



MARINE MAMMAL COMMISSION

3 March 2010

Ms. Kaja Brix
Assistant Regional Administrator
Protected Resources Division
National Marine Fisheries Service
P.O. Box 21668
Juneau, AK 99802-1668

Dear Ms. Brix:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the National Marine Fisheries Service's 2 December 2009 proposed rule (74 Fed. Reg. 63080) to designate critical habitat for the endangered Cook Inlet stock of beluga whales under the Endangered Species Act. The Commission has provided recommendations concerning the designation of critical habitat in two previous letters—its 3 August 2007 letter commenting on the proposed listing rule and its 14 May 2009 letter commenting on the advance notice of proposed rulemaking regarding this proposed designation. As reflected in those letters, the Commission believes that designation of critical habitat for Cook Inlet beluga whales is one of the most important actions that can be taken to prevent the extinction of the population, and it strongly supports the Service in completing this action as soon as possible. Please incorporate those letters (enclosed) by reference.

RECOMMENDATIONS

The Marine Mammal Commission recommends that the National Marine Fisheries Service adopt its proposal to designate all waters and coastal areas of Cook Inlet used by beluga whales north of 60°25' N as critical habitat for Cook Inlet beluga whales. In addition, the Marine Mammal Commission recommends that the Service—

- expand the designation farther from shore to include all coastal waters less than 18 meters deep in the remaining portions of the inlet as critical habitat, including all such waters on the eastern side of the inlet;
- also include areas in the lower portion of the inlet that must be available for reoccupation if and when the population increases;
- adopt a precautionary approach by declining to exercise its discretion to exclude any proposed critical habitat based on economic considerations; and
- provide Fort Richardson's integrated natural resources management plan to the public and, in the final rule, explain the basis for its conclusion that the plan provides benefits to the Cook Inlet beluga whale population.

RATIONALE

Section 4(b)(2) of the Endangered Species Act directs the Service to designate critical habitat for listed species on the basis of the best scientific data available, after taking into consideration the

economic impact and any other relevant impact of specifying any particular area as critical habitat. Critical habitat is defined in section 3(5)(A) of the Act as—

- (i) the specific areas within the geographical area occupied by the species at the time it is listed in accordance with section 4 of this Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
- (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act, upon a determination by the Secretary that such areas are essential for the conservation of the species.

Further guidance is provided in the Service's regulations governing the designation of critical habitat (50 C.F.R. § 424.12(b)). The regulations require consideration of the following in formulating a designation: (1) space for individual and population growth, and for normal behavior; (2) food, water, air, light, minerals, or other nutritional or physiological requirements; (3) cover or shelter; (4) sites for breeding, reproduction, and rearing of offspring; and (5) habitats that are protected from disturbance or are representative of the historic geographical and ecological distribution of the species. The regulations also direct the Service to focus on the "principal biological or physical constituent elements" that are essential to the conservation of the species when designating critical habitat. Primary constituent elements include, but are not limited to, breeding sites, feeding areas, water quality or quantity, and tides.

Response to the Commission's Previous Recommendations

Applying these standards, the Commission recommended in its 14 May 2009 letter that the Service designate as critical habitat for Cook Inlet beluga whales all waters of Cook Inlet from Kalgin Island northward to the headwaters of Knik and Turnagain Arms and all coastal waters less than 18 meters deep in the remaining portions of the inlet. To a considerable extent, the Service's proposal adopts the Commission's recommendation: it includes all waters in the northern portion of the inlet and, in fact, draws the line for this portion of the proposed designation somewhat to the south of Kalgin Island. The Marine Mammal Commission fully supports this part of the proposal and recommends that the National Marine Fisheries Service include in the final critical habitat designation all waters and coastal areas within Cook Inlet used by beluga whales north of 60°25' N. This area includes much of the high-value habitat identified in the conservation plan for the population and, as described in the proposed rule, includes primary constituent elements such as essential feeding areas, sites for breeding, rearing calves, resting, and avoiding predators, and areas that are relatively free from disturbance.

The Commission's recommendation to include waters in other portions of the inlet out to a depth of 18 meters was based on observations indicating that the whales' habitat-use patterns are based more on depth than on distance from shore. In contrast, the Service proposed including most

of Kachemak Bay and all waters within two nautical miles of shore on the west side of the inlet. The reason for excluding shallow areas on the east side of the southern inlet is not clear. Those areas had been characterized as type 3 habitat, and other areas that were characterized as type 3 were included. The habitat characterized as type 3 includes important wintering areas, secondary summering sites, and historic habitat, and seems vital for recovery. For that reason, the Marine Mammal Commission reiterates its recommendation that the National Marine Fisheries Service include in the final designation all areas on both the east and west sides of the inlet out to a depth of 18 meters.

