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6 UNITED STATES OF AMERICA  
7 Department of Commerce  
8 National Oceanic and Atmospheric Administration

9 *In re:* Proposed Waiver and Regulations  
10 Governing the Taking of Eastern North  
11 Pacific Gray Whales by the Makah Indian  
Tribe

Hon. George J. Jordan  
Hearing Docket No. 19-NMFS-0001

12  
13 **RESPONSE TO NATIONAL MARINE FISHERIES SERVICE'S**  
**MOTION TO LIMIT ISSUES AND TESTIMONY**

14 Sea Shepherd Legal (SSL) and Sea Shepherd Conservation Society (SSCS) (collectively  
15 “Sea Shepherd”) file this response in partial opposition to the National Marine Fisheries Service’s  
16 (NMFS) Motion To Limit Issues and Testimony. Without conceding any other points, Sea Shepherd  
17 focuses its response on NMFS’s request to exclude the testimony of Brett W. Sommermeyer.

18 Sea Shepherd does not dispute that legal argumentation is an unusual subject for witness  
19 testimony in adjudicative proceedings, especially adjudicative proceedings in court. However, the  
20 unique circumstances of the present matter rendered this approach necessary. More importantly, the  
21 contents of Mr. Sommermeyer’s declaration address issues that *are* (and must be preserved as)  
22 subjects at the upcoming hearing. In light of the flexible evidentiary rules associated with  
23 administrative rulemaking — and in light of NMFS’s apparent acceptance of similar testimony  
24 provided by another witness — Sea Shepherd opposes NMFS’s request for exclusion.



1           *National Marine Fisheries Service, Draft EIS: The Makah Tribe Request to Hunt Gray*  
2           *Whales*, announced in 80 Fed. Reg. 13373 (March 13, 2015).

- 3           ▪ Mid-2015: SSL submitted extensive comments on NMFS’s DEIS and then waited patiently  
4           to see how NMFS would proceed.
- 5           ▪ April 5, 2019 (more than 14 years since receipt of the Tribe’s waiver application): NMFS  
6           notified stakeholders and the public at large that a formal hearing would begin on August 12,  
7           2019. *Announcement of Hearing*, 84 Fed. Reg. at 13639 (col. 3). Although Judge Jordan  
8           would later postpone the hearing date, the notice also announced a deadline of May 20, 2019  
9           for the submission of initial written direct testimony (*i.e.*, initial direct testimony was due just  
10           six weeks following the announcement of the hearing). *Id.*

11           In conjunction with its announcement of the hearing date and the issuance of proposed  
12           regulations governing the take of ENP gray whales by the Makah Indian Tribe, NMFS released four  
13           declarations and lengthy supporting exhibits on April 5, 2019. *See* Dkt. Nos. 1-6. In total, the newly  
14           released information, including the Federal Register notices, declarations from NMFS personnel, and  
15           various fact sheets and timelines, spanned over 5,000 pages. *Id.* Suddenly faced with this  
16           overwhelming volume of testimony and an extremely short timeline, Sea Shepherd and Animal  
17           Welfare Institute separately moved for an extension of the deadline to submit initial direct testimony.  
18           Dkt. Nos. 13-19. Judge Jordan denied these motions on May 20, 2019. Dkt. 32.

19           Facing an impending deadline and still working to secure expert witnesses, Sea Shepherd did  
20           the only thing possible under the circumstances: submit a declaration addressing some of the most  
21           critical issues as best it could. *See generally* Dkt. 35, Decl. of Brett Sommermeyer.

1       **II. The Sommermeyer Declaration Does Not Run Afoul of the Flexible Evidentiary Rules**  
 2       **Governing This Proceeding, Which Point NMFS Appears To Concede Through Its**  
 3       **Disparate Treatment of the Schubert Declaration.**

