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March 3, 2010

**VIA ELECTRONIC SUBMISSION TO [HTTP://WWW.REGULATIONS.GOV](http://www.regulations.gov)**

Ms. Kaja Brix  
Assistant Regional Administrator  
Protected Resources Division, Alaska Region  
National Marine Fisheries Service  
ATTN: Ellen Sebastian  
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**Re: RIN 0648-AX50; Comments on December 2, 2009 Proposed Rule Designating Critical Habitat for the Cook Inlet Beluga Whale (74 Fed. Reg. 63,080)**

Dear Ms. Brix:

This letter provides the comments of ConocoPhillips Alaska Inc. ("ConocoPhillips") in response to the National Marine Fisheries Service's (the "Service") proposed rule designating critical habitat for the Cook Inlet beluga whale (*Delphinapterus leucas*) in the United States (the "Proposed Rule") pursuant to Section 4 of the Endangered Species Act ("ESA"), 16 U.S.C. § 1533. See 74 Fed. Reg. 63,080 (Dec. 2, 2009).<sup>1</sup>

ConocoPhillips has been a major participant in the exploration, development, and production of oil and gas in Alaska since before statehood and is the largest owner of state and federal leases in Alaska. ConocoPhillips operates onshore and offshore facilities in and around Cook Inlet, including the Beluga River Unit, Tyonek Platform and Kenai Liquefied Natural Gas ("LNG") Plant. ConocoPhillips has long recognized that its ability to develop oil and gas resources in Alaska generally and Cook Inlet in particular, is inextricably linked to the ability of all resource developers to ensure that environ-

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<sup>1</sup> By notice on January 12, 2010, the Service extended the comment period on the Proposed Rule to March 3, 2010. 75 Fed. Reg. 1582 (Jan. 12, 2010). ConocoPhillips previously submitted comments on the advance notice of the proposed rule, 74 Fed. Reg. 17,131 (Apr. 14, 2009), by letter dated May 14, 2009.

mental impacts are minimized and the subsistence way of life is protected. ConocoPhillips has been successfully developing and producing gas in Alaskan waters occupied by the beluga whale for four decades. Most oil and gas platforms in Cook Inlet have been in place since 1967, long pre-dating the beluga whale population decline that led to its ESA listing. Indeed, the best scientific and commercial data available have consistently shown that oil and gas exploration, development and production activities do not have significant adverse effects on beluga whale populations or habitat in Cook Inlet.<sup>2</sup>

ConocoPhillips' comments are organized broadly into two categories: (I) comments explaining why the areas proposed for designation do not meet the statutory requirements for critical habitat designation; and (II) comments explaining why, regardless of whether the statutory requirements for a critical habitat designation are met in some areas, specific areas around ConocoPhillips existing facilities warrant exclusion based on the economic impact of the designation under Section 4(b)(2) of the ESA.

In short, the detailed comments in Sections I and II below address the following points:

- The Cook Inlet beluga whale population decline is not attributable to habitat degradation. Because habitat impacts are not the cause of beluga whale decline, broad critical habitat designation is not necessary for conservation or recovery. The designation should be limited to specific areas that are most utilized and most important to the beluga whale.
- Even assuming that the areas proposed for designation as critical habitat are essential for the conservation or recovery of the beluga, there is no evidence that the essential features in those areas require special management considerations as mandated by the ESA. On the contrary, every activity that might potentially impact beluga critical habitat – from salmon fishing to in-water noise generating activities – are already highly regulated. No “special” management is therefore required.
- The absence of any special management considerations is particularly apparent around highly regulated areas, such as ConocoPhillips' existing operations at the Beluga River Unit, Tyonek Platform and Kenai LNG

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<sup>2</sup> See, e.g., Environmental Assessment of the Issuance of Incidental Harassment Authorizations to ConocoPhillips Alaska, Inc. and Union Oil Company to Take Marine Mammals by Harassment Incidental to Conducting Seismic Operations in Northwestern Cook Inlet, Alaska, March 2007 (concluding that seismic operation in beluga whale habitat will have “no more than a negligible impact” on the beluga whale and have no significant cumulative effects); NOAA Fisheries' Alaska Fisheries Science Center, *Status Review and Extinction Assessment of Cook Inlet Belugas* at 32 (Nov. 2006) (sounds associated with oil and gas activities, including drilling are “not expected to have more than a minor effect on belugas living in the vicinity”).

Plant. While these facilities themselves are exempt under the proposed "manmade structure exclusion," the absence of special management considerations in the areas adjoining these facilities warrants extending that exclusion to a buffer zone around these facilities. This request is described in detail in Section II.C, below.

