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May 14, 2009

*Ms. Kaja Brix*

*National Marine Fisheries Service*

*Protected Resources Division*

*PO Box 21668*

*Juneau, Alaska 99802-1668*

Re: ANPR to Designate Critical Habitat for Cook Inlet Beluga Whales

Dear Ms. Brix:

Thank you for the opportunity to submit comments on the advance notice of proposed rulemaking to designate critical habitat for Cook Inlet beluga whales.

RDC is a statewide business association comprised of individuals and companies from Alaska's oil and gas, mining, forest products, tourism, and fisheries industries. RDC's membership includes Alaska Native corporations, local communities, organized labor, and industry support firms. RDC's purpose is to encourage a strong, diversified private sector in Alaska and expand the state's economic base through the responsible development of our natural resources.

RDC members who live, recreate, and work in and around Cook Inlet are committed to the recovery of the beluga whale. Over the years, we have worked closely with our members and the National Marine Fisheries Service (NMFS) on a number of initiatives to assist in the recovery of the stock.

NMFS' biologists have acknowledged the sole cause for the population decline of Cook Inlet beluga whales was the subsistence harvest that transpired in the 1990s. As we indicated in our comments of June 27, 2005, May 30, 2006, and August 3, 2007, we continue to believe that there is no evidence that human activity, other than the aforementioned subsistence harvest, is negatively impacting the beluga's environment and ecology, either through access to, or production of, prey species, reproduction and subsequent calving, social interactions, migration to and from Upper Cook Inlet, or otherwise. Unfortunately, their current listing under the Endangered Species Act now requires critical habitat designation. In short, we believe that the designation of critical habitat and subsequent mitigation measures should be limited to the extent practicable. We believe NMFS shared this opinion when it stated, "*No information exists that beluga habitat has been modified or curtailed to an extent that it is likely to have caused the population declines observed within Cook Inlet.*"

([www.fakr.noaa.gov/prules/72fr19854.pdf](http://www.fakr.noaa.gov/prules/72fr19854.pdf))

Critical habitat designation will place additional burden on economic and community development activities in and around Cook Inlet with no clear, corresponding benefit to the stock. Though it is understood that critical habitat designations do not necessarily restrict development, they do give agencies the opportunity to require additional stipulations or mitigation measures during the consultation process. These would add costs and time to projects that are oftentimes already at an economic disadvantage in the geographically-isolated communities of Alaska. Further, the additional requirements from critical habitat designations likely would have limited benefits to the Cook Inlet beluga whale population and would likely make projects more susceptible to litigation, further impacting project timelines and costs.

The impacts to whales from economic activities in the Cook Inlet are minimal. In fact, according to the October 19, 1999 Federal Register, NMFS reviewed “existing information on fish runs, oil and gas activities, sewage problems, and other sources of contaminants”...and found ... “the existing information suggests that beluga are not stressed by anthropogenic factors in Cook Inlet.” NMFS has no documented reason to believe this situation does not remain true today.

We strongly urge the agency to not follow the model of the North Pacific Right Whale where 95,200 square kilometers was designated as critical habitat with very little or no data to justify such designation. However, if NMFS determines that some areas of critical habitat must be designated to conserve the species, we request the agency only designate areas where those physical or biological features truly “essential to the conservation of the species” as is required by section 3(5)(A)(i) of the Endangered Species Act, do in fact exist. In addition, as is also required by the Act, in 3(5)(B), “critical habitat shall not include the entire geographical area which can be occupied.” Unfortunately, such extensive critical habitat designation is being advocated by predatory, non-Alaskan environmental interests.

As requested by the agency, following are comments addressing the 11 main issues.

### ***1. Information on the past and current numbers and distribution of Cook Inlet beluga whales***

Photo identification studies conducted by LGL, and funded by Chevron and ConocoPhillips, have been conducted in recent years and should be the basis for determining the population, age structure, and distribution of Cook Inlet beluga whales.

