

(Updated August 2000)

## NORTHSTAR LEGAL ISSUES IN BRIEF

Greenpeace has been campaigning for more than 20 years to stop oil exploration and drilling in the Beaufort Sea, and our particular focus over the past four years has been BP's Northstar project. Greenpeace has reviewed thousands of documents and permits on the project, and has provided oral and written comment at every stage of the permitting process. In addition to visiting North Slope villages, attending hearings, conducting speaking tours, maintaining a winter protest camp next to the Northstar construction site, organizing shareholder resolutions and letter writing campaigns to stop the project in the public court of opinion, Greenpeace has also launched a number of challenges in Alaska state and U.S. federal courts to challenge and stop the project.

Greenpeace's first legal challenge to Northstar was filed in Superior Court in Fairbanks in December 1998. The suit was against the Alaska Department of Natural Resources (DNR) for allowing BP to begin building ice roads for Northstar before state and federal environmental analyses were complete, and before permits based on these analyses had been granted. Specifically, DNR granted approval for BP to begin construction based on a permit that was granted in 1985 (ten years before BP purchased the lease for Northstar), before the U.S. Army Corps of Engineers had released the Final Environmental Impact Statement (FEIS) for Northstar, and before the State of Alaska had issued a permit called a "consistency determination" under the Alaska Coastal Management Program. BP stated that it was proceeding "at its own risk" despite the lack of permits.

Greenpeace asked for a "stay" (legal term for stop) of Northstar construction until these analyses were complete and relevant permits were granted. The court did not grant the stay, but Greenpeace's suit did force BP and the State to backtrack and explain their rush to build the project before it had been approved. In the end, BP did not receive federal permits in time to do anything more than build ice roads in the winter of 1999, and spend 5 to 7 million dollars in ice roads, using 56 million gallons of water from the Kuparuk River, melted into the Beaufort Sea.

In late January 1999, the State of Alaska issued its proposed determination under the Alaska Coastal Management Program in favor of the Northstar project. Greenpeace appealed this proposed decision to the Alaska Coastal Policy Council, and had a hearing before the Council in early February. Greenpeace contended that the State's proposed determination failed to analyze the cumulative impacts of Northstar and oil development on the North Slope coastal zone, the impacts of an oil spill during times when spill response is impossible due to ice or severe weather, the impacts to the environment and wildlife of burning spilled oil, and the potential impacts from noise to bowhead whales and other wildlife. The Coastal Policy Council denied Greenpeace's request to

remand the issues back to the State of Alaska for full analysis. Greenpeace is currently appealing this decision in Superior Court, focusing on the failure to conduct a cumulative impact analysis and the improper phasing of Northstar permits that resulted in a failure to analyze the project as a whole. A decision on this case will most likely be made between January and July 2001.

Greenpeace simultaneously filed an administrative appeal (and then appealed to Superior Court) against DNR for permitting BP to rely upon the expired 1985 permits for water use for ice roads from the Kuparuk River. Alaska's water resources are reserved to the public for common use, and for fish and wildlife resources, unless it is properly appropriated. Greenpeace is asserting that the State (DNR) violated the State's Water Use Act in allowing BPXA to use Kuparuk River water without complying with the Water Use Act. Oral argument is set for August 31, 2000. A decision on that case is expected in the fall.

In early June 1999, Greenpeace submitted Freedom of Information Act (FOIA) requests to every federal agency that had permitting responsibility for the Northstar project. Of the six agencies, the U.S. Army Corps of Engineers and the U.S. Minerals Management Service failed to respond to Greenpeace's FOIA requests as required by law. In the case of the U.S. Army Corps of Engineers, the agency repeatedly delayed the date by which it would provide the documents. Finally, after three months of not receiving any documents, Greenpeace filed suit against the Corps in Alaska District Court. The suit was settled out of court by early October, with the Corps copying and delivering most of the documents Greenpeace had requested, free of charge. In addition, the Corps agreed to pay Greenpeace's attorney fees and to enter into an agreement to grant access to public records in the future for North Slope oil and gas projects without the necessity of litigation.

