



January 28, 2020

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Re: Proposed Incidental Harassment Authorizations for Construction of the Port of Alaska's Petroleum and Cement Terminal

On behalf of the Center for Biological Diversity, these comments oppose the two proposed incidental take authorizations and one-year extensions for construction and associated activities of building a petroleum and cement terminal. The proposed actions will dangerously imperil the already critically endangered Cook Inlet beluga whale.

The take authorization proposed here threatens the very survival of this iconic beluga whale. The removal of even one endangered Cook Inlet beluga whale will impede the recovery of this species.¹ We cannot stress enough that most of the proposed activities should not be authorized until and unless the National Marine Fisheries Service (“Service”) can ensure that take will not impede the survival and recovery of the Cook Inlet beluga whale population. Cook Inlet beluga whales are in trouble, and they have shown no signs of recovery since they were protected under the Endangered Species Act.² Noise is one of the primary threats to Cook Inlet belugas since harvest has ceased.³ The Marine Mammal Commission has repeatedly recommended, and specifically recommended here, that the Service “defer issuance of the final incidental harassment authorizations to [Port of Alaska] or any other applicant proposing to conduct sound-producing activities in Cook Inlet until [it] has a reasonable basis for determining that authorizing any additional incidental harassment takes of Cook Inlet beluga whales would not contribute to or exacerbate the stock’s decline.”⁴

¹ National Marine Fisheries Service, Stock Assessment Report: Beluga Whale (*Delphinapterus leucas*) Cook Inlet Stock (Dec. 30, 2017).

² Valdivia, Abel, et al. (2019) Marine mammals and sea turtles listed under the U.S. Endangered Species Act are recovering, PLoSONE 14(1): e0210164.

³ National Marine Fisheries Service, Recovery Plan for the Cook Inlet Beluga Whale (*Delphinapterus leucas*) (Dec. 2016).

⁴ Marine Mammal Commission letter to Ms. Jolie Harrison, National Marine Fisheries Service, Comments on Proposed Incidental Harassment Authorization and Possible Renewal for Port of Alaska’s Petroleum and Cement Terminal, Anchorage, Alaska, 4 (Jan. 23, 2020).

The proposed incidental harassment authorizations would allow marine mammal takes from construction of a new petroleum and cement terminal and removal of old infrastructure. The project includes a loading platform, access trestle, dolphins, utilities, and ancillary activities. Most important here, the Port of Alaska intends to install and remove piles using vibratory and/or impact pile driving over the course of two years in two phases. The pile driving activities could occur up to 127 days during phase 1 and 75 days for phase 2 during daylight April through November.

The proposal estimates 1,867 instances of Level A and Level B take of six species of marine mammals, including 90 instances of take of endangered Cook Inlet beluga whales.

1. The Service must comply with the Marine Mammal Protection Act

a. The Service’s negligible impact determination is arbitrary and capricious

The Service’s negligible impact determination is flawed. Notably, the authorization for take of critically endangered Cook Inlet beluga whales may contribute to their continued decline and impedes their recovery. As stated previously, the concerns are so great that the Marine Mammal Commission has warned the agency to defer any authorizations for take of Cook Inlet beluga whales. The Service has decided to ignore this recommendation and instead proceed (without the reasonable basis advised by the Commission) to approve activities that will have a greater than negligible impact on Cook Inlet belugas.

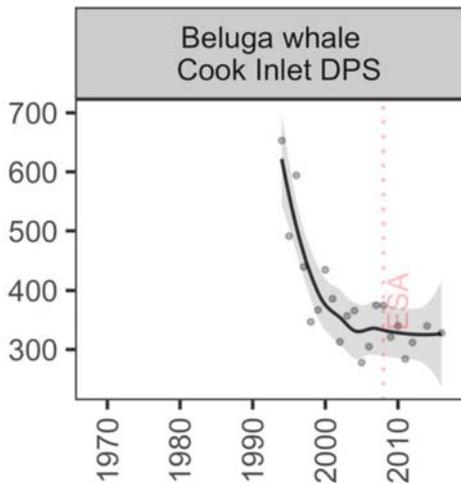


Fig. 1 Population-level trends of cetacean marine mammals listed under the ESA. Trend lines (gray area: 95% confidence interval) are loess curves with span of 0.5 to aid in visual representation. Grey dots are estimated number of individuals. Panels are organized by decreasing length of time listed and then in alphabetical order based on species names. Dashed vertical red lines indicate the year of ESA listing.

