

R. CLAYTON JERNIGAN (AK Bar # 0611099)
THOMAS S. WALDO (AK Bar # 9007047)
ERIC P. JORGENSEN (AK Bar # 894010)
Earthjustice
325 Fourth Street
Juneau, AK 99801-1145
(907) 586-2751
(907) 463-5891 [fax]
cjernigan@earthjustice.org
twaldo@earthjustice.org
ejorgensen@earthjustice.org

Attorneys for Plaintiffs Native Village of Point Hope, et al.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

NATIVE VILLAGE OF POINT HOPE,)
RESISTING ENVIRONMENTAL DESTRUCTION ON)
INDIGENOUS LANDS, a Project of the INDIGENOUS)
ENVIRONMENTAL NETWORK (REDOIL),)
ALASKA WILDERNESS LEAGUE,) Case No. 1:08-cv-____-____
CENTER FOR BIOLOGICAL DIVERSITY,)
NATURAL RESOURCES DEFENSE COUNCIL, and)
PACIFIC ENVIRONMENT,)
)
)
Plaintiffs,)
)
v.)
)
MINERALS MANAGEMENT SERVICE,)
DIRK KEMPTHORNE, Secretary of the Interior,)
NATIONAL MARINE FISHERIES SERVICE, and)
CARLOS GUTIERREZ, Secretary of Commerce,)
)
Defendants.)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

(5 U.S.C. §§ 702-706; 42 U.S.C. § 4332; 16 U.S.C. § 1371)

JURISDICTION

1. This Court has jurisdiction pursuant to 28 U.S.C. § 1331, 28 U.S.C. §§ 2201-02. A cause of action is available under the APA, 5 U.S.C. §§ 702-706. Venue is appropriate under 28 U.S.C. § 1391(e).

INTRODUCTION

2. This action challenges the Defendants' decisions to issue permits to authorize seismic surveys during the summer and fall of 2008 in the Chukchi and Beaufort Seas. The issuance of these permits violates the National Environmental Policy Act (NEPA), the Marine Mammal Protection Act (MMPA) and the Administrative Procedure Act (APA).

3. Seismic surveys are used by the oil and gas industry during offshore exploration and development to generate a picture of the subsurface geology. The airguns used in seismic surveys generate high-intensity, low-frequency sounds. The underwater noise generated by airguns during seismic surveys has been detected thousands of kilometers away from the airguns.

4. The noise from seismic surveys can disrupt important marine mammal behaviors, such as feeding, breathing, communication and social bonding, within several miles of an active survey. The operations of a single survey may harm or displace tens of thousands of marine mammals. The noise generated by seismic airguns can cause permanent hearing loss in fish and marine mammals.

5. Following an increase in the level of seismic surveying activity in the Arctic Ocean during the 2006 open water season, Defendants National Marine Fisheries Service and Minerals Management Service, in order to fulfill their obligations under NEPA, decided to jointly prepare a programmatic environmental impact statement to evaluate the impacts of

seismic surveys. Defendants have not completed the final seismic programmatic EIS.

Nevertheless, Defendants have issued permits that authorize seismic surveys to proceed in the Chukchi and Beaufort Seas during 2008.

6. Defendants Minerals Management Service (MMS) and Dirk Kempthorne have violated NEPA by issuing multiple permits under the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331 *et. seq.*, to authorize seismic surveys in the Chukchi and Beaufort Seas during the summer and fall of 2008 before completing the seismic programmatic EIS. 42 U.S.C. § 4332(C); 40 C.F.R. §§ 1500 *et. seq.* Defendants National Marine Fisheries Service (NMFS) and Carlos Gutierrez have similarly violated NEPA by issuing an incidental harassment authorization (IHA) under the MMPA to authorize Shell and its contractor Western GeCo to “take” marine mammals during seismic surveys in the Chukchi and Beaufort Seas during 2008 prior to completion of the seismic programmatic EIS. 42 U.S.C. § 4332(C); 40 C.F.R. §§ 1500 *et. seq.*

