

November 27, 2024

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

Re: Proposed Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the Port of Alaska Modernization Program Phase 2B: Cargo Terminals Replacement Project in Anchorage, Alaska (NOAA-NMFS-2024-0030)

Dear Ms. Harrison:

Friends of Animals,¹ on behalf of the organization and our members worldwide, submits the following comments to the National Marine Fisheries Service in response to the proposed construction activities associated with *Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the Port of Alaska Modernization Program Phase 2B: Cargo Terminals Replacement Project in Anchorage, Alaska*.² Friends of Animals opposes the proposed rulemaking, five-year regulations, Letter of Authorization (LOA), and one potential year-long IHA, which would approve authorizations from 2026 through 2030 for Level A and B harassment under the Marine Mammal Protection Act (MMPA) incidental to the Cargo Terminals Replacement Project. As the Don Young Port of Alaska (POA) is located within Area 1 of critical habitat for the Cook Inlet beluga whale population and is in proximity to a Biologically Important Area for the species, Friends of Animals urges the National Marine Fisheries Service (NMFS) to complete a biological opinion and further analysis on the cumulative effects of the anthropogenic activities in proximity to the POA before pursuing any new activities that risk impacting critically endangered Cook Inlet beluga whales (CIBW), and other marine mammals.

Redirecting resources toward restoring Anchorage's critical habitats is also imperative for safeguarding the survival of the CIBW population. While removal of the deteriorated cargo terminals is essential, NMFS has a priority in protecting CIBW by reducing disturbances in their range, which will contribute to overall habitat health. Years of

¹ Friends of Animals is an international nonprofit advocacy organization, incorporated in the state of New York since 1957. With tens of thousands of members worldwide, FoA advocates for animals both free-living and domestic. FoA has commented on numerous federal actions regarding Cook Inlet marine mammals, and Cook Inlet beluga whales.

² 89 Fed. Reg. 85686 (October 28, 2024).

construction at the POA will exacerbate noise pollution, accelerate habitat destruction, and degrade water quality, all of which could push the CIBW population closer to extinction.

A. The Cook Inlet beluga whales are far from recovery.

Cook Inlet beluga whales (*Delphinapterus leucas*) are critically endangered and have faced ongoing staggering declines for decades. The loss of even *one* Cook Inlet beluga whale should be considered devastating to the current population, as well as to the recovery of this magnificent species. As Cook Inlet belugas are a NOAA ‘species in the spotlight,’³ and due to lengthy historical management of the species, NMFS is familiar with the significant risks and barriers to the survival of one of Alaska’s most treasured species. After the finalization of a Recovery Plan in December of 2016,⁴ and a Species in the Spotlight 2021-2025 Priority Action Plan for the Cook Inlet beluga whale⁵ in place, NMFS should emphasize greater measures to honor these plans to enhance the survival of the species. Removing the deteriorated port is essential; however, reducing anthropogenic activities at the Port of Alaska is also crucial to prevent further harm to CIBW and other marine life.

While the population estimate for Cook Inlet belugas is estimated to have risen from between 250 and 317 in 2018, to between 290 and 386 in 2022, with a median estimate of 331 via aerial surveying and photo identification, the stability of this increase is still alarmingly low and uncertain.⁶ Prior population declines of 2.3% between 2008-2018 remain to be suspected as a result of a multitude of anthropogenic factors and unprecedented weathering events including heatwaves.⁷ Therefore, it should not be overlooked that a population of 331 individuals is not a significant improvement from the overall decline of 75% from the estimated population size of 1,300 in 1979.⁸

Despite this critical time for monitoring population trends, NOAA Fisheries have delayed aerial surveying of the species from June 2024, until June 2025, due to less aggregation of the whales in places they previously and regularly have been observed.⁹ While the proposed authorizations include increased monitoring methods, the project remains

³ NOAA Fisheries, Beluga Whale: In the Spotlight, <https://www.fisheries.noaa.gov/species/beluga-whale/spotlight>, (last visited November 12, 2024).

⁴ NMFS, *Recovery plan for the Cook Inlet beluga whale (Delphinapterus leucas)*, (December 2016), <https://repository.library.noaa.gov/view/noaa/15979> (“Recovery Plan”).

⁵ NOAA Fisheries, *Species in the Spotlight Priority Actions 2021-2025, Cook Inlet Beluga Whale (March 2021)*, http://media.fisheries.noaa.gov/2021-04/SIS%20Action%20Plan%202021_Cook%20Inlet%20Beluga-FINAL%20508.pdf.

