

Deirdre McDonnell (Alaska Bar # 0111082)  
Center for Biological Diversity  
PO Box 11374  
Portland, OR 97211-0374  
(971) 717-6404  
FAX: (503) 283-5528  
dmcdonnell@biologicaldiversity.org

Rebecca Noblin (Alaska Bar # 0611080)  
Center for Biological Diversity  
PO Box 100599  
Anchorage, AK 95510-0599  
(907) 274-1110  
FAX: (907) 258-6177  
rnoblin@biologicaldiversity.org

*Attorneys for Plaintiff*

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA**

CENTER FOR BIOLOGICAL DIVERSITY	)	Case No.
	)	
Plaintiff,	)	
	)	
v.	)	COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
	)	
UNITED STATES ARMY CORPS OF ENGINEERS, THOMAS P. BOSTICK, Commander and Chief of Engineers, U.S. Army Corps of Engineers, and CHRISTOPHER D. LESTOCHI, Colonel, District Commander, U.S. Army Corps of Engineers, Alaska District,	)	(Clean Water Act, 33 U.S.C. § 1344; Endangered Species Act, 16 U.S.C. § 1536; National Environmental Policy Act, 42 U.S.C. § 4332; Administrative Procedure Act, 5 U.S.C. § 706)
	)	
Defendants.	)	
	)	

---

## I. INTRODUCTION

1. In this action, Plaintiff Center for Biological Diversity challenges a decision by the United States Army Corps of Engineers (Corps) to permit ConocoPhillips Alaska Inc. (ConocoPhillips) to fill approximately 60 acres of nationally significant wetlands on the North Slope of Alaska to construct an oil drill site pad, an access road with four bridge crossings, two valve pads with access roads, and new pipeline support structures at Colville Delta 5 (CD-5). The main bridge proposed will be 1,400 feet long and span the Nigliq Channel—one of the main channels of America’s largest Arctic river, the Colville. After initially finding that ConocoPhillips’ proposed plan was not the least environmentally damaging practicable alternative, the Corps reversed course and decided to permit ConocoPhillips to proceed with its proposed road and bridge. This decision green lights the first oil development within the National Petroleum Reserve-Alaska (Reserve) and would connect the Reserve with existing oil infrastructure outside its boundaries. Despite the magnitude of this decision, the Corps failed to conduct a site-specific analysis as required by the National Environmental Policy Act (NEPA), instead relying on a nearly nine-year-old analysis conducted before ConocoPhillips made its current proposal. The Corps also failed to consult with the National Marine Fisheries Service (Marine Fisheries Service) to ensure that the project will not jeopardize seals and whales listed under the Endangered Species Act (ESA). This Complaint seeks declaratory and injunctive relief against the Corps for violating the Clean Water Act, 33 U.S.C. § 1344; NEPA, 42 U.S.C. § 4332(C); ESA, 16 U.S.C. § 1536(a)(2); and the Administrative Procedure Act (APA), 5 U.S.C. § 706.

## II. JURISDICTION AND VENUE

2. This Court has jurisdiction pursuant to 28 U.S.C. § 1331, 28 U.S.C. §§ 2201-02 and 5 U.S.C. § 706.

3. Venue is appropriate in this judicial district pursuant to 28 U.S.C. § 1391(b)(2) because a substantial part of the events or omissions giving rise to these claims occurred in the Corps' Alaska District Office and because the challenged project is located in Alaska.

4. The Corps issued the permit for the proposed development on December 19, 2011. Plaintiff's Clean Water Act Section 404 claim and its ESA claim challenging the failure to consult on the impacts to endangered bowhead whales accrued on this date. Plaintiff's ESA claim challenging failure to consult on the project's impacts to listed ice seals accrued when the ice seal listings became effective on February 26, 2013. Plaintiff's supplemental NEPA claim accrued each time the Corps became aware of new information and circumstances relevant to environmental impacts and failed to initiate a supplemental NEPA process. All of these claims are timely filed under 28 U.S.C. § 2401(a).

5. The ESA includes a citizen suit provision that authorizes citizens to enforce compliance with its substantive and procedural obligations. 16 U.S.C. § 1540(g). Pursuant to this provision Plaintiff submitted a notice of intent to sue on February 28, 2013, more than 60 days prior to filing the complaint. 16 U.S.C. § 1540(g)(2).

## III. PARTIES AND STANDING

### **Plaintiff**

6. The CENTER FOR BIOLOGICAL DIVERSITY is a 501(c)(3) non-profit corporation incorporated in the State of California with a field office in Alaska. The Center

works through science and environmental law to advocate for the protection of endangered, threatened, and rare species and their habitats throughout the United States and abroad. The Center has over 39,000 active members and 474,000 online activists. Center members reside throughout the United States, including Alaska, as well as in other countries.

7. The Center has been actively involved in protecting Alaska's wildlife since the early 1990s, including various efforts to protect wildlife found in the Reserve and its adjoining marine environment.

8. Specifically with regard to the Reserve, the Center has been actively involved in efforts to protect the unique wildlife resources of this area since at least 1998. For example, in March 1999, the Center brought a legal challenge against the U.S. Fish and Wildlife Service (Fish and Wildlife Service) forcing the agency to propose critical habitat for the federally threatened spectacled and Steller's eiders under the ESA. Both of these species can be found in the Colville Delta.

9. On March 30, 2004, the Center petitioned the Fish and Wildlife Service to list the yellow-billed loon under the ESA. Almost 80% of U.S. nesting yellow-billed loons are thought to occur in the Reserve, and the Colville Delta is an important part of its habitat.

10. The Center has also worked for the protection of the black brant, a significant proportion of which breeds in the Reserve. The Center has worked to protect this species along its migratory routes, opposing potentially disruptive projects such as liquefied natural gas facilities and port expansions in its wintering areas in Humboldt Bay in California and along the Baja California coast.

11. In addition to concern over and advocacy on behalf of the birds that nest in the Reserve, the Center has also been very involved in attempting to further protect the federally

endangered bowhead whale. Bowheads migrate through the waters offshore of the Reserve and are often found during summer months in nearshore waters east of Point Barrow. Development in the Reserve poses risks to the bowhead from oil spills on land that would reach the marine environment or via marine vessels transporting materials or equipment to onshore operations. Further, increased vessel traffic from the Reserve may impact bowheads in the area. In February 2000, the Center filed a petition to designate critical habitat for the Bering-Chukchi-Beaufort Sea stock of the bowhead whale under the ESA.

