

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

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

**NATIONAL MARINE FISHERIES SERVICE’S MOTION
TO LIMIT ISSUES AND TESTIMONY**

I. INTRODUCTION

The National Marine Fisheries Service (NMFS), proponent of the proposed waiver and regulations that are the subject of this proceeding, respectfully moves to limit the scope of issues to be addressed at the hearing and associated testimony. As previously acknowledged and agreed by the parties, the only issues for decision at the hearing concern whether NMFS’s proposed waiver and regulations are consistent with the requirements of sections 101(a)(3)(A) and 103 of the Marine Mammal Protection Act (“MMPA”).¹ *See* 16 U.S.C. §§ 1371(a)(1)(A), 1371. NMFS’s compliance with other sections of the MMPA and with other statutory mandates are not subject to decision and therefore not relevant. NMFS also moves to exclude or limit the

¹ 16 U.S.C. §§ 1361 *et seq.*

testimony of two proffered witnesses on grounds that their testimony lacks proper foundation and probative value, as explained below.

II. BACKGROUND

A. Legal Framework

1. MMPA Requirements for Waivers, Regulations, and Permits

This proceeding is governed by the MMPA, which imposes a general moratorium on the “take”² of any marine mammal but includes a number of exemptions and exceptions. *See* 16 U.S.C. § 1371. One exception allows the Secretary of Commerce,³ who has delegated authority to NMFS, to waive the moratorium from time to time and allow taking from a species or stock of marine mammals (MMPA § 101(a)(3)(A)), adopt suitable regulations governing the take (MMPA § 103), and issue permits authorizing the take (MMPA § 104). *See* 16 U.S.C. §§ 1371(a)(3)(A), 1373, 1374; Proposed Rule, 84 Fed. Reg. 13,604, 13,611-15 (2019).

MMPA section 101(a)(3)(A) governs waivers. A decision by NMFS to issue a waiver must: be based on the best scientific evidence available; be made in consultation with the Marine Mammal Commission; and, have due regard to the distribution, abundance, breeding habits, and times and lines of migratory movements of the marine mammal stock subject to the waiver. 16 U.S.C. § 1371(a)(3)(A). Additionally, NMFS must “be assured” that the taking is “in accord with sound principles of resource protection and conservation as provided in the purposes and policies of the MMPA.” *Id.* The MMPA’s purposes and policies include maintaining marine mammals as a significant functioning element of their ecosystems, maintaining the health and

² Under the MMPA, “take” means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.” 16 U.S.C. § 1362(13).

³ The U.S. Fish and Wildlife Service, Department of Interior, also administers the MMPA with respect to certain species of marine mammals. *See* 16 U.S.C. § 1362(12).

stability of the marine ecosystem, and managing stocks to attain or maintain their optimum sustainable population (OSP) levels,⁴ keeping in mind the carrying capacity of their habitat. 16 U.S.C. § 1361.

When issuing a waiver, NMFS must also adopt implementing regulations. 16 U.S.C. § 1371(a)(3)(A). The requirements for regulations are set forth in MMPA section 103, which provides:

[NMFS], on the basis of the best scientific evidence available and in consultation with the Marine Mammal Commission, shall prescribe such regulations with respect to the taking . . . of animals from each species of marine mammal (including regulations on the taking . . . of individuals within population stocks) as [NMFS] deems necessary and appropriate to insure that such taking will not be to the disadvantage of those species and population stocks and will be consistent with the purposes and policies [of the MMPA].

16 U.S.C. § 1373(a). NMFS has interpreted “disadvantage” in relation to the impact of the take on the stock’s OSP level. *See e.g.*, 45 Fed. Reg. 72178, 72185 (Oct. 31, 1980). In prescribing regulations, NMFS must

give full consideration to all factors which may affect the extent to which such animals may be taken . . . , including but not limited to the effect of such regulations on—

- (1) existing and future levels of marine mammal species and population stocks;
- (2) existing international treaty and agreement obligations of the United States;
- (3) the marine ecosystem and related environmental considerations;
- (4) the conservation, development, and utilization of fishery resources; and
- (5) the economic and technological feasibility of implementation.