Very limited temporal population and distribution data of Cook Inlet beluga whales has been collected in single annual aerial surveys conducted by NMFS since 1994. Unfortunately, these studies have not shown any population trends with a 95 percent level of significance. This is disturbing given it is known over 300 animals were taken during the subsistence hunts of the mid-to-late 90s in addition to an unknown number of dependent young that may have perished as a result. A study from 2001 by Litsky predicted it would take 5 to 7 years after the unsustainable subsistence harvest stopped, before growth would be seen in the population. As predicted, since 2005, there has been a 35 percent increase in the population using this methodology.

In light of Litsky, clearly the methodology of these aerial surveys given such large standard deviations is being called into question by agency biologists and members of the public, especially in light of the contradictory listing decision. The following issues must be addressed before the methodology of this study can be proven superior to photo identification: color changes as individuals reach sexual maturity and the inability to spot juveniles from the airplane in murky Cook Inlet waters; the likelihood of missing significant numbers of diving individuals; the methodology for converting the raw aerial counts and the accompanying video footage of the whales to the final population estimate being derived in part from methodologies used in Bristol Bay, where there is significantly higher clarity to the water column.

Satellite tracking of some individuals was also conducted by NMFS within the last decade and data may have helped determine the range for some individuals through most, but not all, of the year.

In addition to the 1994-present aerial surveys, a 1979 survey is often cited. The methodology of the 1979 study is completely different than the 1994-present surveys. This study determined an estimate of 1,293 animals, though its methodology has repeatedly been questioned. This number should be discarded. Sadly, this one estimate has been used to set the carrying capacity for the entire Inlet and subsequent recovery objectives as well as the population viability analysis. Indeed, NMFS stated in the May 31, 2000 Federal Register, “The true K (carrying capacity), which is the basis for OSP determinations, for this stock is unknown. Furthermore, reliable historical abundance estimates, which may be used as a substitute for K, are not available.” Yet, for some reason, 1,300 continues to be used.

In reality, the carrying capacity of the Cook Inlet for beluga whales has likely declined. A potential cause for this decline in carrying capacity may be the constant release of fine silts from glaciers, filling the Inlet up at a steady rate. This is documented by the increased frequency of dredging that occurs. Thus, it is likely the Cook Inlet is able to support fewer animals than may have historically been found in the Inlet. A much more realistic number should have been used. The associated abundance estimate by the agency of 653 animals in 1994, before the unsustainable harvest of the mid-90s occurred, appears to be a much more realistic number.

There is little to no evidence showing where these animals reside in the winter, and hence members from this stock may even intermix with Bristol Bay beluga whales. If they are found to interbreed with the Bristol Bay population, then this population should not be listed as a DPS.

Traditional Ecological Knowledge is also very important in determining the current population of the belugas. Indeed a NMFS report from the August 2005 aerial survey reports, “Several Natives approached belugas near Big and Little Susitna Rivers where whales were later observed by the aerial crew; unusually high numbers of juveniles and calves were present with the white adult belugas.”

Finally, recent observations cited 10 belugas in the mouth of the Kenai River on April 26, 2009 (*Redoubt Reporter*). According to personal observations, this is likely the first time in over 10 years beluga whales have been seen in this area. The ANPR federal register notice states “An expanding population would likely use the lower Inlet more extensively” so this recent observation would appear to indicate an expanding population.

## ***2. Information describing the habitat type and quality of marine, estuarine, and freshwater habitats for all Cook Inlet beluga whales***

Very little work has been done to identify primary constituent elements (PCE) for the Cook Inlet beluga whales. Federal regulations governing critical habitat designations mandate that, “...an area lacking a PCE may not be designated in the hope it will acquire one or more PCEs in the future.” Specific critical habitat designation must be scientifically confirmed and deemed truly essential to the conservation of the species and not just presumed to be.

## ***3. Within areas occupied by Cook Inlet beluga whales, information regarding the physical and biological features that are essential to the conservation of the DPS***

Cook Inlet belugas have much lower concentrations of PCBs and DDT than other stocks found in Alaska, Greenland, Arctic Canada and the Saint Lawrence estuary in eastern Canada. In fact,

Becker et al. (2000) compared tissue levels of total PCBs, total DDT, chlordane compounds, hexachlorobenzene, dieldrin, mirex, toxaphene, and hexachlorocyclohexene and found the Cook Inlet beluga whales had the lowest concentrations of all. In addition, hepatic concentrations of cadmium and mercury were lower in the Cook Inlet population as compared to the Arctic Alaska populations. In addition, commercial, sports, and subsistence fisheries have long taken salmon and eulachon from Cook Inlet and contaminant levels for these species have never been an issue.

