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6 UNITED STATES OF AMERICA
7 Department of Commerce
8 National Oceanic and Atmospheric Administration

9 *In re:* Proposed Waiver and Regulations
10 Governing the Taking of Eastern North
11 Pacific Gray Whales by the Makah Indian
Tribe

Hon. George J. Jordan
Hearing Docket No. 19-NMFS-0001

12
13 **EXPEDITED MOTION FOR EXTENSION OF TIME TO**
14 **SUBMIT INITIAL DIRECT TESTIMONY AND FOR CONTINUANCE OF HEARING**

15 Sea Shepherd Legal (SSL) and Sea Shepherd Conservation Society (SSCS) (collectively
16 “Sea Shepherd”), non-profit organizations that have filed formal requests to participate as Parties to
17 this proceeding, hereby move for an extension of the deadline to submit initial direct testimony
18 (currently set to expire on May 20, 2019) and for a continuance of the hearing (currently scheduled
19 to commence on August 12, 2019) and associated pre-hearing proceedings. Specifically, Sea
20 Shepherd requests that the hearing and its associated deadlines — beginning with the May 20, 2019
21 deadline for submission of written testimony — be delayed by a minimum of 90 days.

22 In an effort to avoid adversarial motion practice, Sea Shepherd consulted with the proponent
23 of this formal rulemaking, the National Marine Fisheries Service (NMFS), in an attempt to reach an
24 agreement to submit a stipulated motion. Unfortunately, NMFS refused this request.

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EXPEDITED MOTION TO EXTEND TIME
AND FOR CONTINUANCE OF HEARING

- 1 -

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1 As explained below, the current deadline to submit initial direct written testimony fails to
2 provide sufficient time for Sea Shepherd and all other Parties to participate in this hearing in a
3 meaningful manner. In light of the voluminous new material, including a new alternative not
4 covered by the 2015 draft environmental impact statement (DEIS), released by NMFS on April 5,
5 2019, the Parties require additional time to absorb these documents and to prepare initial direct
6 testimony that takes this new information into account. Further, the submission of effective direct
7 testimony is significantly complicated by the fact that the International Whaling Commission's
8 (IWC) 2019 Scientific Committee meeting is being held from May 10 through May 22 in Nairobi,
9 Kenya. Many of the world's leading cetacean experts will be attending the IWC meeting and, as a
10 result, will be unable to prepare written testimony by May 20. In light of the considerable time that
11 NMFS took to issue the proposed rulemaking that triggered this hearing — over fourteen years have
12 elapsed since the Makah Tribe submitted its request for a waiver — it is only fair that this modest
13 extension be granted to allow the interested Parties sufficient time to prepare for these important
14 proceedings.

15 Sea Shepherd respectfully requests expedited consideration of this motion. Of note, on or
16 about May 6, 2019, SSL and SSCS issued timely requests for participation as Parties to this
17 proceeding. Declaration of Catherine Pruett (Pruett Decl.), ¶ 6. While waiting for approval of their
18 Party status, SSL and SSCS reached out to NMFS seeking its consent to a reasonable delay of the
19 hearing and associated deadlines. Pruett Decl., ¶ 7. On May 9, SSL and SSCS received both (1)
20 confirmation of their Party status and (2) notification (at the close of business) from NMFS that it
21 did not consent to the requested deadline extension. Pruett Decl., ¶¶ 9-10. In light of the May 20
22 deadline for Party submission of direct written testimony for the hearing, an expedited ruling on Sea
23 Shepherd's motion is required. Such expedited consideration would not harm any Party to this
24 proceeding. Rather, expedited consideration is critical to avoid harm to Sea Shepherd and other
25 Parties that seek temporary relief from the current schedule before passage of the first significant

1 deadline on May 20. Pursuant to the regulations governing the present rulemaking proceeding under
2 the MMPA, the Presiding Officer has the full discretion and authority to grant Sea Shepherd's
3 requested expedited relief. *See* 52 C.F.R. § 228.6.