16 U.S.C. § 1373(b).

A waiver and regulations, standing alone, do not allow the take of marine mammals. A person or entity eligible under the regulations must apply to NMFS for a permit to authorize

⁴ “The term ‘optimum sustainable population’ means, with respect to any population stock, the number of animals which will result in the maximum productivity of the population or the species, keeping in mind the carrying capacity of the habitat and the health of the ecosystem of which they form a constituent element.” 16 U.S.C. § 1362(9); *see also* Proposed Rule, 84 Fed. Reg. at 13,605.

take. The permit process is subsequent to and separate from the waiver process and is governed by section 104 of the MMPA. 16 U.S.C. § 1374. Permits must be consistent with the applicable regulations established under section 103 and must specify:

- (A) the number and kind of animals which are authorized to be taken . . . ,
- (B) the location and manner (which manner must be determined by [NMFS] to be humane⁵) in which they may be taken . . . ,
- (C) the period during which the permit is valid, and
- (D) any other terms or conditions which [NMFS] deems appropriate.

16 U.S.C. § 1374(b).

2. MMPA Procedures for Issuing Waivers, Regulations, and Permits

The decision to issue a waiver and adopt regulations must be made on the record after opportunity for an agency hearing. 16 U.S.C. § 1373(d). The agency hearing is governed by procedures set forth in MMPA section 103(d), the Administrative Procedure Act (“APA”⁶), and NMFS’s hearing regulations at 50 C.F.R. part 228. Pursuant to NMFS’s regulations, after the agency hearing, the presiding officer or administrative law judge (ALJ) “shall make a recommended decision based on the record and transmit the decision to the Assistant Administrator.” 50 C.F.R. § 228.20(a)-(b). The Assistant Administrator then publishes notice of receipt of the recommended decision in the *Federal Register* and provides opportunities for the parties to the hearing and any other interested persons to submit written comments. 50 C.F.R. § 228.20(c)-(d). After close of the comment period, the Assistant Administrator makes a final decision on the proposed waiver and regulations. 50 C.F.R. § 228.21(a)-(b). The Assistant Administrator “may affirm, modify, or set aside, in whole or in part, the recommended findings, conclusions and decision of the presiding officer [or ALJ].” 50 C.F.R. § 228.21(a).

⁵ The MMPA defines “humane” as “that method of taking which involves the least possible degree of pain and suffering practicable to the mammal involved.” 16 U.S.C. § 1362(4).

⁶ 5 U.S.C. §§ 500 *et seq.*

The issuance of permits is subject to procedures prescribed in MMPA section 104. NMFS must publish notice of a permit application in the *Federal Register* and provide opportunity for interested persons to submit comments. 16 U.S.C. § 1374(d)(2). Any interested person may request a hearing on the permit application, which NMFS may convene in its discretion. *Id.* § 1374(d)(4). After the close of the hearing, if any, and consideration of public submissions, NMFS must issue or deny the permit and publish its final decision. *Id.* § 1374(d)(5). The permit applicant and any party opposed to the permit may seek judicial review of the permit’s terms and conditions or NMFS’s refusal to issue a permit. *Id.* § 1374(d)(6).

3. Administrative Procedure Act

In rendering a decision through formal rulemaking, the agency must make findings and conclusions and identify the reasons or bases therefor. *See* 5 U.S.C. § 557(c)(3)(A). Agencies are not required to make findings on issues that are immaterial or collateral to their decisions. *Id.* (decisions must include a statement of “findings and conclusions, and the reasons or basis therefor, on *all the material issues of fact, law, or discretion* presented on the record”) (emphasis added); *Immigration & Naturalization Serv. v. Bagamasbad*, 429 U.S. 24, 25-26 (1976) (“As a general rule courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach.”); *Minneapolis & St. L. Ry. Co. v. United States*, 361 U.S. 173, 192-94 (1959) (under the APA, agency need not “make subordinate findings on every collateral contention advanced, but only upon those issues of fact, law, or discretion which are ‘material.’”).

Under the APA, an agency official or ALJ presiding over an agency hearing has the power to, among other things, “rule on offers of proof and receive relevant evidence,” and “regulate the course of the hearing.” 5 U.S.C. § 556(c). Per NMFS’s hearing regulations, the

presiding officer or ALJ may “[r]ule upon motions, requests and admissibility of direct testimony” and “[d]o all acts and take all measures . . . for the maintenance of order at and the efficient conduct of the proceeding. 50 C.F.R. § 228.6(b)(3), (8); *see also* 50 C.F.R. § 228.17 (testimony “shall become a part of the record *subject to exclusion of irrelevant and immaterial parts thereof*”) (emphasis added).

While the Federal Rules of Evidence do not apply to agency hearings, only evidence that is both “reliable” and “probative” can be relied on in the agency’s decision. The APA provides:

Any oral or documentary evidence may be received, but the agency as a matter of policy **shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence**. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party **and supported by and in accordance with the reliable, probative, and substantial evidence**.