The impacts of pile driving on beluga whales has been underestimated. Pile driving threatens marine mammals by potentially displacing them from key foraging habitat, causing hearing loss, masking communications, and interfering with natural behaviors. Modeling showed that pile driving could mask strong bottlenose dolphin vocalizations 10-15 km from the source.⁵ Pile

⁵ David, J.A. (2006) Likely sensitivity of bottlenose dolphins to pile-driving noise, *Water and Environment Journal* 20, pp. 48-54.

driving has adverse effects on behavior and foraging of beluga whales.⁶ Bailey et al. measured 205 dB of broadband sound at 100 meters from one pile-driving source.⁷ Some marine mammals have been observed to avoid areas where pile driving was occurring and staying away for more than three days after those activities ceased.⁸ A resident population, like the Cook Inlet beluga whale, is particularly vulnerable to the impacts from high-intensity noise.⁹

The Service's negligible impact determination relies on flaws in estimating take. The Service has misstated the takes in the rule noting that there is the potential for 78 exposures of beluga whales rather than 90, applying the 59 percent factor adopted from reported beluga takes during Port of Alaska Activities from monitoring in years 2009-2012.¹⁰ Although the Service corrected this percentage upward from the average 36 percent proposed by the applicant, this underestimates the likelihood of exposure of beluga whales. The reporting of takes from 2009-2012 relied upon for the 59 percent factor was conducted in July, one of the months with the lowest density of beluga whales. For example, in the month of July monitoring reported 0.01 whales per hour.¹¹ Activities here, however, will extend from April to November. The months of August (0.63 whales/hour), September (0.38 whales/hour) and November (0.82 whales/hour); in contrast, had much higher occurrences of Cook Inlet beluga whales.¹² In its draft Environmental Assessment, the Service also added 11 exposures to each phase to consider group size and account for the highly variable group sizes found in Knik Arm. This group size correction, however, does not appear in the proposed incidental harassment authorizations. The entire approach of discounting the estimated take seems concerning.¹³ Additionally, the rationales for estimating take for other marine mammals are also insufficiently supported and should be re-estimated.

The proposed incidental harassment authorizations likely underestimate take of beluga whales, which are highly sensitive to noise. A new study shows that wild beluga whales have sensitive hearing.¹⁴ The Service here uses thresholds of 120 dB re 1 μ Pa (rms) for continuous and 160 dB re 1 μ Pa (rms) for impulsive or intermittent sources. These are insufficiently conservative to protect Cook Inlet beluga whales. At minimum, the Service should use a 120 dB threshold for all sound sources. Additionally, the Marine Mammal Commission commented that the Service has underestimated the Level B harassment zones, and thus needs to extend the zones and revise its analysis accordingly.¹⁵

⁶ Saxon Kendall, Lindsey & Cornick, Leslie, Behavior and distribution of Cook Inlet beluga whales, *Delphinapterus leucas*, before and during pile driving activity. *Marine Fisheries Review*. 77. 106-114 (2016).

⁷ Bailey, Helen, et al. (2010) Assessing underwater noise levels during pile-driving at an offshore windfarm and its potential effects on marine mammals, *Marine Pollution Bulletin* 60, pp. 888. Note, however, that the thresholds used for TTS and PTS in this study are not stringent enough.

⁸ Leunissen, E. M., Rayment, W. J. and Dawson, S. M. (2019) Impact of pile-driving on Hector's dolphin in Lyttelton Harbour, New Zealand, *Marine Pollution Bulletin* 142(January), pp. 31-42.

⁹ Forney, K. A. et al. (2017) Nowhere to go: noise impact assessments for marine mammal populations with high site fidelity. *Endanger. Species Res.* 32, 391-413.

¹⁰ National Marine Fisheries Service, 84 Fed. Reg. at 72178.

