

STATE OF ALASKA

KNIK ARM BRIDGE AND TOLL AUTHORITY

SEAN PARNELL, GOVERNOR

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

Kaja Brix, Assistant Regional Administrator,
Protected Resources, Alaska Region
National Marine Fisheries Service
Attention: Ellen Sebastian
P. O. Box 21668
Juneau, Alaska 99802-1668

**RE: RIN 0648-AX50, Comments of the Knik Arm Bridge and Toll Authority on December 2, 2009
Proposed Rule Designating Critical Habitat for the Cook Inlet Beluga Whale (74 Fed. Reg. 63,080)**

Dear Ms Brix:

The Knik Arm Bridge and Toll Authority (KBATA) was established by the Alaska Legislature to ...”develop, stimulate, and advance the economic welfare of the state and further the development of public transportation systems in the vicinity of the Upper Cook Inlet with construction of a bridge to span Knik Arm and connect the Municipality of Anchorage and the Matanuska-Susitna (Mat Su) Borough.” KBATA is preparing for Section 7 Consultation under the Endangered Species Act, and therefore appreciates the opportunity to review the proposed Critical Habitat for the Cook Inlet Beluga Whale and offer questions and comments. Over the past 5 years, even prior to the listing of the Cook Inlet beluga whale, we have worked with NMFS to better understand the whale use of the Knik Arm in the proposed crossing area. We have identified construction noise as the possible source of harassment to the beluga, and have conducted studies of ambient noise in the Arm, and of various common sources of man-made noise that frequently and occasionally occur in the inlet.

At the request of NMFS we have also researched and published a white paper entitled *A Review of Beluga Whale Response to In-Water Structures, Vols I and II*, 2009. This paper shows unequivocally that beluga whales in Knik Arm are accustomed to and do pass beneath bridges in the Cook Inlet. We have documented passage beneath 13 bridges, all shorter spans and closer to the water surface than the proposed crossing. We are confident that the bridge would not act as a barrier or prevent belugas from accessing feeding areas in the upper Arm.

We believed that we were well prepared for the Section 7 ESA consultation, including any designation of critical habitat that may occur as a result of your proposal. Now, however, the lack of specificity as to what “special management considerations” or “protection” might be implemented, leaves us with a great deal of uncertainty as to the requirements we may face in the future, how much time it may

require to prepare to meet them, and what they may cost. This is particularly disturbing considering the Advance Notice of Proposed Rulemaking to Designate Critical Habitat for Cook Inlet Beluga Whales, Vol. 74, Federal Register, April 14, 2009, on page 17131 states, "We will document the special management considerations and protection associated with the essential features and relate these to the factors affecting the species and/or critical habitat during rulemaking." This was not done.

Our comments are focused on the unidentified requirements proposed through the PCEs for Critical Habitat that are above and beyond what is required under the listing of the species itself. The Primary Constituent Elements are identified as "those physical or biological features . . . (I) essential to the conservation of the species and (II) which may require special management considerations or protection" meaning "any methods or procedures useful in protecting physical and biological features of the environment for the conservation of listed species" and are the framework for any future regulatory action. In order to follow the rationale for such features, we too, applied the same considerations, but did not reach the same conclusions. Those considerations are "whether there is: (a) Presently a negative impact on the feature(s); (b) A possible negative impact on the feature in the future; (c) Presently a need to manage the feature(s); or (d) A possible need to manage the feature(s) in the future."

"PCE 1: Intertidal and sub-tidal waters of the Cook Inlet with depths < 30 feet below Mean Lower Low Water (MLLW), and within 5 miles of high and medium flow accumulation anadromous fish streams." There are some such locations that have high value and are frequented by beluga for feeding, but not all the intertidal and sub-tidal waters share the same high value. Why was a blanket description applied rather than specific areas identified?

We fail to find either a present or future negative impact or a present or future need to manage this feature. The US Army Corps of Engineers administers the Clean Water Act and regulates the discharge of materials below the Mean Higher High Water (MHHW), including all the area described in PCE 1. Did NMFS determine the administration of the USACE to be insufficient or lacking in any way to compromise the PCE 1 physical feature? If so, this should be disclosed to the public, and a proposal to better administer or protect this feature should be proposed for public review and comment.

"PCE 2: Primary prey species consisting of four (4) species of Pacific salmon (Chinook, sockeye, chum, and coho), Pacific eulachon, Pacific cod, walleye Pollock, saffron cod, and yellowfin sole." One measure of sufficient prey species in beluga is the measurement of blubber developed as a result of lipid-rich food sources. NMFS has recorded blubber thickness of up to 18 cm (7.1 inches) in Cook Inlet beluga whales, or up to a foot thick, according the Native hunters, compared to a worldwide blubber layer of 15 cm (5.9 inches.) This suggests that a more than usual prey source is available to the Cook Inlet DPS, not to the contrary. Where is a present or future negative impact or present or future need to manage this feature?

