

Nos. 07-71457, 07-71989, 07-72183

---

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

---

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

RESISTING ENVIRONMENTAL DESTRUCTION ON INDIGENOUS LANDS,  
CENTER FOR BIOLOGICAL DIVERSITY, and SIERRA CLUB,

NORTH SLOPE BOROUGH and ALASKA ESKIMO WHALING COMMISSION,

Petitioners,

v.

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

Respondents,

and

SHELL OFFSHORE, INC.,

Respondent-Intervenor.

---

Petition for Review

---

**BRIEF OF PETITIONERS NORTH SLOPE BOROUGH AND ALASKA  
ESKIMO WHALING COMMISSION IN 07-72183**

---

Christopher Winter  
CRAG LAW CENTER  
917 SW Oak St.  
Suite 417  
Portland, OR 97205  
(503) 525-2725  
*Attorneys for Petitioners*

Layla Hughes  
NORTH SLOPE BOROUGH LAW  
DEPARTMENT  
P.O. Box 69  
Barrow, AK 99723  
(907) 852-0300  
September 5, 2007

## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, the Petitioners hereby state that none of them has any parent companies, subsidiaries, or affiliates that have issued shares to the public.

## TABLE OF CONTENTS

<b>STATEMENT OF JURISDICTION</b> .....	1
I. Statutory Basis of Subject Matter Jurisdiction of the Agency .....	1
II. Jurisdiction of the Court of Appeals and Timeliness of Petition for Review .....	1
<b>STATEMENT OF THE ISSUES PRESENTED FOR REVIEW</b> .....	3
<b>STATEMENT OF THE CASE</b> .....	4
I. Nature of the Case .....	4
II. Course of the Proceedings and Disposition Below .....	5
<b>STATEMENT OF FACTS</b> .....	6
I. The Proposed Exploration Activities .....	6
II. Inupiats’ Interests in the Subsistence Resources of the Beaufort Sea .....	8
A. Bowhead Whales.....	10
B. Beluga Whales.....	12
C. Caribou .....	14
D. Fish .....	15
<b>SUMMARY OF THE ARGUMENT</b> .....	17
<b>ARGUMENT</b> .....	20
I. The National Environmental Policy Act.....	20
II. Standard of Review.....	22

III. The EA is Arbitrary Because MMS Did Not Take a “hard look” at the Potential Impacts of Oil Exploration on Subsistence Resources and Activities .....	23
A. MMS did not take a “hard look” at the potential impacts to the subsistence use of bowhead whales .....	24
B. MMS’s reliance upon “mitigation measures” to support the FONSI was arbitrary .....	28
C. MMS failed to take a “hard look” at the potential impacts to the subsistence use of beluga whales .....	32
D. MMS did not take a “hard look” at the potential impacts to the subsistence use of caribou.....	34
E. MMS did not take a “hard look” at the potential impacts to the subsistence use of fish.....	35
IV. MMS Must Prepare an EIS to Consider the Potentially Significant Impacts of the Proposed Exploration Activities.....	39
A. The significance thresholds for bowhead whales, subsistence resources and sociocultural systems are arbitrary .....	40
B. MMS must prepare an EIS to address significant unknown risks to subsistence resources and Inupiats’ traditional way of life .....	45
C. MMS must prepare an EIS to resolve the significant scientific controversy regarding the potential impacts to subsistence resources .....	48
D. The proposed exploration activities implicate several other “significance” factors, requiring preparation of an EIS.....	51
V. MMS’s Approval of the Exploration Plan Violated the Outer Continental Shelf Lands Act .....	54

VI. The Court Should Vacate MMS’s Approval of the Exploration  
Plan and Require MMS to Prepare an Environmental Impact  
Statement ..... 54

**CONCLUSION** ..... 57

## TABLE OF AUTHORITIES

### CASES

<i>Acura of Bellevue v. Reich</i> , 90 F.3d 1403 (9 <sup>th</sup> Cir. 1996) .....	2
<i>Am. Bioscience, Inc. v. Thompson</i> , 269 F.3d 1077 (D.C. Cir. 2001).....	54-55
<i>Amoco Prod. Co. v. Village of Gambell</i> , 480 U.S. 531 (1987).....	55-56
<i>Anderson v. Evans</i> , 371 F.3d 475 (9 <sup>th</sup> Cir. 2004) .....	24
<i>Blue Mountains Biodiversity Project v. Blackwood</i> , 161 F.3d 1208 (9 <sup>th</sup> Cir 1998) .....	21, 22, 39-40, 51
<i>City of South Pasadena v. Slater</i> , 56 F. Supp. 2d 1106 (C.D. Cal. 1999) .....	56
<i>Defenders of Wildlife v. EPA</i> , 420 F.3d 946 (9 <sup>th</sup> Cir. 2005) .....	54
<i>Edwardsen v. U.S. Dep’t of the Interior</i> , 268 F.3d 781 (9 <sup>th</sup> Cir. 2001) .....	1
<i>Forest Conservation Council v. United States Forest Service</i> , 66 F.3d 1489 (9 <sup>th</sup> Cir. 1995) .....	56
<i>Fdn. for N. Am. Wild Sheep v. U.S. Dept. of Agric.</i> , 681 F.2d 1172 (9 <sup>th</sup> Cir. 1982) .....	28-29, 49
<i>I.C.C. v. Brd. of Locomotive Engineers</i> , 482 U.S. 270, 284-285 (1987) .....	2-3
<i>Idaho Watersheds Project v. Hahn</i> , 307 F.3d 815 (9 <sup>th</sup> Cir. 2002) .....	2, 3

<i>Idaho Sporting Congress v. Thomas</i> , 137 F.3d 1146 (9 <sup>th</sup> Cir. 1998) .....	21, 31, 39
<i>Klamath-Siskiyou Wildlands Ctr. v. U.S. Forest Serv.</i> , 373 F. Supp. 2d 1069 (ED Cal. 2004) .....	53
<i>Metcalf v. Daley</i> , 214 F.3d 1135 (9 <sup>th</sup> Cir. 2000) .....	21
<i>Nat'l Parks and Conservation Ass'n v. Babbitt</i> , 241 F.3d 722 (9 <sup>th</sup> Cir. 2000) .....	22, 28-29, 31, 39-40, 46-48, 55
<i>Nat'l Parks &amp; Conservation Ass'n v. FAA</i> , 998 F.2d 1523 (10 <sup>th</sup> Cir. 1993) .....	1
<i>Native Ecosystems Council v. U.S. Forest Serv.</i> , 418 F.3d 953 (9 <sup>th</sup> Cir. 2005) .....	23
<i>Native Ecosystems Council v. U.S. Forest Serv.</i> , 428 F.3d 1233 (9 <sup>th</sup> Cir. 2005) .....	40
<i>Natural Res. Def. Council v. Duvall</i> , 777 F. Supp. 1533 (E.D. Cal. 1991) .....	39
<i>Natural Res. Def. Council v. Evans</i> , 232 F. Supp. 2d 1003 (N.D. Cal. 2002).....	56
<i>Ocean Advocates v. U.S. Army Corps of Engineers</i> , 361 F.3d 1108 (9 <sup>th</sup> Cir. 2004) .....	22, 28, 39-40
<i>Okanagon Highlands Alliance v. Williams</i> , 236 F.3d 468 (9 <sup>th</sup> Cir. 2000) .....	31
<i>Robertson v. Methow Valley Citizens</i> , 490 U.S. 332 (1989).....	20, 21, 45
<i>Save the Yaak Comm. v. Block</i> , 840 F.2d 714 (9 <sup>th</sup> Cir. 1988) .....	56

<i>Sierra Club v. Marsh</i> , 872 F.2d 497 (1 <sup>st</sup> Cir. 1989).....	56
<i>Sierra Club v. U.S. Forest Serv.</i> , 843 F.2d 1190 (9 <sup>th</sup> Cir. 1988) .....	39, 40, 47, 49, 51
<i>Steamboaters v. Fed. Energy Regulatory Comm.</i> , 777 F.2d 1384 (9 <sup>th</sup> Cir. 1985) .....	56
<i>Thomas v. Petersen</i> , 753 F.2d 754 (9 <sup>th</sup> Cir. 1985) .....	56

## STATUTES

### Administrative Procedure Act

5 U.S.C. § 551-706 .....	4
5 U.S.C. § 706(2).....	55

### National Environmental Policy Act

42 U.S.C. § 4321, <i>et seq</i> .....	1, 4
42 U.S.C. § 4331.....	20
42 U.S.C. § 4332(C) .....	20, 21

### Outer Continental Shelf Lands Act

43 U.S.C. § 1301, <i>et seq</i> .....	4
43 U.S.C. § 1340.....	1
43 U.S.C. § 1349(c)(2).....	1
43 U.S.C. § 1349(c)(3)(C) .....	1, 3



## RULES AND REGULATIONS

30 C.F.R. § 290.2 .....	2, 6
30 C.F.R. § 290.3 .....	2
30 C.F.R. § 290.7 .....	2, 6
40 C.F.R. § 4.21 .....	2, 6
40 C.F.R. § 1501.4(e) .....	22
40 C.F.R. § 1508.9 .....	21, 22
40 C.F.R. § 1508.13 .....	22
40 C.F.R. § 1508.20 .....	30
40 C.F.R. § 1508.20(a)-(b) .....	28
40 C.F.R. § 1508.25(b)(7).....	53
40 C.F.R. § 1508.27 .....	24
40 C.F.R. § 1508.27(b)(2).....	51
40 C.F.R. § 1508.27(b)(3), (8).....	52
40 C.F.R. § 1508.27(b)(4).....	40
40 C.F.R. § 1508.27(b)(4)-(5) .....	41
40 C.F.R. § 1508.27(b)(5).....	39
40 C.F.R. § 1508.27(b)(9).....	53

National Marine Fisheries Service; Small Takes of Marine Mammals  
Incidental to Specific Activities; Seismic Surveys in the Beaufort and  
Chukchi Seas off Alaska; Notice of Receipt of Application and Proposed  
Incidental Take Authorization, Request for Comments. 72 Fed. Reg.  
17,864, 17,873 (April 10, 2007) ..... 12, 52

## STATEMENT OF JURISDICTION

### **I. Statutory Basis of Subject Matter Jurisdiction of the Agency**

Respondents Dirk Kempthorne, Secretary of the Interior and the Minerals Management Service (collectively, “MMS”) authorized the Beaufort Sea Outer Continental Shelf Exploration Plan 2007-2009 (the “Exploration Plan”) pursuant to Section 11 of the Outer Continental Shelf Lands Act (“OCSLA”), 43 U.S.C. § 1340.