- The Service's primary constituent elements ("PCEs") are vague, defy meaningful determination or location, and lack sufficient scientific basis. These errors make it impossible for the Service, federal agencies, or third parties like ConocoPhillips to determine whether these PCEs are even present at a given location, let alone whether particular actions will affect those PCEs.
- The Service's draft economic analysis seriously underestimates the potential economic impact of a critical habitat designation. Although ConocoPhillips' operations are not the cause of the beluga whale's decline or an ongoing threat to the whale's recovery, a critical habitat designation will result in increased administrative costs and has the potential to result in operational and permitting delays and/or lead to other new costs. Conservatively estimated, the impacts to ConocoPhillips alone could be in the range of \$698,000 to \$796,000 over twenty years, which alone exceeds the Service's estimate of between \$157,000 and \$571,000 for *all* economic impacts associated with the Proposed Rule.<sup>3</sup> See *Preliminary Investigation of Economic Impacts Related to Proposed Critical Habitat Designations for Cook Inlet Beluga Whale* at 2 and 37, Table 8 (Mar. 3, 2010) (attached) (hereinafter "CPAI Analysis"). As demonstrated in the attached economic analysis, costs could rapidly escalate if the Service imposed even minor restrictions on ConocoPhillips' operations in connection with the critical habitat designation. *Id.* at 2 and 41, Table 10. Impacts to oil and gas operations more broadly, and to industrial and municipal operations across Cook Inlet, are similarly underestimated in the Service's economic analysis.<sup>4</sup> At the same time, the Service significantly overestimates the benefits of the critical habitat designation. Because the Service's existing economic analysis is inadequate, ConocoPhillips therefore requests that the Service revise and reissue its economic analysis for additional public comment to ensure that it accurately reflects these facts.

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<sup>3</sup> 74 Fed. Reg. at 63,081. The Service's choice of ten years as a period for evaluating economic impacts is insufficient. Such impacts are likely to continue for at least double that time, as shown in the CPAI Analysis.

<sup>4</sup> See, e.g., Comments of the Resource Development Council for Alaska, Inc. on December 2, 2009 Proposed Rule Designating Critical Habitat for the Cook Inlet Beluga Whale (Mar. 3, 2010).

- Based on the economic impacts demonstrated in the CPAI Analysis, ConocoPhillips requests that the Service exclude Area 2 from the critical habitat designation under ESA Section 4(b)(2). Alternatively, ConocoPhillips requests that the Service exclude a buffer area surrounding the Beluga River Unit, Tyonek Platform and Kenai LNG Plant. The Service's final Section 4(b)(2) analysis must weigh the serious economic impacts of habitat designation in Area 2 against the negligible benefit that designating such habitat will provide for Cook Inlet beluga whales. The benefits of excluding Area 2 or, alternatively, areas surrounding existing ConocoPhillips facilities, from a final critical habitat designation far outweigh any negligible benefit from its designation.

Finally, in Section III below, ConocoPhillips requests that NMFS engage in National Environmental Policy Act ("NEPA") review, without which the Proposed Rule is unlawful.

## DETAILED COMMENTS

### **I. The Service's Broad Critical Habitat Designation Will Not Further Conservation of the Beluga Whale and Is Contrary to the ESA's Narrow Definition of Critical Habitat.**

The Service's broad designation of critical habitat in the Proposed Rule is inconsistent with the ESA's definition of critical habitat. In 1978, Congress amended the ESA to provide an express and narrow definition of critical habitat. That definition was added in response to growing concerns that the Services were designating critical habitat "as far as the eye can see and the mind can conceive," and that such broad designations could collectively have a crippling economic impact.<sup>5</sup>

In response to these concerns, Congress placed express limits on which areas could be designated as critical habitat. First, Congress provided that critical habitat "shall not include the entire geographical area which can be occupied by the . . . species." 16 U.S.C. § 1532(5)(C). Second, Congress limited critical habitat to those "specific areas" that contain the "physical or biological features . . . essential to the conservation of the species." 16 U.S.C. § 1532(5)(A)(i). Third, those physical or biological features (the PCEs) must actually be "found" in the specific geographic areas. *Id.* Fourth, Congress required the Service to make a finding that the designated critical habitat "may require special management considerations or protections." *Id.* If any one of these required elements is absent in a particular area, the Service cannot designate that area as critical habitat.

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<sup>5</sup> See Legislative History of the Endangered Species Act at 823 (reprinting House Consideration and Passage of H.R. 14104, with amendments, Oct. 14, 1978).

As discussed in detail below, the Service's proposal to broadly designate large portions of Cook Inlet as critical habitat for the beluga whale departs from these mandatory requirements in a number of important ways.

**A. The Service's Designation Is Overly Broad Because Habitat Decline Was Not a Significant Factor in the Decline of the Cook Inlet Beluga Whale Population.**

The ESA limits the Service's authority to designate critical habitat to "specific areas" that are "essential" to the "conservation" of the species. The ESA defines "conservation" in turn to mean "the use of all methods and procedures which are *necessary* to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary." 16 U.S.C. § 1532(3) (emphasis added). Thus, by definition, the ESA only authorizes the designation of critical habitat in a particular geographic location when protection of that area (and its physical and biological features) is a "necessary" method to recover the listed species.

For Cook Inlet beluga whales, the Proposed Rule provides no reason to believe that additional habitat protection is "necessary" to recover the species. Unlike many ESA-listed species, whose decline is driven by a loss of habitat, the beluga's decline was driven by overharvesting. 72 Fed. Reg. 19,854, 19,859 (Apr. 20, 2007) (proposed listing decision) ("the subsistence removals reported during the 1990's are sufficient to account for the decline observed in this population"); *id.* at 19,858 ("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."). There is no evidence that habitat quality is a limiting factor to recovery, and therefore no evidence that broad critical habitat designation is necessary, or would be helpful. To the contrary, beluga whale habitat remains intact and functional at levels sufficient to support recovery. 73 Fed. Reg. 62,919, 62,921 (Oct. 22, 2008) (listing decision) ("we have no data at this time to indicate that carrying capacity has decreased"). For these reasons, the proposed broad designation of critical habitat is neither essential nor necessary and therefore is inconsistent with the ESA.