4           Sea Shepherd readily acknowledges that legal argumentation is not normally the subject of  
 5 testimony. However, it is worth noting that the evidentiary rules in this proceeding are relatively  
 6 flexible. *See* 5 U.S.C. § 556(c)(3) (directing the presiding officer to “receive relevant evidence”); 50  
 7 C.F.R. § 228.17(a) (providing that written “[d]irect testimony . . . shall become a part of the record  
 8 subject to exclusion of irrelevant and immaterial parts thereof”); *see also Richardson v. Perales*, 402  
 9 U.S. 389, 410 (1971) (discussing the allowance under the APA of hearsay evidence “up to the point  
 10 of relevancy”); *Gallagher v. Nat’l Transp. Safety Bd.*, 953 F.2d 1214, 1218 (10th Cir. 1992) (noting  
 11 that “[u]nder this [APA] standard, in order to be admissible for consideration in an administrative  
 12 proceeding, the evidence need not be authenticated with the precision demanded by the Federal  
 13 Rules of Evidence”). Under these more lenient standards, Sea Shepherd respectfully asserts that the  
 14 subject declaration is not improper.  
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16           Moreover, if NMFS believes that Mr. Sommermeyer’s testimony is inadmissible, why has  
 17 the agency not advanced this argument against the testimony of DJ Schubert? *Compare* Dkt. 35,  
 18 Decl. of Brett Sommermeyer *with* Dkt. 34, Decl. of DJ Schubert. As the following table reveals, the  
 19 Schubert declaration asserts many of the same points as the Sommermeyer declaration.  
 20

<b>Declaration of Brett Sommermeyer</b>	<b>Declaration of DJ Schubert</b>
<p data-bbox="282 1528 792 1566"><b><u>Overall characterization of testimony</u></b></p> <p data-bbox="240 1604 834 1745">“In the remainder of my declaration responding to the Issues of Fact defined in the Notice of the Hearing, I divide my testimony into the following four categories:            • The Proposed Waiver and Regulations</p>	<p data-bbox="899 1528 1409 1566"><b><u>Overall characterization of testimony</u></b></p> <p data-bbox="857 1604 1435 1782">“The remainder of this declaration is separated into six broad categories including:            A) an analysis of the MMPA criteria for issuing a waiver in respect to ENP gray whales; B) the failure of NMFS to prepare</p>

