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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALASKA WILDERNESS LEAGUE,
NATURAL RESOURCES DEFENSE
COUNCIL, and PACIFIC
ENVIRONMENT

Petitioners,

NORTH SLOPE BOROUGH, ALASKA
ESKIMO WHALING COMMISSION,

Proposed Petitioners-
Intervenors

v.

DIRK KEMPTHORNE, Secretary of the
Interior, and MINERALS
MANAGEMENT SERVICE,

Respondents.

No.: 07-71457

**THE NORTH SLOPE
BOROUGH'S AND THE
ALASKA ESKIMO WHALING
COMMISSION'S URGENT
MOTION FOR A STAY
PURSUANT TO CIRCUIT
RULE 27-3(b)**

**Decision Requested by June 15,
2007**

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Pursuant to Circuit Rule 27-3(b), the North Slope Borough (“NSB”) and the Alaska Eskimo Whaling Commission (“AEWC”) (collectively “Inupiat”) respectfully request that the Court issue an urgent motion for a stay of this project by June 15, 2007. Due to the imminent nature of the irreparable harm to their interests, Inupiat request urgent relief in the form of an order issued to Respondents Dirk Kempthorne and the Minerals Management Service (“MMS”) and proposed intervenor Shell Offshore Inc. (“Shell”): 1) suspending operations under the Beaufort Sea Outer Continental Shelf Lease Exploration Plan 2007-2009 until the Court has issued a decision on the merits; 2) prohibiting Shell from moving any drilling, icebreaker, or support vessels into either the Beaufort or the Chukchi Seas until the Court has issued a decision on the merits; and 3) requiring Shell to immediately remove any such vessels already located in the Beaufort and Chukchi Seas in consultation with NSB and the AEWC.

I. INTRODUCTION

Inupiat seek a stay to prevent imminent and irreparable harm to their unique interests in the subsistence resources of the Beaufort Sea.¹ NSB and AEWC

¹ NSB and AEWC join in and support Petitioners’ Motion for Injunction Pending Appeal. Inupiat have filed their own motion to provide information on their unique interests in this matter, the imminent and irreparable that they will suffer in the absence of a stay, and supplemental grounds for finding that Petitioners and Inupiat are likely to prevail on the merits because of MMS’ failure to adequately consider and disclose potential environmental impacts pursuant to NEPA. Inupiat have made every effort to avoid repeating factual information or legal arguments set forth in Petitioners’ motion.

represent Inupiat communities and citizens who rely principally on subsistence resources in and adjacent to the Beaufort Sea for food and the preservation of their cultural heritage and traditions. The exploration plan approved by MMS authorizes Shell to drill exploratory wells in the Beaufort Sea in the bowhead whale hunting grounds that Inupiats have used since time immemorial to sustain their communities. Ex. 1.²

The threat of underwater noise and the associated harassment of bowhead whales caused by the drill rigs, the icebreakers, and the supply boats will irreparably interfere with Inupiats' ability to continue these historic traditions and will greatly increase the risk of death or serious injury to the whaling crews. The imminent threat of these irreparable injuries far outweighs any economic interest that the government or Shell may have in quickly implementing the project before the Court has an opportunity to review the merits of the case.

Inupiats are likely to prevail on the merits of their claims. The Environmental Assessment ("EA") prepared by MMS is fatally flawed and in violation of the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321, *et seq*, because it fails to take the requisite "hard look" at the potential impacts to

² Exhibit Numbers 1-44 refer to the Exhibits filed by Petitioners in conjunction with their Urgent Motion for Stay dated May 14, 2007. Exhibit Numbers 101-121 refer to the Exhibits submitted in conjunction with Inupiats' motion.

the subsistence use of bowhead and beluga whales and caribou. Inupiats have raised serious questions as to the validity of the EA.

MMS' decision to forego preparation of an Environmental Impact Statement ("EIS") is similarly arbitrary. MMS' staff admits throughout the EA that the potential impacts of this project are highly uncertain and involve unique and unknown risks. Inupiats have raised a serious question as to whether this level of uncertainty requires preparation of an EIS pursuant to well-established case law of this Circuit.

II. PROCEDURAL BACKGROUND

Shell submitted its final exploration plan and permit application to MMS on January 17, 2007. Ex. 3 ("Exploration Plan"). Prior to preparing the EA, MMS forwarded a copy of the Exploration Plan to NSB and requested input. NSB responded in a letter dated February 9, 2007. Ex. 119.

On February 15, 2007, MMS released the final EA and Finding of No Significant Impacts ("FONSI"). Ex. 2. MMS approved the exploration activities without providing a public comment period on the EA. Ex. 1.