### **II. Jurisdiction of the Court of Appeals and Timeliness of Petition for Review**

The Court of Appeals has original jurisdiction over any action of the Secretary to “approve, require modification of, or disapprove any exploration plan \* \* \*.” 43 U.S.C. § 1349(c)(2). The original jurisdiction of the Court of Appeals extends to claims that arise under OCSLA and allege a violation of the National Environmental Policy Act (“NEPA”), 42 U.S.C. § 4321 *et seq.* See *Edwardsen v. U.S. Dep’t of the Interior*, 268 F.3d 781, 784 (9<sup>th</sup> Cir. 2001) (*citing Nat’l Parks & Conservation Ass’n v. FAA*, 998 F.2d 1523, 1527-28 (10<sup>th</sup> Cir. 1993)). A petition for review of the “Secretary’s action” must be filed “within sixty days after the date of such action \* \* \*.” 43 U.S.C. § 1349(c)(3)(C).<sup>1</sup>

---

<sup>1</sup> MMS filed a motion to dismiss Inupiats’ Petition for Review on May 25, 2007 (“Motion to Dismiss”) alleging that the Petition for Review was barred

MMS issued the Environmental Assessment (“EA”), Finding of No Significant Impact (“FONSI”), and a letter approval of the Exploration Plan on February 15, 2007. ER 1153. The North Slope Borough (the “Borough”) and the Alaska Eskimo Whaling Commission (“AEWC”) (collectively, “Inupiat”) filed an optional administrative appeal of the Secretary’s decision with the Interior Board of Land Appeals (“IBLA”) pursuant to 30 C.F.R. § 290.2. ER 1166. They also filed a petition to stay implementation of the Exploration Plan pursuant to 30 C.F.R. § 290.7 and 40 C.F.R. § 4.21. Inupiat filed their Notice of Appeal with the IBLA on April 13, 2007, within the 60 day timeline established the 30 C.F.R. § 290.3.

The filing of an optional administrative appeal rendered the decision non-final as to the Borough and AEWC. *See Acura of Bellevue v. Reich*, 90 F.3d 1403, 1407 (9<sup>th</sup> Cir. 1996); *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 829 (9<sup>th</sup> Cir. 2002). The statute of limitations did not begin to run while the administrative appeal was pending. *See, e.g., I.C.C. v. Brd. Of Locomotive Eng’rs*, 482 U.S. 270, 284-85 (1987) (holding that a “timely

---

by the statute of limitations. Inupiat’s filed their response in opposition on June 8, 2007. Petitioners in the consolidated actions provided additional briefing on jurisdiction at the motion panel’s request on August 2, 2007. In an order dated July 16, 2007, the Appellate Commissioner denied the motion to dismiss without prejudice and directed the parties to address the jurisdictional issues in their briefs on the merits.

petition for administrative reconsideration” renders the underlying decision nonfinal and stops the “running of the [applicable] limitation period”).

On May 4, 2007, the IBLA declined to exercise its jurisdiction and stayed further proceedings in the optional administrative appeal pending the outcome of *Alaska Wilderness League v. Kempthorne*, No 07-71457. ER 1197. In doing so, IBLA eliminated any possibility that the “initial agency decision could have been modified or reversed” by the agency before the plan was implemented and effectively denied Inupiats’ request for relief. *Idaho Watershed Project*, 307 F.3d at 829. IBLA’s decision to stay further proceedings in the optional administrative appeal rendered the agency’s decision final as to Inupiats for purposes of judicial review and restarted the 60-day statute of limitations. Inupiats filed their Petition for Review in this case on May 15, 2007, well within the 60 day statutory time period. 43 U.S.C. § 1349(c)(3)(C).

#### **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

1. Did the Minerals Management Service take a “hard look” at the potential impacts of the proposed exploration plan on the use of subsistence resources where the EA acknowledges that the impacts may be significant to the subsistence use of the most important resource (bowhead whales) and

fails to include an analysis of impacts to the subsistence uses of other important resources (beluga whales, caribou, and fish)?

2. Must MMS prepare an Environmental Impact Statement (“EIS”) to consider the potentially significant impacts of the proposed exploration activities, where:

(a). MMS’s “significance thresholds” arbitrarily fail to take into consideration important Council on Environmental Quality (“CEQ”) criteria such as uncertainty and scientific controversy;

(b). MMS did not address significant unknown risks to subsistence resources and Inupiats’ traditional way of life;

(c). MMS did not address significant scientific controversy regarding the potential impacts to subsistence resources; and

(d). No less than five additional significance factors weigh heavily in favor of MMS preparing an EIS?

## **STATEMENT OF THE CASE**

### **I. Nature of the Case**

This Petition for Review challenges the MMS’s February 15, 2007 approval and EA of a plan to explore for oil in the Beaufort Sea (the “Exploration Plan”) submitted by Shell Offshore, Inc. (“Shell”). The proposed exploration activities would be located in the middle of and

adjacent to important subsistence hunting grounds used by citizens of the Borough and members of the AEWC.

Inupiats seeks declaratory and injunctive relief under the Administrative Procedure Act (“APA”), 5 U.S.C. § 551-706 and the OCSLA, 43 U.S.C. § 1301, *et seq.* The claims arise from MMS’s violations of NEPA, 42 U.S.C. § 4321, *et seq.* and the OCSLA, 43 U.S.C. § 1301, *et seq.* More specifically, Inupiats allege that MMS did not take the required “hard look” at the potential impacts to several subsistence resources and Inupiats’ use thereof, including: a) bowhead whales, b) beluga whales, c) caribou, and d) fish. Inupiats also allege that the MMS erred by failing to prepare an EIS for the proposed exploration activities, because the threatened impacts to subsistence resources may be significant.

## **II. Course of Proceedings and Disposition Below**

Shell submitted its Exploration Plan and permit application to MMS on January 12, 2007. ER 739. MMS provided a copy of the Exploration Plan to the Borough and requested input. The Borough responded in a letter dated February 9, 2007. ER 1031.

On February 15, 2007, MMS approved the Exploration Plan and released the EA and FONSI. MMS did not provide a public comment period on the EA.

On April 13, 2007, Inupiats filed an appeal with the IBLA pursuant to 30 C.F.R. § 290.2. ER 1166. On the same day, Inupiats filed a Petition for Stay Pending Appeal with the IBLA pursuant to 30 C.F.R. § 290.7 and 40 C.F.R. § 4.21.

On April 30, 2007, MMS filed a motion to dismiss Inupiats' administrative appeal. On May 4, 2007, the IBLA issued an order taking under advisement both the Petition for a Stay Pending Appeal and the Motion to Dismiss. ER 1197. The IBLA also suspended any further proceedings in that appeal, pending the outcome of *Alaska Wilderness League v. Kempthorne*, No. 07-71457. ER 1198.

## **STATEMENT OF FACTS**

### **I. The Proposed Exploration Activities**

MMS approved exploration activities on up to twelve separate lease blocks over the next three years in the Beaufort Sea, off the North Slope of Alaska. ER 1047; 1133-34.<sup>2</sup> The lease blocks are grouped into "prospects" and are spread across the Beaufort Sea from the Colville River Delta east almost to the U.S.-Canadian border. ER 666; 1133. The Cornell Prospect is approximately 15-20 miles offshore of the Colville River Delta and almost

---

<sup>2</sup> MMS approved drilling activities on the following twelve lease blocks: Beaufort Sea OCS-Y-1743, 1805, 1807, 1808, 1809, 1817, 1828, 1834, 1841, 1842, 1845, and 1849. ER 1047.



due north from Nuiqsut. *Id.* Sivulliq is located approximately 10 miles offshore in Camden Bay between the villages of Nuiqsut and Kaktovik. *Id.* The Olympia Prospect is located just to the north of Kaktovik. *Id.* The Fosters and Fireclaw Prospects are located further east, between Kaktovik and the Canadian border. *Id.*

Shell prioritized operations at Sivulliq and Olympia during the 2007 open water season but indicated that it may drill on any of the 12 blocks during the 2007 season depending on ice conditions. ER 638. During the 2008-09 open water seasons, Shell “proposes to drill an undetermined number of wells on additional prospects.” ER 1047. “Shell could drill up to 4 wells during any one year.” *Id.*

The Beaufort Sea is completely frozen for over half the year, and boats can transit the Sea only during open water conditions – between June and October of each year depending on ice conditions. The exploration activities are proposed during the open water seasons for each of the three years. *Id.*

Shell’s drilling activities would involve several large vessels operating simultaneously in the Beaufort Sea, including two drilling ships, a bore hole drilling rig, icebreakers, anchor handling vessels, ice management and supply vessels, crew support, oil spill response, and a large tanker barge. ER

670-91; 1048. Shell also proposes to use up to three fixed wing aircraft and three helicopters at any one time to support the exploration activities. ER 1049.

## **II. Inupiat's Interests in the Subsistence Resources of the Beaufort Sea**

Eight separate villages lie along the North Coast of Alaska, and the populations of those villages are predominantly Inupiat Eskimos who have relied upon the subsistence harvest of wildlife such as the bowhead whale and caribou for thousands of years. ER 116. Subsistence practices embody the cultural, social and spiritual values that are the essence of Inupiat heritage. As the multi-sale 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.

*Id.*

The subsistence diet is critical to the long-term health of Inupiat. ER 1176.

