

**MARINE MAMMAL COMMISSION
4340 EAST-WEST HIGHWAY, ROOM 905
BETHESDA, MD 20814**

8 March 2006

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

Dear Kaja:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed (1) the National Marine Fisheries Service's notice of availability of the Administrative Law Judge's recommended decision concerning the establishment of long-term regulations to govern the taking by Alaska Natives of Cook Inlet beluga whales and (2) the Administrative Law Judge's recommended decision. We provide the following comments and recommendations thereon.

The Commission was a party to this proceeding and on 15 April 2005 submitted extensive comments on the Service's proposed long-term harvest regime. As many elements of the Service's proposal were incorporated into the recommended decision, the Commission's earlier comments remain germane. We will not repeat those comments here but rather request that they be incorporated herein for further agency consideration. In particular, we remain concerned that the regime recommended by Judge McKenna (1) responds too slowly to instances where the beluga population is declining, stable, or growing at an unusually slow rate, (2) does not fully satisfy the stipulations agreed to by the parties to govern the long-term regime, and (3) does not require that the current survey effort be maintained or, alternatively, include mechanisms that adequately respond to any diminishment in the quality of the data and estimates resulting from the Service's population monitoring program.

The Commission believes that the Service should retain the option to reconsider the interim harvest limits that would be established through 2009 under the recommended decision. These limits are set forth in section 216.23(f)(2)(iv) of the draft proposed rule and would allow the harvest of up to eight whales between 2005 and 2009. Although the Commission's 15 April 2005 response indicated a willingness to acquiesce to this proposal, the most recent population estimate was unexpectedly low and has prompted us to reconsider. When the 2005 estimate of 278 whales is used, the five-year running average of estimated abundance drops to 340 whales. This is below the proposed "floor" of 350, at which all harvest would stop under the proposed long-term regime. Further, when this latest data point is incorporated into the analyses of population trends, there is a 93 percent probability that the growth rate of the Cook Inlet beluga population is below two percent

and a 71 percent probability that the growth rate is negative (i.e., that the stock is declining). If the long-term harvest regime recommended by the Administrative Law Judge for 2010 and beyond were in place, this observed rate would place the population in the “low growth rate” category. As such, no more than five whales could be taken during a five-year period, even at population sizes that are more than twice the most recent estimate. We are not advocating that the interim harvest be curtailed immediately on the basis of this single estimate. Nevertheless, the Marine Mammal Commission recommends that the Service retain sufficient flexibility in the final rule to allow it to reduce or suspend the harvest during the interim period if very low abundance estimates persist beyond this one year. Should the Service be unable or unwilling to incorporate such a provision into the final rule, the Commission recommends that the Service work with Native hunters to encourage them to voluntarily reduce or suspend the harvest under such circumstances.

Based on the information contained in the 16 February 2006 *Federal Register* notice, we are unclear as to how, procedurally, the Service intends to conclude this rulemaking. Although published as a “proposed rule,” the notice does not include any proposed regulations. This is a break from past practice in rulemakings conducted under section 103 of the Marine Mammal Protection Act, in which the agency has published revised proposed regulations along with its request for comments on the Administrative Law Judge’s recommendations. Does the Service believe that the final rule will be patterned closely enough on the original (December 2000) proposed rule to obviate the need for a reproposal or that referencing the judge’s recommended draft proposed rule is sufficient to meet the notice and comment requirements of the Administrative Procedure Act? If not, what are the Service’s plans for publishing a revised proposed rule? This needs to be clarified.

In addition to these general concerns, the Commission provides the following specific comments on the recommended decision:

Page 11, first paragraph – The decision indicates that, based on the available evidence, there is a 74 percent chance that the growth rate of the Cook Inlet beluga whale population is below two percent and that there is a 46 percent chance that the growth rate is negative. This discussion does not factor in the most recent population estimate. Dr. Goodman has redone the analysis referred to by Judge McKenna and has determined that there is now a 93 percent probability that the growth rate is below two percent and 71 percent probability that the rate is negative. This needs to be recognized by the Service and, as recommended above, factored into the final rule.

