

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 REBUTTAL ISSUES AND TESTIMONY**

I. INTRODUCTION

On August 9, 2019, the National Marine Fisheries Service (“NMFS”), proponent of the proposed Marine Mammal Protection Act (“MMPA”)¹ waiver and regulations in this matter, filed its Motion to Limit Issues and Testimony (hereafter, “NMFS’s Motion to Limit Scope”). NMFS’s Motion to Limit Scope seeks to exclude from the hearing and from the record for decision issues and testimony unrelated to the specific statutory provisions (MMPA §§ 101(a)(3)(A) and 103²) that govern NMFS’s issuance of an MMPA waiver and regulations. Also on August 9, 2019, parties to this proceeding submitted their rebuttal declarations. For the reasons articulated in NMFS’s Motion to Limit Scope and because some of the rebuttal

¹ 16 U.S.C. §§1361 *et seq.*

² 16 U.S.C. § 1371(a)(1)(A), 1373.

testimony improperly presents new issues of fact, NMFS moves to exclude certain issues and testimony presented in the parties' rebuttal declarations.³

II. ARGUMENT

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

As explained in NMFS's Motion to Limit Scope, several issues of fact identified the Final Hearing Agenda⁴ and testimony pertaining to such issues should be excluded from the hearing and from decision-making in this matter because they are unrelated to the legal requirements at issue and are instead governed by other law. For the same reasons, the rebuttal testimony described below should be excluded.

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

NMFS's Motion to Limit Scope explains that issues related to the manner in which a hunt might be carried out if ultimately approved, including the type of weapon that could be used and terms and conditions to protect human safety, would be addressed at the time of permitting per the requirements of MMPA section 104.⁵ NMFS's Mot. to Limit Scope at 9. Accordingly, the rebuttal testimony of Ms. Margaret Owens, submitted on behalf of Peninsula Citizens for the Protection of Whales ("PCPW"), addressing the safety and manner of the hunt should be excluded.⁶ *Id.*

³ NMFS incorporates herein by reference the argument presented in NMFS's Motion to Limit Scope.

⁴ *See* 84 Fed. Reg. 30,088 (2019).

⁵ 16 U.S.C. § 1374.

⁶ *See, e.g.*, Owens Rebuttal to Yates Decl. (undated, submitted Aug. 9, 2019) ¶ 119 (p. 26); Owens Rebuttal to Scordino Decl. (undated, submitted Aug. 9, 2019) ¶¶ 1-4; *id.* ¶ 32 (p. 20) (certain paragraphs of Ms. Owens's rebuttal declarations are misnumbered; where needed NMFS includes pages numbers for clarification).

For similar reasons, issues related to NMFS’s identification of a group of marine mammals as a “stock,”⁷ as that term is defined under the MMPA, should be excluded. Stock identification is governed by the procedures of MMPA section 117 (which include opportunity for public comment) and associated agency guidance (which itself has been subject to public comment).⁸ Therefore, this tribunal is not the appropriate forum in which to challenge NMFS’s determination that there are two gray whale stocks under the MMPA, the eastern North Pacific (“ENP”) stock (which includes whales identified as part of the Pacific Coast Feeding Group, or PCFG) and western North Pacific (“WNP”) stock. Those portions of Mr. DJ Schubert’s rebuttal testimony, submitted by Animal Welfare Institute (“AWI”), arguing that the PCFG “should be designated as a management stock,” are unrelated to any facts at issue and should therefore be excluded.⁹

2. NMFS’s Compliance with NEPA Should Be Excluded

Both Mr. Schubert’s and Ms. Owen’s rebuttal testimony raise various issues related to NMFS’s compliance with the National Environmental Policy Act (“NEPA”),¹⁰ such as whether NMFS adequately considered cumulative impacts, climate change, ocean warming, and “local” impacts, and whether NMFS improperly failed to propose a waiver based on the offshore-hunt alternative from the 2015 Draft Environmental Impact Statement (“DEIS”) prepared by NMFS for this matter. As explained in NMFS’s Motion to Limit Scope, argument related to NMFS’s

⁷ See 16 U.S.C. § 1362(11) (defining “stock”).

⁸ See NMFS’s Mot. to Limit Scope at 9-11; Bettridge Decl. (dated Apr. 1, 2019) ¶ 13.

⁹ See, e.g., Schubert Rebuttal Decl. (dated Aug. 6, 2019) ¶¶ 18-50, 52, 54.

¹⁰ 42 U.S.C. §§ 4321 *et seq.*

compliance with NEPA is irrelevant to the facts at issue and, moreover, unripe, therefore such testimony should be excluded.¹¹ NMFS’s Mot. to Limit Scope at 11-14.

3. Issues Subject to the ICRW and WCA Should Be Excluded

NMFS’s Motion to Limit Scope explains that whether the Makah Indian Tribe has a subsistence need to hunt whales and should be allocated a catch limit for ENP gray whales is determined under the auspices of the International Convention for the Regulation of Whaling, which is implemented domestically via the Whaling Convention Act and therefore is not subject to decision in this forum. Rebuttal testimony relating to these issues should also be excluded.¹² See NMFS’s Mot. to Limit Scope at 15-16.

