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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ALASKA WILDERNESS LEAGUE, *et al.*, *Plaintiffs,* v. SALLY JEWELL, *et al.*, *Defendants,* and ALASKA OIL AND GAS ASSOCIATION, *Intervenor-Defendant.*	Case No. 3:15-cv-00067-SLG **PLAINTIFFS' REPLY IN SUPPORT OF RULE 62(c) MOTION FOR INJUNCTION PENDING APPEAL**

For the reasons set forth in their motion, Doc. 63, and herein, Plaintiffs respectfully request that the Court expeditiously grant an injunction pending appeal. Defendants' oppositions highlight the urgency of the relief Plaintiffs request. "Many of Shell's vessels, including the drilling units, have already begun transiting through the Bering Strait and into the Chukchi Sea, and are expected to be on the Burger Prospect by the third week of July [i.e., this week], at which time Shell expects to begin exploration drilling activities." Doc. 74 at 2; *see also* Doc. 72-2 at 3 (stating "the company . . . presently has ships in the project area and en route to the area"). The irreparable harm that Plaintiffs seek to avoid could commence imminently.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

This Court's denial of Plaintiffs' merits arguments on summary judgment does not, as Defendants imply, preclude the Court from finding a likelihood of success on the merits necessary for an injunction pending appeal. Such a "rigid application of the success-on-the-merits requirement" would "make little sense," because it "would mean that injunctions under Rule 62(c) would issue only if the district court concluded that it was probably incorrect in its evaluation of the merits." *Andrews v. Countrywide Bank, NA*, No. C15-0428JLR, 2015 WL 1599662, at *2 (W.D. Wash. Apr. 9, 2015). Instead, the success-on-the-merits requirement may be met when the court has ruled on an "admittedly difficult legal question," or made a "novel interpretation of the law." *Id.*; *see also Am. Trucking Ass'ns, Inc. v. City of Los Angeles*, No. CV 08-4920 CAS CTX, 2010 WL 4313973, at *2 (C.D. Cal. Oct. 25, 2010) (likelihood of success on the merits shown when the Court did "not doubt the correctness" of its ruling but recognized the "case present[ed] substantial and novel legal questions"). Plaintiffs respectfully incorporate their summary judgment briefing, Docs. 47 & 56, to demonstrate that they have raised issues regarding the legality of the incidental take regulation that pose serious legal questions and

involve novel interpretations of both the Marine Mammal Protection Act (MMPA) and National Environmental Policy Act (NEPA) regarding agency authority to defer critical findings to later agency-created, non-public processes.

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM ABSENT AN INJUNCTION PENDING APPEAL

A. The Extra-Record Declaration of Dr. Timothy Ragen is Admissible Evidence of Irreparable Harm

Plaintiffs have proffered evidence that they will suffer irreparable harm if Shell's drilling is allowed to proceed under the incidental take regulation. *See* Doc. 63-2. Plaintiffs do not merely allege or speculate about harm, Doc. 72 at 8-9; Doc. 73 at 15, they demonstrate it with an expert declaration from the former Director of the federal Marine Mammal Commission and Arctic pinniped specialist, Dr. Timothy Ragen.

Federal Defendants are mistaken that Plaintiffs' reliance on the declaration of Dr. Ragen, Doc. 63-2, is improper. A court may of course consider extra-record evidence when assessing a likelihood of harm and balancing the equities to define injunctive relief. *See, e.g., Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 422 F.3d 782, 797 (9th Cir. 2005) (affirming district court's determination of the scope of appropriate injunctive relief based upon extra-record expert declarations); *Idaho Watersheds Project v. Hahn*, 307 F.3d 815, 833-34 (9th Cir. 2002) (reviewing extra-record declaration filed to inform weighing of equities in evaluation of injunction request); *Ctr. for Biological Diversity v. Wagner*, No. 08-302-CL, 2009 WL 2176049, at *6–7 (D. Or. June 29, 2009) ("Extra-record evidence may also be considered in relation to a request for injunctive relief."); *see also Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1259-1261 (10th Cir. 2003) (allowing evidence from expert witnesses on the issue of irreparable harm in a record review case). Federal Defendants cite no decision to the contrary

and instead appear to base their objection on the fact that the underlying challenge here is to an agency decision, the merits of which are decided on an administrative record. Doc. 72 at 9-10, 11. While review of the *merits* of the challenge is generally confined to the administrative record, Plaintiffs have not offered the Ragen declaration for review of the merits. To show their likelihood of success on the merits, Plaintiffs instead explicitly rely only on the existing summary judgment briefing, *see* Doc. 63 at 4-5, which is based entirely on the administrative record. Plaintiffs cite Dr. Ragen's declaration to demonstrate the likelihood, absent an injunction, of injury to the walrus population and, thereby, to the Plaintiffs' interests. *Id*. at 8-10. Federal Defendants themselves implicitly recognize that extra-record evidence is appropriately introduced on the question of harm, since they rely on such evidence as well. *See* Docs. 72-1 & 72-2.

