

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

In re:	)	
	)	Administrative Law Judge
<b>Proposed Waiver and Regulations</b>	)	Hon. George J. Jordan
<b>Governing the Taking of Eastern North</b>	)	Docket No. 19-NMFS-0001
<b>Pacific Gray Whales by the Makah</b>	)	
<b>Indian Tribe</b>	)	RINs: 0648-B158; 0648-XG584
	)	

**ORDER DENYING REQUEST FOR STAY WAIVER PROCEEDINGS**

**I. Introduction**

The hearing in this matter took place on November 14-21, 2019. After publication of the transcript, I ordered that post-hearing briefs and public comment were due no later than March 16, 2020. *See* 85 FR 5196 (Jan. 29, 2020). On February 27, 2020, during the pendency of the comment period, NMFS published a Federal Register notice detailing its intention to produce a Draft Supplemental Environmental Impact Statement (DSEIS) on the current Unusual Mortality Event (UME) affecting Eastern North Pacific gray whales. 85 Fed. Reg. 11347 (Feb. 27, 2020). NMFS states that the DSEIS is necessary because the existing Draft Environmental Impact Statement (DEIS), which was produced in 2015, predates the UME and does not adequately assess the most current scientific information on the uptick in gray whale deaths. *Id.*

On March 3, 2020, the Animal Welfare Institute, Sea Shepherd, and the Peninsula Citizens for the Protection of Whales, all parties in this proceeding who designated themselves collectively as the “Conservation Parties,” filed a joint motion asking me to stay the proceeding and postpone issuance of the Recommended Decision until the DSEIS is published so it can be included in the record of the proceedings. The Conservation Parties contend that essential additional scientific and factual information was not given to the parties for examination and is

not in the record for my consideration. Motion at 2, 4-5. They also contend that “because the MMPA and Administrative Procedure Act (“APA”) together require that a decision to waive the moratorium be made only on the basis of the best available science and a full factual record, any decision that does not take into account the DSEIS would be unlawful and contrary to basic principles of administrative law.” Motion at 2, 5. One non-party also requested a stay during the public comment period, on substantially similar grounds. *See* Comment from Donald Baur, posted Mar. 17, 2020, *available at* <https://www.regulations.gov/document?D=NOAA-NMFS-2019-0037-0170>.

NMFS filed a response opposing the motion, as did the Makah Tribe. NMFS asserts that the Conservations Parties are incorrect in alleging the DSEIS will go beyond the information adduced during the waiver proceeding and says they have no basis for making such an assertion. NMFS Response at 1, 6-7. Instead, NMFS believes the appropriate time to seek action in the event the DSEIS raises substantial new issues is during the public process outlined in the Federal Register Notice and/or when this matter is before the Assistant Administrator for a final decision. Should the DSEIS contain new information, the Assistant Administrator has the authority to remand the record to me for further development. *Id.* at 7-8. NMFS also argues that only the DEIS is required at the hearing, and that the regulations thus “contemplate that subsequent NEPA documents, such as a final environmental impact statement, necessarily will be developed after the presiding officer issues his recommended decision.” *Id.* at 5. Finally, NMFS argues that a stay would substantially prejudice NMFS by drawing unnecessarily on its limited resources, and the Makah Tribe by further delaying the decision on a request initially filed in 2005. *Id.* at 11.

The Makah Tribe elaborated on the issue of prejudice, pointing out the lengthy delay that has already occurred since the requested a waiver and discussing the impact on tribal members

who have never experienced a whale hunt. Makah Response at 13-15. The Makah Tribe also made similar arguments as NMFS regarding the ways in which the NEPA process differs from the procedures in this formal rulemaking and the availability of remand if the Assistant Administrator finds the DSEIS raises material issues that merit further consideration. *Id.* at 7-13.

## **II. Standard of Review**

A party requesting to stay a proceeding bears the burden of showing that the circumstances justify the request. *Nken v. Holder*, 556 U.S. 418, 433-34 (2009). The Conservation Parties therefore bear the burden here.