<p>1 Violate the National Environmental Policy Act;</p> <p>2 • The Appointment of the Administrative</p> <p>3 Law Judge Violates the Appointments</p> <p>4 Clause;</p> <p>5 • NMFS’s Failure to Consider Cumulative</p> <p>6 Impacts Violates NEPA and the MMPA</p> <p>7 Waiver Provision; and</p> <p>8 • If Permitted, the Hunt Will Set a Dangerous</p> <p>9 Precedent.” Decl. of B. Sommermeyer at ¶ 8.</p>	<p>supplemental NEPA analysis on its new</p> <p>Makah whaling alternative and to adequately</p> <p>consider other issues directed by the</p> <p><i>Anderson</i> court in the 2015 DEIS, in any</p> <p>supplemental analysis, or in the Proposed</p> <p>Regulations; C) whether the Makah Tribe</p> <p>qualifies for an IWC catch limit or quota for</p> <p>the hunting of gray whales; D) a review of the</p> <p>proposed regulations; and E) a review of the</p> <p>preliminary list of issues of fact identified by</p> <p>NMFS for potential consideration at the</p> <p>administrative law hearing.” Decl. of DJ</p> <p>Schubert at ¶ 15.</p>
<p>9 <b><u>Select testimony re failure to consider</u></b></p> <p>10 <b><u>cumulative impacts</u></b></p> <p>11 “When judged by these standards, NMFS’s</p> <p>12 cumulative impacts analysis in the DEIS is</p> <p>13 woefully inadequate. While the analysis is</p> <p>14 generally perfunctory, I focus my attention on</p> <p>15 three categories: (1) military exercises; (2)</p> <p>16 marine energy and coastal development; and</p> <p>17 (3) climate change.” <i>Id.</i> at ¶ 52.</p> <p>18 “<u>Military Exercises</u>: The scientific literature</p> <p>19 continues to evolve in the direction of a</p> <p>20 consensus that Navy sonar is having a</p> <p>21 dramatic impact on whale populations,</p> <p>22 including gray whales. <i>See, e.g., E.C.M.</i></p> <p>23 <i>Parsons, Impacts of Navy Sonar on Whales</i></p> <p>24 <i>and Dolphins: Now Beyond</i></p> <p>25 <i>a Smoking Gun?</i>, <i>Frontiers in Marine Science</i></p> <p>(Sept. 13, 2017).” <i>Id.</i> at ¶ 54.</p> <p>“<u>Marine Energy and Coastal Development</u>: In</p> <p>the years since NMFS released its 2015</p> <p>DEIS, there have been continuing efforts to</p> <p>develop coastal infrastructure harmful to gray</p> <p>whales. One example is the Jordan Cove</p> <p>liquefied natural gas (LNG) facility proposed</p> <p>for construction in Coos Bay, Oregon.” <i>Id.</i> at</p> <p>¶ 55.</p>	<p>9 <b><u>Select testimony re failure to consider</u></b></p> <p>10 <b><u>cumulative impacts</u></b></p> <p>11 “The cumulative impacts of these threats –</p> <p>12 from ship strikes to climate change – have</p> <p>13 never been sufficiently evaluated by NMFS.</p> <p>14 In the 2015 DEIS, for example, NMFS relied</p> <p>15 on speculation and opinion without any</p> <p>16 substantive underlying analysis. In those</p> <p>17 instances where NMFS identifies current and</p> <p>18 future impacts, it does not take the next step</p> <p>19 to assess the cumulative impact of such</p> <p>20 threats on gray whales and their habitat or,</p> <p>21 what analysis it does provide, is deficient. <i>See</i></p> <p>22 <i>AWI Ex. 1</i> at 116-127. NMFS authorizes</p> <p>23 dozens of projects or activities (including</p> <p>24 dock replacement, port repairs, dredging,</p> <p>25 sinking ships, seismic testing, and sonar use)</p> <p>each year throughout the U.S. portion of the</p> <p>gray whale migratory range for which a</p> <p>comprehensive cumulative impact analysis</p> <p>has not been done. The mere fact that, despite</p> <p>these threats, the ENP gray whale population</p> <p>has increased in number does not suggest that</p> <p>there have been no adverse effects associated</p> <p>with these threats, but only that there has</p> <p>apparently been no detectable population-</p> <p>wide impact to date. This ignores the</p> <p>possibility that there have been localized</p>

1 “Climate Change: Warming ocean  
2 temperatures, particularly in the Arctic, are  
3 having a drastic impact on gray whales’  
4 ability to feed. As I noted earlier, nearly sixty  
5 gray whales have been found stranded so far  
6 this year along the West Coast. Yereth Rosen,  
7 *Gray Whale Deaths on West Coast May Be*  
8 *Linked to Arctic Warmth*, Reuters (May 16,  
9 2019).” *Id.* at ¶ 56.

impacts and/or that, as the threats increase in  
number or severity, that the entire population  
may show signs of impacts. The current  
evidence of declining gray whale body  
conditions, an increase in gray whale  
mortality, ecosystem regime shift in the  
Arctic, and the expansion of the species  
summer feeding range to the north, may  
foreshadow more severe and broader impacts  
in the future.” *Id.* at ¶ 30.

10 **Select testimony re the 2019 gray whale**  
11 **Unusual Mortality Event**

10 **Select testimony re the 2019 gray whale**  
11 **Unusual Mortality Event**

12 “Accordingly, these studies may help explain  
13 the rash of recent gray whale strandings  
14 – which may signal the beginning of a new  
15 gray whale Unusual Mortality Event. To the  
16 extent it is claimed that the strandings are due  
17 to the gray whale population reaching  
18 carrying capacity, it should be noted that a  
19 reduction in carrying capacity due to climate  
20 change may also be responsible. *See* F.  
21 Ronzón-Contreras *et al.*, *Gray whales’ body*  
22 *condition in Laguna San Ignacio, BCS,*  
23 *México, during 2019 winter breeding season,*  
24 *SC/68A/CMP/13* (‘Perhaps during the past  
25 decade, the ENP gray whale population has  
reached the current “carrying capacity” of its  
high latitude feeding areas, and/or that the  
capacity for the marine environment to  
produce gray whale prey has changed.’). In  
any case, the recent stranding reports in  
conjunction with scientific studies concerning  
the possible negative effects of climate  
change on gray whales represents ‘significant  
new circumstances [and] information;  
requiring preparation of an SEIS.’ *Id.* at ¶  
34.