¹¹ National Marine Fisheries Service, Draft Environmental Assessment at 57-58.

¹² Id.

¹³ See *Conservation Council of Hawaii, et al. v. National Marine Fisheries Service, et al.*, 97 F. Supp. 3d 1210 (D. Haw. 2015).

¹⁴ Mooney, T. Aran, et al. (2018) Variation in Hearing within a Wild Population of Beluga Whales (*Delphinapterus leucas*) *Journal of Experimental Biology*, 221: jeb171959.

¹⁵ Marine Mammal Commission at 6-7 (2020).

The areas adversely affected by the proposed activities are important for Cook Inlet beluga whales. According to the Service itself, “Knik Arm is one of three areas in upper Cook Inlet where beluga whales concentrate during spring, summer, and early fall.”¹⁶ The Service acknowledges that areas of critical habitat for Cook Inlet belugas will be ensonified by the proposed activities, yet the Service’s negligible impact fails to adequately consider the adverse impacts to critical habitat. Critical habitat is defined as the area *essential* to the conservation and recovery of a species. Notably, the critical habitat rule for Cook Inlet beluga whales includes the acoustic environment as an *essential* physical feature for beluga whales.¹⁷ The Service has noted the importance of sound to Cook Inlet belugas.¹⁸

Beluga whales are known to be among the most adept users of sound of all marine mammals, using sound rather than sight for many important functions, especially in the highly turbid waters of upper Cook Inlet. Beluga whales use sound to communicate, locate prey, and navigate, and may make different sounds in response to different stimuli. Beluga whales produce high frequency sounds which they use as a type of sonar for finding and pursuing prey, and likely for navigating through ice-laden waters. In Cook Inlet, beluga whales must compete acoustically with natural and anthropogenic sounds.

Likewise, the area that will be ensonified includes biologically important areas for Cook Inlet belugas. The Service states that it has reduced impacts to biologically important areas, however, the proposed project does not avoid or impose any specific mitigation for this year-round biologically important area.¹⁹ The impacts to these key habitat areas need to be considered by the Service in making its negligible impact determination.

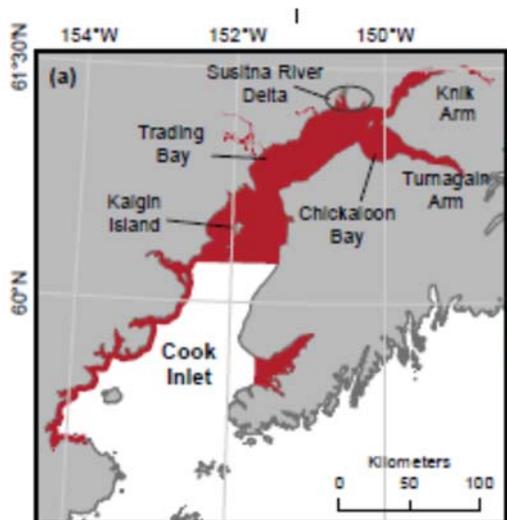


Fig. 2. Cook Inlet beluga (*Delphinapterus leucas*) small and resident population biological important areas (BIAs). These BIAs were substantiated through boat-based and aerial survey data, acoustic recordings, satellite-tagging data (Cook Inlet only), traditional ecological knowledge, photo-identification data, and genetic analyses. Both areas are considered BIAs during the entire year.

¹⁶ Draft Environmental Assessment at 45.

¹⁷ National Marine Fisheries Service, Designation of Critical Habitat for Cook Inlet Beluga Whale, 74 Fed. Reg. 63080 (Dec. 2, 2009)

¹⁸ *Id.*

¹⁹ Ferguson et al. (2015) Biologically Important Areas for Cetaceans Within U.S. Waters – Gulf of Alaska Region, Aquatic Mammals.

