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)

MAKAH TRIBE'S RESPONSE TO MOTION TO STAY WAIVER PROCEEDINGS

I. INTRODUCTION

The Animal Welfare Institute, Sea Shepherd, and Peninsula Citizens for the Protection of Whales (NGO Parties) again seek delay. In previous attempts, the NGO Parties complained that the factual record submitted by the National Marine Fisheries Service (NMFS) was too big and required more time for response. Then they wanted to attend a wildlife conference in Switzerland. Now they complain that the closed factual record is incomplete, and request more time to reopen the hearing to consider a draft supplemental environmental impact statement (DSEIS)—even though the express purpose of the DSEIS is to take into account factual evidence already presented at the hearing and the anticipated Administrative Law Judge recommended decision on the proposed waiver.

What the NGO Parties truly propose is an endless loop of process, in which waiver proceedings develop information which requires more review under the National Environmental Policy Act (NEPA), and NEPA review then triggers more waiver proceedings, *ad infinitum*. The NGO Parties' approach has no legal support and would deprive the Makah Tribe of its Treaty rights, conflict with the Marine Mammal Protection Act (MMPA) authorization of a waiver from the take moratorium, and fail to follow the detailed instruction of NMFS's hearing regulations.

It has now been fifteen years since the Makah Tribe submitted a request for a waiver from the MMPA take moratorium, and nearly a full year since the proposed regulations and notice of hearing were published on April 5, 2019. *See* 84 Fed. Reg. 13639 (April 5, 2019). It has been almost nine months since the ALJ expressly identified the current unusual mortality event and whether it merited delay of the waiver proceedings as issues to be considered at the hearing. *See* 84 Fed. Reg. 11348 (June 26, 2019). The NGO parties submitted testimony and conducted extensive cross-examination on these topics. The parties have all had ample opportunity to develop and submit evidence on every relevant issue, including the UME and whether it merits postponing the waiver proceedings. The record is exhaustive and complete, and there are repeated opportunities for comment in the future. The NGO Parties' latest salvo does not actually identify any insufficiency in the record or extensive proceedings, but rather is simply another attempt at delay. The motion should be denied.

II. BACKGROUND

In 2005, the Makah Tribe submitted a request for a waiver from the take moratorium under the Marine Mammal Protection Act, 16 U.S.C. 1373(a)(3)(A), to carry out a subsistence and ceremonial hunt of eastern north pacific gray whales. On May 9, 2008, NMFS released a draft environmental impact statement (DEIS) pursuant to the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, but later terminated that DEIS in 2012 because of new scientific information. 77 Fed. Reg. 29967 (May 21, 2012). In that 2012 notice the agency announced its intent to prepare a new DEIS and open a scoping process. *Id.* On March 13, 2015, NMFS released a new DEIS for public comment that included a no-action alternative and five action alternatives. 80 Fed. Reg. 13373 (March 13, 2015). On April 5, 2019, NMFS published a proposed waiver and regulations and notice of hearing in the Federal Register, made

public supporting direct testimony and evidence, and set a hearing on the proposed regulations for August 12, 2019. *See* 84 Fed. Reg. 13639 (April 5, 2019). At the same time, NMFS released public comments on the DEIS and responses to those comments. *Id.*

On May 5, 2019, Animal Welfare Institute and Sea Shepherd moved to delay the proceedings. AWI complained about the "4900 pages" of documents submitted by NMFS, and the "enormous hardship on AWI's ability to participate, especially in light of the enormous amount of information, including new information, materials that may not have been available to the public, and a number of reports and studies, released by NMFS." AWI Expedited Motion to Extend Waiver Hearing Schedule at 2 (filed May 10, 2019).

