

**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

**AWI'S MOTION IN LIMINE TO EXCLUDE TESTIMONY AND EVIDENCE**

The Animal Welfare Institute (“AWI”), an animal protection organization with a longstanding interest in the proposed whale hunt at issue in this proceeding, is considered a party in the above-captioned matter. Pursuant to 5 U.S.C. § 556(c), (d) and 50 C.F.R. § 228.6, and for the reasons set forth below, AWI respectfully submits this Motion in Limine to exclude portions of the testimony and evidence submitted by Drs. Jonathan Scordino, John W. Bickham, and John R. Brandon on behalf of the Makah Indian Tribe (“Tribe”).

By this Motion, AWI requests that the ALJ issue an Order excluding portions of the testimony and related exhibits proffered by Drs. Scordino, Bickham, and Brandon on the grounds that those portions are irrelevant and as such, offer little or no probative value to the ALJ. Specifically, the testimony related to whether the Western North Pacific (“WNP”) gray whale stock as currently recognized by the National Marine Fisheries Service (“NMFS”) is properly designated as a single stock that is listed as endangered under the Endangered Species Act (“ESA”) has no bearing on any of the statutory factors (or underlying facts) relevant to whether NMFS may properly issue a waiver of the Marine Mammal Protection Act’s (“MMPA”) moratorium to the Makah Tribe for the take of individuals from the Eastern North Pacific (“ENP”) gray whale stock. Such evidence should therefore be excluded as irrelevant to the

instant proceeding, consistent with applicable laws, regulations, and the Federal Rules of Evidence.

## **BACKGROUND**

On April 5, 2019, NMFS announced an agency hearing to be convened before this administrative law tribunal, involving a proposed waiver under the MMPA, to commence on August 12, 2019, with a pre-hearing conference slated for June 17, 2019. *See* 84 Fed. Reg. 13,639 (Apr. 5, 2019). Simultaneously, NMFS published proposed regulations governing the hunting of ENP gray whales by the Makah Indian Tribe in northwest Washington State. *See* 84 Fed. Reg. 13,604 (Apr. 5, 2019). The parties submitted direct testimony to the ALJ on the proposed waiver and regulations—with the exception of testimony on the new Unusual Mortality Event issue identified at the prehearing conference—before the May 20, 2019 deadline. The hearing date was later delayed to November 14, 2019. *See* Order Granting Request to Change Hearing Date (July 8, 2019); 84 Fed. Reg. 37,837 (Aug. 2, 2019).

## **ARGUMENT**

### **I. The Standard For Admissible Evidence.**

The Administrative Procedure Act provides that agencies “shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence.” 5 U.S.C. § 556(d). The regulations governing the conduct of waiver proceedings under the MMPA likewise empower the ALJ to “rule upon motions, requests and admissibility of direct testimony,” 50 C.F.R. § 228.6(b)(3), and restrict direct testimony to only those “[f]acts that are relevant and material,” *id.* § 228.7(b)(2). The regulations do not define the standard for relevance; however, the Federal Rules of Evidence (“FRE”), while not binding in NOAA administrative proceedings, form a body of well-reasoned standards that provide guidance. *See In the Matter of Albatross Corp., et al*, 1997 WL 1402881

(NOAA) (looking to the FRE for guidance on determining the relevance of evidence). Rule 401 of the FRE provides that “evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”

**II. The Proffered Testimony Regarding The Stock Structure Of The WNP Whales Should Be Excluded Because Such Evidence Does Not Make The Existence Of Any Fact Relevant To The Waiver Proceeding Any More Or Less Probable.**

On February 14, 2005, the Makah Indian Tribe requested a waiver of the MMPA moratorium on take of ENP gray whales. 84 Fed. Reg. at 13,604. Pursuant to the MMPA, the Tribe’s ability to obtain a waiver of the MMPA for the ENP gray whales is based upon whether, “on the basis of the best scientific evidence available,” a waiver of the moratorium will adversely affect the “distribution, abundance, breeding habits, and times and lines of migratory movements of such marine mammals,” and further, whether a waiver “is in accord with sound principles of resource protection and conservation” articulated in the policies and purposes of the MMPA. 16 U.S.C. § 1371(a)(3)(A). In other words, NMFS must examine the proposed waiver’s impacts on the “distribution, abundance, breeding habits, and times and lines of migratory movements” of the ENP gray whale stock, *id.*, and ensure that the proposed waiver: will not cause marine mammal stocks to “diminish below their optimum sustainable population [“OSP”]” or “cease to be a significant functioning element in the ecosystem of which they are a part”; and will still allow marine mammal stocks “to develop to the greatest extent feasible commensurate with sound policies of resource management,” with the “primary objective of . . . maintain[ing] the health and stability of the marine ecosystem,” *id.* § 1361.

