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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 **DECLARATION OF BRETT SOMMERMEYER**
13 **IN SUPPORT OF EXPEDITED MOTION FOR EXTENSION OF TIME**
TO SUBMIT INITIAL DIRECT TESTIMONY AND FOR CONTINUANCE OF HEARING

14 I, Brett Sommermeyer, hereby declare as follows:

15 1. I am an attorney and serve as the Legal Director of Sea Shepherd Legal (SSL). In such
16 capacity, I oversee SSL's review and responses to National Marine Fisheries Service's (NMFS)
17 efforts to grant a waiver of the Marine Mammal Protection Act moratorium on the take of marine
18 mammals to allow for take of Eastern North Pacific gray whales.

19 2. SSL represents the interests of the Sea Shepherd Conservation Society (SSCS) in this
20 proceeding. I refer collectively to SSL and SSCS, where applicable, as "Sea Shepherd."

21 3. On April 6, 2019, when NMFS first published its notice of waiver and proposed regulations,
22 SSL was in the midst of a number of time-sensitive and time-intensive projects that could not be
23 pushed aside or otherwise delayed to immediately accommodate this unexpected development –
24 after nearly 4 years of relative silence by NMFS since SSL submitted its comments on the 2015
25 Draft Environmental Impact Statement (DEIS). Nevertheless, SSL promptly reached out to other

1 organizations that were also involved in commenting on the 2015 DEIS to attempt to coordinate
2 efforts.

3 4. SSL was faced with a seldomly used administrative process governed by a dearth of
4 procedural rules in comparison with *e.g.*, federal court proceedings. After an opportunity to
5 obtain a rough inventory of the enormity of the materials filed by NMFS in support of the waiver
6 and proposed regulations, SSL began exploring options for how to seek a reasonable extension of
7 the hearing and associated deadlines. Given the absence of procedural rules, it was unclear
8 whether NMFS, as the action agency that commenced the waiver proceedings and, apparently,
9 selected the relevant dates driving those proceedings, had the discretion to extend the deadlines or
10 whether that decision rested exclusively with the assigned ALJ. SSL ultimately decided to seek
11 NMFS's consent to an extension while also joining as a "party" and, if NMFS declined, file a
12 motion with the ALJ.

13 5. After SSL filed its request for "party" status, NMFS notified SSL that its request had been
14 received but did not inform SSL that it was now a "party". On May 9th, SSL was able to contact
15 NMFS and obtain at least partial confirmation that it was likely a "party" to the proceeding.
16 Notably, NMFS declined to fully confirm SSL's status. That same day, SSL received a letter
17 from NMFS declining to consent to an extension and attaching a "Service List" listing a number
18 of individuals and entities but not expressly identifying them as "parties".

19 6. Although not completely confident that it was now a "party", SSL promptly filed its motion
20 on behalf of itself and SSCS with the ALJ requesting an extension. On May 13th, counsel for
21 NMFS entered an appearance and filed an intent to respond to the extension motion filed by AWI.
22 On May 14th, I contacted counsel for NMFS and discovered that, despite service on NMFS,
23 counsel had not received a copy of Sea Shepherd's motion. Counsel for NMFS expressed
24 frustration with the process and the fact that there were few procedural rules governing this
25 MMPA proceeding.

1 7. On May 17, I contacted Judge Jordan’s office to provide notice that Sea Shepherd intended to
2 file a Reply to the Respondents briefing later that day. From that call, I learned that there was
3 some potential confusion as to what had been submitted by the parties concerning the requested
4 extension. In particular, Judge Jordan’s office was apparently under the impression that all
5 documents needed to be initially submitted through NMFS, which would then forward them to
6 Judge Jordan. This understanding conflicts with NMFS’s instruction to Sea Shepherd to submit
7 its extension motion directly to Judge Jordan and also with the Announcement of Hearing
8 Regarding Proposed Waiver and Regulations Governing the Taking of Marine Mammals (Docket
9 No. 1) (“All documents pertaining to the hearing, including initial direct testimony, shall be filed
10 with the ALJ.”). I further learned that Judge Jordan would be occupied with another hearing
11 starting on May 20.

12 8. From my prior, direct work with scientists who attend meetings of the Scientific Committee
13 of the International Whaling Commission, I understand that many (if not most) of the meeting
14 participants are occupied well in advance of the conference writing and finalizing working papers
15 for submission at the conference. In fact, participants often also arrive early to engage in pre-
16 meeting discussions with their scientific colleagues.

17 9. Contrary to the Makah Tribe’s suggestion concerning Dr. Sumich, my colleague Catherine
18 Pruet and I have been actively involved in soliciting input from cetacean scientists who are not
19 attending the IWC meeting.

20 10. Since Sea Shepherd filed its Motion in this proceeding seeking an extension on May 10th,
21 there have been an additional 12 gray whale strandings.

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1 I declare under penalty of perjury under the laws of Washington and the United States that the
2 foregoing is true and correct.

3 DATED this 17th day of May 2019

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