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

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

ORDER GRANTING IN PART AND DENYING IN PART MOTIONS IN LIMINE AND REQUESTS TO MODIFY THE FINAL AGENDA

This proceeding is governed by the Marine Mammal Protection Act (MMPA), which generally prohibits the "take" of marine mammals. The MMPA contains an exemption for Alaska Natives, which authorizes the taking of marine mammals for subsistence purposes or for making traditional Native handicraft and clothing so long as the take is not conducted in a wasteful manner. 16 U.S.C. § 1371(b). It does not contain similar exemptions for other Native tribes, such as the Makah, who reside in Washington State. However, the MMPA also permits the Secretary of Commerce, from time to time, to waive the moratorium to allow taking from a species of stock of marine mammals, to adopt suitable regulations governing the take; and to issue permits authorizing the take. The Secretary of Commerce has delegated this authority to the National Marine Fisheries Service (NMFS). The Makah Tribe has sought such an exemption for the take of gray whales.

Several parties have filed motions seeking to strike or modify items in the Final Agenda and to exclude direct and rebuttal testimony and documentary evidence on particular issues.[1]

[1] These are:
- National Marine Fisheries Service's Motion to Limit Issues and Testimony (NMFS Motion)
- Makah Tribe's Motion Re Issues to be Addressed at Hearing (Makah Motion)

A. Standards for Granting Waiver and Publishing Regulations

The process for granting a waiver and prescribing implementing regulations requires an administrative hearing on the record. The procedures governing the hearing are at 50 C.F.R. Part 228, and are governed by the provisions of the Administrative Procedures Act (APA), 5 U.S.C. §§ 556 and 557. 50 C.F.R. § 228.3. I was appointed as the presiding officer in this matter pursuant to 50 C.F.R. § 228.6.

Under the MMPA, waivers must be 1) based on the best scientific evidence available; 2) made in consultation with the Marine Mammal Commission (MMC); and 3) have due regard for the distribution, abundance, breeding habits, and times and line of migratory movements of the marine mammal stock subject to the waiver. 16 U.S.C. § 1371(a)(3)(A). NMFS must also be assured that the taking is "in accord with sound principles of resource protection and conservation as provided in the purposes and policies of the MMPA." These policies and purposes include maintaining marine mammals as significant functioning elements of their ecosystems, maintaining the health and stability of the marine ecosystem, and managing stocks

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- AWI's Motion in Limine to Exclude Testimony and Evidence (AWI Motion)
- Sea Shepherd's Motion to Exclude Evidence Regarding Treaty Right and Cultural Significance of Whaling (Sea Shepherd Motion)
- National Marine Fisheries Service's Combined Response to Parties' Motions to Exclude (NMFS Response)
- Makah Tribe's Combined Response to Motions to Exclude Testimony and Issues for the Hearing (Makah Response)
- Sea Shepherd's Response to National Marine Fisheries Service's Motion to Limit Issues and Testimony (Sea Shepherd Response to NMFS)
- Sea Shepherd's Response to Makah Tribe's Motion Re Issues to be Addressed at the Hearing (Sea Shepherd Response to Makah)
- Marine Fisheries Service's Motion to Limit Rebuttal Issues and Testimony (NMFS Motion re Rebuttal)
- Makah Tribe's Motion to Exclude Certain Portions of the Rebuttal Testimony of Margaret Owens (Makah Motion re Rebuttal)
- AWI's Motion in Limine to Exclude Rebuttal Testimony and Evidence (AWI Motion re Rebuttal)
- Sea Shepherd's Response to National Marine Fisheries Service's Motion to Limit Rebuttal Issues and Testimony (Sea Shepherd Response re Rebuttal)
- PENINSULA CITIZENS for the PROTECTION of WHALES (PCPW) Response to NMFS's Motion to Limit Rebuttal Issues and Testimony (PCPW Response re Rebuttal)

to attain or maintain their optimum sustainable population (OSP) levels, keeping in mind the carrying capacity of their habitat. 16 U.S.C. § 1361.

When NMFS grants a waiver, it must also publish regulations governing the take. 16 U.S.C. § 1371(a)(3)(A). These regulations must be based on the best scientific evidence available and be prescribed in consultation with the MMC, and ensure that the taking "will not be to the disadvantage of those species and population stocks and will be consistent with the purposes and policies" of the MMPA. 16 U.S.C. § 1373(a). In prescribing regulations, the Secretary shall fully consider all factors that may affect the extent of the take, including but not limited to the effect of such regulations on—

> (1) existing and future levels of marine mammal species and population stocks;
> (2) existing international treaty and agreement obligations of the United States;
> (3) the marine ecosystem and related environmental considerations;
> (4) the conservation, development, and utilization of fishery resources; and
> (5) the economic and technological feasibility of implementation.

