

HONORABLE GEORGE J. JORDAN
ADMINISTRATIVE LAW JUDGE

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

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

**NATIONAL MARINE FISHERIES SERVICE’S RESPONSE TO EXPEDITED
MOTION FOR STAY**

I. INTRODUCTION

The National Marine Fisheries Service (“NMFS”) opposes the unsupported and premature motion for a stay filed by Animal Welfare Institute, Sea Shepherd, and Peninsula Citizens for the Protection of Whales (collectively “NGOs”). As reflected in its Notice of Intent to prepare a Draft Supplemental Environmental Impact Statement (“DSEIS”) dated February 27, 2020, NMFS is preparing the DSEIS to update its analysis under the National Environmental Policy Act (“NEPA”) with the information considered and thoroughly examined by the parties in the hearing record of this proceeding. *See* 85 Fed. Reg. 11347. Contrary to NMFS’s intention as stated in notice for the DSEIS, the NGOs speculate that the forthcoming NEPA analysis will contain material information outside the hearing record. They have no basis to make this assertion, and their motion is premature as a result. The NGOs seek to circumvent the process

established under the Administrative Procedure Act (“APA”), Marine Mammal Protection Act (“MMPA”), and in the NOAA hearing regulations and to obstruct the efficient and expedient resolution of this proceeding.

NMFS entirely agrees the presiding officer should have a full record upon which to base his decision, and that is exactly what the Court has before it now. Updating NMFS’s NEPA analysis consistent with the record currently before the Court is wholly consistent with this goal and harmonizes NMFS’s responsibilities under the APA and MMPA with those under NEPA. The NGOs will have their opportunity to review the DSEIS and to participate in the public comment period. If they believe the DSEIS raises material information inconsistent with the information in the existing hearing record, they will have an opportunity to seek a remand of the record to the presiding officer. *See* 50 C.F.R. 228.21 (Assistant Administrator may remand hearing record to presiding officer for fuller development). For these reasons and as set forth below, the NGO’s motion to stay this proceeding should be denied.

II. BACKGROUND

The Makah Tribe’s request to waive the moratorium on the take of Eastern North Pacific (“ENP”) gray whales under the MMPA and resume a ceremonial and subsistence hunt has been pending with NMFS since 2005. Since receiving the Tribe’s request a number of events have contributed to the length of time it has taken to reach this point in the waiver process as NMFS has endeavoured to balance its various responsibilities under the MMPA, APA, NEPA, and the Makah Tribe’s Treaty of Neah Bay.

NMFS first issued a DEIS on this matter in 2008. *See* 73 Fed. Reg. 26375 (May 9, 2008). In 2012, NMFS terminated that 2008 DEIS and opened a new scoping process to allow the

agency to consider several substantive scientific issues related to gray whales that arose after NMFS published the 2008 DEIS. *See* 77 Fed. Reg. 29967 (May 21, 2012). NMFS issued a new DEIS in 2015 analyzing the Makah Tribe's request. *See* 80 Fed. Reg. 13373 (March 13, 2015). In April 2019, NMFS commenced this proceeding. *See* 84 Fed. Reg. 13604 and 84 Fed. Reg. 13639 (April 5, 2019). Then, in May 2019, NMFS declared an unusual mortality event ("UME") for ENP gray whales, which the Court noticed as a new issue in its Announcement of Hearing and Final Hearing Agenda. 84 Fed. Reg. 30088 (June 26, 2019) (outlining the steps any person could take to participate in the hearing on the UME issue).

The parties devoted substantial amounts of their written testimony to the UME leading up to the hearing.¹ Similarly, at the November 2019 hearing, the parties devoted substantial additional amounts of oral testimony and direct and cross examination to the UME.² All of this information is contained in the hearing record before the Court. At the close of the hearing, the Court established a 45-day period after filing of the hearing transcript for written comments from interested persons on the proposed waiver and hunt regulations and for post-hearing briefs and proposed findings and conclusions from the parties. Tr. Vol. 6, pp. 16-17 (Judge Jordan).

While the 2015 DEIS of course did not expressly address the 2019 UME, it did examine a previous UME for ENP gray whales that occurred in 1999-2000. ALJ Ex. 6, 2015 DEIS Sections 3.4.3.1.5, 3.4.3.1.7, 5.1.3.8. Given that the 2019 UME was addressed at length during

¹ *See, e.g.*, NMFS Init. Dir. Testimony re UME, Third Declaration of Dr. Shannon Bettridge, August 6, 2019, NMFS Init. Dir. Testimony re UME, Fourth Declaration of Chris Yates, August 6, 2019; Makah Init. Dir. Testimony re UME, Declaration of John Brandon, August 6, 2019; AWI Init. Dir. Testimony, Declaration of D.J. Schubert, May 21, 2019; AWI Init. Dir. Testimony re UME, Declaration of D.J. Schubert, August 6, 2019; AWI Rebuttal Testimony, Rebuttal Testimony of D.J. Schubert, August 6, 2019.