5 U.S.C. § 556(d) (emphasis added). Accordingly, the presiding officer or ALJ must perform a “gate keeping function” and has an “affirmative duty to qualify evidence as ‘reliable, probative, and substantial’ before relying upon it.” *U.S. Steel Mining Co., Inc. v. Director, Office of Workers’ Compensation Programs*, 187 F.3d 384, 388-89 (4th Cir. 1999). As the Supreme Court has stated, in enacting section 556(d) of the APA, Congress was “primarily concerned with the elimination of agency decision-making premised on evidence which was of poor quality—irrelevant, immaterial, unreliable, and nonprobative—and of insufficient quantity.” *Steadman v. SEC*, 450 U.S. 91, 102 (1981).

B. Procedural Background

NMFS announced the hearing for this matter in a *Federal Register* Notice dated April 5, 2019, which included a list of the issues of fact that may be involved in the hearing. *See* 84 Fed. Reg. 13,639 (2019); 50 C.F.R. § 228.4(b)(5). After reviewing the direct testimony filed by all parties, Administrative Law Judge Jordan issued his preliminary determination of issues of fact,

as required under 50 C.F.R. § 228.11(a). *See* Notice and Agenda: Prehearing Conference, Order dated June 10, 2019. A prehearing conference was held June 17, 2019, after which ALJ Jordan issued an announcement of the hearing and final hearing agenda identifying the parties, witnesses, and issues of fact. 84 Fed. Reg. 30,088 (2019) (hereafter, “Final Hearing Agenda”).

Prior to issuance of the Final Hearing Agenda, several parties to the proceeding conferred and entered into a stipulation regarding the scope of issues to be addressed at the hearing.⁷

Partial Stipulation re Scope of Issues to Be Addressed at the Hearing, dated June 10, 2019 (“Partial Stipulation”). The Partial Stipulation provides:

All issues of fact raised by the Stipulating Parties shall relate to whether the proposed waiver and regulations comply with the procedural and substantive requirements of the MMPA and any regulations that apply to the determination of whether to waive the moratorium on taking and importing marine mammals and adopt regulations under sections 101(a)(3)(A) and 103 of the MMPA.

Partial Stip. at 3, ¶ 1. The Partial Stipulation notes that to the extent compliance with the MMPA’s procedural and substantive requirements involves issues of fact that may also be relevant under other statutes (*e.g.*, NEPA⁸), the stipulating parties remain free to raise such issues. *Id.* ¶ 2. The Partial Stipulation goes on to state:

For example, while the Parties agree that this hearing and the associated waiver rulemaking are not the appropriate vehicles for identifying or challenging the identification of any particular population stock under the MMPA, the Parties agree that evidence concerning the various populations, stocks, or groups of gray whales recognized or supported by the scientific literature and the impacts of the proposed waiver on them may be considered.

⁷ The stipulating parties are: NMFS, Animal Welfare Institute, Makah Indian Tribe, Peninsula Citizens for the Protection of Whales, Sea Shepherd Conservation Society, and Sea Shepherd Legal. Partial Stip. at 1. The Marine Mammal Commission did not enter into the stipulation but later at the prehearing conference stated that the Commission did not object to the stipulation. Prehearing Conference Transcript at 28-30. Ms. Inanna McCarty did not participate in the Partial Stipulation or in the prehearing conference. *Id.* at 2-3, 9.

⁸ National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.*

Partial Stip. at 4, ¶ 2(a). The stipulating parties also agreed that this hearing will not be used to challenge the manner of taking, as that would be identified during any subsequent permitting process in accordance with MMPA section 104. *Id.* ¶ 2(b); *see also* 84 Fed. Reg. at 30,091.

III. ARGUMENT

The only issues properly before the ALJ in this formal rulemaking are whether NMFS's proposed waiver and regulations meet the requirements of sections 101(a)(3)(A) and 103 of the MMPA. To ensure fair and efficient disposition of this matter and to comply with the APA and NMFS's hearing regulations, the Court should exclude issues and testimony unrelated to the governing legal requirements. Specifically, the Court should exclude issues pertaining to NMFS's potential future issuance of permits under MMPA section 104, NMFS's identification of stocks under MMPA section 117, and NMFS's compliance with other legal requirements, including the Endangered Species Act ("ESA"⁹), NEPA, and the International Convention for the Regulation of Whaling. Also, while NMFS does not object to the introduction of limited testimony regarding the treaty between the United States and the Makah Tribe, NMFS did not rely on the Tribe's treaty right in its decision-making therefore such information is of limited relevance. Further, the Court should exclude or limit written and oral testimony by Mr. Brett Sommermeyer (an attorney) and Ms. Margaret Owens (an artist and museum curator), because they have not established that their testimony is reliable and probative with respect to the facts at issue.

