

MARINE MAMMAL COMMISSION
4340 East-West Highway, Room 700
Bethesda, MD 20814-4447

20 January 2009

Mr. P. Michael Payne
Chief, Permits Division
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway, Room 13635
Silver Spring, MD 20910

Dear Mr. Payne:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the application from the Port of Anchorage seeking authorization to harass small numbers of beluga whales, harbor seals, harbor porpoises, and killer whales incidental to Phase II of a five-year marine terminal redevelopment project. The Commission also has reviewed the National Marine Fisheries Service's 18 December 2008 *Federal Register* notice (73 Fed. Reg. 77013) soliciting comments on the application and on its intent to promulgate regulations under section 101(a)(5)(A) of the Marine Mammal Protection Act to authorize the requested taking for a five-year period. The Commission offers the following recommendations and comments.

RECOMMENDATIONS

The Marine Mammal Commission recommends that the National Marine Fisheries Service—

- refrain from publishing a proposed rule to authorize the taking of Cook Inlet beluga whales incidental to port redevelopment or any other activities that may be adversely affecting the stock until it has a better understanding of the causes of the observed population trends; and
- defer publication of a proposed rule until it completes a supplemental environmental assessment.

RATIONALE

The proposed marine terminal redevelopment project is designed to upgrade and expand the Port of Anchorage by replacing aging and obsolete structures and providing additional dock and backland areas. The proposed construction activities include pile-driving, dredging, backfilling, and compaction of fill. These activities have the potential to affect marine mammals in at least four ways: (1) by disturbance from sounds generated during construction, (2) by permanent alteration of habitat, (3) by suspension of contaminants from disturbed sediments in the construction area, and (4) by disturbance and injury from increased vessel traffic and noise during and after the planned expansion. Phase II of the project would occur from April to October annually and is expected to be completed late in 2014.

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The Commission provided comments to the Service on the Port of Anchorage's application for an incidental harassment authorization under section 101(a)(5)(D) of the Marine Mammal Protection Act by letter of 17 April 2008 (enclosed and incorporated herein by reference). In that letter, the Commission questioned whether the proposed activities would have only a negligible impact on the Cook Inlet beluga whale, recommended that the Service defer issuing an incidental take authorization until it has better information on the potential impact of the proposed activities on this stock, expressed concern that managers have repeatedly misjudged the status and resilience of this stock, and noted that the stock has no tolerance for further misjudgment, given its severely reduced state. On 15 July 2008 the Service issued the requested incidental harassment authorization to the Port of Anchorage despite the Commission's recommendation to the contrary.

Since then, the Service has taken two important actions. It listed the Cook Inlet stock of beluga whales as endangered and published a conservation plan for the species. The listing rule determined that "the population has not shown any signs of recovery despite harvest control" and noted that this fact strongly suggests that other factors are responsible for, or contributing to, the lack of recovery. The conservation plan identified the various factors that may be impeding the recovery of the stock. These include several factors that are associated with the redevelopment, expansion, and use of Anchorage's port facilities, such as pollution (e.g., from ballast water discharges or suspension of sediments), development, vessel traffic, and noise. The conservation plan assessed the threats posed to Cook Inlet beluga whales by some of these factors as being high, moderate, or unknown.

The Commission does not see how the Service can make the required determination that the proposed marine terminal redevelopment project will have only a negligible impact on Cook Inlet beluga whales, given that the population is in danger of extinction for as yet undetermined reasons and that the project will present some of the risks that have been identified as possibly causing or contributing to the stock's lack of recovery. The Marine Mammal Commission therefore recommends that the Service refrain from publishing a proposed rule to authorize the taking of Cook Inlet beluga whales incidental to port redevelopment or any other activities that may be adversely affecting the stock until it has a better understanding of the causes of the observed population trends.

The Service prepared an environmental assessment before issuing the one-year incidental harassment authorization. Based on that assessment, the Service determined that the proposed taking would have no more than a negligible impact on the affected species and stocks of marine mammals. The Service states in its 18 December 2008 *Federal Register* notice that it intends to prepare a supplemental environmental assessment to analyze impacts from proposed demolition activities and modification and extension of safety and harassment isopleths, as determined from a 2008 acoustic study conducted by the Port of Anchorage. The Marine Mammal Commission recommends that the Service defer publication of a proposed incidental take rule until it completes a supplemental assessment and can demonstrate that the planned upgrade and expansion activities, once mitigated, will not have a more than negligible impact on the Cook Inlet beluga whale.

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Please contact me if you have questions concerning our recommendations or comments.

Sincerely,

A handwritten signature in blue ink that reads "Timothy J. Ragen". The signature is written in a cursive style with a prominent initial 'T'.

Timothy J. Ragen, Ph.D.
Executive Director

Enclosure