

**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
RINs: 0648-BI58; 0648-XG584

**CONSERVATION PARTIES' EXPEDITED MOTION TO STAY WAIVER
PROCEEDING PENDING COMPLETION OF SUPPLEMENTAL DRAFT
ENVIRONMENTAL IMPACT STATEMENT**

INTRODUCTION

The Animal Welfare Institute, Sea Shepherd Legal, and Peninsula Citizens for the Protection of Whales (collectively, the “Conservation Parties”) are parties 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, the Conservation Parties respectfully submit this Expedited Motion to Stay the Marine Mammal Protection Act (“MMPA”) Waiver Proceeding.¹ This stay is necessary due to the National Marine Fisheries Service’s (“NMFS”) announcement of its intention to prepare a Draft Supplemental Environmental Impact Statement (“DSEIS”) on the Makah Tribe’s request to hunt gray whales—a major new environmental analysis that NMFS publicly announced for the first time on February 27, 2020. *See* 85 Fed. Reg. 11,347, 11,347 (Feb. 27, 2020) (attached as Attachment A). The agency has already started preparing its analysis. *Id.* at 11,347 (reporting that NMFS “is [now] preparing” a DSEIS). The DSEIS will analyze additional scientific and factual information relevant to the ongoing gray whale Unusual Mortality Event (“UME”) and

¹ The National Marine Fisheries Service’s (“NMFS”) hearing regulations do not require consultation with adverse parties prior to filing a motion. However, as a courtesy, the Conservation Parties notified adverse parties of their intent to file this motion by email on the morning of March 3, 2020.

the effects of the even/odd year hunt proposal on resources, including gray whales. *Id.* at 11,348. The additional scientific and factual information is essential to the Waiver Proceeding and the ultimate recommendation of whether NMFS should grant the proposed waiver, yet was not before the Honorable George J. Jordan, the Presiding Officer in this matter, nor presented to the Parties for examination at the hearing through expert testimony or otherwise.

Under these circumstances, issuing a recommended decision on the waiver that relies on findings of fact drawn from an incomplete factual record would only serve to waste administrative resources and undermine the integrity of the administrative process. Since the DSEIS will provide additional analyses and information that will form the basis of NMFS's decision, any decision the Presiding Officer makes risks being superseded by information evaluated in the DSEIS. Moreover, because the MMPA and Administrative Procedure Act ("APA") together require that a decision to waive the moratorium be made only on the basis of the best available science and a full factual record, any decision that does not take into account the DSEIS would be unlawful and contrary to basic principles of administrative law.

Accordingly, to ensure that NMFS's decision is based upon a fully developed factual record subject to robust examination by the Parties, and to promote administrative efficiency, the Conservation Parties respectfully request that Judge Jordan stay the Waiver Proceeding pending the Parties' ability to review and evaluate the information contained in the DSEIS, in order to ensure that the process results in a recommendation that is fair, equitable, and fully informed.

A discussion of the factual background appears in the hearing transcript, *see* Tr. vol. 1, 3:3-11:14, and is incorporated here by reference. Relevant to this motion, on February 24, 2020, NMFS emailed the Parties to inform them for the first time that NMFS had decided to prepare a DSEIS "to evaluate information related to the 2019 UME as well as any other appropriate

updated information.” See Attach. B. Neither Judge Jordan nor his chambers were included on this email, despite the obvious relevance of the DSEIS to the Waiver Proceeding. A Federal Register Notice announcing that NMFS “is preparing” the DSEIS to assess “additional relevant information” not presented at the hearing was published on February 27, 2020. See 85 Fed. Reg. at 11,347-38.

ARGUMENT

Pursuant to the APA, presiding officers in formal rulemaking proceedings have broad discretion to “regulate the course of the hearing.” 5 U.S.C. § 556(c)(5). Likewise, NMFS’s hearing regulations afford the presiding officer broad discretion to determine the “time and place” of the hearing, “rule upon motions,” “modify or waive any rule . . . when determining that no party will be prejudiced,” and “do 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. Accordingly, Judge Jordan has broad powers regarding procedural matters. A stay may be proper when it would promote the “efficient conduct of the proceeding,” and would not prejudice any party. See *id.*

I. Granting A Stay Will Ensure Compliance With The Procedural And Substantive Mandates Of The MMPA And APA, And Will Promote Administrative Efficiency.

