

**COMMENTS OF THE ALASKA ESKIMO WHALING COMMISSION
ON THE U.S. MINERALS MANAGEMENT SERVICE'S
PROPOSED RULES REGARDING THE PROTECTION OF
MARINE MAMMALS AND THREATENED AND ENDANGERED SPECIES**

January 6, 2006

INTRODUCTION

The Beaufort Sea and, increasingly, the Chukchi Sea are subjects of intense interest for the oil and gas development industry. They are also migration habitat for endangered bowhead whales, which supply the subsistence communities of the North Slope with their food and cultural identity as Native people of the land and sea. Bowhead whales are protected by the Marine Mammal Protection Act (MMPA) and the Endangered Species Act (ESA), while oil and gas operations are subject to administrative environmental review under the National Environmental Policy Act (NEPA) and oversight by the Minerals Management Service (MMS) under the Outer Continental Shelf Policy Act (OCSLA).

MMS and operators applying for approval to explore and develop oil offshore in the Alaska OCS must comply with federal law, striking a responsible balance between oil and gas development and protection of the coastal, marine and human environments, including subsistence uses of the bowhead whale

Thus Alaskan OCS operations, at least in the territory of the bowhead whale hunting villages from St. Lawrence Island to the Canadian border, carry unique obligations accompanied by recognized practices for meeting those obligations. Currently, federal regulations do not offer operators considering work in this area a comprehensive overview of the unique statutory obligations that apply in this area of the OCS or of the programs in place to assist them in meeting those obligations. As a result, the AEWG has observed operators who are new to northern Alaska wasting substantial resources and time as they attempt to understand and to prepare plans enabling them to meet their obligations.

With this proposed rule, MMS gives itself an important opportunity to issue guidance to these operators that no doubt would be invaluable to them as they consider work in the Alaskan OCS.

COMMENTS

I. The Marine Mammal Protection Act Requires That Permitted Activities "Will Not Have an Unmitigable Adverse Impact" on the Availability of Marine Resources for Subsistence Uses.

A. The Proposed Rule, as Stated, Is Inconsistent With Federal Law Governing Alaskan Native Subsistence.

As amended in 1986, Section 101(a)(5)(A) of the Marine Mammal Protection Act (MMPA) provides that activities involving the incidental take of marine mammals "**will not have an unmitigable adverse impact on the availability [of marine mammals] for taking for**

subsistence uses.” 16 USC 1371(a)(5)(A)(I) (emphasis added). This is in addition to the pre-existing standard that such activities may have no more than “a negligible impact on such [marine mammal] species or stock.” *Id.* In 1994, Section 101(a)(5)(D) was added to the MMPA, repeating the standard for the protection of subsistence uses, an Alaskan Native activity for which Congress has specifically provided in Section 101(b) of the MMPA. 16 USC 1371(a)(5)(D)(i)(II), 1371(b).

In its proposed rule, MMS misstates the MMPA standard when it identifies the agency’s duty under the statute as requiring it to do no more than carry out agency activities and authorizations “in a manner that *is not likely to . . . have more than a negligible impact on . . . the availability of marine mammals for subsistence use.*” 70 FR 52953 (emphasis added).

The distinction is an important one, and Content for the “no unmitigable adverse impact” standard is found in federal regulations at 50 CFR 216.103:

Unmitigable adverse impact means an impact resulting from the specified activity:

(1) That is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by:

- (i) Causing the marine mammals to abandon or avoid hunting areas;
- (ii) Directly displacing subsistence users; or
- (iii) Placing physical barriers between the marine mammals and the subsistence hunters; and

(2) That cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.

This is the standard for the protection of Alaskan Native subsistence uses that MMS, in carrying out its activities and authorizations, is required to meet and that applicants for agency permits are required to meet. Therefore, it is in the best interest of the agency and its applicants that the final rule accurately reflect this standard or provide an appropriate cross-reference to current regulations.

B. The Proposed Rule Gives MMS an Opportunity To Issue Clear Guidance To Applicants Proposing Activities in the Alaskan OCS.

It is very helpful that MMS has provided separate sections at 30 CFR 250.220 and 250.251 specifically to guide applicants proposing to undertake operations in the Alaskan OCS. In their present form, however, these sections are substantially less helpful to prospective applicants than they could be.

1. Applicants must demonstrate their ability to meet the MMPA’s “no unmitigable adverse impact” standard.

Given the MMPA’s standard for the protection of subsistence uses, discussed above, applicants proposing operations in the Alaskan OCS must demonstrate their ability to mitigate successfully the potential impacts of their activities on the availability of subsistence resources. For activities proposed during the fall bowhead whale migration, well established programs assist operators in addressing the potential impacts of noise, vessel traffic, and oil spill. These programs have been developed over the course of time working with Alaskan OCS operators and the Native subsistence community.

a. *Impacts of noise and vessel traffic*

To address noise and vessel traffic, the Alaska Eskimo Whaling Commission offers applicants a "Conflict Avoidance Agreement" (CAA), setting forth mutually agreeable measures for the mitigation of potential impacts to the bowhead whale subsistence hunt. Incorporating a combination of established communications and avoidance procedures, and terms that are negotiable to meet the specific needs of a given project, the CAA is a highly effective instrument for meeting the MMPA's "no unmitigable adverse impact" standard for noise-generating activities in the Alaskan OCS.

b. *Potential impacts of an oil spill*

The North Slope subsistence community calls upon applicants planning to drill for, or to produce, oil in or near the OCS to enter into an agreement with specified representatives of that community under its "Good Neighbor Program." Recognizing the inadequacy of monetary damages to address a loss of subsistence resources, this program provides operators a means of pledging cooperation with and support for that community as it seeks alternative subsistence hunting opportunities in the event of an oil spill. Again, agreements under this program offer an effective means of mitigating the potential impacts of an oil spill.