7. Defendants NMFS and Carlos Gutierrez have violated the MMPA by issuing an IHA to authorize Shell and its contractor Western GeCo to “take” by harassment tens of thousands of marine mammals even though the MMPA limits such authorizations to “small numbers” and even though permitted seismic activity may cause serious injury to seals and whales, contrary to the MMPA. 16 U.S.C. § 1371; 50 C.F.R. §§ 216.101 *et. seq.*

PLAINTIFFS

8. Plaintiff Native Village of Point Hope is a federally recognized tribal government under the 1934 Indian Reorganization Act, as amended in 1936 for Alaska Natives. It is responsible for the well-being of its 800-900 members. The Chukchi Sea is of vital importance to the Native Village of Point Hope. Members of the Native Village of Point Hope have

depended for millennia on bowhead whales, walrus, seals, polar bears, beluga whales, fish such as salmon, trout, and tom cod, and birds, for their subsistence. These resources are critical to both the health and culture of the members. The Native Village of Point Hope and its members have a strong interest in the sea's resources and the well-being of the wildlife that inhabits the sea.

9. Plaintiff Alaska Wilderness League is a non-profit organization with approximately 10,000 members and activists. Alaska Wilderness League was founded in 1993 to advocate for protection of Alaska's public lands that are threatened with environmental degradation. Since its inception, it has taken an active role on issues related to oil and gas development in Alaska. Its Alaska office has three full-time employees and houses its Arctic Environmental Justice Program. Through advocacy and education, the League's Arctic Environmental Justice Program works closely with communities in the Arctic affected by development. Alaska Wilderness League is committed to honoring the human rights and traditional values of the people of the Arctic, and the shared interest in protecting critical areas for future generations.

10. Plaintiff Center for Biological Diversity is a non-profit organization with offices in San Francisco, Joshua Tree and San Diego, California; Phoenix and Tucson, Arizona; Silver City, New Mexico; Portland, Oregon; and Washington, D.C. The Center's mission is to ensure the preservation, protection, and restoration of biodiversity, native species, ecosystems, public lands, and public health. The Center is actively involved in species and habitat protection issues throughout the United States, including protection of Arctic wildlife in general and the polar bear, Pacific walrus, ribbon seal and bowhead whale in particular. These efforts include petitioning FWS to list the Pacific walrus and polar bear and petitioning NMFS to designate

critical habitat for the endangered bowhead whale and to list the ribbon seal under the Endangered Species Act.

11. Plaintiff Natural Resources Defense Council is a non-profit environmental membership organization with more than 550,000 members throughout the United States. It has had a longstanding and active interest in the protection of the environment in Alaska's Arctic, including the Beaufort and Chukchi Seas. With its nationwide membership and a staff of lawyers, scientists, and other environmental specialists, it plays a leading role in a diverse range of land and wildlife management and resource development issues.

12. Plaintiff Pacific Environment is a non-profit organization which protects the living environment of the Pacific Rim by promoting grassroots activism, strengthening communities and reforming international policies. It has an office in Alaska with employees who travel throughout the state, working with native communities in the Arctic and elsewhere to protect the resources on which they depend. Pacific Environment actively advocates for greater protection of the Arctic environment and its inhabitants from the harms caused by oil and gas exploration, development and production.

13. Plaintiff Resisting Environmental Destruction on Indigenous Lands, or REDOIL, is a network of grassroots Alaska Natives of the Inupiat, Yupik, Aleut, Tlingit, Gwich'in, Eyak and Denaiana Athabascan tribes, including residents of Arctic Ocean coastal communities. REDOIL takes an active role in addressing the human and ecological health impacts of the unsustainable development practices of the fossil fuel industry in Alaska. It advocates for the preservation of subsistence rights for Native Alaskans, self-determination rights of tribes in Alaska, a just transition from fossil fuel development, and the implementation of tribal options for sustainable development. REDOIL is a project of the Indigenous Environmental Network, a

network of grassroots Indigenous organizations, groups, communities and traditional societies from throughout North America working together to address environmental and economic justice issues impacting Indigenous peoples and territories.