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

As explained in the Third Declaration of Chris Yates and NMFS’s Motion to Limit Scope, NMFS recognizes and respects the Makah Tribe’s treaty right to take whales but did not rely on the fact that the Tribe has such a right in determining whether the proposed waiver and regulations comply with the relevant provisions of the MMPA. Third Yates Decl. ¶ 4; NMFS’s Mot. to Limit Scope at 15. However, given the lengthy history regarding the Tribe’s efforts to carry out a ceremonial and subsistence whale hunt, NMFS does not object to limited testimony regarding the Tribe’s treaty right as background information. *Id.*

Parties Sea Shepherd Legal and Sea Shepherd Conservation Society (collectively “Sea Shepherd”) have submitted rebuttal testimony asserting that the Treaty of Neah Bay provides non-tribal members an “in common” right for non-consumptive use of whales. Their declarant,

¹¹ See, e.g., Owens Rebuttal to Yates Decl. ¶¶ 9-10, 13-18, 20-21, 25-30, 37, 50-57, 71-72, 75-84, 91-92, 94; Owens Rebuttal to Scordino Decl. ¶ 6; Schubert Rebuttal Decl. ¶¶ 8-11.

¹² See, e.g., Tillman Decl. (dated Aug. 6, 2019, submitted by the Marine Mammal Commission) ¶¶ 5-7, 9-12, 14-15; Owens Rebuttal to Yates Decl. ¶ 121; Owens Rebuttal to Scordino Decl. ¶ 50.

Ms. Carrie Newell, argues that she has “the right to conduct [] research” under the treaty. Newell Decl. (dated August 5, 2019) ¶ 46. Neither Sea Shepherd nor Ms. Newell identify any MMPA requirement or issue of fact to which the proffered testimony regarding Ms. Newell’s alleged treaty right to carry out research could be relevant. Accordingly, such testimony should be excluded.¹³

C. Ms. Owens’s Proffered Expert Testimony Should Be Excluded

As explained in NMFS’s Motion to Limit Scope, Ms. Owens has not established qualifications to testify about gray whale biology or science. NMFS’s Mot. to Limit Scope at 18-19. The testimony of Ms. Owens should therefore be limited to those matters within her personal knowledge, and those portions of her rebuttal testimony comprised of scientific opinions, commentary, and purported analysis should be excluded.¹⁴ *Id.*

D. Rebuttal Testimony Regarding New Issues Should Be Excluded

Ms. Owens and Mr. Schubert raise new issues on rebuttal that are not identified in the Final Hearing Agenda and are not relevant to whether NMFS’s proposed waiver and regulations are consistent with applicable MMPA requirements. Specifically, both Ms. Owens’s and Mr. Schubert’s rebuttal declarations discuss Canada’s possible designation of PCFG gray whales as “endangered” under Canadian laws, with Mr. Schubert alleging that NMFS must explain why it has reached a different conclusion.¹⁵ Mr. Schubert also argues that NMFS must consider the “economic value of gray whales” in determining if a waiver should be issued. Schubert Rebuttal Decl. ¶ 51. These assertions are both irrelevant and untimely. In accordance with the hearing

¹³ See, e.g., Newell Decl. ¶¶ 9-11, 46; see also Owens Rebuttal to Yates Decl. ¶¶ 101-109; Owens Rebuttal to Scordino Decl. at 1, ¶ 14.

¹⁴ See, e.g., Owens Rebuttal to Yates Decl. ¶¶ 1-4, 5, 10, 15, 20-21, 24-30, 32, 34, 37-39, 42-47, 59-65, 74, 125; Owens Rebuttal to Scordino Decl. ¶¶ 7, 17, 24-25, 27, 46-49.

¹⁵ See, e.g., Schubert Rebuttal Decl. ¶¶ 41-50; Owens Rebuttal to Yates Decl. ¶¶ 86-93.

regulations and the ALJ's prior orders, the date for identification of new issues of fact not included in the Notice of Hearing was August 6, 2019. *See* 84 Fed. Reg. at 30,088; 84 Fed. Reg. 37,837 (2019); 50 C.F.R. § 228.12(b)(2). Allowing the parties to introduce new issues of fact now would violate the regulatory procedures, which allow new parties the opportunity to participate in the hearing if new issues of fact are identified, as well as the ALJ's prior orders, and therefore should not be permitted. 50 C.F.R. § 228.14(b)(1); 84 Fed. Reg. at 30,088, 37,837.

Also, with respect to the belated PCFG arguments, NMFS's identification of the PCFG as part of the ENP stock is not properly before this tribunal for the reasons previously stated. *See* NMFS Mot. to Limit Scope at 9-11; Section II.A.1, *supra*. Neither AWI nor PCPW identifies an MMPA provision requiring NMFS to consider how other countries characterize the status of marine mammal population under their own laws in issuing an MMPA waiver. Likewise, AWI has not identified an MMPA requirement that NMFS evaluate the "economic value of gray whales."¹⁶ Therefore, even if Mr. Schubert had presented testimony on this topic in a timely manner, it would lack legal relevance. *Id.* For these reasons, the Court should exclude the proffered testimony relating to issues not previously identified.

¹⁶ MMPA § 2, titled "Congressional findings and declaration of policy," refers to marine mammals as "resources of great international significance, esthetic and recreational *as well as economic*." 16 U.S.C. §1361 (emphasis added). Mr. Schubert's testimony appears to conflate § 2's language stating Congress's "findings" with its language expressing the statutes "policies," the latter of which, in any event, do not impose any specific substantive requirements. *Id.* Mr. Schubert does not identify any provision of the MMPA requiring NMFS to undertake an economic impact analysis in MMPA decision-making.

III. CONCLUSION

For the reasons stated above and in NMFS's Motion to Limit Scope, all rebuttal testimony unrelated to the facts at issue and rebuttal testimony bearing on previously unidentified issues of fact should be excluded from the hearing and from consideration in the recommended decision for this matter.

Respectfully submitted this 16th day of August, 2019.

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