



MARINE MAMMAL COMMISSION

28 March 2016

Ms. Jolie Harrison, Chief
Permits and Conservation Division
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910-3225

Dear Ms. Harrison:

The Marine Mammal Commission (the Commission), in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the National Marine Fisheries Service's (NMFS) draft environmental assessment (EA) for the issuance of annual incidental take authorizations for oil and gas activities in 2016 in Cook Inlet, Alaska, pursuant to the Marine Mammal Protection Act (MMPA). The Commission also has reviewed NMFS's 9 March 2016 notice (81 Fed. Reg. 12475) announcing the availability of the draft EA.

Scope of the draft EA

In August 2015, NMFS published a notice of intent to prepare a programmatic EA for the issuance of annual incidental take authorizations in 2016 in Cook Inlet, Alaska. The notice stated that a programmatic EA would "aid us [NMFS] in more effectively assessing the aggregate effects of multiple incidental take authorizations and to more comprehensively consider a range of mitigation and monitoring measures in the context of the multiple activities." As previously noted, the Commission agreed with that approach, stating that it would allow for a more thorough assessment of both the individual and cumulative impacts of all planned or ongoing activities on Cook Inlet beluga whales and also provide NMFS with a stronger foundation from which to ascertain whether negligible impact determinations are warranted (see the Commission's letter dated 11 September 2015). However, NMFS subsequently narrowed the scope of the draft EA to consider only the effects of the three oil and gas activities for which it received incidental harassment applications (ExxonMobil Alaska LNG LLC (EMALL), SAEExploration Inc. (SAE), and Bluecrest Alaska Operating LLC (Bluecrest)). No mention was made of, nor rationale provided for, excluding consideration of a fourth authorization, the one that NMFS recently issued to the Port of Anchorage (POA) for incidental harassment of beluga whales and other marine mammals associated with proposed pile-driving activities during 2016 (81 Fed. Reg. 15048). The Commission believes it was inappropriate not to include activities other than oil and gas exploration and operations under the proposed action in the draft EA.

NMFS has identified the potential for some additional activities to occur in Cook Inlet in its cumulative effects analysis (section 4.4 of the EA). However, several of the activities referenced in section 4.4 of the draft EA may occur in 2016 and have the potential to result in incidental taking of

marine mammals concurrent with those expected to result from the proposed action. Those activities may include, but are not limited to, oil and gas-related construction and/or drilling activities¹ (other than the three projects evaluated in the draft EA), coal mine-related construction², construction and operation of tidal energy facilities³, and port construction or maintenance⁴ (in addition to the POA project mentioned previously).

The Commission believes that the endangered status of Cook Inlet beluga whales warrants a complete accounting of *all* activities that may occur in 2016 and that could affect the stock. A complete accounting would allow for the identification of appropriate and necessary mitigation measures and an analysis of whether activities, both individually and cumulatively, meet the small numbers and negligible impact criteria under the MMPA. If indeed some activities are occurring on a temporary or continuous basis and may result in incidental taking of beluga whales and other marine mammals in 2016, and such takes are currently not authorized, NMFS should increase its efforts to ensure full compliance with the MMPA by all entities operating in Cook Inlet, particularly those generating sound levels in excess of NMFS's current injury and disturbance thresholds. Incidental taking that occurs without appropriate authorizations should prompt enforcement action by NMFS. Therefore, the Commission recommends that NMFS expand its outreach and coordination with federal, state, and local officials, industry representatives, private entities, and tribal organizations in Cook Inlet to ensure that (1) all activities (including POA's pile-driving activities) for which incidental harassment authorizations have been or are expected to be issued in 2016 are included in the proposed action of the final EA, (2) information on all activities that may impact Cook Inlet beluga whales and other marine mammals is included in the final EA (and subsequent environmental assessments and environmental impact statements pertaining to anthropogenic activities in Cook Inlet), and (3) all entities whose activities may result in incidental taking of Cook Inlet beluga whales and other marine mammals are apprised of both the incidental take authorization provisions of the MMPA and the consequences associated with unauthorized taking.