Even assuming *some* additional habitat protection in *certain areas* could be deemed necessary to reverse the trend caused by overharvest, the Service should, at the very least, limit the designation to those areas that are truly essential. The Service recently identified the areas that are most essential for the beluga whale when it completed its Conservation Plan for the Beluga whale under the Marine Mammal Protection Act ("MMPA"). See *Conservation Plan for the Beluga Whale* at 26-28 (Oct. 2008) ("Conservation Plan"). In that document, the Service distinguishes between "Type 1" beluga whale habitat, which is believed to be highly valuable, and the less valuable Type 2 and Type 3 habitats.

Type 1 habitat is located in the northeastern-most portion of Cook Inlet (identified as "Area 1" in the Proposed Rule) and includes shallow tidal flats, river mouths and estuarine areas that the Service believes are important for foraging and calving, among other things. Type 1 habitat encompasses the areas with the greatest concentrations of

belugas from spring through fall. In addition, the Service believes the areas within Type 1 habitat – not Type 2 – are most vulnerable to impacts from anthropogenic threats. See Conservation Plan at 26-28. Conversely, the Service believes belugas are more widely dispersed through Type 2 habitat, which the whales use in fall and winter for feeding and transit. *Id.* at 26-28; see 74 Fed. Reg. at 63,090 (“Area 2... is generally more remote and less developed than Area 1”); *id.* at 63,084 (Area 2 has “less concentrated spring and summer beluga use” and only “probable” fall feeding areas).

Type 2 habitat, as described in the Conservation Plan, does not meet the ESA’s requirement that critical habitat be designated only in areas where features *essential* to a species’ conservation are found and that require special management. Nothing in the Conservation Plan, or the data available to date, suggests that Type 2 habitat is either essential to beluga whale conservation or otherwise requires additional protections. For these reasons, Area 2 habitat does not meet the standard articulated in the ESA and therefore should not be considered by the Service for critical habitat designation.<sup>6</sup>

**B. The Proposed Areas Do Not Require Special Management Consideration or Protections.**

The Service’s proposed designation is deficient with respect to the need for identified special management considerations. If the essential features of a species habitat within a specific geographic area do not require “special management considerations or protections,” then the Service cannot designate those lands as critical habitat. This “crystal clear statutory requirement” must be met by explaining how “each identified PCE would need management or protection.” *The Cape Hatteras Access Preservation Alliance v. U.S.F.W.S.*, 344 F. Supp. 2d 108, 124 (D.D.C. 2004). A cursory analysis or “conclusory statement” does not meet this requirement. *Id.*

As discussed above, habitat considerations are neither the source of the beluga whale decline nor an impediment to beluga recovery. This alone provides strong evidence that the PCEs – which are intact and functioning – do not require special management considerations or protections. On the contrary, existing management is already sufficient to adequately protect these PCEs and provide ample opportunity for the beluga to recover.

The Proposed Rule’s contrary determination that these PCEs may still require special management is little more than a conclusory statement – one that is contradicted by the results of the Service’s separate economic analysis. Specifically, the Proposed Rule concludes that potential activities such as (hypothetical) dredging operations, fishing activities, National Pollution Discharge Elimination System (“NPDES”) discharges, (hypothetical) dam construction, and activities that make in-water noise may impact the PCEs and that the PCEs may therefore require special management. 74 Fed. Reg. at 63,088. Oddly, the Service’s economic analysis reaches the opposite conclusion. In that analysis, the Service identifies each of these same activities, and concludes that critical habitat designation will have either *no economic impact* on those activities, or that the economic impact will be *coextensive* with existing protections. See

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<sup>6</sup> The same is true for Area 3, which the Service has not proposed for designation.

*Draft RIR/4(b)(2) Preparatory Assessment/IRFA for the Critical Habitat Designation of Cook Inlet Beluga Whale at Table 6-28 (Nov. 17, 2009) ("Draft RIR"). In other words, the Service's economic analysis cannot identify a single project modification that will take place as a result of this critical habitat designation that would not already take place under existing management regimes.*

If the Service can identify no change in activity that must occur as a result of the designation, then there is no credible basis to conclude that "special" management may be required. The Service cannot reasonably designate a broad area of critical habitat, but decline to identify special management considerations and conclude no significant economic impacts will result from the designation. Either the critical habitat designation will have identifiable impacts on activities in and around critical habitat – in which case those costs must be included in the Service's 4(b)(2) analysis of economic impacts – or the designation will have no impact on activities in and around critical habitat – in which case there is no need for special management.