Designation of Currently Unoccupied Habitat

The Commission also recommended that the Service include in its critical habitat designation currently unoccupied habitat that was used historically and that will likely be important to support future population recovery. As the Service noted in its proposed rule, the designation of areas outside the geographical area currently occupied by a listed species is appropriate “only when a designation limited to its present range would be inadequate to ensure the conservation of the species.” The Service decided not to include areas outside the current range of the Cook Inlet beluga whale in its proposed designation because “any such areas are presently unknown (if they exist)” and because “the value of any such habitat in conserving this species cannot be determined.”

As discussed on page 63082 of the proposed rule, the range of beluga whales in Cook Inlet has contracted significantly over the past two decades, likely as a function of the reduced size of the population. Whereas the whales were once abundant and frequently sighted in the lower inlet during summer, they are now concentrated in the upper portion of the inlet. Such concentration strongly suggests that the upper reaches of the inlet are preferred habitat. However, the fact that the whales depended on the lower portion of the inlet when their numbers were larger suggests that the upper portion is not adequate to sustain a recovered population. The Service recognized as much in the proposed rule stating that “[a]n expanding population would likely use the lower inlet more extensively.” This being the case, and in light of the more extensive use of the lower portion of the inlet by beluga whales in the past, the Commission does not see how the species can be recovered (i.e., brought to the point at which the measures applicable to a listed species are no longer necessary) unless they are able to reoccupy at least some of this former range. That is, limiting the designation to the species’ current range would be inadequate to ensure the conservation of the species. In essence, the destruction or modification of critical habitat in areas not currently occupied could preclude recovery and hold the population in an endangered state indefinitely, which would be in no one’s best interest. The Marine Mammal Commission therefore recommends that the National Marine Fisheries Service review the existing data on beluga whale habitat use in the southern half of the inlet, identify those areas that were used before the population’s recent precipitous decline and are likely to be essential for recovery, and include them in the final critical habitat designation.

The need to include more than the currently occupied habitat in the designation is underscored not only by the contraction of the species’ range but also by the stock’s population trend. As reflected in the listing rule, the population likely has continued to decline over the past decade despite the establishment of strict limits on subsistence hunting. This suggests that, for some

reason, the currently occupied habitat and its primary constituent elements are not adequate to sustain the population, let alone support its recovery. Although one might expect Cook Inlet beluga whales to reoccupy former habitat if the population increases substantially from its currently depressed numbers, they may not do so or do so as quickly as they otherwise might for a variety of reasons, such as a failure to recognize and respond to potential habitat-related risk factors.

The Commission also notes that much of the information on foraging patterns, calving sites, and other habitat use relied upon by the Service in the proposed designation has been collected over the past 15 years during the period when the stock had already begun to decline and habitat-use patterns already may have been affected. Thus, the Service cannot be confident that the areas identified as high-use habitat in these studies are, in fact, sufficient to support a recovered population. A historical perspective, such as that provided by Mahoney and Sheldon (2000), may provide additional insight into past habitat use patterns, which, in turn, would provide a stronger basis for projecting future habitat use and identifying historically occupied habitat that merits inclusion in the critical habitat designation.

Special Management Considerations or Protection

The proposed rule includes a discussion of physical or biological features¹ that “may require special management considerations or protection.” The Service indicates that it interprets “may require” to mean that a biological or physical feature may require special management considerations presently or in the future. The Service then considers whether there presently is a negative impact on any of the identified features, a possible negative impact on the feature in the future, presently a need to manage the feature, or a possible need to manage the feature in the future. The Commission concurs with the Service’s application of these criteria and believes that all of the primary constituent elements identified by the Service may require special management considerations or protection.

Nevertheless, the Commission is not convinced that this type of detailed review of management considerations or protection is necessary or required under the Act. The regulations implementing section 4 of the Act define “special management considerations or protection” to mean “any methods or procedures useful in protecting physical and biological features of the environment for the conservation of listed species.” In keeping with this definition, section 424.12(b) of the implementing regulations seems to assume that any habitat areas that are essential to the conservation of a listed species because they provide space for population growth, feeding, breeding and the rearing of offspring, etc., may require special management considerations or protection. Against this backdrop, it does not appear that the type of analysis in which the Service examines particular threats to the population from particular sources is needed to support a critical habitat designation.

¹ The Commission interprets this term to include all aspects of the physical and biological environment inhabited by beluga whales, including the chemical aspects, which would include things like pollution and chemical contamination.

Economic Impacts

Section 4(b)(2) of the Endangered Species Act directs the Service to consider “the economic impact, and any other relevant impact, of specifying any particular area as critical habitat” and authorizes it to “exclude any particular area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat. . . .” However, the Service may not exclude an area on this basis if, based on the best scientific and commercial data available, it determines that the failure to designate the area as critical habitat will result in the extinction of the species. In the proposed rule and a separate regulatory impact review, the Service considers the impact of designating critical habitat on a variety of activities.