“In 2019 there is evidence of a potential new  
UME given a recent spike in reports of dead  
gray whales being found on beaches along the  
west coast of North America, reports of a  
disproportionate number of emaciated  
(‘skinny’) whales, and an unusually low calf  
count in the Mexican lagoons and during the  
2019 northbound migration.” *Id.* at ¶ 25.

“As was the case 19 years ago, some  
scientists are claiming that this spike in deaths  
and evidence of skinny whales indicates that  
ENP gray whales have exceeded the carrying  
capacity of their habitat while others suggest  
that this is a result of changing ecosystem  
conditions in the arctic in response to ocean  
warming (*see* AWI Ex. 7). It is unlikely that  
the carrying capacity of gray whale habitat  
has increased in the past 19 years; if anything,  
it is more likely that it has decreased, given  
the myriad threats facing the species.  
Therefore the spikes in gray whales mortality  
are most likely tied to changing ecosystem  
conditions in their summer feeding areas  
linked to climate change. . . . NMFS is  
monitoring the current increase in dead gray  
whales (pers. comm. with Dr. Dave Weller),  
but it does not appear that NMFS has  
considered the impact of a potential second

	<p>UME on its preliminary decision to issue the requested MMPA waiver, which would permit the intentional killing of gray whales while the impacts of a potential UME and/or the long-term impact of ecosystem regime shift in the Arctic remain unknown.” <i>Id.</i> at ¶ 26.</p>
<p style="text-align: center;"><b><u>Select testimony re failure to issue supplemental EIS covering new alternative</u></b></p> <p>“In its DEIS, released to the public in February 2015, NMFS evaluated half a dozen alternatives in response to the Makah Tribe’s petition. <i>See generally</i> 2015 DEIS. These alternatives were: (1) a no-action alternative (<i>i.e.</i>, denial of the petition), <i>id.</i> at 2.3.1; (2) the Makah Tribe’s proposed alternative, <i>id.</i> at 2.3.2; (3) an ‘offshore hunt’ alternative, <i>id.</i> at 2.3.3; (4) a ‘summer/fall hunt’ alternative, <i>id.</i> at 2.3.4; (5) a ‘split-season hunt’ alternative, <i>id.</i> at 2.3.5; and (6) an alternative that, while similar to the Makah Tribe’s proposed alternative, built in additional limitations to protect Pacific Coast Feeding Group (PCFG) gray whales, <i>id.</i> at 2.3.6.” <i>Id.</i> at ¶ 10.</p> <p>“In contrast to the alternatives analyzed in the 2015 DEIS, the current proposal contains several elements that were not present in any of the previously examined iterations. <i>See</i> Proposed Regulations, at 13604, 13618–13624 (setting forth new proposed regulations). Most significantly, the new alternative contemplates an even-odd year regime (a.k.a, ‘alternating hunt seasons’) that does not have any counterpart in the 2015 DEIS.” <i>Id.</i> at ¶ 12.</p> <p>“Under the regulations implementing NEPA, this new alternative is unlawful in the absence of a supplemental environmental impact statement (SEIS).” <i>Id.</i> at ¶ 14.</p>	<p style="text-align: center;"><b><u>Select testimony re failure to issue supplemental EIS covering new alternative</u></b></p> <p>“In the 2015 DEIS, NMFS evaluated six alternatives: Alternative 1 (No Action); Alternative 2 (Tribe’s Proposed Action); Alternative 3 (Offshore Hunt), Alternative 4 (Summer/Fall Hunt), Alternative 5 (Split-season Hunt); Alternative 6 (Different Limits on Strikes and PCFG, and Limited Duration of Regulations and Permits. <i>See generally</i> 2015 DEIS Section 2. However, in the Proposed Regulations published on April 5, NMFS disclosed its selection of an entirely new alternative for Makah whaling that, to date, has not been subject to NEPA review.” <i>Id.</i> at ¶ 42.</p> <p>“None of the six alternatives analyzed in the 2015 DEIS contemplated different standards for even-year versus odd-year hunts, none proposed a winter/spring and summer/fall hunt in the same calendar year, and none included the option of training approaches and training harpoon throws. Such changes in combination with new information relevant to the number of WNP gray whales migrating to the west coast of North America, ecosystem regime shift in the Arctic (Grebmeier <i>et al.</i>, 2018, AWI Ex. 12), adverse impacts associated with ocean warming in the Pacific Ocean (Moore and Huntington 2003, AWI Ex. 10; Burek <i>et al.</i>, 2008, AWI Ex. 26), and the ongoing and increasing threats to gray whales throughout their migratory corridor</p>