As the presiding officer, I have the authority under both the Administrative Procedures Act (APA) and NOAA's procedural regulations to regulate the course of the hearing. *See* 5 U.S.C. § 556(c)(5); 50 C.F.R. § 228.6. However, I must construe the regulations as requiring "a just, speedy, and inexpensive determination of all issues raised with respect to any waiver or regulation." 50 C.F.R. § 228.3. I must also ensure that the stay would not prejudice any party. 50 C.F.R. § 228.6(a)(5); *see also* Order Denying Motion to Extend Hearing Schedule, May 20, 2019. While a stay may be the appropriate course of action in certain circumstances, the regulations tend to discourage the issuance of stays and particularly those of a lengthy or indefinite nature.

The evidentiary record in this case closed at the end of the hearing in November 2019; the public comment period closed on March 16, 2020 and the parties were permitted to file post-hearing briefs by March 20, 2020. Thus, at this point the record is closed and granting the Conservation Parties' motion would require reopening.

The regulations do not directly address reopening by the presiding officer. Rather, it would come under my power to rule on motions and to “do all acts and take all measures ... for ... the efficient conduct of the proceedings.” 50 C.F.R. § 228.6(b)(3) and (8).

### **III. Analysis**

#### **A. Compliance with the Procedural and Substantive Mandates of the MMPA and APA Does Not Require the Completed DSEIS to be Included in the Administrative Record.**

The Conservation Parties contend that a stay will ensure compliance with the procedural and substantive mandates of the MMPA and the APA. They focus on the right of cross-examination granted in the APA at 5 U.S.C. § 556(d), arguing that the 2019 UME and the impacts of the proposed even/odd year hunt are important issues which they will be prevented from effectively cross-examining witnesses on if I issue the recommended decision before the DSEIS is finalized. Motion at 3-4. They also argue that NMFS’s decision to produce a DSEIS is effectively an admission that the information presented at the hearing was not the best available science, as required by the MMPA. See 16 U.S.C. § 1371(a)(3)(A). Motion at 5.

NMFS and the Makah Tribe disagree with the Conservation Parties’ characterizations, and the Makah Tribe devoted a substantial portion of its response to this issue. Both parties noted that under 50 C.F.R. § 228.16(b), the only NEPA document required under the regulations for this rulemaking is a *draft* EIS, not a final EIS. Thus, they posit, other draft documents postdating the existing DEIS and leading up to the issuance of the Final EIS are also not mandatory components of the administrative record. *See* NMFS Response at 9, Makah Response at 14. Rather, the full requirements of NEPA come into play for the final agency action, meaning the Assistant Administrator’s decision. As the Makah Tribe points out, the parties also stipulated that

they would not raise NEPA arguments at the administrative hearing. *See Order on Motions in Limine* at 22 (Oct. 9, 2019).

After reviewing the requirements for these proceedings, I find NMFS's and the Makah Tribe's arguments more persuasive. The regulations clearly require only that a draft EIS be in the record of the proceeding, but do not mention any follow-up documents. Thus, I conclude that the regulations do not intend the record to contain all possible NEPA documents at the initial adjudicatory stage. The provision for remand if significant new information comes to light after the recommended decision but before the Assistant Administrator issue a final decision also shows that the drafters of the regulations contemplated situations where this might occur.

**B. The Motion to Stay is Premature Because the DSEIS is Incomplete.**

At this stage, it is unclear what NMFS will include in the DSEIS. While NMFS asserts that the information will be drawn from the evidentiary record, including exhibits and testimony from the hearing, the Federal Register notice states NMFS expects it will also "incorporate ... any additional relevant information and will take into consideration the Administrative Law Judge's recommended decision." In addition to discussing the 2019 UME, NMFS also intends to identify the hunt proposal put forth for consideration in the draft regulations previously published in the Federal Register and entered for consideration at the hearing, which NMFS determined would not require a DSEIS if it was the sole alteration to the 2015 DEIS.