⁹ 16 U.S.C. §§ 1531 *et seq.*

A. NMFS’s Compliance With Legal Requirements Other than MMPA Sections 101(a)(3)(A) and 103 Should Not Be Addressed at the Hearing

1. Testimony Related to MMPA Sections 104 and 117 Should Be Excluded

As explained above, *if* NMFS ultimately issues a waiver and regulations authorizing a tribal hunt for eastern North Pacific (“ENP”) gray whales, the Makah Indian Tribe (“Makah Tribe” or “Tribe”) would need to obtain a permit prior to taking any whales. Permits are governed by MMPA section 104, which establishes procedures for permit issuance and for judicial review of permits. Section II.A.2, *supra*; 16 U.S.C. § 1374. Most of the parties previously stipulated that issues related to permit issuance are not subject to decision in this proceeding. Partial Stip. at 4, ¶ 2(b) (“the Parties agree that this hearing will not be used to challenge the manner if taking . . . including whether the manner of taking whales is ‘humane’ . . . or would pose risks to human safety.”). Part of the initial direct testimony submitted by Peninsula Citizens for the Protection of Whales (“PCPW”) raises issues regarding the safety of weapons that might be used for a hunt.¹⁰ Declaration of Margaret Owens, dated May 17, 2019, ¶¶ 16-25. Because PCPW stipulated that the manner of hunting, including the type of weapon that might be authorized and related safety issues, would not be addressed at the hearing, and because these issues are otherwise not relevant, this testimony should be excluded. *See* 16 U.S.C. § 1374(b)(1)(B); Partial Stip. at 4, ¶ 2(b).

Similarly, the MMPA provides, and the parties have agreed, that NMFS’s identification of a group of marine mammals as a “stock” under the MMPA is not subject to decision at the hearing but instead is governed by the requirements of MMPA section 117.¹¹ *See* Partial Stip. at

¹⁰ PCPW is party to the Partial Stipulation.

¹¹ The MMPA defines “stock” or “population stock” as “a group of marine mammals of the same species or smaller taxa in a common spatial arrangement, that interbreed when mature.” 16 U.S.C. § 1362(11). Identification of stocks is governed by MMPA § 117 and implementing guidance developed by NMFS and the U.S. Fish and

4, ¶ 2(a); 84 Fed. Reg. at 30,091 (“the parties will not challenge the identification of any whale populations, stocks, or groups under the MMPA during this hearing”). As stated in NMFS’s Notice of Hearing and Proposed Rule, the agency currently recognizes two gray whale stocks under the MMPA: the ENP stock and the western North Pacific (“WNP”) stock. 84 Fed. Reg. at 13,641; 84 Fed. Reg. at 13,606. The Pacific Coast Feeding Group (“PCFG”) is a feeding aggregation within and a component of the ENP stock. *Id.*

Two issues included in the Final Hearing Agenda include text that appears to question whether NMFS has properly identified the WNP stock: the last sentence of Issue I.A.3(a),¹² and the last clause of Issue I.B.1(d)(i).¹³ *See* 84 Fed. Reg. at 30,089-90. Per the Partial Stipulation and because the identification and composition of the WNP stock are determined by NMFS through MMPA section 117 and not through MMPA sections 101(a)(3)(A) or 103, these issues and related testimony¹⁴ should be excluded from consideration at the hearing. *See* 5 U.S.C. § 556(d); 50 C.F.R. § 228.17 (agency shall exclude irrelevant and immaterial evidence). Likewise, testimony relating to whether the PCFG should be considered a separate stock rather than part of the ENP stock is not subject to decision therefore not relevant to the facts at issue and should be

Wildlife Service (*see* note 3, *supra*). 16 U.S.C. § 1386; *see* Declaration of Dr. Shannon Bettridge, dated April 1, 2019, ¶¶ 5-13. The statutory process through which stocks are identified includes consultation with regional scientific review groups, input by the Marine Mammal Commission, and public notice and comment. *Id.* The MMPA does not impose formal rulemaking requirements for identification of stocks. *Id.*; *compare* 16 U.S.C. § 1373(d) (requiring formal rulemaking for issuance of waiver and regulations).

¹² Issue I.A.3(a) reads: “Does the majority of the ENP stock range from the winter/spring breeding grounds in northern Mexico and southern California to the summer/fall feeding grounds in the Bering, Beaufort, and Chukchi seas? *Should the Okhotsk Sea be included in the migratory range?*” 84 Fed. Reg. at 30,089 (emphasis added). The italicized text should be excluded for the reasons discussed above.

