

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

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

ORDER GRANTING REQUEST TO CHANGE HEARING DATE

On April 5, 2019, the National Marine Fisheries Service (NMFS) proposed a waiver of the Marine Mammal Protection Act (MMPA) ban on the take of marine mammals to allow the Makah Tribe to take Eastern North Pacific Grey Whales. NMFS published its proposed waiver and regulations in the Federal Register. *Announcement of Hearing Regarding Proposed Waiver and Regulations Governing the Taking of Marine Mammals (Announcement of Hearing)*, 84 Fed. Reg. 13639 (April 5, 2019) and *Regulations Governing the Taking of Marine Mammals*, 84 Fed. Reg. 13604 (April 5, 2019). According to the Federal Register notice, the hearing is set to begin on August 12, 2019 at the Henry M. Jackson Federal Building in Seattle, Washington.

During a prehearing conference with the parties on June 17, 2019, Sea Shepherd Legal and Sea Shepherd Conservations Society (collectively, Sea Shepherd) and the Animal Welfare Institute (AWI) raised the issue of a conflict between the hearing dates and the dates of the (CITES) conference in Geneva, Switzerland and requested a continuance until September 16, 2019. Margaret Owens, a representative of the Peninsula Citizens for the Protection of Whales (PCPW), also requested a continuance due to financial constraints. The Makah Tribe opposed any change to the hearing dates, while NMFS and the Marine Mammal Commission (MMC) did not strongly support or oppose a date change. I ordered all parties to submit briefs setting out

their positions regarding the requested continuance. NMFS, the MMC, the Makah Tribe, Sea Shepherd, AWI, and PCPW all filed briefs.

The statute and regulations governing this proceeding explicitly permit the presiding officer to change the time and place of the hearing. *See* 5 U.S.C. § 556(c)(2), (9); 50 C.F.R. § 228.6(b)(1). However, the regulations do not require the presiding officer to consider any particular factors in doing so, including the convenience of the parties and witnesses.

Nevertheless, I find it appropriate to balance the convenience of the parties and witnesses with both logistical requirements and the need to hold a hearing without undue delay.

The Federal government's fiscal year ends September 30, 2019. The Memorandum of Understanding between NOAA and the Coast Guard, under which I am authorized to preside over this hearing, currently expires at the end of this fiscal year. NMFS has represented that an extension of the Memorandum is in progress but has not yet been completed. Still, it has become clear that I will not be able to issue a recommended decision until the next fiscal year even if the hearing takes place on schedule in August. Thus, although uncertainties remain about the funding for this matter, I do not believe it is a determinative issue at this point in the proceeding.

Regarding the availability of the parties, NMFS stated that all its counsel and witnesses are available during the currently scheduled hearing dates. One of its lead counsel is unavailable during the week of September 16, and one of its witnesses has a conflict but can become available if absolutely necessary. NMFS is also opposed to the possibility of a bifurcated hearing, in which the hearing would begin as scheduled on August 12, 2019 but would not last the entire week, and would resume during the proposed week in September. This is due to the logistics of setting up and breaking down the audiovisual services NMFS is expecting to contract for, as a bifurcated hearing would entail significant additional expense.

The MMC's full team is also available during the week of August 12, 2019 but one key team member is unavailable during the week of September 16, 2019. Thus, the MMC's preference is to maintain the original hearing date. However, the MMC is not opposed to a short delay, provided it would not affect the dates the Makah Tribe could begin whaling if the proposed waiver and regulations are approved.

The Makah Tribe is strongly opposed to any delay. One of its expert witnesses is unavailable for the majority of the week of September 16, 2019, and it is uncertain whether he could alter his travel plans in order to testify at the hearing. Another of the Makah Tribe's expert witnesses has limited availability during the week in September. Moreover, three of the Tribe's lay witnesses face professional conflicts that week, and two of its attorneys are scheduled to be in Minnesota that week on a Federal court matter. Even if counsel could reschedule the trip, they would face difficulties preparing for both this hearing and the other matter.

Sea Shepherd and AWI both strongly support changing the hearing date, as each organization employs personnel who intend to testify as witnesses and/or act as party representatives during this hearing, as well as attend the CITES conference. Originally, the CITES conference was scheduled to be held in Sri Lanka in May 2019, but it was postponed due to terrorist attacks in Sri Lanka on April 21, 2019. The Secretariat for CITES announced the rescheduled conference dates and location on June 12, 2019, and it is now set for August 17 through 28, 2019 in Geneva, Switzerland.

