

COOK INLET KEEPER

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VIA FACSIMILE
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November 26, 2000

Donna Wieting, Chief
National Marine Fisheries Service
Office of Protected Resources
Marine Mammal Conservation Division
1315 East-West Highway, 13th Floor
Silver Spring, MD 20910-3226

Re: Comments on Proposed Rule: Taking of Cook Inlet, Alaska, Stock of Beluga
Whales by Alaska Natives (56 FR 59164 (Oct. 4, 2000))

Dear Ms. Wieting:

I. Introduction

Cook Inlet Keeper is a nonprofit organization dedicated to protecting the Cook Inlet watershed and the life it sustains. On behalf of Keeper's 600+ members living in the Cook Inlet area, please accept these comments on the above-referenced proposed rule and accompanying Draft Environmental Impact Statement (DEIS).

Cook Inlet Keeper appreciates NMFS's efforts to address the dramatic decline of beluga whales in Cook Inlet, and applauds NMFS work to respect the cultural significance of a subsistence harvest in Cook Inlet. However, based on a review of the proposed rule and the accompanying DEIS, and in light of the substantial history on this matter, Keeper believes NMFS has succumbed to political pressures, and unfairly and illegally foisted the belugas' decline solely on Alaska Native subsistence hunting, without adequate review and consideration of other anthropogenic factors.

Keeper does not argue that Native subsistence takes cannot have a significant impact on the small and localized Cook Inlet beluga population. Keeper does assert, however, that NMFS is taking a simplistic approach to a highly complex issue, and is threatening the continued survival of this tenuous stock by failing to address land use, pollution and other anthropogenic issues in its management strategy.

II. Comments

A. Marine Mammal Protection Act

The MMPA requires NMFS to "prepare conservation plans . . . as soon as possible, for any species or stock designated as depleted." 16 U.S.C. § 1383b(b)(1)(C) (emphasis added). The conservation plan must be designed for "conserving and restoring the species or stock to its optimum sustainable population." 16 U.S.C. § 1383b(b). Now, rather than moving ahead with a comprehensive plan to address beluga whale survivorship, NMFS has arbitrarily opted to focus only on one possible factor in the whales' decline (i.e. Native Alaska subsistence hunting). While NMFS clearly has the authority to regulate native harvests pursuant to the MMPA, this authority in no way authorizes NMFS to summarily dismiss its responsibility to consider other factors under 16 U.S.C. § 1383b(b)(1)(C).

NMFS bases its entire regulatory strategy on the presumption that Native subsistence hunting alone "is believed to be responsible for the observed level of decline" of Cook Inlet beluga whales. 65 Fed. Reg. 59165 (Oct. 4, 2000). Yet this sweeping presumption hinges on a single year's data, i.e. the 1999 population abundance estimate. *Id.* Similarly, the last three years of population data show no statistically significant increase in the number of Cook Inlet belugas, despite the 1999 moratorium on subsistence takes. Clearly, the inference exists within these discrepancies that factors other than Native subsistence takes are involved in the complex picture of beluga survivorship.

Accordingly, Keeper believes NMFS is subverting the purposes and provisions of the MMPA by failing to develop and implement a conservation plan "as soon as possible" for the Cook Inlet beluga stock.

B. National Environmental Policy Act

NEPA requires all EIS documents to consider the direct, indirect, and cumulative impacts of agency action. 40 C.F.R. § 1502.16. A cumulative impact on the environment "results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions . . ." 40 C.F.R. § 1508.7. Cumulative impacts may result from "individually minor but collectively significant actions taking place over a period of time." *Id.*

The DEIS's cumulative impacts assessment is flawed in several respects. First and foremost, in the DEIS's conclusion on cumulative impacts, NMFS states: "the recovery of the CI beluga stock is dependent on the identification of those factors which have caused this stock to decline. . ." DEIS § 4.14, p. 65. Yet nowhere does NEPA or MMPA law or regulation require a direct causal link showing harm. To do so raises the regulatory bar to unreachable heights, because demonstratively proving causal links in the natural environment is akin to finding the proverbial needle in a haystack. Rather, the burden rests on NMFS to show that potentially harmful activities, such as oil & gas, logging, mining, and municipal waste, do not negatively affect the whale. NMFS relies on insufficient support throughout the DEIS to conclude such sources do not harm belugas during mating, birthing or feeding activities. As a result, it must consider these activities when devising a legitimate conservation plan.