¹³ Issues I.B.1(d)(i) reads: “Do WNP whales occasionally migrate along with ENP whales to the North American breeding grounds, *or are these whales in fact a Western Feeding Group (WFG) of the ENP stock?*” 84 Fed. Reg. at 30,090 (emphasis added). The italicized text should be excluded for the reasons discussed above.

¹⁴ *See, e.g.*, Declaration of Jonathan Scordino, dated May 15, 2019, Report at 64-71, 74-77, 100-01; Declaration of John W. Bickham, dated May 17, 2019, Report at 4-6.

excluded.¹⁵ *Id.* Finally, because the PCFG is not an MMPA “stock,” Issue I.B.2(b)¹⁶ regarding whether or not the PCFG is at OSP levels, should be excluded as immaterial, because the MMPA defines OSP as applying to the status of “stocks.” *See* note 4, *supra*.

2. Issues Related to ESA Compliance Should be Excluded

Final Hearing Agenda Issue I.B.1(d)(iv) asks whether an incidental take permit under the ESA will be required to account for the possibility of a WNP whale being taken in the course of a hunt for ENP gray whales. 84 Fed. Reg. at 30,090. As explained in the Third Declaration of Chris Yates, NMFS’s compliance with the ESA is not relevant to this proceeding, and, in any event, NMFS will carry out consultation under ESA section 7(a)(2) prior to making a final decision whether to issue a waiver and regulations. Third Yates Decl., filed August 5, 2019, ¶ 28; *see* 16 U.S.C. § 1536(7)(a)(2); Proposed Rule, 84 Fed. Reg. at 13,615. The parties previously agreed that this issue of fact should be removed from the hearing agenda. *See* Prehearing Conference Transcript at 40-41.

3. NMFS’s Compliance with NEPA Should Not Be Addressed

The parties to the Partial Stipulation agreed that NMFS’s compliance with NEPA would not be considered at the hearing, while acknowledging that if issues of fact pertain both to the MMPA and to NEPA, those issues could be raised.¹⁷ Partial Stip. at 3, ¶ 2; *see also* Prehearing Conference Transcript at 40, 45. Nevertheless, a number of NEPA-related issues that have no

¹⁵ *See, e.g.*, Declaration of DJ Schubert, dated May 20, 2019, ¶¶ 39-41, 79 (arguing that the PCFG should be considered a separate stock.); Owens Decl. ¶ 8 (same).

¹⁶ Issue I.B.2(b) states: “Regardless of whether the PCFG is properly considered a separate stock or a subset of the ENP stock, should an OSP be separately determined for this group of whales?” 84 Fed. Reg. at 30,090.

¹⁷ Issues concerning NMFS’s compliance with NEPA are both immaterial to this proceeding and unripe, as NMFS has not yet issued a final environmental impact statement or record of decision. If NMFS ultimately decides to issue a waiver and regulations, NMFS would at that time fulfill its obligations under NEPA. *See, e.g., Wild Wilderness v. Allen*, 12 F. Supp. 3d 1309, 1319 (D. Or. 2014) (draft EIS not final agency action subject to judicial review), *aff’d*, 871 F.3d 719 (9th Cir. 2017).

bearing on MMPA requirements have been raised by the parties and referenced in the Final Hearing Agenda. These include the purported need for a “cumulative effects” analysis, for consideration of an off-shore hunt alternative, and for consideration of “local” impacts as discussed by the Ninth Circuit in *Anderson v. Evans*, 371 F.3d 475 (9th Cir. 2011). Because none of these issues bears on whether the proposed waiver and regulations comply with the MMPA, they should be excluded from the hearing. 5 U.S.C. § 556(d); 50 C.F.R. § 228.17.

Issue II.A.3(b) in the Final Hearing Agenda is whether consideration of cumulative impacts, including those from military exercises, marine energy and coastal development, and climate change, is necessary, and, if so, whether they were considered. 84 Fed. Reg. at 30,090. Preliminarily, as agreed by the parties and documented at the prehearing conference, this issue should be revised to include the words “under the MMPA” after “necessary,” to clarify that this issue is only pertinent insofar as it relates to an MMPA requirement. Prehearing Conference Transcript at 43. Even with this modification, however, the issue should be stricken, because there is no MMPA requirement that NMFS undertake a cumulative impacts analysis before issuing a waiver and regulations. *See* 16 U.S.C. §§ 1371(a)(3)(A), 1373.