On April 13, 2007, NSB and AEWC filed an appeal with the Interior Board of Land Appeal ("IBLA") challenging MMS' decision to approve the Exploration Plan and issue the EA and FONSI. Ex. 101. Inupiats filed that appeal pursuant to 30 C.F.R. § 290.2, which provides the right of administrative appeal to any party

who is “adversely affected” by a decision. On the same day, NSB and AEWC filed a Petition for Stay Pending Appeal with IBLA pursuant to 30 C.F.R. § 290.7 and 40 C.F.R. § 4.21. Ex. 102.³

On April 30, 2007, MMS filed a motion to dismiss Inupiats’ administrative appeal, arguing in part that the “MMS appeal regulations do not contemplate appeals of this nature by citizens or environmental groups.” Ex. 104 at 6. On May 4, 2007, IBLA issued an order taking under advisement both the Petition for a Stay Pending Appeal and the Motion to Dismiss. Ex. 105. IBLA also suspended any further proceedings in that appeal, pending the outcome of the present case in the Ninth Circuit Court of Appeals. *Id.*

On May 14, 2007, Petitioners filed the pending Motion for Stay. On May 15, 2007, NSB and AEWC filed a Notice of Voluntary Dismissal with the IBLA citing the need to seek urgent relief from this Court. Ex. 106. On the same day, NSB and AEWC filed their Unopposed Motion to Intervene in the present case. NSB and AEWC have also filed an independent protective Petition for Review.

III. FACTUAL BACKGROUND

A. Subsistence Harvesting in and Adjacent to the Beaufort Sea

³ Inupiats include the Notice of Appeal and Petition for Stay Pending Appeal in the Exhibits filed with this motion. Intervenors have not filed all the exhibits that were submitted to IBLA with the Petition for Stay Pending Appeal, because they would be duplicative of documents already submitted to the Court. Inupiats have provided a list of exhibits that were filed with the IBLA. Ex. 103.

Alaska Eskimos have lived on the North Slope of Alaska and have relied upon the subsistence harvest of wildlife such as bowhead whales for thousands of years. *See, e.g.*, Ex. 109 ¶ 8. Subsistence practices embody the cultural, social and spiritual values that are the essence of Inupiat heritage. Ex. 6 at 16-18. As the 2003 EIS states:

This close relationship between the spirit of a people, their social organization, and the cultural value of subsistence hunting may be unparalleled when compared with other areas in America where energy development is taking place. The Inupiat's continuing strong dependence on subsistence foods, particularly marine mammals and caribou, creates a unique set of potential effects from onshore and offshore oil exploration and development on the social and cultural system.

Ex. 117 at 3.

The subsistence diet is critical to the long-term health of Inupiat. Ex. 107 ¶¶ 10-13; Ex. 111 ¶ 18. A decrease in the subsistence diet is “particularly harmful for Alaska Natives because they are believed to have a particular genetic susceptibility to diabetes.” Ex. 107 ¶ 13. When Inupiat change their subsistence diet, they experience diabetes rates “at a much higher frequency than in the non-Native U.S. population.” *Id.* A decrease in the abundance and availability of subsistence foods can also lead to severe psychological dysfunction caused by food insecurity and hunger. *Id.* ¶¶ 15-16, 18.

The bowhead whale is the single most important subsistence resource. Ex. 110 ¶ 4. The Inupiat refer to the bowhead whale as the “ice whale” because of its

migration routes through the pack ice in the Beaufort Sea. Ex. 109 ¶ 8. The “Eskimo have been called ‘the people of the ice whale’ because without the bowhead we would not exist.” *Id.*

The Inupiat harvest of bowhead whales is regulated by the International Whaling Commission (“IWC”). AEWG represents Inupiat whaling captains before the IWC, which sets annual quotas for subsistence harvest. *Id.* ¶ 7. “The quota is very important to the Inupiat, because it sets the limit for our most important subsistence resource.” *Id.*

Inupiat hunt bowhead whales in both the spring and fall as they migrate between the Bering and the Canadian Beaufort Seas. Ex. 110 ¶¶ 7-9. In the spring, Inupiat hunt in sealskin boats called umiaks. *Id.* ¶¶ 6, 8, Photo H; Ex. 109 ¶ 9. In the fall, “the water is too rough for umiaks, so we hunt from small boats with outboard motors.” Ex. 110 ¶ 9. The fall hunt takes place in open boats powered by outboard motors that range from eighteen to twenty-four feet in length. *Id.*