**C. The Lack of Any Special Management Requirements Is Especially Apparent Around Facilities That Are Already Highly Regulated.**

Should the Service designate Area 2 despite the comments above, the Service should extend the manmade structure exclusion to provide a reasonable buffer around those structures. The Proposed Rule excludes "manmade structures and the land on which they rest within the designated boundaries" that are in existence as of the effective date of the rule. The Service should extend this exclusion to include a buffer around ConocoPhillips' existing oil and gas operations at Tyonek Platform, Beluga River Unit, and Kenai LNG Plant. These areas are already highly regulated so that no additional special management considerations for the protection of the beluga or its PCEs are necessary.<sup>7</sup>

PCEs such as water quality and absence of noise disturbance are, to the extent they exist around those facilities, already subject to the protections of the ESA, MMPA and myriad spill prevention and response requirements, including:

- the Oil Spill Control Act of 1990, pursuant to which Minerals Management Service regulates offshore natural gas operations at the Tyonek Platform;
- a Tyonek Platform Oil Spill Response Plan;
- the Clean Water Act, pursuant to which the Environmental Protection Agency regulates onshore natural gas operations at the Beluga River Unit and Kenai LNG Plant;

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<sup>7</sup> As explained below, this exclusion of a buffer area is also warranted under Section 4(b)(2) based on the unnecessary and potentially large economic impact caused by designation in these areas.

- Spill Prevention, Control, and Countermeasure Plans for the Beluga River Unit and the Kenai LNG Plant;
- NPDES permits addressing discharge prevention and containment procedures at the Tyonek Platform and Kenai LNG Plant;
- State of Alaska non-domestic discharge requirements for the Kenai LNG Plant;
- U.S. Department of Transportation Operations, Maintenance and Emergency Manual addressing natural gas gathering systems at the Kenai LNG Plant;
- an LNG Transfer Operations Manual addressing Kenai LNG Plant operations under the jurisdiction of the U.S. Coast Guard; and
- a Kenai Marine Terminal Facility Response Plan.

Collectively, these significant regulations leave no gap in management that might otherwise necessitate special management in these areas. To the extent that there are any identifiable negative impacts from oil and gas operations on beluga whale habitat, those impacts are already being sufficiently mitigated under existing management. See Conservation Plan at 59 (offshore oil platform produced noise at level below hearing range of beluga); *id.* at 56 (ship strikes have not been confirmed and “ship strikes from large vessels are not expected to pose a significant threat”).

Because oil and gas development is already appropriately managed to avoid and minimize impacts to beluga whales and their habitat, additional management of those activities is not necessary to further beluga whale recovery. Thus, at the very least, the Service should not include areas in and around these heavily regulated facilities because these areas do not require special management considerations or protections.

#### **D. The PCEs Are Overly Broad and Lack Sufficient Scientific Basis.**

The Service’s errors in over-designating critical habitat are compounded by PCEs that defy meaningful identification. The ESA requires the Service to make a factually and scientifically justified determination that the PCEs are “found” within a specific geographic area before it designates that area as critical habitat. 16 U.S.C. § 1532(5)(A). Apparently ignoring that requirement, the Service here has defined the PCEs in a manner that makes it largely impossible to determine what the PCEs are and whether they are actually found in a particular area.

For example, the Proposed Rule identifies one PCE as the “[a]bsence of in-water noise at levels resulting in the abandonment of habitat by beluga whales,” but does not explain: (a) what is meant by the “absence” of noise; (b) what noise level triggers “abandonment;” (c) what is meant by “abandonment;” or (d) *what areas within Cook Inlet contain that PCE*. These are serious errors that contravene the letter and intent of the ESA.



Principally, the Service must explain what it means by the “absence of noise” given that Cook Inlet belugas already live in a noisy environment where ambient noise ranges from 80 to 150 dB re 1 $\mu$ Pa.<sup>8</sup> Without such clarification, the Proposed Rule provides no meaningful guidance to allow ConocoPhillips or other members of the public to discern what this PCE is, whether it is found in a particular area, or whether individual project actions are likely to affect that PCE. Equally troubling, the Service concedes that it simply does not have that information. As the Proposed Rule explains, “data is lacking regarding levels that might elicit more subtle reactions such as avoiding certain areas.” See 74 Fed. Reg. at 63,087. Perhaps the Service lacks this data because whales continue to use areas in spite of high ambient noise.<sup>9</sup> In any case, because the Service does not know the level of noise necessary to trigger avoidance, the Service cannot reasonably determine, as required by the ESA, that this PCE is found anywhere. The Service must know what the PCE is before it can claim it is “found” in a specific geographic area.

Even if the Service could make fundamental findings about the nature of this PCE, it would still not qualify as a PCE because the absence of “noise ... resulting in abandonment” describes an impact to an animal, not its habitat. The Service reached this conclusion itself when it declined to adopt a noise-related PCE for the Southern Resident Killer Whale. In that rule, the Service acknowledged that in-water noise could impact whale behavior but concluded that “[t]hese effects, however, are direct effects to the animal itself *and not to the habitat.*” See 71 Fed. Reg. 69,054, 69,055 (Nov. 29, 2006) (emphasis added). The beluga whale critical habitat designation is no different. To the extent that noise has any impact on the beluga whale, that is an impact to the whale itself “and not to the habitat.”

The PCE for the “absence of toxins or other agents of a type or amount harmful to beluga whales” suffers from the same flaws as the “absence of noise” PCE. The Service does not explain: (a) what is meant by the “absence” of toxins; (b) which “toxins or other agents” are harmful to the beluga whale; (c) at what levels these toxins are harmful to the whales; (d) what is meant by “harmful”; and (e) where the “absence” of these toxins is found. As with the “absence of noise” PCE, the Service cannot meaningfully say that this PCE is found anywhere without first identifying what the PCE means – which toxins and at what amounts. Moreover, the “harmful” nature of a toxin is similarly an impact “to the animal itself and not to the habitat.” See 71 Fed. Reg. at

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<sup>8</sup> Blackwell and Greene 2002; Blackwell 2005; URS 2007; Scientific Fishery Systems (“SFS”) 2009. Ambient levels of 120 dB re 1 $\mu$ Pa have been found in non-industrialized areas due to tidal activity. Blackwell and Greene (2002).