The preponderance of Alaskan public health data indicate that subsistence – including both the diet and the active lifestyle involved in hunting – is the most important protective factor against metabolic disorders; and furthermore that the risk of

developing these health problems increases as the proportion of total dietary intake from subsistence foods decreases.

*Id.*<sup>3</sup>

Subsistence activities also lie at the heart of Inupiat culture and tradition. “Subsistence activities are assigned the highest cultural values by the Inupiat and provide a sense of identity in addition to being an important economic pursuit.” ER 101.

On the North Slope, ‘subsistence’ is much more than an economic system. The hunt, the sharing of the products of the hunt, and the beliefs surrounding the hunt tie families and communities together, connect people to their social and ecological surroundings, link them to their past, and provide meaning for the present.

ER 115.

Subsistence use varies greatly depending on location and time of year:

Because primary resources are migratory, the extent of potential impacts from oil exploration on subsistence hunting largely depends on the time of year that specific activity occurs and the location. Subsistence activities are concentrated in time and space. Should exploration activities be coincident in time and space such that subsistence animals are frightened away or

---

<sup>3</sup> A decrease in the subsistence diet is “particularly harmful for Alaska Natives because they are believed to have a particular genetic susceptibility to diabetes” and changes in their diet lead to increased diabetes rates. *Id.* A decrease in the abundance and availability of subsistence foods can also lead to severe psychological dysfunction resulting from food insecurity and hunger. ER 1177.

hunter access to animals is hindered, the subsistence-hunting efforts may not provide the expected returns.

ER 364.

**A. Bowhead Whales**

The bowhead whale is the single most important subsistence resource.

ER 362. Bowhead whales are “slow-moving, late-maturing, long-lived animals.” ER 380. As baleen whales, they filter prey through fibers in their mouths. ER 88. They may live well over 100 years and reach sexual maturity around 15-20 years old. ER 94. Female bowheads give birth to a single calf probably every three to four years. ER 93.

The Borough and AEWC have worked very hard in the last thirty years in partnership with the federal government to document current bowhead populations to ensure that subsistence harvest takes place at sustainable levels. Decades of efforts by Inupiat have helped to produce a “steady recovery of this population” due in part to a “well-managed subsistence hunt.” ER 380.

The Inupiat harvest of bowhead whales is regulated by the International Whaling Commission (“IWC”), which sets strict quotas on the number of whales that can be taken for subsistence purposes. ER 102.<sup>4</sup>

---

<sup>4</sup> AEWC represents Inupiat whaling captains before the IWC. ER 1276.

In the spring, Inupiats hunt in sealskin boats called umiaks. ER 1295; 1300.

In the fall, “the water is too rough for umiaks, so we hunt from small boats with outboard motors.” ER 1296. The hunt is very dangerous, and many whalers have died from accidents at sea in Arctic conditions. *Id.*<sup>5</sup>

Once the whale is struck, the whalers “must be very careful and work very hard to ensure that it does not escape.” ER 1296. The whale must be landed and processed quickly to ensure that the meat does not spoil. *Id.* “The wife of the whaling captain will freeze some of the whale and will feed the community many more meals over the year.” ER 1277.

The proposed oil exploration activities would take place directly in the middle of and adjacent to the traditional subsistence hunting grounds for the whaling captains of both Nuiqsut and Kaktovik. ER 666; 1316. In particular, the lease blocks at the Sivulliq prospect in Camden Bay are in the middle of the subsistence hunting grounds for Nuiqsut, the lease blocks at Olympia are in the middle of the subsistence hunting grounds for Kaktovik, and the lease blocks at the Fosters and Fireclaw prospects are adjacent to the subsistence hunting grounds for Kaktovik. *Id.*

---

<sup>5</sup> Inupiats typically hunt for whales that are twenty-five to fifty feet in length. ER 1276-77. “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 breath.” *Id.*

Previous studies have documented the fact that underwater noise associated with oil drilling causes bowhead whales to deflect from their normal migration routes. *See, e.g.*, ER 1083. The activities therefore threaten the subsistence hunt of bowhead whales “by potentially forcing hunters to travel further offshore to find whales.” ER 1084. By forcing whalers to travel further offshore into the Arctic Ocean, the deflection of bowhead whales creates a “significant safety hazard for whaling crews (with potential loss of life).” 72 Fed. Reg. 17,864, 17,873 (April 10, 2007). When whaling captains have to travel further out into the open ocean, there is also a much greater risk that the whale will spoil before it is landed and processed at shore. ER 1183.

### **B. Beluga Whales**

Beluga whales are an important subsistence resource for the residents of the North Slope. ER 97-98; 359-60. Beluga whales form pods that appear to be based upon matrilineal lines, with males forming separate aggregations. Belugas mate in the early spring between March and April and then calve from May through July in their summer feeding areas. ER 360. Calves are typically weaned at two years of age. *Id.* Belugas feed primarily on schooling and anadromous fish, such as herring, smelts, cod, and salmon. *Id.*

The proposed exploration activities could impact two separate stocks of beluga whales – the Beaufort Sea stock and the Eastern Chukchi Sea stock. ER 97; 359-60. The Beaufort population migrates from the Bering Sea into the Beaufort Sea and back each year. *Id.* Most belugas from the Beaufort stock migrate into the Beaufort Sea in April and May, although they can pass Point Barrow as late as July. *Id.* The fall migration through the western Beaufort Sea generally coincides with the bowhead whale migration in September and October. *Id.*<sup>6</sup>

The Eastern Chukchi stock of beluga whales moves into coastal areas along Kasegaluk Lagoon in Northwest Alaska near Point Lay in late June and then remains there until mid to late July. *Id.* The Eastern Chukchi Sea stock then migrates into the eastern Beaufort Sea during the summer. *Id.*

Beluga whales from the Eastern Chukchi Sea stock are an important subsistence resource for the residents of the Pt. Lay and other villages in Northwest Alaska. ER 359; 1312-13. Whaling captains from Kaktovik harvest beluga whales from August through November in conjunction with the bowhead harvest. ER 222.

---

<sup>6</sup> Beluga whales are more likely to be found further offshore but also use near shore areas. *Id.*; *see also* ER 220.

Beluga whales rely on hearing for feeding, navigation and communication. ER 1312-13. “These whales are sensitive to noise, and this is commonly known by hunters in Northwest Alaska and is a widespread and very old part of traditional knowledge.” ER 1313.

Underwater noise associated with icebreakers has been documented to interfere with the communication of beluga whales over very long ranges. *Id.* “Changes have been observed in beluga swimming behavior at distances of 40-60 km from an icebreaker (Cosense and Dueck, 1987; Finley et al., 1990).” *Id.*

### **C. Caribou**

“Caribou is the most important overall subsistence resource in terms of hunting effort, quantity of meat harvested, and quantity of meat produced.” ER 101. “The meat is often shared with kin, friends, and elders within the community.” ER 112. Caribou also “plays an important part in holiday feasts. Traditionally, the skins of caribou taken in July and August have been used to manufacture parkas, boot soles, mitts, and mukluk tops \* \* \*.” *Id.*

Caribou “is the most-preferred mammal in Nuiqsut’s diet and, during period of high availability, it provides a source of fresh meat throughout the year.” ER 107. Studies suggest that caribou provide up to 35% of the



annual subsistence diet. *Id.* Nuiqsut’s subsistence hunting grounds for caribou include coastal areas near the Colville River Delta and east toward Camden Bay and Cross Island. ER 225. The Nuiqsut caribou hunt also occurs during the open-water drilling season. ER 221.

Caribou is also an extremely important subsistence resource for the village of Kaktovik.

With open water comes a period of intense caribou harvest that usually occurs in July. Kaktovik residents hunt caribou by boat along the coast, with hunting usually lasting until mid-August when the caribou move inland and are no longer abundant. Approximately 70% of all caribou harvests take place on the coastal plain.

ER 112; *see also* ER 22-23. Several of the lease blocks are located in close proximity to Kaktovik’s traditional subsistence hunting grounds. *Cf.* ER 225; 666.

Aircraft and helicopter traffic associated with exploration activities “is assumed to be a source of primary disturbance” to caribou. ER 159. As stated by MMS in the EA, “helicopter and aircraft supply flights have the potential to disturb caribou movements and alter the subsistence hunt.” ER 1083.

#### **D. Fish**

“Depending on the community, fish is the second or third most important resource after caribou and bowhead whales.” ER 101. Fish

provide a consistent and stable source of food for coastal communities and also play an important role in the traditions and customs of the Inupiat. Fish are shared during the holidays with family and community-members, and fish “also appear in traditional sharing and bartering networks that exist among North Slope communities.” ER 109. “Because it often involves the entire family, fishing serves as a strong social function in the community \* \* \*.” *Id.*

The harvest of fish is particularly important for Nuiqsut because of its location near the Colville River Delta. ER 108. “Nuiqsut has been shown to have the largest documented subsistence fish harvest on the Beaufort Sea coast.” *Id.* “Fish provide the most edible pounds per capita of any subsistence resource harvested by Nuiqsut.” *Id.* Local residents generally harvest fish during the summer and fall, from early June until mid-December. *Id.* “Broad whitefish is the primary anadromous species harvested during the summer.” *Id.*

The proposed exploration activities would take place adjacent to or in close proximity to Nuiqsut’s fishing grounds during the subsistence fishing season. One of the lease blocks is located to the north of the Colville River Delta, one of the most important subsistence fishing grounds. *Cf.* ER 225; 1133.

Fish are also an important subsistence resource for Kaktovik. ER 114. The harvest of fish is more consistent than other subsistence resources used by the citizens of Kaktovik and therefore provides a steady source of food and nutrition. *Id.* During the summer, Kaktovik residents primarily harvest arctic char along the coast and barrier islands. They also harvest arctic cisco in the ocean in August and into early September. *Id.*; *see also* ER 222. The proposed exploration activities would be located in close proximity to the subsistence fishing grounds used by residents of Kaktovik. *Cf.* ER 225; 666.