12. The Center has been heavily involved in working to protect polar bears from Arctic oil development and climate change for more than a decade. The Center has filed and litigated numerous lawsuits seeking to block oil development that would harm the polar bear, starting with a 2001 lawsuit to force the release of information about the impacts on polar bears of oil development in the Arctic National Wildlife Refuge and continuing through ongoing lawsuits challenging Shell's plans for offshore oil development in polar bear habitat. In 2005, the Center petitioned the Fish and Wildlife Service to list the polar bear as threatened under the ESA. The Center has filed and joined numerous legal actions surrounding polar bear ESA listing, including listing decision and critical habitat lawsuits. Most recently, on May 15, 2013, the Center launched litigation challenging the Obama administration's failure to consider "endangered" status for the polar bear or develop a recovery plan for this gravely imperiled species.

13. The Center has also been heavily involved in working to protect Arctic ice-dependent seals from oil and gas development and climate change. The Center has filed and joined numerous lawsuits fighting offshore oil development that threatens ice seals including ringed and bearded seals. The Center initially filed a petition to list the ribbon seal under the

ESA and then followed up in 2008 with a petition to list ringed and bearded seals. The Center has supported these petitions with litigation to ensure the federal government meets its listing decision deadlines. As a result of the Center's efforts, the Marine Fisheries Service has agreed to reconsider a negative listing decision for the ribbon seal. And at the end of 2012, after the Center sued the Marine Fisheries Service for delaying its final decision, the agency finalized threatened status for bearded and ringed seals.

14. The Center has challenged Reserve planning decisions that make various areas available for oil and gas leasing. *See Nat'l Audubon Soc'y v. Kempthorne*, (D. Alaska, 05-cv-00008-JKS); *N. Alaska Env'tl Ctr v. Kempthorne*, 457 F.3d 969 (9<sup>th</sup> Cir. 2006); *Wilderness Soc'y v. Salazar*, 603 F. Supp. 2d 52 (D.D.C. 2009).

15. On June 12, 2009, the Center submitted comments on the proposal arguing that the horizontal directional drilling alternative was less damaging to the environment. The Center's comments also called on the Corps to conduct a supplemental NEPA process before issuing a permit because the current proposal differed substantially from that considered in the 2004 environmental impact analysis upon which the Corps relied.

16. On April 21, 2011, after the Corps' initial decision on the permit was appealed and remanded, the Center commented on the remand. An additional letter was submitted on June 8, 2011, on behalf of the Center objecting to new information being considered as part of the appeal process.

17. The Center submitted a letter to the Corps on February 28, 2013, providing notice of its intent to sue under the ESA. This letter also noted that the recent Bureau of Land Management (BLM) planning process for the Reserve had identified changed circumstances and new information bearing on the environmental impacts of oil development in the Reserve and

requested the Corps consider this information in a supplemental Environmental Impact Statement (EIS).

18. The Center has members who visit or otherwise use and enjoy the Colville area for recreation, wildlife viewing, education, research, photography, or aesthetic and spiritual enjoyment. The oil development proposed for the area will directly and irreparably injure these interests. These members have traveled to the Reserve for professional and recreational purposes. Members have traveled in the vicinity of ConocoPhillips' proposed development and have visited areas that will be affected by the proposed development. Center members have observed migratory birds, caribou and marine mammals in and around the Reserve and plan to do so in the future. These members also appreciate the variety of plant life in the Reserve in the summer and enjoy the solitude that can be experienced there.

19. Center members have observed red-throated and yellow-billed loons and brant within the Reserve and have enjoyed viewing these species in their winter habitats. The Center's members plan to continue viewing these species and plan to return to the Reserve to do so. These birds would be impacted by ConocoPhillips' proposed project, which would take place in their habitat. The Center's members who enjoy viewing these birds within the Reserve and in their winter habitats would be harmed as well because they would be less likely to be able to view these species in their natural habitats.

20. Center members have also observed polar bears, bowhead whales and ringed and bearded seals in their Beaufort Sea habitat and plan to return to the area to observe these species in the future. The proposed project poses a serious risk to these species, especially in the case of a catastrophic oil spill. If these species' numbers are further reduced by destructive oil development, the Center's members who enjoy viewing them will be harmed.

21. The interests of the Center's members are injured by the proposed project and the Corps' failure to conduct a thorough environmental analysis for the project under NEPA and the ESA, and its failure to choose the least damaging alternative for the Clean Water Act permit. Without such compliance with environmental laws, the Corps has failed to ensure that its decision to issue the permit and conditions on its permit prevent harms to endangered species and other wildlife and mitigate harms to their habitat. Accordingly, the members' use and enjoyment of the Colville Delta and the Reserve are impaired by the Corps' action. Relief in this case would better ensure that the wildlife and habitat values are preserved and would redress the harms to the Center and its members.

22. In addition, the Center and its members rely upon NEPA and ESA processes to assist the Center in monitoring conditions and actions proposed in areas it cares about that will affect species it advocates for. The lack of a supplemental NEPA process and the absence of a Marine Fisheries Service Biological Opinion for the CD-5 development make it more difficult for the Center to assess the project and harm the Center's and its members' procedural and informational interests. The Center and its members are unable to avail themselves of the public process and comment opportunities provided by NEPA.

23. Because the Colville Delta is important breeding and/or staging habitat for numerous migratory bird species, any impacts to these species or their habitats in the Delta also threatens to impact the interests of the Center and its members in these species elsewhere in their range. For example, Center members in California participate in bird watching for the black brant when the species winters in Humboldt Bay and Baja California. Declines in the brant caused by oil and gas development or a catastrophic spill would harm the interests of these members even if they themselves never visit the brant's breeding and molting areas in Alaska.



Similarly, declines of shorebirds caused by loss of their breeding habitat would harm the interests of Center members and other birdwatchers who live along or visit the migratory pathways of these species.

### **Defendants**

24. Defendant U.S. ARMY CORPS OF ENGINEERS is the federal agency charged with administering permits under section 404 of the Clean Water Act for the discharge of dredged or fill material into waters of the United States. 33 U.S.C. § 1344(a), (d); 33 C.F.R. § 323.6(a). The Corps is headquartered in Washington, D.C., and has a District Office in Alaska, where a significant portion of the actions and omissions alleged in this Complaint occurred.

25. Defendant LIEUTENANT GENERAL THOMAS P. BOSTICK is the Chief of Engineers and Commander of the U.S. Army Corps of Engineers. He is charged with the supervision and management of all Corps decisions and actions, including the issuance of Corps permits under section 404 of the Clean Water Act. He is sued in his official capacity.

26. Defendant COLONEL CHRISTOPHER D. LESTOCHI is the District Engineer for the Alaska District office of the U.S. Army Corps of Engineers headquartered in Anchorage, Alaska. The Alaska District office is responsible for issuing permits for discharges of dredged and fill material into waters of the United States in Alaska under section 404 of the Clean Water Act. He is sued in his official capacity.

