

# Alaska Eskimo Whaling Commission

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August 9, 2010

**Via Electronic Mail:** PR1.0648-XW05@noaa.gov  
P. Michael Payne  
Chief, Permits, Conservation, and Education Division  
Office of Protected Resources  
National Marine Fisheries Service  
1315 East-West Highway  
Silver Spring, MD 20910-3225

**Re: Take of Marine Mammals During Marine Seismic Survey in the Arctic Ocean During August to September, 2010. 75 Fed. Reg. 39,336 (July 8, 2010).**

Dear Mr. Payne,

Thank you for the opportunity to comment on the United States Geological Survey's (hereafter "USGS") application for an Incidental Harassment Authorization ("IHA") to the National Marine Fisheries Service ("NMFS") pursuant to the Marine Mammal Protection Act ("MMPA") for seismic survey activities in the sensitive Arctic Ocean. *See* 75 Fed. Reg. 39,336 (July 8, 2010). These comments are submitted on behalf of the Alaska Eskimo Whaling Commission ("AEWC"). AEWC represents the eleven bowhead whale subsistence hunting villages of Barrow, Nuiqsut, Kaktovik, Pt. Hope, Wainwright, Kivalina, Wales, Savoonga, Gambell, Little Diomedede, and Pt. Lay.

As you are aware, our communities depend upon the marine mammals at stake in this application and the environment that supports them, which is changing rapidly as a result of climate change, at the same time that it is being subjected to increasing levels of industrial and commercial activities. We rely on the migration of bowhead whales and other marine mammals through the Arctic Ocean to feed our people and to preserve our society and culture. The ramifications of improperly managed industrial and commercial activities place our continued nutritional and cultural survival at great risk. This risk comes both from the potential effects of

physical changes and impacts and from the potential for legal challenges to our bowhead whale subsistence quota should a failure of regulatory oversight raise concerns about the health of our bowhead whale stock among the broader public.

Because the AEWC is responsible for protecting our bowhead whale subsistence hunt, that is the cornerstone of our subsistence livelihood and way of life, we take very seriously the changes and impacts we are seeing in our waters and the need for vigilant federal regulatory oversight of potential impacts. We hope that NMFS and NOAA will take seriously the lessons being learned at the Department of the Interior regarding the costs of lax regulatory oversight, in the wake of the Deep Water Horizon disaster. Similarly, we hope that your agencies will take seriously the legal risk our communities face in the context of an increasingly irrational process at the International Whaling Commission.

With respect to the current application, at the outset, we would like to recognize the efforts made by the USGS to meet with representatives of the AEWC and to provide information on the proposed seismic survey work planned for this summer. We appreciate the opportunity to receive information directly from the federal agency planning the activities, and those efforts have helped to provide us with a better understanding of the proposed seismic surveys. We would look forward to further dialogue in the future should the federal government continue with similar work in the Arctic, and we wish to emphasize that, given the willingness of the USGS to work with the AEWC, **we do not object to the issuance of an IHA for these operations, despite the serious process concerns raised in these comments.**

At the same time, however, we must once again vigorously object to the **flawed and broken public process employed by the Office of Protected Resources (“OPR”) of NMFS**, in which it purports to accept and consider public comment on requests for Incidental Harassment Authorizations. This particular case provides a stark example of how OPR's process is flawed to the point of being irrelevant for the local impacted communities on the North Slope. Indeed, in this case, **the proposed seismic activities were scheduled to begin at least two days before the public comment period closed.** Moreover, vessel transit across the Chukchi, a major issue of concern for our whaling captains and a focus of the Open Water Season Conflict Avoidance Agreement (CAA), was to begin even earlier.

The AEWC participates in a Cooperative Agreement with NOAA/NMFS for the management of the bowhead whale subsistence hunt, which requires NOAA/NMFS to consult with the AEWC on any federal action potentially affecting bowhead whales. Thus, NMFS has the ability to consult directly with the AEWC and our whaling captains on these matters if time is an issue. Despite this, we are forced to write comments to NMFS expressing our concerns about impacts to our marine mammal species, the operations that are supposedly regulated by NMFS are already occurring out in the water. Rather than consult with the directly affected communities, as it has agreed to do, NMFS ignores us, allowing applicants to commence operations before reviewing our comments submitted as part of the general public process, before responding to our comments, or even before the IHA has been issued. This is no more than a simple exercise in

paper shuffling without any substantive and meaningful opportunity for input from the local community.