The Commission also notes that NMFS is in the process of developing an Ocean Noise Strategy (ONS), which will set forth its vision for addressing ocean noise impacts during the next 10 years. Among the expected benefits of the strategy are the development and integration of management actions to reduce the acute, chronic, and cumulative effects of noise. Cook Inlet seems like an ideal place to apply ONS—it is a fairly small and confined area where diverse acute and chronic sound sources cumulatively may be having adverse impacts on Cook Inlet beluga whales⁵, one of NMFS's species in the spotlight. As such, the Commission recommends that the draft EA be expanded to discuss the potential application of ONS to the suite of sound-producing activities in Cook Inlet, with a particular focus on understanding the impacts of sound from multiple sources on

¹ <http://dog.dnr.alaska.gov/GIS/Data/ActivityMaps/CookInlet/CookInletOilAndGasActivityMap-201511.pdf> and specifically plans by Furie Operating Alaska, LLC, to conduct drilling operations in Cook Inlet from 2016 through 2021 http://dog.dnr.alaska.gov/AboutUs/Documents/PublicNotices/LOC116-001_Kitchen_Lights_Unit_Plan_Of_Operations_03082016.pdf

² http://www.chuitnaseis.com/documents/Applicants_Proposed_Project.pdf

³ http://www.orpc.co/projects_alaska.aspx

⁴ <http://www.matsugov.us/port>

⁵ Identified as needing a concerted effort to reverse an on-going decline.

beluga whales and developing and implementing management actions to mitigate cumulative impacts.

A broader range of alternatives

NMFS has proposed two alternatives in the EA including (1) issuance of the requested authorizations for the three identified oil and gas activities with mitigation measures as specified (the Preferred Alternative) or (2) no issuance of these authorizations (the identified No Action Alternative). NMFS apparently did not consider a third alternative that would issue the requested authorizations but make them subject to additional mitigation measures (i.e., beyond those required for similar activities in past years). This is another alternative that merits consideration and indeed could provide for additional conservation measures that are both effective and practicable. In this case, it is not apparent that even the mitigation measures typically required of entities operating in Cook Inlet, such as restrictions on operating within 10 miles of the Susitna River Delta from 15 April to 15 October, would be applied consistently across the three applicants. In addition, the use of passive acoustic monitoring was identified as a mitigation measure for EMALL but not for SAE, even though previous authorizations issued for SAE have required passive acoustic monitoring. As another example, EMALL and Bluecrest would be required to suspend operations in the event of a nearby live marine mammal stranding, but SAE would not be subject to such a provision.

The Commission was disappointed to see that NMFS did not include in the EA for consideration additional alternatives that would incorporate a broader suite of mitigation and monitoring measures, such as more extensive time-area restrictions, a cessation of sound-producing activities at night or in low visibility conditions, and/or increased numbers of observers to ensure that all beluga whales that are within or approaching the specified exclusion and disturbance zones would be detected. As such, the Commission recommends that NMFS revise the EA to include one or more alternatives that contain additional mitigation and monitoring measures.

Take limits for beluga whales

NMFS's current approach to keeping takes of beluga whales in Cook Inlet within permissible limits is to impose caps (generally about 30 takes) on each individual entity conducting activities in the inlet. However, there currently are no corresponding limits on the number of entities that can obtain incidental take authorizations annually or requirements that activities be separated geographically or temporally. That number can vary from year to year, and as noted previously, not all entities whose activities have the potential to take beluga whales and should be seeking incidental take authorizations are doing so. Under the current approach, project-specific take limits are not adjusted for the number of individual entities requesting authorizations nor do they mitigate against potentially overlapping operations. As the number of entities conducting activities in Cook Inlet increases, the total number of authorized beluga whale takes also increases under that approach. Further, if two or more activities that alone would take only small numbers of marine mammals and have only negligible impacts are being conducted in close proximity to one another or at the same time, there is a much greater risk that the MMPA limits will be exceeded. Given that a variety of anthropogenic activities in Cook Inlet may be contributing to the population's decline, NMFS must implement a mechanism that addresses incidental taking more holistically.