⁶ *Id.*

⁷ NOAA Fisheries, *New Abundance Estimate for Endangered Cook Inlet Beluga Whales*, (June 15, 2023), <https://www.fisheries.noaa.gov/feature-story/new-abundance-estimate-endangered-cook-inlet-beluga-whales>.

⁸ *Id.*

⁹ *Id.*

⁹ NOAA Fisheries, *NOAA Fisheries to Delay New Aerial Survey for Cook Inlet Beluga Whales Until June 2025* (June 14, 2024), <https://www.fisheries.noaa.gov/feature-story/noaa-fisheries-delay-new-aerial-survey-cook-inlet-beluga-whales-until-june-2025>.

especially concerning since the resident population is known for behavioral congregation patterns, such as for feeding and reproduction.¹⁰

Moreover, a prominent number of authorizations are already allowing for the take of Cook Inlet beluga whales. **Between 2017 and 2025, NMFS has already authorized approximately 120,000 incidental takes of Cook Inlet beluga whales.**¹¹

B. The proposed regulations and Letters of Authorization (LOA) violate the Marine Mammal Protection Act and underestimate the effects of noise.

The Marine Mammal Protection Act (“MMPA”) was enacted in response to Congressional concern that “certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man's activities.”¹² Under the MMPA, it is unlawful to take any marine mammal unless as permitted by statutory exception, 16 U.S.C. § 1371(a), where take is defined as “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.”¹³

Under the MMPA, citizens are allowed to take “small numbers of marine mammals of a species or population stock” for less than “five consecutive years each” and only if such taking: (1) will have a negligible impact on such species or stock; and (2) will not have an unmitigable adverse impact on the availability of such species or stock for taking for subsistence uses.¹⁴ 16 U.S.C. § 1371(a)(5)(A)(i). To determine whether a take is negligible, NMFS should consider the potential cumulative impact from past, current, and future activities and their impact on the environmental baseline.

The potential Level B impacts of the proposed Modernization Project on marine species are varied and numerous. These impacts include hearing impairment, separation of family groups, loss of prey and habitat, disturbances to biologically sensitive feeding and mating areas, bodily harm, behavioral changes, and synergistic and cumulative effects, among others. Despite the proposed increased monitoring efforts, the numerous negative effects on CIBW are not negligible. Even with improved monitoring efforts, the proposed actions would allow for an estimated 471 incidental Level B takes of the CIBW population for a total of up to five consecutive years.¹⁵ Yet, the Marine Mammal

¹⁰ NOAA Fisheries, *Species in the Spotlight Priority Actions 2021-2025, Cook Inlet Beluga Whale* (March 2021), http://media.fisheries.noaa.gov/2021-04/SIS%20Action%20Plan%202021_Cook%20Inlet%20Beluga-FINAL%20508.pdf (March 2021).

¹¹ Migura, M. & Bollini, C. To take or not take? Examination of the status quo process for issuing take authorizations of endangered Cook Inlet beluga whales and implications for their recovery, *Conservation Science and Practice*, e590 (2021).

¹² 16 U.S.C. § 1361(1).

¹³ 16 U.S.C. § 1362(13).

¹⁴ 16 U.S.C. § 1371(a)(5)(A)(i).

¹⁵ See NOAA, NMFS, *Proposed Rulemaking for Issuance of a Letter of Authorization and an Incidental Harassment Authorization for the Take of Marine Mammals Incidental to the Don Young Port of Alaska’s Cargo Terminals Replacement (CTR) Project in Anchorage, Alaska, Draft Environmental Assessment*, (October 2024) at 92.

Commission 2018 Stock Assessment clearly states, “even one take every two years may still impede recovery.”¹⁶

Noise disturbances remain among the highest threats to the CIBW population. The proposed authorizations would allow for simultaneous in-water construction activities at numerous locations, involving two “spreads,” or construction crews at a time with a crane and one pile driving hammer per crew, and further allow for the possibility of three “spreads” to be present.¹⁷ However, NMFS points out in its Draft Environmental Assessment that, “this scenario is not addressed.”¹⁸ Even if a third “spread” is unanticipated, NMFS should include the possible noise levels and cumulative effects consequential to three “spreads” in its final considerations, before issuing any authorizations, as proposed actions rely on an estimated schedule and involve 699.5 hours alone for in-water installation and removal of 1,273 piles.¹⁹ The project further involves in-water pile cutting, onshore demolition, and other construction activities that generate noise. Therefore, NMFS cannot reasonably conclude that the associated acoustic disturbances from the proposed project will have a negligible or reversible impact on CIBWs. Further, the potential one-year authorization following the initial five-year period should not even be contemplated without conducting a more thorough analysis.