### **SUMMARY OF THE ARGUMENT**

MMS rushed to approve an unprecedented level of offshore oil exploration in the Beaufort Sea in the middle of traditional subsistence hunting and fish grounds of Inupiat Eskimos. The agency, however, lacks the most basic information about the impacts of offshore oil exploration on the Arctic environment and Inupiat's well being. MMS's decision to rely on the EA and FONSI and forego preparation of an EIS violates the plain language of NEPA, its implementing regulations, and this Court's previous decisions.

The EA is arbitrary because MMS failed to take a "hard look" at the potential impacts of oil exploration on the subsistence hunt of several important resources, including bowhead whales, beluga whales, caribou and

fish. MMS focused exclusively on the subsistence use of bowhead whales and potential deflection of whales resulting from underwater noise. MMS admitted that impacts may be significant but did not and cannot quantify or analyze the predicted level of impact, because it does not know how the whales will react to the unprecedented level of exploration activity. MMS admitted that the impacts of the planned exploration are unknown, because MMS does not have any data on how whales react to the level of proposed activities.

Faced with a lack of information, MMS relied upon “mitigation measures” that amount to little more than a plan to defer a discussion of mitigation until some indefinite point of time in the future. MMS relied upon a Conflict Avoidance Agreement (“CAA”), which is a separate document that is negotiated between offshore operators (including Shell) and the AEWC. MMS has no role to play in those discussions, and MMS did not set forth in any detail the mitigation measures that would be included in a CAA should Shell and the AEWC reach an agreement. In the event the parties do not sign a CAA, MMS relied upon Lease Stipulation No. 5, which also amounts to nothing more than a future discussion as to what mitigation would be appropriate to avoid “unreasonable” conflicts with subsistence uses.

The EA is also arbitrary because MMS completely ignored the potential impact to the subsistence hunt of other important resources such as beluga whales, caribou, and fish. Inupiat rely upon a wide array of wildlife for the make-up of their subsistence diet, but MMS focused narrowly on the bowhead whale. The EA ignored potential impacts to other important subsistence resources, masking the true impact of the project on Inupiat communities and families.

MMS must also prepare an EIS in this case. MMS admitted throughout the EA and other planning documents that it does not have enough information to predict the level of impact to the Arctic environment. The biological impacts and impacts to the subsistence uses of bowhead whales, beluga whales, caribou, fish, and birds are uncertain and involve the unique and unknown risks of oil exploration in the Beaufort Sea. NEPA requires that MMS prepare an EIS to analyze and disclose to the public these potential impacts before the project is implemented.

Furthermore, MMS must prepare an EIS to resolve the significant scientific controversy that exists regarding the agency's decision to forego preparation of an EIS. MMS's own experts strenuously objected to the conclusions of the EA that the potential impacts to subsistence resources would not be significant. Several different scientists questioned or criticized

the agency's conclusions and expressed concern that underwater noise from exploration activities could significantly disrupt the subsistence hunt of bowhead whales and interfere with the bowhead whale migration. Scientists from the Borough concur with the agency's internal experts and also criticize the agency's failure to prepare an EIS in this case for those same reasons. MMS failed to disclose any of these opinions to the public or resolve the controversy in the EA, requiring preparation of an EIS.

## **ARGUMENT**

### **I. The National Environmental Policy Act**

In passing NEPA, Congress declared “a broad national commitment to protecting and promoting environmental quality.” *Robertson v. Methow Valley Citizens*, 490 U.S. 332, 348 (1989); *see also* 42 U.S.C. § 4331. “To insure this commitment is infused into the ongoing programs and actions of the Federal Government, the act also establishes some important ‘action-forcing’ procedures.” *Robertson*, 490 U.S. at 348. To the fullest extent possible, all federal agencies must prepare an EIS whenever they propose “major federal actions significantly affecting the quality of the environment.” 42 U.S.C. § 4332(C); *Robertson*, 490 U.S. at 348.

NEPA's disclosure goals are two-fold: (1) to insure that the agency has carefully and fully contemplated the environmental effects of its action,

and (2) “to insure that the public has sufficient information to challenge the agency.” *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1151 (9<sup>th</sup> Cir. 1998). By focusing the agency’s action on the environmental consequences of its proposed action, NEPA “ensures that important effects will not be overlooked or underestimated only to be discovered after resources have been committed to the die otherwise cast.” *Robertson*, 490 U.S. at 349.

“A threshold question in a NEPA case is whether the proposed action will ‘significantly affect’ the environment, thereby triggering the requirement for an EIS.” *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1212 (9<sup>th</sup> Cir 1998) (citing 42 U.S.C. § 4332(2)(C)). “As a preliminary step, an agency may prepare an EA to decide whether the environmental impact of a proposed action is significant enough to warrant preparation of an EIS.” *Id.* (citing 40 C.F.R. § 1508.9). “The purpose of an EA is to provide the agency with sufficient evidence and analysis for determining whether to prepare an EIS or to issue a [Finding of No Significant Impact].” *Metcalf v. Daley*, 214 F.3d 1135, 1143 (9<sup>th</sup> Cir. 2000) (citing 40 C.F.R. § 1508.9). “Because the very important decision whether to prepare an EIS is based solely on the EA, the EA is fundamental to the decision-making process.” *Id*

If the agency determines on the basis of the EA not to prepare an EIS, the agency must prepare a FONSI to set forth a “convincing statement of reasons” to explain why the action will not have a significant impact on the environment. *Blackwood*, 161 F.3d at 1212; *see also* 40 C.F.R. § 1501.4(e); 40 C.F.R. § 1508.13. “The statement of reasons is crucial to determining whether the agency took a ‘hard look’ at the potential environmental impact of a project.” *Blackwood*, 161 F.3d at 1212. The agency must do more than simply “make conclusory assertions that an activity will have only an insignificant impact on the environment.” *Ocean Advocates v. U.S. Army Corps of Engineers*, 361 F.3d 1108, 1124 (9<sup>th</sup> Cir. 2004).

## **II. Standard of Review**

In reviewing an agency’s decision to forego preparation of an EIS, courts employ “an arbitrary and capricious standard.” *Nat’l Parks & Conservation Ass’n v. Babbitt*, 241 F.3d 722, 730 (9<sup>th</sup> Cir. 2001) (citing *Blackwood*, 161 F.3d at 1211). The court must determine whether the agency has: 1) taken a “hard look” at the potential consequences of its actions, 2) based the decision on a “consideration of the relevant factors,” and 3) provided a “convincing statement of reasons to explain why a project’s impacts are insignificant.” *Nat’l Parks & Conservation Ass’n*, 241 F.3d at 730 (internal cites and quotations omitted).



The Court should not substitute its judgment for that of the agency but must “engage in a substantial inquiry” and a “thorough, probing, in-depth review.” *Native Ecosystems Council v. U.S. Forest Serv.*, 418 F.3d 953, 960 (9<sup>th</sup> Cir. 2005) (quotations omitted).

**III. The EA is Arbitrary Because MMS Did Not Take a “Hard Look” at the Potential Impacts of Oil Exploration on Subsistence Resources and Activities.**

MMS failed to take a “hard look” at the potential impacts to subsistence resources and the subsistence activities of Inupiat. The proposed levels of exploration activities in the Beaufort Sea are unprecedented, and MMS concedes that it does not have enough information to accurately predict the intensity of the potential impacts to the bowhead whale subsistence hunt. Instead of gathering the needed data and performing the required analysis, MMS relies upon speculative and undefined “mitigation measures” to avoid preparation of an EIS.

Furthermore, MMS completely ignored potential impacts to subsistence resources other than bowhead whales, including beluga whales, caribou, and fish. The proposed exploration activities threaten many different subsistence activities that provide food for the Inupiat’s families and continue the traditions that have sustained their communities and culture. Despite the well-documented threats to these other subsistence

activities, MMS did not conduct any analysis in the EA of these potential impacts.

**A. MMS did not take a “hard look” at the potential impacts to the subsistence use of bowhead whales.**

The EA must consider the context and intensity of the proposed action and must set forth enough “evidence and analysis for determining whether to prepare an environmental impact statement \* \* \*.” 40 C.F.R. § 1508.27; *see also Anderson v. Evans*, 371 F.3d 475, 488 (9<sup>th</sup> Cir. 2004) (citations omitted). In this case, MMS failed to provide to the public the information necessary to determine whether the potential impacts to the subsistence hunt of the bowhead whale would be significant, requiring preparation of an EIS.

In particular, MMS failed to predict the severity of the potential impacts to the subsistence hunt of bowhead whales caused by underwater noise associated with drilling and icebreaking activities. The level of activity proposed in Shell’s Exploration Plan is unprecedented in the Beaufort Sea, with multiple drilling rigs operating at the same time as four icebreakers and many additional support vessels. In the EA, MMS focuses almost exclusively on monitoring results from previous operations in the

Beaufort Sea conducted from 1992-93. ER 1072-75.<sup>7</sup> This information was collected based on the operations of a single drillship. ER 1074.

MMS failed to analyze the level of impact likely to result from the proposed activities, which are far more extensive than the activities that took place in the early 1990s. Instead, the agency acknowledged that the effects will be greater but then stated that “it is unknown what the increased level of effect of two proposed drillships and associated icebreakers and other attendant vessels would be.” ER 1082 (emphasis added).<sup>8</sup> Given the level of uncertainty, MMS concluded that the operations at Sivulliq in Camden Bay could cause a “significant sociocultural effect if the bowheads do not migrate back into the shoreward portion of the migration corridor as they approach Cross Island.” ER 1075 (emphasis added).

The lack of available information renders the agency’s analysis of potential impacts to subsistence uses inadequate at best. Although the agency acknowledged that exploration activities “could deflect whales away

---

<sup>7</sup> Indeed, those previous exploration activities did interfere with the subsistence hunt by deflecting bowhead whales from their traditional migration routes and the subsistence hunting grounds. ER 1305-06; 1312-13.