	merit an analysis of the environmental impacts of this new alternative in a supplemental EIS. . . . Such a supplemental analysis is needed to satisfy the public participation requirements of NEPA.” <i>Id.</i> at ¶ 45.
<p style="text-align: center;"><b><u>Select testimony re failure to consider precedential effects</u></b></p> <p>“The <i>Anderson</i> court’s dire predictions became a reality in 2017 when, in <i>Makah Indian Tribe v. Quileute Indian Tribe</i>, 873 F.3d 1157, 1162 (9th Cir. 2017), the 9th Circuit confirmed a district court ruling concluding that the term ‘fish’ in the Treaty of Olympia was intended to include sea mammals such as whales and seals[.]” <i>Id.</i> at ¶ 62.</p> <p>“While neither the Quileute and Quinault tribes have requested a waiver to hunt whales, it is certainly a plausible concern that they and other tribes will do so given the foregoing ruling. And certainly nothing would make that more likely than if the Makah hunt were permitted.” <i>Id.</i> at ¶ 63.</p>	<p style="text-align: center;"><b><u>Select testimony re failure to consider precedential effects</u></b></p> <p>“While this particular ruling [<i>Makah Indian Tribe v. Quileute</i>, 873 F.3d 1157 (9th Cir. 2017)] was limited to the Quileute and Quinault tribes, there is no reason why those tribes and other coastal tribes anywhere in the United States who have a treaty right to hunt or fish could not seek the authority to engage in whaling based on the precedent that could be set if the MMPA waiver is granted and NMFS authorizes the Makah Tribe to hunt gray whales. While the ruling in <i>Makah Indian Tribe</i> was published well after the deadline for public comments on the DEIS, AWI is aware of no new analysis of the precedential impact of the current decision conducted by NMFS in response to <i>Makah Indian Tribe</i>.” <i>Id.</i> at ¶ 48.</p>

To the extent that NMFS bases its motion for exclusion on the grounds that Mr. Sommermeyer’s declaration contains “legal argumentation,” this same observation could be made with respect to Mr. Schubert’s declaration. Yet, NMFS does not move to exclude Mr. Schubert’s declaration on this basis.<sup>1</sup> Rather, NMFS has merely taken aim at limited portions of Mr. Schubert’s

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<sup>1</sup> Whether attributable to an oversight or otherwise, NMFS is also not at liberty to now seek to exclude the substantively equivalent testimony offered by Mr. Schubert. Under Judge Jordan’s clearly defined schedule, and the rules applicable to this proceeding, NMFS does not have another



1 testimony on the basis that those portions address issues that are allegedly beyond the scope of the  
2 hearing. At bottom, it appears that NMFS is seeking to exclude the entirety of Mr. Sommermeyer’s  
3 declaration merely because Mr. Sommermeyer is an attorney. However, NMFS has not offered any  
4 authority to suggest that, under the flexible standards attendant to an administrative hearing, this fact  
5 alone serves as a reasonable basis for exclusion.<sup>2</sup>  
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(continued . . .)

11 opportunity to move to exclude Mr. Schubert’s testimony — even assuming NMFS had a valid basis  
for doing so.

