

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

**SUPPLEMENTAL DECLARATION OF DJ SCHUBERT IN SUPPORT OF
AWI'S COMBINED REPLY TO THE NATIONAL MARINE FISHERIES SERVICE'S
AND MAKAH INDIAN TRIBE'S RESPONSES TO
AWI'S EXPEDITED MOTION TO EXTEND WAIVER PROCEEDING SCHEDULE**

I, Donald John "DJ" Schubert, hereby supplement my prior Declaration and declare as follows:

1. I was not aware of, nor did I have access to, the new documents that NMFS admits postdate the publication of the DEIS, before they were made available by NMFS on or around April 5, 2019. While they may have been available prior to that date, I do not automatically receive every report, document, or study published on gray whales, their ecology, or their habitat. Furthermore, in many instances, unless I have the title, journal name, or other identifying information for such new materials it can be difficult to locate even if available online.

Therefore, NMFS's suggestion that I should have known of and had access to many of these new documents and, otherwise, that I had sufficient time to review these documents is incorrect.

2. While there are some similarities between the new and previously evaluated alternatives from the DEIS, they are not the same. Some of the previously reviewed alternatives propose a summer/fall hunt while others propose a winter/spring hunt but none combine these bifurcated hunts into a single alternative. The only alternative that includes two hunting seasons in a single

year (Alternative 5) included a 21-day hunting window in the winter (December 1 through December 21) and a 21-day hunting window in the spring (May 10 through May 31) for a total of 42 hunting days, which is much shorter than either the even-year or odd-year hunt proposed in the new alternative. The new alternative also proposed over 350 training approaches and training harpoon throws at gray whales which were not included in any of the alternatives considered in the DEIS. Since the new alternative, as a package, differs so dramatically from the alternatives evaluated in the DEIS, this raises additional concerns about potential environmental impacts not disclosed or evaluated in the DEIS.

3. While I did not have to spend time preparing for the IWC Scientific Committee meeting, I had and continue to have other urgent projects and campaigns that require my attention. For example, research for preparation of comments on U.S. Fish and Wildlife Service's proposed rule to delist all gray wolves from the Endangered Species Act (that comment deadline of May 14 was extended by 60 days on May 13), preparation of a comprehensive letter to the World Heritage Centre and International Union for Conservation of Nature on the near extinction of the vaquita, review of nominations for AWI's Clark R. Bavin Wildlife Law Enforcement Awards, and attendance at a meeting with aides of New Jersey Governor Phil Murphy to discuss a controversial wildlife bill in the New Jersey legislature. Additionally, before and after April 5, I had been spending considerable time reviewing and analyzing several hundred species proposals and working documents that were to be discussed at the 18th meeting of the Conference of the Parties (CoP) to the Convention on International Trade in Endangered Species of Wild Fauna and Flora which was scheduled to begin in Colombo, Sri Lanka on May 23. Due to the terrorist attacks that occurred in Sri Lanka starting on Easter Sunday (April 21, 2019), the CoP was

postponed, but notification of that decision was only published on April 26.¹ As a consequence, upon publication of the notices relevant to the present case on April 5, I had to juggle ongoing preparations for the CoP, other projects and campaigns, while also attempting to review the notices, other information, and prepare substantive testimony on the proposed waiver and proposed regulations to submit to Judge Jordan.

4. Each of the fourteen categories of records contained in the AWI FOIA request I filed on AWI's behalf are directly relevant to the proposed waiver and proposed regulations, as I have no spare time to read so called "tangential and irrelevant materials." The submission of the FOIA request on May 6 was not the product of a purposeful delay but, rather, reflects the time invested in studying the proposed regulations and some of the associated information before compiling the FOIA request so that AWI would not request "tangential and irrelevant" materials.

Furthermore, while there is information about this issue on the NMFS website, I am not familiar with any NMFS webpage that provide access to all of the information cited in the DEIS and/or where the records AWI sought via FOIA is made available to the public.

5. AWI did not provide the level of detail that NMFS claims is lacking with respect to IWC Scientific Committee papers as it would have violated the IWC Scientific Committee Handbook - Working Methods of the IWC's Scientific Committee (IWC/67/FA/20) policy related to citing or using papers submitted to the Scientific Committee. There are papers submitted to the IWC meeting, including Zharikov et al. 2019 (SC/68a/ASW 03), Urban et al. 2019 (SC/68a/CMP 11 Rev 1), and Urban et al. 2019 (SC/68a/CMP 12 Rev 1), that provide information or raise questions pertinent to the issues associated with the proposed waiver and proposed regulations,

¹ See CITES website, Status update on the postponement of CoP18 (May 10, 2019), https://www.cites.org/eng/news/Status-update-on-the-postponement-of-CoP18_10052019.

including about ENP gray whale calf counts, the condition of gray whales in their wintering area, the number of WNP gray whales found in the wintering lagoons in Mexico, and possible changes in the availability or accessibility of whales in the Russian hunt. A 90-day extension, if granted, would allow AWI to incorporate the findings of these papers into its direct testimony. The fact that, as noted in the NMFS Motion (and in the Yates second declaration) the IWC has postponed its planned 2019 implementation review for North Pacific gray whales until 2020 does, however, concern me given that NMFS may be seeking to complete its decision-making process on this matter before that implementation review is concluded.

6. Although, prior to April 5, I had been privy to a *summary* of NMFS's new alternative for the hunt, none of the specific details regarding unsuccessful strike limits, struck-and-lost limits, training approaches, training throws, the dates of the bifurcated hunts, or the provisions specific to PCFG and WNP gray whales, had been disclosed. All of these details are crucial to being able to meaningfully analyze and address the implications of the hunt. Further, especially considering the significant amount of time that had passed between the July 2015 deadline for comments on the DEIS, NMFS's submission of the Makah hunt description to the IWC in May 2018, and NMFS's publication of the hearing notice and proposed regulations in April 2019, I had no basis for assuming that the summary of the new alternative from May 2018 would be the same as the official publication by NMFS as part of a waiver proceeding.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing statements are true and correct to the best of my knowledge, information, and belief.

Executed this 17th day of May, 2019.

A handwritten signature in cursive script, appearing to read "D.J. Schubert".

DJ Schubert