

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**

)
) Docket No. 19-NMFS-0001
)
) RIN: 0648-BI58 and
) RIN: 0648-XG584
)

**NATIONAL MARINE FISHERIES SERVICE’S COMBINED RESPONSE
TO PARTIES’ MOTIONS TO EXCLUDE**

I. INTRODUCTION

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 on August 9, 2019, and its Motion to Limit Rebuttal Issues and Testimony on August 16, 2019 (“NMFS’s Motions to Limit Scope”). On August 9, 2019, parties Animal Welfare Institute (“AWI”), the Makah Indian Tribe (“Makah Tribe” or “Tribe”), and Sea Shepherd Legal / Sea Shepherd Conservation Society (collectively, “Sea Shepherd”) filed motions to exclude and/or add certain issues and testimony (“Motions”). For the reasons articulated in NMFS’s Motions to Limit Scope, incorporated herein by reference, and as stated below, NMFS supports those aspects of the parties’ Motions that would eliminate extraneous

¹ 16 U.S.C. §§1361 *et seq.*

matters from the hearing and opposes the parties' Motions to the extent they seek to include issues and testimony unrelated to the controlling legal requirements.

II. ARGUMENT

A. Evidence Regarding NMFS's Identification of Gray Whale Stocks Is Not Relevant

NMFS, AWI, the Makah Tribe, and Sea Shepherd all previously entered into a stipulation agreeing that the only issues of fact they will raise at the hearing concern whether NMFS's proposed waiver and regulations comply with the requirements of MMPA sections 101(a)(3)(A) and 103.² Partial Stipulation re Scope of Issues to Be Addressed at the Hearing, dated June 10, 2019 ("Partial Stipulation"). The parties expressly agreed that this hearing is "not the appropriate vehicle[]" for identifying or challenging the identification of any particular population stock under the MMPA." Partial Stip. at 4, ¶ 2(a). As explained in NMFS's Motions to Limit Scope, NMFS's identification of "stocks" is not subject to formal rulemaking, but instead is governed by procedures set forth in MMPA section 117 and associated agency guidance. NMFS's Mot. to Limit Scope (Aug. 9, 2019), at 9-11.

Although gray whale stock identification is not subject to decision at this hearing, the Makah Tribe and AWI continue to press for the inclusion of evidence regarding gray whale stock structure. The Makah Tribe agrees with NMFS's determination that there are two gray whale stocks,³ yet wants to present evidence both: (1) disputing NMFS's identification of the western North Pacific ("WNP") gray whale stock, and (2) supporting NMFS's identification of Pacific Coast Feeding Group ("PCFG") whales as part of the eastern North Pacific ("ENP") stock.

² 16 U.S.C. § 1371(a)(1)(A), 1373.

³ Makah Tribe Mot. at 5. Similarly, AWI's Motion states: "[T]he appropriate focus of this inquiry is the proposed waiver and regulations' effects on the marine mammal stock at issue." AWI Mot. at 5.

Makah Tribe’s Mot. at 4-8. AWI opposes the Makah Tribe’s proffered evidence regarding the WNP stock but wants to present evidence disputing NMFS’s characterization of the PCFG. AWI’s Mot. at 3-8, note 4. These fundamentally inconsistent arguments, which cannot be reconciled with the text of the MMPA or the Partial Stipulation, amount to no more than a collateral attack on decisions made by NMFS in a separate process under section 117.

As explained by Dr. Shannon Bettridge, Stock Assessment Reports (SARs) developed pursuant to MMPA section 117 must be based on the best scientific information available, are prepared in consultation with independent regional scientific review groups, and are subject to rigorous review by specialists in the field, as well as the public. *See* Bettridge Decl. ¶¶ 4-12. NMFS published updated SARs for both the ENP and WNP gray whale stocks just this past June. *Second Bettridge Decl.* ¶ 4; 84 Fed. Reg. 28,489 (June 19, 2019). To the extent the Tribe or AWI has any new information regarding gray whale stock structure, they should have submitted it through that process to be evaluated by other members of the public and the specialists involved in making those determinations. Section 4 of the Endangered Species Act (“ESA”)⁴ lays out a similarly public process that agencies must follow to list—or delist—species as endangered or threatened under the Act. *See* 16 U.S.C. § 1533. If the Makah Tribe “takes issue with NMFS’s characterization of the contemporary WNP stock as endangered,” Makah Mot. at 5, then it may follow the prescribed procedures to seek a formal change in the WNP stock’s listing status. *See* 16 U.S.C. § 1533(b)(3)(A). If the ALJ were to consider evidence going to stock structure or ESA status through this proceeding, it would to circumvent the public processes in place designed to evaluate studies and data and determine the best scientific

⁴ 16 U.S.C. §§ 1531 *et seq.*

information available, and deprive the public and other interested parties a chance to evaluate the Tribe's and AWI's allegations and purported evidence.