Finally, the conservation plan indicates, “The amount of fish required to sustain this population is unknown.” Historical fish runs from the Alaska Department of Fish and Game however, show fish are managed responsibly and indicate that belugas are not prey limited. Therefore designating upstream critical habitat in spawning areas or fishing grounds in the Inlet is unwarranted.

***4. Any special management considerations or protection currently associated with essential physical and biological features within areas occupied by Cook Inlet beluga whales, such as any land use management plan, a state statute, a municipal ordinance, or other binding local enactment***

Development activities in Cook Inlet do not occur in a regulatory vacuum, as they are strictly regulated under numerous state and federal environmental laws. Belugas have been and will continue to be an important part of state, federal, and local oversight and the associated public process.

In addition, there is a co-management agreement in place that limits the subsistence harvest of Cook Inlet beluga whales. This agreement is working as the population has increased 35% in the last three years.

***5. Any specific areas within the range of Cook Inlet beluga whales that may not qualify for critical habitat because they lack essential physical or biological features or may not require special management consideration or protections***

Cook Inlet beluga whale numbers have increased 35% in the past three years without Endangered Species Act management considerations and protections. Therefore, the entire area within the range of Cook Inlet beluga whales should not qualify for critical habitat designation.

***6. Any specific areas outside the area occupied by Cook Inlet beluga whales that are essential for their conservation***

No, there are not areas outside of the area occupied by Cook Inlet beluga whales that are essential for their conservation.

***7. Any specific areas that should be excluded from critical habitat designation because the benefits of such exclusion outweigh the benefits of specifying such area as part of critical habitat***

All of the Cook Inlet beluga whale’s range should be excluded from critical habitat designation. Cook Inlet beluga whales have coexisted with oil and gas activity, community discharges, commercial fishing, vessel traffic, coastal development, etc. without significant impact for nearly half a century, and it wasn’t until pressure from the subsistence harvest that their numbers dramatically declined.

***8. Any current or planned activities in the range of Cook Inlet beluga whales and their possible impacts on areas that may qualify as critical habitat***

All current and planned activities in Cook Inlet will be appropriately managed under existing local, state, and federal environmental statutes and regulations.

***9. Any economic or other relevant impacts that may result from designating critical habitat, regardless of whether those impacts are attributable co-extensively to other causes, in particular those impacts affecting small entities***

A number of potential economic opportunities exist in Cook Inlet that as of yet, haven't even been imagined. Designating critical habitat in Cook Inlet could squash these ideas before they are even explored. This may have particular impacts on small businesses, communities, and aspiring entrepreneurs. RDC is very concerned about the potential for regulatory creep caused by this critical habitat designation. The citizen suit provision of the ESA permits members of the public to seek judicial review of the agency's compliance with its mandatory statutory duty to consider the habitat needs of imperiled species. Thus, there is a strong likelihood that critical habitat designation will result in litigation and delays in projects. Ultimately, economic activities that are not impacting the recovery of the Cook Inlet beluga whale will be negatively affected, if not stopped entirely, with limited benefit to the whales. In addition, NMFS staff will be forced to deal with this litigation rather than focus its efforts on recovery plans and additional scientific studies. Designating critical habitat will require federal agencies to spend more time fulfilling section 7(a)(1) requirements of the ESA, regardless of whether the habitat is presently occupied by the beluga whales or if such consultations will have any positive impact on the species. Unfortunately, this work will increase the costs of development activities through added consultations, mitigation measures, and likely third party litigation. The areas surrounding critical habitat may ultimately be closed to future development due to the additional regulatory hurdles projects would need to go through to get permitted. None of these risks are offset by any scientifically proven benefits that may lead to recovery of beluga whales.

***10. Other benefits of excluding or designating a specific area as critical habitat***

Designating critical habitat may have severe consequences on economic activities that are not at all impacting the recovery of the beluga whales with limited benefit to the species.