We also reiterate, as we have many times in the past, that **NMFS should be imposing the mitigation measures developed in the Conflict Avoidance Agreement** to ensure that regulated activities do not have an unmitigable adverse impact on subsistence activities. In this case, the USGS plans to transit the Chukchi Sea in early August, and the CAA speaks directly to this issue, with those provisions having been developed by our whaling captains and offshore operators over several seasons. Neither USGS nor NMFS discusses at any point in the IHA application or the federal register notice the potential impacts resulting from vessel transit or the protective measures developed by the AEWG, which have been approved by the local whaling captains.

Finally, we reiterate comments we have made with respect to earlier IHA applications for this open water season, namely that OPR lacks an adequate scientific and legal basis for issuing the proposed IHAs. As an example, OPR continues to operate under flawed mitigation measures that fail to provide adequate protections against Level A take, and OPR similarly fails entirely to consider the impacts of this project in the context of all other oil and gas activities planned for the Arctic Ocean. As opposed to restating those comments, we incorporate them by reference and ask that you give serious consideration to the concerns set forth in those earlier documents.<sup>1</sup>

#### **I. NMFS's Public Process is Fundamentally Broken and of Little Use for the Local Impacted Communities**

As we have stated for many years, the public process employed by NMFS is ineffective at ensuring that the agency considers adequately and incorporates the concerns of the local communities in regulating activities in the Arctic. We on the North Slope feel like we have no opportunity to influence government decision-making and therefore do not feel like NMFS's decisions reflect the interests or input of the local whaling captains, who have invaluable observations and direct experience, developed over hundreds of generations, to offer. This case presents a stark example of how and why NMFS's public process is fundamentally broken and must be wholly reformulated.

First, we note that Congress clearly recognized the importance of public participation when it required NMFS to provide an opportunity for public comment on the "proposed incidental harassment authorization." 16 U.S.C. § 1371(a)(5)(D)(iii). Congress directed that the public

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<sup>1</sup> Those comments include our July 8, 2010 submissions on the proposed IHA for Statoil (75 Fed. Reg. 32,379), our June 17, 2010 comments on Shell's proposed open-water marine survey program (75 Fed. Reg. 27,708) and our May 19, 2010 comments on Shell's Exploration Drilling Program in the Beaufort Sea (75 Fed. Reg. 20,482). We incorporate those comments by reference herein.

comments period commence “not later than 45 days after receiving an application,” that the period be left open for “30 days,” and that NMFS then issue the authorization with the required findings “[n]ot later than 45 days after the close of the public comment period.” *Id.* Clearly, Congress intended that the local impacted communities have an opportunity to provide substantive feedback to the federal government before decisions are made and **before** any harassment takes place. Indeed, without an IHA, it is illegal for USGS or any other party to harass marine mammals. 16 U.S.C. § 1371(a).

NMFS, in implementing the MMPA, has done everything in its power to gut Congress’ expressed intent to provide for meaningful public participation. The way in which NMFS sequences the IHA applications and the public notices renders the public comment process ineffective and irrelevant for NMFS’s decision-making process.

Here, for instance, NMFS requested that comments be received by **August 9, 2010**, and the agency then supposedly has 45 days within which to analyze the comments and issue a final IHA. 16 U.S.C. § 1371(a)(5)(D)(iii). In the Federal Register notice, however, NMFS clarifies that USGS’s **two ships intend to rendezvous in the survey area on August 7, 2010**. 75 Fed. Reg. at 39337. The obvious problem is that the ships have been deployed, the crews have been informed of their operational restrictions, and **seismic activities have likely commenced before NMFS receives public comment** or issues the final IHA. As a result, we cannot possibly provide any meaningful input into the operations or how they should be regulated. While we are being forced to write detailed comments on a lengthy IHA application and federal register notice, the ships are already out in the water adding noise to the marine environment and transiting the Chukchi Sea. It is absolutely insulting for the activities to commence before the public comment deadline has even been closed.