B. Neither the Incidental Take Regulation nor the Letter of Authorization Resolve the Likelihood of Irreparable Harm From Shell's Planned 2015 Drilling Activities.

Other than the meritless extra-record argument, Defendants rely on conclusions stated in the incidental take regulation and the fact of the issuance of a letter of authorization (LOA) to try to rebut the evidence of harm to walrus provided by the Plaintiffs, including in the Ragen declaration. Doc. 72 at 10-11; Doc. 73 at 17, 19-20. Defendants point to the impact findings in the incidental take regulation, Doc. 72 at 11; Doc. 73 at 17, 19-20, but of course the agency specifically found that oil and gas activities in the Hanna Shoal region, like those Shell is proposing here, *could* have non-negligible—i.e., population-level—effects, and its findings do not, on that record, resolve the question of harm to walruses in the Hanna Shoal area. *See* Doc.

47 at 21-22 (quoting incidental take regulation); Doc. 56 at 8.[1] Nor does the incidental take regulation address the evidence of harm from Shell's specific operations in and around the Burger Prospect described in Dr. Ragen's declaration. The LOA adds nothing to the Federal Defendants' argument, Doc. 72 at 10 n.7, because the LOA does not purport to make any findings at all. *See* Doc. 63-1. Further in discussing the LOA, the Federal Defendants' own declarant makes clear the LOA decision is only derivative of the incidental take regulation analysis: "[t]he best available information regarding the likely effect of Shell's planned operations, including implementation of the required mitigation measures, is found in the analysis supporting the 2013 Incidental Take Regulation." Doc. 72-1 at 3. But as described above and in Plaintiffs' prior pleadings, the agency's analysis supporting the incidental take regulation explicitly deferred conclusions about the impacts of and imposition of mitigation measures for exploration activities in the Hanna Shoal region.

Defendants' assertion that the harm to the walrus population described by Dr. Ragen is not irreparable, Doc. 72 at 11; Doc. 73 at 17-20, largely ignores that testimony. Dr. Ragen relies on Shell's own data from 2012 to show that large numbers of walruses will lose access to foraging habitat as a result of Shell's operations, with effects on recruitment and survival, and that the population, already in decline, will decline further and "will require years to recover from disturbance in 2015." Doc. 63-2 at 10-14, ¶¶ 14-17. Such harm is "of long duration, i.e., irreparable," *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987); *see also Oregon*

[1] The incidental take regulation's analysis of impacts is not due deference by this Court when assessing the equities for an injunction. *See Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1185-86 (9th Cir. 2011) (noting "[e]cology is not a field within the unique expertise of the federal government" and holding district court abused its discretion by deferring to agency views concerning the equitable prerequisites for an injunction); *Audubon Soc'y of Portland v. Jewell*, No. 1:14-CV-0675-CL, 2015 WL 1788722, at *2-3 (D. Or. Apr. 15, 2015).

State Pub. Interest Research Group v. Pac. Coast Seafoods Co., 374 F. Supp. 2d 902, 907 (D. Or. 2005) (finding harm requiring three years to recover is irreparable). *Cf. United States v. Holmes*, 646 F.3d 659, 661 (9th Cir. 2011) (noting land is "destroyed if its aesthetic, environmental, recreational, economic or cultural uses have been eliminated for a significant period of time, generally meaning more than a year").[2]

C. Absent an Injunction, Plaintiffs' Members Will Suffer Likely Irreparable Harm to Their Individual Interests in Pacific Walruses.

Defendants' arguments that Plaintiffs have not demonstrated an injury that is sufficiently "individualized" to "them," Doc. 72 at 11-12; Doc. 73 at 20-21, ignore the detailed descriptions of harm contained in Plaintiffs' member declarations. It is undisputed that Plaintiffs' members make regular trips to experience, guide business clients to view, consult others on, study, write scholarship on the topic of, fight to protect, hunt for subsistence, recreate alongside, observe, and enjoy the Pacific walruses in the Chukchi Sea and along its coastline. Dr. Ragen's expert declaration establishes likely harm—at the population level—to Pacific walruses, Doc.63-2. Harm to the Pacific walrus population in this region is direct, personal injury to these members' interests.