16 U.S.C. § 1373(b). The regulations may also restrict the number of animals allowed to be taken each year; the age, size, and/or sex of the animals which may be taken; the season during which the animals may be taken; the manner and location in which the animals may be taken; and fishing techniques which have been found to cause undue fatalities to any marine mammal species. 16 U.S.C. § 1373(c).

The question of whether a waiver should be granted is mainly scientific in nature. *See* 16 U.S.C. §§ 1631, 1371(a)(3)(A). However, while the regulations must also be based on the best available scientific evidence, the considerations in formulating and adopting such regulations includes other factors such as international treaty and agreement obligations, environmental considerations related to the marine ecosystem, and technological concerns, which may implicate scientific evidence but are not constrained to a purely science-based analysis. The statute

requires the Secretary to **fully** consider the effect of the regulations on the five enumerated categories. 16 U.S.C. § 1373(b). The MMPA also contains a list of restrictions that may be considered in the regulations but are not mandated. 16 U.S.C. § 1373(c). However, it is not entirely clear whether, if NMFS decides not to impose a particular restriction in the implementing regulations, it can be imposed later via another process such as permitting.

In any event, my role as presiding officer in this proceeding is to develop a full and complete record and make recommendations to the Assistant Administrator regarding 1) whether the waiver should be granted, and 2) whether the regulations NMFS has proposed should be adopted as drafted or should be modified and amended based on the evidence presented at the hearing. Thus, any topic raised in the proposed regulations is presumed relevant to this matter.

NMFS has already made clear that it intends for the Assistant Administrator to go beyond the record I develop in issuing a final determination regarding the waiver and regulations. *See* NMFS Motion at 11 ("in any event, NMFS will carry out consultation under [Endangered Species Act] section 7(a)(2) prior to making a final decision whether to issue a waiver and regulations."). However, while the Assistant Administrator "may affirm, modify, or set aside, in whole or in part, the recommended findings, conclusions and decision of the presiding officer," under the regulations, the Assistant Administrator is not responsible for further developing the record. 50 C.F.R. § 228.21(a). Instead, the Assistant Administrator "may remand the hearing record to the presiding officer for a fuller development of the record." *Id.* Thus, I believe it is my duty to create a robust hearing record for the Assistant Administrator to rely on, even if certain issues are ultimately not relied on for either the Recommended Decision or the Final Decision.

B. Formal Rulemaking Procedures under the MMPA

In hearings on MMPA waivers and implementing regulations, direct and rebuttal testimony is submitted in written form. 50 C.F.R. § 228.7. In a formal rulemaking conducted pursuant to the Administrative Procedures Act (APA), 5 U.S.C. § 551 *et seq.*, any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. 5 U.S.C. § 556(d). Under the agency's procedural rules, the presiding officer in a formal rulemaking proceeding under 50 C.F.R subpart 228 shall have power to rule upon the admissibility of direct testimony. 50 C.F.R. § 228.6(b)(3). "With respect to direct testimony submitted as rebuttal testimony or in response to new issues presented by the prehearing conference, the presiding officer shall determine the relevancy of such testimony." 50 C.F.R. § 228.16(b). While the Federal Rules of Evidence are not controlling in a formal rulemaking, they may be considered for guidance, and Rule 104 provides, in part: "Preliminary questions concerning ... admissibility of evidence shall be determined by the court ..." Fed.R.Evid. 104(a).

Much of the testimony in this proceeding consists of expert testimony. As a general matter, experts "may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702. Other testimony is in the nature of commentary. In a rulemaking, public comments are the focal point of the opportunity to participate and they must be placed in the record so that they may be subject to comment from other interested persons. As the presiding officer, I have the power to "receive written comments and hear oral arguments." 50 C.F.R. § 228.6(b)(6). "The exchange of comment in the formal rule making

process constitutes written debate which generates information and test the accuracy of the information upon which the rule will be based." 7 West's Fed. Admin. Prac. § 7572.

Motions in limine to exclude evidence prior to hearing are subject to a rigorous standard of review. In general, courts may bar evidence in limine "only when evidence is clearly inadmissible on all potential grounds." *Dartey v. Ford Motor Co.,* 104 F.Supp.2d 1017, 1020 (N.D.Ind.2000) (quoting *Hawthorne Partners v. AT & T Tech.,* 831 F.Supp. 1398, 1400 (N.D.Ill.1993)). If evidence does not meet this standard, "[the] evidentiary rulings should be deferred until trial so that questions of foundation, relevancy and potential prejudice may be resolved in proper context." *Id.* (quoting *Hawthorne,* 831 F.Supp. at 1400).

In this Order, I am not making a final determination on the admissibility of any evidence. I reserve the right to change these rulings during the hearing should the evidence or arguments at hearing justify such change. "If a party objects to the admission or rejection of any direct testimony or to any other ruling of the presiding officer during the hearing, he or she shall state briefly the grounds of such objection, whereupon an automatic exception will follow if the objection is overruled by the presiding officer. … The ruling by the presiding officer on any objection shall be a part of the transcript and shall be subject to review at the same time and in the same manner as the Assistant Administrator's final decision." 50 C.F.R. § 228.16(d).