Finally, contrary to the Tribe's and AWI's assertions, the Partial Stipulation clearly limits the parties from introducing evidence to challenge stock structure through this proceeding. *See* Partial Stip. At 4, ¶ 2(a) (“[T]he 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.” Partial Stip. at 4, ¶ 2(a); 84 Fed. Reg. at 30,091. The stipulation only allows for the introduction of evidence concerning populations, stocks, or groups of gray whales to the extent such information is recognized or supported by the scientific literature and informs an evaluation of the impacts of the proposed waiver on such whales. *Id.* Neither the Makah Tribe's nor AWI's attacks on NMFS's identification of the ENP and WNP gray whale stocks relate to the actual impacts of the proposed waiver on a group of whales.⁵ For these reasons, NMFS opposes the Makah Tribe's and AWI's evidence regarding stock structure, including the Tribe's request to reinstate Issues I.A.1.A and I.A.1.b and to modify the description of the Partial Stipulation as stated in the Final Hearing Agenda. *See Makah Tribe's* Mot. at 4, 13; AWI's Mot. at 8 n.4.

⁵ The Makah Tribe “agrees with NMFS's determination that there is only a very remote possibility that its hunt will impact a ‘WNP’ whale,” and does not otherwise explain how its stock-structure evidence relates to any impacts on WNP whales. Makah Mot. at 5. AWI tries to couch its testimony in terms of “impacts,” but the impacts with which AWI is concerned are impacts “if” the PCFG were a stock. AWI's Mot. at 8 n.4 (“If the PCFG constitutes a separate stock, special consideration must be given to the proposed waiver's effects . . .”). That is, AWI is not offering evidence that the waiver would have biological impacts to PCFG whales different from those NMFS has previously considered, but instead argues that the impacts would have different legal significance if the PCFG were a stock.

B. Testimony Related to Alleged “In-Common” Rights Is Immaterial

With respect to the Treaty of Neah Bay, NMFS agrees with the Tribe and Sea Shepherd that the treaty is not an international treaty or agreement. *See* Makah Mot. at 8; Sea Shepherd Mot. at 7. Therefore, NMFS concurs that this issue is not included in the correct place in the Final Hearing Agenda. Makah Mot. at 8. As stated in NMFS’s Motions to Limit Scope, although NMFS did not rely on the Tribe’s treaty right in evaluating the proposed waiver and regulations under the MMPA, NMFS does not object to limited testimony about the treaty right as background information. In contrast, Sea Shepherd has not sought an MMPA waiver or other MMPA authorization to which Sea Shepherd’s asserted “co-tenancy” rights could be relevant. Because Sea Shepherd does not identify any MMPA requirement or issue of fact to which testimony regarding alleged co-tenancy rights under the Treaty of Neah Bay could be relevant, such evidence should be excluded.

C. NMFS Supports Certain Requests by the Makah Tribe

For the reasons explained in NMFS’s Motions to Limit Scope, NMFS agrees with the Tribe that Issue I.B.1(d)(iv), regarding whether an incidental take permit under the Endangered Species Act would be required, and Issue II.B.4(e), relating to the consideration of a potential off-shore hunt, should be excluded pursuant to the Partial Stipulation and because neither issue is relevant to this proceeding. NMFS’s Mot. to Limit Scope (8/9/19) at 11-14; NMFS’s Mot. to Limit Scope (8/16/19) at 3. Additionally, NMFS agrees that Issue II.B.4(b) should be modified to exclude the second sentence regarding consultation with other federal agencies, because it is not an issue that relates to the MMPA’s requirements for issuing a waiver and associated regulations, for the reasons stated by the Tribe. Makah Mot. at 10-11.

III. CONCLUSION

For the reasons stated and as described above, NMFS respectfully requests that issues and testimony at the hearing be limited to those matters relevant to the applicable MMPA requirements and that extraneous issues and testimony be excluded.

Respectfully submitted this 19th day of August, 2019.

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