



Alaska Eskimo Whaling Commission

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July 27, 2006

David Gann
Alaska Department of Natural Resources
Office of Program Management and Permitting
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david_gann@dnr.state.ak.us

Re: Comments on DNR's analysis and preliminary recommendations for the North Slope Borough Coastal Management Plan Amendment

Dear Mr. Gann:

The Alaska Eskimo Whaling Commission appreciates the opportunity to submit the enclosed comments on DNR's analysis and preliminary recommendations for the North Slope Borough Coastal Management Plan Amendment.

In addition to these comments, the AEWC supports the comments submitted to you by the North Slope Borough.

If you have any questions, please do not hesitate to call me.

Sincerely,

Maggie Ahmaogak
Executive Director

cc: AEWC Commissioners
Harry Brower, Chairman
Mayor Edward S. Itta, North Slope Borough
Michael Menge, Commissioner, Department of Natural Resources
Randy Bates, Acting Director, Department of Natural Resources, OPMP / ACMP

**COMMENTS OF THE ALASKA ESKIMO WHALING COMMISSION
TO THE ALASKA OFFICE OF PROGRAM MANAGEMENT AND PERMITTING
ON THE ALASKA DEPARTMENT OF NATURAL RESOURCES'
PRELIMINARY RECOMMENDATIONS FOR THE
AMENDED NORTH SLOPE BOROUGH COASTAL MANAGEMENT PLAN**

July 27, 2006

INTRODUCTION & SUMMARY

The Alaska Eskimo Whaling Commission (AEWC), represents the ten bowhead whale subsistence hunting villages of Barrow, Nuiqsut, Kaktovik, Pt. Hope, Wainwright, Kivalina, Wales, Savoonga, Gambell, and Little Diomedé. Our bowhead whale hunt feeds our communities and is the keystone of our Inupiat identity. We are highly concerned that the Alaska Department of Natural Resources (DNR) and the North Slope Borough (NSB or "the Borough") develop strong regulatory tools to ensure protection of the bowhead whale and its habitat, and therefore, our subsistence bowhead whale hunt.

The ACMP and NSB CMP are an integral part of the regulatory regime upon which the AEWC relies to fulfill its mandate to protect the bowhead whale and the bowhead subsistence hunt. Before they were revised, the ACMP and NSB CMP provided the legal basis for the Borough's Planning Department to review and permit activities in the Borough's coastal zone, with the shared authority of the Alaska Coastal Policy Council. The NSB could incorporate Inupiat traditional knowledge of environmental conditions into its consistency reviews that would otherwise not play a role in regulation of coastal activities. The NSB also was able to require applicants to consult with the AEWC on matters that could adversely affect the subsistence bowhead whale hunt. The ACMP and the NSB CMP thus have played an important, positive role in bringing operators and subsistence communities together to avoid potential conflicts.

However, as DNR reviews the NSB CMP, our chief concern is that consistency reviews no longer will account for the potential that vessel traffic and other industrial uses of the coastal zone and federal OCS will cause offshore deflection of the bowhead migration route. When the whales are pushed offshore, our whaling boats must travel farther, endangering the lives of the hunters, and raising the likelihood of meat spoilage as they tow the whale back home. Therefore, it is imperative that the ACMP and NSB CMP function together to regulate noise-producing industrial activities so that they avoid our subsistence hunt and the subsistence hunts of other marine mammals.

The State is bound by the Marine Mammal Protection Act to ensure that industrial activities cause no unmitigable adverse impacts on the availability of marine mammal resources for subsistence use. To meet this standard, DNR must allow the NSB to designate subsistence use areas for marine mammals and permit the NSB to include other meaningful protections, such as timing restrictions on industrial activities, in its

enforceable policies. DNR is obligated, and through the ACMP has the opportunity, to regulate use of the Alaska coastal zone by granting the NSB the regulatory power to protect marine mammal subsistence hunting.

COMMENTS

I. The State is Obligated to Authorize the North Slope Borough to Manage Offshore Industrial Activity During the Federally Protected Bowhead Whale Migration and Subsistence Hunts.

The State's and the NSB's enforceable policies must reflect the fact that Congress has sanctioned Alaskan Eskimo bowhead whale and other marine mammal subsistence hunting through the both the Whaling Convention Act of 1949¹ and the Marine Mammal Protection Act of 1973² (MMPA). In the MMPA Congress also articulated its standard of protection for subsistence resources and hunting in the presence of industrial activity. This standard prohibits activities that are likely to have an "unmitigable adverse impact" on the availability of marine mammals for subsistence use.