## **IV. BACKGROUND**

27. The Corps' decision challenged in this case approved a drill pad with a footprint of 11.74 acres, which would support up to 33 oil wells. The project would include a 6-mile-long gravel road with a width of 30 to 34 feet and a minimum height of 5 feet. The access road would cross a 1,405-foot bridge to be constructed over the Colville River's Nigliq Channel, which will

also support a pipeline to transport oil to processing facilities outside the Reserve. In addition to this main bridge, three bridges are proposed—a 277-foot bridge across the Nigligvik Channel, a 317-foot bridge across Lake 9341, and a 250-foot bridge across Lake 9323.

28. The proposed development marks the first time production wells will be developed in the Reserve. The Reserve covers 23.5 million acres of public land on Alaska's North Slope, making it the largest roadless area and single unit of public land in the nation. The Reserve stretches from the Colville River delta in the east to the Chukchi Sea in the west and from the Arctic Ocean in the north to the Brooks Range in the south. The Reserve provides highly valuable habitat for many species of fish and wildlife, including Alaska's largest caribou herd, large carnivores, marine mammals, millions of migratory birds, and one of the densest populations of nesting birds of prey in the world. The Reserve is home to many animals listed under the ESA.

### **The Colville River Delta**

29. ConocoPhillips' proposed development will take place in the Colville River Delta. The Colville River is America's largest Arctic River, and its delta is the most productive in Northern Alaska. The Western most part of the delta is within the Reserve.

30. The Colville River Delta is more than 25 miles long and covers approximately 250 square miles. Most of the water reaching the delta is carried to the ocean through two main channels: the East Channel and the Nigliq Channel.

31. The Nigliq Channel is approximately 1,000 feet wide and 10 to 30 feet deep. The proportion of the Colville's flow it carries can vary widely, especially during breakup when ice jams occur.

32. The proposed drilling site is also adjacent to a buffer area established by BLM's 1998 Northeast Reserve Integrated Activity Plan around Fish Creek. Fish Creek is one of the most significant coastal streams in the area and, like the Colville River, supports a great diversity of freshwater fish.

33. The Colville Delta is internationally recognized for its biological diversity and richness and provides habitat for significant fish and wildlife resources.

34. The Colville Delta provides much of the best fish habitat in the Reserve, supporting 20 species of fish. The deep channels and lakes of the Colville Delta provide approximately 70% of the overwintering fish habitat on the North Slope.

35. The delta provides breeding habitat for a density and diversity of waterbirds that is exceptional on the North Slope. Birds nesting in the area include tundra swans, brant, greater white-fronted geese, spectacled eiders and yellow-billed loons.

36. Black brant prefer the Colville Delta's habitats for nesting. Researchers have observed a high density of brant nesting in the vicinity of ConocoPhillips' proposed drilling pad. This nesting site is used year after year. A high density of nesting greater white-fronted geese has also been observed in the vicinity.

37. More than 30 species of ducks nest on the Arctic Coastal Plain. In the CD-5 area there are high concentrations of nesting king eiders.

38. Hundreds of thousands of shorebirds migrate from four continents to the habitat provided by the Colville Delta. The salt marshes and tidal flats of the outer Colville Delta are the most extensive found along the Beaufort coast. Black-bellied plover, American golden plover, bar-tailed godwit, semipalmated sandpiper, pectoral sandpiper, long-billed dowitcher, red-necked

phalarope, and red phalarope can all be found nesting in the vicinity of ConocoPhillips' proposed development.

39. The Colville Delta also provides important staging habitat for as many as 300,000 shorebirds on any given day in the late summer.

40. The Colville River itself has been recognized for its value as arctic peregrine falcon habitat. The bluffs around the Colville provide nesting habitat for a quarter of Alaska's arctic peregrine falcon population.

41. Among the bird species found in the Colville Delta are three special status species—the threatened spectacled eider and Steller's eider and the candidate species yellow-billed loon.

42. The area between Teshekpuk Lake and the Colville River Delta is breeding habitat for more than 10% of spectacled eiders on the North Slope. Annual aerial surveys conducted by the Fish and Wildlife Service indicate that up to 5.4 % of North Slope breeding spectacled eiders make use of areas in or adjacent to the Alpine Satellite Development.

43. The area also is within the migratory habitat of both the Teshekpuk Lake caribou herd and the Central Arctic caribou herd.

44. The Colville Delta and the adjacent Beaufort Sea provide habitat for ESA-listed marine mammals, including ringed and bearded seals, bowhead whales and polar bears.

45. Spotted seals regularly haul out in the main (east) channel of the Colville River, and some also are seen in the Nigliq Channel and in the Fish Creek Delta.

46. The EIS the Corps relied upon acknowledges that “ringed seals, bearded seals, and polar bears remain in the vicinity of the Plan Area during the winter months and might be present during construction of the project.” Alpine Satellite EIS at 1170.

## Listed Species in the Reserve

47. The Colville River Delta and adjacent Beaufort Sea are home to several threatened and endangered species of marine mammals and seabirds. These include polar bears (*Ursus maritimus*), spectacled eiders (*Somateria fischeri*), Alaska-breeding Steller's eiders (*Polysticta stelleri*), and the candidate species yellow-billed loons (*Gavia adamsii*) (listing proposal due in 2014 pursuant to settlement between the Center and the Fish and Wildlife Service) and Kittlitz's murrelets (*Brachyramphus brevirostris*) (listing proposal due in 2013 pursuant to settlement between the Center and the Fish and Wildlife Service), which are managed by the Fish and Wildlife Service, and the bowhead whale (*Balaena mysticetus*), fin whale (*Balaenoptera physalus*), and humpback whale (*Megaptera novaeangliae*), which are managed by the Marine Fisheries Service. In December 2012, the Marine Fisheries Service published a final rule listing the Ladoga, Arctic, Okhotsk, and Baltic subspecies of ringed seal (*Phoca hispida ladogensis*, *Phoca hispida hispida*, *Phoca hispida ochotensis*, and *Phoca hispida botnica*, respectively). 77 Fed. Reg. 76706 (Dec. 28, 2012). On the same day, the Marine Fisheries Service listed the Beringia and Okhotsk distinct population segments of the bearded seal (*Erignathus barbatus nauticus*). 77 Fed. Reg. 76740 (Dec. 28, 2012). These listings were effective February 26, 2013.