14. Members of the Plaintiff groups reside near, visit, or otherwise use and enjoy the Beaufort or Chukchi Seas for subsistence, recreation, wildlife viewing, education, research and other scientific uses, photography, or aesthetic and spiritual enjoyment, or enjoy or otherwise use migratory wildlife from the Beaufort and Chukchi Seas.

15. Each of the Plaintiff groups monitors uses of the Beaufort and Chukchi Seas, the outer continental shelf, and the marine life that inhabits the Beaufort and Chukchi Seas. Each Plaintiff group monitors compliance with the law respecting these resources, educates its members and the public concerning the management of these resources, and advocates policies and practices that protect the natural value and sustainable resources of these areas. It is impossible to achieve these organizational purposes fully without adequate information and public participation in the processes required by law for management of these public resources. The interests and organizational purposes of the Plaintiffs will be directly and irreparably injured by Defendants' violations of the law as described in this complaint.

DEFENDANTS

16. Defendant Minerals Management Service is an agency of the United States Department of the Interior responsible for authorizing oil and gas exploration activities, including seismic surveys, on the outer continental shelf of the Beaufort and Chukchi Seas.

17. Defendant Dirk Kempthorne is sued in his official capacity as Secretary of the Department of the Interior.

18. Defendant National Marine Fisheries Service is an agency of the United States Department of Commerce entrusted to manage and protect marine life, including the marine mammals that inhabit the Beaufort and Chukchi Seas.

19. Defendant Carlos M. Gutierrez is sued in his official capacity of Secretary of the Department of Commerce.

FACTS

The Beaufort and Chukchi Seas

20. The Beaufort and Chukchi Seas are located north of the Bering Strait off the northern and northwestern coast of Alaska. Together, the Beaufort and Chukchi Seas encompass the entire portion of the Arctic Ocean subject to the jurisdiction of the United States. These waters provide rich feeding grounds and habitat where many species of marine mammals migrate, feed, mate, give birth and/or wean their young. Some marine mammals, such as polar bears and ringed seals, inhabit the Chukchi and Beaufort Seas throughout the year. Other species migrate to these waters to feed during the summer and fall, including the gray whale, which travels from breeding grounds off the west coast of Mexico to feed in the Arctic Ocean. During the open water period of the summer and fall, many marine mammal species inhabit the Chukchi or Beaufort Seas, including beluga whales, bowhead whales, gray whales, killer whales, minke whales, fin whales, humpback whales, Pacific walrus, polar bears, spotted seals, bearded seals, ribbon seals and ringed seals. The bowhead whale, fin whale, and humpback whale are all listed as endangered species under the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* Several bird species also use these seas for feeding, molting or migrating in the spring, summer and fall, including murrelets, common and King eiders, and Steller's and spectacled eiders, both of which

are listed as threatened species under the Endangered Species Act. These seas are also home to over 100 fish species, including cisco, capelin and Arctic cod.

21. The Beaufort and Chukchi Seas provide important subsistence resources upon which many residents of the coastal communities depend for their cultural and nutritional well-being. Native Alaskan communities, such as Point Hope, have been vitally connected to the Arctic Ocean and its resources for thousands of years. These communities depend upon bowhead whales, walrus, seals, beluga whales, polar bears, birds, and fish for subsistence. Subsistence hunting and fishing is central to the cultural traditions of these communities. Food is shared among members of the community and among different communities. Oil and gas exploration and development in the Beaufort and Chukchi Seas has the potential to threaten the subsistence way of life communities on the North Slope have practiced for thousands of years.