The Makah Tribe explained in response that the NGO Parties "fail to recognize or acknowledge that it is exactly these kinds of seemingly harmless, short-term delays that have added up to a 14-year wait for the Tribe . . .The harm to the Tribe from not being able to hunt whales in that time – or even longer since its last hunt in 2000 – has been significant." Makah Response at 6; citing Decl. of Patrick DePoe. The ALJ found that "the Makah Tribe has advanced a well-reasoned argument as to why it would be prejudiced by a delay in these proceedings" and denied the motion to extend the waiver hearing schedule. May 20, 2019, Order Denying Sea Shepherd's and Animal Welfare Institute's Expedited Motions to Extend Waiver Proceeding Schedule at 5. Judge Jordan also noted that any new issues could be raised at the prehearing conference, and that all reasonable efforts would be made to hold a hearing prior to the end of the fiscal year on September 30, 2019. *Id.*

At the June 17, 2019, prehearing conference, the issue of the UME was raised and acknowledged by multiple parties. The NGO Parties again sought a delay in the hearing, this time due to an alleged conflict with a later-scheduled conference in Geneva, Switzerland. *See*

Request to Move Hearing Date in Waiver Proceeding, at 1-2. In a brief submitted following the pre-hearing conference, AWI explained that its sole witness D.J. Schubert sought to attend meetings and awards ceremonies prior to the start of the Conference on International Trade on Wild Fauna and Flora on August 17, 2019. Sea Shepherd filed a similar motion, requesting a delay because two of its attorneys also wished to attend the Switzerland meeting.

On June 26, 2019, Judge Jordan issued a notice of final agenda for publication in the Federal Register. 84 Fed. Reg. 30088 (June 26, 2019). The notice identified as new issues the questions: “Is the ENP stock currently undergoing an Unusual Mortality Event (UME)?” and “If so, does this merit further consideration before a waiver may be granted?” 84 Fed. Reg. 30092.

On July 8, 2019, Judge Jordan granted AWI’s and Sea Shepherd’s motions to delay the hearing in order to attend the Geneva conference, and extended the hearing to a date mutually agreeable for the parties, “likely between September 30 and October 11, 2019.” Order Granting Request to Change Hearing Date at 6 (July 8, 2019). The parties held a prehearing telephonic conference to determine scheduling and revised deadlines.

On August 2, 2019, Judge Jordan issued a notice of changed hearing date and deadlines in the Federal Register. 84 Fed. Reg. 37837. The notice publicly set the hearing for November 14, 2019, and the deadline to submit testimony related to the UME for August 8, 2019. *Id.* Rebuttal testimony on the UME issue was due September 11, 2019. *Id.* More than ten weeks was allotted between the notice of final agenda identifying the UME as an issue and the rebuttal testimony deadline. These revised deadlines meant that all parties had at least ten additional weeks to develop testimony that could be submitted related to the UME and whether it merited delay in the granting of a waiver. AWI, NMFS, and the Makah Tribe each submitted extensive direct and rebuttal testimony regarding the UME and whether it merited delay in the

proceedings. Indeed, AWI submitted testimony on the UME in its initial direct testimony filed on May 20, 2019. *See* Schubert Decl. ¶ 25.

In the UME focused filings, the NGO Parties raised concerns regarding the uncertainty presented by the UME. *See* Decl. of DJ Schubert re: UME. NMFS and Makah Tribe witnesses explained that the eastern north pacific (ENP) stock is very robust, with a recent abundance estimate of approximately 27,000 whales, and all available evidence suggests that the UME has no effect or a positive effect on the Pacific Coast Feeding Group (PCFG) and western north pacific (WNP) groups of whales. The very conservative strike limit of 2.5 whales per year on average meant that irrespective of the UME, the Makah Hunt will have little to no discernible impact on ENP whales and will protect all three groups of whales in accordance with the objectives of the International Whaling Commission and Marine Mammal Protection Act. *See generally*, Decl. of Brandon re: UME. If there is a truly unanticipated occurrence, UME or otherwise, the very short duration of the proposed waiver, the requirement to obtain at least three MMPA hunting permits over the ten year waiver period, regulation of the hunt under Tribal law, and NMFS' discretion to modify the waiver regulations and hunting permits all build in adaptive management and ongoing rigorous review. *Id.*; *see also* Decl. of Greig Arnold at ¶ 24 and Exh. M-0603.