## ConocoPhillips Development in the Colville Delta

48. The first commercial discovery of oil in the Colville Delta was the Alpine field located on State of Alaska lands east of the Reserve. Atlantic Richfield Company (ARCO) and its partners discovered the field in the winter of 1994–1995. The Alpine infrastructure built by ARCO, a predecessor of ConocoPhillips, is composed of two drilling pads: CD-1 and CD-2. CD-1 contains Alpine's processing facility as well as production wells. CD-2 is a production pad. A

road and pipeline link the two pads. Both CD-1 and CD-2 are accessed by air, with a landing strip that was constructed as a wider portion of the road connecting the two pads. They are also accessed in the winter by ice road. In November 2000, Phillips Alaska, Inc., (successor to ARCO Alaska, Inc., and predecessor to ConocoPhillips) began production at Alpine, which is the westernmost producing oilfield on Alaska's North Slope.

49. When the Corps permitted the Alpine development, it included a permit condition requiring further satellite developments to be roadless.

50. Alpine was touted as a new roadless model for North Slope oil development that would minimize the environmental impact of such development. On its website, ConocoPhillips describes the Alpine development as an example of its "environmentally-sensitive and technologically advanced approaches to oil extraction."

<http://alaska.conocophillips.com/EN/about/operations/Pages/index.aspx> (visited June 3, 2013).

51. The existing Alpine field includes a pipeline crossing of the Colville's main channel. This crossing is underground, where approximately 4,300 feet of the oil pipeline was installed using horizontal directional drilling. Entry and exit locations for the underground portion of the pipeline are set back approximately 300 feet from the Colville River's banks.

52. ConocoPhillips has extensive oil lease holdings both within and outside of the Reserve.

53. In November 2000, ConocoPhillips began the process to permit two satellite oil and gas accumulations near Alpine: CD-3 and CD-4. On May 21, 2001, ConocoPhillips announced several discoveries of oil and gas accumulations on its leases in the Reserve. Subsequently, the Corps, which had initiated evaluation of ConocoPhillips' permit applications

for CD-3 and CD-4, and BLM determined to cooperate to evaluate the proposed development in the Colville River Delta—both outside and within the Reserve.

### **NEPA Process**

54. In 2004, before ConocoPhillips had applied for a 404 permit from the Corps, lead federal agency BLM, along with four cooperating agencies—the Corps, U.S. Environmental Protection Agency (EPA), U.S. Coast Guard, and the State of Alaska—conducted an EIS process for the Alpine Satellite Development Plan (Alpine EIS).

55. The 2004 Alpine EIS was intended to review five oil development pads proposed by ConocoPhillips—CD-3 through CD-7 and to analyze development options for pads, pipelines, and other facilities at a higher-than-project-specific level.

56. The proposal at issue here is known as CD-5. It is one of the units included in the Alpine EIS, and although it is located on Native-owned land, it is within the Reserve. The proposal reviewed for CD-5 would include a gravel drill site pad, a pipeline, access road, and bridge crossing the Nigliq Channel of the Colville River, the largest river on Alaska's North Slope.

57. In a Draft EIS published in January of 2004, the agencies considered ConocoPhillips' proposal, three alternatives that also would fulfill the purpose and need of the proposed action and a No Action Alternative.

58. The Final EIS considered the five alternatives considered in the DEIS and added a sixth "preferred alternative."

59. The preferred alternative modified ConocoPhillips' proposal to require that the bridge over the Nigliq Channel span the active flow-way and frequently active floodplain that occupies the area between topographic rises, making the bridge approximately 1,650 feet long.

60. The FEIS was tiered to the then-current 1998 Integrated Activity Plan/EIS for the Northeast portion of the Reserve.

61. On November 8, 2004, BLM finalized a decision adopting the preferred alternative with minor changes and approving issuance of rights of way and permits to drill to ConocoPhillips.

62. In December 2004, the Corps issued a decision and permit for the construction of the CD-3 and CD-4 satellite drilling pads, access road to CD-4 and an airstrip at CD-3. The Corps' decision did not authorize CD-5, its road and the bridge crossing the Nigliq Channel.

63. BLM has conducted three more planning and NEPA processes for the area since the 2004 Alpine EIS was completed. The Corps, however, has not conducted any further site-specific NEPA analysis of the CD-5 proposal.

#### **Clean Water Act Section 404 Process**

64. In September 2005, ConocoPhillips first submitted an application to the Corps for a section 404 permit for construction of the CD-5 pad and road access to the pad.

65. On November 23, 2005, EPA sent a letter to the Corps responding to the proposal.

66. The EPA stated that ConocoPhillips had not demonstrated that the proposed project was the least environmentally damaging practicable alternative and failed to provide sufficient information to support a determination that the roadless design was infeasible or that ConocoPhillips' proposed road was environmentally preferable.

67. EPA's letter also informed the Corps that the project had changed significantly since the publication of the 2004 Alpine EIS and suggested that the Corps conduct a supplemental comprehensive alternatives analysis.



68. Due to its importance for subsistence use and its unique aquatic habitat, the EPA determined that the Colville Delta is an aquatic resource of national importance. EPA made this aquatic resource of national importance opinion pursuant to the August 11, 1992, Memorandum of Agreement between the EPA and the Corps regarding section 404(q) of the Clean Water Act.

69. EPA found that the proposed project might result in substantial and unacceptable impacts to aquatic resources of national importance and could affect habitat for endangered waterfowl and other fish, birds, and wildlife.

70. The Fish and Wildlife Service sent a letter to the Corps on November 23, 2005, analyzing ConocoPhillips' proposal.

71. The Fish and Wildlife Service determined that the Delta is an aquatic resource of national importance because of the diversity and abundance of fish and wildlife and their habitats. The Fish and Wildlife Service informed the Corps that ConocoPhillips' proposal would cause significant indirect and cumulative impacts to fish and wildlife resources in the Delta. The Fish and Wildlife Service recommended that CD-5 be developed without a road connection and noted that a roadless design would be feasible and less damaging to the environment than ConocoPhillips' proposal.

72. In February 2008, after a protracted process that included opposition from local land managers, ConocoPhillips requested that the Corps suspend the permit application.

73. In May 2008, the Corps closed the application file.

74. In May 2009, ConocoPhillips submitted a new section 404 permit application to the Corps for the CD-5 drill pad and access road to the pad. The application included changes in the location of the drill pad, the road alignment, and the bridge crossing over the Nigliq Channel. The pipeline would be suspended on the bridge and would run from CD-5 to CD-1 above ground

and generally parallel to the road. The bridge crossing over the Nigliq Channel was moved approximately three miles south of the location proposed in the 2005 permit application, just north of the CD-4 pad location.