<sup>9</sup> The beluga’s continued use of areas with high noise levels is supported, for example, by the whales’ continued use of Knik Arm for feeding (i.e., Funk et al. 2005) even though ambient noise in the area from Eagle Bay to the Port of Anchorage has been shown to have naturally-occurring noise as high as 150 dB 1  $\mu$ Pa (Blackwell and Greene 2002; Blackwell 2005; URS 2007; SFS 2009). Belugas are consistently observed near and within areas such as Eagle Bay and the Susitna, Little Susitna, and Beluga rivers, including near ConocoPhillips facilities (e.g., McGuire and Kaplan 2009). Observation of belugas made during ConocoPhillips’ marine mammal monitoring efforts indicates that belugas do not abandon an area during high noise conditions such as seismic surveys (e.g., Brueggeman et al. 2007).

69,055. Finally, there is no evidence that the Cook Inlet beluga whale is being impacted by the presence of toxins in the area.<sup>10</sup>

These significant errors warrant withdrawal of the Proposed Rule until the Service can reasonably determine and explain the nature, location, scope, and essential characteristics of these PCEs. Failure to do so will deny ConocoPhillips and other members of the public the right to meaningfully comment on the critical habitat designation.

## **II. The Service Should Exclude Significant Portions of the Proposed Critical Habitat Area Under Section 4(b)(2).**

Regardless of whether the Service agrees with ConocoPhillips' conclusion that some or all of the areas in the Proposed Rule are not eligible for consideration as critical habitat because these areas are neither essential nor in need of special management, or because the PCEs are overbroad and fundamentally flawed, the Service should use its authority under Section 4(b)(2) of the ESA to exclude significant areas from the final critical habitat designation. Section 4(b)(2) of the ESA requires the Service to designate critical habitat after "taking into consideration the economic impact . . . and any other relevant impact, of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). That section further authorizes the Secretary to "exclude any area 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." *Id.*

In order to comply with these requirements, the Service produced a Draft RIR assessing the economic impact of a critical habitat designation. As explained below, the Draft RIR is seriously flawed and significantly underestimates the economic impact of a designation. At the same time, the Draft RIR seriously overestimates the anticipated benefits of the Proposed Rule by relying on speculative benefits unsupported by any data. In some areas, the analysis defies common sense. Properly evaluated, the economic impacts of designation outweigh the benefits of designation in Area 2 generally, as well as in and around ConocoPhillips' existing operations.

### **A. The Service's Economic Analysis Seriously Underestimates Potential Economic Impacts.**

The Service's Draft RIR identifies two types of economic costs associated with the critical habitat designation: (1) the incremental administrative costs of considering

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<sup>10</sup> Port of Anchorage *et al.* 2009 sampled dredged sediments near the Port of Anchorage to determine the presence of contaminants. Samples were tested for volatile and semi-volatile organic compounds, total recoverable petroleum hydrocarbons, PCBs, pesticides, cadmium, mercury, selenium, silver, arsenic, barium, and chromium, all of which were found to be below screening levels. Lees *et al.* 1999 found "extremely low levels of [polycyclic aromatic hydrocarbons] PAH," at 40-50 times below NOAA/Estuarine Research Laboratory concentrations, after sampling near the Beluga River and Tyonek Platform. See also 74 Fed. Reg. at 63,086 ("It appears Cook Inlet beluga whales have lower levels of contaminants stored in their bodies than other populations of belugas"); Becker *et al.* 2000 (finding that Cook Inlet belugas have lower concentrations of most measured toxins as compared with other beluga populations):

critical habitat in an ESA Section 7 consultation; and (2) project modification costs. Collectively, the Draft RIR concludes that the total quantifiable impact of the critical habitat designation *on the entire Cook Inlet economy* is a minor \$187,000 to \$571,000 in present value terms. Draft RIR at 7-12. As explained below, and as demonstrated in the attached economic assessment commissioned by ConocoPhillips, these low numbers are below the costs that ConocoPhillips conservatively anticipates *it alone will bear* as a direct result of the beluga whale critical habitat designation.

The Draft RIR's conclusion that total costs are no more than \$571,000 is based on an unreasonable and unrealistic estimation of the cost of conducting consultations on critical habitat. The Draft RIR estimates that "third party" costs to permittees like ConocoPhillips are likely to be: (a) \$3,500 for a formal consultation that occurs only because of the critical habitat designation; (b) \$1,750 for a consultation that is reinitiated because of the critical habitat designation; and (c) \$900 for the additional effort to address critical habitat in a new consultation. See Draft RIR at 4-3. These numbers are unreasonably low and suggest a complete lack of familiarity with the usual process and industry costs associated with ESA actions.

Based on ConocoPhillips' significant experience as the "third party" in numerous Section 7 consultations, we estimate that the third-party costs in a formal consultation typically run significantly higher than estimated in the Draft RIR. See CPAI Analysis at 34-35. As explained in the attached report, ConocoPhillips' costs as the third party in a formal Section 7 consultation could average \$100,000 in staff time, expert opinions and outside consultant time, including legal counsel in support of permitting. *Id.* This number does not include potential additional studies or litigation costs. The Draft RIR's conclusion that consultation costs are only \$3,500 for a consultation caused by the critical habitat designation and \$1,750 for a reinitiated consultation caused by the critical habitat designation are not consistent with ConocoPhillips' practical experience.