First, a stay will ensure that NMFS’s decision complies with the procedural mandates of the APA. The APA provides that “[a] party is *entitled* to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required *for a full and true disclosure of the facts.*” 5 U.S.C. § 556(d) (emphases added). Even a cursory review of the record and hearing transcript reveals that the 2019 UME and the impacts of the even/odd year hunt proposals on North Pacific gray whales are issues of great importance. See, e.g., *Announcement of Hearing and Final Agenda*, 84 Fed. Reg. 59,360,

59,360-61 (Nov. 4, 2019) (listing the 2019 UME and the impacts of even/odd-year hunts on North Pacific gray whales as issues of fact to be addressed at the hearing). Indeed, these matters directly pertain to the statutory criteria NMFS must satisfy in order to issue a waiver.

Consequently, a great deal of time at the hearing was devoted to cross-examining witnesses on their testimony regarding these very issues to ensure “a full and true disclosure of the facts.” *See, e.g.*, Tr. vol. 1 62:10-67:13 (UME); Tr. vol. 2, 150:1-152:12 (even/odd year hunts).

Now, several months *after* the hearing—and only weeks from the deadline to submit comments, post-hearing briefs, and proposed findings of facts and conclusions of law—NMFS announced that the DSEIS will analyze “*additional relevant information*” regarding the 2019 UME and the impacts of the even/odd year hunt proposal on North Pacific gray whales. 85 Fed. Reg. 11,347, 11,348 (Feb. 27, 2020) (emphasis added). The updated analyses and new information are undoubtedly relevant to the MMPA Waiver Proceeding. Indeed, NMFS itself acknowledges that the process will “benefit both the public *and agency decision making*.” *Id.* (emphasis added). Yet, the agency announced that it will issue the DSEIS only *after* Judge Jordan makes his recommended decision. *Id.* (reporting that the DSEIS “will take into consideration the Administrative Law Judge’s recommended decision”). Consequently, the Parties will not have an opportunity “to submit rebuttal evidence” or “conduct such cross examination as may be required,” and will thus be deprived of their procedural right to ensure “a full and true disclosure of the facts.” 5 U.S.C. § 556(d). Such a result is highly prejudicial and contravenes the clear intent of the APA to provide for fair and impartial agency decisionmaking. *Cf. Kisor v. Wilkie*, 139 S. Ct. 2400, 2421 (2019) (noting that “the ideas of fairness and informed decisionmaking” are “the core of the APA”). Issuing a stay will ensure that Judge Jordan’s recommended decision is based on a fully developed factual record, and thus complies with the

basic strictures of the APA. *See* 5 U.S.C. § 556(d) (requiring that rules only issue “on consideration of the whole record . . . and supported by . . . substantial evidence”).²

Second, issuing a stay will ensure that NMFS’s decision complies with the procedural and substantive mandates of the MMPA. The MMPA requires that a decision to waive the moratorium be based on the best available science. 16 U.S.C. § 1371(a)(3)(A). By acknowledging that significant new information bearing on the agency’s decision requires additional analysis, *cf.* 40 C.F.R. § 1502.9 (requiring the preparation of a supplemental Environmental Impact Statement (“EIS”) when there are “significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts”), NMFS effectively concedes that the record as it exists before Judge Jordan does *not* represent the best available science. Accordingly, issuing a stay will ensure that the record—and any decision based upon it—meets this statutory command. Likewise, it is clear that the new information NMFS purports to analyze in the DSEIS bears directly on factual matters that are at issue in the Waiver Proceeding. *See* 84 Fed. Reg. at 59,360-61 (listing the 2019 UME and the impacts of even/odd-year hunts on North Pacific gray whales as issues of fact to be addressed at the hearing). Further development of these factual matters would enable Judge Jordan to better

² NMFS did not include Judge Jordan’s chambers on its email notifying the Parties of its intent to prepare a DSEIS. *See* Attach. B. Whatever the reason for this omission, the Conservation Parties find it extremely troubling that NMFS has evidently known for some time that it would be preparing a DSEIS (a process it has already commenced), and then failed to notify the presiding officer of this material changed circumstance bearing directly on the Waiver Proceeding when it notified the Parties less than three weeks before the deadline to submit comments, post-hearing briefs, proposed findings of fact and conclusions of law—including on issues that will be analyzed afresh in the DSEIS. As courts have explained, “[t]o allow an agency to play hunt the peanut with technical information, hiding or disguising the information that it employs, is to condone a practice in which the agency treats what should be a genuine interchange as mere bureaucratic sport.” *Conn. Light & Power v. Nuclear Reg. Comm’n*, 673 F.2d 525, 530 (D.C. Cir. 1982).

assess whether NMFS has demonstrated “due regard” for the “distribution, abundance, breeding habits, and times and lines of migratory movements” of the gray whales, and whether the proposed waiver “is in accord with sound principles of resource protection and conservation,” as required by the MMPA. 16 U.S.C. § 1371(a)(3)(A).