The ESA requires the consideration of the economic impact of critical habitat designation. The Secretary has the authority to exclude areas from critical habitat "if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned." We encourage the exclusion of the entire Cook Inlet as it is clear with the mitigation and regulatory measures already in place, the extinction of the species will not likely occur.

We also urge the agency to follow the requirements of the Endangered Species Act requiring agencies to use "the best scientific **and commercial** data available" (Emphasis added). Millions of dollars have been spent by RDC member companies on beluga research and this data must be incorporated into any final critical habitat designations.

Specific economic highlights and potential impacts of a listing follow for a number of Cook Inlet activities:

### **Alaska Gas Pipeline**

One of President Obama's top 5 green energy projects is the Alaska Natural gas pipeline to the Lower 48, which upon construction, could transport 4 billion cubic feet of natural gas per day to the lower 48, or approximately 6-8% of U.S. daily consumption. Construction of this project will require 5-6 million tons of steel, much of which will come through the Port of Anchorage. Associated gas treatment plant construction, thousands of jobs, and significant revenues to the federal, state, and local tax bases will result.

Critical habitat designations and associated mitigation measures on transportation could increase costs for pipeline construction and potentially kill a project that is already marginally economic. The end result could ultimately be increased CO2 emissions in the Lower 48 with limited benefit to the belugas.

### **Energy Exploration and Development**

Sixteen oil and gas production platforms and three onshore treatment facilities are located in the region. Cook Inlet has current oil production of 14,000 BPD (*Alaska Dept of Revenue Fall 2008 Revenue Sources Book*). Of note, recent volcanic eruptions from Mount Redoubt have interrupted oil development and subsequent transportation operations at Drift River Terminal. While Cook Inlet oil and gas production numbers cannot compare to production from the North Slope fields, the industry is a cornerstone of the economy of the Kenai Peninsula. In addition, gas produced in Cook Inlet provides heat and electricity for all of Southcentral Alaska.

According to a 2008 study by Information Insights and the McDowell Group (found at: [aoga.org/pdfs/report2008.pdf](http://aoga.org/pdfs/report2008.pdf)), oil and gas activities generate more payroll than any other nongovernmental industry in Anchorage and the Kenai Peninsula Borough. Oil and gas is second only to the service industry in the Matanuska-Susitna Borough. In Anchorage, 1,649 area residents are directly employed in oil and gas extraction, refinery and pipeline sectors, with combined wages of \$294.6 million. Support activity positions filled by Anchorage residents totaled 3,543 with \$349.3 million wages in 2007. Indirect and induced employment in Anchorage totals 22,295 jobs with an associated \$1.1 billion in payroll. The industry directly employs 939 Kenai Peninsula borough residents with associated wages of \$99.1 million. The industry directly employs 830 Mat-su residents with \$98.2 million in wages.

Property taxes paid in 2007 to the Kenai Peninsula Borough by the oil and gas industry totaled \$7 million, or 13.2% of total property taxes paid. This does not include local properties owned by individuals employed by the industry. Marathon and ConocoPhillips have LNG export operations and Agrium has an idled fertilizer plant which formerly utilized natural gas. Future uses by Agrium may employ coal from the Usibelli Coal Mine delivered from Port MacKenzie. The Tesoro refinery processes all of the crude oil produced in Cook Inlet, producing jet fuel, diesel fuel, heating oil, as well as gasoline. In 2008, Tesoro also imported oil with 69 tanker arrivals at the Kenai dock and 13 arrivals at Drift River. A 40,000-barrels-per-day pipeline links the refinery with the Anchorage International Airport, the top ranked air cargo facility in North America. The refinery also supplies gasoline and diesel to Alaskans through more than 100 Tesoro-branded retail outlets. Other companies including XTO, Pioneer, CIRI, and Enstar Natural Gas are engaged in Cook Inlet communities.

Critical habitat designations could lead to decreased exploration, the potential inability to conduct seismic operations, thereby decreasing the success of exploration activities, decreased development, decreased revenue to the state and boroughs, fewer jobs, and higher utility bills, as well as lower Permanent Fund Dividends for all Alaskans as 25% of all royalties are paid to the Permanent Fund.