C. Final Agenda

As the proponent of the waiver and regulations, NMFS was the first to submit its written testimony, including the Notice of Hearing in which it published its determination of the issues of fact that should be considered in reaching a recommended decision. However, as permitted under 50 C.F.R. § 228.7(c), other parties' direct testimony included additional issues of fact not

defined in the Notice of Hearing. I considered all the parties' submissions, as well as discussions that occurred at the prehearing conference, in developing the Final Agenda for the hearing.

The purpose of the Final Agenda is to set a framework for the hearing, and to give notice to parties and other persons of the issues and the order in which they will be addressed. 50 C.F.R. § 228.12. The publication of a Final Agenda is required by regulation, but is not a statutory requirement under the MMPA. While the Final Agenda may raise an issue or pose a question, the evidence adduced at the hearing will develop the issue, answer the question, or may even render a particular issue moot. It is not equivalent to a complaint in a formal adjudication, which sets out allegations to be found proved or not proved; rather, the presiding officer must take into account all the evidence on each issue that is germane to the determination of whether the requirements of the MMPA are met and whether the proposed waiver and implementing regulations are appropriate under the circumstances.

D. Issues Raised by the Parties and Rulings Thereon

1. Issues Pertaining to NMFS's Potential Future Issuance of Permits Under MMPA Section 104

NMFS asks me to exclude testimony related to MMPA Section 104, which governs the issuance of permits. Under the MMPA, if a waiver is ultimately granted and regulations are promulgated, the Makah Tribe would have to apply for a permit to hunt gray whales. NMFS must publish notice of a permit application in the Federal Register and provide the opportunity for interested persons to submit comments. 16 U.S.C. § 1374(d)(2). Any interested person may request a hearing on the permit application, but unlike the mandatory hearing on a waiver and implementing regulations, it is at NMFS's discretion whether to grant a hearing regarding a permit application. 16 U.S.C. § 1374(d)(4). After the close of the hearing, if any, and

consideration of public comments, NMFS must issue or deny the permit and publish its final decision, which is subject to judicial review. 16 U.S.C. § 1374(d)(5)-(6).

NMFS contends that the section of PCPW's initial direct testimony that raises issues regarding the safety of weapons that might be used for a hunt should be excluded because most of the parties, including PCPW, entered into a partial stipulation stating that the manner of hunting, including the type of weapon that might be authorized and related safety issues, would not be addressed at the hearing. NMFS Motion at 9. PCPW did not respond to this argument. However, the Makah Tribe clarified that its understanding was "that the stipulation would not exclude evidence regarding the 'mechanics of the hunt,' including testimony describing the Tribe's proposed method of hunting and the process for developing that method." Makah Response at 17.

Section 103 of the MMPA (16 U.S.C. 1373(c)(4) specifically allows the implementing regulations to contain restrictions on the manner in which animals in which animals are taken. NMFS has proposed that the implementing regulation, which would be at 50 C.F.R. § 216.113(a)(6)(v), require the Assistant Administrator to specify in the permit "[m]easures to be taken by the hunt permit holder to provide for the safety of the whaling crew, the public, and others during a hunt." While the specific nature of these measures may be reserved for the permitting process, I nevertheless must determine that this proposed regulation is sufficient and could recommend additions, deletions, or other modifications to the regulatory language if changes are warranted.

PCPW has raised concerns about the safety of bystanders if a high-caliber weapon is used to speed a whale's death after it has been harpooned. The record (including documentary evidence submitted by NMFS) and the proposed regulations themselves contain a significant

amount of information concerning the manner of taking. The preamble to the proposed regulations discusses the manner of taking in a broad manner and refers to a more detailed discussion in the EIS, and the regulatory definitions NMFS would adopt include definitions of the various tribal members, including a "rifleman," observers, and other participants in the hunt.

I find generic information about hunt safety as it relates to the specific language of the proposed regulations is admissible. While PCPW's testimony goes further into depth on safety issues than the language of the regulation does, it is the nature of a formal rulemaking such as this one that the record of the hearing will contain more evidence than is strictly necessary to reach a decision. Here, I do not see safety concerns being so irrelevant as to warrant exclusion, and NMFS's request to exclude PCPW's testimony on this issue is **DENIED**. Nevertheless, I reserve the right to limit any testimony at the hearing to whether the proposed regulations set an appropriate framework for consideration of the safety issues during the permitting stage.

2. Issues Regarding Identification of Whale Stocks

A point of contention between several parties is the extent to which testimony regarding the identification and composition of the Western North Pacific (WNP) stock of gray whales should be permitted. On the issue of stock identification and composition, the Partial Stipulation provides:

> [W]hile the parties agree that this hearing and the associated waiver rulemaking are not the appropriate vehicles for identifying or challenging the identification of any particular population stock under the MMPA, the Parties agree that evidence concerning the various populations, stocks, or groups of gray whales recognized or supported by the scientific literature and the impacts of the proposed waiver on them may be considered.