A programmatic approach that assesses all activities in Cook Inlet that could result in incidental taking or that otherwise could be having adverse effects on the beluga whale population would provide NMFS with greater ability to comprehensively impose limits on the number of takes authorized for each entity. By establishing and implementing a cap on total annual takes authorized for all entities, NMFS has a greater chance of ensuring that the total taking does not impede recovery of the population. Deriving this total annual level of taking could be challenging given the lack of information on what has caused the continued decline of the Cook Inlet beluga whale population since the late 1990s. Nevertheless, whatever level is established, it should reflect the best available data on reproduction and survival rates, as well as the biological significance of disturbance on marine mammals (New et al. 2013). The method that NMFS uses to allocate the total annual take limit of beluga whales in Cook Inlet among the various activities or applicants could be based on an equally distributed authorized number of takes, or variable numbers of take based on the relative impact of the proposed activity, with additional mitigation measures required as necessary for certain activities to ensure that the takes for which they are authorized are not exceeded. If NMFS issues additional incidental take authorizations for beluga whales in 2016, the Commission recommends that NMFS include a total annual take limit for beluga whales in its final EA and allocate those takes among all entities holding or seeking authorizations in 2016 (and future years) to ensure that limit is not exceeded.

Marine mammal species in the action area

The draft EA identifies different assemblages of marine mammal species that could be impacted by each of the three proposed activities, even though portions of the individual action areas overlap. Although survey data are limited, at least ten marine mammal species⁶ potentially occur in Cook Inlet (Shelden et al. 2013). Four species—beluga whales, harbor seals, harbor porpoises, and gray whales—have been sighted in both the upper and lower inlet, while the other five—killer whales, fin whales, minke whales, Dall’s porpoises, and Steller sea lions—have been sighted only in the lower inlet (i.e., south of Kalgin Island).

The EA identifies the following species as impacted by the different applicants:

- EMALL—beluga whales, harbor seals, harbor porpoises, and killer whales;
- Bluecrest—beluga whales, harbor seals, harbor porpoises, killer whales, humpback whales, and Steller sea lions; and
- SAE—beluga whales, harbor seals, harbor porpoises, killer whales, humpback whales, Steller sea lions, Dall’s porpoises, minke whales, and gray whales.

Although a case can be made that EMALL’s activities have less potential to overlap with species typically found further south, EMALL has included killer whales but not gray whales in its take request. Bluecrest is operating in the lower inlet but has not included Dall’s porpoises, minke whales, or gray whales in its take request, even though those species were included by Bluecrest in a previous incidental take application (79 Fed. Reg. 54398). Furthermore, neither Bluecrest nor SAE has included fin whales in its take requests. Finally, information regarding gray whales, minke whales,

⁶ Sea otters also are likely to occur in Cook Inlet, but that species is under jurisdiction of the U.S. Fish and Wildlife Service.

and Dall's porpoises was not included in section 3.2 (Affected Biological Environment) of the draft EA even though they are included in SAE's estimation of takes.

In response to comments made by the Commission in previous letters⁷ regarding the omission of species that could be impacted by various activities in Cook Inlet, NMFS stated that "the issuance of an authorization to an applicant is a request-based process" (80 Fed. Reg. 50990) and that NMFS would work with the applicant to modify the request if it believes that other species should be included. However, the Commission believes that it is NMFS's responsibility to conduct its own assessment of which marine mammal species may be taken and therefore should be included in any authorization it issues. Moreover, NMFS should take steps to ensure that all entities conducting similar activities in the same areas include those species in their incidental take authorization applications.

As such, the Commission recommends that NMFS (1) ensure that all relevant marine mammal species are included in the final EA for all entities conducting activities in the action area and (2) include species information in section 3.2.3 of the final EA for gray whales, minke whales, and Dall's porpoises

The Commission hopes that these comments will be helpful to NMFS in meeting its responsibilities under the MMPA and National Environmental Policy Act. Please let me know if you have any questions.

Sincerely,



Rebecca J. Lent, Ph.D.
Executive Director

cc: Jon Kurland, NMFS Alaska Regional Office

References

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⁷ See the Commission's letters dated 31 January 2014, 4 September 2014, 14 October 2014, 13 April 2015, and 24 July 2015.