to now advise AWI that the May 20 deadline is irrevocably final and that this Court lacks any legal authority to change it, regardless of how legitimate the reasons, despite his role as presiding officer over the waiver proceeding, and despite the importance of the direct testimony to decisions he must make before, during, and after the hearing. While NMFS

could have, and for the foregoing reasons, should have consented to AWI's request, surely this Court, having been invested with the authority to adjudicate the matter, must be deemed to possess the authority to grant a reasonable scheduling extension in this matter.

In its response, NMFS opposes the request to extend the hearing schedule by 90 days, but suggests that it would not object to an extension in the deadline for rebuttal testimony as long as it did not affect the August 12 hearing date, which NMFS claims must be maintained due to its contract with the Coast Guard that expires at the end of September. While AWI did not know, and would have no reason to know the details of NMFS's contract with the USCG ALJs, NMFS's and the Tribe's argument that the hearing needs to occur on August 12—in the middle of the summer—because the ALJ's contract runs out on September 30, is groundless. NMFS **itself** opted to establish a system under which an adjudicatory hearing over a highly controversial MMPA waiver request has been scheduled just six weeks before the end of the current contract period. NMFS's unilateral decision to short-circuit the process should not undermine AWI's reasonable request for some more time to meaningfully participate. In any event, NMFS has presented no reason why it could not extend the contract for the ALJ's services if need be – presumably this is a routine matter for a government agency that does not employ its own set of ALJs, and there is nothing whatsoever in NMFS's submission to indicate that NMFS cannot extend the contract for several months in order to accommodate reasonable requests for an extension so that opposing parties may meaningfully participate in the proceeding.

Furthermore, NMFS's claim that a 90-day delay would move the hearing to the fall-winter holiday season, thereby potentially impacting parties and any witnesses, makes no sense. If NMFS was truly concerned with the ability of parties and witnesses—including expert witnesses with busy schedules—to participate it surely would not have set a hearing date in

August, the height of many people's travel and vacation schedules. In contrast, AWI seeks to the delay the hearing until November 12, which would not only give witnesses some additional time to plan accordingly to accommodate their schedules, but it is well **before** the Thanksgiving holiday and not likely to be disruptive to anyone's holiday schedule. But if the Court nonetheless deems this to be a valid concern, a simple solution would be to hold the hearing in October instead of November, thereby allowing some additional time for the parties that have not had the benefit of direct involvement in this process, as have NMFS and the Tribe. In any event, NMFS's ostensible concern with travel and holiday conflicts certainly weighs heavily in favor of deferring an **August** hearing until some reasonable time thereafter.

C. AWI's Replies Specific to the Makah Tribe's Response

In addition to those claims raised just by NMFS, or by both NMFS and the Makah Tribe, the Tribe raises two additional issues not included in the NMFS motion that warrant a response.

First, the Makah Tribe's argument that they have been asking for a waiver since 2005 has nothing to do with whether a reasonable request to extend the schedule should now be granted. AWI has had no control over NMFS's response to the request, and thus that should have no bearing on AWI's need for some additional time now that NMFS has triggered the process for determining whether the Makah's request satisfies the pertinent, stringent criteria. Moreover, the Tribe is asking for a waiver from the MMPA's ordinary protections. NMFS effectively concedes that the legal presumption is therefore **against** granting such a waiver – this is why NMFS has the burden of proof at the proceeding. This reality sits in stark contrast to the burden that is usually imposed on a party opposing an agency action. Consequently, AWI and other parties that are arguing in favor of maintaining the MMPA's presumptive protections, must be able to do so

in a meaningful and informed manner, which will be severely prejudiced if a reasonable extension is not granted.

Second, the Makah erroneously claim that AWI should not have been surprised by the new alternatives for Makah whaling contained in the proposed regulations. Although information about the new hunt submitted by NMFS to the IWC in May 2018 provided a *summary* of the new alternative, none of the specific details regarding unsuccessful strike limits, struck-and-lost limits, training approaches, training throws, the dates of the bifurcated hunts, and the provisions specific to PCFG and WNP gray whales had been disclosed. Consequently, prior to NMFS's April 5 announcement, AWI was in no position to meaningfully analyze the new alternative that will be the subject of the adjudicatory proceeding.³ Supplemental Schubert Decl. at p. 4.

CONCLUSION

The Makah Tribe has requested an extraordinary waiver of the MMPA. Waivers of the MMPA are hardly a routine occurrence. Indeed, such waivers of the MMPA have been issued only a handful of times in the history of this statute and never under circumstances comparable to what is before the Court here. This waiver proceeding, and all its elements, is vitally important to AWI, as it is surely important to all of the parties. In good faith, AWI requested an extension of the waiver proceeding schedule *because of* how important this proceeding is to AWI and because of the need to review an enormous amount of complex information and participate in a meaningful, effective manner. Especially in the grand scheme of the Makah whaling issue, and

³ Furthermore, if what NMFS submitted to the IWC in May 2018 reflected its final decision on the new management alternative, it is unclear why NMFS needed eleven months to publish the proposed regulations. Considering the significant amount of time taken by NMFS between the deadline for comments on the 2015 DEIS and its publication of the hearing notice and proposed regulations, AWI was not sure the summary of the new alternative that NMFS submitted to the IWC in May 2018 would not be further amended prior to official publication by NMFS.

in consideration of the fact that this is the first waiver proceeding held in over two decades,
AWI's request for a 90-day extension is reasonable.

WHEREFORE AWI respectfully requests that the ALJ grant its Motion to Extend the
Waiver Proceeding Schedule.

Presented on this 17th day of May, 2019, by:

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