Members of Plaintiff organizations describe in detail their interests in walruses. Earl Kingik is a tribal member of the Native Village of Point Hope IRA, and he hunts Pacific walruses off the Point Hope shore. Doc. 47-31 at 2, ¶¶ 1-2, 5. Mr. Kingik explains that if oil and gas activity in the Chukchi Sea is permitted to "chase these animals from their feeding grounds"

[2] Federal Defendants are wrong that Dr. Ragen misapprehended the significance of the Fish and Wildlife Service's determination that walruses warrant listing under the Endangered Species Act. Doc. 72 at 10 n.6. Dr. Ragen's declaration describes the basis of the warranted decision—a loss of access to habitat due to dramatic sea-ice decline—not the legal consequences of the decision. Doc. 63-2 at 4-7, ¶¶ 5-8; 13-14, ¶ 17.

and cause "changes in the health of these animal populations," Mr. Kingik "will not be able to engage in subsistence hunting." *Id.* at 6, ¶ 20; *see also* Doc. 47-30 at 6-7, ¶ 15 (Robert Thompson, a Native Alaska Inupiaq, would suffer if he were unable to continue to carve ivory, eat walrus, and share other walrus-related traditions.). Michael Wald is the co-owner and managing partner of Arctic Wild LLC, an Alaska-based business specializing in adventure and nature tours in Arctic Alaska. Doc. 47-33 at 1, ¶ 3. A population-level impact to walruses, caused by displacement from their most productive feeding areas, would adversely affect his livelihood by reducing the number of walruses to be observed. *Id.* at 5, ¶ 13 (explaining that clients will not sign up for expeditions if he is unable to assure them that they will see large numbers of walruses). Richard G. Steiner has taught, consulted, produced public television shows, and authored publications about the impacts of oil and gas activities and climate change on Arctic wildlife for decades. Doc. 47-32 at 2-3, ¶¶ 3-6. In the course of his work, Mr. Steiner has specifically observed walruses in the Chukchi Sea feeding offshore over Hanna Shoal and has plans to return there specifically to view walruses. *Id.* at 5-6, ¶¶ 12, 14. Dan Ritzman is a professional wilderness guide, and he also has plans to travel to the Chukchi coast specifically to observe Pacific walrus. Doc. 47-29 at 7-9, ¶¶ 18, 28. These examples illustrate that a population-level decline in Pacific walruses from activities this summer would cause irreparable harm to Plaintiffs' members. *Cf. Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1150 (9th Cir. 2000).

III. THE BALANCE OF EQUITIES TIPS SHARPLY IN FAVOR OF PLAINTIFFS AND THE PUBLIC INTEREST FAVORS AN INJUNCTION

As Plaintiffs demonstrated in their opening brief, the balance of the equities and public interest both strongly favor an injunction pending appeal. *See* Doc. 63 at 9-11.

Defendants' arguments that the public interest disfavors an injunction because exploration permitted under the incidental take regulation would be undertaken pursuant to the Outer Continental Shelf Lands Act (OCSLA), *see* Doc. 72 at 12-13; Doc. 73 at 24-25, disregard that OCSLA's policy of "expeditious and orderly development" is specifically "subject to environmental safeguards," 43 U.S.C. § 1332(3), like the MMPA and NEPA, *see* Doc. 63 at 10-11. OCSLA's general policy of development, subject to environmental safeguards, does not therefore trump the environmental mandates of the MMPA and NEPA. *See Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008) ("[T]he public interest in preserving nature and avoiding irreparable environmental injury outweighs economic concerns in cases where plaintiffs were likely to succeed on the merits of their underlying claim."), *overruled on other grounds by Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7 (2008).

Intervenor Defendant's reliance on economic harm to Shell from an injunction pending appeal also fails to tip the scales against an injunction because Shell's alleged harm is self-inflicted. Plaintiffs filed this suit in November 2014 shortly after learning about Shell's plans for operations beginning July 2015, *see* Doc. 1 at 24-25, ¶ 65, and Intervenor Defendants moved to intervene on behalf of its members, including Shell, shortly thereafter, *see* Doc. 10. Shell's declarant states that the company made "significant financial commitments" during the pendency of this case and "before knowing for sure" whether it would be issued the necessary permits, including the LOA. *See* Doc. 74 at 4, ¶ 10. Shell's commitment of resources before "knowing for sure" whether it would be issued a LOA, cannot now be used as a shield to protect the LOA that was issued under an illegal incidental take regulation. Just as Shell assumed the risk that its application for a LOA might be denied, Shell also assumed the risk that any LOA issued might be set aside if the incidental take regulation was determined to be illegal. "Such self-imposed

costs are not properly the subject of inquiry on a motion for stay." *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 977 (D.C. Cir. 1985) (decisions to hire contractors in anticipation of a license that might or might not be granted was a self-imposed risk); *see also Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1093 (9th Cir. 2013) ("[W]hen parties anticipate[ ] a pro forma result in permitting applications, they become largely responsible for their own harm.") (internal quotation marks omitted); *Davis v. Mineta*, 302 F.3d 1104, 1116 (10th Cir. 2002) (refusing to consider harms to defendants who "have 'jumped the gun' on the environmental issues by entering into contractual obligations that anticipated a pro forma result").