12 <sup>2</sup> Relatedly, NMFS raises in a footnote the possibility that Mr. Sommermeyer’s declaration could be  
13 in tension with Rule 3.7 of the American Bar Association’s Model Rules of Professional Conduct (or  
14 the Washington Rules of Professional Conduct, which are virtually identical in all material respects),  
15 commonly known as the “lawyer as witness” rule. Sea Shepherd would be happy to provide  
16 additional briefing on this matter at Judge Jordan’s request. For the time being, Sea Shepherd notes  
17 that, pursuant to Rule 3.9 (“Advocate in Nonadjudicative Proceedings”), Rule 3.7 is inapplicable in  
18 administrative rulemaking. *See* Model Rules of Prof’l Conduct, Rule 3.9 (“A lawyer representing a  
19 client before a legislative body or administrative agency in a nonadjudicative proceeding shall  
20 disclose that the appearance is in a representative capacity and shall conform to the provisions of  
21 Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.”); Wash. Rules of Prof’l Conduct, Rule 3.9 (“A  
22 lawyer representing a client before a legislative body or administrative agency in a nonadjudicative  
23 proceeding shall disclose that the appearance is in a representative capacity and shall conform to the  
24 provisions of rules 3.3(a) through (e), 3.4(a) through (c), and 3.5.”); *see also* George M. Cohen, *The*  
25 *Laws of Agency Lawyering*, 84 *FORDHAM L. REV.* 1963, 1967 (2016) (“When the agency acts in a  
legislative (rulemaking) capacity, lawyers practicing before that agency are bound by some, but not  
all, of the rules applicable to advocates practicing before tribunals. Rule 3.9 identifies specific rules  
that a lawyer in this situation must follow: Rules 3.3(a) through (c) (Candor Toward the Tribunal),  
3.4(a) through (c) (Fairness to Opposing Party and Counsel), and 3.5 (Impartiality and Decorum of  
the Tribunal). *The negative implication is that these lawyers are not bound by the other rules in the*  
*‘Advocate’ group.*”) (emphasis added); Arnold Rochvarg, *The Attorney as Advocate and Witness:*  
*Does the Prohibition of an Attorney Acting as Advocate and Witness at a Judicial Trial also Apply in*  
*Administrative Adjudications?*, 26 *J. NATIONAL ASSOC. OF ADMIN. L. JUDICIARY* 1, 1 (2006)  
(discussing the “split of authority [as to] whether the lawyer as witness rule does apply in  
administrative adjudications”; no mention of application in administrative rulemaking scenarios).

1       **III. The Issues Covered by Mr. Sommermeyer’s Declaration Are Properly Before Judge**  
2       **Jordan.**

3           To the extent that Judge Jordan feels compelled to exclude Mr. Sommermeyer’s declaration  
4 as containing irrelevant or improper legal argumentation, Sea Shepherd respectfully requests an  
5 order clarifying that the following subjects, addressed by Mr. Sommermeyer’s declaration *and other*  
6 *witnesses*, are properly at issue in this proceeding:

- 7           (1) Cumulative impacts (*i.e.*, the idea that the proposed waiver and hunt must be considered  
8           in the context of other past, present, and reasonably foreseeable future actions, which,  
9           when added to the proposed waiver and hunt, may heighten the impact of the proposed  
10          waiver and hunt on gray whales and their habitat);  
11  
12          (2) Precedential effects (*i.e.*, the idea that the proposed waiver and hunt may lead to, or  
13          increase the possibility of, additional future whaling activities by the Makah Indian Tribe,  
14          other tribes in the U.S., and/or foreign nations, which would in turn affect grey whale  
15          abundance); and  
16  
17          (3) The 2019 gray whale Unusual Mortality Event (UME).

18           Even if Judge Jordan concludes that Mr. Sommermeyer’s declaration did not offer admissible  
19 testimony related to these issues, they are (1) relevant under the governing law, (2) preserved via the  
20 parties’ partial stipulation, and (3) the subject of properly admitted testimony by other witnesses.