Further, critical habitat designations would prohibit oil and gas facilities in the inlet from discharging inside or within 4 kilometers of critical habitat areas. Previous discharges have been shown not to impact beluga populations as shown in Becker et al (2000). These designations could effectively shut down oil and gas operations in the marginal fields in Cook Inlet.

Finally, Executive Order 13211 (May 18, 2001) requires agencies to prepare “Statements of Energy Effects” if an agency action will affect energy supplies, distribution, or use. We believe that critical habitat designations will be a significant energy action.

### **Chuitna Coal**

The Chuitna Coal project is completing environmental and other studies as part of its NEPA analysis. When constructed, the mine could create 350 new jobs, account for property taxes to Kenai Peninsula Borough of \$100 million over 25 years, pay royalties to state of \$300 million over 25 years, and a Mining License Tax of \$120 million over 25 years.

Critical habitat designations could derail the project, impact vessel traffic, and at best has already increased costs.

### **Pebble**

The Pebble Project is potentially one of the world’s largest copper/gold deposits. Partners Northern Dynasty and Anglo American could employ thousands of rural Alaskans and bring economic diversification to an area of Alaska that desperately needs it. Millions of dollars in state royalties will be paid over the life of the mine.

An ESA listing’s impact to Pebble is unknown as a mine plan has not yet been proposed. However, power transmission, vessel transportation, and other factors could be impacted.

### **Port of Anchorage Expansion Project**

The Port of Anchorage accounts for delivery of more than 90 percent of the consumer goods arriving in Alaska. In addition, the Port of Anchorage handles 5 million tons of cargo annually and generates more than \$750 million for the State’s economy. Jet fuel is delivered through pipelines to military bases and the port stages 100% of the refined petroleum products from the state’s largest refinery. Further, it handles delivery of 80% of all fuel for the Ted Stevens International Airport, the busiest cargo airfield in the U.S. Currently, it continues its Port Intermodal Expansion Project to accommodate larger ships, support increased military deployments, and keep pace with the steadily increasing movement of goods into and out of Alaska. High-speed ferry docks for transportation between the Mat-su Borough and Anchorage are also proposed for construction

Critical habitat designations could increase the costs of goods for nearly every Alaskan. It could jeopardize stevedoring and other associated jobs. It could also stall continued expansion or increase the associated costs through potential mitigation measures. The Port has a history of working closely with NMFS to choose construction techniques that reduce noise; monitor the

Inlet for the presence of belugas and when belugas are present, stop in-water activities until the whales move to a safe distance; and conducting an underwater noise study from in-water work associated with the pile driving activities induced by the type of vibratory hammers the Port expects to use in the expansion project.

### **AWWU Discharges**

AWWU handles the wastewater for Anchorage, particularly from the John M. Asplund Wastewater Treatment Facility at Point Woronzof. Studies have shown that their discharge is not impacting the marine environment or Cook Inlet beluga whales and fish. EPA and NMFS scientists have concurred with these studies.

Critical habitat designations could require the expenditure of \$400-\$600 million dollars to upgrade AWWU's facilities, potentially tripling Anchorage resident's wastewater bills.

### **Knik Arm Bridge**

The Knik Arm Bridge (KABATA) could provide a quick transportation link between the growing communities of the Mat-su and Anchorage as well as reduced travel time to Denali National Park and Fairbanks. This link would also open large areas of undeveloped land near Anchorage for residential and commercial uses and could significantly reduce carbon emissions due to less travel time for commuters. To date, KABATA has spent \$2.5 million on beluga studies.

Critical habitat designations may impact investment from consortia and may lead to additional construction seasons. Mitigation could include construction only when whales are not present in the Upper Inlet which could significantly increase the cost of the project.

### **Port MacKenzie**

Port MacKenzie has the opportunity to significantly diversify the economy of the Mat-Su borough. Commodities including wood chips and gravel are currently shipped from Port MacKenzie and future shipments of coal and other materials could be shipped out and goods could be shipped into the Port for distribution to the Mat-Su Valley and Interior Alaska via the forthcoming rail extension to the port.

Critical habitat designations could decrease the use of Port MacKenzie and have significant impacts on inland resource development activities that would utilize it in the future.