Part. Stip. dated June 10, 2019 at 3, ¶ 1.

NMFS argues that I should exclude any issues pertaining to NMFS's identification of stocks under MMPA section 117. This hearing is not a forum for parties to challenge the identification of a group of marine mammals as a "stock" under the MMPA, but NMFS believes two issues included in the Final Agenda appear to question whether NMFS has properly identified the WNP stock. NMFS Motion at 9-10. Thus, NMFS believes the last sentence of Issue I.A.3(a) and the last clause of Issue I.B.1(d)(i) and related testimony should be excluded from consideration. *Id.* at 10.

In its responsive brief, NMFS also contends that "the Stock Assessment Reports (SARs) developed pursuant to MMPA section 117 must be based on the best scientific information available" and were most recently published this past June, thus if any party had additional information about gray whale stocks, they should have submitted it for consideration during the SAR preparation process. NMFS Response at 3. Even so, a motion in limine is not the proper forum for me to decide whether the information the parties wish to present is the best scientific evidence available; rather, the parties will make their arguments and counterarguments during the hearing and have witnesses provide testimonial evidence on the subject. Thus, while I note NMFS's argument, I do not find it conclusively proven at this time that evidence not considered during the SAR preparation process is *per se* inferior.

The Makah Tribe seeks to reinstate two issues identified in the preliminary determination of issues, which I provided to the parties in advance of the prehearing conference, but which were removed from the Final Agenda. These issues were:

> Is NMFS's determination that there are two stocks of gray whales under the MMPA, the Eastern North Pacific (ENP) and Western North Pacific (WNP) stock appropriate? In particular, is NMFS's determination that the Pacific Coast Feeding Group (PCFG) is a subset of the ENP stock, rather than a separate stock, appropriate?

> Is NMFS's definition of the PCFG as "gray whales observed between June 1 and November 30 within the region between northern California and northern Vancouver Island (from 41°N. lat. to 52°N. lat.) and photo-identified within this area during two or more years" appropriate?

The Makah Tribe argues that these issues are relevant and central to the application of the requirement of best scientific evidence in MMPA. The Makah agree with NMFS's identification of stocks but seeks to present additional evidence to further support these determinations given the best evidence standard. They also argue that, if these issues are not reinstated, the relevance of their evidence concerning populations, stocks, or groups of gray whales may be questioned.

AWI contends that the stock structure of WNP whales does not make the existence of any fact relevant to the waiver proceeding more or less probable. AWI's motion does not specifically seek changes to the Final Agenda, but rather asks me to exclude testimony and evidence related to this issue. AWI argues that the proffered testimony and evidence amounts to a collateral attack on the designation of a WNP stock by arguing that the group of whales NMFS has designated as the WNP stock is actually a feeding group subset of the ENP stock, and that the historical WNP stock may be extirpated. AWI believes this argument is not scientifically sound and goes beyond the scope of this proceeding, particularly since the evidence cannot change the existing legal status of the WNP gray whale stock.

Turning first to the requests to modify the Final Agenda, I note that NMFS, the Makah Tribe, and AWI are all Stipulating Parties and have therefore agreed not to challenge the existing identification of stocks, populations, and groups. The Makah aver they are not challenging these identifications, but rather seeking to supplement the information NMFS provided about the stocks, populations, and groups with additional data and evidence. I see no reason to insert the two items from the proposed agenda, which was a working document provided for the parties'

convenience, into the Final Agenda and the Makah Tribe's motion to do so is **DENIED**. However, the Makah's desire to submit additional evidence about gray whale stocks, populations, and groups *as currently identified* clearly falls within the scope of evidence permissible under the stipulation.

NMFS argues that the last sentence of Issue I.A.3(a), which asks whether the Okhotsk Sea should be included in the migratory range of ENP whales, appears to question whether NMFS has properly identified WNP stock and should be excluded. NMFS appears to have misconstrued my intent in including this question in the Final Agenda. The migratory range of the stock subject to the waiver is a mandatory issue for consideration, and the parties have submitted a plethora of evidence regarding the migratory patterns of ENP whales, including evidence about whether this range has been expanding or changing in recent years. I must consider whether the evidence NMFS has relied on in proposing the waiver is the best available scientific evidence. Such testimony is not irrelevant on all possible grounds, and the request to exclude this sentence from the Final Agenda at this time is **DENIED**.

Similarly, NMFS argues that the last clause of Issue I.B.1(d)(i), which questions whether WNP whales occasionally migrate along with ENP whales to the North American breeding grounds or whether these particular migratory whales are actually a feeding group within the ENP stock, runs afoul of the stipulation. However, the stipulation clearly states that "evidence concerning the various populations, stocks, or groups of gray whales *recognized or supported by the scientific literature* and the impacts of the proposed waiver on them may be considered." To the extent there is scientific evidence available that rebuts the idea that WNP whales occasionally migrate with ENP stock along the North American coast, the stipulation appears to permit its introduction and it is relevant to the likelihood a WNP whale could be taken during the hunt. The

main issues are whether the literature supporting it is the best available scientific evidence, and, if so, whether it should have any impact on the Section 103 analysis of the ENP stock. The request to exclude this language from the Final Agenda is **DENIED**.

