

**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

**REQUEST TO MOVE HEARING DATE IN WAIVER PROCEEDING**

The Animal Welfare Institute (AWI), an animal protection organization with a longstanding interest in the proposed whale hunt at issue in this proceeding, is a party in the above-captioned matter. For the reasons set forth below, AWI respectfully submits this Request to Move the Hearing Date in the Waiver Proceeding, as authorized at the pre-hearing conference. On May 10, 2019, AWI filed an expedited motion to extend the time for filing written direct testimony and all deadlines thereafter by ninety days. The ALJ denied that request. However, in light of new circumstances as detailed herein, and subsequent discussions amongst the parties, including before the ALJ at the prehearing conference, AWI now submits this request to adjust the hearing dates by a substantially shorter amount of time. In support of this request, AWI hereby submits to the presiding officer the Declaration of Donald John “DJ” Schubert.

On April 5, 2019, the National Marine Fisheries Service (NMFS) announced an agency hearing to be convened before this administrative law tribunal, involving a proposed waiver under the Marine Mammal Protection Act (MMPA), to commence on August 12, 2019, with a pre-hearing conference slated for June 17, 2019. 84 Fed. Reg. 13,639 (Apr. 5, 2019).

Simultaneously, NMFS published proposed regulations governing the hunting of eastern North Pacific (ENP) gray whales by the Makah Indian Tribe in northwest Washington State. 84 Fed. Reg. 13,604 (Apr. 5, 2019). At the pre-hearing conference, AWI requested a change in the date

of the hearing due to issues concerning the availability of witnesses and its ability to fully participate in the waiver proceeding, especially in light of very recent developments outside of AWI's control that cast serious doubt on AWI's ability to fully participate in the hearing should it not be postponed. The presiding officer requested that the parties submit briefs on this issue. Specifically, the presiding officer requested the parties explain the factual basis for the difficulties faced by each party and propose alternative hearing dates. Accordingly, AWI submits this request and its attached declaration for this purpose. As explained below, AWI has good cause for moving the hearing dates.<sup>1</sup> As alternative dates, AWI proposes to hold the hearing on the above-captioned waiver proceeding in Seattle, Washington, from September 16, 2019 to September 20, 2019.<sup>2</sup> As alternative dates, AWI proposes beginning mid-week on September 25, 2019.<sup>3</sup> AWI is also available from September 30, 2019 until October 9, 2019.

As AWI noted at the pre-hearing conference and as is further outlined in the attached Declaration of DJ Schubert, the current hearing dates during which the waiver proceeding is scheduled raise several conflicts for AWI, and will hinder its ability to adequately participate and

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<sup>1</sup> In his May 20, 2019 Order denying AWI's expedited motion to extend the deadlines in this waiver proceeding, the ALJ held that his authority to modify the default timelines governing the submission of testimony, *see* 50 C.F.R. § 228.7(a), is dependent upon a lack of prejudice to any party. AWI respectfully notes that the regulation governing the timing of the hearing does not require the proceeding to be held by a date certain. *See* 50 C.F.R. § 228.4(b)(2). Rather, the regulation merely provides that the hearing "shall not be less than 60 days after the publication of notice of the hearing. *Id.* Accordingly, AWI believes that the "good cause" standard generally applicable to administrative proceedings governs here. *Accord* Dkt. No. 32 at 4 (recognizing that the "good cause" standard is generally appropriate in administrative proceedings").

<sup>2</sup> The presiding officer also requested that the parties provide the name and phone number of a representative with whom the presiding officer's staff could confer to coordinate a new hearing date. AWI identifies DJ Schubert for this purpose. His telephone number is: (609) 601-2875, and his email address is dj@awionline.org.

<sup>3</sup> AWI proposes beginning mid-week due to conflicts in AWI's counsel's schedule.

secure witnesses. Most significantly, the hearing dates in the waiver proceeding create a clear conflict with the recently announced dates of the rescheduled Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) Conference of the Parties (CoP). On June 12, 2019, the Secretariat for CITES announced that the 18th CoP would take place in Geneva, Switzerland from August 17, 2019 until August 28, 2019. *See* Decl. of DJ Schubert ¶ 10.<sup>4</sup> The CoP “is the supreme decision-making body of the convention in that decisions made at the CoP are key to protecting wildlife in international trade, in ensuring the proper implementation of the convention, and to providing direction to the work of the CITES committees.” *Id.* ¶ 3. Given the importance of the CoP to determining the implementation of CITES, AWI has participated in the plenipotentiary meeting of CITES in 1973 and in every CoP since the initial meeting in 1976. *Id.* ¶ 4. Since 2007, DJ Schubert has been the CITES lead representative for AWI, and he has represented the organization at every CoP held over the last twelve years. As a result, DJ Schubert has accumulated a wealth of institutional knowledge regarding CITES procedures and processes, and consequently, is actively engaged in multiple aspects of the CoP with various delegates from member states, representatives from non-governmental organizations, and coalitions. *Id.* ¶ 5-6.

