



**UNITED STATES DEPARTMENT OF COMMERCE**  
**National Oceanic and Atmospheric Administration**

*National Marine Fisheries Service*

*P.O. Box 21668*

*Juneau, Alaska 99802-1668*

October 28, 2004

Colonel Timothy J. Gallagher  
U.S. Army Corps of Engineers  
P.O. Box 898  
Anchorage, Alaska 99506-0898

Re: POA-2000-97-O  
Passage Canal 32

Attn: John Klutz

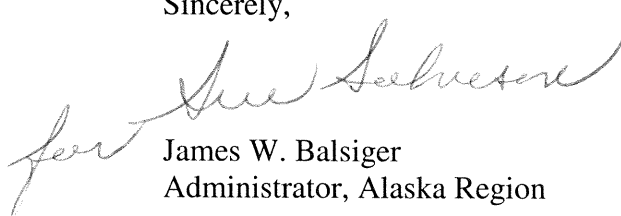
Dear Colonel Gallagher:

The National Marine Fisheries Service (NMFS) has reviewed your letter regarding the above referenced Department of the Army permit for work in conjunction with the Whittier Marina project. The permittee, Passage Canal Development LLC, its agent Peratrovich, Nottingham, Drage, and associated contractors have repeatedly violated the terms and conditions of the permit since the original permit was issued in September of 2000. The violations, including the most recent violations witnessed by NMFS and Corps staff, suggest a pattern of willful disregard for the Corps' permitting process and associated environmental safeguards. NMFS is concerned that these repeated violations, as summarized in the enclosed chronology, have caused substantial adverse effects to living marine resources.

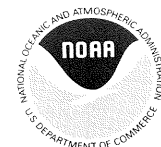
In the past the Corps has issued notices of violation and noncompliance to the permittee and its agent and contractor, and has accepted applications for after-the-fact permit modification to resolve the various violations. Despite repeated admonishment by the Corps, the permittee has continued to violate the permit and cause unauthorized impacts to living marine resources, and NMFS has seen no indication that this pattern will change. NMFS recommends that the Corps take all necessary action to ensure that the permittee complies with its authorization, potentially including issuing a cease and desist order and levying fines. We urge you to demonstrate that permit stipulations are important for protecting natural resources and violations will not be tolerated. We also recommend that the Corps consider referring this case to the Environmental Protection Agency for enforcement under the Clean Water Act for unauthorized discharges. For your information, the NMFS Office of Law Enforcement is continuing to investigate potential violations of the Marine Mammal Protection Act associated with this project.

We look forward to working with you to address these issues. Brian Lance is the NMFS contact for this project, and can be reached at (907) 271-1301.

Sincerely,

  
James W. Balsiger  
Administrator, Alaska Region

Enclosure



cc: USFWS, EPA, ADGC, ADNOR-OHMP, ADEC - Anchorage  
NMFS Enforcement – Anchorage  
Records – Lori Durall

Mr. James Barnett  
Passage Canal Development LLC  
10050 Prospect Drive  
Anchorage, Alaska 99507-5932

Ms. Sandra Donahue-Morris  
Peratrovich, Nottingham, and Drage  
1506 West 36<sup>th</sup> Avenue  
Anchorage, Alaska 99503

Mr. Rick Hohnbaum  
City Manager  
City of Whittier  
P.O. Box 608  
Whittier, Alaska 99693

Chronology of Events for the Whittier Marina Project  
Compiled October 25, 2004

**September 6, 2000**

The original permit was issued to Passage Canal Development LLC (PCD) for construction of a new harbor facility on approximately 13 acres to include the construction of wave barriers/docks, mooring facilities, discharge of fill, and dredging in Whittier, Alaska. NMFS did not provide any specific conservation recommendations because the project was designed and the permit conditioned to avoid and minimize impacts to living marine resources. The project design was a result of pre-application coordination including NMFS review of a dive video and dive report for the proposed site.

**April 25, 2003 (M-2000-0097) and August 22, 2003 (N-2000-0097)**

Permit modifications authorized a time extension in order to complete the project, a change in the mooring float configuration, placement of additional dolphins and catwalks, and an extension of the timing window to drive pilings from August 22 through March 1.

**August 28, 2003**

PCD and its representative Peratrovich, Nottingham, Drage (PN&D) were issued a notice of noncompliance and Notice of Violation (NOV), respectively, by the Corps for unauthorized work in waters of the United States for fill into Passage Canal. The NOV cited an August 19, 2003 telephone conversation between Corps staff and Ms. Sandra Donohue, PN&D Staff Engineer, and quoted Ms. Donohue stating that it is "PN&D's position to knowingly disregard terms and conditions of DA permits, as they see necessary in the interests of project construction, without first seeking permit modifications from the Corps of Engineers."

**September 12, 2003**

Passage Canal Development LLC and PN&D were again issued a notice of violation by the Corps for unauthorized work in Whittier Creek.

**November 13, 2003**

The Corps sent a letter to PCD regarding resolution of the August violations. This resolution was reached after obtaining information from PCD and PN&D, interagency field investigations and subsequent meetings with PCD and PN&D.