Finally, NMFS argues that the question posed in I.B.2., whether an optimum sustainable population (OSP) determination exists for the Pacific Coast Feeding Group (PCFG), is immaterial because the MMPA defines OSPs as, "with respect to any population stock, the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element." I concur that this is the statutory definition, and the MMPA only requires that the regulations consider whether the taking will "be to the disadvantage of those species and population stocks," but not groups within stocks. 16 U.S.C. § 1373(a). Thus, NMFS's motion to exclude Issue I.B.2(b) is **GRANTED**.

Even so, NMFS has explicitly considered the potential impact of the regulations on PCFG whales and included limits on hunting when the PCFG population falls below specified minimums. How those levels were reached and whether they are based on the best available scientific evidence are therefore relevant. I will therefore **GRANT** NMFS's motion to exclude the issue of whether an OSP should be separately determined for PCFG whales, but allow parties to present evidence and testimony regarding how many PCFG whales are, and should be, identified each year and the potential impact of the waiver and regulations on these numbers. As several other items in the Final Agenda raise issues regarding the health and impact of the regulations on the PCFG, excluding I.B.2(b) will not foreclose the parties' ability to present such evidence.

Also on the issue of the PCFG whales, NMFS seeks to exclude the rebuttal testimony of Mr. Schubert and Ms. Owens as it pertains to the designation of PCFG whales as "endangered" under Canadian laws. NMFS argues that these issues are both irrelevant and untimely, and allowing introduction would violate regulatory procedure. I agree that prospective changes to Canadian law are beyond the scope of this proceeding, but disagree that the information in Mr. Schubert's and Ms. Owens' rebuttal testimony should be excluded in its entirety. The proposed regulations contain explicit limitations on the take of whales identified as belonging to the PCFG, and I must ultimately make a recommendation on whether those regulations should be adopted as written, modified, or deleted. *See* 16 U.S.C. § 1373(a). Thus, to the extent the rebuttal testimony contains information that is helpful to me in reaching a determination, I find it would be relevant. However, I consider any discussion of the Canadian government's deliberations to be in the nature of comment or argument, and not substantive evidence. NMFS's motion in limine on this issue is **DENIED**.

AWI has not sought exclusion of any particular issue in the Final Agenda, and its argument is primarily premised on the section of the MMPA that governs waivers. While I am mindful that while the waiver determination only requires due regard for the distribution, abundance, breeding habits, and times and line of migratory movements of the marine mammal stock *subject to the waiver*, the language in the section on regulations requires consideration of existing and future levels of *marine mammal species and population stocks*—not expressly limited to the stock subject to the waiver. 16 U.S.C. § 1371(a)(3)(A); 16 U.S.C. § 1373(b). AWI's argument that evidence regarding WNP whales has no effect on the ENP stock does not account for the fact that the process of developing and promulgating regulations takes a more expansive view of the effect of the waiver than what is required for the waiver itself.

While the categorization of gray whales as part of the ENP or WNP stock is not an issue for the hearing, issues affecting the currently recognized composition of the stocks and the ways in which the constituent members function is clearly relevant to both the waiver and implementing regulations. The question of which scientific evidence in the record is ultimately deemed the "best available" is a matter for determination after the hearing, not at this preliminary stage. The regulations also specifically discuss issues related to the migration of WNP whales and the probability a WNP whale could be taken by mistake. Thus, the testimony is not clearly inadmissible on all grounds, and AWI's motion to exclude portions of the testimony and related exhibits submitted by Drs. Jonathan Scordino, John W. Bickham, and John R. Brandon on behalf of the Makah Tribe is **DENIED**.

3. The Treaty of Neah Bay, the International Whaling Commission, and the Cultural and Historical Significance of Whaling to the Makah Tribe

Issue II.A.2.a asks what the relevance of the Treaty of Neah Bay (the Treaty) is to this proceeding. Sea Shepherd seeks to exclude all testimony and documentary evidence on this issue. The Makah argue it is relevant and material but wish to restructure the way it is presented in the Final Agenda by moving the agenda items relating to the Treaty and the importance of whaling in Makah society to a new section. NMFS's position is that, while it did not rely on the Treaty in formulating the waiver and regulations, it does not object to limited testimony about the Treaty and its significance to the Makah. NMFS does not consider treaties between the United States and Native American tribes to be "international treaties," nor do Sea Shepherd or the Makah Tribe. NMFS also argues that the activities described in II.A.2(b)(vi)(A)-(E) are subject to determination under the International Convention for the Regulation of Whaling and the Whaling Convention Act, not the MMPA, and should therefore be excluded.