² *See, e.g.*, Tr. Vol. 1, pp. 20-22, 27, 62-67 (Yates testimony); Tr. Vol. 1, pp. 95-97, 117-21 (Bettridge testimony); Tr. Vol. 4, pp. 23-27 (Schubert testimony).

the hearing process, NMFS determined it would be consistent with NEPA to supplement the 2015 DEIS. As a result, on February 27, 2020, NMFS published its Notice of Intent to prepare a DSEIS that would update the agency's NEPA analysis consistent with the information addressed at the hearing.³ 85 Fed. Reg. at 11348. In the Notice, NMFS also indicated it would address "additional relevant information" in the DSEIS. *Id.* Such information will include updated population estimates and resulting updated WNP strike analysis that was addressed in the 2019 waiver proceeding record but post-dated the 2015 DEIS. The Notice also indicated it would take into consideration the Court's recommended decision (85 Fed. Reg. at 11348), which itself might require additional analysis under NEPA if it varies in a meaningful way from the alternatives NMFS has considered. By proceeding in this manner, NMFS helps ensure the waiver process may continue to move expediently towards a final determination by the NMFS Assistant Administrator and not suffer further delay, while engaging in a transparent NEPA process that will allow for public input.

III. APPLICABLE LAW

The party requesting a stay bears the burden of showing that the circumstances justify the request. *Nken v. Holder*, 556 U.S. 418, 433-34 (2009). As a result, the NGOs bear the burden here.

Various provisions under NOAA's hearing regulations are also applicable. As an initial matter, "the regulations shall be construed to secure the just, speedy, and inexpensive

³ The NGOs attempt to make much out of NMFS's email informing the parties of the upcoming notice of intent to issue the DSEIS. NGOs' Motion at 3, 5, n.2. Contrary to their unfounded assertions, NMFS was not hiding anything as there is nothing to hide. The intent of DSEIS is to update the NEPA analysis consistent with the hearing record. NMFS informed the parties of the notice as a courtesy. That the agency was somehow nefariously trying to hide the notice from the court, a public document that they were informing all of the parties of, is absurd.

determination of all issues raised with respect to any waiver or regulation.” 50 CFR 228.3. The presiding officer has various enumerated powers intended to allow for appropriate management of the proceeding. *See* 50 CFR 228.6. Consistent with this Court’s prior ruling and as the NGOs acknowledge, the Court may grant relief like a stay where “it would promote the ‘efficient conduct of the proceeding,’ and would not prejudice any party.” NGOs’ Motion at 3; Order Denying Motion to Extend Hearing Schedule, May 20, 2019, p. 3; 50 CFR 228.6(a)(5). In addition to these overarching procedural requirements, the NOAA hearing regulations state that at the commencement of the hearing the presiding officer shall introduce “the draft Environmental Impact Statement if it is required.” 50 CFR 228.16(b). By only referencing the DEIS, the regulations contemplate that subsequent NEPA documents, such as a final environmental impact statement, necessarily will be developed after the presiding officer issues his recommended decision. Once the presiding officer has made a recommendation, the hearing regulations provide the Assistant Administrator with the option to remand the matter if fuller development of the record is needed. *See* 50 CFR 228.21(a).

With regard to formal rulemaking under the APA, the Act contemplates a hearing process that allows parties to present their own evidence and conduct examination of the other parties’ witnesses and evidence to produce a record for decision. *See* 5 U.S.C. 556(d), (e). When information or analysis is developed subsequent to a hearing, reopening of the record is only required where the information constitutes material information inconsistent with the information in the existing record. *See* 5 U.S.C. 556(e) (for purposes of official notice, a party is entitled to contest “material facts” not appearing in the record). Analogous principles apply in the context of informal rulemaking. There is no requirement to reopen the public comment period for

information post-dating a proposed rule where the subsequent information is “consistent with the information presented in the proposed rulemaking.” *Alaska v. Lubchenco*, 825 F. Supp. 2d 209, 224 (D.D.C. 2011) (citing *Solite Corp. v. E.P.A.*, 952 F.2d 473, 484 (D.C. Cir. 1991); *Kern County Farm Bureau v. Allen*, 450 F.3d 1072, 1080 (9th Cir. 2006)). “Were it otherwise, an agency could find itself stuck in an infinite feedback loop of public comments on responses to public comments.” *Id.* The same holds true in formal rulemaking. Absent material information inconsistent with the existing record, there is no need for—or basis to—reopen the record.