The Service's conclusion that a new consultation will only result in \$900 in third-party costs for the additional effort to address critical habitat in a new consultation is equally arbitrary. ConocoPhillips estimates that the incremental cost of considering critical habitat in future Section 7 consultations likely increases these costs by between ten and thirty percent depending on the type and nature of the facility and its proximity to critical habitat. See CPAI Analysis at 34-35.<sup>11</sup> As such, the incremental costs to third parties from designation of critical habitat for the beluga whale is likely to increase by between \$10,000 and \$30,000 *per* consultation – far and above the \$900 identified by the Draft RIR.<sup>12</sup>

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<sup>11</sup> These percentage increases are consistent with the Draft RIR, which attributes about 25% of the cost of a full consultation to the incremental impact of critical habitat. Draft RIR at 4-3.

<sup>12</sup> The third-party costs are not the only costs that the Draft RIR significantly underestimates. For example, the Draft RIR states that preparation of a biological assessment typically costs \$5,600. Draft RIR at 4-3. ConocoPhillips has previously produced biological assessments as the designated non-federal representative in Section 7 consultations. The costs of producing a biological assessment commonly ranges between \$50,000 and \$75,000, or more than ten times the amount estimated by the Service. In more difficult cases, other third parties have spent as much as \$6 million producing a biological assessment for the Service. See

Based on the total number of consultations ConocoPhillips expects to engage in over the next twenty years, the present value of these incremental costs ranges between \$698,000 and \$796,000. See CPAI Analysis at 37, Table 8. The Draft RIR must account for these significant costs.

The costs identified by ConocoPhillips (which exceed the total amount anticipated by the Service for all sectors of the economy) are *conservative*, and likely *underestimate* the total economic impact even to ConocoPhillips. As explained in the attached economic analysis, any number of relatively minor restrictions imposed on ConocoPhillips' operations to protect beluga whale critical habitat could have additional, rapidly escalating economic impacts. For example, if the critical habitat designation resulted in relatively minor cost increases and delays for one \$5 million (net) well at the Beluga River Unit, the present value cost impact would be a staggering \$1.9 to \$2.2 million. See CPAI Analysis at 41, Table 10. Similarly, if restrictions on transportation to protect beluga whale critical habitat resulted in forgoing a single natural gas shipment from the Kenai LNG Plant, that one forgone shipment would result in present value losses of \$17.6 million to \$18.3 million. *Id.* The Service must consider these potential impacts as well. And these potential costs are not speculative. If ConocoPhillips seeks a federal permit for an activity that may, directly or indirectly, affect critical habitat, and third-party litigation results in a delayed permit, project delay costs are quite likely. That is only one of a number of ways in which the costs could arise.

ConocoPhillips' estimates do not include the potentially high costs of conducting studies necessary to demonstrate that its facilities are not adversely modifying critical habitat. These costs are likely to be significantly amplified by the Service's decision to broadly define the PCEs, as discussed above. PCEs that are defined as the "[a]bsence of in-water noise" at "abandonment" levels or the "absence of toxins" at "harmful" levels provide no meaningful basis for ConocoPhillips or the Service to determine whether that PCE is present or will be adversely modified at a particular location. As such, ConocoPhillips may well be forced to conduct in-water studies to both identify the presence of the PCE and demonstrate that its actions will not adversely modify or destroy critical habitat. A single acoustical study to prove the absence of noise could cost approximately \$400,000 at a minimum. See CPAI Analysis at 19, Table 3. These types of study costs must be considered in the Service's economic analysis as well.

These costs to ConocoPhillips, of course, only represent a fraction of the total economic impacts of the region,<sup>13</sup> and the Draft RIR must be amended to consider these same types of costs for companies that are similarly situated.

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<http://www.bradwoodlanding.com/content1818> (describing cost of preparing biological assessment for LNG project).

<sup>13</sup> See, e.g., Comments of the Resource Development Council for Alaska, Inc. on December 2, 2009 Proposed Rule Designating Critical Habitat for the Cook Inlet Beluga Whale (Mar. 3, 2010).

**B. The Economic Analysis Seriously Overestimates the Benefits of the Critical Habitat Designation.**

In addition to significantly underestimating the costs of the designation, the Draft RIR also significantly overestimates the benefits of the designation. That is true with respect to: (1) the identified benefits to the oil and gas industry; and (2) the identified conservation benefit to the beluga whale.

With regard to the oil and gas industry, the Draft RIR posits that “[e]mployees of the industry may be willing to work in the area, in part, because of the natural beauty, environmental quality and outdoor recreation opportunities available,” and that the critical habitat designation will help “attract and retain employees.” This hypothetical benefit cannot be reconciled with the practical reality of employment in Alaska. As one of the largest employers of oil and gas industry workers in Alaska, and as an employer that has been in operation in Alaska since before statehood, ConocoPhillips is certain that the critical habitat designation will have *no impact* on its ability to attract and retain employees. ConocoPhillips has no intention of trying to attract workers by advertising the alleged incremental (yet unidentified) environmental benefits of the beluga whale critical habitat designation. Nor does ConocoPhillips believe that any of its current employees are more likely to stay in Alaska based on this unidentified hypothetical benefit to beluga whale habitat. The environment remains the same, regardless of whether it is designated as critical habitat. While the Service concedes that this benefit is “likely to be relatively small,” that statement is still an overestimate. The benefit to ConocoPhillips’ ability to attract and retain workers will be zero. The Draft RIR should be amended to reflect the absence of any benefit to the oil and gas industry.