Seismic Surveys and their Effects on Marine Mammals

22. Other than underwater explosions, airgun arrays used in seismic surveying during oil and gas exploration generate the loudest manmade noise in the oceans. During operations, these airguns fire and generate a sound pulse once every seven to fifteen seconds. The noise generated by seismic airguns can propagate long distances in water. The noise generated by seismic airguns used for oil and gas exploration has been detected by an underwater hydrophone several thousand kilometers away from the airguns that generated the noise.

23. In the Beaufort and Chukchi Seas, seismic vessels may actively operate airguns twenty-four hours a day, including during periods of darkness. Active airgun operation in the Chukchi and Beaufort Seas may continue during periods of high winds, rough seas, and periods of low visibility, such as in the presence of fog.

24. Several types of seismic surveys are used in offshore oil and gas exploration, including marine streamer 3D seismic surveys, Ocean Bottom Cable 3D seismic surveys, marine streamer 2D seismic surveys and high resolution shallow hazard and site clearance surveys. Each of these involves the use of airguns.

25. The potential impact of underwater noise pollution is among the greatest concerns regarding the adverse impacts of oil and gas exploration on marine mammals. Increased underwater noise like that generated by seismic airguns can harm marine mammals in numerous ways. Noise can interfere with communication among marine mammals, impair social bonding, and mask natural sounds that marine mammals rely on to obtain information about their environment and to avoid predators. Noise can cause marine mammals to avoid areas, including areas used for feeding, resting or migration. Repeated avoidance of feeding or resting areas can have long-term adverse effects to marine mammals, such as reducing the overall fitness or reproductive rate of a population. Underwater noise has been shown to cause physiological impacts, and even to cause serious injury and death to marine mammals. Fatal whale strandings have been documented in areas near active seismic surveys on at least two occasions. Seismic airgun pulses of sufficient volume have the potential to cause temporary and permanent hearing loss in marine mammals.

26. In 1997, MMS convened a panel of experts to evaluate the potential adverse effects of noise from seismic airguns on marine mammals. The panel reached a consensus that marine mammals exposed to seismic pulses at levels higher than 180 dB re μPa (rms) could suffer serious behavioral or physiological impacts, including impacts to their hearing. Since at least 2000, both NMFS and MMS have since employed 180-dB re μPa (rms) and 190-dB re μPa (rms) as the received sound pressure level thresholds above which sound potentially injures

cetaceans (whales) and pinnipeds (seals), respectively. In a draft Environmental Impact Statement published in April 2007, NMFS and MMS repeated that whales and seals exposed to noise at some received sound pressure level above 180-dB re μPa (rms) and 190-dB re μPa (rms), respectively, may suffer permanent hearing loss.

27. Since 2000, when issuing incidental harassment authorizations under the Marine Mammal Protection Act to allow seismic surveys to harass marine mammals in the Chukchi and Beaufort Seas, NMFS has imposed 180-dB and 190-dB “exclusion zones” for cetaceans and pinnipeds, respectively, which preclude airgun operations when affected marine mammals are observed within the zones. NMFS imposes these exclusion zones because seismic operations can cause injury, including injury in the form of permanent hearing loss, to marine mammals within these zones.

Recent Seismic Surveys in the Chukchi and Beaufort Seas

28. Between 1995 and 2004 MMS authorized at most only one seismic survey per year in the Beaufort Sea. In 2005, no oil and gas industry seismic surveys occurred on the federal OCS in the Alaskan Beaufort Sea. Between 1991 and 2005, no oil and gas industry seismic surveys occurred in the Chukchi Sea.

29. Three oil companies requested authorization from MMS to conduct seismic surveys in the Chukchi and/or Beaufort Seas in 2006. This represented the highest level of concurrent seismic surveying activity in the Chukchi and Beaufort Seas since the 1980s. Pursuant to NEPA, MMS, with NMFS as a cooperating agency, completed a programmatic environmental assessment (EA) to evaluate the environmental impact of seismic survey activity in federal waters of the Beaufort and Chukchi Seas in 2006. Each agency separately issued a finding of no significant impact, and thereby declined to prepare an environmental impact

statement (EIS) to evaluate the effects on the environment from seismic surveys in the Alaskan Arctic Ocean by the oil and gas industry in 2006.