The Declaration of Brett Sommermeyer, submitted by Sea Shepherd Legal / Sea Shepherd Conservation Society (collectively “Sea Shepherd.”), points to the MMPA requirement that NMFS give “due regard to the distribution, abundance, breeding habits, and times and lines of migratory movements” and “sound principles of resource protection and conservation” in issuing a waiver as a basis for arguing that the MMPA requires a cumulative impacts analysis. However, Mr. Sommermeyer concedes that the statute does not explicitly incorporate such a requirement. Sommermeyer Decl., dated May 20, 2019, ¶ 50. In contrast, NEPA and the ESA both include express requirements and definitions related to analysis of cumulative effects. *See*

40 C.F.R. § 1508.7; 50 C.F.R. § 402.01.¹⁸ In context of the ESA, the Ninth Circuit held that because neither the statute nor the agency implementing regulations had “directly spoken” to whether a cumulative effects analysis is required during informal (as opposed to formal) consultation, the U.S. Fish and Wildlife Service was not required to consider such effects. *Conservation Cong. v. U.S. Forest Serv.*, 720 F.3d 1048, 1055-56 (9th Cir. 2013). The Ninth Circuit explained that it could not read the regulation’s failure to address cumulative effects as equivalent to a duty to analyze them, particularly when the formal consultation regulation expressly created that duty. *Id.* at 1056 (citing *Vermont Yankee Nuclear Power Corp. v NRDC*, 435 U.S. 519, 543 (1978), quoting *Earth Island Inst. v. Carlton*, 626 F.3d 462, 472 (9th Cir. 2010) (“Courts may not impose procedural requirements not explicitly enumerated in the pertinent statutes.”)) (citation and quotes omitted). Here, because the MMPA does not require consideration of cumulative impacts, and courts may not impose procedures in addition to those required by statute or regulation, the ALJ should exclude Issue II.A.3(b) and related testimony.¹⁹

For similar reasons, the Court should exclude Issue II.B.4(e), which asks whether the potential for an off-shore hunt to result in the taking of more migratory ENP whales and fewer PCFG/Makah U&A whales should be considered. 80 Fed. Reg. at 30,091. This issue appears to derive from PCPW’s testimony asserting that NMFS failed to select an alternative analyzed in the 2015 DEIS that would require a Tribal hunt to start five miles off-shore. Owens Decl. ¶¶ 12-13. Again, this is a collateral attack on NMFS’s NEPA compliance. There is no requirement in

¹⁸ Under NEPA, cumulative impacts are defined as “the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions” including impacts “from individually minor but collectively significant actions taking place over a period of time.” 40 C.F.R. § 1508.7. The ESA defines cumulative effects as “those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area” 50 C.F.R. § 402.02.

¹⁹ *See, e.g.*, Schubert Decl. ¶ 30; Sommermeyer Decl. ¶¶ 50-58.

the MMPA that NMFS consider a range of alternatives, or any alternatives. Instead, NMFS must ensure that whatever form of waiver and regulations it issues meets MMPA requirements. *C.f.*, *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 624 (9th Cir. 2014) (under ESA, consulting agency is not required to explain why it chose one “reasonable and prudent alternative” over another, but rather that the chosen alternative complies with ESA requirements). Accordingly, this issue and related testimony should not be addressed at the hearing.²⁰

Finally, two issues premised upon the Ninth Circuit’s opinion in *Anderson v. Evans* should be excluded because they concern NEPA and not the MMPA. These are Issue II.A.3(c) regarding analysis of “local impacts” and II.A.6(a) regarding the legal issue of the degree to which the *Anderson* case applies.²¹ The Ninth Circuit’s decision in *Anderson* was twofold: (1) NMFS violated NEPA by failing to prepare a full environmental impact statement rather than an environmental assessment before approving a whaling quota for the Tribe, and (2) notwithstanding the Tribe’s treaty right, the Tribe must obtain authorization through the MMPA in order to carry out a hunt for gray whales. *Anderson*, 371 F.3d at 501-02. The Court’s holding under NEPA is not relevant to this proceeding for the reasons stated above, and the Court’s holding under the MMPA is not relevant because the Tribe is now seeking MMPA authorization as directed by the *Anderson* Court. *See* Third Yates Decl. ¶ 31. The discussion in *Anderson*

²⁰ *See, e.g.*, Schubert Decl. ¶¶ 5, 30, 42-46; Owens Decl. ¶¶ 12-13, 21, 24.