While AWI has employed legal counsel to represent it at this hearing, its primary witness is DJ Schubert, who intends to attend the CITES conference and several pre-conference events during the week leading up to the conference. AWI argues that Mr. Schubert's long history of attendance at the CITES conference and his institutional knowledge make it vital for him to

attend, but that he is also a critical part of its team for this hearing. Nevertheless, it appears AWI's counsel is available to attend the hearing and represent the interests of its client during both the August and September weeks.

Sea Shepherd is a small organization with three full-time staff members. Two of these staff members, Catherine Pruitt and Brett Sommermeyer, intend to represent Sea Shepherd at this hearing and also plan to represent the organization at the CITES conference. Sea Shepherd asserts that extensive preparation is required for effective and meaningful participation the CITES conference, posing issues not just in the logistics of attending both the hearing and the conference, but also in adequately preparing for both. Sea Shepherd intends to participate in pre-conference meetings and side events that require additional preparation. Finally, Sea Shepherd has been in contact with two out-of-state gray whale experts who are interested in presenting rebuttal testimony, but have professional and personal conflicts during the week of August 12, 2019.

Margaret Owens, the PCPW representative, supports the request for continuance. Ms. Owens stated she did not initially realize that the hearing would last longer than one day, and it would pose a hardship for her personally, as well as for her employer, if she needs to travel to Seattle for a week during the height of the tourist season. Ms. Owens believes she is the best member of her organization to act as a representative and that PCPW would not be able to present a full and fair case without her presence.

I recognize that in a hearing involving numerous parties and witnesses, such as this one, finding dates during which no conflicts exist is extremely difficult. Adding to the logistical issues, the facility where the hearing is currently set to take place is not available during the week of September 16, 2019. My staff has contacted numerous other facilities in the area but has

been unable to locate a suitable alternate space for those dates with adequate security that can accommodate all the parties, witnesses, and anticipated spectators. However, the facility is currently available between September 30 and October 11, 2019.

This matter is a formal rulemaking under 5 U.S.C. § 553(c). “Under sections 556 and 557 of the APA, 5 U.S.C. §§ 556-557 (1976), formal rulemaking must include a trial-type hearing at which a “party is entitled ---, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.” 5 U.S.C. s 556(d).” *Ass’n of Nat. Advertisers, Inc. v. F.T.C.*, 627 F.2d 1151, 1160 (D.C. Cir. 1979).

If I hold the hearing as scheduled, several parties will be adversely impacted in their ability to conduct cross-examination. While the presiding officer may “limit the number of times parties having a common interest may cross-examine an ‘adverse’ witness on the same matter” and exclude immaterial, irrelevant, or unduly repetitious questions, see 50 C.F.R. § 228.18(a)(3) and (4), I note that all of the affected parties are generally opposed to the proposed waiver and regulation. While AWI and Sea Shepherd have advanced many of the same arguments and their interests are well aligned, and PCPW shares their interest in defeating the proposed regulations but has focused on somewhat different issues, none of the remaining parties are sufficiently aligned with any of these parties’ positions to conduct effective cross-examination in their absence. Thus, for reasons outside their control, AWI and Sea Shepherd will undeniably be prejudiced if at least one of the two organizations is unable to fully participate at the hearing.¹ However, if this matter is continued until the requested date of September 16, 2019, two of the Makah Tribe’s attorneys and nearly half the Tribe’s witnesses will be unavailable or will face


¹ While Ms. Owens will be personally affected by the expense and inconvenience of participating at an August hearing, it appears she still intends to at least attempt to represent PCPW if the hearing is not continued. Neither AWI nor Sea Shepherd stated whether they would still attempt to be present for part of the hearing if it takes place in August, or whether they would choose to travel to Geneva rather than participate in this hearing.

severe difficulties attending the hearing to testify, and both NMFS and the MMC will face counsel and/or witness availability issues to a lesser degree.

Earlier in this proceeding, I issued an order denying a request to extend the submission date for initial direct testimony because the regulations only permitted me to grant such an extension if no party would be prejudiced. *See* Order dated May 17, 2019. The presiding officer is not similarly restricted with respect to changing the date and location of the hearing, though, as this authority is explicitly granted without any further qualifications. 50 C.F.R. § 228.6(b)(1). I find AWI and Sea Shepherd have shown good cause why the original hearing schedule should be continued to a later date, but also find September 16, 2019 is not an appropriate date to reset the hearing. My staff will work with the parties to schedule a telephonic prehearing conference to discuss other dates for the hearing, likely between September 30 and October 11, 2019. I will aim to accommodate the parties' schedules to the greatest extent possible while also minimizing any delay in issuing a recommended decision.

ORDER

Sea Shepherd's, AWI's, and PCPW's motions to continue the hearing in this matter are GRANTED.



George J. Jordan
Administrative Law Judge

Done and dated this 8th day of July, 2019, at
Seattle, Washington.