The NOAA Fisheries administers Essential Fish Habitat, and the State of Alaska manages fisheries in state waters. Has NMFS determined that these agencies are causing a present or future negative impact on the prey species, or failing to manage for present and future needs? If so, please disclose these findings, and identify the special management or protective measures that would be initiated to fill the perceived void. KABATA would appreciate the opportunity to consider and comment on such measures.

"PCE 3: The absence of toxins or other agents of a type or amount harmful to beluga whales." Just how this would be determined or administered is particularly uncertain. At present belugas in Cook Inlet are

not known to contain any toxins, nor are the waters of Cook Inlet known to contain any detectable amount of toxins. The Cook Inlet DPS is especially clean of contaminants, ranking their environment superior to other stocks of beluga. Given the tremendous flush of approximately 60% of the Knik Arm waters in the twice a day tidal movement greater than 11 feet per second, it is difficult to imagine the presence of toxins in any appreciable or even detectable amount that could possibly harm the whales. It is impossible for us to predict how this PCE would be measured against or applied to project impact evaluation.

Toxins are regulated by the Environmental Protection Agency and the State of Alaska. Since the inlet is clean, as are the beluga, there is no basis to determine that additional regulation is needed by NMFS.

“PCE 4: Unrestricted passage within or between critical habitat areas.” There are no barriers to passage now, or in the foreseeable future. In terms of need to manage, the USACE and the US Coast Guard would regulate any proposed barriers to navigation (or passage), such as dams on the waters of the Cook Inlet. KABATA’s White Paper demonstrated that the Cook Inlet Beluga Whales do not consider bridges as barriers. In fact this Cook Inlet stock passes under at least 13 bridges within the inlet to reach shallow water feeding areas. What is the present or future need that NMFS perceives to designate this PCE?

“PCE 5: The absence of in-water noise at levels resulting in the abandonment of habitat by Cook Inlet Beluga Whales.” Since the belugas have not abandoned their habitat in the Cook Inlet, it is unknown what the threshold noise level is. Presently NMFS sets 120 dB as the threshold of acoustic harassment for continuous noise, 160 dB for impulsive sounds resulting in a Level B “take” and 180 dB for a Level A take. This, we believe is not appropriate to the Cook Inlet where ambient noise rises to 150 dB and possibly greater, so that the 120 dB isopleths to indicate harassment could not be measured. The belugas surfacing within the Level B take of 160 dB isopleths at the Port of Anchorage did not appear to be annoyed or harassed by it. Even the beluga themselves have vocal sounds around 219 dB, which are surely not harassment to their own species.

With such high ambient noise, and the difficulty of site specific measurement, given the differences in subsurface elevations and surfaces, and the complicating factor of the tides, winds, ice and other natural or ambient sounds, each pile driving site would differ, and the effectiveness of monitoring is questionable. Yet the belugas are present, and therefore obviously tolerate the sounds. Some scientists (Brandon Southall, 2007) believe that beluga whales accustomed to very quiet conditions would not be injured at sound pressure levels of less than 230 dB. Given the ambient levels to which the Cook Inlet DPS have adapted, it is unlikely a lower sound pressure level would harm them. Are monitoring costs and shut-downs justified?

The cost of regulating noise by monitoring and shutting down construction when whales appear is very expensive, totally a \$5 million annual cost, plus twice the amount in contractor risk factor of shutting down. Given this very high expense, it is imperative that the sound levels be evaluated scientifically, be appropriate for this specific location, and these DPS whales.

We recommend that NMFS try again to determine the real cost of designating critical habitat, and consider the entire effort that goes into preparing for consultation, not just presence at the consultation itself. Also, we recommend that the cost to developers be fully evaluated, and that such costs be completely justified and demonstrably benefiting the Cook Inlet beluga whales.

Attached in greater detail are Biological and Economic Comments for your full consideration. The purpose of this attachment is to:

- Assess the adequacy of the information used to formulate proposed CHD for the Cook Inlet beluga whale;
- Determine the merit of the proposed primary constituent elements (PCEs) and their parameters and provide suggestions on updates to PCEs;
- Analyze the adequacy of the draft regulatory impact review (RIR); and
- Identify discrepancies between the draft RIR and the Proposed Rule.

Thank you for the opportunity to comment, and we look forward to your response.

Sincerely,

A handwritten signature in black ink, appearing to read "Andrew J. Niemiec". The signature is fluid and cursive, with a long horizontal stroke at the end.

Andrew J. Niemiec, Executive Director

Enclosure