C. The proposed rulemaking, regulations, LOA, and potential IHA violate the Endangered Species Act.

The Endangered Species Act (ESA), safeguards species classified as endangered or threatened with extinction.²⁰ 16 U.S.C. § 1531 *et seq.* Under its provisions, federal agencies must consult either Fish and Wildlife Service (FWS) or NMFS to determine if a proposed project is “not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species.”²¹ 16 U.S.C. §1536(a)(2).

Formal consultation is required if it is determined that an action may affect a listed species or critical habitat.²² 50 C.F.R. § 402.14. The formal consultation includes but is not limited to:

¹⁶ Marine Mammal Commission, Alaska Marine Mammal Stock Assessments, Cook Inlet Stock at 112 (2018), <https://www.mmc.gov/wp-content/uploads/2018-Alaska-SAR-Cook-Inlet-Beluga-Whale.pdf>.

¹⁷ See NOAA, NMFS, *Proposed Rulemaking for Issuance of a Letter of Authorization and an Incidental Harassment Authorization for the Take of Marine Mammals Incidental to the Don Young Port of Alaska’s Cargo Terminals Replacement (CTR) Project in Anchorage, Alaska, Draft Environmental Assessment*, (October 2024) at 21.

¹⁸ *Id.*

¹⁹ *Id.*, at 22-24.

²⁰ 16 U.S.C. § 1531 *et seq.*

²¹ 16 U.S.C. §1536(a)(2).

²² 50 C.F.R. § 402.14.

- (1) Review all relevant information provided by the Federal agency or otherwise available. Such review may include an on-site inspection of the action area with representatives of the Federal agency and the applicant.
- (2) Evaluate the current status of the listed species or critical habitat.
- (3) Evaluate the effects of the action and cumulative effects on the listed species or critical habitat.
- (4) Formulate its biological opinion as to whether the action, taken together with cumulative effects, is likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of critical habitat.

Mitigation methods and increased monitoring programs are not enough to protect the fragile CIBW population. Given that the proposed authorizations would affect the CIBW population and its habitat, NMFS is required to conduct a formal consultation and issue a biological opinion.²³ See 16 U.S.C. § 1536(b). The biological opinion must use the best scientific and commercial data available.²⁴ 50 C.F.R. § 402.14(d).

D. A more thorough analysis of noise and the cumulative effects of anthropogenic activities on marine mammals is needed before more projects are initiated in the Cook Inlet.

Cook Inlet beluga whales possess sensitive hearing and reliance on acoustic communication, making them particularly vulnerable to the disruptive effects of anthropogenic noise, even within long ranges.²⁵ Impairment of their hearing from pile driving, and intense, ongoing noise exposure can disorient their sense of direction, negatively impacting their ability to communicate, navigate, forage and locate prey, and avoid predators.²⁶ Research has also indicated that marine mammals may avoid returning to areas where pile driving has occurred for up to three days following the activity.²⁷

NFMS acknowledges in its own Recovery Plan that anthropogenic noise from pile driving, drilling, dredging, tugboats, and even surveillance helicopters pose high risks of interfering with the beluga's recovery.²⁸ NMFS additionally acknowledges that masking of calls and vocalizations is also consequential to commercial shipping activities.²⁹ Only

²³ See 16 U.S.C. § 1536(b)

²⁴ 50 C.F.R. § 402.14(d)

²⁵ Recovery Plan, at II-52.

²⁶ NOAA Fisheries, *Vocal Repertoire of Cook Inlet Beluga Whales Documented for the First Time* (December 11, 2023), <https://www.fisheries.noaa.gov/feature-story/vocal-repertoire-cook-inlet-beluga-whales-documented-first-time>.

²⁷ 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.

²⁸ Recovery Plan at III-13.