<sup>8</sup> In particular, MMS lacked adequate data on the potential impacts of underwater noise caused by icebreakers and other support vessels. *See* Petitioners’ Consolidated Brief in Numbers 07-71457 and 07-71989 (“AWL’s Opening Brief”) at 28-30.

from their migration normal (sic) route and away from traditional Kaktovik harvest areas,” MMS sidestepped this concern by declaring that “ideally, drilling and high resolution seismic activity would not deflect whales until after they had passed by Barter Island and Kaktovik whalers had harvested whales.” ER 1082. MMS, however, provided no rationale for why it would be reasonable to conclude that this “ideal” scenario has any likelihood of occurring.<sup>9</sup> MMS offers little more than conclusions that impacts to the subsistence hunt could or could not occur.

MMS compounded the problems in the EA by failing to disclose to the public the opinions of its own scientists, who repeatedly questioned the agency’s conclusion that impacts to the subsistence hunt would not be significant. Dr. Jeffery Gleason, Wildlife Biologist in MMS’s Environmental Studies Section, criticized the EA’s analysis of potential impacts to the subsistence hunt. ER 1387-94. Dr. Gleason reviewed the

---

<sup>9</sup> The analysis is similarly flawed with respect to the proposed 2008 and 2009 exploration activities at the Fosters and Fireclaw Prospects east of Kaktovik. ER 1083. MMS stated only that noise disturbance “at the Fosters and Fireclaw Prospects could deflect whales offshore and disrupt Kaktovik’s subsistence whale harvest.” *Id.* MMS made no effort to determine whether the proposed impacts to the hunt would be significant, whether the hunt could continue and what risk would be posed to the safety of the whaling crews.

analysis and stated that it “was cursory at best.” ER 1392. He questioned the lack of a site-specific analysis and wrote that:

The area in the vicinity of Kaktovik represents one of the narrowest ‘bands’ of migration anywhere off the north coast of Alaska. The presence of seismic vessels, ice breakers, transport vessels, exploratory drill rigs, and eventually platforms will almost certainly lead to behavioral responses that will most likely jeopardize the subsistence harvest in this area.

*Id.* (emphasis added). Dr. Gleason concluded that the impacts would “almost certainly exceed the 500 bowhead whales mentioned in the EA, and thus has to result in a significant impact/effect.” *Id.* (emphasis added).

Other agency scientists echoed Dr. Gleason’s comments that the proposed exploration activities may have a significant impact on the subsistence harvest. Dr. Charles Monnett, Marine Ecologist with MMS’s Environmental Studies Section, also provided sharp criticisms of the EA’s analysis of potential impacts to the subsistence hunt of bowhead whales. ER 1009-13. Dr. Monnett stated that “drilling/development activities near Kaktovik or Cross Island have the potential to substantially impact the Bowhead Whale subsistence harvests, and cultural activities associated with it, potentially leading to long-term (i.e. project life) disruption of the hunt. ER 1009 (emphasis added).<sup>10</sup>

---

<sup>10</sup> Ms. Jill Lewandowski, Protected Species Biologist with MMS’s Environmental Assessment Branch echoed the comments of Drs. Gleason

MMS, in this case, has done little more than offering “conclusory assertions” that the impacts to the subsistence hunt of bowhead whales will not be significant. *Ocean Advocates*, 361 F.3d at 1124. MMS never predicted the level of impact to the subsistence hunt and merely acknowledged that the project could or could not result in significant harm.

**B. MMS’s reliance upon “mitigation measures” to support the FONSI was arbitrary.**

Faced with the lack of data and potentially significant impacts to the bowhead whale hunt, MMS relied upon “mitigation measures” in arguing that it does not have to prepare an EIS. ER 1083-86. The mitigation measures, however, are vague and uncertain and fail to meet the minimum requirements of NEPA.

The CEQ regulations define mitigation as a limitation on the proposed action, such as “not taking a certain action or parts of an action” or “limiting the degree or magnitude of the action and its implementation.” 40 C.F.R. § 1508.20(a)-(b). An agency can rely upon mitigation measures in determining whether preparation of an EIS is necessary. *See Nat’l Parks & Conservation Ass’n*, 241 F.3d 734. To do so, the agency must show that

---

and Monnett. Ms. Lewandowski stated that she was “concerned about the potential for significant impacts to bowhead whale feeding or migration and also subsistence harvesting of this species.” ER 1163 (emphasis added).

those measures will reduce the impacts below the level of significance. *Id.*; *see also Fdn. for N. Am. Wild Sheep v. U.S. Dept. of Agric.*, 681 F.2d 1172, 1178 (9<sup>th</sup> Cir. 1982).

The EA must describe the proposed mitigation measure “to a reasonable degree” and must do more than set forth a “perfunctory description” or a “mere listing” of the proposed measures. *Nat’l Parks & Conservation Ass’n*, 241 F.3d at 734 (quotations omitted). The agency must provide analytical data on the efficacy of the proposed measures, and the Court is to determine whether mitigation “will render such impacts so minor as to not warrant an EIS.” *Id.* (rejecting the use of mitigation measures that were uncertain).

In this case, MMS primarily relied upon a future process whereby Shell would negotiate and enter into a CAA with the AEWC. ER 1083-85. The CAA is an agreement voluntarily entered into between offshore operators (including Shell) and the AEWC on an annual basis. MMS is not a party to those negotiations and has no input over that process. The CAA is a private agreement, and the negotiations take place outside of the agency’s jurisdiction and formal decision-making process pursuant to NEPA. Shell has no legal obligation to agree on the terms of a CAA, and MMS acknowledges that the parties may not reach agreement.

In the event that Shell and the affected communities do not agree on the terms of a CAA, MMS relies upon Lease Stipulation No. 5 (“Stipulation No. 5”). ER 1086. Under this future process, the responsible official (“RS/FO”) for MMS “may assemble a group to address conflicts before making a final determination.” *Id.* “Potentially some agreement could be reached under this process that would allow whaling and exploration activities to continue.” ER 1084. After discussing the issue with the parties, the RS/FO would make a “final determination on the adequacy of the measures taken to prevent unreasonable conflicts with subsistence harvests.” ER 1086.<sup>11</sup>

MMS cannot rely on the CAA and Stipulation No. 5 to reduce the threatened impacts to the subsistence hunt below the level of significance. First, neither the CAA nor Stipulation No. 5 meet the basic requirements of a mitigation measure. 40 C.F.R. § 1508.20. MMS did not identify the specific limitations on the project that would result from a CAA. *See, e.g.*, ER 1084 (stating that the CAA would “likely address mobilization period, would “likely follow protocols” to address conflicts, and that the mitigation

---

<sup>11</sup> Stipulation No. 5 is particularly troubling, because the RS/FO does not have to make any findings or determinations with respect to significance, instead replacing NEPA’s standard with an ambiguous “unreasonable” inquiry.



would be effective “if Shell obtains a CAA”) (emphasis added). MMS similarly failed to identify the specific limitations that would result from the Stipulation No. 5 process. Instead, the agency assumed that these future processes would protect the subsistence hunt without requiring any specific limitations to be imposed upon Shell.

Furthermore, MMS does not provide any analytical data to support its conclusion that these “mitigation measures” would reduce the impact below the level of significance. *See National Parks & Conservation Ass’n*, 241 F.3d at 734 (citing *Idaho Sporting Congress*, 137 F.3d at 1151). This Court has upheld an agency’s use of mitigation measures when, for instance, the agency “discussed the monitoring measures to be put in place, ranked the probably efficacy of the different measures, detailed steps to achieve compliance should the measures fail, and identified environmental standards by which mitigation success could be measured.” *Okanagon Highlands Alliance v. Williams*, 236 F.3d 468, 473 (9<sup>th</sup> Cir. 2000). Even where an agency has described the specific measures, however, this Court found a FONSI to be arbitrary where the agency could not establish that the mitigation measures would actually work. *See National Parks & Conservation Ass’n*, 241 F.3d at 734-37. MMS suggests that the CAA could include a call center or marine mammal observation program, but MMS

does not analyze whether those measures would be effective at preventing impacts to the subsistence hunt. ER 1085. By relying on the uncertain outcome of some future negotiation process, MMS has deprived the public and this court of their ability to review the agency's determination that these measures will mitigate otherwise significant impacts.

**C. MMS failed to take a “hard look” at the potential impacts to the subsistence use of beluga whales.**

The EA prepared by MMS contains even less information on the potential impacts of the exploration activities on the subsistence use of beluga whales. MMS completely disregarded any potential impacts to the subsistence use of this resource, refused to admit that those impacts could occur, and set forth no analysis of these impacts in the EA.

The primary concern regarding the potential impacts to beluga whales results from the movement of icebreakers, drillrigs, and vessels through the Chukchi Sea and into the Beaufort Sea once the pack ice retreats at the beginning of the open water drilling season. ER 1313. Beluga whales are extremely sensitive to underwater noise, particularly from icebreakers, and the movement of vessels through the Chukchi Sea could potentially interfere with the subsistence hunt of beluga whales near Kasegaluk Lagoon near Point Lay. ER 253-54; 518; 1313. The drilling operations could also

potentially interfere with the subsistence hunt of beluga whales by captains out of Kaktovik. ER 111.

The EA does not include any discussion of the potential impacts to the subsistence hunt of beluga whales. EA 1082-85. The EA's discussion of potential impacts to subsistence harvest patterns is limited to the bowhead whale. MMS did not acknowledge or discuss the potential for vessel movement through the Chukchi Sea to interfere with the subsistence hunt of beluga whales at Kasegaluk Lagoon.<sup>12</sup>

The EA contains a very brief, one paragraph discussion of potential biological impacts to other cetaceans, including beluga and grey whales. ER 1091. This discussion does not address the potential impacts to the subsistence hunt from vessel movement through the Chukchi Sea or from drilling activities at locations in the Beaufort Sea.

Comments made by one of MMS's analysts suggest that MMS did not have adequate information to determine potential impacts to either the

---

<sup>12</sup> In preparing the Programmatic Environmental Assessment for seismic activities, MMS acknowledged the risk that vessel movement could interfere with the beluga whale hunt at Kasegaluk Lagoon. ER 367. MMS noted that belugas, when confined in areas such as the lagoon "are particularly sensitive to noise" and that icebreaking activities have been "demonstrated to disturb beluga whales at much greater distances than bowhead whales." *Id.* MMS concluded in that analysis that vessel movement and icebreaker activity in this area "could compromise the Point Lay subsistence effort." *Id.*

subsistence hunt of beluga whales or the whales themselves. ER 921.