²¹ Issue I.A.3(c) states: “Were all local impacts that must be considered under the MMPA adequately considered?” 84 Fed. Reg. at 30,090. Issue II.A.6(a) reads: “What is the appropriate degree to which the analysis in *Anderson v. Evans* . . . should be considered in this proceeding?” *Id.* at 30,091.

about “local impacts” related solely to the Court’s NEPA analysis and therefore is not relevant to this hearing.²²

4. Issues Subject to the ICRW and WCA Should Not Be Addressed

As explained in NMFS’s Proposed Rule, the United States is a signatory to the International Convention for the Regulation of Whaling (“ICRW”²³), which bans commercial whaling by member states but provides a framework for the take of whales by aborigines of member states for subsistence purposes. 84 Fed. Reg. at 13,606; *see also* Declaration of Dr. David Weller, dated April 2, 2019, ¶¶ 4-6. The convention is implemented through the International Whaling Commission (“IWC”), an inter-governmental organization whose purpose is the conservation of whales and the management of whaling. Weller Decl. ¶ 4. In order to allow aboriginal subsistence whaling, a member state must identify a subsistence need and obtain a quota of whales from the relevant stock from the IWC. *Id.* ¶ 6. The IWC has approved a quota of ENP gray whales for joint use by the United States and the Russian Federation. *Id.* ¶ 9; *see* 84 Fed. Reg. at 13,606. The ICRW is implemented domestically through the Whaling Convention Act (“WCA”²⁴) and NMFS’s implementing regulations.²⁵

Issues II.A.2(b)(vi)(A)-(E) in the Final Hearing Agenda relate to whether the Makah Tribe qualifies as an aboriginal subsistence user for purposes of an IWC catch limit for ENP gray whales. 84 Fed. Reg. at 30,090. These issues are beyond the scope of this proceeding, because

²² The direct testimony related to these issues includes paragraphs 5,30, and 42-46 of the Schubert Declaration and paragraphs 6 and 10 of the Owens Declaration.

²³ *See* <https://iwc.int/convention>.

²⁴ 16 U.S.C. § 916.

²⁵ 50 C.F.R. part 230.

they are subject to determination under the ICRW and the WCA, not the MMPA.²⁶ *See* Partial Stip. at 3, ¶ 1. Accordingly, Issues II.A.2(b)(vi)(A)-(E) and related testimony should be excluded from consideration.²⁷

B. Testimony Related to the Makah Tribe’s Treaty Rights Lacks Relevance

Final Hearing Agenda Issue II.A.2(a) concerns the relevance of the Treaty of Neah Bay to this proceeding. 84 Fed. Reg. at 30,090. The agenda identifies this issue as pertaining to MMPA section 103(b)(2), which requires that, in prescribing regulations, NMFS give full consideration to international treaty and agreement obligations of the United States. *Id.*; *see* 16 U.S.C. § 1373(b)(2). As explained in the Third Declaration of Chris Yates, NMFS does not interpret the MMPA’s requirement to consider “international” treaty obligations as encompassing treaties between the United States and Native American tribes. Third Yates Decl. ¶ 4 (dated August 5, 2019). NMFS acknowledges and respects the Tribe’s treaty right but did not rely on the treaty right in evaluating whether the proposed waiver and regulations satisfy the applicable MMPA standards. *Id.* Accordingly, although NMFS does not object to limited testimony regarding the Tribe’s treaty rights, the testimony is not relevant for purposes of determining whether the proposed waiver and regulations comply with MMPA section 103. *Id.*

C. Mr. Sommermeyer’s and Ms. Owens’s Testimony Should Be Excluded or Limited

As stated in Section II.A.3 above, only evidence that is both “reliable” and “probative” can be relied on in the ALJ’s recommended decision and the agency’s final decision. 5 U.S.C. § 556(d). The ALJ has a duty to determine that evidence is “reliable, probative, and substantial”

²⁶ NMFS’s WCA implementing regulations define “aboriginal subsistence whaling” as “whaling authorized by paragraph 13 of the Schedule annexed to and constituting a part of the [ICRW].” 50 C.F.R. § 230.2. Thus, whether the proposed hunt is an aboriginal subsistence hunt is determined under the ICRW, not the MMPA. *Id.*

²⁷ *See, e.g.,* Schubert Decl. ¶¶ 49-53, 82.

before relying upon it.” *U.S. Steel Mining Co.* 187 F.3d at 388-89; *see Steadman*, 450 U.S. at 102. Although the Federal Rules of Evidence do not apply, the ALJ must still evaluate whether a proffered witness has established the appropriate foundation and qualifications for his or her testimony in order to assess whether the testimony is credible and probative. *Cf. White v. Apfel*, 167 F.3d 369, 375 (7th Cir. 1999) (“Speculation is, of course, no substitute for evidence, and [an agency] decision based on speculation is not supported by substantial evidence.”) (citations omitted). In order to ensure a fair and efficient hearing and avoid confusion, NMFS respectfully moves to exclude the testimony of Mr. Brett Sommermeyer on grounds that he lacks qualifications to testify to any relevant issues of fact and moves to limit the testimony of Ms. Margaret Owens to those matters within her personal knowledge.