2. MMS should use Sections 250.220 and 250.251 to inform its Alaskan OCS applicants of the information requirements relevant to the protection of subsistence activities unique to that region.

Both sections should contain the following or similar language:

"(c) Measures to mitigate potential impacts to subsistence uses of the OCS. A description of the measures in place, and copies of relevant agreements, to ensure that your activities will not have an unmitigable adverse impact on the availability of subsistence resources for taking by Alaskan Natives. For activities with the potential to affect subsistence uses of the OCS, information provided shall include, where appropriate:

- (1) measures to address the potential adverse effects of project-related noise and vessel traffic on subsistence resources and their availability to subsistence users, including:
 - (i) steps that have been taken to cooperate with the affected subsistence users in the development of these measures, plans for ongoing cooperation in their implementation, and an independently peer reviewed plan for monitoring the effectiveness of these measures; or
 - (ii) a copy of a Conflict Avoidance Agreement signed with the Alaska Eskimo Whaling Commission; and
- (2) measures to address the potential adverse effects of an oil spill on the availability of subsistence resources, including:
 - (i) steps that have been taken to cooperate with the affected subsistence users in the development of these measures and plans for ongoing cooperation in their implementation, or
 - (ii) a copy of an agreement signed under the North Slope subsistence community's Good Neighbor Policy; and
- (3) other measures required by the Regional Supervisor.
- (4) Applicants may meet the information requirements of subparagraphs (1) and (2) above by submitting a copy of a Letter of Authorization or an Incidental Harassment

Authorization issued by the National Marine Fisheries Service pursuant to section 101(a)(5)(A) or (D) of the Marine Mammal Protection Act.

II. **MMS Should Clarify its Requirements for Information from Applicants in the Sections on Environmental Impact Analysis.**

A. NEPA Does Not Permit MMS to Rely on Unverified Analyses of Environmental Impacts.

In the proposed rule, MMS uses regulatory language that appears to surrender to its applicants the independent analysis of environmental impacts required of federal agencies under NEPA. In the proposed rule, MMS calls on applicants to submit their own assessments of environmental impacts "to assist the Regional Supervisor in complying with NEPA and other federal laws such as the ESA and MMPA." Sections 250.227 (a) and ©); 250.261 (a) and (c). Under NEPA's regulations, if an agency solicits information from its applicants, it must independently verify the information and publish the names of the persons who performed the independent evaluation. 40 CFR _ 1506.5(a). If MMS intends to seek analyses, rather than mere data, from its applicants, it should indicate clearly in its regulations that the agency will independently analyze and verify the information before using it for NEPA review purposes. Therefore, MMS should use caution when using the terms "assess" and "analyze" rather than "describe" or "identify" because it risks public perception that the agency is soliciting potentially biased analyses to incorporate wholesale into its environmental reviews.

B. MMS Should Affirmatively Adopt the Definition of the Phrase "Cumulative Impacts" from NEPA Regulations.

There are at least two definitions of "cumulative impacts: in federal law. NEPA defines "cumulative impact" as an "[i]mpact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or non federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time. 50 CFR 1508.7.

The ESA defines cumulative effects as "Those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the federal action subject to consultation." 50 CFR 402.02.

In the proposed rule, MMS requires applicants to analyze cumulative impacts without offering any guidance concerning the meaning of "cumulative impacts." _250.277©)(2). MMS does not define the phrase except to require detail sufficient to assist MMS in complying with NEPA, the ESA, and the MMPA. Sections 250.227 (a) and ©); 250.261 (a) and ©).

It is unlikely that an applicant will be able to intuit the level of detail that would "assist" the agency in complying with NEPA, the ESA, and the MMPA, since NEPA and the ESA define "cumulative impact /effect" differently, and the MMPA does not define it at all.

MMS should adopt the definition from the Council on Environmental Quality for NEPA because it is the most conservative definition and would challenge applicants to take the broadest view of their projects when combined with past, present, and reasonably foreseeable future actions in the arctic OCS. MMS would then have the most comprehensive information from applicants to use in the agency's own cumulative effects analysis, whether for NEPA, the ESA, or the MMPA. This definition would provide the greatest benefit to the agency, and to the coastal marine, and human environments, including subsistence resources and activities.

CONCLUSION

MMS, as a federal agency, is required to meet the statutory standard for protecting subsistence Alaskan Native subsistence uses of marine mammals. Therefore, MMS activities and authorizations cannot have an unmitigable adverse impact on the availability of marine mammals for subsistence use. MMS must be clear in its regulations that the standard for protecting subsistence is not negligible impact, but rather, no unmitigable adverse impact.

Further, MMS should provide guidance to its Alaska OCS applicants that describe the programs currently in operation that help operators address adverse impacts of noise, vessel traffic, and oil spill, particularly Conflict Avoidance Agreements with the AEWC and Good Neighbor Program agreements with the subsistence communities of the North Slope. MMS should also inform applicants of the information requirements relevant to protecting Alaska subsistence activities, which may be met by submitting a Letter of Authorization or Incidental Harassment Authorization from the National Marine Fisheries Service.

MMS needs to clarify in its Environmental Impacts Analysis sections that it will independently evaluate all analyses submitted by applicants. Alternatively, the agency should avoid solicitation of analyses or assessments from its applicants, in favor of requiring applicants to *identify* or *describe* potential impacts that will assist MMS in its environmental review under NEPA, the ESA, and the MMPA. Finally, MMS should adopt the NEPA definition of "cumulative impacts" to give shape and substance to its requirement that applicants analyze potential cumulative impacts. The NEPA definition will encourage applicants to provide the most comprehensive information to MMS.