During the drafting process, Mr. Wilder noted the lack of information on potential impacts to beluga whales and stated that it interfered in his ability to conduct an adequate site-specific analysis. *Id.* In the EA, MMS did not provide any information on icebreaker noise or any analysis of how that noise may affect beluga whales or the subsistence hunt.

**D. MMS did not take a “hard look” at the potential impacts to the subsistence use of caribou.**

The EA is similarly silent as to the potential impacts to the subsistence use of caribou. The Borough and many community members repeatedly expressed concern that the flight activities of fixed wing aircraft and helicopters could harass caribou and interfere with the subsistence hunt. ER 1033.

MMS’s analysis of the potential impacts to the subsistence hunt of caribou is limited to a single sentence – “helicopter and aircraft supply flights have the potential to disturb caribou movements and alter the subsistence hunt.” ER 1083. This one sentence falls far short of NEPA’s requirements.

In the multi-sale EIS, MMS stated that flight activity “is assumed to be a source of primary disturbance” to caribou, because the animals may “exhibit panic or violent reactions to aircraft.” ER 159. MMS also

acknowledged the importance of conducting site-specific impacts to determine whether exploration activities “coincide in time and space” with subsistence hunting. ER 359. Despite these potential conflicts and the need to conduct a site-specific analysis, MMS did not include any of this information in the EA.

In particular, MMS should have considered the potential impacts to Kaktovik’s subsistence hunt of caribou. Kaktovik’s subsistence hunt takes place during the open water season, and the hunt takes place from boats along the coast. ER 221. The Olympia, Fosters, and Fireclaw prospects are all located in close proximity to Kaktovik’s subsistence hunting grounds. ER 223; 666. Despite the information contained in the EIS, MMS did not consider or disclose the potential flight paths related to exploration at these prospects or discuss the timing of exploration activities as compared to the timing of the subsistence hunt. The EA does not contain any information that would allow either the agency or the public to determine whether these activities may cause a significant impact on the caribou hunt.

**E. MMS did not take a “hard look” at the potential impacts to the subsistence use of fish.**

MMS also failed to take a “hard look” at the potential impacts to the Inupiat’s subsistence use of fish. Residents from both Nuiqsut and Kaktovik rely heavily upon fish as a subsistence resource. ER 108; 114. The EA fails

to recognize fish as a subsistence resource and provides no discussion of whether the proposed exploration activities could potentially interfere with subsistence activities. ER 1082-86.

The record documents that MMS again lacked the necessary information about the Arctic environment to conduct a proper analysis. In the 2006 Programmatic Environmental Assessment of Seismic Activity in the Beaufort and Chukchi Seas (“PEA”), MMS discusses the data deficiencies.

Information on current distributions and abundance (e.g., density/km<sup>3</sup>) estimates, age structure, population trends, or habitat use areas are not available or are outdated for fish populations in the northeastern Chukchi or western Beaufort seas. \* \* \* Another important data gap is the lack of information concerning discrete populations for arctic fishes using modern scientific methods.

ER 304; *see also* ER 297-98 (discussing the lack of information on fish stocks in the Chukchi and Beaufort Seas). The PEA also documents the fact that fish use sounds in “behaviors including aggression, defense, territorial advertisement, courtship, and mating.” ER 305.

In the EA, MMS reiterated that it lacks the data necessary to determine impacts to fish populations from underwater noise. ER 1092. For instance, MMS stated that impacts to fish were not studied during previous drilling operations in the Beaufort Sea. ER 1094. MMS also stated that it

does not have information on different sound levels that can impact fish.

“As each species is sensitive to different sound levels, the lowest sound level at which each fish species reacts is unknown.” *Id.*<sup>13</sup>

MMS also admitted that it does not have enough information to conduct a site-specific analysis of the impacts from the particular drilling locations. For instance, the Cornell prospect is located offshore of the Colville River Delta, which is particularly important to the village of Nuiqsut and also provides key spawning habitat for arctic cisco, an important subsistence resource. ER 1095. MMS stated that operations could cause cisco to avoid the drilling location and disrupt their migration from the Colville River into the ocean. “A blockage, delay, or decrease in fitness could result in decreased adult cisco survival and decreased spawning activity during three season of exploration drilling activity.” *Id.* “It remains unclear what potential effects (sic) rearing ciscos could result from an offshore drilling operation that is located more directly offshore of the Colville River Delta, such as on Lease Y01743 Block 6222.” *Id.* (emphasis added).

---

<sup>13</sup> Seismic activities, as an example, have been show to cause Atlantic cod to abandon an area up to 20 miles in diameter from for at least 5 days. ER 1095.

MMS concluded the discussion in the EA with the following statements:

Given scientific uncertainty surrounding how several important fish species would react to varying levels of drilling program noise, we believe it possible there will be more than a minimal level of effect on some species. Therefore, we cannot concur with the Shell EP conclusion \* \* \* that ‘temporary and seasonal exploration program may have minimal to no impact on fish ... migration patterns.’

The MMS also cannot concur that the effect of all fish species would be ‘short term’ or that these potential effects are insignificant, nor would they be limited to the ‘...localized displacement of fish...’, because they could persist for up to five months each year for three consecutive years and they could occur during critical times in the life cycle of important fish species.

*Id.*<sup>14</sup> MMS could not concur that that the potential effects are insignificant, yet MMS issued a FONSI and did not prepare an EIS. MMS did not take a “hard look” at the potential impacts to Inupiat’s subsistence fishing activities.

//

//

//

---

<sup>14</sup> Based on the lack of information and the importance of local fish species, the initial draft of the EA recommended the following mitigation measure – “The underwater noise-level experienced at shore will not exceed 120dB.” ER 974. This mitigation was not included in the final EA.



#### **IV. MMS Must Prepare an EIS to Consider the Potentially Significant Impacts of the Proposed Exploration Activities.**

The Ninth Circuit has established a “relatively low threshold for preparation of an EIS.” *Natural Res. Def. Council v. Duvall*, 777 F. Supp. 1533, 1537 (E.D. Cal. 1991).

An EIS must be prepared if ‘substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor.’ *Idaho Sporting Congress*, 137 F.3d at 1149. Thus, to prevail on a claim that the [agency] violated its statutory duty to prepare an EIS, a ‘plaintiff need not show that significant effects will in fact occur.’ *Id.* at 1150. It is enough for the plaintiff to raise ‘substantial questions whether a project may have a significant effect on the environment.’ *Id.*

*Blackwood*, 161 F.3d at 1212.

CEQ regulations “outline the factors that an agency must consider in determining whether an action ‘significantly’ affects the environment \* \* \*.” *Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190, 1193 (9<sup>th</sup> Cir. 1988); *see also Blackwood*, 161 F.3d at 1212. “Where the environmental effects of a proposed action are highly uncertain or involve unique or unknown risks, an agency must prepare an EIS.” *Ocean Advocates*, 361 F.3d at 1129 (citing 40 C.F.R. § 1508.27(b)(5)). “Preparation of an EIS is mandated where uncertainty may be resolved by further collection of data or where the collection of data may prevent ‘speculation on potential \* \* \* effects. The

purpose of an EIS is to obviate the need for speculation \* \* \*.’” *Id.*

(quoting *Nat’l Parks & Conservation Ass’n*, 241 F.3d at 733).

The analysis must also consider “the degree to which the effects on the quality of the human environment are likely to be highly controversial.”

40 C.F.R. § 1508.27(b)(4). “A project is ‘highly controversial’ if there is a ‘substantial dispute [about] the sizes, nature, or effect of the major Federal action rather than the existence of the opposition to a use.’” *Native*

*Ecosystems Council*, 428 F.3d at 1240 (quoting *Blackwood*, 161 F.3d at

1212). Any one of these factors may be sufficient to require preparation of an EIS. *Nat’l Parks & Conservation Ass’n*, 241 F.3d at 731.

**A. The significance thresholds for bowhead whales, subsistence resources and sociocultural systems are arbitrary.**

In this case, MMS devised a set of criteria to determine whether the proposed exploration activities may have a significant impact on the environment. ER 120-21. Those criteria were narrowly designed by the agency to focus on the length of time that the potential impacts may last without any consideration for the CEQ factors, which the agency “must consider.” *Sierra Club*, 843 F.2d at 1193. By narrowly defining the meaning of “significance” without regard to CEQ’s regulations, MMS acted arbitrarily in violation of NEPA.

MMS based its determination of whether an effect is significant by examining whether the effect has exceeded the “significance threshold.” ER 1072. MMS established the significance thresholds in the multi-sale EIS. ER 119-21. According to MMS, significant effects to subsistence activities occur when “[o]ne or more important subsistence resources would become unavailable, undesirable for use, or available only in greatly reduced numbers for a period of 1-2 years.” ER 120 (emphasis added). Similarly, the threshold for socio-cultural systems is “[c]hronic disruption [that] occurs for a period of 2-5 years, with a tendency toward the displacement of existing social patterns.” *Id.* The threshold for bowhead whales is an “adverse impact that results in a decline in abundance and/or change in distribution requiring one or more generations for the indicated population to recover to its former status.” *Id.*

The thresholds are narrowly based on the length of time an impact may occur and fail to accommodate other relevant considerations as required by the CEQ regulations. In particular, the thresholds do not account for the degree of unknown risk and the level of controversy. 40 C.F.R. § 1508.27(b)(4)-(5). MMS referred to the CEQ regulations in the multi-sale EIS and listed the severity of impacts, threatened violations of federal law, and the presence of endangered species as criteria that must be considered.

ER 119. MMS, however, noticeably excluded any reference to uncertainty or controversy as to the effects. *Id.* Thus, in developing the significance thresholds, MMS apparently started from the flawed premise that it could pick and choose which CEQ elements to use in developing the thresholds. In any event, it is clear that MMS did not consider even those criteria which it did list in the multi-sale EIS.