30. In 2006, NMFS imposed 180-dB and 190-dB exclusion zones as conditions in each of the IHAs it issued to oil companies that conducted seismic surveys in the Chukchi Sea. These authorizations require that one or more observers be posted on the deck of the seismic vessel during daytime operations to visually monitor the water for marine mammals. They further require that airguns be shut down or powered down when whales and seals are observed entering an area where received sound pressure levels exceed 180-dB re μPa (rms) and 190-dB re μPa (rms), respectively (i.e., the applicable exclusion zone). NMFS imposed these exclusion zones to prevent potential injury, including injury in the form of permanent hearing loss.

31. On or before June 7, 2007, both NMFS and MMS received two reports prepared by LGL Alaska Research Associates: LGL Report P903-2 and LGL Report P891-1. Each of these reports describes the results of marine mammal monitoring efforts during seismic surveys conducted in the Chukchi Sea in 2006.

32. During the seismic surveys conducted in the Chukchi Sea in 2006, scores of seals or whales entered the applicable exclusion zone while airguns were firing. Marine mammal observers, on board the vessels pursuant to IHA requirements, reported it likely or very likely that at least 61 individual seals or whales were exposed to seismic pulses with received sound pressure levels above 180-dB re μPa (rms) and 190-dB re μPa (rms), respectively. This number accounts only for seals and whales that were spotted by observers.

33. Subsequently, on November 17, 2006, MMS and NMFS announced a decision to prepare a programmatic EIS to evaluate the impact on the environment of seismic surveys in the Beaufort and Chukchi Seas over a longer time frame than the single year—2006—that was

evaluated in the programmatic EA. NMFS and MMS published notice of the availability of a draft programmatic EIS in April 2007. That document recognizes that seismic surveys in the Beaufort and Chukchi Sea may have potentially significant environmental impacts, particularly to bowhead whales. NMFS and MMS have not published a notice of the availability of the final programmatic EIS or issued a record of decision related to the programmatic EIS.

34. In November 2006, Shell submitted an application to NMFS requesting an IHA in connection with planned seismic surveys in the Beaufort and Chukchi Seas. On June 6, 2007, NMFS published in the federal register notice of its proposal to issue an IHA to Shell. This notice indicated that Shell had requested authorization to take by harassment over 40,000 marine mammals in total, including 1,460 beluga whales in the Chukchi Sea and a total of 34,832 ringed seals and 2,167 bowhead whales in the Beaufort and Chukchi Seas combined. Several Plaintiff organizations submitted comments on the proposed permit indicating that as proposed it would violate the MMPA and NEPA. On August 20, 2007, NMFS issued an IHA to Shell Offshore, Inc. (Shell), and its contractor Western GeCo (2007-2008 Shell IHA), authorizing them to harass several species of marine mammals (ringed seals, spotted seals, bearded seals, beluga whales, bowhead whales, killer whales, gray whales and harbor porpoises) during seismic surveys, including shallow hazard surveys, in the Chukchi and Beaufort Seas. NMFS completed a supplemental EA and issued a finding of no significant impact in connection with its issuance of the IHA. The IHA authorizes take by harassment during seismic operations through August 1, 2008. By its terms, the IHA does not impose a limit on the number of marine mammals that Shell may take by harassment. The 2007-2008 Shell IHA imposes the identical 180-dB and 190-dB “exclusion zones” that were imposed as conditions in each of the IHAs that NMFS issued in connection with seismic surveys in the Beaufort and Chukchi Seas in 2006.