As relevant to the instant motion, in their direct testimony, Drs. Scordino, Bickham, and Brandon challenge the widely accepted conclusion that there are two distinct population stocks

of gray whales in the Pacific Ocean: the WNP and ENP. Specifically, they argue that the WNP stock is actually comprised of “Western Feeding Group” (sometimes called the “Western Grey Whales,” *see* Bickham Decl. at 30), which are allegedly a subset of the ENP whale stock, and “Western Breeding Stock” whales (sometimes called the “historical Western Grey Whales,” *see* Bickham Decl. at 30), which may be extirpated. *See, e.g.*, Brandon Decl. at 32; Scordino Decl. at 68; Bickham Decl. at 30. For the reasons set forth below, it is clear that any assertions attacking or disputing the structure of the WNP as a population stock under the MMPA are irrelevant to the central question in this proceeding—i.e., whether NMFS has properly demonstrated by the best available scientific evidence that each of the statutory criterion for issuing an MMPA waiver for the ENP stock has been satisfied.

Setting aside the abundance of scientific evidence supporting the conclusion that the Pacific gray whale population is split into two distinct stocks, it is beyond dispute that the WNP stock is a single stock listed as endangered under the ESA. *See* 58 Fed. Reg. 3121, 3134-35 (Jan. 7, 1993). As a result of its listing status under the ESA, the WNP stock is, by definition, a separate, “depleted” stock under the MMPA. *See* 16 U.S.C. § 1362(1)(C) (providing that a species or population stock that is listed as endangered under the ESA is, by definition, considered a “depleted” stock under the MMPA). Indeed, as NMFS recognized in its most recent Stock Assessment Report for the WNP population stock, “[a]s long as the WNP stock remains listed as endangered under the ESA, it will continue to be considered as depleted under the MMPA.” NMFS, *Gray Whale (Eschrichtius robustus): Western North Pacific Stock 4* (Mar. 15, 2019) [hereinafter NMFS, *Grey Whale Stock Assessment*], available at <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock->

[assessment-reports-species-stock](#). Accordingly, any challenge to the stock structure of the WNP gray whales is, in reality, a challenge to the listing status of the WNP stock under the ESA.<sup>1</sup>

When viewed through this statutory lens, it is clear that the evidence presented by Drs. Scardino, Bickham, and Brendon challenging the structure of the WNP stock under the MMPA in fact challenges the designation of the entire WNP stock as endangered under the ESA. However, whether the WNP gray whale stock—which is scientifically and legally distinct from the ENP gray whale stock—is properly identified as a single stock and designated as endangered under the ESA does not “tend to make” the adverse impacts of the proposed waiver on the distribution, abundance, breeding habits, and migration of the *ENP gray whale* stock any more or less probable. 16 U.S.C. § 1371(a)(3)(A). Rather, the appropriate focus of this inquiry is the proposed waiver and regulations’ effects on the marine mammal stock at issue. *Accord* 84 Fed. Reg. at 13,605 (“A decision to waive the MMPA take moratorium must . . . have due regard to the distribution, abundance, breeding habits, and times and lines of migratory movements of the marine mammal stock subject to take.”). Thus, relevant evidence is that which relates to the proposed waiver and regulations’ impacts to the ENP stock, not evidence related to NMFS’s designation of the WNP stock as a single stock listed as endangered under the ESA.<sup>2</sup>

Likewise, any purported debate over the WNP gray whale stock’s structure and designation as endangered under the ESA is (which, again, is not supported by the best available

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<sup>1</sup> The listing status of the WNP gray whales cannot be altered in a waiver proceeding under the MMPA. To the contrary, the ESA sets forth specific procedures that must be followed in order to downlist or delist species and population stocks. *See* 16 U.S.C. § 1533.

<sup>2</sup> Evidence relevant to the proposed waiver and regulations’ collateral impacts to the WNP stock—including impacts to the distribution, abundance, breeding habits, and times and lines of migratory movements—are, as described below, relevant to NMFS’s inquiry to whether the proposed waiver and regulations are consistent with the policies and purposes of the MMPA. *See* 16 U.S.C. §§ 1361, 1371(a)(3)(A).

science) is not a fact “of consequence” to NMFS’s determination of whether a waiver for the ENP stock is in accord with the purposes and policies of the MMPA. The focus of NMFS’s inquiry in determining whether a waiver may be issued for the ENP stock is whether the proposed waiver will impede the recovery of marine mammal stocks, or impair their ability to serve as functional elements of the marine ecosystem. 16 U.S.C. §§ 1361, 1371(a)(3)(A). Thus, while evidence that relates to the proposed waiver and regulations’ collateral effects on the WNP stock is certainly “of consequence” to the determination at issue, evidence that relates to the entirely separate inquiry of whether the WNP stock is properly identified as being comprised of a single stock subject to listing as endangered under the ESA—and by extension, identified as a “depleted” stock under the MMPA—is outside the legal and factual scope of the MMPA waiver proceeding, and must be addressed through the separate procedures set forth in the ESA and its implementing regulations, which have no relevance to this proceeding. *See* 16 U.S.C. § 1533 (setting forth the statutory criteria and procedures for listing and delisting endangered and threatened species). The Tribe’s attempts to escape this fact by couching their evidence as challenging the stock structure of the WNP gray whales exclusively under the MMPA cannot be sustained.