The negligible impact analysis has other shortcomings. For example, the Service only counts one take exposure per day, but the animals may be exposed as they travel in and out of Knik Arm. Also, the Service does not take into account the above-water impacts on seals and sea lions that haul out. And, the conclusion that there is no harassment from vessels is wrong, there is both the risk of ship strikes and vessel noise that will contribute to harassment of marine mammals.

b. Small numbers determination

Even accepting the Service's flawed approach to making a small numbers finding in the proposed incidental harassment authorization, its small numbers determination does not meet the small numbers requirement. The small numbers determination relies on take of 17 percent or less of any population. The Service estimates take of 55 Cook Inlet beluga whales in Phase 1 and 35 in Phase 2, as well as hundreds of other marine mammals. There are only 328 Cook Inlet beluga whales, which are declining, and the authorized take for each phase amounts to more than 10 percent of that population. This does not even account for the underestimates of the take exposures described earlier. Given the small population and documented decline of belugas, the Service cannot rationally argue that this is a small number. Courts have concluded that "[a] definition of 'small number' that permits the potential taking of as much as 12% of the population of a species is plainly against Congress' intent."²⁰

The Service's definition of small numbers also conflates this criterion with the negligible impact requirement. Although the Service uses different headings for its small numbers and negligible impact findings, by defining small numbers to be relative to the overall population the criterion ends up being similar to the negligible impact finding. Instead, the small numbers requirement is intended to protect individual marine mammals. As the Ninth Circuit stated in *Center for Biological Diversity v. Salazar*, "[l]egislative history confirms our reading of the statute if such confirmation is needed. The House Report accompanying Section 101(a)(4)-(5) of the MMPA indicates that Congress intended "'small numbers'" and "'negligible impact'" to serve as two separate standards."²¹ The requirement that the Service authorize the take of only "small numbers" of individual animals is no mere technicality. Congress's intent was that the MMPA protect not only populations, but individual marine mammals.²² While the "negligible impact" standard should serve to protect the species or population as a whole, the "small numbers" requirement guarantees that Congress's directive to protect individual marine mammals is carried out. The incidental harassment authorizations here violate the MMPA because it does not guarantee that only small numbers of Cook Inlet beluga whales and the other marine mammals impacted by the Port of Alaska's activities will be taken.

In sum, the Service may not rely on its flawed small numbers analysis.

²⁰ *Natural Res. Def. Council v. Evans*, 279 F. Supp. 2d 1129, 1152 (N.D. Cal. 2003).

²¹ *Center for Biological Diversity v. Salazar*, 695 F.3d 893 (9th Cir. 2012).

²² See 16 U.S.C. § 1362 (18)(A) (definition of "harassment" expressly applies to acts that affect "a marine mammal or marine mammal stock in the wild."); see also *Natural Res. Def. Council v. Evans*, 364 F. Supp. 2d at 1109 ("In expressing concern about harassment to 'a marine mammal,' Congress was concerned about harassment to individual animals.").

c. The Service should reconsider least practicable adverse impact

The Service has failed to implement “means of effecting the least practicable impact”²³ on marine mammals. The Service relies on visual monitoring that is known to be ineffective and inadequate to protect marine mammals. Lookouts are not as effective in mitigating acoustic impacts as time-area restrictions.²⁴

Finally, the Service failed to consider many other mitigation measures to reduce the proposed activities’ impacts to the least practicable level.

Limit on cumulative beluga whale takings in Cook Inlet: The Service should place an overall cap on authorizations for Cook Inlet beluga whale incidental take. The various construction, vessel traffic, oil and gas, and other activities are cumulatively threatening the conservation and recovery of Cook Inlet beluga whales. An overall limit on taking beluga whales for all activities needs to be set.

Time-area restrictions: The Service should consider time restrictions during months, August through October, when Cook Inlet beluga whales frequent the project area. The Service must not allow pile driving during times when beluga whales aggregate in the area. The Service should also consider time area restrictions that would further mitigate impacts to beluga whales and other marine mammals.

Larger exclusion zones: The Service should require larger exclusion zones.

Other noise reduction technologies: There are technologies in addition to bubble curtains available to reduce the noise from pile driving. For example, the Service should consider the effectiveness of pile caps, dewatered cofferdams, and other physical barrier mitigation.

Sound source verification: The Service should require that the in-situ, sound-source verification be used to ensure that the Level A and Level B zones are sufficient.