²⁹ Castellote, et al., *Anthropogenic Noise and the Endangered Cook Inlet Beluga Whale, Delphinapterus leucas: Acoustic Considerations for Management*, 80 *Marine Fisheries Review* 63–88 (2019),

recently in 2023, it was found that Cook Inlet belugas have forty-one calls.³⁰ Each of the most utilized calls were identified as compromised or entirely masked by shipping activities, which are prominent in the POA.³¹

Increasing an abundance of projects and conditions that make the Cook Inlet “naturally noisy, complex, and dynamic,” only raises “potential for negative effects when anthropogenic sources of noise are introduced into the inlet.”³² Therefore, the National Marine Fisheries Service (NMFS) should complete a biological opinion before the rulemaking and explore alternatives to reduce the duration and activity of Phase 2B of the Modernization Project.

The Recovery Plan also addresses cumulative impacts at length, stating that, “Although individual activities may be deemed insignificant when considered independently, creeping normality (e.g., death by a thousand cuts) can cause substantial adverse effects to nearly any entity, including CI [Cook Inlet] belugas, at both individual and population levels.”³³ Furthermore, although “[a]pplications for Incidental Harassment Authorizations (IHAs) historically have been reviewed on the basis of an individual activity in isolation . . . [the] high level of human activity in Cook Inlet has increased such that cumulative effects of multiple activities must be appropriately accounted for.”³⁴ NMFS’s rhetoric in this document, as well as in others, establishes its high-priority concern for Cook Inlet belugas and the effects of cumulative impacts and noise on this population.

Despite this establishment of high concern in the Recovery Plan, the cumulative effects of numerous threats, have remained shockingly under-studied. To prevent further decline of the species, NMFS should not stray from conducting a more comprehensive assessment of the cumulative effects related to noise, habitat degradation, chemical exposure, mortality, stranding, climate change, and migration of the species and its prey.

Specifically, the synergistic effects of noise and toxic chemical exposure are particularly concerning in coastal areas where pollutants are concentrated, and in areas heavy with potential spillage, construction, engine leaks, and consistent vessel traffic. Despite consideration of the possible negative impacts, little has been researched on this as a cumulative threat. While the 2021-2025 Recovery Action Plans initiated analysis of “emerging contaminants of concern,” including “energetic content, contaminants, stable isotopes, and fatty acids,” in prey in 2017, an expansion of the studies related to toxins

https://www.researchgate.net/publication/333356584_Anthropogenic_Noise_and_the_Endangered_Cook_Inlet_Beluga_Whale_Delphinapterus_leucas_Acoustic_Considerations_for_Management.

³⁰ NOAA Fisheries, Vocal Repertoire of Cook Inlet Beluga Whales Documented for the First Time (December 11, 2023), <https://www.fisheries.noaa.gov/feature-story/vocal-repertoire-cook-inlet-beluga-whales-documented-first-time>.

³¹ Castellote, et al., *Anthropogenic Noise and the Endangered Cook Inlet Beluga Whale, Delphinapterus leucas: Acoustic Considerations for Management*, 80 *Marine Fisheries Review* 63–88 (2019), https://www.researchgate.net/publication/333356584_Anthropogenic_Noise_and_the_Endangered_Cook_Inlet_Beluga_Whale_Delphinapterus_leucas_Acoustic_Considerations_for_Management.

³² Recovery Plan, at III-12-13.

³³ Recovery Plan, at VI-31.

³⁴ *Id.*

and cumulative impacts will further lead to an improved understanding of the cumulative effects harming beluga whales.³⁵ While in vivo research in belugas has not been conducted, recent studies in mammals, including humans, have confirmed that noise and exposure to specific organic solvents have negative and synergistic physiologic impacts.³⁶

Conclusion.

Even the smallest potential take could have irreversible consequences for Cook Inlet beluga whales. Without clear evidence that this critically endangered group is on a successful path to recovery, Friends of Animals requests that NMFS exercise its authority to impose more rigorous mitigation measures to prevent any harm to this world-renowned species. The continuous approval of incidental take authorizations by federal agencies jeopardizes the recovery and survival of this group of beluga whales, who cannot endure additional losses. Thank you for your consideration of these comments.

Respectfully submitted,

/s/ Elizabeth Holland

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³⁵ NOAA Fisheries, *Vocal Repertoire of Cook Inlet Beluga Whales Documented for the First Time* (December 11, 2023), <https://www.fisheries.noaa.gov/feature-story/vocal-repertoire-cook-inlet-beluga-whales-documented-first-time>.

³⁶ Recovery Plan, at III-8. (citing Peter Steyger, *Potential of chemical ototoxicity by noise*. 30 Seminars in Hearing, 38-36. (2009)).