Page 34, first full paragraph – This paragraph notes that the establishment of a population “floor” at 350 whales “is a reasonable reflection of Congressional intent.” However, the judge goes on to note that “the current five year abundance average is 371, so the floor should not become an issue for the Native Alaskans unless the population declines by more than 5.7 percent.” In the few months between the issuance of the recommended decision and the issuance of the 2005 abundance estimate, this assessment has changed considerably. The five-year abundance average is now 340 whales and, as such, a harvest may no longer be consistent with Congressional intent. This issue should be analyzed in the final rule.

Page 34, footnote 17 – In this footnote, the Administrative Law Judge agrees with the Commission’s point that the Service needs to commit to a level of survey effort capable of detecting population declines with reasonable certainty. This needs to be recognized in the final rule. If there is a possibility that the Service will not be able to meet this standard in the future, sufficient flexibility needs to be incorporated into the harvest regime to allow the Service to add additional protections for the whales (e.g., by reducing allowable harvest limits) to offset increased uncertainty in abundance estimates and/or a reduced ability to detect population trends.

Page 38, second full paragraph – The judge characterizes the Commission comments with respect to the unusual mortality event provision of the harvest regime as “really nothing more than a request for better science when better scientific evidence is not currently available.” Although we would like there to be “better science” on this aspect of the proposed harvest regime, the judge’s assessment does not fully capture the Commission’s comments. The crux of the issue is how to make appropriate management decisions in the face of less than optimal information. The general principle embodied in the Marine Mammal Protection Act and in similar legislation is that a precautionary approach should be taken when such information is lacking or incomplete. Here, the Service is making an assumption that the data on which it is relying represents “normal” years in terms of stranding events. The Commission believes that such an assumption is unwarranted, inasmuch as the years in question represent the period during which known human causes of mortality were extremely low, yet the population showed no signs of recovery and even appeared to experience a further decline. The Commission therefore continues to believe the Service should not rely on these assumptions as part of its harvest management regime until it has conducted the research needed to verify those assumptions.

Page 41, first full paragraph – The judge recommends that the Service “consider MMC’s suggestion [concerning growth rates] and serious consideration should be given to making the best use of information as it becomes available.” In his view, “[t]his approach would better balance the needs of recovery with the needs of subsistence hunters.” Consistent with the judge’s assessment, the Commission reiterates its recommendation that the harvest management regime consider population trends over shorter intervals (e.g., 5 to 10 years) rather than relying exclusively on the long-term trends relative to 1994. (See second paragraph of the discussion of the fourth stipulation in the Commission’s 15 April 2005 response.)

Page 45, section 216.23(f)(2)(v) – As recommended above, this section should be amended to allow the Service to reduce these harvest levels prior to the year 2010 if the average abundance over running five-year intervals remains below the 350-whale threshold.

Page 45, section 216.23(f)(2)(v)(B) – This provision specifies that co-management agreements may include “provisions regarding the sex composition of the harvest.” Either here, or in the preamble to the final rule, the Service should clarify that the rationale for such limitations would be to minimize the taking of reproductively active females in the harvest.

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Page 45, section 216.23(f)(2)(v)(C) – This provision should be rewritten to specify that the Service will strive to conduct annual surveys with precision at least as good as in the recent past.

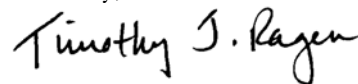
Page 45, section 216.23(f)(2)(vi)(B) – Consistent with our recommendation above regarding page 41, the Commission believes that short-term growth rates may be more important than the overall trend since 1994, particularly as we move farther into the future. This provision should be amended accordingly or a new criterion added that looks not only at the rate since 1994 but also at rates during other, shorter (e.g., 5 or 10-year) intervals.

Page 48, section 216.23(f)(2)(viii) – The judge recommended that the Service commit to and seek funding for various studies “[i]f the Cook Inlet Beluga Whale population continues to experience less than 1% growth and well before the five year abundance average reaches 350....” This provision needs to be rewritten to reflect the fact that the five-year abundance average has already dipped below 350 whales. In this context, the judge’s recommendation serves to underscore the urgency with which the agency needs to pursue such studies. To that end, we attach a copy of the Commission’s 25 January 2006 letter expressing our concern about the insufficiency of funds allocated for research on the Cook Inlet beluga whale population.

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Please let me know if you have any questions concerning these recommendations and comments.

Sincerely,



-for-

John E. Reynolds, III
Chairman

Attachment