The regulations require that the Recommended Decision I issue, as well as the Assistant Administrator's Final Decision, contain "a statement containing a description of the history of the proceedings." 50 C.F.R. 228.20(a)(1); 228.21(b)(1). While the Treaty is not relevant to the scientific issues before me, it is unquestionably relevant to the history of these proceedings. Indeed, the regulations NMFS has proposed directly reference the Treaty in the Background section. Proposed Rule, 84 Fed. Reg. 13604, 13605 (Apr. 5, 2019). Moreover, the proposed regulatory definition of "*U&A* or *Makah Indian Tribe's U&A*" appears to directly reference the Treaty's language securing the Tribe's right of fishing, whaling, or sealing at its "usual and accustomed grounds and stations." *Id.* at 13619. In order for me to prepare a legally sufficient decision, I must consider at least some information regarding the Treaty.

Next, the Makah seek to categorize certain issues in II.A.2.b as stipulated facts, rather than contested issues for the hearing. These issues involve the International Whaling Commission's (IWC) approval of a catch limit for ENP gray whales based on joint requests by the United States (on behalf of the Makah) and the Russian Federation (on behalf of the Chukotka Natives). The Makah argue that any questions about the IWC's criteria for aboriginal subsistence hunting and whether or not the Makah have satisfied such criteria are beyond the scope of this hearing.

I agree with NMFS and the Makah Tribe that, while the fact that the ICRW has determined the Makah Tribe qualifies as an aboriginal subsistence user and has allocated to the United States, on behalf of the Makah, a quota of gray whales, is an important factor to consider in this proceeding, this is not a proper forum for challenging the ICRW's decision. I concur that Issue II.A.2.b.vi is not relevant to these proceedings and should be stricken. The remaining issues in II.A.2.b were generally stipulated to at the June 17, 2019 prehearing conference and

may also be judicially noticed. I therefore do not believe these are contested issues to be explored at the hearing, unless a party who is not a Stipulating Party wishes to raise them. In light of the fact that not all parties to the proceeding are Stipulating Parties, I will not remove these issues from the Final Agenda but will limit any testimony elicited at the hearing by Stipulating Parties on the issue of the IWC allocations.

I must also decide whether to move the issues stemming from the Treaty and the centrality of whaling to the Makah's subsistence, culture, and identity to a new section of the Final Agenda, as requested by the Makah. While Sea Shepherd argues that evidence regarding the cultural importance of whaling 'do[es] not engage in any way with the legally relevant criteria . . . concentrating instead on extra-statutory considerations," I do not agree. NMFS has proposed to place regulatory limitations on the Makah Tribe's use of whale meat and other whale parts. The Makah do not agree with all these limitations. Testimony about the tribe's cultural and subsistence need for whale meat and other whale parts is relevant in determining whether the regulations should be adopted as proposed.

The Makah Tribe also argues that this information is "necessary to properly harmonize the treaty right and the MMPA in NMFS's final decision on the waiver and regulations." Makah Response at 4. Harmonizing the treaty right with the requirements of the MMPA is beyond the scope of my role as the presiding officer in this hearing and must be litigated in an appropriate forum. The Ninth Circuit clearly considered the Treaty a potentially relevant factor for NMFS to consider in reviewing an application for a waiver of the MMPA. *Anderson v. Evans*, 371 F.3d 475, 501 & n.26 (9th Cir. 2002). The court did not did not determine whether the Treaty had been abrogated by the MMPA, and it is unclear whether its analysis is affected in any way by the recent Supreme Court decision in *Herrera v. Wyoming*, 139 S.Ct. 1686 (2019), where the Court

stated, "If Congress seeks to abrogate treaty rights, 'it must clearly express its intent to do so.'" *Id.* at 13-14 (*quoting Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202 (1999)). Even so, as the law currently stands, I am bound by the Ninth Circuit's determination that the procedures of the MMPA apply to the Tribe. Thus, to the extent the cultural and historical information the Makah Tribe wishes to present is relevant to any factors I must consider about the waiver or the implementing regulations, I will grant them some latitude. Nevertheless, I reserve the right to limit testimony from the Makah Tribe's expert on tribal history and its tribal members if the testimony becomes repetitious, cumulative, or strays far afield from whether the regulations appropriately provide for or unduly limit the tribe's current needs and practices.

Sea Shepherd also argues that, if I allow introduction of evidence regarding the Tribe's treaty right and the cultural importance of whaling, I must also consider "the co-tenancy rights of all citizens of the United States," including "testimony concerning the non-consumptive uses of whales by non-tribal members." Sea Shepherd draws this argument from the *Anderson* decision, where the court determined that the language of the treaty granting the Tribe whaling rights "in common with all citizens of the United States" created a relationship between Makah and non-Makah that was similar to a co-tenancy in a natural resource "in which neither party may permit the subject matter of [the treaty] to be destroyed." 371 F.3d at 500.[2] In support of its argument, Sea Shepherd has submitted rebuttal testimony from Dr. Carrie Newell, which NMFS seeks to exclude.