NMFS has argued that the motion is premature, since none of the parties knows yet what new information, if any, will be included in the SDEIS. I agree. The Conservation Parties have not met their burden of showing any specific information that was not available during the hearing but will be included in the SDEIS. Furthermore, NMFS stated that it does not intend to complete the DSEIS until after I issue the recommended decision in this matter. Granting a stay

now would create a situation where information NMFS intends to rely on would be unavailable during the preparation of the SDEIS, thereby further delaying the process. Should any new information appear in the SDEIS, it is incumbent on the Assistant Administrator to determine whether the information is substantial enough to require remand for further development of the evidentiary record. If, on the other hand, the SDEIS is based entirely on information which the parties have already relied on and entered into evidence, it would tend to show that information is the best available scientific evidence regarding the 2019 UME.

**C. An Indefinite Stay Would Cause Prejudice to the Tribe and Would be Inconsistent with Agency Regulations Governing the Waiver and Regulations Process**

The issue of prejudice is also particularly important. The Conservation Parties assert that no other parties would be prejudiced because 1) NMFS would benefit from a more thoroughly developed factual record; 2) the MMC's input would be based on the best available scientific evidence; and 3) a stay "will not harm the Makah Tribe, or cause any hardship or inequity." Motion at 9-10. They also assert that they will be prejudiced in the absence of a stay because they will not have the opportunity to address new information as part of this proceeding. *Id.* at 10.

Both NMFS and the Makah Tribe have put forth colorable arguments about why a stay would, in fact, prejudice them. NMFS argues that this proceeding is resource intensive and will become even more so the longer it goes on. NMFS Response at 11. Although my staff and I would not perform substantial work on the decision during the pendency of a stay, I recognize that a stay of indefinite length such as they Conservation Parties have requested would almost certainly mean the decision would not be issued during the current fiscal year. Thus, the memorandum of agreement between NOAA and the Coast Guard, through which I am providing

services as an adjudicator, would have to be extended for yet another year. While not insurmountable issue, it is clear that this would cause at least some prejudice to NMFS.

The Makah Tribe has made an even stronger argument of prejudice. They made their initial waiver request in 2005, meaning the Tribe has now been waiting over 15 years for a decision. They argue that even small delays have a cumulative effect, an entire generation of Makah youth has now come of age without ever seeing a hunt, and they have been denied the ability to meet their cultural and subsistence needs because of the lengthy delay. Makah Response at 13-14. Here, it is not clear how long it will take NMFS to prepare the DSEIS, but the delay would likely be significant. Moreover, granting an indefinite stay in the proceedings would be inconsistent with the statutory and regulatory intent of this type of proceeding, which requires that a speedy proceeding and a prompt decision. *See* 50 C.F.R. §§ 228.3 and 228.20. I find the Makah have made a credible and persuasive argument that the requested stay would prejudice the tribe.

In contrast, the Conservation Parties' argument that they will be highly prejudiced if the stay is not granted is based on speculation that 1) the DSEIS will contain significant new information that was not presented at the hearing, and 2) the Assistant Administrator will not remand the record for further development if this occurs. As stated above, if the record includes only information already presented, there is no reason to reopen it. Moreover, the Conservation Parties retain the ability to participate fully in the future proceedings and to pursue litigation at an appropriate time if they feel it is necessary. At this stage in the proceedings, I see no prejudice to the Conservation Parties if I move forward in issuing a recommended decision.

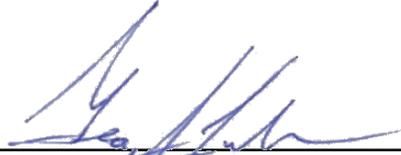
Finally, I note that the draft regulations already contain threshold levels for gray whale populations, and the hunt would cease if the number of animals falls below those specified

levels. If the waiver is granted and the proposed regulations adopted, these levels will be in place regardless of what—if any—additional information about the UME is discovered in the coming months or years. Should the UME be severe enough to cause a significant reduction in the Eastern North Pacific gray whale population, the propriety of the hunt can also be addressed at the permitting stage and each time the relevant data is made available.

For the above reasons, I **DENY** the Conservation Parties' motion to stay the issuance of a recommended decision until NMFS completes the DSEIS.

**IT IS SO ORDERED.**

Dated: May 4, 2020



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George J. Jordan  
Administrative Law Judge

## CERTIFICATE OF SERVICE

I hereby certify that I have transmitted the above document to the following persons, as indicated:

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