Inupiat typically hunt for whales that are twenty-five to fifty feet in length. Ex. 109 ¶ 9. “The whale is struck with a hand-held darting gun, loaded with an explosive charge.” *Id.* “To take an animal of this size with a hand-held weapon requires that the crew must be almost directly on top of the whale as it surfaces to breathe.” *Id.* The hunt is very dangerous, and many whalers have died from

accidents at sea in Arctic conditions. *Id.*

Once the whale is struck, the whalers “must be very careful and work very hard to ensure that it does not escape.” Ex. 110 ¶ 10. The whale must be landed and processed quickly to ensure that the meat does not spoil. *Id.* ¶ 11. Once the whale has been landed, people from the community come out to help in pulling the whale ashore, butchering the whale, and celebrating a successful hunt. *Id.* ¶¶ 10-11, Photos F, I-O. “The wife of the whaling captain will freeze some of the whale and will feed the community many more meals over the year.” Ex. 109 ¶ 13.

In addition to the bowhead, Inupiats rely on other wildlife such as beluga whales, seals, waterfowl, fish, and caribou. Ex. 110 ¶¶ 5-6; Ex. 114 ¶ 12. In particular, beluga whales are a vitally important subsistence resource for residents of the village of Pt. Lay. Ex. 113 ¶ 17. Seal skins are used to make the umiaks. Ex. 110 ¶ 6, Photo G. In the fall, Inupiats fish in the Beaufort Sea and also hunt caribou. *Id.* ¶ 5; Ex. 108 ¶¶ 9, 33. The food from fishing and the caribou hunt feeds the whalers during the fall bowhead hunt. Ex. 110 ¶ 5.

B. The Bowhead Whale and the Impacts of Oil Exploration

Bowhead whales are “slow-growing, late-maturing, long-lived animals.” Ex. 113 ¶ 6. They may live well over 100 years and reach sexual maturity around 20 years-old. *Id.* Female bowheads give birth to a single calf probably every three to four years. *Id.*

Bowhead whales in the Chukchi and Beaufort Sea were subject to heavy commercial hunting between 1848 until around 1914. Ex. 24 at 4. The population was likely to have been between 14-26,000 prior to the commercial hunt and only a few thousand after. *Id.*

NSB and AEWFC have worked very hard in the last thirty years to ensure that subsistence harvest takes place at sustainable levels. The population of the Bering stock of bowhead whales is estimated to be approximately 10,500 with the population increasing approximately 3.2% per year. *Id.* Decades of efforts by Inupiat have helped to produce a “steady recovery of this population” due in part to a “well-managed subsistence hunt.” *Id.*

Bowhead whales migrate through the Chukchi and Alaskan Beaufort Sea semiannually between their wintering areas in the Bering Sea and summer feeding grounds in the Beaufort Sea, including the western Canadian Beaufort Sea. Ex. 113 ¶ 7.⁴ Inupiat concur with Petitioners’ description of the timing and location of the bowhead migration. *See* Petitioners’ Urgent Motion for Stay (“Pet. Motion”) at 9-11.

The migration route brings the whales very close to shore following “leads” or areas of open water between shore-fast ice and the pack ice. Ex. 113, Figure B.

⁴ *See also* Ex. 3 at 54 for a map of the North Slope of Alaska and an overview of the geography of the Chukchi/Beaufort Sea area.

The fact that the whales travel close to shore enables Inupiat whalers to reach the bowhead in small size craft.

Inupiat also concur with Petitioners' description of the potential impacts of underwater noise on bowhead. Pet. Memo at 10-11. Previous studies at the Kuvlum site, located just to the east of the proposed operations at Sivulliq, have confirmed the significant deflection of bowhead whales by underwater noise associated with offshore drilling and exploration activities. Ex. 112 ¶¶ 6-11.⁵ Furthermore, once the whales changed course, they did not return to their normal migratory path and remained in a dispersed pattern until at least 200 miles west. *Id.* ¶ 8. The exploration activities are therefore likely to impact the Barrow subsistence hunters as well. *Id.*

Previous studies focused on the impacts of a single drilling operation. No studies document the combined impacts of multiple drilling activities taking place in the migration route at the same time. *See, e.g.*, Ex. 2 at 39 (MMS stating that it is “unknown what the increased level of effect of two proposed drillships and associated icebreakers and other attendant vessels would be”).⁶

⁵ Other studies also confirm that distribution of bowhead whales is highly correlated with the distance from drilling rigs and that bowheads avoid areas with active drillships. Ex. 112 ¶ 11. These studies confirm that bowheads will divert from their migration routes to avoid an active drilling operation.