Third, issuing a stay will ensure compliance with NMFS’s hearing regulations. The regulations clearly contemplate that the environmental analyses contained in the draft EIS will serve as an important factual basis for the agency’s decision. *See* 50 C.F.R. § 228.16 (providing that at the commencement of the hearing, the presiding officer is to introduce into the record the draft EIS, including public comments and the agency’s responses). Indeed, NMFS’s Final Rule promulgating the original hearing regulations explicitly state that the EIS “*will* be considered when the [agency] determines the issues of fact published in the [initial] notice of hearing.” 40 Fed. Reg. 10,182, 10,183 (Mar. 5, 1975), *withdrawn*, 60 Fed. Reg. 39,271 (Aug. 2, 1995), *reinstated in full* 65 Fed. Reg. 39,560 (June 27, 2000). Thus, the draft EIS and its environmental analyses, including public comments and the agency’s responses, must be completed *prior* to the hearing so that they may inform the presiding officer’s recommended decision. *See* 50 C.F.R. §§ 228.16(a), .20(a) (directing the presiding officer is directed to make a recommended decision based on the record—which includes the draft EIS—and transmit the decision to NMFS); *see also* Tr. vol. 1, 11:25-12:1 (accepting the Draft EIS into the record as ALJ Ex. 6). The regulations further provide that NMFS may “affirm, modify, or set aside, in whole or in part,” the recommended decision, *or* it may “remand the hearing record to the presiding officer for a fuller development of the record.” 50 C.F.R. § 228.21. Accordingly, if NMFS believes that the record is deficient in some way, its own regulations require that the record be remanded to the presiding officer for further proceedings. NMFS cannot unilaterally consider extra-record

evidence in making its waiver decision that was not subject to rebuttal or cross-examination at a formal hearing before the presiding officer.³

Fourth, issuing a stay will promote administrative efficiency. Logically, the hearing is the *culmination* of the fact-finding process. NMFS's decision to prepare an DSEIS that will provide updated analyses and new information pertaining to facts that are material to the Waiver Proceeding would turn the entire process on its head. Because the information and analyses in the DSEIS bear directly on the facts at issue in the Waiver Proceeding, there is a significant risk that Judge Jordan's findings of fact and conclusions of law will be superseded in whole or in part by NMFS's imminent new decision and the facts and analysis contained therein. In that case, the entire hearing process would have been a pointless expenditure of administrative resources. Instead, Judge Jordan should have *all* of the relevant facts in hand before making his recommended decision, to ensure both the integrity of the decisionmaking process, and compliance with the MMPA and APA.

Finally, it must be noted that NMFS's abrupt concession that new information pertaining to the 2019 UME requires additional analysis shows that the agency's contrary statements throughout this proceeding were suspect. Throughout the waiver process, the Conservation Parties maintained that the precautionary approach and conservation principles embodied by the MMPA demanded that NMFS postpone the hearing until more information about the causes and impacts of the 2019 UME could be obtained and evaluated. *See, e.g., Schubert UME Rebuttal*

³ To be clear, the Conservation Parties are not at this time or in this Waiver Proceeding contesting the sufficiency of NMFS's analysis of alternatives or impacts in the 2015 DEIS under NEPA. Rather, the Conservation Parties are making the commonsense argument, supported by basic administrative law principles and NMFS's own regulations, that the Presiding Officer and NMFS will rely on the environmental analyses in the DSEIS to make material findings of fact that are directly relevant to the waiver criteria under the MMPA. Accordingly, such analyses must be considered under the MMPA process as well.

Decl. ¶ 7 (insisting that the “precautionary principle and conservative bias . . . embraced by the MMPA” demands that NMFS wait until data regarding the UME can be collected and fully analyzed); Tr. vol. 1, 67:5-8 (cross-examination of NMFS witness Dr. Yates asking whether gathering new information about the UME would be “more consistent with the precautionary approach of the MMPA”). In response, NMFS insisted that it had *already* evaluated the possibility of a UME in its Draft EIS, and accordingly, no additional analysis was necessary. *See* Tr. vol. 1, 34:10-35:7 (NMFS witness Dr. Yates relying on the agency’s analysis in the Draft EIS to insist that NMFS adequately considered the possibility of a UME in developing the waiver). Now that the Waiver Proceeding is nearly concluded and the Parties have no further opportunity to rebut the agency’s evidence or cross-examine its witnesses, NMFS has announced its new plan to unilaterally supplement the record with new information that bears on facts that are material to Judge Jordan’s—and the agency’s—decision. This decision suggests that, in light of the Parties’ rebuttal evidence and new information that has become available post-hearing, NMFS viewed its proposed decision as vulnerable to legal challenge. However, instead of requesting that Judge Jordan re-open the record for further factual development by *all* Parties, NMFS couched its decision as solely arising under its NEPA obligations so that the agency could unilaterally examine these matters and issue a one-sided DSEIS that lacks any opportunity for criticism on cross-examination. *See* 85 Fed. Reg. at 11,349.⁴