4 **BACKGROUND**

5 On February 14, 2005, NMFS received a request from the Makah Indian Tribe for a waiver
6 of the Marine Mammal Protection Act (MMPA) moratorium on the take of marine mammals to
7 allow for take of Eastern North Pacific (ENP) gray whales. *Announcement of Hearing Regarding*
8 *Proposed Waiver and Regulations Governing the Taking of Marine Mammals (Announcement of*
9 *Hearing)*, 84 Fed. Reg. 13639, 13640 (col. 2) (April 5, 2019). Approximately ten years later, on
10 March 13, 2015, NMFS released a DEIS to analyze the proposed waiver in response to this request.
11 *Id.*; National Marine Fisheries Service, *Draft EIS: The Makah Tribe Request to Hunt Gray Whales*,
12 announced in 80 Fed. Reg. 13373 (March 13, 2015).

13 Like many other individuals and organizations, SSL submitted extensive comments on
14 NMFS's DEIS in mid-2015. Since then, Sea Shepherd and countless other groups have waited
15 patiently to see how NMFS would proceed.

16 On April 5, 2019, NMFS pivoted from a leisurely pace — with more than 14 years having
17 passed since the Makah Tribe's original request, and nearly four years since NMFS's DEIS — to an
18 accelerated approach, notifying stakeholders and the public at large that a formal hearing would
19 begin on August 12, 2019. *Announcement of Hearing*, 84 Fed. Reg. at 13639 (col. 3). More
20 importantly for present purposes, the notice announced a deadline of May 20, 2019 for the
21 submission of initial written direct testimony. *Id.* In conjunction with its announcement of the
22 hearing date and the issuance of proposed regulations governing the take of ENP gray whales by the
23 Makah Indian Tribe, NMFS released four declarations and lengthy supporting exhibits on April 5,
24 2019. *See In re: Proposed Waiver and Regulations Governing the Taking of Eastern North Pacific*
25 *Gray Whales by the Makah Indian Tribe* (Hearing Docket No. 19-NMFS-0001), United States Coast

1 Guard Electronic Reading Room, *available at* [https://www.uscg.mil/Resources/Administrative-Law-](https://www.uscg.mil/Resources/Administrative-Law-Judges/Decisions/ALJ-Decisions-2016/NOAA-Formal-Rulemaking-Makah-Tribe/)
2 [Judges/Decisions/ALJ-Decisions-2016/NOAA-Formal-Rulemaking-Makah-Tribe/](https://www.uscg.mil/Resources/Administrative-Law-Judges/Decisions/ALJ-Decisions-2016/NOAA-Formal-Rulemaking-Makah-Tribe/). In total, the
3 newly released information, including the Federal Register notices, declarations from NMFS
4 personnel, and various fact sheets and timelines, spans over 5,000 pages. *Id.*

5 **STANDARD OF REVIEW**

6 Pursuant to Section 556(c) of the Administrative Procedure Act (APA), an Administrative
7 Law Judge (ALJ) has ample authority to conduct proceedings associated with formal rulemaking.
8 This authority is akin to that of a federal district judge, and it includes the power to “regulate the
9 course of the hearing” and to “dispose of procedural requests or similar matters[.]” 5 U.S.C. §
10 556(c)(5),(9). Similarly, under the regulations governing MMPA waiver hearings, the presiding ALJ
11 has the power to “rule upon motions[.]” 50 C.F.R. § 228.6(b)(3).