IV. ARGUMENT

The NGO’s request for stay is premature and based upon speculation—speculation contrary to the facts at hand. Staying this proceeding based on the NGO’s unsupported assertions would not promote administrative efficiency. Rather, a stay would have the opposite effect as delay now could spell more delay later as the time period between the current record for this proceeding and future events grows longer. For similar reasons, the parties, including NMFS, would be significantly prejudiced by prolonging this resource-intensive administrative process. Such prejudice is in addition to the anticipated prejudice the Tribe would suffer from further delay of a determination on its request to exercise its treaty right that has been pending since 2005.

A. The NGO’s Motion is Premature and Speculative.

The NGOs have not established they are entitled to a stay of this proceeding. First, their motion is based entirely on speculation and the unsupported premise that there is material new information that must be considered by the Court. They have not submitted or identified any new, material information. Moreover, the NGO’s speculation is entirely contradicted by

NMFS's Notice of Intent that explains NMFS's plan to update its 2015 NEPA analysis consistent with the information presented by the parties leading up to and at the November 2019 hearing. The Notice indicates the subjects intended to be updated in the DSEIS include the 2019 UME, the NMFS hunt proposal, and additional relevant information that was addressed at the hearing (e.g., ENP, WNP, and PCFG population estimates post 2015). All of this information was the subject of the hearing, which the NGOs themselves acknowledge. NGOs' Motion at 4. Yet, despite having a full opportunity to present their own direct and rebuttal evidence on these topics and to cross examine the other parties' witnesses, the NGOs now raise the spectre that the DSEIS will raise new information not contained in the existing record. However, the Notice for the DSEIS does not support that assertion, and the NGOs otherwise have no basis to assert there is material new information inconsistent with the existing record developed over eight months and six hearing days that warrants a stay of these proceedings or a reopening of the record.

Second, the NGOs' motion is premature and ignores the process established in NOAA's hearing regulations. As explained above, NMFS's Notice of Intent to prepare the DSEIS reflects the agency's intention to update its NEPA analysis consistent with the existing record and therefore provides no basis at this time to stay these proceedings. But even if that were not the case, and the DSEIS *did* raise substantive new issues, now is not time to raise this challenge, and a stay of the proceedings at this stage is not the proper vehicle. Instead, once NMFS issues the DSEIS, the NGOs will have the opportunity to fully participate in that process. They will have an opportunity to review the NEPA analysis and provide public comments to NMFS. That will be the proper time for them to consider whether the DSEIS raises any material new information inconsistent with the existing record such that reopening of the hearing would be required. If in

their view it does, the NGOs may seek relief from the NMFS Assistant Administrator who may remand the matter back to the presiding officer for further development of the record, if necessary. *See* 50 CFR 228.21(a). Because the NGOs have failed to meet their burden to show that the circumstances warrant a stay, their request should be denied.

B. The NGOs' Unsupported Request for a Stay Will not Promote Efficiency.

The NGOs attempt to delay this proceeding frustrates the requirements of NOAA's hearing regulations to "secure the just, speedy, and inexpensive determination of all issues," 50 CFR 228.3, and runs afoul of the overarching principle of judicial efficiency. We live in an ever-changing world where new information and new science are constantly being discovered and developed. Yet the current hearing record before this Court reflects the best available science as it stands today—and an updated DSEIS similarly would reflect this information. On prior occasions, substantial and material new information has led to significant delays in this matter. This is not one of those occasions. However, if the Court grants the NGOs' request, such a situation could develop. During an open-ended stay of the formal rule-making process, new information could arise that the NGOs will surely argue was also not considered at the hearing, resulting in a request for an additional hearing, and an inability to ever reach a final determination in this proceeding. By contrast, the Court's expedient completion of this phase of the waiver proceeding will help ensure the record remains up-to-date, does not require further process, and allow the NMFS Assistant Administrator to make a timely final determination. An unwarranted delay would only serve the NGOs' interests—to slow the process to the point where more process is required. This is the opposite of efficient.