Second, the DEIS summarily reviews various anthropogenic sources in Cook Inlet, then jumps to the unsupported conclusion that none will harm the beluga whale stock. Yet NMFS devotes no

part of the DEIS to the analysis required to support such a finding. See Council on Environmental Quality, *Considering Cumulative Effects Under the National Environmental Policy Act* (1997). At a minimum, NMFS must analyze the cumulative and synergistic impacts anthropogenic activities have on whales and their habitat, including GIS analysis involving land use, permitted pollution and toxic site information. Consistent with the growing body of scientific literature and government regulations advocating watershed-based management, NMFS should analyze anthropogenic impacts on the beluga whale in the context of the Cook Inlet watershed. For a preliminary review of the types of pollution sources and activities NMFS should include in such a review, see Cook Inlet Keeper, *Cook Inlet GIS Atlas on CD ROM* (1998) (available from Cook Inlet Keeper).

Finally, federal rules require NMFS to evaluate "reasonably foreseeable" impacts with potentially "catastrophic consequences," even if their probability of occurrence is low. 40 C.F.R. § 1502.22(b). The DEIS fails to properly characterize and consider a variety of impacts and issues flowing from various anthropogenic activities in Cook Inlet:

1. Oil & Gas Activities

a. The DEIS plainly concedes it lacks the information needed to "accurately predict the effects of an oil spill on beluga whales." DEIS 4.8.4, p. 45. Therefore, under NEPA and 40 C.F.R. 1402.22, NMFS clearly lacks the legal authority to patently dismiss oil-based impacts on the whale in any conservation or recovery plan addressing the whale's decline.

b. The DEIS relies on antiquated spill data. For example, with the exception of the 1987 Glacier Bay spill, the most current oil spill data cited by NMFS is from 1979. The DEIS fails to cite current spill data from Department of Conservation Spill Prevention and Response (SPAR) division, the National Response Center, spill response and contingency plans filed by industry, and other sources. Without such basic and available information, NMFS cannot reasonably begin to understand the impacts of oil on beluga whales.

c. The DEIS focuses on acute rather than chronic exposures to oil by beluga whales, and fails to account for temporal, geographic and whale behavioral considerations relevant to oil/whale interactions. For example, summer spills at Trading Bay could have significantly more effect on feeding and breeding whales than a winter spill in the same location. Furthermore, the DEIS fails to address long term exposures to chronic oil pollution (this issue is raised here because it is not discussed adequately in either the Oil Spill (4.8.4) or Other Pollutants (4.8.5) sections of the DEIS).

d. The DEIS fails to cite and analyze important EVOS research conducted at the NMFS/Auke Bay Laboratory which shows increased salmon mortality at petroleum aromatic hydrocarbon (PAH) concentrations as low as 1 ppb. Because salmon is an important food source for belugas, this research implicates the potential for reduced food availability for belugas in chronically or acutely oiled waters. It also raises serious questions about chronic toxic effects on belugas from ingested hydrocarbons.

e. The DEIS fails to account for aging and unfit pipeline infrastructure in and around Cook Inlet, and the acute and chronic oil spills they contribute to Cook Inlet. Cook Inlet has approximately 156 miles of subsea and land-based oil pipelines, and because most of these pipelines were installed prior to 1970, they "are approaching the end of their expected life span

and need closer monitoring and testing." Tim Robertson & Parker Horn Company, *Overview of Pipeline Regulatory Requirements, Cook Inlet, Alaska* (May 2000) (prepared for the Cook Inlet Regional Citizens Advisory Council). The 1999 spill from the Dillon Platform pipeline, with evidence suggesting that external scouring caused the pipe to corrode from the outside inward, is an excellent example of the dilapidated state of oil pipeline infrastructure in Cook Inlet. The risks posed by inadequate pipeline condition and oversight are compounded by recent information suggesting Cook Inlet is more seismically active than previously understood. See Peter J. Haeussler, et al., *Potential seismic hazards and tectonics of the upper Cook Inlet basin, Alaska, based on analysis of Pliocene and younger deformation*, GSA Bulletin, v. 112, no. 9 (Sept. 2000).