12 As the Supreme Court has repeatedly held, an “ALJ exercises authority ‘comparable to’ that
13 of a federal district judge conducting a bench trial.” *Lucia v. SEC*, 138 S. Ct. 2044, 2049 (2018)
14 (quoting *Butz v. Economou*, 438 U. S. 478, 513 (1978)). As is the case with federal district judges,
15 an ALJ’s power to regulate the course of proceedings, including through motions for extensions and
16 continuances, is considerable. Ultimately, motions seeking to modify a schedule rest with the
17 presiding officer’s discretion and should be granted when the moving party has shown “good cause.”
18 *See In re Domestic Airline Travel Antitrust Litig.*, 2018 U.S. Dist. LEXIS 155775, *33 (D.D.C. Sept.
19 13, 2018) (“The legal standard for this Court to modify a schedule permits this Court to exercise its
20 discretion so long as the party seeking the modification shows good cause.”); *accord* Fed. R. Civ. P.
21 16(b)(4); *see also NLRB v. Pan Scape Corp.*, 607 F.2d 198, 201 (7th Cir. 1979) (“It is well
22 established that the grant or denial of a continuance is within the discretion of the ALJ[.]”). In its
23 analysis, the ALJ “may properly consider the length of the delay requested, the potential adverse
24 effects of that delay, the possible prejudice to the moving party if denied the delay, and the
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1 importance of the testimony that may be adduced if the delay is granted.” *PATCO v. Fed. Labor*
2 *Relations Authority*, 685 F.2d 547, 588 (D.C. Cir. 1982).

3 **ARGUMENT**

4 There are multiple compelling reasons why this Motion should be granted. These reasons
5 include (1) the extremely short period of time currently available for the Parties to digest, and
6 prepare testimony in response to, the more than 5,000 pages that NMFS released in April, (2) the
7 new alternative proposed by NMFS that is not covered by the 2015 DEIS and that is allegedly
8 supported by NMFS’s voluminous document submission, (3) the scheduling conflict between the
9 current May 20 deadline and the IWC’s Scientific Committee meeting in Kenya, (4) the fact that the
10 IWC meeting has produced, and will continue to produce, new scientific literature directly relevant
11 to the proposed waiver, (5) the inconsistency between NMFS’s apparent desire to hold this hearing
12 as soon as possible and the agency’s casual pace in the years preceding the proposed rulemaking,
13 and (6) emerging evidence of a wide-spread mortality event among gray whales along the West
14 Coast, the facts of which should be considered as part of the formal record.

15 Taking these factors in turn, it is undeniable that NMFS has introduced copious amounts of
16 new material (much of which is technical in nature) over the past few weeks. On April 5, 2019, in
17 conjunction with its announcement of the hearing date and the issuance of proposed regulations
18 governing the take of ENP gray whales by the Makah Indian Tribe, NMFS introduced into the
19 record over 5,000 pages of documents (including the Federal Register notices, declarations from
20 NMFS personnel, and various fact sheets and timelines). *See In re: Proposed Waiver and*
21 *Regulations Governing the Taking of Eastern North Pacific Gray Whales by the Makah Indian Tribe*
22 (Hearing Docket No. 19-NMFS-0001), United States Coast Guard Electronic Reading Room,
23 *available at* [https://www.uscg.mil/Resources/Administrative-Law-Judges/Decisions/ALJ-Decisions-](https://www.uscg.mil/Resources/Administrative-Law-Judges/Decisions/ALJ-Decisions-2016/NOAA-Formal-Rulemaking-Makah-Tribe/)
24 [2016/NOAA-Formal-Rulemaking-Makah-Tribe/](https://www.uscg.mil/Resources/Administrative-Law-Judges/Decisions/ALJ-Decisions-2016/NOAA-Formal-Rulemaking-Makah-Tribe/). Under the current schedule, the Parties have only
25 45 days (from the release of these documents) to process this new material and submit substantive,

1 written testimony. Even for Parties that have been following this matter closely, 45 days is not
2 nearly enough time to review, analyze, and use these materials in preparation of informed and
3 comprehensive written testimony.