In the PEA, completed in June of 2006, MMS took a markedly different approach in defining the significance thresholds, making a greater attempt to incorporate the role of uncertainty and the CEQ guidelines. *See, e.g.,* ER 294. In particular, the PEA determines significance for harassment of bowhead from underwater noise based on guidance from the National Research Council (“NRC”).

Importantly, the NRC guidelines acknowledge the role of scientific uncertainty. ER 296. The NRC encourages “precautionary management in instances when there is greater uncertainty about the potential population effects of behavioral changes resulting from noise exposure.” *Id.*

In conducting the analysis and applying the significance criteria for bowhead whales, MMS acknowledged in the PEA the role that uncertainty plays in the analysis. “Where there is uncertainty on the status of the affected population relative to the species and other important characteristics

of the population, the analysis should be conservative and cautious.” ER 327. MMS then devoted an entire section of the PEA to evaluating the “context and intensity of the proposed action” and listed out each significance criteria in turn. ER 352.

MMS’s failure to incorporate scientific uncertainty and controversy into the equation for this EA is especially troubling with regards to the potential disruption of Inupiat’s sociocultural systems. MMS defines significance as a chronic disruption of socio-cultural systems lasting for a period of 2-5 years. ER 120. The risks of underregulation ought to carry even more weight in this context because of the potential harm to Inupiat’s children and families resulting from the potential disruption of the subsistence traditions. MMS may not brush these uncertainties under the rug by arbitrarily defining significance without regard to the CEQ regulations.

Furthermore, MMS’s thresholds are unsupported by science. MMS did not provide scientific justification for the criteria it used or explain why an impact to an endangered species must last for one or two generations before it is considered significant.

In the PEA, MMS changed the definition of significance for bowhead whales that had been established in the multi-sale EIS. The PEA defines a

significant effect as an “adverse impact that could affect the survival and reproduction of twelve or more whales (of an affected species and/or stock) annually.” ER 294.

MMS provided a compelling and scientifically justifiable basis for changing the threshold in the PEA. ER 294-96. In particular, the PEA relies on the “potential biological removal level” (“PBR”) to determine significant effects. The PBR is “the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population.” ER 294. The National Marine Fisheries Service uses this method to determine significant effects. ER 295.<sup>15</sup>

MMS applied arbitrary significance thresholds in the EA, and subsequently reaches a flawed decision to forego preparation of an EIS. The thresholds used by MMS conflict with CEQ’s regulations by omitting consideration of uncertainty and controversy, and MMS has failed to set forth an adequate scientific basis for those thresholds.

---

<sup>15</sup> In commenting on the EA for the Exploration Plan, one of MMS’s scientists questioned the validity of the significance criteria and referred to the more recent criteria developed in conjunction with the PEA. ER 1009. Another MMS analyst also noted the “lack of biological validity of the current thresholds.” ER 921.

**B. MMS must prepare an EIS to address significant unknown risks to subsistence resources and Inupiats' traditional way of life.**

MMS's failure to adhere to the CEQ regulations is particularly critical in this case because of the uncertainty regarding the impacts of offshore oil development in the Arctic environment on Inupiats' traditional subsistence lifestyle. MMS has very little, if any, experience with the unprecedented level of activity proposed under the Exploration Plan. The record is riddled with the agency's admissions that it cannot accurately predict the potential impacts of the activities due to a lack of data and information. In this situation, MMS must prepare an EIS to conduct a more searching review to ensure that "important effects will not be overlooked or underestimated only to be discovered after resource have been committed and the die otherwise cast." *Robertson*, 490 U.S. at 349.

The EA, for instance, discusses the level of uncertainty regarding the potential impacts to subsistence harvest of bowhead whales. *See supra* at 26-28. MMS scientists also documented the level of uncertainty regarding potential impacts to beluga whales. MMS's staff could not predict the intensity of the impacts to beluga whales, because they did not have adequate data from Shell on the noise from icebreaking activities. *See supra* at 34.

MMS scientists also documented the level of uncertainty regarding potential impacts fish stocks relied upon by Inupiat as an important subsistence resource. In the PEA, MMS discussed the data deficiencies and admitted that it lacks information on current distributions and abundance of important subsistence fish stocks. ER 304. In the EA, MMS again discussed the lack of information, stating that impacts to fish were not studied during the previous drilling operations in the '80s and '90s. ER 1094. The "lowest sound level at which each fish species reacts is unknown." *Id.* (emphasis added). MMS concluded by rejecting Shell's conclusions because of the "uncertainty surrounding how several important fish species would react to varying levels of drilling program noise \* \* \*." ER 1095.<sup>16</sup>

This case is analogous to *Nat'l Parks & Conservation Ass'n*, 241 F.2d at 733. In that case, 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

---

<sup>16</sup> MMS also discusses the level of uncertainty in relation to impacts to birds.

Given the unknown distribution and timing of vessel activity, as well as the unknown distribution of coastal birds, it would be impossible to determine how many birds would be affected to a level that would impact their fitness.

ER 1089 (emphasis added).



EIS, because the potential impacts were highly uncertain and involved unique and unknown risks. *Id.* at 731-36.

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 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.

*Id.* at 733 (emphasis added). The Ninth Circuit held that the EA failed to “provide a convincing explanation as to why the requisite information could not be obtained prior to” implementing the project. *Id.*

In this case, MMS repeated the same mistakes. MMS conceded that the potential impacts to bowhead whales, beluga whales, caribou, fish, and birds are all unknown because of a basic lack of information on offshore oil exploration in the Arctic environment. MMS similarly failed to provide any

explanation as to why the necessary information could not be obtained prior to exploration.

MMS also relied heavily on a proposed monitoring program to fill the information gaps. *Id.* at 733. For instance, MMS cannot predict the intensity of the impacts to bowhead whales resulting from deflection, but MMS proposed to rely upon monitoring to “detect indications of displacement around operations.” ER 1075. The results of the monitoring will be used to determine if whales have been displaced from Inupiats’ subsistence hunting grounds. *Id.* Similarly, MMS proposed to rely on monitoring to address the uncertainty regarding impacts to fish stocks. ER 1097. “Implementation of this acoustic monitoring would provide information that could help evaluate potential fish assessment in the future as well as helping MMS work with local commercial and subsistence users to avoid impacts to fish resources.” *Id.* MMS must take the “hard look” before, not after, approval of the Exploration Plan.

**C. MMS must prepare an EIS to resolve the significant scientific controversy regarding the potential impacts to subsistence resources.**

Given the lack of data, several well-respected scientists from both MMS and the Borough concur that the potential impacts of the proposed oil exploration may have significant impacts on subsistence resources.

Scientists both inside and outside the agency soundly criticized the EA's conclusions and the agency's refusal to prepare an EIS. The chorus of scientific opinions questioning the agency's conclusions in this case requires preparation of an EIS to resolve the brewing controversy. *See, e.g., Sierra Club*, 843 F.2d at 1193 (requiring preparation of an EIS when experts were highly critical of the agency's conclusions that there would be not significant effects); *Fdn. for N. Am. Wild Sheep*, 681 F.2d at 1182 (same).

First, MMS's own scientists questioned the conclusions of the EA with respect to the potential effects of the exploratory drilling. *See supra* at 27-28. Dr. Monnett, Dr. Gleason, Ms. Lewandowski, and Mr. Wilder all questioned or criticized the conclusions of the EA regarding impacts to bowhead whales, and/or subsistence resources and activities. ER 1009; 1163; 1392.

Furthermore, expert scientists within the Borough concur with the opinions of MMS's experts. John C. "Craig" George has been with the Borough for 25 years working on bowhead whales and the Arctic environment. Mr. George discusses the scientific evidence documenting the threat to the bowhead whales posed by exploratory drilling and the risk that underwater noise will deflect whales from their migratory routes. ER 1304-06. He also discusses the fact deflection of whales will affect their habitat

use, potentially resulting in reduced feeding. ER 1306. Mr. George also discusses the risk posed by the cumulative impacts of multiple drilling, seismic, or production operations, which could include a “significant reduction in the success of the Eskimo subsistence whale hunt” and “significant changes in bowhead whale distribution, habitat use, and possibly health status.” ER 1307.

Robert Suydam also works as a wildlife biologist for the Borough and concurs with this assessment. Mr. Suydam reviewed the comments of MMS’s scientists, including Dr. Gleason and Dr. Monnet and concurred with their criticisms of the EA. Mr. Suydam states that the “EA fails to analyze the impacts of noise on bowhead and beluga whales and on subsistence,” noting that Shell did not provide information on underwater noise to be generated by the vessels. ER 1314. Mr. Suydam states that MMS “cannot conclude that significant effects are unlikely. Because the proposed exploration drilling will occur within the migratory path of the whales, there is a potential for the activities to significantly impact whales and/or subsistence hunting.” ER 1315.

The Borough and AEWC have worked in partnership with the federal government for many years to manage the bowhead whale and other subsistence resources for the benefit of the Inupiat Eskimos. In this case,

scientists from both the Borough and the federal government have spoken with a unified voice and soundly criticized the analysis performed by MMS in its rush to approve offshore oil exploration in the Beaufort Sea. MMS must prepare an EIS to resolve the well-documented concerns of the scientific community regarding the potential impacts of the proposed activities. “This is precisely the type of ‘controversial’ action for which an EIS must be prepared.” *Sierra Club*, 843 F.2d at 1193.

**D. The proposed exploration activities implicate several other “significance” factors, requiring preparation of an EIS.**

In addition to the uncertainty and controversy, the proposed exploration activities implicate no less than five additional significance factors out of the ten that are listed in CEQ’s regulations. MMS must prepare an EIS to address the “substantial questions” that the project implicates these additional significance criteria. *Blackwood*, 161 F.3d at 1212.