35. At least five oil companies have requested additional authorizations from NMFS and/or MMS to conduct seismic surveys in the Beaufort and/or Chukchi Seas during the open water season in 2008. MMS has issued three permits under the Outer Continental Shelf Lands Act to authorize seismic surveys to proceed in 2008. On February 15, 2008, MMS issued one permit to authorize Shell to conduct seismic surveys in the Chukchi Sea and a second permit to authorize Shell to conduct seismic surveys in the Beaufort Sea. On March 13, 2008, MMS issued a permit to authorize BP Exploration (Alaska), Inc. to conduct seismic surveys in the Beaufort Sea. MMS prepared a separate EA and issued a separate finding of no significant impact in connection with each of these three permits.

STATUTORY FRAMEWORK

Administrative Procedure Act

36. The APA authorizes courts to review agency actions and “hold unlawful and set aside agency action, findings, and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or] (D) without observance of procedure required by law” 5 U.S.C. § 706(2)(A). The EAs, findings of no significant impact and IHA are reviewed under this provision of the APA and for compliance with NEPA and the MMPA, respectively.

National Environmental Policy Act

37. Congress enacted NEPA in order to require federal agencies to incorporate environmental concerns into the decision-making process. 42 U.S.C. § 4331(a). In furtherance of this goal, NEPA compels federal agencies prospectively to evaluate the environmental impacts of proposed actions that they carry out, fund or authorize and ensures that the public participates in the decision making process.

38. NEPA requires federal agencies to prepare an EIS for any major federal action that may significantly affect the quality of the human environment. 42 U.S.C. § 4332.

39. During an agency’s preparation of an EIS to evaluate a proposed action—meaning before the agency has completed a final EIS and issued a record of decision, 40 C.F.R. § 1505.2; 40 C.F.R. § 1506.10—“no action concerning the proposal shall be taken which would [h]ave an adverse environmental impact,” 40 C.F.R. § 1506.1(a).

40. While an agency is in the process of preparing a programmatic EIS, an agency “shall not undertake in the interim” any action under the program “which may significantly affect” the environment unless that action is either covered by an existing program EIS or meets three specified conditions. 40 C.F.R. § 1506.1(c).

Marine Mammal Protection Act

41. Congress enacted the MMPA in order to preserve currently healthy marine mammal populations and replenish waning marine mammal populations. 16 U.S.C. § 1361(2). The “primary objective” of the MMPA is maintaining the “health and stability of the marine ecosystem,” through the retention of marine mammal populations as a “significant functioning element in the ecosystem of which they are a part. . . .” 16 U.S.C. §§ 1361(6), (2). “Whenever consistent with this primary objective, it should be the goal to obtain an optimum sustainable population keeping in mind the carrying capacity of the habitat.” 16 U.S.C. § 1361(6).

42. To those ends, the MMPA imposes a general moratorium on the taking of marine mammals. 16 U.S.C. § 1371(a). Prohibited takings include actions that injure marine mammals or disrupt behavioral patterns, such as migration, breeding or sheltering.

43. In 1981, Congress amended the MMPA, creating a limited exception to the moratorium on taking for takings that occur incidental to a specified activity. 16 U.S.C. §

1371(a)(5). The amendment authorizes NMFS or the Fish and Wildlife Service to issue authorizations, with a maximum duration of one year, that enable U.S. citizens who are engaged in a specified activity to take, by harassment, “small numbers” of marine mammals incidental to a specified activity. 16 U.S.C. § 1371(a)(5)(D). To ensure the purposes of the Act were achieved, Congress carefully circumscribed the ability of the agencies to authorize such incidental takings by harassment. The restrictions on incidental takings by harassment include the following separate limitations: (1) only “small numbers” of a population may be taken; (2) the taking may only occur “within a specific geographical region”; (3) the agency may only authorize “incidental, but not intentional” takings; (4) the taking must be incidental to a “specified activity”; and (5) prior to authorizing incidental takings by harassment and after notice and opportunity for public comment, the agency must (a) find that such harassment “will have a negligible impact” on the affected population; and (b) find that the total of such takings “will not have an unmitigable adverse impact on the availability of [the population] for taking for subsistence uses[.]” 16 U.S.C. § 1371(a)(5)(D).