75. On June 9, 2009, EPA submitted comments to the Corps on the new proposal. EPA stated that the proposal increased the adverse impacts to waters of the U.S. compared to its 2005 application. EPA stated that ConocoPhillips failed to demonstrate how the proposed road and bridge project was the least environmentally damaging practicable alternative.

76. EPA determined that the proposed project might result in substantial and unacceptable impacts to the Colville Delta, which EPA has determined to be an aquatic resource of national importance. EPA found that the direct, indirect, and cumulative impacts from the discharge of fill material may cause or contribute to the significant degradation of waters of the U.S., which support fish overwintering, feeding, and spawning areas; migratory bird nesting and feeding habitat; and wildlife and protected and endangered species habitat. EPA expressed particular concern over adverse impacts to regional surface hydrology within the Nigliq Channel and the Delta, caused by the bridge and road, especially during flood events.

77. EPA also reiterated that it believed a supplemental NEPA process was needed, stating “EPA believes that not only has the CD-5 proposed satellite drill site significantly changed since the initial NEPA analysis but substantial changes have also occurred including the applicant’s future development plans and other reasonably foreseeable oil and gas developments such as, Kuukpik Corporation’s proposed Nuiqsut road and lay down pad, State of Alaska plans for road and Colville River bridge access to the NPR-A, and recent capacities in Ultra Extended Reach Drilling (UERD) that render the 2004 NEPA analysis even less complete for the applicant’s current proposal. In addition since the 2004 EIS, there is increased National concern

for the effects of developments in the Arctic and the need to develop resources in an environmentally protective manner. EPA strongly recommends the USACE carefully consider preparing a Supplemental EIS to analyze this current, specific proposal in light of the significant changes made by the applicant and the need to analyze these proposed increased disturbances with an eye toward avoiding unnecessary and duplicate infrastructure within and surrounding the [Colville River Delta].”

78. EPA recommended that the Corps deny the permit. In a July 10, 2009, letter, the Fish and Wildlife Service also recommended that the Corps deny the permit application.

79. The Fish and Wildlife Service expressed concern that the conversion of the Alpine complex into an operations and logistics center, made possible by the road and bridge over the Nigliq Channel, would lead to greater industrial activity on the Delta requiring more facilities and fill, which would result in the further loss of habitat in the Delta.

80. The Fish and Wildlife Service notified the Corps that the proposed project might result in substantial and unacceptable impacts to the Delta, which the Fish and Wildlife Service identified as an aquatic resource of national importance. The Fish and Wildlife Service stated that an alternative that avoids the creation of additional infrastructure in the Delta would be the least environmentally damaging practicable alternative for the development of oil reserves at CD-5.

81. The Fish and Wildlife Service included an alternatives analysis with the July 10, 2009, letter. Based on the analysis, the Fish and Wildlife Service concluded that an alternative utilizing an underground horizontal directionally-drilled pipeline and no road to connect the main Alpine facility (CD-1) and CD-5 would conserve high-value wetland habitat and would

“eliminate redundant road infrastructure and greatly reduce construction and activity-related impacts” on the Delta.

82. In February 2010, the Corps published a final decision denying the permit application based on its finding that the proposed project was not the least environmentally damaging practicable alternative. The Corps concluded that there were reasonable and practicable alternatives that would accomplish the purposes of the proposed action and would be less environmentally damaging.

83. The Corps found that horizontal directional drilling was a practicable alternative that would have less harm to the environment.

84. ConocoPhillips appealed this permit denial alleging multiple errors in the decision.

85. In a decision that remanded the matter to the District Engineer, the Corps found that some of ConocoPhillips allegations should be addressed further.

86. The appeal officer remanded on some of the issues ConocoPhillips raised with the determination that horizontal directionally-drilled alternative under the Nigliq was the least environmentally damaging practicable alternative. The remand was based on ConocoPhillips’ arguments that directional drilling was not environmentally preferable and practicable.

87. While the reviewing officer remanded the decision, he found that none of ConocoPhillips’ arguments were sufficient to find the permit denial arbitrary and capricious, but some of the issues would benefit from further consideration and explanation by the District Engineer.

88. On December 19, 2011, the Corps issued a second decision in which it found that ConocoPhillips' preferred alternative was the least environmentally damaging and approved the project as proposed.

89. The Corps did not prepare an Environmental Assessment or EIS for ConocoPhillips' 2009 proposal, but instead relied on the 2004 Alpine Satellite EIS.

### **Endangered Species Act Process**

90. The Corps is aware that the project may affect threatened seals and whales.

91. In its decision, the Corps relied upon the 2004 Alpine EIS in evaluating the potential impacts on currently listed marine species, as well as bearded and ringed seals. The 2004 Alpine EIS lists a myriad of ways in which listed marine mammals may be impacted by the project. While most of these impacts would occur as a result of potential oil spills, “[r]inged seals, bearded seals, and polar bears remain in the vicinity of the Plan Area during the winter months and might be present during construction of the project.” Alpine EIS at 1170. In addition, “[s]ome disturbance and displacement of ringed seals and bearded seals during the operation period could occur from aircraft noise.” *Id.* at 1171. Increased access by local residents as a result of bridge and road construction “could increase harvest of marine mammals, including seals in the rivers and nearshore Beaufort Sea.” *Id.* at 1177.

92. For oil spills measuring up to 100,000 gallons, the Corps states that these spills could have limited impacts on some of the marine mammals. According to the Corps “[s]ome seals could be exposed to oil if a spill were to reach the marine environment of Harrison Bay or the areas they occupy in the Colville River Delta, lower Nigliq Channel, Kogru River, and the adjacent nearshore Beaufort Sea during the open water season. Such an event could result in the oiling of those seals directly exposed. It is possible, though unlikely, that a small number of these

exposed seals could die, but the population would be likely to replace this loss within one year.” A large spill would not be likely to affect many bearded seals, walruses, beluga or gray whales because these species tend to occur offshore of Harrison Bay. *Id.* at 400.

93. For very large volume spills (spills greater than 100,000 gallons), the potential impacts to the environment, and listed marine mammals, increase. “Because the volume of oil in a [very large volume spill] is large, more of the oil is likely to reach the estuarine and marine environments of Harrison Bay and nearshore Beaufort Sea than in smaller spills, even if the spill were to occur well upstream on a major river or creek.” *Id.* at 409. “Unlike the impact assessment for small to large spills, a [very large volume spill] of oil could reach the marine environments of Harrison Bay . . . in concentrations and volumes great enough to contact the nearshore marine fish and benthic community.” *Id.* at 410. In addition, “[m]arine mammals in the Colville River Delta, lower Nigliq Channel, Harrison Bay, and possibly the nearshore Beaufort Sea have a greater probability of exposure to oil in [very large volume spills] than in small to large ones for the same reasons birds do.” *Id.*

94. The Service issued a Biological Opinion for the proposed Alpine Satellite Development Project on September 28, 2004 (Alpine BiOp), concluding that the proposed project, including plans for the future development of CD-5, would not jeopardize the continued existence of spectacled eiders and that the proposed action was not likely to adversely affect Steller’s eiders.