Avoid overlapping one-year renewals: The proposal includes the possibility of one-year renewals for both authorizations. The potential extension and overlap of activities should be avoided.

The Service must also clarify the proposed mitigation measures to ensure that they meet the requirements. In the proposed incidental harassment authorization notice the mitigation measures are vague. They do not clearly specify the amount of time for start-up if there’s a delay, the spatial area requiring delay of start-up, whether piledriving will be prohibited in low-visibility, non-daylight hours, and the size of Level A harassment zones. These need to be clarified and mandated in the authorizations.

²³ *Id.* at § 1371(a)(5)(A)(ii)(I).

²⁴ *NRDC v. Pritzker* 828 F.3d 1125, 1133 (9th Cir. 2016), *Conserv. Council of Hawaii, et al. v. National Marine Fisheries Service, et al.*, 97 F. Supp. 3d 1210, 1230 (D. Haw. 2015).

d. The proposed activities will have an unmitigable adverse impact on subsistence uses.

The proposed action may have an adverse impact on the availability of beluga whales, harbor seals, and Steller sea lions for Native Alaskan subsistence harvest. For example, the authorization to take 90 endangered Cook Inlet belugas has an adverse impact on subsistence use, which is suspended due to conservation concerns. Limits on the harvest of beluga whale are in place because of their low population and lack of recovery. The proposed activities are stressors on beluga whales, which will contribute to their imperilment. Therefore, any take of beluga whales has an adverse impact on their availability for subsistence use and must be fully mitigated.

Additionally, the proposed rule should require consultation with Native Alaskan communities to ensure adequate mitigation for subsistence harvest for harbor seals and Steller sea lions. The Service must not allow unmitigatable adverse impacts on subsistence use of marine mammal stocks.²⁵

2. The draft Environmental Assessment fails to comply with the requirements of the National Environmental Policy Act.

a. The Service must prepare a full Environmental Impact Statement

The Service must prepare a full environmental impact statement (EIS) for this proposed action and circulate it for public notice and comment before finalizing the proposed incidental harassment authorizations. The draft Environmental Assessment is inadequate to fulfill the Service's duties under the National Environmental Policy Act (NEPA). NEPA requires federal agencies to prepare an EIS for all "major federal actions significantly affecting the quality of the human environment."²⁶ A full EIS is required if "substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor."²⁷ To trigger this requirement, the plaintiff "need *not show* that significant effects will *in fact* occur;" but rather, "raising substantial questions whether a project may have a significant environmental effect is sufficient."²⁸

Whether an action may have "significant" impacts on the environment is determined by considering the "context" and "intensity" of the action.²⁹ "Context" means the significance of the project "must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality."³⁰ Intensity of the action is determined by considering the following ten factors, including whether the action is related to other actions with individually insignificant but cumulatively significant impacts; and the degree to which the

²⁵ 16 U.S.C. § 1371(a)(5)(A)(i)(I).

²⁶ 42 U.S.C. § 4332(2)(C); *see also* 40 C.F.R. § 1501.4.

²⁷ *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1149-50 (9th Cir. 1998).

²⁸ *Id.* (emphasis in original).

²⁹ 40 C.F.R. § 1508.27.

³⁰ *Id.* § 1508.27(a).

action may adversely affect an endangered or threatened species or its habitat that has been determined to be critical under the federal Endangered Species Act.³¹

If any one of these factors is met, then the agency must prepare an EIS. Here, for example, the impacts on an endangered species like the environmentally and culturally significant Cook Inlet beluga and its designated critical habitat alone is enough to trigger a full environmental impact statement. In addition, the action will contribute to cumulative impacts and meets additional criteria for an EIS. In sum, based on multiple factors in NEPA's regulations, the proposed activities may have a significant environmental impact and require preparation of a full EIS.³²

b. The Environmental Assessment is inadequate

i. The Service has failed to consider a reasonable range of alternatives

The draft Environmental Assessment fails to consider a reasonable range of alternatives by examining only the proposed action and a no action alternative. The alternatives analysis "is the heart of the environmental impact statement."³³ Here, the alternatives do not consider mitigation that would reduce noise impacts on marine mammals in Cook Inlet. This approach to alternatives fails to meet the requirements of NEPA to consider alternatives.