2. Sewage Discharges

a. The DEIS notes that "bacterial infection of the respiratory tract is one of the most common diseases encountered in marine mammals." DEIS, p. 20. Yet NMFS fails to consider the fact that virtually all the wastewater from Cook Inlet's major population centers flows from facilities with Clean Water Act exemptions which allow the discharge of largely untreated wastes directly into prime beluga habitat. These largely untreated effluents pose significantly greater risk of bacteriologic infection to beluga whales than would effluents from secondary or tertiary treatment plants. Furthermore, NMFS fails to consider relevant geographic, oceanographic and temporal issues regarding sewage discharges and beluga whales. For example, the Anchorage and Kenai POTWs experience marked spikes in effluent volume during summer tourist months when belugas congregate in these areas to feed, mate and birth. Additionally, effluent discharges during slack tides can lead to high concentrations of bacteria and pollution in localized areas where belugas congregate.

3. Toxic Contamination

a. The DEIS fails to cite preliminary data available from EPA on toxic pollution found in a wide array of Cook Inlet subsistence foods. EPA, *Cook Inlet Contaminant Study Preliminary Findings* (1998). The data reveal a wide range of toxic substances in numerous fish and shellfish consumed by Cook Inlet beluga whales. NMFS reliance on limited beluga tissue sampling does not eliminate the risks posed by toxic contaminants, especially if the Cook Inlet tissue samples were taken from younger whales which bioaccumulate fewer contaminants than older whales (this comports with the traditional knowledge that past Native takes have focused on larger, older animals).

b. The DEIS fails to consider terrestrial inputs of toxic chemicals from contaminated sites. Superfund sites, hazardous wastes sites, and similar areas regulated under state and federal law.

4. Oil & Gas Wastes

a. The DEIS pays short shrift to the billions of gallons of hydro-carbon contaminated produced waters discharged into prime beluga habitat each year. The DEIS relies solely on the industry-funded FBASCO study (DEIS, p. 48), yet fails to consider other toxicity data generated under facility NPDES permits. The DEIS should consider up to date toxicity information on produced waters, taking into account the high flow volumes, low treatment technologies and sensitive receiving waters at many Cook Inlet facilities.

b. The DEIS also cites only one source on drilling mud toxicity (DEIS, p. 49). Yet the cited study indicated that 11% of the tested drilling mud samples "exceeded toxic levels for the test subjects." *Id.* Without any further analysis, the DEIS then takes a broad leap to conclude that a 11% toxicity in test species does not translate to adverse impacts for Cook Inlet belugas. NMFS needs to substantiate this conclusion. Drilling mud constituents vary considerably depending on stratum, cost and other factors, and biocides, anti-scaling agents and other toxic additives are regularly mixed with muds to improve performance. As a result, water-based drilling muds can be highly toxic, and their toxicity can vary greatly. See Sakhalin Watch, *Muddied Waters* (2000) (available from commentor). Due to varying toxicities in different muds, NMFS should not only update its information on drilling mud toxicities generally, but it should also address issues omitted from the cited study, namely, drilling muds used during exploration activities.

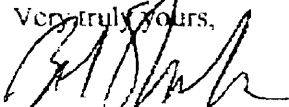
5. Nonpoint Source Pollution and Land Use

a. The DEIS summarily concludes that "[d]etermining the impact of municipal [stormwater] discharges on the beluga whale stock is not possible." DEIS, p. 51. While accurate characterization of nonpoint source pollution can be laborious, it is certainly not impossible. For example, the Municipality of Anchorage, the Kenai Peninsula Borough, Cook Inlet Keeper, and other groups and local governments have extensive GIS information on coastal watersheds, and numerous models exist to facilitate assessments of nonpoint source impacts. NMFS should rely on available information on impervious cover, slope steepness and land type/use to produce run-off coefficients estimating nearshore sediment loading during dry and wet weather events. For NMFS to summarily dismiss a nonpoint source impact assessment as "impossible" points yet again to a bias against considering anything other than hunting in the whales' decline.

III. Conclusion

Thank you for considering these comments when finalizing the proposed rule. If you have any questions or concerns regarding these comments, please contact me at (907) 235-4068 or bob@inletkeeper.org.

Very truly yours,


Bob Shavelson
Executive Director