95. On May 15, 2008, the Fish and Wildlife Service listed the polar bear (*Ursus maritimus*) as a threatened species. 73 Fed. Reg. 28212.

96. Pursuant to Section 7 of the ESA, the Corps reinitiated consultation with the Service regarding the issuance of the Section 404 permit, and the Service issued its Biological

Opinion in December 2011. The Service reanalyzed the validity of the 2004 Alpine BiOp with respect to Steller's eiders and spectacled eiders and assessed the potential impacts to polar bears and their critical habitat because they were not included in previous consultations. The Service concluded that "the proposed activities may adversely affect spectacled eiders (*Somateria fischeri*), polar bears (*Ursus maritimus*), and polar bear critical habitat, but are not likely to jeopardize the continued existence of either species and are not likely to destroy or adversely modify designated critical habitat for polar bears." Biological Opinion Cover Letter, available at <http://alaska.fws.gov/fisheries/endangered/pdf/ConocoPhillips%20Alpine%20CD-5%202011.pdf>. The Fish and Wildlife Service also concluded that the proposed action was also not likely to adversely affect Steller's eiders (*Polysticta stelleri*). *Id.* In the cover letter transmitting the BiOp to the Corps, the Fish and Wildlife Service stated that the "conclusions, incidental take statement, and terms and conditions of the 2004 [BiOp] remain valid," and incorporated the 2004 Alpine BiOp as an appendix. *Id.*

97. While the Corps consulted with the Fish and Wildlife Service on the potential effects on listed terrestrial species, the Corps did not consult with the Marine Fisheries Service regarding the potential impacts of the 404 permit on listed marine species, such as the bowhead whale (*Balaena mysticetus*). Bowhead whales inhabit the Beaufort Sea and could potentially be impacted by an oil spill into the Nigliq Channel.

98. The Corps also did not initiate consultation with the Marine Fisheries Service when the final rules listing the bearded and ringed seals were published in December 2012. These rules became effective on February 26, 2013.

99. In response to Plaintiff's February 28, 2013, letter, the Corps has stated that it will reinitiate consultation with the Marine Fisheries Service on the impacts of the project to bowhead whales and bearded and ringed seals.

100. The Corps has not indicated that it will suspend the permit pending the completion of the consultation process.

### **National Petroleum Reserve-Alaska History**

101. The proposed development marks the first in the Reserve, a vast and significant piece of federal land that has long received unique treatment by the federal government.

102. The Reserve is currently managed by BLM under a comprehensive management plan designed to protect important wildlife resources.

103. In 1976, Congress passed the National Petroleum Reserve Production Act and transferred management authority of the Reserve from the Navy to the Department of Interior. Congress expressly recognized that the protection of the unique natural, fish and wildlife, scenic and historical values of the Reserve should be evaluated and managed under the authority of the Secretary of the Interior. Naval Petroleum Reserves Production Act (NPRPA). Pub. L. 94-258, 90 Stat. 303 (1976).

104. The Department of Interior's regulations governing the Reserve provide that its surface values may be protected by limiting, restricting, or prohibiting the use of and access to lands within the Reserve, including "Special Areas." 43 C.F.R. § 2361.1(e)(1).

105. In the late 1990s, BLM undertook a planning process for the Northeast portion of the Reserve, including the area where CD-5 is located. This process culminated in a 1998 Integrated Activity Plan and Environmental Impact Statement (IAP/EIS). This plan made areas available for leasing, but closed some areas and included stipulations to protect surface



resources. The plan provided for a three-mile setback around Fish Creek and prohibited the construction of roads (other than temporary ice roads) connecting the northeast planning area with the existing road network outside the planning area.

106. The 1998 plan was the one in place when the Alpine Satellite EIS was prepared, and the Alpine EIS is tiered to the 1998 EIS.

107. The 1998 EIS assumed that permanent roads would not be constructed along pipeline alignments or from new fields to existing infrastructure east of the Colville River.

108. BLM has conducted three additional EISs covering the Northeast portion of the Reserve since the 2004 Alpine Satellite EIS that have considered new information and provided new analysis of oil development in the Reserve. These later processes have not been incorporated into the Corps' NEPA process. In addition to considering new information, these BLM EISs have accompanied new management plans that themselves present a new circumstance relevant to environmental concerns.

109. Pursuant to the Bush Administration's 2001 National Energy Policy, which called for the Secretary of Interior to "consider additional environmentally responsible oil and gas development . . . through further lease sales in the National Petroleum Reserve-Alaska," including "areas not currently leased within the Northeast corner of the Reserve," BLM amended the 1998 Northeast Plan. This process culminated in a BLM record of decision on January 11, 2006, that adopted with minor modifications and clarifications the preferred alternative in the Final EIS.

110. The Center, along with a coalition of groups seeking to protect the Reserve and its wildlife from destructive oil development, challenged the EIS and decision in this court alleging they violated NEPA, the NPRPA and the ESA.

111. In an order entered on September 25, 2006, the Court found that the EIS violated NEPA, vacated the decision and remanded it to the agency.

112. Pursuant to the Court's remand, BLM conducted a supplemental NEPA process.

113. BLM published a draft supplemental EIS on August 1, 2007. In it, BLM stated that the supplement was necessary to address the NEPA violation found by the Court and noted that several circumstances had changed since the publication of the 2005 EIS that "resulted in changes in the analysis." Northeast Reserve Supplemental IPA/EIS at ES-2.

114. In May of 2008, BLM published a final EIS that identified as its preferred alternative a plan to defer leasing in the sensitive areas that would have been opened to immediate leasing in the previous plan. BLM published a decision on July 16, 2008, adopting the preferred alternative.

115. The Center did not challenge this decision, and the 2008 plan remained in force until recently.

116. On July 28, 2010, BLM announced its intent to prepare a new Integrated Activity Plan for the entire Reserve and accompanying EIS.

117. The Draft EIS was published on March 22, 2012. The Draft stated that part of its purpose was to "benefit management by incorporating an updated and consistent analysis of issues such as climate change, species recently listed under the ESA, updated oil and gas projections, and ramifications for onshore land management due to offshore oil and gas drilling." Reserve Draft EIS at ii.