From November 14, 2019 to November 21, 2019, the parties and their attorneys participated in a hearing. Each of the NGO Parties, NMFS, and the Makah Tribe presented testimony and conducted cross-examination regarding the potential impact of the UME on gray whales and its implications for the proposed waiver. As one relevant example, Makah expert witness Dr. John Brandon explained that the world's foremost scientific body on whaling, the International Whaling Commission's Scientific Committee, had thoroughly evaluated the

likelihood of future UMEs in its modeling of gray whale populations and determined that the hunt would meet IWC conservation objectives, one of which is equivalent to the "optimum sustainable population" requirement of the MMPA. Dr. Brandon noted that the proposed Makah hunt was one of the most conservative hunts ever presented to the Scientific Committee, both due to the limited number of strikes allowed and the short time duration, and testified that delay of the waiver proceedings was not necessary to conduct further evaluations. Dr. Brandon was then subject to extensive cross-examination on the subject of the UME by the NGO Parties. Presenting the contrary view, AWI witness D.J. Schubert set forth his opinion that the UME merited delay, and he was subject to cross-examination.

On February 27, 2020, NMFS published a notice of intent to publish a DSEIS relating to the potential approval of the proposed waiver and regulations. The reason for the DSEIS is stated as follows:

> A new issue of fact that occurred after issuance of the 2015 DEIS but was addressed at the agency hearing is the Unusual Mortality Event (UME) for ENP gray whales declared by NMFS in May 2019…Because information concerning the ongoing 2019 UME *was presented at the agency hearing* but not expressly addressed in the 2015 DEIS, NMFS has determined that it would now benefit both the public and agency decision making to prepare a supplement to the DEIS. NMFS expects that the supplement will incorporate the information presented at the hearing regarding the 2019 UME and any additional relevant information and will take into consideration the Administrative Law Judge's recommended decision. NMFS also intends to expressly identify the hunt proposal, as described in the proposed rule and addressed at the agency hearing, as a separate action alternative in the supplement.

85 Fed. Reg. 11348 (emphasis added). Thus, NMFS's intent is to consider information regarding the UME that has become available *since* the 2015 DEIS was published but was the subject of testimony and cross-examination at the hearing.

On March 3, 2020, the NGO Parties moved to stay the waiver proceeding for an indeterminate amount of time pending completion of the DSEIS. The NGO Parties also

request additional time to consider whether the DSEIS merits reopening the waiver proceedings. NMFS filed a response brief in opposition to the motion to stay, and the Makah Tribe also opposes the motion.

III. ARGUMENT

The NGO Parties argue that they have an unlimited and absolute right under the Administrative Procedure Act, 5 U.S.C. § 556(d), to develop and present evidence in the waiver proceeding whenever new circumstances may arise. This contention is incorrect. NMFS hearing regulations implement the APA by providing detailed procedures for a waiver hearing, which these proceedings have followed. The factual record is now closed and the remaining steps for the ALJ are to accept post-hearing briefs and written comments, and prepare and transmit a recommended decision and the record developed in the waiver proceeding to the Assistant Administrator. A delay is not warranted, particularly to consider evidence that has largely already been presented at the hearing and will be considered in the recommended decision.

A. Granting a Stay Would be Contrary to the APA and NMFS's Hearing Regulations.

Appellants note that the APA provides that "[a] party is *entitled* to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required *for a full and true disclosure of the facts*." Motion at 3 (citing 5 U.S.C. § 556(d) (emphasis added in motion). They surmise that the DSEIS will include "updated analyses and new information," assert that the Parties will not have an opportunity to submit rebuttal evidence or conduct cross examination as to that new information, and then argue that the recommended decision will invariably be based on an incomplete factual record, in alleged violation of 5 U.S.C. § 556(d).

This string of arguments features many flaws. The core error is that it confuses and conflates the ALJ's recommended decision with the ultimate decision on the waiver and proposed regulations by the NMFS Assistant Administrator. NMFS hearing regulations dictate the implementation of the APA for this proceeding, including 5 U.S.C. § 556(d). To comply with the APA, the ALJ must only provide a fair opportunity for parties to submit evidence and conduct cross-examination in accordance with NMFS hearing regulations. 50 C.F.R. part 228. A fair opportunity has been provided.