ii. The draft Environmental Assessment lacks meaningful environmental and cumulative impacts analyses

The Service has failed to include a meaningful analysis of what the noise impacts will be on Cook Inlet beluga whales or other marine mammals. For example, the beluga whale section describes the total amount of estimated harassment for the animals, but it does not evaluate what that level of take will have on individual whales or the population. Simply restating the estimated take level, does not provide the hard look that NEPA requires to promote informed decision making. Moreover, that draft Environmental Assessment does not analyze the same amount of take as authorized in the proposed incidental harassment authorizations, and it must be revised and recirculated.³⁴

The Service does not include the most recent available information about the impacts of noise on marine mammals, and new information about Cook Inlet belugas.³⁵ Cook Inlet beluga whales face many threats that are impeding their recovery, and noise is among the most important.³⁶

³¹ 40 C.F.R. § 1508.27(b)(1)-(10).

³² See 42 U.S.C. § 4332(2)(c); 40 C.F.R. § 1508.27; *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998) ("[A]n EIS must be prepared if 'substantial questions are raised as to whether a project . . . may cause significant degradation of some human environmental factor'").

³³ 40 C.F.R. § 1502.14.

³⁴ And the sentence about not authorizing any Level A take for beluga whales is in the humpback whale section.

³⁵ L. Weilgart (2018), *The Impact of Ocean Noise Pollution on Fish and Invertebrates*; Convention on Biological Diversity (2012). *Scientific synthesis on the impacts of underwater noise on marine and coastal biodiversity and habitats*. UN Doc. UNEP/ CBD/ SBSTTA/ 16/ INF/ 12; National Research Council (2003) *Ocean noise and marine mammals*. Washington, D.C.: National Academics Press; Weilgart, L.S. (2007) 'A brief review of known effects of noise on marine mammals.' *International Journal of Comparative Psychology* 20: 159-168.

³⁶ Norman et al. (2015) *Potential Natural and Anthropogenic Impediments to the Conservation and Recovery of Cook Inlet Beluga Whales*, *Marine Fisheries Review*.

Beluga whales use echolocation to find their prey. Beluga whales depend on communication for hunting and reproduction, and high-intensity noise can mask key communications that may have population level impacts that the Service has failed to consider.³⁷ Scientists measured noise in Cook Inlet, and they found that noise levels from anthropogenic activities often exceed thresholds for Cook Inlet beluga whales.³⁸ The study noted that a high concentration of noise was at Knik Arm and noted the importance of this area for foraging beluga whales.³⁹

The draft Environmental Assessment names, but entirely fails to evaluate, numerous other proposed projects and ongoing activities in Cook Inlet. It fails to adequately consider the proposal to take marine mammals for the Alaska LNG proposed project, the Hilcorp seismic surveys and exploratory drilling, among other reasonably foreseeable projects that must be analyzed. It is insufficient to merely identify the other projects, NEPA requires that the Service consider the proposed activities in combination with the cumulative impacts.

Additionally, the draft Environmental Assessment's consideration of climate change is inadequate and fails to discuss the impact of the proposed activities on climate change in Cook Inlet. The proposed project is for cement and petroleum, the products that contribute the most carbon pollution. The Service acknowledges climate change, its conclusion that the impacts are "unclear" is insufficient to meet NEPA's requirements.

Climate change is likely to result in habitat loss or alteration for marine mammals, including Cook Inlet beluga whales. As a non-migratory population that exhibits high fidelity to summering areas and occupies a small, constricted range, Cook Inlet beluga whales may be particularly vulnerable to climate-induced habitat alteration and reduction of their prey base. This population of belugas relies largely on Pacific salmon (*Oncorhynchus* spp) runs in Cook Inlet, yet these runs are threatened by increasing water temperatures both in marine waters of Alaska and freshwater spawning habitat.⁴⁰ Water temperature is known to have a strong effect on the abundance and health of anadromous fish populations, with warmer than usual temperatures associated with increases in disease, depressed oxygen levels, reduced growth and reduced survival in salmonids and other fishes.⁴¹