44. The 1981 amendments to the MMPA provided a separate mechanism for authorizing, for a period of up to five years, incidental take by persons engaged in activities that may cause more serious harm than harassment. 16 U.S.C. § 1371(a)(5)(A)(i). In order to authorize more than harassment, including take that results in serious injury or mortality, the Services must first promulgate regulations for a specific activity in a specific geographic area. 16 U.S.C. § 1371(a)(5)(A)(i)(II).

45. NMFS has adopted general regulations to implement these provisions of the MMPA. These regulations allow NMFS to issue incidental harassment authorizations (IHA) for Arctic waters, “following a 30 day public review period, to allowed activities that may result in

only the incidental harassment of small numbers of marine mammals,” provided certain conditions are met. 50 C.F.R. § 216.107(a). However, “[a]ctivities that have the potential to result in serious injury or mortality” may be authorized only following the adoption of specific regulations that govern such take, 50 C.F.R. §§ 216.107(a), 216.105.

46. NMFS has not issued specific take regulations covering take of any species by seismic operations anywhere in the Arctic Ocean that are currently in effect.

47. NMFS regulations define “small numbers” as “a portion of a marine mammal species or stock whose taking would have a negligible impact on that species or stock.” 50 C.F.R. § 216.103.

COUNT I

National Environmental Policy Act

48. Paragraphs 1 through 47 are re-alleged and incorporated by reference.

49. NEPA requires the preparation of an environmental impact statement (EIS) for all major federal actions significantly affecting the quality of the human environment. 42 U.S.C. § 4332(C). While an agency is in the process of preparing an EIS to evaluate the impacts of a proposed action, the agency may not take any “action concerning the proposal ... which would have an adverse environmental impact[.]” 40 C.F.R. § 1506.1(a). The regulation also provides:

While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action:

1. Is justified independently of the program;
2. Is itself accompanied by an adequate environmental impact statement;
and
3. Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.

40 C.F.R. § 1506.1(c).

50. NMFS and MMS have decided to prepare a programmatic EIS to evaluate the effects of seismic surveys, including shallow hazard surveys, in the Chukchi and Beaufort Seas during the years beyond 2006. NMFS and MMS completed a draft of this programmatic EIS, which indicates that seismic surveys in the Chukchi and Beaufort Seas may significantly affect the quality of the human environment. NMFS and MMS have not published a final programmatic EIS. There is no other adequate EIS that covers all of the seismic surveys authorized by the agencies that considers all the direct and cumulative impacts of the program or all the various alternatives that could limit or mitigate the effects of the surveys.

51. MMS has issued three permits to authorize seismic surveys in the Chukchi and/or Beaufort Seas during the summer and fall of 2008. NMFS has issued an IHA under the MMPA to Shell, which authorizes Shell to conduct seismic surveys, including shallow hazard surveys, in the Chukchi and Beaufort Sea during the summer of 2008. NMFS and MMS issued each of these permits pursuant to an EA and FONSI. The activities authorized by each of these permits may have significant cumulative impacts on the environment, and on particularly marine life in the Beaufort and Chukchi Seas.

52. Defendants' issuance of each permit to authorize seismic surveys, including shallow hazard surveys, in the Beaufort and Chukchi Seas before completing the final programmatic EIS and issuing a record of decision violated NEPA, 42 U.S.C. § 4332(C)(2), the CEQ regulations, 40 C.F.R. § 1506.1, and is arbitrary, capricious, not in accordance with law, and without observance of procedures required by law under the APA, 5 U.S.C. §§ 702-706.