⁶ The National Research Council (“NRC”) prepared a report looking at the potential cumulative environmental impacts of offshore oil development. Ex. 9. The NRC concluded that multiple offshore operations within the migratory path could present a “barrier” to migrating whales. Ex.

IV. ARGUMENT

A. Standard of Review

Inupiat concur with the standard of review as set forth in Petitioners' motion. Pet. Motion at 15-16.

B. Inupiat are Likely to Suffer Irreparable Injury in the Absence of a Stay.

Inupiat are likely to suffer irreparable injury as a result of the deflection of bowhead and beluga whales from their normal migration routes. The deflection of whales significantly increases the time and effort required to reach the whales and dramatically increases the risk of death or serious injury to the whalers.

Noise disturbance produced from seismic survey and drilling activities at the Sivulliq Prospect west of Kaktovik and 45 miles east of Cross Island could displace migrating bowhead whales further offshore. Such disturbance could pose a serious threat to the Nuiqsut fall 2007 subsistence whaling season by potentially forcing hunters to travel further offshore to find whales.

Ex. 2 at 40 (emphasis added); 72 Fed. Reg. 17864, 17873 (April 10, 2007)

(National Marine Fisheries Service ("NFMS")) stating that exploration activities could create "significant safety hazard for whaling crews (with potential loss of life)." "When we have to travel further out into the open water to find the whales, its very dangerous, because the small boats do not travel fast. Bad weather and

9 at 10. NRC theorized that this barrier could: 1) displace the whales seaward into heavier sea ice conditions; 2) affect the animals' behavior and/or distribution so as to interfere with the subsistence hunt; and 3) prevent whales from passing through the area. *Id.*; *see also* Ex. 112 ¶ 21.

rough seas are very dangerous for us when we are out in open water.” Ex. 109 ¶ 10.

Whalers out of Nuiqsut in the late 1980s and early 1990s experienced these problems when a single drilling ship was located in the same area that two drilling ships would be located this summer. *Id.* ¶ 15; Ex. 112 ¶¶ 7-13. The previous drilling operation “affected the migratory path of the bowheads,” and whalers were forced to travel 20-30 miles offshore instead of six miles. Ex. 109 ¶ 15. During this time, “Nuiqsut whalers lost two boats and one of the whales they had taken for their village, because the crews had to travel so far from shore and their boats were swamped in high seas. One of the whaling captains almost drowned.” *Id.* ¶ 16; *see also* Ex. 108 ¶¶ 14-21; Ex. 113 ¶ 11; Ex. 114 ¶ 5.⁷

The deflection of bowhead whales also greatly increases the risk that the meat will spoil before it is processed on shore. Ex. 108 ¶ 17; Ex. 109 ¶ 20; *see also* 72 Fed. Reg. at 17873 (NMFS concluding that exploration activities could result in whalers “not landing bowheads quickly before decomposition and spoilage occurs”). If a whale spoils, Inupiats cannot replace it. “We can only take a limited number of whales, because of the international quotas. If a whale spoils, we can’t just go get another whale. We’ll have less food to eat for our

⁷ Furthermore, the NSB “is responsible for dispatching rescue operations to retrieve stranded whalers and crews whose boats have capsized or been swamped.” Ex. 115 ¶ 10. The safety of rescue personnel may also be jeopardized by the deflection of bowhead whales.

community.” Ex. 109 ¶ 21. Reduced subsistence food leads to “severe health problems even apart from the ultimate potential outcomes of severe malnutrition and starvation.” Ex. 107 ¶ 15. “Even in early stages, both food insecurity and hunger are associated with significant psychological dysfunction, learning problems, poor self-reported health status, poor overall functional status, and increased likelihood of chronic illness.” *Id.*

C. The Balance of Harms Tips Sharply in Favor of Issuing the Requested Stay.

“Environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, i.e., irreparable. If such injury is sufficiently likely, therefore, the balance of the harms will usually favor the issuance of an injunction to protect the environment.”

Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 545, 107 S. Ct. 1396 (1987) (“*Amoco Prod. Co.*”). The Court should look to *Amoco Prod. Co.* in balancing the harms, because that case involved a challenge to an offshore lease under the Outer Continental Shelf Lands Act (“OCSLA”) and allegations of harm to subsistence resources.

In *Amoco Prod. Co.*, plaintiffs brought a challenge to offshore oil and gas leases alleging that the Secretary of Interior failed to comply with § 810 of the Alaska National Interest Lands Conservation Act, 16 U.S.C. § 3120. *Id.* at 534. The District Court denied plaintiffs’ motion for a preliminary injunction, because

they had not demonstrated that activities would cause harm to subsistence resources. *Id.* at 540. The Ninth Circuit Court of Appeals reversed, holding that the District Court had not properly balanced the harms. *Id.* at 540-41.