[2] It is not clear whether the Ninth Circuit interpreted the phrase "in common with all citizens of the United States," as used in the Treaty, as the Makah signatories would have understood it to mean. *See Herrera v. Wyoming*, 139 S.Ct. 1686, 1699. Thus, the co-tenancy argument cannot ultimately be resolved as part of this administrative hearing, but rather by a court of competent jurisdiction.

The Ninth Circuit stated that "the Makah cannot, consistent with the plain terms of the treaty, hunt whales without regard to processes in place and designed to advance conservation values by preserving marine mammals or to engage in whale watching, scientific study, and other non-consumptive uses. *Anderson*, 371 F.3d at 500. The court continued, "we conclude that to the extent there is a "fair share" of marine mammal takes by the Tribe, the proper scope of such a share must be considered in light of the MMPA through its permit or waiver process. The MMPA will properly allow the taking of marine mammals only when it will not diminish the sustainability and optimum level of the resource for all citizens. The procedural safeguards and conservation principles of the MMPA ensure that marine mammals like the gray whale can be sustained as a resource for the benefit of the Tribe and others." *Id*. at 502

While Sea Shepherd has gone to great lengths to explain its position that the Treaty and the cultural significance of whaling are irrelevant here, it has not explained why evidence concerning non-consumptive uses of whales by either tribal of non-tribal members would be relevant. As discussed above, the major point of relevance for the cultural issues are the limitations on the consumption and use of whale meat and whale parts in the proposed regulations. Non-consumptive uses are not a mandatory factor for consideration in the waiver analysis, and the proposed regulations do not address non-consumptive uses of whales in connection with the proposed hunt. Nor, to my knowledge, has any other person or group submitted an application for a waiver under the MMPA to "take" gray whales for non-consumptive purposes (for example, to engage in behaviors that may be deemed harassing or annoying to the whales). However, because the statute requires me to give "full consideration of all factors that affect the extent to which such animals are taken," I believe testimony on the impact of the hunt on activities such as whale watching and research may be relevant.

While I do not see how the co-tenancy argument is highly relevant, Sea Shepherd is free to further develop this argument as the hearing proceeds. I am reserving a ruling on Dr. Newell's testimony until after cross-examination of all witnesses who submitted initial direct testimony, at which time I will determine the scope of rebuttal testimony that will be allowed.

In light of the foregoing discussion, I find some of the proposed revisions submitted by the Makah to be logical and to frame the issues more clearly than the Final Agenda currently does. I will **GRANT** the Makah Tribe's request to modify the Final Agenda by making II.A.2.a the main topic for a new Section III. However, I **DENY** the request to modify the language to that proposed in the Makah's Motion. I will move issues II.A.2.a.vii.A-E to this new section, with the understanding that the questions raised therein are relevant to NMFS's proposed restrictions on the consumption and use of whale meat and whale parts, and are not intended to challenge the ICW's determination that the Makah Tribe qualifies as an aboriginal subsistence user. The modifications proposed by the Makah would, in some instances, constitute new issues not identified in the Notice of Hearing and would necessitate reopening the window for additional parties to file notices of intent to participate and additional evidence. In particular, I do not find this an appropriate forum to determine whether it is possible to harmonize the requirements of the MMPA with the Makah Treaty right to hunt whales, as the Makah have asked me to do. Such modifications would result in an unnecessary delay in the hearing process.

4. Compliance with Other Laws, Such as the Endangered Species Act and National Environmental Policy Act

NMFS seeks to exclude Final Agenda issue I.B.1(d)(iv), which asks whether an incidental take permit is required under the Endangered Species Act (ESA) to account for the possibility that a WNP whale would be taken during a hunt. NMFS argues that its compliance with the ESA is not relevant to this proceeding and states it will carry out consultation under

ESA section 7(a)(2) prior to making a final decision on whether to issue the waiver and regulations. NMFS Motion at 11. Both NMFS and the Makah Tribe also state that this issue was subject to the partial stipulation made during the June 2019 prehearing conference and should be removed. *Id.*; Makah Motion at 10.

I discussed my reservations about NMFS's assertion that it will be considering information not included in the hearing record when making its final determination earlier in this order. However, NMFS and the Makah Tribe are correct that the Stipulating Parties did agree to remove this issue from the Final Agenda; the MMC did not object and Ms. McCarty was not present. If an incidental take permit is ultimately required, it would not be mandated under the MMPA but rather under the ESA. Therefore, I **GRANT** the motion to strike this issue.

Similarly, both NMFS and the Makah would like Issue II.A.3(b) stricken, arguing that the parties reached a partial stipulation that NMFS's compliance with NEPA would not be considered during this hearing and "cumulative impacts" are considered only under NEPA, not under the MMPA. In the alternative, NMFS asks me to modify the issue to add "under the MMPA" after the word "necessary."