118. The Draft EIS also noted that new circumstances and information had become known since the 2008 Northeast Reserve EIS was completed. *Id.* In particular, the EIS identified changed oil prices; updated information on recoverable oil and gas within the Reserve; new

information about North Slope development; foreseeable Chukchi Sea development; changes to special status species; and the availability of new scientific studies related to surface resources, public health, and climate change.

119. BLM published a Final EIS on December 19, 2012, and published a final decision on February 21, 2013.

120. The Corps has not conducted any NEPA process on the CD-5 proposal to consider the import of these new plans or to examine the new information contained in the 2006, 2008 and 2012 EISs.

## **VI. CLAIMS FOR RELIEF**

### **Count I**

#### **Failure to Prepare a Supplemental Environmental Impact Statement**

**(Violation of 42 U.S.C. § 4332(C); 40 C.F.R. § 1500 et seq; 5 U.S.C. § 706)**

121. Plaintiff realleges and incorporates herein by reference the allegations contained in Paragraphs 1 through 120 of this Complaint.

122. NEPA requires federal agencies to contemplate the environmental impacts of their actions before committing to a course of action. NEPA requires federal agencies to include an EIS “in every recommendation or report on . . . major Federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(C). An EIS must be prepared if “substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor.” *Greenpeace Action v. Franklin*, 14 F.3d 1324, 1332 (9th Cir. 1992) (citation omitted); *Sierra Club v. U.S. Forest Serv.*, 843 F.2d 1190, 1193 (9th Cir. 1988).

123. An EIS must include “a detailed statement” that analyzes the direct, indirect and cumulative impacts to the environment of the proposed action along with reasonable alternatives

to the proposed action. 42 U.S.C. § 4332(C); 40 C.F.R. §§ 1500 *et seq.* NEPA requires the agency to take a hard look at all environmental effects of the proposed action.

124. When ConocoPhillips applied for a section 404 permit in 2009, the Corps did not conduct a site-specific NEPA analysis of its application.

125. Instead the Corps relied on the 2004 Alpine Satellite EIS to fulfill its NEPA duty.

126. The Corps' decision to rely on a stale analysis of a different proposal does not fulfill NEPA's requirements and is arbitrary, capricious and not in accordance with law. 42 U.S.C. § 4332(C); 40 C.F.R. §§ 1500 *et seq.*; 5 U.S.C. § 706(2)(A).

127. Agencies must not only complete an EIS prior to taking federal action, but agencies must include a supplemental EIS whenever the agency makes substantial changes in the proposed action that are relevant to environmental concerns or there are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts. 40 C.F.R. § 1502.9(c)(1).

128. ConocoPhillips' proposal is substantially different from the proposal considered in the 2004 Alpine Satellite EIS.

129. Significant new information relevant to environmental concerns has become available since the Alpine Satellite EIS was published in 2004, including information about climate change, species recently listed under the ESA, updated oil and gas assessments and ramifications for onshore land management due to offshore oil and gas drilling.

130. The land management plan applicable when the 2004 Alpine Satellite EIS was completed has since been changed three times.

131. The Corps' failure to conduct a supplemental NEPA process in light of these new circumstances and new information is arbitrary, capricious and not in accordance with law. 42 U.S.C. § 4332(C); 40 C.F.R. §§ 1500 *et seq.*; 5 U.S.C. § 706(2)(A).

## **Count II**

### **Failure to Choose the Least Environmentally Damaging Practicable Alternative**

#### **(Violation of Clean Water Act § 404, 33 U.S.C. § 1344)**

132. Plaintiff realleges and incorporates herein by reference the allegations contained in Paragraphs 1 through 131 of this Complaint.

133. The Clean Water Act authorizes the Corps of Engineers to issue section 404 permits, under certain circumstances, "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a); 33 C.F.R. § 323.6(a).

134. Construction of the CD-5 project requires a 404 permit from the Corps because it involves filling wetlands. 33 U.S.C. § 1344(e)(1).

135. Under the Clean Water Act and the Corps' regulations, a section 404 permit "will be denied if the discharge that would be authorized by such permit would not comply with" the Guidelines. 33 C.F.R. § 320.4(a)(1). Under the Guidelines, the Corps must adopt practicable alternatives that avoid environmental impacts of the discharge. *Id.* § 230.10(a). The Corps must also take "appropriate and practicable steps" to "minimize potential adverse impacts of the discharge on the aquatic ecosystem." 40 C.F.R. § 230.10(d). This process identifies and mandates the selection of the Least Environmentally Damaging Practicable Alternative.

136. The Corps defines a practicable alternative as an alternative that "is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." *Id.* § 230.10(a)(2). The Corps is prohibited from issuing a

permit if “[t]here is a practicable alternative to the proposed discharge that would have less adverse effect on the aquatic ecosystem, so long as such alternative does not have other significant adverse environmental consequences.” *Id.* § 230.12(a)(3)(i).

137. Practicable alternatives include, but are not limited to, “[a]ctivities which do not involve a discharge of dredged or fill material into the waters of the United States” and “[d]ischarges of dredged or fill material at other locations in waters of the United States.” *Id.* § 230.10(a)(1)(i)-(ii). An alternative to discharging to a wetland “is practicable if it is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.” *Id.* § 230.10(a)(2).

138. The section 404 permit issued for CD-5 violates the Clean Water Act because there are practicable alternatives that would have less adverse effects on the ecosystem.

139. The Corps’ determination that the 404 permit complies with the Clean Water Act is arbitrary, capricious and not in accordance with law in violation of the Clean Water Act, 33 U.S.C. § 1344, and the APA, 5 U.S.C. § 706.

140. The Corps’ decision to issue the 404 permit is contrary to the record, and the reasoning in its decision is arbitrary in violation of the APA, 5 U.S.C. § 706.

### COUNT III

#### **Failure to Consult with the Marine Fisheries Service Before Issuing the 404 permit**

#### **(Violation of ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2))**

141. Plaintiff realleges and incorporates herein by reference the allegations contained in Paragraphs 1 through 140 of this Complaint.

142. The ESA vests primary responsibility for administering and enforcing the statute with the Secretaries of Interior and Commerce, who have delegated this responsibility to the Fish

and Wildlife Service and the Marine Fisheries Service, respectively. 50 C.F.R. §402.01(b). The Marine Fisheries Service has primary responsibility for administering the ESA with regards to most marine species, including whales, while the Fish and Wildlife Service has responsibility for terrestrial species, as well as some marine mammals, including polar bears, and all seabirds.

143. To fulfill the substantive purposes of the ESA, all federal agencies are required to engage in consultation with the Marine Fisheries Service and/or the Fish and Wildlife Service to ensure that “any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of habitat of such species . . . determined . . . to be critical.” 16 U.S.C. § 1536(a)(2) (Section 7 consultation).