COUNT II (NMFS and Carlos Gutierrez only)

Marine Mammal Protection Act

53. Paragraphs 1 through 52 are re-alleged and incorporated by reference.

54. NMFS may not issue an IHA to authorize take by “activities that have the potential to result in serious injury or mortality.” 50 C.F.R. § 216.107(a).

55. NMFS may authorize the take of only “small numbers” of marine mammals by harassment when issuing an IHA. 16 U.S.C. § 1371(a)(5)(D)(i). NMFS must ensure that any take by harassment authorized by an IHA will result in no more than a “negligible impact” to the affected population of marine mammals. *Id.* These represent separate and independent restrictions on NMFS’ authority to issue an IHA.

56. NMFS’ definition of “small numbers,” 50 C.F.R. § 216.103, effectively eliminates the requirement of the MMPA that an IHA authorize the take of only “small numbers” of marine mammals. This definition is unlawful.

57. The 2007-2008 IHA issued to Shell and its contractor Western GeCo for Chukchi and Beaufort seismic operations authorized the companies to take more than 40,000 marine mammals. This is more than a small number. In issuing this IHA, NMFS failed to explain how it determined that the 2007-2008 Shell IHA authorized the companies to take by harassment only small numbers of marine mammals and relied on an unlawful definition of small numbers.

58. The seismic surveys authorized by the 2007-2008 Shell IHA have the potential to result in serious injury, including permanent hearing loss, or mortality of marine mammals, including seals and whales. The conditions included in the IHA are insufficient to eliminate the potential for seismic surveys to result in permanent hearing loss in marine mammals.

59. Defendants NMFS' and Carlos Gutierrez's decision to issue an IHA that authorizes the harassment of large numbers of marine mammals by seismic surveys that may result in serious injury or mortality of marine mammals is arbitrary, capricious and not in accordance with law and violated the MMPA, 16 U.S.C. § 1371(a)(5), NMFS' regulations, 50 C.F.R. § 216.107, and the APA, 5 U.S.C. §§ 702-706.

PRAYER FOR RELIEF

Therefore, Plaintiffs respectfully request that the Court:

1. Declare that Defendants MMS, Dirk Kempthorne, NMFS and Carlos Gutierrez have violated NEPA by issuing permits to authorize seismic surveys to proceed and to harass marine mammals before completing the final programmatic EIS and issuing a record of decision, and that the actions as set forth above are arbitrary, capricious, not in accordance with law, and without observance of the procedures required by law;

2. Declare that Defendants NMFS and Carlos Gutierrez have violated the MMPA and NMFS' regulations by issuing an IHA that authorizes the harassment of more than small numbers of marine mammals by seismic surveys that have the potential to result in serious injury or mortality to marine mammals, and that the actions as set forth above are arbitrary, capricious, and not in accordance with law;

3. Enter appropriate injunctive relief to ensure that the Defendants comply with NEPA and the MMPA and to prevent irreparable harm to the Plaintiffs and to the environment until such compliance occurs, including by requiring Defendants to rescind any permits unlawfully issued to authorize seismic surveys in the Beaufort and Chukchi Seas;

4. Award Plaintiffs the costs of this action, including reasonable attorney's fees pursuant to the Equal Access to Justice Act, 28 U.S.C. § 2412; and

5. Grant such other relief as the Court deems just and proper.

Respectfully submitted this 5th day of May, 2008.

s/ R. Clayton Jernigan

R. CLAYTON JERNIGAN (AK Bar # # 0611099)

THOMAS S. WALDO (AK Bar # 9007047)

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Earthjustice

325 Fourth Street

Juneau, AK 99801

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twaldo@earthjustice.org

ejorgensen@earthjustice.org

*Attorneys for Plaintiffs Native Village of Point Hope,
Resisting Environmental Destruction on Indigenous Lands,
a project of the Indigenous Environmental Network
(REDOIL), Alaska Wilderness League, Center for
Biological Diversity, Natural Resources Defense Council,
and Pacific Environment*