Because the standard arises in federal law, it is clear that Congressional intent is to preserve the opportunity of hunters to harvest marine mammals, in spite of industrial operations planned in the same area and at the same time as the hunt. Therefore, the state of Alaska is bound to protect marine mammals subsistence hunting not only by the MMPA, but by the federal Coastal Zone Management Act, which provides the federal foundation for state coastal management programs.³

To implement the federal standard and protect subsistence hunting of marine mammals, the ACMP must be flexible enough to enable the North Slope Borough, through district enforceable policies, to manage industrial operations so that they do not interfere with the bowhead whale migration and our subsistence hunt. Simply put, DNR should use the Borough to implement the federal "no unmitigable adverse impact" standard. This regulatory approach is essential to the effective regulation of noise producing oil and gas development activities, and it is supported by federal law.

II. DNR Must Allow the Borough to Designate Areas of Subsistence Use and Important Habitat and to Incorporate Timing Parameters on Industrial Activity Adversely Affecting Marine Mammals.

DNR must support the Borough's use of both geographic and temporal restrictions as enforceable policies in the NSB CMP because these are the most effective ways to prevent adverse impacts from activities that are not otherwise covered

¹ 16 U.S.C. §§ 916-9161.

² 16 U.S.C. §§ 1371(b).

³ 16 U.S.C. §§ 1451-1465.

under federal or state law. Gaps in protective coverage from federal and state law include noise disturbance from vessels that are not associated with an offshore oil and gas facility, scientific research vessels and vessels supporting onshore oil and gas development, e.g., within NPR-A.

Designation of subsistence use areas and the power to restrict the timing of industrial activities are crucial regulatory tools the Borough because areas of marine mammal subsistence use vary over time, expanding and contracting with changing weather, ice conditions, and other influences in the marine and coastal environment. Traditional knowledge is not only vital to the effective regulation of coastal uses that affect subsistence; it also has played an important role in ensuring the safety and integrity of energy facilities sited in the coastal zone.

In one example, an operator planned to drill from an ice island and to store oil in drums on the island if they found oil. Federal and state agencies were prepared to approve the project, but in consistency review the Borough and the AEWG were able to demonstrate, through Inupiat traditional knowledge, that this project design was seriously flawed: the ice island would be unable to withstand the ice forces in the area where it was to be located. The project did not go forward because the state found it unsound. Later, when a different operator applied to drill at the same site using a safe, bottom-founded drilling structure, we raised no consistency issues because we knew that this structure would be able to withstand the pressures of the sheer ice zone. This is the sort of traditional knowledge of geography and timing of operations that can save lives and natural resources where gaps in federal and state law do not reveal potential problems.

- A. Specific Areas Requiring Designation for Subsistence Use Include the Spring Lead System and the Alaska Coastal Current.

Spring Lead System

DNR must ensure the protection of the spring lead system by allowing the Borough to designate it as a subsistence use area and prohibiting onshore activities from overwhelming the lead system with noise-producing vessel traffic. The spring lead system is a critical migratory habitat and subsistence hunting area for Barrow and the AEWG's western villages. Bowhead whales migrate northward in the spring from the Bering Sea, following breaks in the ice (leads) through the Chukchi and Beaufort Seas. The villages of Wales, Wainwright, Pt. Hope, Kivalina, and Barrow hunt in these leads during the spring migration.

Our main concerns are noise and the risk of oil spill in the lead system that could affect the bowhead migration. It is also noteworthy that MMS consistently has deferred the spring lead system from development because it is so important for spring hunting and as bowhead habitat. We continually encourage MMS to defer permanently the lead system, most recently in light of that agency's development of the new 2007-2012 OCS

Oil and Gas Leasing Program. The State and the Borough's adoption of a Coastal Management Program that protects this critical subsistence area conforms with state subsistence and habitat standards to avoid or minimize adverse effects of projects in the coastal zone on coastal resources, such as bowhead whales migrating through the Chukchi Sea and Beaufort Sea spring lead systems. Because these restrictions "flow from" state standards and because the state standard (avoid or minimize) is quite general, it should be permissible for the Borough to adopt enforceable policies that specify restrictions in this area, giving definition and greater force to the state standard. 11 AAC 112.270.