1. Mr. Sommermeyer’s Legal Arguments Are Inadmissible as Testimony

The written testimony of Mr. Sommermeyer, attorney for Sea Shepherd, should be excluded from consideration, and he should not be permitted to appear as a witness the hearing, because Mr. Sommermeyer has improperly submitted legal argument in the form of direct testimony. Mr. Sommermeyer’s declaration includes the following topics: “The Proposed Waiver and Regulations Violate the National Environmental Policy Act”; “The Appointment of the Administrative Law Judge Violates the Appointments Clause”; “NMFS’s Failure to Consider Cumulative Impacts Violates NEPA and the MMPA Waiver Provision”; and, “If Permitted, the Hunt Will Set a Dangerous Precedent.” Sommermeyer Decl. Because Mr. Sommermeyer’s testimony relates to legal issues, and not issues of fact, it is not admissible as either expert or lay testimony. *See S.E.C. v. Capital Consultants, LLC*, 397 F.3d 733, 749 (9th Cir. 2005) (“Experts may interpret and analyze factual evidence but may not testify about the law”); *McHugh v. United Serv. Auto. Ass’n*, 164 F.3d 451, 454 (9th Cir. 1999) (“we view the experts’ testimony in

this case as only relevant for the historical facts that they observed and not for their legal conclusions as to what conditions were covered or excluded under the terms of the policy”); *Crow Tribe of Indians v. Raciot*, 87 F.3d 1039, 145 (9th Cir. 1996) (“Expert testimony is not proper for issues of law.”); *California Sportfishing Prot. All. v. River City Waste Recyclers, LLC*, 205 F. Supp. 3d 1128, 1134 (E.D. Cal. 2016) (Legal conclusions are inadmissible when presented as lay testimony; *Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1060-61 (9th Cir. 2008) (lay witnesses may not tell the finder of fact what result to reach)). Because Mr. Sommermeyer has not presented himself as, nor does he qualify as, either an expert or a lay witness, his testimony is improper and should be excluded.²⁸

2. Ms. Owens’s Testimony Should Be Limited to Her Personal Knowledge

Because Ms. Owens appears to provide testimony as a lay witness rather than an expert, her testimony should be limited to those matters within her personal knowledge. Ms. Owens states in her Declaration: “I am not a scientist. I am an artist, (painter and sculptor), and curator of a small local history museum.” Owens Decl. ¶ 1. Based on Ms. Owens’s background, Ms. Owens does not qualify as an expert through scientific, technical, or other specialized knowledge. Accordingly, she should not testify about information requiring such expertise, including the abundance, feeding habits, genetics, population structure, or recruitment mechanisms of the PCFG or the potential effects of the proposed waiver and regulations on the PCFG. *See, e.g.*, Owens Decl. ¶¶ 4, 5, 8; *Lane v. District of Columbia*, 887 F.3d 480, 485-86 (D.C. Cir. 2018) (mother’s testimony that her son suffered from certain medical conditions was inadmissible lay testimony because mother was not qualified to testify about a medical

²⁸ Mr. Sommermeyer’s participation as both a witness and an advocate may raise potential issues under the Professional Rules of Conduct, Rule 3.7, Lawyer As Witness.

diagnosis); *see* Second Weller Decl. ¶ 20 (clarifying and refuting Ms. Owens's opinions regarding PCFG whale biology and science). NMFS does not object to Ms. Owens's testimony based on her personal observations of the local environment, but her opinions, commentary, and analysis of scientific and technical matters lack proper foundation and should therefore be excluded. *See U.S. Steel Mining Co., Inc.*, 187 F.3d at 388-89 (ALJ must determine that evidence is reliable, probative, and substantial).

IV. CONCLUSION

For the reasons explained above, NMFS respectfully requests that the Court exclude from the hearing and from consideration in the recommended decision the issues and testimony identified above, the written and oral testimony of Mr. Sommermeyer, and the written and oral testimony of Ms. Owens other than as it pertains to those matters within her personal knowledge.

Respectfully submitted this 9th day of August, 2019.

CHRIS MCNULTY
Section Chief
National Oceanic & Atmospheric Administration Office of
General Counsel, Northwest Section

By: /s/ Laurie K. Beale
Laurie K. Beale, Attorney-Advisor
Caitlin B. Imaki, Attorney-Advisor
7600 Sand Point Way NE
Seattle, WA 98115
laurie.beale@noaa.gov
(206) 526-6327
caitlin.imaki@noaa.gov
(206) 526-6159

Counsel for the National Marine Fisheries Service