21           First, these issues are plainly relevant under the substantive law governing the hearing. As  
22 concerns cumulative impacts, evidence regarding this issue is pertinent to the MMPA analysis.  
23 Although section 101 of the MMPA does not explicitly incorporate a “cumulative impacts analysis”  
24 (*i.e.*, it does not employ that very term), NMFS could not have paid “due regard to the distribution,  
25

1 abundance, breeding habits, and times and lines of migratory movements” of gray whales in the  
2 absence of a thorough consideration of cumulative impacts. 16 U.S.C. § 1371(a)(3)(A). The  
3 statute’s reference to “sound principles of resource protection and conservation” only reinforces this  
4 conclusion. *Id.*

5 This same statutory language renders the UME relevant, a fact that no party seems to dispute.  
6 Because no party has disputed the relevance of the UME — and because Judge Jordan, in fact,  
7 issued a new notice calling for testimony on this issue — Sea Shepherd believes that this issue  
8 merits no further discussion.

9 As for precedential effects, the Ninth Circuit underscored this factor’s relevance in *Anderson*  
10 *v. Evans*, 350 F.3d 815 (9th Cir. 2003), writing as follows:

11 [W]e cannot agree with the agencies’ assessment that because the Makah Tribe is the  
12 only tribe that has an explicit treaty-based whaling right, the approval of their whaling  
13 is unlikely to lead to an increase in whaling by other domestic groups. And the  
14 agencies’ failure to consider the precedential impact of our government’s support for  
15 the Makah Tribe’s whaling in future IWC deliberations remains a troubling vacuum.

16 *Id.* at 836. While Sea Shepherd does not assert that precedential effects are pertinent to the present  
17 hearing for purposes of establishing a violation of the National Environmental Policy Act (NEPA),  
18 precedential effects *are* relevant to the waiver factor of “abundance,” as an increased likelihood of  
19 future hunts has a direct bearing on abundance of gray whale populations.

20 Second, the parties stipulated that these issues were fair game at the hearing. Dkt. 40, Partial  
21 Stipulation Re Scope of Issues to Be Addressed at Hearing. While the parties agreed that this  
22 hearing is not the appropriate forum for litigation regarding compliance with NEPA’s requirement  
23 that the action agency consider cumulative impacts and precedential effects, the parties also  
24 stipulated that they “shall be free to raise such issues in the present proceeding for purposes of  
25

1 challenging, or defending, the proposition that NMFS has satisfied the MMPA insofar as it relates to  
2 the waiver determination.” *Id.* at ¶ 2. In other words, to the extent that there are “cross-over”  
3 issues, the parties agreed to preserve those issues insofar as they relate to the MMPA waiver criteria.  
4 The factors of cumulative impacts and precedential effects are such issues.

5 Finally, other witnesses, whose testimony has not and should not be challenged, offered  
6 evidence on these issues. Such evidence includes, *inter alia*: (1) the testimony of DJ Schubert  
7 regarding cumulative impacts, precedential effects, and the UME, Dkt. No. 34, Decl. of DJ Schubert  
8 at ¶¶ 7, 25-26, 30, 48, and associated exhibits; (2) the testimony of Carrie Newell regarding the  
9 UME, Dkt. No. TBA, Decl. of C. Newell at ¶¶ 25-26, and associated exhibits; (3) the testimony of  
10 Dr. Stella Villegas-Amtmann regarding the factor of climate change as a cumulative impact, Dkt.  
11 No. TBA, Decl. of Dr. S. Villegas-Amtmann at ¶¶ 18-21, and associated exhibits. The foregoing  
12 pieces of testimony are simply illustrative examples of the significant testimony and documentary  
13 evidence that has been properly introduced on these issues by various witnesses.  
14  
15

16 In sum, even if Judge Jordan is inclined to exclude Mr. Sommermeyer’s declaration in its  
17 entirety — an action that Sea Shepherd opposes — the parties and public would benefit from an  
18 order clarifying that such exclusion does not imply the exclusion of any other testimony addressing  
19 the above issues.  
20

### 21 CONCLUSION

22 For the foregoing reasons, Sea Shepherd respectfully requests that Judge Jordan deny  
23 NMFS’s motion insofar as it seeks to exclude the entirety of Mr. Sommermeyer’s declaration. In the  
24 alternative, Sea Shepherd respectfully requests that Judge Jordan issue an order clarifying that the  
25

1 above-identified issues covered by Mr. Sommermeyer's declaration remain valid subjects to be  
2 addressed by other witnesses.

3  
4  
5 Dated this 19th day of August 2019

6  
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