Increasing ocean acidification is also likely to impact coastal Alaskan fish populations and ultimately the marine mammals that depend on them, including Cook Inlet beluga whales. Ocean acidification is occurring more rapidly in the coastal and pelagic waters of Alaska than in tropical climates, and is likely to result in a decrease in abundance of pteropods and other shelled planktonic species, which are unable to grow as rapidly in acidic waters.⁴² These species represent an important food source for pink salmon and other species; given the short life cycle

³⁷ Erbe, Christine, Colleen Reichmuth, Kane Cunningham, Klaus Lucke, and Robert Dooling. Communication Masking in Marine Mammals: A Review and Research Strategy. *Marine Pollution Bulletin* 103: 15–38 (2016).

³⁸ Castellote, Manuel et al. (2019) Anthropogenic Noise and the Endangered Cook Inlet Beluga Whale, *Delphinapterus leucas*: Acoustic Considerations for Management, Marine Fisheries Review.

³⁹ Id.

⁴⁰ Kyle R.E., and Brabets, T.P., Water temperature of streams in the Cook Inlet Basin, Alaska, and implications of climate change (2001) (USGS Water Resources Investigations Report 01-4109).

⁴¹ See, e.g., *id.*

⁴² Fabry, V.J., Seibel, B.A., Feely, R.A., and Orr, J.C., Impacts of ocean acidification on marine fauna and ecosystems processes, *ICES J. Mar. Sci.* 65: 414-432 (2008).

of salmon, prey quality and availability during the juvenile stage strongly affect salmon biomass and abundance.⁴³ Studies estimate that a 10% reduction in pteropods could result in a 20% decrease in the weight of adult salmon. While the full impact of warming waters and ocean acidification on beluga prey species is difficult to predict, these changes will almost certainly be negative and the MMPA requires the agency to take a precautionary approach.

3. The Fisheries Service must comply with the Endangered Species Act

We do not believe that the Service should issue take authorization under the Endangered Species Act for the proposed activities because they will jeopardize the continued existence of Cook Inlet beluga whales and adversely modify their critical habitat.

Section 7(a)(2) of the Endangered Species Act requires federal agencies to “insure 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”⁴⁴ To accomplish this goal, agencies must consult with the delegated agency of the Secretary of Commerce (through the National Marine Fisheries Service) or Interior (through the U.S. Fish and Wildlife Service) whenever their actions “may affect” a listed species.⁴⁵ The Service has the discretion to impose terms, conditions, and mitigation on any authorization.

The proposed action here clearly affects listed species — the critically endangered Cook Inlet beluga whale, other whales, and Steller sea lions— and therefore the Service must consult. The proposed action also affects designated critical habitat for Cook Inlet beluga whales. Importantly, a primary constituent element essential to the conservation of Cook Inlet beluga whales is “the absence of in-water noise at levels resulting in the abandonment of habitat by Cook Inlet beluga whales.”⁴⁶ The proposed notice indicates that the Service will complete consultation before authorizing any take of marine mammals, and we urge the Service to fulfill this commitment. We strongly believe that the Service cannot authorize the activities proposed here because they will jeopardize the recovery and survival of Cook Inlet beluga whales.

4. Conclusion

For all of the above reasons, we believe that the Service should not authorize take of Cook Inlet beluga whales and other marine mammals for the Port of Alaska project in Cook Inlet. To the extent that the Service is still considering take authorization, it must impose stringent mitigation measures to ensure the least adverse impact on protected species. Thank you for your consideration of these comments.

⁴³ Aydin, K.Y., McFarlane, G.A., King, J.R., Megrey, B.A., and Myers, K.W., Linking oceanic food webs to coastal production and growth rates to Pacific salmon (*Oncorhynchus* spp.), using models on three scales, *Deep Sea Res. II* 52: 757-780 (2005).

⁴⁴ 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a).

⁴⁵ *Id.*

⁴⁶ National Marine Fisheries Service, 74 Fed. Reg. 63080 (Dec. 2, 2009)

Sincerely,

/s/ Miyoko Sakashita

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