⁴ As discussed above, the environmental analyses contained in the EIS provide an important factual basis for the presiding officer and agency in making the decision to waive the moratorium. *See* 50 C.F.R. § 228.16. NMFS’s position is further belied by its own acknowledgement that the information and analyses in the DSEIS will “benefit . . . agency decision makers” evaluating whether the decision to grant the waiver request is supported by substantial evidence, 85 Fed. Reg. at 11,349, and by agency policy providing for the consolidation of NEPA documents with other environmental requirements, *see* Nat’l Oceanic & Atmospheric Admin., *Policy and Procedures for Compliance with the National Environmental Policy Act and Related Authorities* 22 (Jan. 13, 2017) (noting that in accordance with NEPA

In so doing, NMFS deprived the Parties of their procedural rights under the APA, and undermined the integrity of the entire waiver process. NMFS's decision not to release the DSEIS until after Judge Jordan makes his recommended decision—despite repeated calls by the Conservation Parties *during* the hearing to gather more information on the UME before making any final recommendations or decisions regarding the waiver—only reinforces this conclusion. Indeed, delaying the release of the DSEIS in this way allows NMFS to stack the deck in its favor by providing the agency an additional opportunity to supplement the record, with an apparent eye towards preempting potential criticisms in Judge Jordan's decision and the Parties' post-hearing briefs, but without affording the Parties the opportunity to which they are "entitled" to rebut such evidence or even reply to it in written briefs. 5 U.S.C. § 556(d). In the interest of ensuring a fair and impartial decisionmaking process, Judge Jordan should stay the Waiver Proceeding pending the issuance of the DSEIS and the Parties' opportunity to review, submit testimony, and take any other appropriate action to which they are entitled under the APA, regarding the analyses therein.

II. Granting A Stay Will Cause No Harm.

None of the Parties will be prejudiced by the granting of a stay. Granting a stay will in no way damage NMFS's interest in its ongoing administrative process. To the contrary, briefly halting the proceedings to allow for a more fully developed factual record *benefits* NMFS in issuing a procedurally and substantively defensible decision. For similar reasons, a stay will not harm—and may in fact benefit—the Marine Mammal Commission's interests in ensuring that

regulations, NEPA documents should be "prepared concurrently with and integrated with environmental impact analyses and related surveys and studies required by other federal statutes), *available at* <https://www.nepa.noaa.gov/docs/NOAA-NAO-216-6A-Companion-Manual-03012018.pdf>.

the eventual waiver decision is based on the best available science and complies with the procedural and substantive mandates of the MMPA. Likewise, a stay will not harm the Makah Tribe, or cause any hardship or inequity. NMFS has already determined that it will prepare and issue a DSEIS. Accordingly, a stay would not be the reason for any delay in the agency's final decision. Rather, the true cause of any such delay is NMFS's decision to conduct additional analyses. Granting the stay merely ensures that NMFS continues to comply with the requirements of the MMPA and the APA as it moves through the decisionmaking process, and if anything avoids the possibility of Judge Jordan remanding this matter to NMFS in several months for further fact-finding on the UME issue—i.e., an outcome that would cause the Tribe *more* delay than a stay issued at this juncture.

In contrast, the Conservation Parties will be *highly* prejudiced if the stay is denied. As explained above, if NMFS is permitted to rely on information and evidence that was not a part of the Waiver Proceeding, the Conservation Parties will be deprived of the opportunity to rebut the agency's evidence or cross-examine its witnesses on the matters analyzed in the DSEIS. Moreover, the Conservation Parties will be deprived of their procedural right to have their testimony and evidence considered by an impartial adjudicator, on the basis of a full and complete factual and scientific record. In any event, the opportunity for public comment under NEPA cannot substitute for the formal rulemaking process that the MMPA requires.

Accordingly, because NMFS's DSEIS will necessarily affect the facts at issue in this proceeding, a limited stay is appropriate so that the Parties—and the Presiding Officer—may evaluate the impacts of those new facts and related analyses on the issues at stake in this matter. Such a stay will not cause significant harm or prejudice to any Party, will ensure that the procedural and substantive mandates of the MMPA and the APA are satisfied, and will promote

administrative efficiency and fairness in this decisionmaking process. This is both the legally appropriate and common-sense outcome required in response to NMFS's announcement that it must analyze new facts and information in an DSEIS that indisputably relate to the Waiver Proceeding.

Dated: March 3, 2020

Respectfully submitted,

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