4 Significantly, NMFS submitted the above-described voluminous materials in support of a
5 new action alternative that is very distinct from any of the alternatives presented in the 2015 DEIS.
6 Pruet Decl., ¶ 5. Given the distinctiveness of this new alternative, the Parties will likely be
7 addressing whether it requires issuance of a supplemental environmental impact statement and, thus,
8 whether it is legally appropriate to issue a waiver of the MMPA moratorium on the take of ENP gray
9 whales on the basis of this newly presented alternative. See 40 C.F.R. § 1502.9(c)(1)(i) (providing
10 that an agency “shall” prepare a supplemental environmental impact statement if, after issuing its
11 latest DEIS, “the agency makes substantial changes in the proposed action that are relevant to
12 environmental concerns”); *Dubois v. United States Dep’t. of Agric.*, 102 F.3d 1273, 1292 (1st Cir.
13 1996) (requiring preparation of a supplemental environmental impact statement where new
14 alternative “involve[d] a ‘substantial change’ from the prior proposals at Loon Mountain”). Of
15 greater importance to this motion, in refusing to consent to Sea Shepherd’s requested extension,
16 NMFS made the extraordinary claim that the 2015 DEIS contained all of the information required
17 for this proceeding:

18 Finally, the issues proposed to be addressed at the hearing were evaluated in our
19 Draft Environmental Impact Statement (DEIS) on this matter, which was
20 published in 2015, as your letters note. Your organizations provided comments
soon after the release of that DEIS, and there has been ample time since then to
review issues addressed by that DEIS.

21 Pruet Decl., Exhibit A.

22 It is true that SSL (and the other Party addressed in NMFS’s statement) did in fact submit
23 extensive comments on the 2015 DEIS. However, the new alternative that is the subject of this
24 proceeding was obviously not made available for review – with its extensive supporting materials –
25 until April 6, 2019. Numerous, new issues, that were not “addressed” by the 2015 DEIS, have, thus,

1 suddenly been presented to the Parties with little opportunity for review – and certainly not in time
2 for submission of written testimony addressing them by May 20.

3 This nearly impossible situation is aggravated by the fact that the IWC Scientific Committee
4 is scheduled to meet in Nairobi, Kenya from May 10 to May 22. As the global body charged with
5 the conservation of cetaceans and the management of whaling, the IWC makes some of the most
6 important decisions affecting whales around the world. As a result of the underlying treaty’s
7 requirement that certain key decisions “shall be based on scientific findings,” the IWC has
8 established a Scientific Committee to inform decision-making. International Convention for the
9 Regulation of Whaling, with Schedule of Whaling Regulations, Dec. 2, 1946, 62 Stat. 1716, 161
10 UNTS 72, at Art. V(2). The Scientific Committee’s annual meeting is a marquee event attended by
11 the world’s leading authorities on cetaceans. *See* IWC, IWC Meetings, *available at*
12 <https://iwc.int/meetingsmain> (“The Scientific Committee Meeting is attended by up to 200
13 scientists[.]”). This year’s meeting is no exception. It is hard to imagine that NMFS was not aware
14 of this conflict, as NMFS employees regularly attend these meetings. In fact, the proposed Makah
15 hunt was a major topic of discussion in last year’s proceedings. *See* Report of the Scientific
16 Committee, IWC/67/Rep01 (2018), at p. 15 (2018) (discussing proposal and noting that “[t]he
17 Government of the USA requested the Committee to test this plan to ensure that it meets IWC
18 conservation objectives”). As NMFS must surely realize, scientists attending the IWC meeting
19 invest substantial time and energy in connection with this event. It is all but impossible for these
20 authorities — several of whom specialize in subjects directly relevant to the proposed rulemaking —
21 to prepare written testimony for this hearing while working a demanding schedule in Kenya. While
22 NMFS may have the institutional resources to cover both events at once, it is unrealistic (and simply
23 unfair) to expect all Parties and their scientific partners to be in a similar position.