IV. PLAINTIFFS' RULE 62(c) MOTION IS PROPERLY BEFORE THIS COURT AND SEEKS APPROPRIATE RELIEF

Federal Rule of Civil Procedure 62(c) is "a recognition of the long established right of the trial court, after an appeal, to make orders appropriate to preserve the status quo while the case is pending in the appellate court." *United States v. El-O-Pathic Pharmacy*, 192 F.2d 62, 79 (9th Cir. 1951). To that end, Rule 62(c) provides that "[w]hile an appeal is pending from . . . final judgment that . . . denies an injunction, the [district] court may . . . grant an injunction." Plaintiffs' motion fits squarely within Rule 62(c).

Contrary to Intervenor Defendant's arguments, Doc. 73 at 9, the Court's summary judgment decision did deny Plaintiffs' request for injunctive relief. Plaintiffs both sought injunctive relief in their complaint, Doc. 1 at 29, and explicitly argued for vacatur of the incidental take regulation in their motion for summary judgment, Doc. 47 at 40-41; Doc. 56 at 23-26. The Court's summary judgment order denied both forms of equitable relief referenced in the complaint, and Plaintiffs have noted their appeal from this Court's grant of summary

judgment.[3] *See* Doc. 60. Given the Court's prompt adjudication of the summary judgment motion and that the LOA under the rule was not issued until days before that decision, there was no need for Plaintiffs separately to file a motion for injunctive relief. A Rule 62(c) injunction is therefore the appropriate vehicle for Plaintiffs to protect their rights on appeal. *See El-O-Pathic Pharmacy*, 192 F.2d at 65, 79 (trial court had authority to grant an injunction pending appeal where plaintiff sought permanent injunctive relief in its complaint).[4]

Intervenor Defendant's other attacks on the propriety of Plaintiffs' motion, Doc. 73 at 10-11, similarly fail. Plaintiffs' motion does not go beyond the scope of this Court's summary judgment order merely because it includes relief as to the LOA. Plaintiffs seek to stay the effect of the illegally issued incidental take regulation; if that regulation is stayed, any LOA that authorizes take based on that regulation must necessarily be stayed as well. An injunction pending appeal therefore would not alter "the core questions before the appellate panel" or otherwise "alter the status of the case on appeal," *see Natural Res. Def. Council v. Sw. Marine Inc.*, 242 F.3d 1163, 1167 (9th Cir. 2001), because the question on appeal will remain the same: whether the challenged incidental take regulation violates the MMPA and NEPA.

Further, Plaintiffs' requested injunction pending appeal seeks to *maintain* the status quo from the time when their appeal was filed—July 7—before Shell had begun operations in the Burger Prospect pursuant to the LOA issued only days earlier. *See El-O-Pathic Pharmacy*, 192 F.2d at 79; *see also McClatchy Newspapers v. Cent. Valley Typographical Union No. 46, Int'l*

[3] Intervenor Defendant's argument that the notice of appeal divested this Court of jurisdiction also assumes the notice of appeal has taken effect. Plaintiffs note that "[a] notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry." Fed. R. App. P. 4(a)(2).

[4] As *El-O-Pathic Pharmacy* demonstrates, Rule 62(c) motions are procedurally proper even if the movant did not file a separate motion for injunctive relief before the district court entered final judgment.

Typographical Union, 686 F.2d 731, 735 (9th Cir. 1982) (measuring status quo from time "when the appeal was filed").[5]

CONCLUSION

For the reasons stated in their opening brief and above, the Court should enter an order staying the effectiveness of the incidental take regulation and LOA pending appeal. Alternatively, should the Court determine that an injunction for the full period of the appeal is not warranted, Plaintiffs request that the Court enter such an order until August 7, 2015,[6] allowing the Ninth Circuit time to decide a motion for injunction pending appeal.

Respectfully submitted this 22nd day of July, 2015.

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[5] Intervenor Defendant's reliance on *McClatchy* is misplaced. Far from preserving the status quo, the district court in *McClatchy* entered an order while appeal was pending that committed appellant to take affirmative actions that would extend beyond the time on appeal. 686 F.2d at 735. Plaintiffs here merely seek to stay the effect of a regulation during an expedited appeal to prevent irreparable harm that will otherwise occur during that appeal.

[6] Plaintiffs amend the date of their original request in light of the passage of time and the briefing schedule adopted by this Court, Doc. 70.

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