In the case of the U.S. Minerals Management Service, the agency denied Greenpeace's request for expedited consideration and fee waiver because, in MMS' opinion, Greenpeace and the public lacked the expertise with which to understand the material, and Greenpeace failed to show an ability to disseminate the information to the general public. MMS estimated that if Greenpeace still wanted the documents, it would cost \$18,700. Greenpeace took the matter to court, and in January 2000, the Office of the Solicitor at the U.S. Department of the Interior (where MMS is housed in the federal government) ruled on behalf of Greenpeace. The Office of the Solicitor examined the information in Greenpeace's FOIA request to MMS and concluded that indeed, Greenpeace did have the technical expertise to understand the material, as well as tools for public distribution and dissemination of the information. As such, the Office of the Solicitor granted Greenpeace's request for a fee waiver, and soon thereafter, MMS delivered four boxes of photocopied documents to the Greenpeace office in Anchorage. In settling this suit, MMS, like the Corps, agreed to pay Greenpeace's attorney's fees and to enter into an

agreement to grant access to public records in the future for North Slope oil and gas projects without the necessity of litigation.

In July 1999, after receiving information about significant changes BP was proposing for the Northstar project AFTER all of the environmental analysis was complete and permits were granted, Greenpeace requested that the State of Alaska and U.S. federal government conduct supplemental analyses of the changes. The federal government denied the request, but the State initiated a new environmental review under the Alaska Coastal Management Program. Greenpeace submitted comments on BP's proposed changes in October, and in early November, the State released its proposed decision in favor of Northstar. Greenpeace appealed this proposed decision to the Alaska Coastal Policy Council and had a hearing before the Council in mid-December. Greenpeace contended that the State's analysis and proposed determination failed to mention or consider Greenpeace's comments as required by law. Greenpeace contended that the issues it had raised – the cumulative impacts of water use, permafrost thawing and oil spill issues – had not been addressed by the State. The Coastal Policy Council denied Greenpeace's request to remand the issues back to the State of Alaska for full analysis. Greenpeace decided not to appeal this specific decision to Alaska Superior Court, focusing its resources on appealing the State's 1999 Alaska Coastal Management Program determination (described above).

In October 1999, Greenpeace joined six Inupiat Eskimos residing on Alaska's North Slope to file a petition for review of the U.S. Minerals Management Service's (MMS) approval of the Development and Production Plan (DPP) for the Northstar project in the Ninth Circuit Court of Appeals in San Francisco. The main points in the suit are that the oil spill response plan for Northstar fails to ensure response equipment and personnel adequate to contain and clean up a large oil spill, and fails to identify and ensure protection for resources of special environmental importance, such as bowhead whales and other subsistence resources and areas. This lawsuit has been briefed by lawyers at Greenpeace, MMS and BP, and will probably be heard by the court in the fall of 2000.

In December 1999, Greenpeace requested that the National Marine Fisheries Service issue a cease and desist order to BP to stop the construction of ice roads. BP lacked (and never actually received) a permit called an "Incidental Harassment Authorization" or IHA, which allows small numbers of marine mammals such as ringed seals to be harassed, killed or maimed during industrial activity. Ringed seals and other marine mammals are protected under the Marine Mammal Protection Act, and as such, BP is required to have an IHA permit in case marine mammals are harmed. (In short, an IHA is a loophole in the Marine Mammal Protection Act that allows marine mammals to be harmed by industrial activity.) A biologist hired by BP surveyed the Northstar area prior to construction and found 26 ringed seal breathing holes and lairs. Greenpeace brought this to NMFS' attention along with other information to support its request that NMFS order BP to cease and desist building ice roads, but NMFS denied the request. It is interesting to note

that even the biologist who surveyed the area for BP prior to construction had an IHA from NMFS to conduct the survey.

In mid-January 2000, Greenpeace appealed a Department of Natural Resources (DNR) water use permit for Northstar. Greenpeace contended that the permit allows BP to withdraw more water from a local river during the first two years of Northstar construction than BP said it would use over the entire 15-year lifetime of the project. Furthermore, there was no analysis of the environmental impact of this increase in water use to fish overwintering in the river, subsistence fishing, and other significant impacts. An appeal of this type results in an immediate "stay" on water use, which meant BP had to stop withdrawing water from the Kuparuk river for Northstar ice road construction. At BP's request, DNR lifted the stay. Greenpeace went to court immediately to challenge the lifting of the stay. After Greenpeace presented its evidence to the court, BP decided to stop its water use under the permit. DNR then reimposed the stay until July 2000. Greenpeace is currently evaluating whether to continue that appeal.

Greenpeace will continue to review this project and challenge any and all activities that are beyond the scope of state and federal laws and permits.