That is not to say that new information will not be considered as it arises. As was discussed during the hearing and as the record reflects, the proposed waiver, hunt regulations, and permit process are set up to address potential changes and new information in the future. *See, e.g.,* NMFS Init. Dir. Testimony, Declaration of Chris Yates, April 5, 2019, p. 12, ¶ 28, p. 16, ¶ 37. However, if we are never able to obtain a final determination from the NMFS Assistant Administrator on whether the proposed waiver and regulations meet the requirements of the MMPA due to the *potential* for new information, this effectively results in a denial of the waiver. To alter a famous saying, waiver delayed, is waiver denied. That cannot be considered efficient.

Notably, because the stated intent of the DSEIS is to update the NEPA analysis with the information considered at the hearing, there is no need for the Court to wait for the DSEIS before issuing its recommended decision. The Court has a complete record before it now, and following the comment period and briefing, will be fully informed to issue its recommended decision. By waiting to issue the DSEIS until after the Court issues its recommended decision, NMFS may address any proposed revisions to the hunt regulations the Court may adopt and ensure the NEPA analysis is fully up-to-date and ready for the NMFS Assistant Administrator to consider. This approach contributes to efficiency.

Moreover, issuing the DSEIS after the Court's recommended decision is also consistent with NOAA's hearing regulations. The regulations state that the presiding officer shall introduce "the draft Environmental Impact Statement if it is required." 50 CFR 228.16(b). By only referencing the initial *draft* NEPA document, the regulations clearly contemplate that subsequent NEPA documents, such as a final environmental impact statement ("FEIS") with responses to public comments, necessarily will be developed *after* the presiding officer's recommended

decision. If the complete NEPA analysis had to be before the presiding officer, including FEIS and Record of Decision, that would turn the presiding officer into the decision-maker. That is of course not how the APA nor NEPA work. The regulations by design contemplate the development of subsequent NEPA documents. Accordingly, the regulations do not require, nor is it necessary to delay this proceeding while NMFS completes the DSEIS, especially given NMFS's stated intention for the analysis, which is to update it for the hearing record *already* before the Court.

Finally, proceeding in this fashion also harmonizes NMFS's responsibilities under the APA and MMPA with those under NEPA. As long as the material information is contained in the hearing record, that is sufficient for purposes of the APA and MMPA. As long as NMFS adequately considers the impacts of the proposed action and reasonable alternatives, NEPA is satisfied. *See Sierra Club v. Sigler*, 695 F.2d 957, 967 (5th Cir. 1983) (agencies "must mesh the requirements of NEPA with their own governing statutes as far as possible"). Contrary to the NGOs assertion, NMFS's development of the DSEIS is not a "unilateral" or "one-sided" process. NGOs' Motion at 8. Just like other members of the public, the NGOs will have a full opportunity to review the DSEIS and to participate in the public comment period. And, as a party to this proceeding, if in their view the DSEIS presents material new information that is not already part of the existing record, the proper and efficient course would be for the NGOs to seek relief from the NMFS Assistant Administrator by asking for a remand to this Court. Thus, the court should deny the requested stay.

C. The NGOs' Unsupported Request for a Stay is Prejudicial.

For these same reasons the NGOs' delay is not efficient, it is also prejudicial. For NMFS as well as the other parties, this proceeding is extremely resource intensive. The more protracted it becomes, the more the agency and other parties will have to continue to devote their limited resources to its resolution. The longer this proceeding takes, the more likely more process will be required. This prejudices all the parties.

Any further unwarranted delay will also substantially prejudice the Makah Tribe's ability to obtain a determination on its 2005 request. No doubt the Tribe will address this prejudice in more detail in its own filing. It is worth recalling the Tribe's initial response to the NGOs' first request to delay this proceeding, which noted "that seemingly harmless, short-term delays have added up to" a now 15-year wait for the Tribe. Tribe's Response to Motion to Extend Waiver Proceeding Scheduled, May 15, 2019, p. 6. We have already seen the short-term delays continue to add up. We subsequently have had a three-month delay to begin the hearing, and then an additional delay for the finalization of the hearing transcript. Further unsupported delay would prejudice the parties and should be denied.⁴

⁴ As reflected above, the NGOs have failed to establish a delay is warranted. If, however, the Court is inclined to consider their request, we would urge the Court to complete the public comment period and require the parties to file their post-hearing briefs/proposed findings and conclusions. This will ensure we have completed the process required by the hearing regulations, and the Court will be in a position to issue its recommended decision.

V. CONCLUSION

For the reasons set forth above, the NGOs' motion for stay should be denied.

Respectfully submitted this 10th day of March, 2020.

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