The Supreme Court reversed the Court of Appeals, holding that the District Court did not abuse its discretion in denying the request for preliminary relief. *Id.* at 545. As the Supreme Court stated, if environmental injury “is sufficiently likely” the balance of the harms will “usually favor the issuance of the injunction.” *Id.* In that particular case, however, plaintiffs had not carried their burden of establishing the likelihood of injury to subsistence uses. Importantly, the Supreme Court noted that implicit in the District Court’s ruling “was the finding that the lease-sale stage had not significantly restricted subsistence uses.” *Id.* at 545 n. 10.

The question for this Court is whether Inupiats have established the probability of irreparable harm to subsistence uses. If so, the balance of the harms “will usually favor the issuance of an injunction.” *Id.* at 54.⁸ Importantly, this case does not involve the lease-sale stage but rather exploration, which is when “potential threats to the environment are readily visualized and evaluated.” *Vill. of*

⁸ The threats posed to the safety of the whaling crews and their families and communities also weigh heavily in favor of granting the requested stay. *See, e.g., Laforest v. Former Clean Air Holding Co., Inc.*, 376 F.3d 48, 55 (2nd Cir. 2004) (holding that harm to human health is irreparable and cannot be redressed); *California Independent System Operator Corp. v. Reliant Energy Services, Inc.*, 181 F. Supp. 2d 1111, 1121 (E.D. Cal. 2001).

False Pass v. Watt, 565 F. Supp. 1123, 1136 (D. Alaska 1983), *aff'd* 733 F.2d 605 (9th Cir. 2004) (quotations omitted).

Inupiat have carried their burden in this case by presenting the following:

1. Evidence that planned exploration activities will take place in and adjacent to subsistent hunting grounds (Ex. 113, Figures A and B);
2. Evidence that underwater noise associated with those activities will cause bowhead whales to deflect from their typical migration routes (Ex. 109 ¶ 15; Ex. 112 ¶¶ 7-23; Ex. 113 ¶¶ 9-11, 13; Ex. 114 ¶ 5);
3. Evidence that the deflection of bowhead whales increases the risk of death or serious injury to the whaling crews and the risk of whale meat spoiling. (72 Fed. Reg. at 17873; Ex. 109 ¶¶ 10, 15; Ex. 113 ¶ 11; Ex. 114 ¶ 5; Ex. 115 ¶ 10);
4. Evidence that interference in the subsistence hunt may cause both physical and psychological harm to Inupiat communities that rely on subsistence resources for food, nutrition, spiritual and cultural fulfillment (Ex. 107 ¶¶ 7-23); and
5. Evidence that this harm is irreparable and cannot be adequately remedied, because international quotas prohibit Inupiat from taking more whales if meat spoils and because the subsistence diet is uniquely important for the physical and psychological health of Inupiat. (Ex. 107 ¶15; Ex. 109 ¶¶ 20-21).

The potential injury to subsistence uses far outweighs any potential economic damages caused by a temporary delay in the project while the Court reviews the merits.⁹ The loss of anticipated revenue should not outweigh potential

⁹ Inupiat are willing to agree to an expedited schedule for filing and resolving objections to the administrative record, completing briefing, and participating in oral argument to minimize potential economic harm to Shell resulting from a temporary stay.

irreparable damage to the environment. *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722 (9th Cir. 2001). Furthermore, any economic injury to Shell is counter-balanced by the economic value that can be placed on the subsistence resources. *See, e.g.*, Ex. 107 ¶ 11 (stating that the replacement value of has been estimated at \$31-50 million if suitable meat were purchase in its place).¹⁰

D. The Public Interest Favors a Stay.

Inupiats concur with Petitioners' discussion of the public interests that underlie NEPA. Pet. Motion at 40.

The public policy expressed by Congress in passing OCSLA also weighs heavily in favor of a stay. OCSLA "shall be construed in such a manner that the character of the waters above the Outer Continental Shelf as high seas and the right to navigation and fishing therein shall not be affected." 43 U.S.C. § 1332(2) (emphasis added). Development is to take place in an "orderly" fashion "subject to environmental safeguards." *Id.* at § 1332(3).