These proceedings have provided exhaustive opportunity for presentation of evidence and cross examination. There has been opportunity for any interested person or entity to participate as a party, 50 C.F.R. § 228.5, to submit direct testimony, 50 C.F.R. § 228.17, to subject adverse parties' witnesses to cross-examination, 50 C.F.R. § 228.18, and to submit written arguments with proposed findings of fact and conclusions of law, 50 C.F.R. § 228.19. Each party and the general public had notice of the issues at the hearing and opportunity to submit direct and rebuttal evidence. Each party and the general public had notice of the UME issue on June 26, 2019, and more than two months to submit direct and rebuttal testimony. The parties then had opportunity to conduct extensive cross examination over a six-day hearing. These facts demonstrate that throughout the proceedings, the NGO Parties fully availed themselves of the opportunity to participate and contest NMFS's proposed waiver and regulations. As a result, under NMFS's hearing regulations, the requirements of the APA have been met, and the development of the factual record is complete. *See* Tr. V6 (Judge Jordan) at 11:24-25 ("Testimony in this matter was closed yesterday.").

The only remaining steps for the ALJ are to receive the post-hearing briefs and public comments and issue a recommended decision. 50 C.F.R. §§ 228.19, 20. The APA and NMFS

regulations make clear that the decision is to be based on the record already developed in the hearing. The APA provides that "[t]he transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision" for the ALJ's recommended decision on the waiver and regulations. 5 U.S.C. § 556(e). Under NMFS's regulations, following the hearing, oral and written argument may be presented, but "shall be limited to issues arising from direct testimony *on the record*." 50 C.F.R. § 228.19(c) (emphasis added). "Promptly after expiration of the period for receiving written briefs, the presiding officer shall make a recommended decision based *on the record*." 50 C.F.R. § 228.20 (emphasis added). In short, the waiver proceeding and development of factual record is complete for purposes of the ALJ's recommended decision, which must be based on that record.

The issue of whether to consider new information prior to approval of the waiver and regulations is left to the Assistant Administrator. Once the Assistant Administrator receives the recommended decision, there will be public comment period on the ALJ's recommended decision, 50 C.F.R. § 228.20(d), and the Assistant Administrator will have broad discretion in making a final decision. At that time, the Assistant Administrator "may affirm, modify, or set aside, in whole or in part, the recommended findings, conclusions and decision of the presiding officer," or decide to "remand the hearing record to the presiding officer for a fuller development of the record." 50 C.F.R. § 228.21(a). In this instance, it means that if significant new information develops in the coming months that pertains to the proposed waiver and regulations, it will be left to the discretion of the Assistant Administrator to evaluate such information and, if warranted, modify findings of fact or remand for further development of the factual record by the ALJ. The APA and NMFS hearing regulations are being followed and the NGO Parties' arguments to the contrary are without merit.

The NGO Parties repeatedly allege that they are being deprived of due process because of their anticipated inability to provide rebuttal and cross-examination to information they think might be developed as part of the DSEIS. This argument misrepresents the APA's requirements and the remaining procedures. Under the APA, the right to develop a factual record through cross-examination pursuant to 5 U.S.C. § 556(d) has limits. The APA "mandates only 'such cross-examination as may be required for a full and true disclosure of the facts'…. Cross-examination is thus not an absolute right in administrative cases." *Cent. Freight Lines, Inc. v. United States*, 669 F.2d 1063, 1068 (5th Cir. 1982) (citing 5 U.S.C. § 556(d)); *Barrett v. Berryhill*, 906 F.3d 340, 345 (5th Cir. 2018). The overarching requirement is to provide "some mechanism for interested parties to introduce adverse evidence and criticize evidence introduced by others." *Mobil Oil Corp. v. Fed. Power Com.*, 483 F.2d 1238, 1258 (1973); *see also Bethlehem Mines Corp. v. Henderson*, 939 F.2d 143 (4th Cir. 1991). As set forth above, the ALJ's careful application of the NMFS hearing regulations meets the requirements of the APA and the NGO Parties were provided abundant opportunity to present evidence and conduct cross-examination, including on the UME issue.