With regard to the benefit to the beluga whale, the identified benefits are also illusory. The Proposed Rule identifies as the “primary benefit” that federal agencies can no longer adversely modify or destroy critical habitat, and that this designation therefore provides additional benefit to the beluga. 74 Fed. Reg. at 63,090. This belief is premised on the hypothetical possibility that a consultation with critical habitat will lead to project modifications that improve beluga conservation. *Id.* But this hypothetical benefit lacks factual support. As the Proposed Rule explains, the Service has “little information at this time to predict what those actions may be, or how such actions may be changed, as a result of section 7 consultation.” *Id.* Given that the Service has “little information” that the designation will have any benefit, it lacks the requisite factual basis to rely on this hypothetical conservation benefit.

Equally important, to the extent that any of these hypothetical project modifications actually occurs, each project modification necessarily has an economic cost imposed on the entity (such as ConocoPhillips) who must modify their project. As explained above, even minor restrictions on ConocoPhillips’ operations can result in rapidly escalating economic costs. To the extent that the Service includes project modifications as a qualitative benefit to the beluga, it *must* also consider qualitatively the economic cost that such a modification would impose.

The second main conservation benefit identified by the Proposed Rule is the “educational value” of highlighting that certain areas are beluga whale critical habitat. 74 Fed. Reg. at 63,090. But under the Service’s own model, this benefit must be attributed to the baseline. Prior to the Proposed Rule, the Service already identified these same areas as essential to the beluga whale in the Service’s 2008 *Conservation Plan*

*for the Beluga Whale.* That educational benefit is therefore attributable to the Conservation Plan, not the critical habitat designation. Any additional incremental benefits that could flow from identifying these same areas *again* are negligible.

In any event, the educational benefit of the critical habitat rule is largely negated by the fact that the Service has defined most of the PCEs in such a way that defy meaningful location or determination. The Service does not define the areas where the “absence of toxins,” the “absence of in-water noise,” or the need for passage actually exist. The Service has provided a map showing areas where belugas are generally located, something that was already provided in the previous Conservation Plan and was generally known to those operating in the area. As such, the educational benefit of designation is negligible.

In short, the Service has not identified any reasonable or probable conservation or economic benefit that is likely to accrue from the critical habitat designation.

**C. Economic Considerations Warrant Exclusion of Area 2 or, Alternatively, Areas Surrounding ConocoPhillips’ Facilities.**

Based on the impacts identified above and the lack of any significant benefits to the beluga whale from the designation, ConocoPhillips requests exclusion of Area 2 in its entirety or, alternatively, exclusion of a buffer area that includes: (1) NPDES-permitted mixing zones;<sup>14</sup> and (2) an area of 1,000 yards (914.4 meters) surrounding ConocoPhillips’ Beluga River Unit, Tyonek Platform and Kenai LNG Plant to match the 1,000-yard security radius at the LNG terminal that is required by 33 C.F.R. § 165.1709(a)(1) and (2) and to correspond to the area for all three facilities in which ConocoPhillips’ transfer operations and other facility operation and maintenance activities occur. ConocoPhillips will provide coordinates at the Service’s request to easily identify and depict this buffer around existing facilities. This buffer exclusion will protect ConocoPhillips from undue economic impacts as a result of a critical habitat designation and represents an appropriate weighing of the potential negligible benefit of critical habitat designation against associated economic impacts. ConocoPhillips advocates a clear and reasonable buffer area around our existing structures and activities that have no known adverse impacts on habitat.

Exclusion of these areas is warranted for the following reasons:

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<sup>14</sup> This exclusion is necessary to protect ConocoPhillips from unnecessary and unwarranted economic impacts resulting from interaction between NPDES permitting and a critical habitat designation. Specifically, the State of Alaska and the Environmental Protection Agency (“EPA”) have agreed to follow a process whereby EPA may review, comment on, and object to any permit, including objections where a permit is “likely ... to result in the destruction or adverse modification of critical habitat.” See EPA Response to Comments, Alaska National Pollution Discharge Elimination System Program Approval at 43, 47-50 (Oct. 31, 2008) (available at <http://www.epa.gov/r10earth/waterpermits.htm>) (cited in 73 Fed. Reg. 66,243 (Nov. 7, 2008) (approving Alaska administration of NPDES program)).

