

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

26 May 2009

Mr. P. Michael Payne, Chief
Permits, Conservation, and Education Division
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910-3225

Dear Mr. Payne:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the National Marine Fisheries Service's 23 April 2009 proposed rule (74 Fed. Reg. 18492) under section 101(a)(5)(A) of the Marine Mammal Protection Act. The rule would authorize the Port of Anchorage to harass small numbers of beluga whales, harbor seals, harbor porpoises, and killer whales incidental to a five-year marine terminal redevelopment project. The Commission offers the following recommendations and comments.

RECOMMENDATION

The Marine Mammal Commission recommends that the National Marine Fisheries Service withdraw the proposed rule and refrain from authorizing the taking of Cook Inlet beluga whales incidental to port redevelopment and expanded use until it has conducted further research to identify the factor or factors that are causing or contributing to the decline and/or lack of recovery of the population and can discount the factors associated with port construction and use as significant contributors.

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, demolition of the existing dock, 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 associated noise and pollution during and after the planned expansion. The proposed activities would occur from mid-2009 to late 2014. By letters of 17 April 2008 and 20 January 2009 (enclosed and incorporated herein by reference), the Commission provided comments to the Service on the Port of Anchorage's applications for incidental harassment authorizations under section 101(a)(5)(D) and the Service's notice of intent to issue regulations under section 101(a)(5)(A) of the Marine Mammal Protection Act. As in those letters, the focus of our concern continues to be the Cook Inlet beluga whale. We believe that a negligible impact determination is appropriate for the other species included in the proposed rule.

Concurrent with publication of this proposed rule, the Service issued a draft supplemental environmental assessment to provide additional analysis of the impacts of the proposed project on marine mammals. The draft supplemental assessment (1) updates the original environmental assessment to reflect (a) the listing of the Cook Inlet beluga whale as endangered under the Endangered Species Act and (b) the revised habitat classification for the action area identified in the Service's conservation plan for this species; (2) includes demolition of the existing dock as a component of the applicant's specified activities and the Service's proposed authorization and considers additional measures designed to mitigate impacts incidental to that demolition; (3) updates the analyses to consider the applicant's proposed pile-driving schedule; (4) analyzes a change in the threshold for Level B harassment for vibratory pile-driving (from 120 dB to 125 dB) and revises the area in which harassment is expected to occur based on a site-specific 2008 acoustics study; and (5) updates the analyses of environmental consequences based on reports of marine mammal interactions from monitoring carried out under incidental harassment authorizations.

In its 20 January 2009 letter, the Commission recommended that the Service defer publication of this proposed incidental take rule until it has a better understanding of the causes of the observed population trends of beluga whales in Cook Inlet and can demonstrate that the planned port upgrade and expansion activities, once mitigated, will not have more than a negligible impact on the Cook Inlet beluga whale. Neither the proposed rule nor the draft supplemental environmental assessment adequately addresses these concerns.

The population viability analysis cited in the final rule listing the Cook Inlet beluga whale stock as an endangered species concluded that there was a 62 percent probability that the population would continue to decline, a 26 percent chance of extinction within 100 years, and a 70 percent chance of extinction within 300 years. At the same time, the final rule identified several possible causes for the observed population trends. These include—

...the continued development within and along upper Cook Inlet and the cumulative effects on important beluga whale habitat. Ongoing activities that may impact this habitat include: (1) continued oil and gas exploration, development, and production; and (2) industrial activities that discharge or accidentally spill pollutants (e.g., petroleum, seafood processing waste, ship ballast discharge, effluent from municipal wastewater treatment systems, and runoff from urban, mining, and agricultural areas). Destruction and modification of habitat may result in "effective mortalities" by reducing carrying capacity or fitness of individual whales, with the same consequence to the population survival as direct mortalities. Therefore, threatened destruction and modification of Cook Inlet beluga whale DPS habitat contributes to its endangered status.

In essence, the Service has determined that the Cook Inlet beluga whale, although originally reduced in numbers by overhunting, remains in danger of extinction throughout all or a significant portion of its range for reasons that are as yet undetermined but that may include some of the factors that could result from the proposed dock construction activities and secondary effects

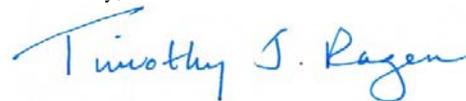
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associated with the anticipated use of the expanded port. Based on the projections in the Service's population viability analysis, it appears that the status quo is already jeopardizing the continued existence of the species and, if nothing is done to reverse the trends observed over the past 10 years, there is a high probability that the population will continue to decline, eventually to extinction.

Against this backdrop, the Commission does not see how the Service can support a determination that the increase in noise and other types of disturbance associated with the redevelopment project, the habitat degradation or destruction that is likely to occur, the suspension of potentially harmful sediments in the project area, and the disturbance, pollution, discharge of ballast water and other impacts associated with increased vessel traffic and use of the port would have a negligible impact on the Cook Inlet beluga whale or would not have an unmitigable adverse impact on the availability of beluga whales to subsistence hunters in Cook Inlet whose hunting opportunities have already been drastically curtailed. The Marine Mammal Commission therefore recommends that the National Marine Fisheries Service withdraw the proposed rule and refrain from authorizing the taking of Cook Inlet beluga whales incidental to port redevelopment and expanded use until it has conducted further research to identify the factor or factors that are causing or contributing to the decline and/or lack of recovery of the beluga whale population and can discount the factors associated with port construction and use as significant contributors.

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

Sincerely,



Timothy J. Ragen, Ph.D.
Executive Director

Enclosures