Indeed, on the basis of the best available science, NMFS determined that the WNP stock was a single stock that should remain listed as endangered under the ESA. *See* 58 Fed. Reg. 3121, 3134-35 (Jan. 7, 1993). That determination was made according to the rulemaking procedures set forth in Section 4 of the ESA, and the legal status of the WNP gray whale stock has not changed since the stock was originally listed in 1970. *See id.*; NMFS, *Grey Whale Stock Assessment*, *supra* at 3-4. NMFS has further determined that while “not all gray whales in the WNP [stock] share a common wintering ground,” and indeed, that there is a “seasonal

occurrence of WNP gray whales in U[nited] S[tates] waters,” the WNP gray whale stock should continue to be identified and managed as a separate stock under the ESA, and therefore, under the MMPA. NMFS, *Grey Whale Stock Assessment, supra* at 1. To delist the WNP gray whale stock from the ESA, NMFS must follow the procedures set forth in the ESA and its implementing regulations, and only if that conclusion is supported by the best available scientific evidence as part of a delisting decisionmaking process. *See* 16 U.S.C. § 1533; 50 C.F.R. pt. 424, subpt. B. Unless and until the WNP gray whale stock is delisted, the stock as currently described is entitled to all of the protections afforded to endangered species by the ESA. *Accord* NMFS, *Grey Whale Stock Assessment, supra* at 4. Of course, it goes without saying that the delisting processes cannot be carried out in a waiver proceeding under the MMPA.

Thus, even assuming, *arguendo*, that the ALJ accepts the Makah experts’ proffered testimony that the WNP stock is actually two separate groups (i.e., the Western Feeding Group and the Western Breeding Stock), the *entire* WNP gray whale stock will remain listed as endangered under the ESA. In other words, the ALJ’s findings in an MMPA waiver proceeding cannot alter the WNP gray whale stock’s structure or status under the ESA, nor can it lessen the protections to which the stock’s individuals are entitled.<sup>3</sup> Regardless of the ALJ’s evaluation of the evidence, the fact that the entire WNP gray whale stock is legally endangered and consequently, identified as a population stock remains the same. Because the evidence cannot change the legal status of the WNP gray whale stock, it is irrelevant to a determination of whether the waiver will impede the recovery of marine mammals (including the WNP gray

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<sup>3</sup> For that to occur, the Makah Tribe would have to petition NMFS to delist the WNP gray whale stock, and NMFS would have to determine at the conclusion of that process that delisting is supported by the ESA’s listing criteria when the best available science is applied to the WNP stock of gray whales. *See* 16 U.S.C. § 1533; 50 C.F.R. pt. 424, subpt. B.

whale stock), or impair their ability to serve as functional elements of the marine ecosystem.

Simply put, the proffered testimony does not tend to make the existence of any fact that is “of consequence” to the ALJ’s determination any more or less probable.<sup>4</sup>

In sum, because those portions of the direct testimony offered by Drs. Scordino, Bickham, and Brandon related to the status of the WNP gray whale stock in actuality challenges the listing of the WNP stock under the ESA, such evidence does not have any bearing on whether NMFS has demonstrated by the best available science that all of the statutory criteria for a waiver to issue under the MMPA have been met, it should be excluded. *See* 5 U.S.C. § 556(d). The appropriate venue for challenging NMFS’s listing decision for WNP gray whales, and by extension, its stock designation under the MMPA, is through the separate delisting process Congress set forth in Section 4 of the ESA context, not in an administrative proceeding under the MMPA. The Makah Tribe should not be permitted to distract the ALJ with extrinsic and immaterial evidence that has no relevance to the facts here at issue.

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<sup>4</sup> In contrast, testimony that relates to the status of the Pacific Coast Feeding Group (“PCFG”) gray whales under the MMPA is entirely relevant to the instant proceeding. The proposed waiver would allow the take of individuals from the ENP gray whale stock, which according to NMFS, includes the PCFG. The proposed waiver and regulations clearly acknowledge that PCFG whales will likely be taken. *See* 84 Fed. Reg. at 13,605. If the PCFG constitutes a separate stock, special consideration must be given to the proposed waiver’s effects on the distribution, abundance, breeding habits, and migration of the PCFG whale stock. *See* 16 U.S.C. § 1371(a)(3)(A). Additionally, special consideration must be given to whether the waiver will impair the PCFG stock’s recovery, or impact its ability to serve as a functional element of the marine ecosystem. *Id.* Because the PCFG numbers are low, the take of even one individual could have dire consequences for the stock’s recovery, making it even more unlikely that NMFS would be able to demonstrate that the Tribe’s request satisfies the statutory criteria necessary for the issuance of a waiver. Evidence that tends to make the PCFG’s status as a separate stock more likely would therefore also tend to make the facts that are determinative of the entire action—i.e., that the proposed waiver would not adversely affect the stock at issue and would be in accord with the purposes and policies of the MMPA—less likely. Consequently, such evidence is clearly relevant to facts that are “of consequence” to the action and must be allowed.



## **CONCLUSION**

Because the proffered testimony is irrelevant to the facts at issue in the instant proceeding, it should be excluded.

Presented on this 9th day of August, 2019, by:

*/s/ Elizabeth L. Lewis*

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