

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

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In re:	)	Docket No. 19-NMFS-0001
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<b>Proposed Waiver and Regulations Governing</b>	)	RIN: 0648-BI58 and
<b>the Taking of Eastern North Pacific Grey</b>	)	RIN: 0648-XG584
<b>Whales by the Makah Tribe</b>	)	
	)	

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**ORDER DENYING SEA SHEPHERD’S AND ANIMAL WELFARE INSTITUTE’S  
EXPEDITED MOTIONS TO EXTEND WAIVER PROCEEDING SCHEDULE**

**I. INTRODUCTION**

On April 5, 2019, the National Marine Fisheries Service (NMFS) proposed a waiver of the Marine Mammal Protection Act (MMPA) ban on the take of marine mammals to allow the Makah Tribe to take Eastern North Pacific Grey Whales. NMFS published its proposed waiver and regulations in the Federal Register. *Announcement of Hearing Regarding Proposed Waiver and Regulations Governing the Taking of Marine Mammals (Announcement of Hearing)*, 84 Fed. Reg. 13639 (April 5, 2019) and *Regulations Governing the Taking of Marine Mammals*, 84 Fed. Reg. 13604 (April 5, 2019). Interested persons had until May 6, 2019 to register as parties to the proceeding. The Makah Tribe filed its notice of intent to participate on May 1, 2019. Sea Shepherd Legal and Sea Shepherd Conservations Society (collectively, “Sea Shepherd”) and the Animal Welfare Institute (AWI) both filed their respective notices of intent to participate on May 6, 2019.

Under the timeline specified in the Federal Register notice, parties must file their initial written direct testimony by May 20, 2019. The prehearing conference in this matter is set to take place on June 17, 2019 and the hearing to begin on August 12, 2019. *See Announcement of*

*Hearing.* Sea Shepherd and AWI each filed Expedited Motions on May 10, 2019, seeking to extend the time for filing written direct testimony and all deadlines thereafter by a minimum of 90 days. NMFS and the Makah Tribe both filed responses opposing the extension of time on May 15, 2019. On May 17, 2019, AWI and Sea Shepherd filed a reply briefs.

## **II. PRESIDING OFFICER'S SCOPE OF AUTHORITY**

Sea Shepherd and AWI argue that, under the Administrative Procedures Act (APA), 5 U.S.C. § 556(c)(5), (9) and the NOAA regulations at 50 C.F.R. § 228.6(b)(3), I have the authority to grant the relief they seek. NMFS disagrees, arguing that the regulations expressly provide the presiding officer the power to modify the date of the hearing but do not grant the same authority with respect to other filing deadlines. NMFS argues that basic canons of interpretation limit my powers to those expressly enumerated in the regulations, and that the plain language of the regulation does not contemplate the deadline for submission of written direct testimony to be altered.

I find NMFS's reading of the presiding officer's ability to modify filing deadlines to be too restrictive. The powers granted by regulation to the presiding officer include to:

- (1) Change the time and place of the hearing and adjourn the hearing;
- (2) Evaluate direct testimony submitted pursuant to these regulations, make a preliminary determination of the issues, conduct a prehearing conference to determine the issues for the hearing agenda, and cause to be published in the FEDERAL REGISTER a final hearing agenda;
- (3) Rule upon motions, requests and admissibility of direct testimony;
- (4) Administer oaths and affirmations, question witnesses and direct witnesses to testify;
- (5) Modify or waive any rule (after notice) when determining that no party will be prejudiced;
- (6) Receive written comments and hear oral arguments;
- (7) Render a recommended decision; and

(8) Do all acts and take all measures, including regulation of media coverage, for the maintenance of order at and the efficient conduct of the proceeding.

50 C.F.R. § 228.6(b)(1)-(8). The section regarding direct testimony submitted as written documents provides that “[u]nless otherwise specified, all direct testimony, including accompanying exhibits, must be submitted to the presiding officer in writing no later than the dates specified in the notice of the hearing (§ 228.4), the final hearing agenda (§ 228.12), or within 15 days after the conclusion of the prehearing conference (§ 228.14) as the case may be.” 50 C.F.R. § 228.7(a) (emphasis added).