Congress also stated that the "national interest in the effective management of the marine, coastal, and human environment" requires active participation of local governments such as NSB. *Id.* at § 1332(4). Local governments "are entitled to an opportunity to participate * * * in the policy and planning decisions made by

¹⁰ Inupiats note in this regard that there is no "suitable replacement" for whale meat, and that interference with subsistence hunting cannot be adequately compensated with economic damages and causes irreparable non-economic harm to the physical and psychological health of community members. Ex. 107 ¶¶ 13, 15-16, 18.

the Federal Government relating to exploration for, and development and production of, minerals of the Outer Continental Shelf.” Id. at § 1332(4)(B) (emphasis added). The “rights and responsibilities of * * * local governments, to preserve and protect their marine, human, and coastal environment through such means as regulation of land, air, and water uses, of safety, and of related development and activity should be considered and recognized.” Id. at § 1332(5) (emphasis added). The fact that NSB has the obligation and responsibility to represent the more than 8,000 citizens of the North Slope of Alaska weighs heavily in favor of the requested stay.¹¹

E. Inupiats and Petitioners are Likely to Prevail on the Merits of their Appeal.

1. Legal Background

Inupiats concur with Petitioners’ discussion of the applicable law pursuant to NEPA and OCSLA. Pet. Memo at 16-18.

2. MMS Violated NEPA by Failing to Examine Adequately the Potential Impacts to Bowhead Whales and Subsistence Harvest of Bowhead Whales.

Inupiats concur with and join in Petitioners’ argument that MMS failed to adequately consider the potential impacts of the project on bowhead whales. Pet.

¹¹ Our national policy favoring the participation of local governments applies with particular force in this case, because: 1) MMS issued the EA without any public comment period; and 2) MMS has attempted to deprive NSB of the right to an administrative appeal. Ex. 104. Judicial review and the requested stay are the only way for NSB to effectively participate in this decision as envisioned by Congress.

Memo at 23-32. Inupiats also point out that the success of the subsistence hunt is unavoidably tied to the project's impacts on bowhead whales. MMS cannot adequately consider the impacts to subsistence uses without an appropriate analysis of impacts to bowhead whales.

Inupiats also have unique information for the Court regarding the alleged mitigation measures that MMS relied upon to prevent significant impacts to Inupiats' subsistence harvest of bowhead whales. Ex. 2 at 38-39. The analysis in the EA is contingent upon two mitigation measures: 1) a Conflict Avoidance Agreement ("CAA") between Shell and the subsistence whalers; and 2) an Incidental Harassment Authorization ("IHA") from the National Marine Fisheries Service ("NMFS"). *Id.* (stating that MMS "assumed" that Shell would obtain both a CAA and IHA). Neither of these mitigation measures actually exists.

First, the AEWC and Shell have not reached agreement on a CAA for the upcoming whaling season, and those discussions have been terminated. Ex. 120. MMS therefore cannot rely upon the CAA to mitigate adverse impacts to bowhead whales and/or the subsistence hunt. *See, e.g., Nat'l Parks & Conservation Ass'n*, 241 F.3d at 733-36 (discussing uncertainty that mitigation measures would be implemented and requiring preparation of EIS); Pet. Motion at 30-31.

Second, NMFS has not issued an IHA and is unlikely to do so. This renders the analysis in the EA invalid. Ex. 2 at 41-42 (noting that if "the appropriate IHA

is not obtained, this EA’s environmental review as it applies to subsistence-harvest patterns and socio-cultural systems would no longer be applicable and further environmental review would be necessary”).

NMFS may issue an IHA only if it determines that the harassment of bowhead whales will not have an unmitigable adverse impact on subsistence uses of marine mammals. 72 Fed. Reg. at 17873 (*citing* 50 C.F.R. § 216.103). This determination is unlikely. NMFS included the following discussion in its April 10, 2007 notice of Shell’s IHA application:

At this time NMFS is unable to make a preliminary determination that [Shell’s] proposed drilling program will not have an unmitigable adverse impact on subsistence uses of bowhead whales. As [Shell] notes in its IHA application, there could be an adverse impact on the Inupiat bowhead subsistence hunt if the whales were deflected seaward (further from shore) in the traditional hunting areas north of Pt. Thomson in Camden Bay.

Id. at 17872. NMFS committed to issue the IHA only “provided the mitigation measures in the CAA are agreed upon by the involved parties * * *.” *Id.* at 17873 (emphasis added).

3. MMS Violated NEPA by Failing to Examine Adequately the Potential Impacts to Other Subsistence Resources.

MMS ignored and failed to discuss the potential impacts to subsistence uses of other wildlife species relied upon heavily by the Inupiat, including beluga

whales, caribou, seals, and fish.¹² Ex. 109 ¶¶ 7-9; Ex. 113 ¶ 17; Ex. 114 ¶¶ 12-14. The EA fails to include any discussion of the potential impacts to subsistence uses of these other wildlife species. Furthermore, the facts show that the project is likely to impact these uses.

a. Beluga whales

Beluga whales are an important subsistence resource, especially for Inupiats that live in the village of Pt. Lay. Ex. 113 ¶¶ 14, 17. Inupiats rely on the subsistence hunt of beluga whales during both the spring and fall migration between the Bering and Beaufort Seas. *Id.* Studies have shown that underwater noise associated with icebreakers can deflect Beluga whales from their normal migration route. *Id.* ¶¶ 15-16.

