



April 23, 2008

***Via Facsimile, Electronic and Certified Mail***

Carlos M. Gutierrez  
Secretary of Commerce  
U.S. Department of Commerce  
1401 Constitution Avenue, N.W., Room 5516  
Washington, D.C. 20230  
Fax: (202) 482-2741  
Email: cgutierrez@doc.gov

James Balsiger, Acting Director  
NOAA Fisheries  
1315 East-West Highway  
Silver Springs, MD 20910  
Fax: (301) 713-1940  
Email: jim.balsiger@noaa.gov

**RE: 60-Day Notice of Intent to Sue: Violations of the Endangered Species Act; Failure to Finalize Proposed Listing Rule for the Cook Inlet Beluga Whale (*Delphinapterus leucas*)**

Dear Mr. Gutierrez and Mr. Balsiger:

This letter serves as a sixty-day notice on behalf of the Center for Biological Diversity, Natural Resources Defense Council, Alaska Center for the Environment, Cook Inletkeeper, Alaska Community Action on Toxics, Friends of the Anchorage Coastal Wildlife Refuge, North Gulf Oceanic Society, and Dr. Sylvia Brunner of intent to sue the Secretary of Commerce and the National Marine Fisheries Service/NOAA Fisheries (collectively “NMFS”) over violations of Section 4 of the Endangered Species Act (“ESA”)(16 U.S.C. § 1531 *et seq.*) for the agency’s failure to make a final listing determination for the Cook Inlet distinct population segment (“DPS”) of the beluga whale (*Delphinapterus leucas*) under the ESA. *See* 16 U.S.C. § 1533(b)(6). Specifically, NMFS has arbitrarily and unlawfully determined that a “substantial disagreement” regarding the population trend of the Cook Inlet beluga whale exists, and that this “disagreement” warrants a six-month extension of the deadline for finalizing the listing rule for the species. *See* 73 Fed. Reg. 21578 (April 21, 2008). This letter is provided pursuant to the 60-day notice requirement of the citizen suit provision of the ESA, to the extent such notice is deemed necessary by a court. *See* 16 U.S.C. § 1540(g).

**BACKGROUND****A. The Cook Inlet Beluga Whale**

The Cook Inlet beluga whale’s long and frequently interrupted journey towards ESA listing is well documented in our April 20, 2006 Petition, the 2006 and 2008 Status Reviews, and

summarized in the Proposed Rule. *See* 72 Fed. Reg. at 19855. We will not repeat that history here. Instead, we note that it has been fully two decades since the Cook Inlet beluga whale was first recognized by NMFS as potentially needing the protections of the ESA. *See* 53 Fed. Reg. 33516 (August 31, 1988) (“Endangered and Threatened Wildlife and Plants; Identification of Marine Vertebrate and Invertebrate Candidate Species for Listing under the Endangered Species Act”). Given the estimated population of approximately 1300 whales in 1979 had declined to 650 by 1994, it is reasonable to assume the population was on the order of 700-1000 animals in 1988. If NMFS had acted to protect the species in 1988, the overharvest and consequent decline might have been prevented, and the species would not be facing the high probability of extinction currently confronting it. To avoid any further declines and additional risk to the beluga’s viability, NMFS must not repeat the mistakes of the past and continue to delay the necessary and inevitable listing of the Cook Inlet beluga whale under the ESA. Instead, NMFS must promptly finalize the listing rule and list the beluga as Endangered. Only with such listing will the full force of our Nation’s most powerful and successful wildlife law be brought to bear to help stem the Cook Inlet beluga whale’s decline and start the species on the path to recovery. Unfortunately, rather than comply with its statutory mandates and follow the overwhelming weight of the science, NMFS has chosen to once again illegally delay protection for this critically endangered species.

## **B. Violation of the ESA**

No matter how imperiled a species might be, it does not receive any protection under the ESA until it is officially listed as Threatened or Endangered. As a result, Congress aptly described Section 4 of the ESA, 16 U.S.C. §1533, the section that sets out the process for listing a species, as “[t]he cornerstone of effective implementation of the Endangered Species Act ...” S. Rep. No. 418, 97th Cong., 2d Sess. at 10; *see also* H. Rep. No. 567, 97th Cong., 2d Sess. at 10.

Section 4 sets forth a detailed process by which the Secretary of Commerce through his designee NMFS adds to the lists of Threatened and Endangered species. 16 U.S.C. §1533. The listing process can begin either by citizen petition or by internal NMFS processes. In either case, strict timelines apply once the process is initiated. 16 U.S.C. §1533(b)(3)(A).

Upon receipt of a petition to list a species under the ESA, NMFS must determine whether the petition “presents substantial scientific or commercial information indicating that the petitioned action may be warranted.” *Id.* NMFS must make this initial, “90-Day Finding,” “[t]o the maximum extent practicable, within 90 days after receiving the petition.” *Id.* If NMFS determines that the petition presents substantial information that a listing may be warranted, it must “promptly commence a review of the status of the species” to determine whether listing is (1) warranted, (2) not warranted, or (3) warranted but precluded by other pending proposals that require immediate attention. 16 U.S.C. § 1533(b)(3)(B). This finding, known as the 12-Month Finding, is due “within 12 months after receiving a petition.” *Id.* NMFS has no discretion to extend the time allotted for the 12-Month Finding.