The question posed in the Final Agenda is not intended to be a collateral attack on NMFS's compliance with NEPA, but rather an attempt to ascertain the regulations' effect on "the marine ecosystem and related environmental considerations." 16 U.S.C. § 1373(b)(3). Precisely what constitutes "related environmental considerations" is undefined. While the term "cumulative impacts" as defined for purposes of NEPA is not included in the text of the MMPA, factors such as the individual and combined impacts of military exercises, marine energy and costal development, and climate change may be relevant to the marine ecosystem and related

environmental considerations under the MMPA for purposes of establishing regulations governing the hunt.

Thus, to the extent that any party may wish to argue the sufficiency of the cumulative impacts analysis included in the Draft Environmental Impact Statement, they must reserve such arguments for another forum. However, the issue of whether any of all of these factors are "related environmental considerations" as contemplated by 16 U.S.C. § 1373(b)(3), and, if so, whether the proposed regulations adequately consider them, remains an open question and is subject to exploration by the parties at the hearing.[3] I will **GRANT** the request to insert the phrase "under the MMPA" at the end of Issue II.A.3(b), in order to clarify that questions related to the sufficiency of the DEIS and other arguments about NEPA compliance are beyond the scope of this hearing.

5. Testimony of Brett Sommermeyer and Margaret Owens

NMFS and Makah seek to exclude or limit written or oral testimony of Mr. Sommermeyer and Ms. Owens because they have not established that their testimony is reliable and probative with respect to the facts at issue. Specifically, NMFS argues Mr. Sommermeyer's testimony is inadmissible because he is an attorney for Sea Shepard and should not be permitted to appear as a witness. As for Ms. Owen's testimony, both NMFS and Makah argue that it should be limited to her personal knowledge.

A major purpose of rulemaking is to permit the broadest possible participation. Adjudication is purposely limited to those who have a strong, direct interest in the outcome, "parties," in order to focus the decision on those interests and permit defense of those interests.

[3] The Stipulating Parties agreed that, to the extend compliance with the MMPA's procedural and substantive requirements involves issues of fact that may also be relevant under other statutes, such as NEPA, these issues could be raised at the hearing. Partial Stip. at 3, ¶ 2.

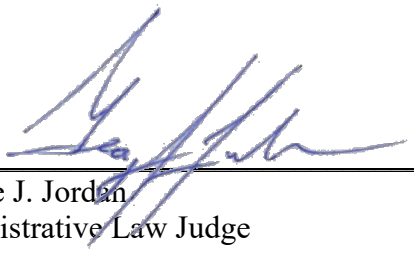
"So long as an administrative agency is not arbitrary, it has some discretion in determining whether to admit expert evidence." *Alabama Ass'n of Ins. Agents v. Board of Governors of Federal Reserve System*, 533 F.2d 224 (5 Cir. 1976), *vacated in part on other grounds* 558 F.2d 729, certiorari denied 98 S.Ct. 1448, 435 U.S. 904, 55 L.Ed.2d 494.

In light of the foregoing discussion, I find Mr. Sommermeyer's testimony to be admissible and **DENY** the request to exclude it in its entirety. As noted above, public comments provide parties and other interested persons the opportunity to participate in the rulemaking process. One of the authorities granted to me as the presiding officer is to receive written comments, and I will consider after receiving all the testimony and evidence whether the arguments therein are helpful in formulating my recommendations. *See* 50 C.F.R. § 228.6(b)(6).

Similarly, I **DENY** the requests by NMFS and Makah to limit the testimony of Ms. Owens to her personal knowledge at this time. As mentioned above, I reserve the right to change these rulings during the hearing should the evidence or arguments at hearing justify such change. Ms. Owens states that "[n]one of the members of PCPW, including myself, have ever claimed 'expert' status," but they have never missed the opportunity for public comment on issue over the past 20 years. PCPW Rebuttal Response at 1. Ms. Owens argues that PCPW relied on a number of research papers and the 2015 DEIS, which accompanied NMFS's testimony, in formulating its comment. *Id.* It is a settled principle of administrative law that, "[p]rovided that it is relevant and material, hearsay is admissible in administrative proceedings." *Hoska v. U.S. Dep't of the Army*, 677 F.2d 131, 138 (D.C. Cir. 1982). Not only is hearsay admissible, but under the appropriate circumstances, it may constitute substantial evidence. *Johnson v. United States*, 628 F.2d 187,190–91 (D.C. Cir. 1980) (citations omitted). Accordingly, even though some of Ms. Owen's testimony may not be entirely based off of personal knowledge, it can nevertheless

be relevant to the waiver and regulations. I note again the importance of the public participation process and my role to fully develop the rulemaking record for the benefit of the Assistant Administrator.

IT IS SO ORDERED.



George J. Jordan
Administrative Law Judge

Done and dated this 9th day of October, 2019, at
Seattle, Washington.