24 In addition to the fact that leading cetacean scientists will not be available to weigh in on the
25 subject proposal and related decisions by NMFS, these very scientists will be submitting, reviewing,

1 and discussing *new* reports during the IWC meeting that are of significant relevance to the
2 administrative hearing. *See, e.g.*, F. Ronzón-Contreras *et al.*, *Gray whales' body condition in Laguna*
3 *San Ignacio, BCS, México, during 2019 winter breeding season* SC/68A/CMP/13, available at
4 <https://portal.iwc.int/e/sc68a#> (login required); S. Martínez-Aguilar, *et al.*, *Gray whale (Eschrichtius*
5 *robustus) stranding records in Mexico during the winter breeding season in 2019*, SC/68A/CMP/14,
6 available at <https://portal.iwc.int/e/sc68a#> (login required). As of this writing, the authors of these
7 reports are uploading their respective documents on an ongoing basis. Under the MMPA, NMFS is
8 obligated to analyze the “best scientific evidence available” when determining whether to waive the
9 general moratorium on takes of marine mammals. 16 U.S.C. § 1371(a)(3)(A). Documents from the
10 IWC Scientific Committee’s annual meeting, some of which are authored by NMFS personnel,
11 surely qualify as relevant scientific literature necessary to the statutorily mandated analysis. Yet the
12 Parties (and, one suspects, NMFS) require additional time to review these documents and, if
13 warranted, incorporate their findings into written testimony. Accordingly, the requested 90-day
14 extension is also necessary to satisfy the statutory obligation requiring any waivers to be based on
15 the “best scientific evidence available[.]” *Id.*

16 Our request is all the more reasonable in light of the relaxed pace at which NMFS has
17 proceeded until very recently. The Makah Tribe submitted its request for a waiver in 2005. NMFS
18 did not release a DEIS until ten years later, in 2015.¹ After the July 31, 2015 deadline for public
19 comments on the DEIS, NMFS took over 1,300 days (nearly four years) to publish its announcement
20 of the hearing, its preliminary determination to issue the proposed waiver, and the proposed
21 regulation. Now, without any compelling justification, NMFS seeks to expedite the completion of
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23 ¹ While NMFS initially released a DEIS in 2008, the agency later terminated that DEIS because of
24 new scientific information and announced preparation of a new DEIS, which was released in 2015.
25 *See Notice of Intent To Terminate the Existing Draft Environmental Impact Statement and Prepare a*
New Environmental Impact Statement, 77 Fed. Reg. 29967 (May 21, 2012).

1 the administrative law hearing. With the exception of a regulation requiring that the hearing date be
2 *at least* 60 days after the hearing announcement is published, 50 C.F.R. § 228.4(b)(2), there is no
3 law, rule, or policy that mandates completion of the administrative hearing portion of the decision-
4 making process within a particular time frame. While Sea Shepherd recognizes the value of
5 proceeding in a reasonably expeditious manner, none of the stakeholders involved, including the
6 Makah Tribe, would be harmed by a minimal delay (90 days) in the hearing date and associated
7 deadlines. To the contrary, the interests of Sea Shepherd and other stakeholders who may have
8 concerns about the actions taken by NMFS in support of whaling by the Makah Tribe would be
9 harmed by the breakneck schedule under which NMFS seeks to complete this formal rulemaking
10 process. Delaying the hearing date and associated deadlines by 90 days would, at least, minimize
11 this harm.

12 Finally, the evidence suggests that we are in the midst of a range-wide gray whale mortality
13 event — and it is simply too early to judge the implications of this event on the proposed waiver and
14 regulations. It is axiomatic that a clear understanding of the relevant facts is essential to support a
15 lawful rulemaking, whether formal or informal, under the APA. *See Motor Vehicle Mfrs. Ass'n v.*
16 *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (stating the general proposition that “the
17 agency must examine the relevant data and articulate a satisfactory explanation for its action
18 including a rational connection between the facts found and the choice made”) (internal quotations
19 omitted). Moreover, insofar as formal rulemaking resembles an adversarial proceeding in federal
20 court, it bears noting that the presence of emerging facts is one of the classic grounds for a court to
21 refrain from ruling on summary judgment and, instead, grant a continuance to allow the opposing
22 party time to marshal those facts. *See Fed. R. Civ. P. 56(d); Morrissey v. Boston Five Cents Sav.*
23 *Bank*, 54 F.3d 27, 35 (1st Cir. 1995) (observing that this provision serves as “the means by which a
24 party opposing summary judgment may obtain a denial or deferral of judgment upon a
25 demonstration of an authentic need for, and an entitlement to, an additional interval in which to