Furthermore, the NGO Parties will have ample opportunity to respond in the future. They are provided a 45-day comment period on the DSEIS. 85 Fed. Reg. 11347. They will also be provided a 20-day comment period on the ALJ's recommended decision, where they could urge the Assistant Administrator to modify findings of fact or remand for more fact development on the UME issue. 50 C.F.R. § 228.20(d). If the waiver is approved, there will be entire additional administrative processes, the applications for hunt permits, which will also afford repeated opportunity for public comment and the potential for an additional hearing. *See generally* 16 U.S.C. § 1374. If new information arises in the DSEIS process, there is abundant

opportunity for the NGO Parties to express their evaluation of that new information. Every indication in these proceedings thus far is that the NGO Parties will make every use of the many remaining opportunities for public comment under both NEPA and the MMPA. The allegations of a deprivation of due process are baseless.

B. The NGO Parties Mischaracterize the Role of NEPA in the Decisionmaking Process.

The NGO Parties contend that "the draft EIS and its environmental analyses, including public comments and the agency's responses, must be completed prior to the hearing so that they may inform the presiding officer's recommended decision." Motion at 6. This happened. NMFS properly submitted the draft EIS, public comments, and responses to those comments to inform the waiver proceedings and the ALJ's recommended decision, and the requirement of 50 C.F.R. § 228.16 is therefore fulfilled.

While their argument is not clear, the NGO Parties appear to suggest that all factual development that occurs under NEPA must be complete prior to the ALJ's recommended decision. This argument is facially invalid. NMFS's regulations expressly require submission of a "*draft* Environmental Impact Statement," not a supplemental EIS or a final EIS. 50 C.F.R. § 228.16 (emphasis added). A draft EIS suffices because the ALJ's recommended decision is not final agency action. Rather, the NEPA requirements apply to the decision of the Assistant Administrator, who makes the "final decision on the proposed regulations and waiver." 50 C.F.R. § 228.21; *see* 42 U.S.C. § 4332(C) (stating that NEPA applies to major federal actions). It is for this reason that the parties *stipulated* that NEPA issues were irrelevant at the hearing before the ALJ, and Judge Jordan ordered that "questions related to the sufficiency of the DEIS and other arguments about NEPA compliance are beyond the scope of this hearing." *See* October 9, 2019, Order on Motions in Limine at 22. Requirements under NEPA and the

MMPA's waiver provision are separate, and the NGO Parties should not be permitted to shoehorn NEPA issues into the waiver proceedings at the final hour.

The NGO Parties also contend that the MMPA's "best available scientific evidence" standard requires ongoing consideration of all NEPA analyses and information in the waiver proceedings, with opportunity for live testimony and cross examination. This is not the case. The MMPA does not require endless collection of every bit of new information or report—the standard is best "available" scientific evidence, and at some point, the collection of new evidence must stop. *See San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 602 (9th Cir. 2014) (quoting *Building Indus. Ass'n v. Norton*, 247 F.3d 1241, 1246, 345 U.S. App. D.C. 426 (D.C. Cir. 2001) ("[T]he 'best scientific . . . data available,' does not mean 'the best scientific data possible.'").

The NGO Parties have failed to identify any provision of the APA or NMFS's hearing regulations that requires the on-the-record hearing to be re-opened whenever there is a chance that new information will be obtained following the close of the hearing. Their argument is also based on the inaccurate premise that the Assistant Administrator is strictly limited to the record assembled by the ALJ in making his decision on the waiver and proposed regulations. That is not the case. There are two relevant records. The first is the record compiled by the ALJ for purposes of the recommended decision. The second record is the record assembled by the Assistant Administrator for purposes of making the final decision. As part of the final decision, the Assistant Administrator must take into account the record prepared by the ALJ, but also has broad discretion to consider public comments submitted to the ALJ, 50 C.F.R. 228.20(b), and public comments submitted to the Assistant Administrator, 50 C.F.R. 228.21(b). These provisions requiring consideration of materials submitted after the close of the waiver

proceedings make clear that the Assistant Administrator not only can, but must, consider materials beyond what was provided at the hearing. In order to comply with NEPA, the Assistant Administrator must also consider the various stages of environmental review through the eventual Final EIS. *See* 42 USC 4332(C).