- The *benefits* of inclusion to the beluga whale are *minimal* to non-existent given that: (a) the habitat factors are neither the source of the beluga whale decline nor an impediment to its recovery; (b) Area 2 habitat is not essential to the beluga whale; and (c) the Draft RIR fails to identify any significant project modification that will need to take place to protect critical habitat in Area 2 that is not already occurring under existing management practices and regulations.
- The lack of any identifiable benefit to the beluga from the critical habitat designation is especially apparent in the areas surrounding ConocoPhillips' existing facilities. These areas are small on a habitat scale and, while they may be habitat, the Service has provided no evidence that they are also "critical" habitat. Moreover, these areas are already heavily regulated, thus obviating the need for special management considerations.
- The other *non-beluga benefits* identified in the Draft RIR, such as creating "a more pristine environment for whale watchers" or increasing the ability to attract and retain workers are simply illusory. See Draft RIR at 7.6.2. Similarly, the Service identifies no project modifications associated with water quality that are not coextensive with existing regulatory requirements, and therefore the addition of critical habitat necessarily provides no additional water quality benefits, although it does increase administrative costs. See Draft RIR at Table 6-28 (costs of project modifications to protect water quality are co-extensive).
- As demonstrated above, the economic burdens on ConocoPhillips and other entities in Area 2 are likely to be extensive, and at the very least for ConocoPhillips are likely to range from \$698,000 to \$796,000 with a very significant chance of impacts in the multiple millions of dollars. CPAI Analysis at 2, 37, 41. These costs would in turn reverberate throughout the region in the form of reduced state oil revenues and reduced tax revenues for local jurisdictions. These burdens clearly outweigh any benefit to beluga whales since, as discussed above, no benefits exist. See, *supra*, Section I.B.; Draft RIR at Table 6-28.
- Economic impacts are especially acute around existing oil and gas operations and can be significantly mitigated or reduced by excluding a buffer around existing ConocoPhillips facilities. This could effectively avoid costs associated with reinitiating consultation or of consultations based solely on the presence of critical habitat. It would also eliminate the significant costs associated with obtaining individual NPDES permits.

For the above reasons, ConocoPhillips requests that NMFS exclude Area 2 from its final critical habitat designation. In the alternative, ConocoPhillips requests that

NMFS exclude a buffer area that includes: (1) NPDES-permitted mixing zones;<sup>15</sup> and (2) an area of 1,000 yards (914.4 meters) surrounding ConocoPhillips' Beluga River Unit, Tyonek Platform and Kenai LNG Plant. These facilities are primarily located in Area 2, which is not the most valuable habitat for beluga whales according to the Service's own Conservation Plan. Moreover, long-standing oil and gas development and operations in these areas are not responsible for the beluga whale's population decline, nor would additional regulatory schemes enhance opportunities for recovery in any meaningful way. Designation of these areas would therefore provide no additional conservation benefit and a meaningful consideration of economic impacts warrants their exclusion.

### III. The Service Should Engage in NEPA Procedures

ConocoPhillips believes that NEPA is applicable to the designation of critical habitat. See *Catron County Board of Comm'rs v. U.S. Fish and Wildlife Service*, 75 F.3d 1429, 1436 (10th Cir. 1996). Because the Service has not engaged in any NEPA process, the Proposed Rule is unlawful.<sup>16</sup>

### CONCLUSION

The Proposed Rule's broad designation of critical habitat will not further the Cook Inlet beluga whale's recovery since the beluga does not suffer from anthropogenic impacts that threaten its recovery in the first instance. In fact, the Service has acknowledged that a designation will lead to no action that isn't already occurring under existing management regimes. The Service's putative PCEs are vague, overbroad and lack the requisite definition to allow ConocoPhillips or other members of the public to determine what they are or where they are located. In any case, however, economic considerations warrant exclusion of Area 2 from the designation or, in the alternative, exclusion of a buffer area surrounding ConocoPhillips' existing facilities to avoid the very serious economic impacts demonstrated in the attached report.

For the reasons discussed above, ConocoPhillips requests that the Service revise its Proposed Rule and economic analysis consistent with the comments provided herein and reissue its proposal to allow meaningful public review and comment.

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<sup>15</sup> This exclusion is necessary to protect ConocoPhillips from unnecessary and unwarranted economic impacts resulting from interaction between NPDES permitting and a critical habitat designation. Specifically, the State of Alaska and the EPA have agreed to follow a process whereby EPA may review, comment on, and object to any permit, including objections where a permit is "likely ... to result in the destruction or adverse modification of critical habitat." See EPA Response to Comments, Alaska National Pollution Discharge Elimination System Program Approval at 43, 47-50 (Oct. 31, 2008) (available at <http://www.epa.gov/r10earth/waterpermits.htm>) (cited in 73 Fed. Reg. 66,243 (Nov. 7, 2008) (approving Alaska administration of NPDES program)).

<sup>16</sup> The Proposed Rule relies on *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), cert. denied, 116 S.Ct. 698 (1996), for the proposition that NEPA does not apply. Other courts disagree, including the District of D.C. which explained that *Douglas* "is premised on the faulty idea that the ESA repealed or replaced NEPA by implication." See *Cape Hatteras*, 344 F.Supp. 2d at 134.



Ms. Kaja Brix  
March 3, 2010  
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Thank you for considering these comments. If you have any questions, please do not hesitate to call Caryn Rea at (907) 265-6515.

Sincerely,



Dan Clark  
Manager, Cook Inlet Assets

JK

cc: J. Lecky, Protected Resources/NOAA Fisheries  
D. Mecum, Acting Regional Director/NOAA Fisheries  
D. DeMaster, Director, Alaska Fisheries Science Center/NOAA Fisheries

Attachments:

Resource Dimensions 2010. Preliminary Investigation of Economic Impacts Related to Proposed Critical Habitat Designations for Cook Inlet Beluga Whale. Prepared for ConocoPhillips of Alaska, Inc.

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