Alaska Coastal Current

DNR must allow the Borough to designate the Alaska Coastal Current as a subsistence use area and important habitat for marine mammals, including the bowhead whale. Furthermore, DNR should consider any project with potential adverse effects on the Alaska Coastal Current⁴ a trigger for consistency review under 11 AAC 110.010 and 11 AAC 110.015, as these effects would constitute direct effects to the marine mammal coastal resources of our western coastal whaling communities. DNR also should consider placing oil and gas development projects with potential to affect the Alaska Coastal Current on the C List, which is identified and discussed later in these comments.

Elder whaling captains in Pt. Hope have specified in recent public meetings⁵ that there should be no industrial operations in or near the Alaska Coastal Current because it carries the prey of many marine mammals to the Chukchi villages, and brings with it the marine mammals themselves. These are valuable subsistence resources whose food supply could be adversely affected by noise and pollution from oil and gas development near the Alaska Coastal Current.

B. DNR Must Allow the Borough to Specify in its CMP Periods of Subsistence Hunting That Require Special Protection.

DNR must allow the Borough to restrict not only the locations of industrial operations, but their timing. For instance, the most critical time of year to restrict operations is during the weeks of the bowhead whale migration and subsistence hunt. Our hunters generally take their bowhead whale quota within a few weeks per village. Thus the time required for seasonal restrictions is short, and leaves plenty of time for industrial operators to complete their work, especially in light of the fact that the open water season is longer each year, due to the receding ice pack. Variable ice and weather conditions cause the timing of the weeks of hunts to vary annually, so an

⁴ The "Alaska Coastal Current" consists of the Bering/ Chukchi Sea ecosystem carrier current stemming from Little Diomed (Bering Sea into the Chukchi Sea), as bounded by the Chukchi Sea near-shore polynya, up the coastline to Pt. Hope, Wainwright and into the Beaufort Sea.

⁵ The meetings were with MMS and the National Marine Fisheries Service on the permitting of seismic data acquisition in the Chukchi Sea.

annual consultation is absolutely necessary to assign accurate timing parameters to operations to avoid the bowhead migration and subsistence hunts.

III. DNR Should Identify Federal Geological & Geophysical Permitting in the State “C List” of Authorizations Requiring State Consistency Reviews.

Under the amended ACMP, the consistency review process applies to an activity that is subject to a state resource agency or federal agency permit, lease, authorization, approval or certification that is located within the State’s coastal area (including the OCS), and to federal agency activities that would affect any land, or water uses or natural resources of the state’s coastal zone. 11 AAC 110.750. The “ABC List” identifies those state resource agencies that authorize projects or activities that are subject to the ACMP. The A List denotes “categorically consistent approvals”; the B List denotes “general concurrence determinations”; and the C List enumerates activities requiring “individual project consistency review”.

The C List contains an inclusive list of state resource agency authorizations for activities that may have a reasonably foreseeable direct or indirect effect on coastal uses or resources. If an activity in the coastal zone requires a state resource agency authorization on the C List, the activity is subject to an individual consistency review under 11 AAC 110, unless the activity is excluded under the provisions of AS 46.40.096 or 11 AAC 110.700.

Currently, there is no direct mention of federal offshore seismic permitting on the ABC List. We believe DNR should add MMS permits for seismic exploration to the C List. Doing so would conform completely to Alaska state law, which provides that DNR shall establish consistency review procedures for activities on the federal outer continental shelf that would affect any land or water use or natural resource of the state’s coastal zone. AS 46.40.096(k)(1). By definition, federal geophysical permitting occurs on the federal OCS and, by virtue of its placement of sound pulses in the water, it affects bowhead whales, a natural resource of Alaska’s coastal zone. Therefore, it stands to reason that federal G&G permitting belongs on the C List of the ACMP and that seismic activities should undergo individual consistency review.

CONCLUSION

Under the federal Coastal Zone Management Act, Alaska’s coastal management program must preserve, protect, develop, and where possible, restore or enhance the resources of the nation’s coastal zone. CZMA Sec. 303. This includes bowhead whales and marine mammals, as well as our Inupiat people who depend on those resources for subsistence. The State must also ensure protection of the bowhead whale and other marine mammal subsistence resources at a level of “no unmitigable adverse impact,” in accordance with Congress’ stated intent under the MMPA.

Therefore, the State must allow the NSB to adopt enforceable policies that specify meaningful protections for subsistence use areas and timing parameters for industrial activities in the coastal zone and federal OCS. Only in this manner can DNR avoid or minimize adverse impacts of coastal and offshore development on subsistence resources. Finally, DNR must include geophysical permitting on its C List of activities requiring individual consistency review.

The AEWG looks forward to working with DNR on matters related to our subsistence hunt, bowhead whale habitat, and consistency evaluations under the revised ACMP.