As the D.C. Circuit has explained in the parallel example of a hearing examiner followed by an agency decision:

> The Examiner's decision is part of the record, and the record must be considered as a whole in order to see whether the result is supported by substantial evidence. The agency's departures from the Examiner's findings are vulnerable if they fail to reflect attentive consideration to the Examiner's decision. Yet in the last analysis it is the agency's function, not the Examiner's, *to make the findings of fact and select the ultimate decision*, and where there is substantial evidence supporting each result it is the agency's choice that governs.

Greater Bos. Television Corp. v. FCC, 444 F.2d 841, 853 (1970) (emphasis added); *accord Maka v. U.S. INS*, 904 F.2d 1351, 1357 n. 9 (9th Cir. 1990). In these proceedings, the parties have been given ample opportunity to present evidence and make a record for the recommended decision to the ALJ. Now the waiver moves to its next stage, and, after issuance of a recommended decision, any remaining scientific information that bears on the proposed waiver and regulations may be submitted to the Assistant Administrator for consideration in a final decision. This extensive process provides ample due process and accords with the MMPA, the APA, NMF'S's hearing regulations, and NEPA.

C. A Stay Would Greatly Prejudice the Makah Tribe.

The NGO Parties have the audacity to suggest that a stay will not prejudice, and could actually *benefit* the Makah Tribe. *See* Motion at 10. This is patently false, and the notion that the NGO Parties are looking out for the Tribe's best interests by requesting further delay is preposterous.

The NGO Parties reason as follows: "NMFS has already determined that it will prepare and issue a DSEIS. Accordingly, a stay would not be the reason for any delay in the agency's final decision." The problem with this argument is that it is circular: it assumes the premise as its conclusion. The NGO parties assume that NEPA and the recommended decision on the waiver must occur sequentially, and that as soon as NMFS elected to prepare a DSEIS it chose delay. In actuality, the NMFS regulations call for the NEPA and MMPA processes to be carried out in parallel. *See, e.g.,* 50 C.F.R. § 228.16(b) (requiring a *draft* EIS, rather than a *final* EIS to be available for the hearing). By seeking to halt the MMPA process for an indeterminate amount of time pending completion of the next NEPA stage, the NGO Parties would change the required legal procedure and require the two processes to be carried out sequentially.[1] This is an inefficient result that will invariably delay the proceedings, with resulting harm to the Tribe.

On May 5, 2019, Tribal Councilman Patrick DePoe stated in a signed declaration: "an entire generation of young Makahs has been born and grown to adulthood without experiencing a whale hunt by our people. Whaling is central to our identity as Makahs, and the long process to obtain a waiver has denied us the ability to exercise our treaty whaling right and meet our subsistence and cultural needs." Mr. DePoe then stated "[w]e have learned in this waiver process that delays of days tend to tum into weeks, weeks become months, and months become years…The delay requested by AWI and Sea Shephard would add to the long cumulative delay that has already caused significant harm to the Tribe in this process." Councilman DePoe's words appear prophetic 10 months later as the NGO Parties drop another request for delay on

[1] Animal Welfare Institute and other NGOs have repeatedly used the same circular arguments to seek delay in approval of the gray whale catch limit at the International Whaling Commission. *See, e.g.* SCHUBERT CROSS EX M-02 (statement opposing the gray whale catch limit at the 2018 IWC meeting because the United States should be "deferring its [catch limit] request until its domestic legal obligations have been met"); SCHUBERT CROSS EX. M-01 at 7 (letter urging U.S. delegation to withdraw its request for a gray whale catch limit at the 2012 IWC meeting "until the NEPA and MMPA processes mandated by *Anderson* are completed"). Both the IWC and the United States rejected these requests, and the ALJ should do likewise here as well.

this proceeding. Further delay pending further NEPA review is unwarranted, contrary to NMFS's regulations, and inconsistent with NEPA procedures. Further delay would also be incredibly harmful to the Tribe's pursuit of whaling. The MMPA waiver process, which was exhaustive in its consideration of "available" scientific evidence, must go forward; the motion should be denied.

Respectfully submitted this 11th day of March, 2020.

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