If the 12-Month Finding concludes that listing is warranted, NMFS must simultaneously publish a proposed rule to list the species in the Federal Register. 16 U.S.C. § 1533(b)(3)(B)(ii). Within 12 months of publishing the proposed rule, NMFS must make a final listing determination for the species. At this point, NMFS must either publish a final rule listing the species, publish a

withdrawal of the proposal, or in the rare instance where there is substantial disagreement about scientific data, delay a final determination for up to six months to solicit more scientific information. 16 U.S.C. §§ 1533(b)(6)(A)(i) & 1533(b)(6)(B)(i).

The petition to list the Cook Inlet beluga whale as Endangered was received by NMFS on April 20, 2006. On April 20, 2007 NMFS published a proposed listing rule to list the Cook Inlet beluga whale as Endangered. *See* 72 Fed. Reg. 19854. That proposed listing rule triggered an obligation for NMFS to finalize the listing decision for the Cook Inlet beluga whale by no later than April 20, 2008. 16 U.S.C. § 1533(b)(6)(C).

However, instead of finalizing the proposed listing rule, on April 22, 2008 NMFS published a notice purportedly invoking 16 U.S.C. § 1533(b)(6)(B)(i), which, in limited circumstances, authorizes a six-month delay in making a final listing determination. Specifically, the ESA states:

If the Secretary finds with respect to a proposed regulation referred to in subparagraph (A)(i) that there is substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination or revision concerned, the Secretary may extend the one-year period specified in subparagraph (A) for not more than six months for purposes of soliciting additional data.

16 U.S.C. § 1533(b)(6)(B)(i).

NMFS asserts that there is a “substantial disagreement” regarding population trends in the Cook Inlet beluga whale:

However, several commenters, including Alaska Department of Fish and Game, questioned the sufficiency or accuracy of the available data used in the rulemaking. We have considered these comments, and we find that substantial disagreement exists over a certain aspect of the data presented in the proposed rule. In particular, there remains disagreement over the population trend of belugas in Cook Inlet, and whether the population is now demonstrating a positive response to the restrictions on subsistence harvest imposed in 1999.

72 Fed. Reg. 19854.

The primary basis for this “disagreement” is the slightly higher numbers of whales counted in the June 2007 abundance survey. *Id.* However, this new abundance data cannot reasonably alter the determination that the beluga is endangered and therefore interpretation of this data does not rise to the level of a “substantial disagreement” justifying a delay under 16 U.S.C. § 1533(b)(6)(B)(i). In fact, the 2008 Status Review and Extinction Risk Assessment of Cook Inlet Belugas, released by NMFS the week *before* the deadline extension, explicitly included and considered the 2007 abundance estimate in making its extinction risk assessment. The Status Review concluded that *even with the 2007 abundance estimate*, under relatively optimistic scenarios, the Cook Inlet beluga whale still has a 79% chance of extinction over the next 300 years. In other words, regardless of the whether or not the 2007 count represents an increasing population, the Cook Inlet beluga whale faces

a sufficiently high risk of extinction to warrant the protections of the ESA. Further survey data from 2008 cannot reasonably be expected to change this fact. As such, it is not “relevant to the determination concerned” and cannot justify an extension under 16 U.S.C. § 1533(b)(6)(B)(i).

Because NMFS has not established any lawful justification for the six-month delay in listing the Cook Inlet beluga whale, NMFS’ finding is unlawful and must be immediately withdrawn. *See, e.g. Marbled Murrelet v. Lujan*, 1992 U.S. Dist. LEXIS 14645 (W. Dist Wash. 1992)(“The court finds that defendant Secretary of the Interior’s Notice of Six-Month Extension regarding his decision on whether to list the marbled murrelet under the Endangered Species Act (‘ESA’), 16 U.S.C. § 1533, does not comply with the requirements of the Act in that the Secretary has not established the existence of any ‘substantial disagreement regarding the sufficiency or accuracy of the available data relevent to the determination . . . concerned.’”).

Time is of the essence in all efforts to protect endangered species, but especially so for the Cook Inlet beluga whale, which is one of the most endangered cetacean populations on the planet. The Cook Inlet beluga whale, our organizations and their members, and the public are entitled to timely protection of species under the ESA within the deadlines set by Congress. Accordingly, an acceptable remedy would be the immediate issuance of a final rule listing the Cook Inlet beluga whale as Endangered. Moreover, given NMFS is already overdue in completing the listing rule, we see no reason for NMFS to delay the effective date of the final rulemaking for 30 days following publication in the Federal Register as is often done with ESA listing. *See* 5 U.S.C. § 553(d)(3)(allowing rules to take effect immediately if good cause exists); *see also Marbled Murrelet v. Lujan*, 1992 U.S. Dist. LEXIS 14645 (requiring final listing determination to be published within three days and made effective upon publication after finding the Secretary to have unlawfully invoked a six-month extension of the final listing determination.).

If NMFS does not act within 60 days to correct these violations of the ESA, we will pursue litigation in federal court. We will seek injunctive and declaratory relief, and legal fees and costs regarding these violations. If you have any questions, wish to meet to discuss this matter, or feel this notice is in error, please contact me at (760) 366-2232 x304. Thank you for your concern

Sincerely,



Brendan Cummings  
Center for Biological Diversity  
P.O. Box 549  
Joshua Tree, CA 92252