**February 9, 2004**

NMFS received a copy of a request for modification to the permit to include changes to the main mooring float/breakwater, the west fill pad and floating breakwater mooring, the main pier floats and other floats, the moorage the dry stack storage pad, the dredging, pile driving, and the discharge of fill. Significant proposed modifications included changing the dredging methodology; variances for timing windows for pile driving, dredging and filling; dredge spoil and disposal methods; and dredging quantities.

**March 1, 2004**

NMFS provided comments to the Corps of Engineers on the proposed modification to the original permit. NMFS made several Essential Fish Habitat (EFH) conservation recommendations. In addition, based on the fact that the proposed permit modifications would increase the impacts of the project substantially, NMFS recommended that the proposed permit modification be denied.

**April 19, 2004**

The Corps responded to NMFS's March 1, 2004 EFH conservation recommendations. The Corps noted that with the exception of our conservation recommendation requesting compensation for the alteration of 4.3 acres (EFH Conservation Recommendation # 6), all of our conservation recommendations were accepted.

**May 10, 2004**

NMFS responded to the Corps accepting the Corps' decision regarding Conservation Recommendation #6, but disagreeing that transplanting and re-establishing eelgrass beds is ineffective.

**August 10, 2004**

NMFS was copied on an email from Sandra Morris (PN&D) to John Klutz at the Corps. The subject of the email was a pre-dredge meeting, possibly the week of September 6, and included a copy of the dredge plan for Whittier Marina. NMFS reviewed the dredge plan; there was no mention of blasting.

**September 1, 2004**

NMFS was copied on an email from Sandra Morris (PN&D) to John Klutz at the Corps. This email was a summary of the pre-dredge meeting held at PN&D on August 31, 2004. Meeting notes indicate no discussion of blasting. However, NMFS understands the Corps informed PCD and PN&D that a blasting plan, reviewed by NMFS, was required prior to any blasting. Blasting plans include detailed guidelines to ensure minimizing the effects of blasting on marine mammals and fish. PCD and PN&D indicated no blasting would be required during dredging operations (John Klutz, pers. comm.).

**October 5, 2004**

Matthew Eagleton (NMFS), Mark Boland (NMFS), Mark Schroeder (USFWS), and Joe O'Connor (USFWS) visited the project site and noticed that the dredging silt curtain was open approximately 100 feet while the dredge was operating, resulting in a muddy plume heading from the opening into Passage Canal.

**October 8, 2004, approximately 9:00 am**

John Klutz (Corps) arrived at the project site and learned of intention to blast rocks from dredge area.

**October 8, 2004, approximately 10:00 am**

John Klutz informed contractor and PN&D that no blasting plan had been filed and blasting was not authorized under the Corps permit, noted the presence of a harbor seal (*Phoca vitulina*) within the blast containment area, and instructed the contractor not to do any blasting until NMFS and USFWS were contacted. John Klutz left the project site and informed NMFS of two potential permit violations: 1) a breach in the silt curtain, and 2) PN&D's intention to detonate explosives during the course of dredging.

**October 8, 2004, approximately 10:30 am**

John Klutz returned to project site and learned blast had occurred sometime between 10:00 and 10:30.

**October 8, 2004, approximately 11:00 am**

NMFS contacted Sandra Morris at PN&D requesting no detonation until NMFS had the opportunity to devise a plan to ensure the safety of the harbor seal.

**October 8, 2004, approximately 11:15 am**

Matt Clark (NMFS Enforcement) contacted Sandra Morris at PN&D regarding taking of marine mammals under MMPA. During this conversation NMFS learned the blasting had occurred.

**October 8, 2004, approximately 12:00 noon**

NMFS again spoke with John Klutz. Mr. Klutz indicated numerous dead fish were floating in the Whittier harbor in the wake of the blasting. The seal was not observed again and its fate remains unknown. (Marine mammals, including harbor seals, are sensitive to noise and pressure waves.)

**October 8, 2004, approximately 2:30 pm**

John Klutz returned to the project site and learned that a second blast had taken place after he had advised PN&D that blasting was not authorized, and the permit would need to be revised to include a blasting plan.

**October 13, 2004**

An adult Stejneger's beaked whale (*Mesoplodon stejnegeri*) beaches (first observed approximately 9:15 a.m.) and later dies (around 12:00 noon) in Passage Canal, approximately 1.5 miles from the project area. A necropsy was performed that day. The female Stejneger's beaked whale was 17½ feet and lactating. The cause of death is not known at this time. The animal was bleeding from the head. (Contrary to news reports, it did not die of a gunshot wound.) Beaked whales are sensitive to subsurface pressure waves and noise, and pressure pulses from high explosives are the one type of noise known to be able to cause physical injury or death to marine mammals, with death often showing a delayed response (Richardson et al. 1995).

**October 16, 2004**

NMFS received a call from the Whittier Police Department regarding a stranded marine mammal (described as a porpoise) at the head of Passage Canal, approximately 0.5 mile from the project area. The animal was another Stejneger's beaked whale. This whale was more than nine feet long, and may be the calf of the lactating female. A necropsy was performed on this beaked whale, although cause of death is not known at this time.

Two marine mammal strandings in four days in Passage Canal is very unusual and a cause for concern. According to NMFS stranding records, there have been no marine mammal strandings in Passage Canal for the past five years. Also, the Whittier Police have no records of marine mammal strandings during the past two years.