The proposed activities include icebreaker traffic through the migration route of the beluga whales. *See* Declaration of Chandler T. Wilhelm ¶¶ 12-14.¹³ The icebreaker Valdimir Ignatjuk will pass through the Chukchi and Beaufort Seas to reach the Kulluk, the drilling ship, which is located in the Northwest Territories. *Id.* ¶ 13. The second drilling ship, the Discoverer, will be led from the west coast of Alaska through the Chukchi to a location in the Beaufort Sea by the icebreaker

¹² For purposes of this limited motion, Inupiats focus on subsistence uses of beluga whales and caribou, although the analysis is similarly flawed regarding subsistence uses of seals and fish. Inupiats intend to more fully develop these issues in their brief on the merits.

¹³ Shell submitted Mr. Wilhelm's declaration in support of its Motion to Intervene dated May 11, 2007.

Kapitan Dranitsyn. *Id.* ¶ 15. These routes of travel overlap with the beluga migration and the locations of the subsistence hunt, which include Pt. Lay, Barrow, and Wainwright during both the spring and fall migrations. Ex. 113 ¶ 17. “The transit of icebreakers during June and July in the Chukchi could therefore have significant impacts on a large number of beluga whales.” *Id.* ¶ 19.

MMS did not adequately consider these potentially significant impacts to the subsistence hunt of beluga whales. Ex. 2 at 48-49. MMS concedes that beluga whales are present within the project planning area and that they are an important subsistence resource. *Id.* at 23. Without discussing the location of the subsistence hunt or the routes of the icebreakers, MMS concluded that “no significant effects are anticipated from the routing activities proposed in the EP.” *Id.* at 48-49. The EA provides no site-specific information to support this analysis. Importantly, the section of the EA discussing subsistence-harvest patterns does not include any discussion of subsistence harvest of beluga whales. *Id.* at 37-38.

An earlier draft of the EA discusses the lack of information and reached a markedly different conclusion. Ex. 118. The draft prepared by MMS’ staff scientist stated that “[b]elugas are most likely to be impacted by ice breaker noise, but Shell provides no discussion/estimates of ice breaker impacts.” *Id.* at 26 (emphasis added). Based on the lack of information, Mr. Wilder concluded in the draft that “the overall level of impacts to belugas is uncertain.” *Id.* MMS never

provided this information to the public or disclosed the conflicting views of its own staff scientists. MMS' failure to disclose Mr. Wilder's opinion raises serious questions about the validity of the analysis in the EA. *See, e.g., Ctr. for Biological Diversity v. United States Forest Serv.*, 349 F.3d 1157, 1167 (9th Cir. 2003).

b. Caribou

MMS also failed to analyze of the potential effects to caribou. The NSB and many community members expressed serious concerns that aerial support vehicles could harass and otherwise injure caribou in their calving grounds near the exploration activities, disrupting the subsistence hunt. Ex. 2 at 25; *see also* Ex. 110 ¶¶ 15-16.

The analysis of potential impacts to caribou and the subsistence hunt consists of a single sentence - "helicopter and aircraft supply flights have the potential to disturb caribou movements and alter the subsistence hunt." Ex. 2 at 40. This single sentence falls far short of NEPA's requirements. The EA must provide enough "evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impacts." *Anderson v. Evans*, 371 F.3d 475, 488 (9th Cir. 2004) (citation omitted); *see also* 40 CFR § 1508.27. Notably, MMS never determined in the EA whether potential impacts to caribou might be significant. Ex. 2 at 40. Inupiats have raised serious questions

about the adequacy of the EA's analysis of impacts to caribou.¹⁴

4. MMS Failed to Provide a Convincing Statement that the Potential Impacts of the Project Will Not be Significant.

“Where the environmental effects of a proposed action are highly uncertain or involve unknown risks, an agency must prepare an EIS.” *Ocean Advocates v. United States Army Corps of Eng’rs*, 361 F.3d 1108, 1129 (9th Cir. 2004) (citing 40 CFR § 1508.27(b)(5)) (emphasis added); *see also Nat’l Parks & Conservation Ass’n*, 241 F.3d at 733. The EA cannot rely on mitigation measures that seek to fill the information gap. In *Nat’l Parks & Conservation Ass’n*, the National Park Service prepared an EA approving an increase in the amount of cruise ship traffic in Glacier Bay. *Id.* at 725. Plaintiffs challenged the Park Service’s decision to forego preparation of an EIS, because the potential impacts were highly uncertain and involved unique and unknown risks. *Id.* at 731-736.