### **Commercial Fishing**

Commercial fishing in upper Cook Inlet accounts for 5 percent of Alaska's ex-vessel salmon values. A mid-90s estimate of commercial salmon fishing supported an estimated 500 average annual jobs in harvesting, processing, and indirect employment producing \$15 million in income (Source: ISER Report).

Critical habitat designation could threaten the entire Cook Inlet commercial fishery as the beluga's primary food source is fish. The conservation plan specifically states, "At this time, it is unknown whether competition with commercial fishing operations for prey resources is having any significant or measurable effect on Cook Inlet beluga whales." Therefore, it would not be prudent to designate critical habitat in areas where commercial fishing is transpiring.



## **Sport Fishing**

Sport fishing generated \$415 million in total expenditures in Southcentral Alaska in 2003. A total payroll of \$171 million and 6,100 jobs resulted (State of Alaska). 685 licensed guide businesses existed in communities around Cook Inlet in 2006.

Critical habitat designation could threaten the entire Cook Inlet sport fishery as the beluga's primary food source is fish.

## **Military**

Anchorage is home to both Elmendorf Air Force Base and the Army's Fort Richardson. Both bases rely heavily on Cook Inlet and the Port of Anchorage. In addition, military aircraft frequently fly closely over areas in Cook Inlet that have been identified as type 1 habitat.

Critical habitat designations could impact flight patterns, military operations, equipment and troop delivery, and ultimately could threaten national security with limited benefit to the whales. The ESA allows NMFS to take into account consideration of the impact critical habitat designation would have on national security. Further, section 318(a) of the National Defense Authorization Act authorizes the Secretary of the Interior to exempt military lands from designation as critical habitat under the ESA. Section 318(b) of the same act directs the Secretary of the Interior to consider impacts on national security when deciding whether to designate critical habitat. Since enactment of these provisions, military lands have been routinely excluded from critical habitat designations.

## **Community Development**

Cook Inlet has a number of new and ongoing community development projects on the horizon. These include but are not limited to expansion of the Anchorage International Airport, railroad expansion and maintenance, Chugach Electric's electric distribution and submarine cable maintenance, the telecommunication industry's fiber optic cables, the proposed Fire Island Wind Project, as well as tidal, geothermal, and hydroelectric energy opportunities.

Critical habitat designations could derail or increase the costs for any potential community development project.

## **Vessel Traffic**

Nearly all of Alaska's goods are brought into Anchorage on commercial vessels. Critical habitat designations could increase costs by requiring observers on board, decrease efficiency by setting speed limits, and ultimately raise the cost of all goods, and subsequent services, paid for by Alaskans.

## **Tourism**

Tourism is a growing industry in Southcentral Alaska. Hotels, rental cars, other goods and services are consumed by visitors. In 2010, Holland America Cruise Lines will bring numerous cruise ships into the Port of Anchorage. Future moorings by the industry could be decreased or eliminated with critical habitat designations. Subsequently, decreased visitors to Southcentral Alaska could transpire as limitations are placed on sport fishing, sightseeing cruises, and other operations. Local communities will be significantly impacted through decreased bed and rental taxes.

***11. Potential peer reviewers for proposed critical habitat designations, including persons with biological and economic expertise relevant to the designations:***

Individuals that have a broad range of experience, not just lifelong agency biologists/economists should be considered as peer reviewers.

Jason Brune, Executive Director, Resource Development Council, Biologist

Matt Cronin, University of Alaska, PhD Biologist

Marilyn Crockett, Executive Director, Alaska Oil and Gas Association

Bill Popp, Executive Director, Anchorage Economic Development Corporation

Todd Loomis, Cascade Fishing, Former NMFS employee

Doug Vincent-Lang, Alaska Department of Fish and Game

Tina Cunning, Alaska Department of Fish and Game

In conclusion, RDC members are extremely concerned with potential critical habitat designation in Cook Inlet. We urge the agency to exercise extreme caution as it makes its decision. Thank you for the opportunity to comment.

Sincerely,

A handwritten signature in blue ink, appearing to read "Jason W. Brune".

Jason W. Brune  
Resource Development Council for Alaska, Inc.