Threats to public health and safety (40 C.F.R. § 1508.27(b)(2)). The exploration activities threaten the safety of subsistence hunters and the health of the communities that depend on subsistence resources for food, nutrition, and spiritual and cultural fulfillment. The deflection of bowhead whales threatens to increase the objective risk of death or serious injury to whaling crews. ER 1082; 1278; 1296; 72 Fed. Reg. at 17873. Threats to the

whaling crews also increase threats to the Borough's safety crews, which may be dispatched to rescue them. ER 1353.

Reductions in subsistence foods also threaten the physical and mental health of members of the public that rely upon subsistence resources. ER 1176. Bowhead whale accounts for as much as 63% of the total subsistence harvest for entire communities. ER 111; *see also* ER 107. The exploration activities threaten a primary source of food for many Inupiat people that live in North Slope communities. Potential changes in the subsistence diet can cause an increased risk of diabetes. Furthermore, threats to subsistence activities can also result in psychological dysfunctions resulting from food insecurity and hunger. *Id.*

Threats to unique characteristics of the geographic area and cultural resources (40 C.F.R. § 1508.27(b)(3), (8)). The Arctic Ocean and the Beaufort Sea are critical and unique ecological and cultural resources for the Inupiat people of the North Slope. By threatening subsistence resources, the project also threatens to cause the loss or destruction of a unique geographic area and significant cultural resource. "Subsistence activities are assigned the highest cultural values by the Inupiat and provide a sense of identity in addition to being an important economic pursuit." ER 101. As MMS stated in the multi-sale EIS, the "potential activities might lead to social disruption

and a change in cultural values through employment changes, further displacement of the subsistence lifestyle by a cash economic, and the alteration of subsistence-harvest pattern \* \* \*.” ER 72. This project threatens the unique resources that have supported Inupiats’ culture and traditions for thousands of years.

Threats to threatened and endangered species (40 C.F.R. § 1508.27(b)(9)). The proposed project threatens bowhead whales, which are listed as endangered pursuant to the Endangered Species Act. *See, e.g.*, ER 1055. The project also threatens to adversely affect Spectacled and Steller’s Eider, which are both listed as threatened. ER 1076-80 (stating that helicopter overflights, drilling, oil spills, and collisions could all have adverse impact on both species). The potential impacts to threatened and endangered species are “important factor[s] supporting the need for an EIS.” *See, e.g., Klamath-Siskiyou Wildlands Ctr. v. U.S. Forest Serv.*, 373 F. Supp. 2d 1069, 1081 (ED Ca. 2004).

Potentially significant cumulative impacts (40 C.F.R. § 1508.25(b)(7)). In addition the Exploration Plan, several other development-related activities are scheduled to take place in the Beaufort and Chukchi Seas during over the next three years. Several of MMS’s scientists criticized the EA because it did not adequately discuss the

potential cumulative impacts of the Exploration Plan in conjunction with these other projects and the impact that a changing climate has on the Arctic environment. ER 906; 921; 1009-11; 1163; 1391.

**V. MMS’s Approval of the Exploration Plan Violated the Outer Continental Shelf Lands Act.**

Inupiats incorporate by reference AWL’s argument that MMS violated OCSLA in approving the exploration plan. *See* AWL’s Opening Brief at 45-47.

**VI. The Court Should Vacate MMS’s Approval of the Exploration Plan and Require MMS to Prepare an Environmental Impact Statement.**

Inupiats respectfully request that the Court vacate MMS’s decision to approve the Exploration Plan, remand that plan back to the agency, and enjoin MMS from approving the Exploration Plan until such time as MMS has prepared an EIS that complies with the requirements of NEPA.

The normal remedy under the Administrative Procedure Act for an unlawful agency action is to “vacate the agency’s action and remand to the agency to act in compliance with its statutory obligations.” *Defenders of Wildlife v. EPA*, 420 F.3d 946, 978 (9<sup>th</sup> Cir. 2005); *see also Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1084 (D.C. Cir. 2001) (where a plaintiff “prevails on its APA claim, it is entitled to relief under that statute, which normally will be a vacatur of the agency’s order”); 5 U.S.C. § 706(2)



(directing “reviewing court” to “hold unlawful and set aside” arbitrary or unlawful agency action). Because MMS’s EA and FONSI are arbitrary and in violation of NEPA, the Court should vacate MMS’s decision and remand the EA and FONSI to the agency.

Furthermore, where the project may have a “significant impact” on the environment, the proper remedy is to enjoin the activities until an EIS has been prepared. *See Nat’l Parks & Conservation Ass’n*, 241 F.3d at 738. “Where an EIS is required, allowing a potentially environmentally damaging project to proceed prior to its preparation runs contrary to the very purposes of the statutory requirement.” *Id.* at 737. Here, Inupiats have raised serious questions that the project may have a significant impact on the environment, and MMS must prepare an EIS before moving forward with the proposed offshore exploration.

The bases for injunctive relief are irreparable injury and inadequacy of legal remedies. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 542 (1987). “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.” *Amoco Prod. Co.*, 480 U.S. at 545. “If such injury is sufficiently likely, therefore, the balance of the harms will usually favor the issuance of an injunction to protect the environment.” *Id.*

In the NEPA context, irreparable injury flows from a failure to evaluate the environmental impact of a major federal action. The harm at stake when the government fails to comply with the NEPA procedures ‘is a harm to the *environment*, but the harms consists of the added *risk* to the environment that takes place when governmental decisionmakers make up their minds without having before them an analysis (with prior public comment) of the likely effects of their decision upon the environment.’

*Natural Res. Def. Council v. Evans*, 232 F. Supp. 2d 1003, 1052 (N.D. Cal. 2002) (quoting *Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. 1989)).

Once irreparable injury is shown to be “sufficiently likely,” the burden is then on the opponent of the injunction to show “unusual circumstances” that would justify action in violation of the law. *Forest Conservation Council v. United States Forest Service*, 66 F.3d 1489, 1496 (9<sup>th</sup> Cir. 1995); *Save the Yaak Comm. v. Block*, 840 F.2d 714, 722 (9<sup>th</sup> Cir. 1988); *Steamboaters v. Fed. Energy Regulatory Comm.*, 777 F.2d 1384, 1386 (9<sup>th</sup> Cir. 1985); *Thomas v. Petersen*, 753 F.2d 754, 764 (9<sup>th</sup> Cir. 1985); *City of South Pasadena v. Slater*, 56 F. Supp. 2d 1106, 1143 (C.D. Cal. 1999).

Inupiats have submitted extensive information on harm, which demonstrates their reliance upon the subsistence resources of the Beaufort Sea and the irreparable harm that could result in the form of increased risk to whaling crews and a reduction in the amount of subsistence foods available

to their communities. ER 1175-78; 1183-85; 1276-79; 1295-96; 1304-07; 1311-15; 1333-35; 1337-39; 1350-53. No “unusual circumstances” exist in this case that outweigh the irreparable harm to Inupiat’s subsistence lifestyle and traditions.

### **CONCLUSION**

Petitioners North Slope Borough and the Alaska Eskimo Whaling Commission respectfully request that the Court vacate MMS’s approval of the Exploration Plan, remand the decision back to the agency, and enjoin MMS from approving the Exploration Plan until an EIS has been prepared.

Respectfully submitted,

---

Christopher Winter  
CRAG LAW CENTER

Layla Hughes  
NORTH SLOPE BOROUGH LAW  
DEPARTMENT

Attorneys for Petitioners North Slope  
Borough and Alaska Eskimo  
Whaling Commission

September 5, 2007

**CERTIFICATE OF COMPLIANCE PURSUANT TO  
FED. R.APP.P. 32(a)(7)(C) AND CIRCUIT RULE 32-1**

I certify that, pursuant to Fed.R.App.P 32(a)(7)(B) and Ninth Circuit Rule 32-1, the attached BRIEF OF PETIONERS NORTH SLOPE BOROUGH AND ALASKA ESKIMO WHALING COMMISSION IN 07-72183 is proportionally spaced, has a typeface of 14 points, and contains 11,435 words.

Dated this 5th day of September, 2007.

---

Christopher Winter  
Attorneys for Petitioners North Slope  
Borough and Alaska Eskimo Whaling  
Commission

## **STATEMENT OF RELATED CASES**

Pursuant to Circuit Rule 28-2.6, Petitioners state that other than the consolidated Petitions for Review, they are aware of no other related cases pending in this Court.

## PROOF OF SERVICE

I, Christopher Winter, certify that on September 5, 2007, an original and fifteen (15) copies of the BRIEF OF PETIONERS NORTH SLOPE BOROUGH AND ALASKA ESKIMO WHALING COMMISSION IN 07-72183 were sent by first-class mail, postage prepaid, to the Clerk of the Court, U.S. Court of Appeals for the Ninth Circuit, P.O. Box 193939, San Francisco, California, 94119-3939. Two (2) copies of the BRIEF OF PETIONERS NORTH SLOPE BOROUGH AND ALASKA ESKIMO WHALING COMMISSION IN 07-72183 were served by first-class mail, postage prepaid, on:

David Shilton  
Appellate Section  
Environment & Natural Resources  
Division  
U.S. Department of Justice  
P.O. Box 23795, L'Enfant Plaza  
Station  
Washington, DC 20026-3795

Michele Walter  
Patton Boggs LLP  
2550 M Street NW  
Washington, DC 20037

Kyle W. Parker  
Patton Boggs LLP  
601 West 5<sup>th</sup> Avenue, Suite 700  
Anchorage, AK 99501

Deirdre McDonnell  
Eric Jorgensen  
Earthjustice  
325 Fourth Street  
Juneau, Alaska 99801

---

Christopher Winter  
Attorneys for Petitioners

**ADDENDUM OF AUTHORITIES**

43 U.S.C. § 1340..... ADD1

43 U.S.C. § 1349..... ADD4

30 C.F.R. § 290.2..... ADD7

30 C.F.R. § 290.7 ..... ADD8

40 C.F.R. § 1508.9..... ADD9

40 C.F.R. § 1508.20..... ADD10

40 C.F.R. § 1508.27..... ADD11

43 C.F.R. § 4.21 ..... ADD12