The Ninth Circuit invalidated the EA due to the significant uncertainty about the effects of increased cruise ship operations on whales, stellar sea lions, birds and waterfowl, and air pollution. *Id.* at 732. The EA stated that this information was obtainable and proposed a monitoring program to “fill information needs.” *Id.* at 733.

The Park Service proposes to increase the risk of harm to the environment and then perform its studies. * * * This approach has the

¹⁴ Inupiat also concur with and join in Petitioners’ argument that MMS failed to adequately consider the impacts of a crude oil spill. Pet. Motion at 18-23.

process exactly backwards. *Sierra Club*, 843 F.2d at 1195. Before one brings about a potentially significant and irreversible change to the environment, an EIS must be prepared that sufficiently explores the intensity of the environmental effect it acknowledges. * * * The point is, however, that the ‘hard look’ must be taken before, not after, the environmentally-threatening actions are put into effect.

NPCA, 241 F.3d at 722 (emphasis added).

This case is analogous. MMS knows just as little about the potential environmental effects of the proposed oil exploration activities:

1. The potential effects to **bowhead whales** and subsistence use of bowhead whales are uncertain. Ex. 2 at 39 (stating that “it is unknown what the increased level of effect of two proposed drillships and associated icebreakers and other attendant vessels would be”); Ex. 23 at 5, 15, 24; Ex. 116.¹⁵
2. The potential effects to **beluga whales** and subsistence use of beluga whales are uncertain. Ex. 118 at 26.
3. The potential effects to **caribou** and subsistence use of caribou are uncertain, because MMS never analyzed effects to caribou and never determined whether those effects may be significant. Ex. 2 at 40.
4. The potential effects to **fish stocks** and subsistence fishing are uncertain. *Id.* at 52. MMS cited the “scientific uncertainty surrounding how several important fish species would react to varying levels of drilling program noise.” *Id.* (emphasis added). Based on the level of uncertainty, MMS concluded that it “cannot concur” with Shell’s determination that “these potential effects are insignificant.” *Id.*

¹⁵ In a recent analysis performed by MMS for other OCSLA activities in the Beaufort Sea, MMS included a robust discussion of the significant level of scientific uncertainty regarding the potential impacts of underwater noise on bowhead whales. Ex. 23; Ex. 116 (additional excerpts).

Just as in *Nat'l Parks & Conservation Ass'n*, MMS must gather this information before approving the activities. For instance, the EA discusses the fact that MMS is currently preparing a study entitled *Quantitative Description of Potential Impacts of OCS Activities on Bowhead Whale Hunting and Subsistence Activities in the Beaufort Sea*. Ex. 2 at 57. NSB and AEWC are actively working with MMS to complete this study. This information should be developed “before, not after, the environmentally threatening actions are put into effect.” 241 F.3d at 722 (emphasis added).

Just as in *Nat'l Parks & Conservation Ass'n*, MMS also proposes a monitoring program to fill information gaps. *Id.* at 733. For instance, MMS proposes an acoustic monitoring program to address the uncertainty regarding impacts to fish stocks. Ex. 2 at 54. “Implementation of this acoustic monitoring would provide information that could help evaluate potential fish assessments in the future as well as helping MMS work with local commercial and subsistence users to avoid impacts to fish resources.” *Id.* Again, MMS must obtain this information before approving the project.¹⁶

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¹⁶ Inupiats note that this project also involves heated scientific controversy within MMS as to whether the proposed exploration activities will have a significant impact on subsistence resources. *See, e.g.*, Exs. 17, 31, 32, 36. These facts also raise serious concerns that MMS’ decision to forego preparation of an EIS is arbitrary. *Nat'l Parks & Conservation Ass'n*, 241 F.3d at 736-67.

V. CONCLUSION

For the reasons set forth above, the North Slope Borough and the Alaska Eskimo Whaling Commission respectfully request a stay and order from the Court by June 15, 2007.

DATED this 22nd day of May, 2007.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Megan Hooker, certify that on May 22, 2007, I served true and correct copies of **THE NORTH SLOPE BOROUGH'S AND THE ALASKA ESKIMO WHALING COMMISSION'S URGENT MOTION FOR A STAY PURSUANT TO CIRCUIT RULE 27-3(b)** on the following parties by overnight mail and electronic mail:

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