Moreover, it is readily apparent from this sequencing that **NMFS is actually allowing the USGS to operate without an IHA (or simply looking the other way) during a significant portion of the planned activities**. Based on past experiences, it has taken NMFS several weeks to review public comments and issue a final IHA. Here, USGS plans to operate during August and September, 75 Fed. Reg. at 39336, and yet the public comment period did not close until August 9. It is very likely in this situation that USGS will therefore complete a majority of its planned operations before even receiving from NMFS the actual IHA, which spells out specific mitigation requirements such as monitoring of exclusion zones and shut down and ramp up procedures. In its response to comments, we request explicit clarification from NMFS on whether and to what extent NMFS knew of or allowed USGS to conduct seismic activities before the IHA was issued. We also request explicit clarification on whether USGS or NMFS was in violation of any provisions of the MMPA as a result.

**NMFS is also in plain violation of the MMPA by failing to provide to the public a “proposed incidental harassment authorization.”** 16 U.S.C. § 1371(a)(5)(D)(iii). Instead of providing a draft of the authorization itself, NMFS publishes a federal register notice that describes the application and the basis for the agency’s proposed statutory findings. Because it is

the specific authorization itself that governs the harassing activities, it is imperative that we be allowed input into the actual draft authorization and not simply be given a description of the mitigation measures and proposed findings.

For example, the authorization itself must prescribe certain requirements such as “permissible methods for taking by harassment,” “means of effecting the least practicable impact on such species,” measures to “ensure no unmitigable adverse impact on the availability of the species or stock for taking for subsistence use,” requirements pertaining to “monitoring and reporting” and for “independent peer review” of such monitoring and reporting if the taking may affect subsistence use. 16 U.S.C. § 1371(a)(50(D)(ii). Indeed, NMFS’s regulations further provide that “[a]ny preliminary finding of ‘negligible impact’ and ‘no unmitigable adverse impact’ shall be proposed for public comment along with [] the proposed incidental harassment authorization . . .” 50 C.F.R. § 216.104(c). Without understanding exactly how the IHA incorporates these requirements through specific language, the public is foreclosed from providing input on how the activities will be regulated.

Finally, as we have stated many times in the past, **NMFS has a long track record of publishing its response to our public comments many weeks and months after the IHA has been issued and after the activities have commenced (and in many times concluded)**. This issue again convinces us that our comments are not given serious consideration by the agency before its decision has been made. If the agency cannot articulate a rationale response to public comments, it should not grant the requested authorization. Moreover, if activities are going to commence in our waters, potentially interfering with subsistence activities or the migration of our marine mammals, the government owes us a reasoned response to our concerns before allowing the activities to proceed. Again, as we sit here to write these comments, we know that the boats are already in the water, the activities will begin in a matter of days, and NMFS will not bother to respond to our concerns until well after the harmful activities have taken place. This is little more than an exercise in paper shuffling with the agency already having made up its mind or simply turning a blind eye to activities that will occur without coverage from a valid IHA.

In sum, NMFS’s public process is fundamentally broken and must be reformulated. NMFS should not allow USGS to commence operations until we have had the statutorily required opportunity to comment on the draft authorization and NMFS has published responses to those comments. Time and again, Mr. Payne, you have requested input from AEWG and other stakeholders into how NMFS can better respond to our concerns. At bare minimum, we ask that you lead NMFS through a process of reformulating its public participation to provide a meaningful opportunity for the local community. As it stands now, the agency has given every indication that it does not give serious consideration to our concerns.

## **II. NMFS Should Adopt the Mitigation Measures Set Forth in the Conflict Avoidance Agreement**

As you know, our whaling captains have worked for years with the oil and gas industry to design and implement mitigation measures to prevent conflicts between industry operations such as seismic testing and the subsistence activities of the local communities. The CAA contains protective measures that should have been applied to USGS's operations to ensure effective communication between the ships and our whaling captains and to ensure that those ships adhere to travel routes through the Chukchi that our whaling captains have designated.

We are particularly concerned because the Federal Register notice and the IHA application make clear that the USGS intends to transit the *Healy* through the Bering Strait, across the Chukchi Sea and into the survey area in the Beaufort Sea during the first week of August.<sup>2</sup> Again, it is extremely unfortunate that we are only now being given an opportunity to comment on these activities, as they are likely already occurring or have already occurred.

More importantly, however, our whaling captains, through the CAA, have established communication protocols and vessel travel corridors that will avoid conflicts between vessel traffic and subsistence activities. Section 202 of the CAA establishes a communication protocol for vessels and whaling crews to report their location and heading on a regular basis and ensures that both commercial vessels and our whaling captains are able to communicate effectively in the event of incidents. Section 302 of the CAA establishes requirements for vessel routes, which requires that those vessels remain at least five (5) miles offshore in the Chukchi Sea. Section 302 also includes speed limitations and operational restrictions when in the presence of whales.