In those analyses, the Service correctly points out that the primary effect of a critical habitat determination comes from the consultation requirement of section 7(a)(2) of the Endangered Species Act. That section requires federal agencies, in consultation with the Service, to ensure that any action they authorize, fund, or carry out is not likely to result in the destruction or adverse modification of critical habitat. The same section requires that federal actions not jeopardize the continued existence of listed species. The Service appropriately concludes that a large subset of those activities that would result in the destruction or adverse modification of critical habitat also would jeopardize the continued existence of the species. This is particularly true if the Service has done a good job of identifying those areas that are essential to the conservation of the species when designating critical habitat.

The primary instance when critical habitat might be destroyed or adversely modified, but in which a jeopardy determination would not also be made, is when the critical habitat designation includes areas not currently occupied by the species. Even though such areas would be essential to the recovery of the species, the consulting agencies might not believe that activities would jeopardize the continued existence of the species if the species currently does not occupy those areas. The associated risk provides another compelling reason why the Service should include historically, but not currently, occupied areas in its critical habitat designation. The jeopardy prong of section 7 alone arguably is not sufficient to ensure that such habitat is not destroyed or adversely modified, even though it is essential for the recovery and conservation of the species.

The Commission agrees with the Service’s conclusion that the economic or other impacts of critical habitat designation must be evaluated in terms of the incremental impact of the designation beyond that which would apply under the jeopardy prong of section 7 by virtue of listing the species. As reflected in the regulatory impact review, the incremental impact of a critical habitat designation is relatively modest and does not support the exclusion of any of the proposed areas based on economic considerations, particularly when weighed against the significant conservation benefits to beluga whales from such designation. In addition, such exclusions can be considered by the Service only in instances when the exclusion would not result in the extinction of the species concerned. Because of the precarious status of the Cook Inlet beluga whale population, the importance of its remaining range to its continued existence, particularly in the upper portion of the inlet, and the Service’s inability to identify which factor or factors may be causing or contributing to

the decline over the past 10 years, the exclusion of any of the areas proposed as critical habitat from the final designation may well contribute to the population's extinction. In light of these considerations, the Marine Mammal Commission recommends that the National Marine Fisheries Service adopt a precautionary approach by declining to exercise its discretion to exclude any of the proposed critical habitat based on economic considerations.

The Commission also notes that the taking prohibition of the Marine Mammal Protection Act applies to any activity that would result in the taking of Cook Inlet beluga whales, whether or not they constitute federal actions. As such, most of the actions that would be subject to consultation under section 7 of the Endangered Species Act also would require an incidental take authorization under the Marine Mammal Protection Act. For all activities other than commercial fishing operations, this would require an incidental take authorization that can be issued only if the Service determines that the taking would have a negligible impact on the affected species or stock. The negligible impact threshold is higher (i.e., more risk-averse) than the jeopardy standard applicable under section 7 and would be applicable to many of the federal actions that could be expected to destroy or adversely modify critical habitat. This being the case, the already applicable requirements of the Marine Mammal Protection Act likely constrain certain activities that might occur within Cook Inlet if they would have more than a negligible impact on beluga whales. Thus, compliance with the Marine Mammal Protection Act's requirements likely would already have precipitated much of the economic or other impact that might otherwise result from the designation of critical habitat. This should be reflected in the final rule and supporting documentation.

Exclusion of Military Sites under the Sikes Act

The Service is considering whether to exempt areas owned or controlled by the Department of Defense from designation as critical habitat under section 4(a)(3)(B)(i) of the Endangered Species Act. That provision directs that such areas are to be excluded from designation as critical habitat if the Service determines in writing that an integrated natural resources management plan prepared under section 101 of the Sikes Act (16 U.S.C. § 670a) provides a benefit to the species for which critical habitat is being proposed. The Service received two requests for such exclusions, one from Elmendorf Air Force Base and the other from Fort Richardson pertaining to its Eagle River Flats range. The Service preliminarily determined that none of the areas within Elmendorf Air Force Base are included in the proposed critical habitat designation and, as such, an exemption is not necessary. The Service proposed to exclude the Eagle River Flats range from the designation based on its conclusion that Fort Richardson's integrated natural resources management plan provides benefits for the Cook Inlet beluga whale population. However, the proposed rule merely notes this conclusion but does not include sufficient detail regarding the plan for the Commission to provide an independent assessment as to whether it provides benefits specific to beluga whales and whether the exclusion of the Eagle River Flats area is warranted. The Marine Mammal Commission therefore recommends that, in the final rule, the Service provide that plan to the public and explain the basis for its conclusion that the plan benefits the Cook Inlet beluga whale population.

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Please contact me if you would like to discuss our recommendations and other comments.

Sincerely,



Timothy J. Ragen, Ph.D.
Executive Director

Enclosures

Literature Cited

Mahoney, B. A., and K. E. W. Sheldon. 2000. Harvest history of belugas, *Delphinapterus leucas*, in Cook Inlet, Alaska. *Marine Fisheries Review* 62:124–133.