1 marshal facts essential to mount an opposition”) (internal quotation marks omitted). In the present
2 case, evidence of a potentially catastrophic mortality event is directly relevant to the waiver
3 proceeding, as the statutory language authorizing waivers instructs NMFS to conduct the analysis
4 with, *inter alia*, “due regard to the distribution, *abundance*, breeding habits, and times and lines of
5 migratory movements of such marine mammals[.]” 16 U.S.C. § 1371(a)(3)(A) (emphasis added).

6 Total strandings of gray whales cross the U.S. West Coast, including California, Oregon, and
7 Washington, stand at 45 in 2019 to date, compared to 25 in the same area all of last year. *Two Dead*
8 *Grey Whales Wash Ashore, Raising Total to 13 in Wash. This Year*, KOMO NEWS (May 5, 2019),
9 available at [https://komonews.com/news/local/dead-whale-washes-ashore-at-harborview-park-in-](https://komonews.com/news/local/dead-whale-washes-ashore-at-harborview-park-in-everett?fbclid=IwAR10nBNYfbAgtf41u3Sazz4m8p9MXQrrl4PtuPXzdYYrxtnIFg94_Svlj0Q)
10 [everett?fbclid=IwAR10nBNYfbAgtf41u3Sazz4m8p9MXQrrl4PtuPXzdYYrxtnIFg94_Svlj0Q](https://komonews.com/news/local/dead-whale-washes-ashore-at-harborview-park-in-everett?fbclid=IwAR10nBNYfbAgtf41u3Sazz4m8p9MXQrrl4PtuPXzdYYrxtnIFg94_Svlj0Q). Just
11 last week, two more gray whales were found washed ashore in Washington, suggesting that this die-
12 off is a continuing event. *Id.* In addition, researchers are extremely concerned about a significant
13 increase in underweight gray whales sighted. Bridgit Katz, *Nine Gray Whales Have Washed Up*
14 *Dead in the San Francisco Bay Area*, SMITHSONIAN (May 8, 2019), available at
15 [https://www.smithsonianmag.com/smart-news/nine-gray-whales-have-washed-dead-san-francisco-](https://www.smithsonianmag.com/smart-news/nine-gray-whales-have-washed-dead-san-francisco-bay-area-180972132/)
16 [bay-area-180972132/](https://www.smithsonianmag.com/smart-news/nine-gray-whales-have-washed-dead-san-francisco-bay-area-180972132/). While it may be too early to draw any firm conclusions from these recent
17 events, this is hardly an insignificant occurrence. As one leading researcher explained, “[i]f this
18 continues at this pace through May . . . we would be alarmed.” *Id.* (quoting Frances Gulland, UC
19 Davis School of Veterinary Medicine) (internal quotation marks omitted).

20 Clearly, the significance of these reports and the impacts of this impending mortality event
21 must be fully evaluated before a waiver determination can be reached. For this reason too, it is
22 imperative that an extension be granted in this matter.

23 CONCLUSION

24 For the foregoing reasons, Sea Shepherd respectfully requests that the hearing and its
25 associated deadlines — beginning with the May 20, 2019 deadline for submission of initial written

1 direct testimony — be delayed by a minimum of 90 days. Sea Shepherd further requests an
2 expedited ruling on its motion in order to secure a ruling before the May 20 deadline.

3 Dated this 10th day of May 2019

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26 Attorneys for SEA SHEPHERD LEGAL and
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1 **CERTIFICATE OF SERVICE**

2
3 I hereby certify that I have served the foregoing Expedited Motion for Extension of Time To Submit
4 Initial Direct Testimony and for Continuance of Hearing upon the following Parties to this
5 proceeding at the addresses indicated below via electronic mail:
6

7 Mr. Barry Thom
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13 Dated this 10th day of May 2019.

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