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COMMENTS BY THE CENTER FOR REGULATORY
EFFECTIVENESS ("CRE") ON DRAFT PROGRAMMATIC
ENVIRONMENTAL IMPACT STATEMENT - SEISMIC SURVEYS
IN THE BEAUFORT AND CHUKCHI SEAS ("DPEIS")(FILED
ELECTRONICALLY TO PR1.ALASKAEIS@NOAA.GOV, ON
JUNE 29, 2007)

The main purpose of the DPEIS is to determine the requirements of Incidental Take Authorizations ("ITA") for marine mammals during oil and gas seismic surveys in the Chukchi and Beaufort Seas. CRE does not oppose issuance of ITAs for seismic surveys in the Chukchi/Beaufort. We would have no basis for such opposition because these surveys are necessary for U.S. energy independence and security, and because there is no evidence that the extensive past seismic oil and gas exploration in the Chukchi and Beaufort has harmed marine mammals.

We do, however, oppose any ITAs which contain mitigation requirements that are impossible to achieve. The category of impossible mitigation requirements includes, but is not limited to, monitoring and reporting requirements for exclusion zones that are too big to monitor accurately and reliably.

We also oppose any ITAs containing conditions that endanger human life. The category of life-threatening conditions includes, but is not limited to, those that require aerial monitoring under some of the most extreme and hazardous conditions on earth.

CRE also asks what number of seismic MMPA permits NMFS expects to issue each year. We ask this question because the DPEIS says that NMFS expects to issue 12 each year in the Chukchi/Beaufort for the next five years.¹

Yet we understand that NMFS also claims the reporting requirements for seismic exclusion zone monitoring, and the other reporting requirements in these MMPA permits, are not

¹ DPEIS, pages I-5 to I-6.

subject to the OMB review and approval requirements of the Paperwork Reduction Act. We understand that NMFS takes this position on the ground that less than ten permits per year will be issued containing seismic exclusion zone monitoring and reporting requirements.

If NMFS believes that 12 MMPA permits per year will contain seismic exclusion zone monitoring and reporting requirements in the arctic alone, then NMFS needs OMB review and approval under the PRA for those Information Collections. NMFS also needs to correct its representations to OMB.

If, on the other hand, NMFS believes that less than 10 permits per year will contain seismic exclusion zone monitoring and reporting requirements in the arctic, then NMFS needs to revise its environmental impacts estimates and assessment to account for significantly less traffic.

Seismic Has Not Harmed Whales or the Inupiat

The agencies' primary concerns with seismic in the Beaufort/Chukchi appears to be bowhead whales and the impact on Inupiat hunting. These concerns are unwarranted.

Oil and gas activities have occurred in the Beaufort and Chukchi since the 1960s. The bowhead whale and North Slope Borough Inupiat populations have both increased over that time period.²

In 2002, NMFS turned down a petition to designate critical habitat for the Bering-Chukchi-Beaufort stock of bowhead whales.³ The Petitioners argued that noise from oil and gas activities was degrading the bowhead's habitat in these seas. NMFS summarized its reasons for rejecting the petition as follows:

"NMFS is not proposing designation of critical habitat for this population of bowhead whales for the following reasons: (1) the decline and reason for listing the species was overexploitation by commercial whaling, and habitat issues were not a factor in the decline; (2) there is no indication that habitat degradation is having any negative impact on the increasing population in the present; (3) the population is abundant and increasing; and (4) existing laws and practices adequately protect the species and its habitat."