Instead of adopting or even discussing these provisions as requirements, NMFS simply ignores altogether the potential impacts of the USGS transiting the Chukchi Sea. We ask for clarification from NMFS as to whether it views the USGS's vessel transit as an activity that potentially results in take of marine mammals or adverse impacts to subsistence activities. We are concerned that NMFS failed to consider at all the potential impacts of vessel traffic to and from the survey area. A simple and straightforward manner to address these issues would be to adopt the provision of the CAA or simply require that USGS sign the CAA as a basis for making the statutorily required findings of no unmitigable adverse impacts to subsistence activities.

## **III. NMFS Continues to Issue IHAs Without an Adequate Scientific and Legal Basis.**

As we stated above, we incorporate by reference all of our earlier comments from proposed IHAs for this open water season, in which we set forth how NMFS is issuing IHAs without adequate protections to prevent against Level A take, without adequate monitoring activities and

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<sup>2</sup> IHA Application at 4.

without adhering to the best available science. Given the fact that the activities in the water are already going to occur before NMFS ever even reads our public comments, we will not restate all those arguments again but ask that NMFS review those previous comments.

We will, however, reiterate how **this proposed project clearly demonstrates the flawed nature of NMFS's mitigation measures as they relate to exclusions zones.** As plain logic and the best available science tell us, exclusion zones are only as effective as the people who monitor those areas for marine mammals. Here, NMFS has stated that the "Protected Species Observer" ("PSO") will not be on duty during nighttime operations and yet seismic operations will be allowed to continue 24 hours per day. 75 Fed. Reg. at 39,359. USGS survey crews will encounter as much as 8.5 hours of darkness per day during the survey operations. *Id.* During those times, NMFS states that bridge personnel will keep watch for marine mammals "insofar as practical." *Id.* This requirement is meaningless, as anyone who has spent time on the water will tell you that no bridge personnel can identify marine mammals at night in Arctic conditions.

It is absolutely unacceptable for NMFS to simply look the other way while vessels shoot seismic in the Arctic without any monitoring at all to prevent against Level A take. Given the fact that the proposed operations will emit sounds well in excess of 190 dB, and the fact that USGS will be operating without any observers for much of the time, we fail to see how NMFS could possibly rule out the potential for Level A take. This determination simply has no basis in science or law.

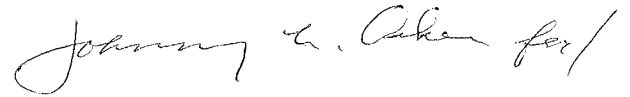
This is just one glaring example of how OPR has failed to regulate adequately activities in the Arctic. In a functional governmental system, NMFS would publish a draft authorization and take public comment on that document well in advance so that our whaling captains could provide meaningful input. In the alternative and in the event of a timing issue, NMFS would consult directly with the AEWG under the NMFS/NOAA-AEWG Cooperative Agreement. Here, however, because the ships have already been deployed, it would be impossible for NMFS to consult with us or review our comments and, for instance, require USGS to implement more rigorous monitoring protocols. That is now impossible or impractical because the ships have already left port. This is but one example of NMFS disregard of its regulatory responsibilities and its utter lack of concern for the local impacts it is charged with preventing.

## CONCLUSION

We appreciate the opportunity to provide comment, however the system employed by OPR and NMFS is fundamentally broken. We strenuously object to a public comment process that fails to provide an opportunity for meaningful input before the activities are scheduled to occur. We also reiterate our well-founded concerns that OPR lacks an adequate scientific and legal basis for its decisions. These issues have plagued OPR's program for years, and despite many lessons learned in the offshore context over the past several years, nothing at OPR has changed for the better. We would welcome the opportunity to work with you, Mr. Payne, to improve upon this important regulatory program in the coming months if NMFS and OPR are willing to make

substantive changes to ensure adequate public participation and adequate protection for our local communities and the marine mammals upon which we depend. As it stands now, however, this process is little more than an exercise in paper shuffling to rubber stamp operations already underway.

Sincerely,

A handwritten signature in cursive script, appearing to read "Johnny L. Baker for".

Harry Brower  
Chairman

cc: AEWG Commissioners  
Mayor Edward Itta  
Dr. Jane Lubchenco  
Eric C. Schwaab