The presiding officer’s authority to modify the dates for direct testimony is not specifically stated, as it is for changes to the hearing date. However, contrary to NMFS’s assertions, the plain language of 50 C.F.R. § 228.7(a) permits exceptions to the schedule for submission of direct testimony. The rule sets out the procedures to be followed by default, but the filing dates may be “otherwise specified.” The question is who has the authority to specify modifications to the schedule. I find the presiding officer is permitted to do so in appropriate circumstances under 50 C.F.R. § 228.6(b)(3) and (5), which grant authority to rule on motions and requests and to “modify or waive any rule (after notice) when determining that no party will be prejudiced.”

### III. CONSIDERATION OF REQUEST FOR EXTENSION

Sea Shepherd and AWI assert that I should apply a “good cause” standard to their requests for extension of time. Sea Shepherd draws this standard from case law holding that Administrative Law Judges exercise authority comparable to that of district court judges conducting a bench trial, which includes in part the ability to regulate the course of the hearing. *See Lucia v. SEC*, 138 S.Ct. 2044, 2049 (2018) (quoting *Butz v. Economou*, 438 U.S. 478, 513

(1978)) and *In re Domestic Airline Travel Antitrust Litig.*, 2018 U.S. Dist. LEXIS 155775, \*33 (D.D.C. Sept. 13, 2018). AWI points out that the regulations are silent on the issue of filing a motion for extension of time in these proceedings and urges me to look at Federal Rule of Civil Procedure 16(b)(4) for guidance. NMFS argues that, even assuming the “good cause” standard is applicable here, neither Sea Shepherd nor AWI has met the standard and the request should be denied.

While a “good cause” standard is generally appropriate in administrative proceedings, it is not the proper standard to apply when considering modification of the default timelines established in 50 C.F.R. § 228.7(a). Rather, the determinative issue is whether modifying the timeline will prejudice any party. *See* 50 C.F.R. § 228.6(b)(5). Only if there is no prejudice would the parties’ reasons for seeking the extension be relevant. In other words, the regulations do not contemplate whether meeting the specified filing deadlines would cause hardship to a party, but the presiding officer has the discretion to extend time if such extension will not cause prejudice to any party.

The Makah Tribe argues that it has already been subjected a lengthy delay in exercising its right to hunt whales, which is established by treaty. NMFS has confirmed that, due to funding and contractual issues in securing the services of an Administrative Law Judge to serve as the presiding officer in this proceeding, continuing the hearing beyond the end of Fiscal Year 2019 would result in an additional delay of uncertain length while these issues are resolved. The Makah Tribe also contends that, while Sea Shepherd and AWI posit that a continuance would actually benefit all parties, “[t]hey 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.

I find that the Makah Tribe has advanced a well-reasoned argument as to why it would be prejudiced by a delay in these proceedings. Therefore, I am precluded from modifying the deadline for submission of written direct testimony, as I only have the authority to do so when no party would be prejudiced by the delay. The dates set in the notice of hearing for submission of written direct testimony and the prehearing conference will stand. In light of the fiscal and contractual issues, I also find it important that I make all reasonable efforts to hold the hearing during the current Fiscal Year. I therefore decline to change the date of the hearing at this time.

This will not preclude the movants from raising these issues at the hearings. The regulations provide that when filing initial direct testimony a party “may propose issues of fact not defined in the notice of the hearing and the reason(s) why such issues should be considered at the hearing.” 50 C.F.R. 228.7(c). Prior to the prehearing conference the ALJ “shall make a preliminary determination of issues of fact which may be addressed at the hearing.” 50 C.F.R. 228.11(a). The purpose of the prehearing conference is to enable the presiding officer to determine whether there are any additional significant issues, what facts are not in dispute, which witnesses may appear at the hearing, and the nature of the interest of each party and which parties’ interests are adverse. 50 C.F.R. § 228.11. Thus, any discussion of issues that may have been omitted from consideration as a result of keeping the currently-established deadlines can be raised at that time.

**ORDER**

Sea Shepherd's and AWI's Expedited Motions to extend time for submission of direct testimony and to continue the hearing in this matter are DENIED.



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George J. Jordan  
Administrative Law Judge

Done and dated this 20th day of May, 2019, at  
Seattle, Washington.