67 FR 55767 (Aug. 30, 2002).

² See, e.g., Seismic Surveys in the Beaufort and Chukchi Seas, Alaska, DPEIS, MMS/NMFS at pages II-17, II-18, III-199, and III-214, available online at http://www.mms.gov/alaska/ref/EIS%20EA/draft_arctic_peis/draft_peis.htm

³ This Petition is available online at <http://209.85.165.104/search?q=cache:WTAE8JelVpcJ:www.biologicaldiversity.org/swcbd/species/bowhead/petition.pdf+chukchi+bowhead+petition+critical+habitat&hl=en&ct=clnk&cd=1&gl=us>

The National Research Council and MMS both conclude that

"there have been no known instances of injury, mortality, or population level effects on marine mammals from seismic exposure but that the potential for these types of impacts may exist without appropriate mitigation measures. The MMS-approved seismic surveys include mitigation measures designed to reduce the potential for effects to occur." ⁴

The MMS mitigation measures include a 500 meter exclusion zone. There is no evidence in the record or elsewhere that any other exclusion zone is necessary to protect marine mammals or the indigenous populations that prey on them.

NMFS Cannot Issue ITAs Containing Impossible Monitoring and Reporting Requirements

NMFS recently issued ITAs containing exclusion zones based on 120 dB re: 1 microPa.

ConocoPhillips sued NMFS on one of these ITAs, arguing that the 120 dB based requirements were arbitrary and capricious and not in accordance with applicable law. The reviewing court took the unusual step of staying the disputed provisions.⁵

We understand that no company granted an ITA with a 120 dB exclusion zone conducted seismic operations that complied with that requirement. No one could comply with that requirement because exclusion zones based on 120 dB are impossible to monitor accurately and reliably.

No exclusion zone requirement could be implemented without imposing monitoring and reporting requirements on the operating vessel.

Under the PRA, NMFS could not enforce these requirements without an ICR approved by OMB.

OMB could not approve an ICR for a 120 dB based exclusion zone because the monitoring and reporting requirements for such zones lack practical utility.

Practical utility requires that NMFS demonstrate that a proposed ICR will generate accurate and reliable information before OMB can approve it.

An ITA containing an exclusion zone - or containing monitoring requirements - based on 120-dB could not generate accurate and reliable information. Consequently, OMB could not, and never has, approved such an ITA under the PRA.

⁴ See, e.g., Outer Continental Shelf Oil & Gas Leasing Program, 2007-2012 Final Environmental Impact Statement, page V-64 (MMS April 2007), available online at http://www.mms.gov/5-year/2007-2012_FEIS.htm

⁵ ConocoPhillips Alaska, Inc. v. NMFS, Case No. 3:06 - CV - RRB (Stay Order entered Sept. 18, 2006).

An ITA requiring exclusion zones that are impossible to monitor would also violate the Marine Mammal Protection Act ("MMPA"), which only authorizes NMFS to impose feasible mitigation measures., 16 U.S.C. § 1371(a)(5)(D)(ii)(1).

NMFS Cannot Issue ITAs Containing Dangerous Monitoring and Reporting Requirements

The Alaska Oil and Gas Association's *Comment letter on 2006 PEA* explained to NMFS and MMS that aerial monitoring in the Chukchi/Beaufort is extremely unsafe

- because the survey area is remote,
- the weather conditions are unpredictable,
- the ocean temperatures are extremely cold, and
- daylight hours are limited.

These extreme and adverse conditions make accidents more likely and successful rescue less likely.

Consequently, any requirement of aerial monitoring in the Chukchi/Beaufort would be a significant and unwarranted risk to human life.

Any such requirement would also violate the Outer Continental Shelf Leasing Act ("OCSLA"), 43 U.S.C. § 1332(6), which requires that operations on the OCS "be conducted in a safe manner."

Conclusion

How many permits containing seismic exclusion zone monitoring and reporting requirements does NMFS expect to issue each year? If more than ten, then where is NMFS' ICR approval under the PRA for those information collections?

Any monitoring and reporting requirements for exclusion zones much larger than the traditional 500 meters would be impossible to meet because there is no way to accurately and reliably monitor zones larger than this. Any requirements of larger zones would violate the PRA and the MMPA and Information Quality Act.

Any monitoring and reporting requirements that require aerial monitoring in the Chukchi/Beaufort would endanger human life and violate OCSLA.

Sincerely,

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Attachments

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