In addition to the CoP itself, DJ Schubert also attends meetings and events that take place during the week preceding the meeting. *Id.* ¶ 6-7. These meetings are vital to preparing and strategizing for the CoP, including by “discuss[ing] many of the species proposals and working documents, identify[ing] persons/organizations working on particular issues, develop[ing] in-person lobbying strategies, and provid[ing] persons who have not previously attended a CoP with

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<sup>4</sup> The CoP had originally been scheduled to take place in Sri Lanka in late May 2019; however, a series of deadly terrorist attacks across Sri Lanka on Easter Sunday, April 21, 2019, led the Secretariat to cancel and reschedule the CoP to ensure the safety of all participants. *Id.* ¶ 9.

an understanding of meeting procedures and rules governing observer participation in the meeting deliberations.” *Id.* ¶ 6. Additionally, DJ Schubert and AWI’s participation in these preparation meetings and discussions are important to coordinating the effective participation of the Species Survival Network, an influential coalition of over 100 non-governmental organizations (NGOs) “committed to the promotion, enhancement and strict enforcement of CITES,” in the CoP. *Id.* ¶ 6.

Mr. Schubert also coordinates the Clark R. Bavin Wildlife Law Enforcement awards for AWI which recognize the superlative efforts of wildlife law enforcement officers, police and customs agencies, prosecutors, and others in combatting wildlife crime. *Id.* ¶ 13. Those selected to receive this prestigious award are honored during a ceremony that occurs at an SSN reception for delegates to the CoP where Mr. Schubert, the Secretary-General of CITES and others give remarks before recognizing the award recipients. *Id.* That reception usually takes place within the first few days of the CoP but the specific date for the event at the upcoming CoP has not yet been selected. Similarly, Mr. Schubert is scheduled to speak at a side event during the CoP on the illegal trade in totoaba, a large fish species that is endemic to the Gulf of California in Mexico and whose illegal trade has caused the near extinction of the vaquita porpoise. That event is anticipated to be scheduled for August 17 or 18, 2019. *Id.*

In light of the above, DJ Schubert’s institutional knowledge is most important to the successful movement of several important conservation and trade issues through the CITES process, as many veteran wildlife experts are unable to attend the rescheduled meeting. *Id.* ¶ 11. Furthermore, it is clear that DJ Schubert’s participation in these meetings, as well as in the CoP itself, is important to AWI and its organizational mission, DJ Schubert personally, and to the

NGO community as a whole, particularly given the scheduling difficulties that have arisen due to the new CoP dates. See *id.* ¶¶ 11, 12.

At the same time, AWI has a demonstrated longstanding interest in the waiver proceeding here at issue. *Id.* ¶ 14. DJ Schubert has been engaged in this issue since the mid-1990s, and AWI itself has been involved in this issue since at least 1999. *Id.* AWI has participated in the administrative and court proceedings associated with the proposed Makah hunt, and DJ Schubert has accumulated a wealth of institutional knowledge that is critical to AWI's effective participation as a party in this proceeding. *Id.* ¶¶ 14, 15. However, DJ Schubert cannot be in two places at once. *Id.* ¶ 15. Thus, should the hearing date in the waiver proceeding not be postponed for a minimal amount of time, AWI's ability to effectively participate in either the CITES CoP or the waiver proceeding will be severely impeded, thereby causing potential adverse impacts from international trade to animals, which, in turn, significantly harms the organization, its mission and interests, and the many members it represents. *Id.*

Although AWI is aware that the Makah Tribe opposes any delay in the waiver proceeding, AWI respectfully reiterates that it is not responsible for the lengthy delay in setting the hearing date, in the publication of the proposed rules, or in the broader decision-making process, and does not believe that a minimal postponement of the hearing date to allow for the full participation of all interested parties in the waiver proceeding would prejudice the Tribe or any other party. In contrast, AWI will be unable to fully participate in the waiver proceeding, thereby impairing its ability to represent its interests and those of its members, if the hearing date is not postponed to mid-September, including by being unable to secure the participation of important witnesses. Given that a fair and transparent formal rulemaking process is what was intended by 50 C.F.R. Part 228 and the Administrative Procedure Act, 5 U.S.C. §§ 553, 555–

557, 701-706, it is of vital importance for all parties to take the time needed to ensure a fair and objective proceeding in which all parties can participate in an effective and informed manner. Accordingly, to ensure a fair proceeding and the meaningful participation of all parties, AWI respectfully submits that the hearing date should be moved such that the conflict between the waiver proceeding and the CITES CoP is resolved.

WHEREFORE AWI respectfully requests that the presiding officer grant this request as set forth above.

Presented on this 24th day of June, 2019, by:

/s/ Elizabeth L. Lewis

Elizabeth L. Lewis

DC Bar No. 229702

Meyer Glitzenstein & Eubanks LLP

4115 Wisconsin Ave NW, Ste. 210

Washington, DC 20016

202-588-5206

[llewis@meyerglitz.com](mailto:llewis@meyerglitz.com)

*Counsel for Animal Welfare Institute*