144. As the permitting agency for a dredge-and-fill permit under Section 404 of the Clean Water Act, the Corps is required to ensure that its permitting decisions comply with all of the substantive and procedural requirements of the ESA. 33 U.S.C. § 1344(a); 16 U.S.C. § 1536(a)(2).

145. Section 7 consultation is required for “any action [that] may affect listed species or critical habitat.” 50 C.F.R. § 402.14. Whenever a federal agency is considering undertaking or approving an action with the potential to harm listed species, the agency must take the initiative to “request . . . information” from the Fish and Wildlife Service and/or the Marine Fisheries Service to determine “whether any species which is listed or proposed to be listed may be present in the area of such proposed action.” 16 U.S.C. § 1536(c)(1). If the Fish and Wildlife Service and/or the Marine Fisheries Service advise the action agency that “such species may be present,” then the action agency is required to “conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such

action.” 16 U.S.C. § 1536(c)(1). If the Biological Assessment shows that the proposed action “may affect” threatened or endangered species, the action agency must undergo formal consultation with the Fish and Wildlife Service and/or the Marine Fisheries Service. 50 C.F.R. § 402.14(a).

146. At the completion of consultation the Marine Fisheries Service or Fish and Wildlife Service issues a biological opinion that determines if the agency action is likely to jeopardize the species. If so, the opinion may specify reasonable and prudent alternatives that will avoid jeopardy and allow the agency to proceed with the action. 16 U.S.C. § 1536(b). The Marine Fisheries Service or Fish and Wildlife Service may also “suggest modifications” to the action during the course of consultation to “avoid the likelihood of adverse effects” to the listed species even when not necessary to avoid jeopardy. 50 C.F.R. § 402.13.

147. The Corps’ approval of ConocoPhillips’ 404 permit constitutes “agency action” as that term is defined under the ESA. 50 C.F.R. § 402.02.

148. This action “may affect” listed species including the bowhead whale.

149. The 2004 Alpine EIS concedes that an oil spill associated with the authorized activity may adversely affect bowhead whales.

150. The Corps failed to consult with the Marine Fisheries Service to ensure that its decision to issue a 404 permit would not jeopardize bowhead whales.

151. Until the Corps has completed consultation it cannot ensure against jeopardy as required by the ESA. 16 U.S.C. § 1536(a)(2).

152. The Corps’ decision to issue a 404 permit in the absence of a valid biological opinion was arbitrary, capricious and not in accordance with law and violated the ESA, 16 U.S.C. § 1536(a), and the Administrative Procedure Act, 5 U.S.C. §§ 702, 706.



153. By allowing ConocoPhillips to proceed with its plan that may affect listed species or their critical habitat prior to the completion of consultation with the Marine Fisheries Service, the Corps is violating the ESA. 16 U.S.C. § 1536(d); *see, e.g., Silver v. Babbitt*, 924 F. Supp. 976, 982 (D. Az. 1995) (“An agency must hold action in abeyance until the required consultation is complete”). This also constitutes a violation of section 7(d) of the ESA, which prohibits “any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.” 16 U.S.C. § 1536(d).

#### COUNT IV

##### **Failure to Ensure Against Jeopardy to Listed Ringed and Bearded Seals**

##### **(Violation of ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2))**

154. Plaintiff realleges and incorporates herein by reference the allegations contained in Paragraphs 1 through 153 of this Complaint.

155. The ringed seal and bearded seal were listed under the ESA after the Corps issued ConocoPhillips a 404 permit. The final rule listing these species became effective on February 26, 2013.

156. An agency’s duty to avoid jeopardy is continuing, and “where discretionary Federal involvement or control over the action has been retained or is authorized by law,” the agency must in certain circumstances reinitiate formal consultation if a new species is listed or critical habitat designated that may be affected by the identified action.

157. The listing of the bearded and ringed seals constitutes a “new species . . . that may be affected by the identified action,” triggering the duty to reinitiate consultation. 50 C.F.R. §

402.16(d). The final rule listing these species became effective on February 26, 2013. The 2004 Alpine EIS specifically mentions ringed and bearded seals as species that would be impacted by development in the Colville River Delta.

158. While the Corps has reinitiated consultation with the Marine Fisheries Service on the effects of the 404 permit, such consultation is not complete. Thus, the Corps has failed to ensure against jeopardy, in violation of the ESA.

159. The Corps' failure to complete consultation on ringed and bearded seals before ConocoPhillips begins construction on CD-5 is arbitrary, capricious and not in accordance with law and violated the ESA, 16 U.S.C. § 1536(a), and the APA, 5 U.S.C. §§ 702, 706.

160. By allowing ConocoPhillips to proceed with its plan that may affect listed species or their critical habitat prior to the completion of consultation with the Marine Fisheries Service, the Corps is violating the ESA. 16 U.S.C. § 1536(d); *see, e.g., Silver v. Babbitt*, 924 F. Supp. 976, 982 (D. Az. 1995) (“An agency must hold action in abeyance until the required consultation is complete”). This also constitutes a violation of section 7(d) of the ESA, which prohibits “any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.” 16 U.S.C. § 1536(d).

## **VII. PRAYER FOR RELIEF**

Therefore, plaintiff respectfully requests that the Court:

1. Declare that defendants have violated the Clean Water Act, NEPA, ESA, and the APA, and that the actions as set forth above are arbitrary, capricious and not in accordance with law;

2. Vacate the Defendants' 2011 decision;
3. Enter appropriate injunctive relief to ensure that the defendants comply with the Clean Water Act, NEPA, the ESA, and the APA, and to prevent irreparable harm to the plaintiffs and to the environment until such compliance occurs;
4. Award plaintiff the costs of this action, including reasonable attorneys' fees, pursuant to the ESA, 16 U.S.C. § 1540(g)(4), and the Equal Access to Justice Act, 28 U.S.C. § 2412; and
5. Grant such other relief as the Court deems just and proper.

Respectfully submitted this 4th day of June, 2013,

*s/ Deirdre McDonnell*  
Deirdre McDonnell (Alaska Bar # 0111082)  
Center for Biological Diversity  
PO Box 11374  
Portland, OR 97211-0374  
(971) 717-6404  
FAX: (503) 283-5528  
dmcdonnell@biologicaldiversity.org

Rebecca Noblin (Alaska Bar # 0611080)  
Center for Biological Diversity  
PO Box 100599  
Anchorage, AK 95510-0599  
(907) 274-1110  
FAX: (907) 258-6177  
moblin@biologicaldiversity.org

*Attorneys for Plaintiff*