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March 3, 2010

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

Ms. Kaja Brix

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Protected Resources Division, Alaska Region  
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**Re: RIN 0648-AX50; Comments of the Resource Development Council for Alaska, Inc. on December 2, 2009 Proposed Rule Designating Critical Habitat for the Cook Inlet Beluga Whale (74 Fed. Reg. 63,080)**

Dear Ms. Brix:

Thank you for the opportunity to submit comments on the National Marine Fisheries Service's ("Service") proposal to designate 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>

The Resource Development Council for Alaska, Inc. ("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 municipal governments, organized labor and industry support firms. The industries represented within RDC constitute the great majority of private sector economic

<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).

activity and employment within Alaska. 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 Cook Inlet beluga whale. RDC members have funded millions of dollars in research on beluga whales over the past decade. Over the years, RDC has worked closely with our members and the Service on a number of initiatives to assist in recovery of the stock and I am pleased to have been recently invited to serve on the Cook Inlet Beluga Recovery Stakeholder Panel.

As described in detail below, the Service has recognized that the beluga whale's decline was not caused by the activities of our members or, indeed, habitat impacts of any kind, but rather to overharvesting.<sup>2</sup> *See, e.g.*, 72 Fed. Reg. 19,854, 19,859 (April 20, 2007) (proposed beluga whale listing decision) (“[T]he subsistence removals reported during the 1990s 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.”). Major industrial activities in the region date back more than 60 years, far preceding the abrupt decline in the beluga whale population in the 1990s. Yet, as the attached economic analysis describes, the critical habitat designation will discourage development and our members will suffer significant adverse impacts in the form of delays, additional process, protracted litigation, and unnecessary protection measures as a result of a broad designation that provides no measurable benefit to beluga whales.

It is RDC's position that the Proposed Rule designating beluga whale critical habitat is not justified based on the available data and is inconsistent with the ESA's clear standards and congressional intent, which require the Service to constrain its designation to areas that are in fact “essential” and that may require “special management.” As discussed in detail in the comments below, the Service has failed to meet the requirements of the ESA for designating critical habitat because: (a) designation of critical habitat is not necessary for conservation of beluga whales since overharvest, not habitat decline, is the source of past beluga population decreases; (b) the identified primary constituent elements (“PCEs”) are overbroad and the Proposed Rule fails to identify where those elements can be found; and (c) beluga whale habitat does not require special management considerations or protections.

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<sup>2</sup> The Service estimated that subsistence harvests resulted in the removal of a mean average of 87 whales per year prior to 1999, after which a series of actions including legislation, co-management agreements and voluntarily dropped hunts has limited subsistence harvests. 64 Fed. Reg. 56,298, 56,298-99 (Oct. 19, 1999).

RDC requests that the Service:

(1) revise and reissue its fundamentally flawed economic analysis and reissue a proposal that is based on the best available science and that properly identifies the locations and features of any purported “critical” habitat to afford the public an opportunity to meaningfully comment on the Service’s proposal;

(2) exclude all or a portion of the identified habitat from a final designation based on ESA Section 4(b)(2) as discussed in detail below; and

(3) conduct the required analyses and consultations under the National Environmental Policy Act (“NEPA”), Executive Order 13211 (Statement of Energy Effects) and Public Law 108-199 (consultation with Alaska Native corporations).

## DETAILED COMMENTS

### **I. The Service’s Overreaching Proposal Is Inconsistent with the ESA’s Narrow Critical Habitat Requirements and Will Not Further the Beluga Whale’s Recovery**

The Service’s designation of large portions of Cook Inlet, including the most developed portions of the Inlet, as critical habitat for the beluga whale cannot be reconciled with the ESA’s purpose and intent in authorizing the Service to designate critical habitat. Specifically, the ESA *narrowly* defines critical habitat to include:

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of this Act, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection.

16 U.S.C. § 1532(5)(A).

That definition narrowly limits the Service’s authority and discretion to designate critical habitat by placing specific and detailed requirements on any designation. Specifically, the definition limits critical habitat to “specific areas,” not the entire range of the species. *Id.* Those “specific areas” *must* contain “physical or biological features” (also referred to as primary constituent elements or “PCEs”) that are “essential to the conservation of the species.” *Id.* More than just being “essential” to the conservation of the species, the PCEs found on the specific geographic area must be in need of “special management considerations or protections.” *Id.*

Viewed as a whole, the ESA evinces clear intent to limit critical habitat designations to those narrowly identified areas that are truly essential to the conservation of the species.

Congress' intent to narrowly confine critical habitat designations to only the most essential areas is patently evident in the ESA's legislative history. As originally enacted, the ESA had no definition of critical habitat. The Service adopted an expansive definition which allowed it to designate any habitat useful to the species.<sup>3</sup> In 1978, the U.S. Supreme Court in *TVA v. Hill*, 437 U.S. 153, changed the nation's perception of critical habitat when it enjoined construction of a partially completed dam because further construction would adversely modify or destroy critical habitat for the endangered snail darter.<sup>4</sup> That decision created a concern that the Service's burgeoning critical habitat designations would lead to economic paralysis by halting or unduly burdening economic activity. In response, Congress identified the lack of a circumscribed definition of critical habitat as the "heart of the problem" and crafted the current definition of critical habitat to limit designations to only the most essential areas.<sup>5</sup> Under this more "narrow[]" definition, "areas would be designated critical habitat only if their loss would *significantly decrease* the likelihood of conserving the species in question."<sup>6</sup>

The Service's current designation for the beluga whale departs from these required statutory criteria by: (a) proposing to designate areas that are not necessary for the conservation of the beluga; (b) failing to identify where the PCEs are located within the specific areas proposed for designation; and (c) proposing to designate areas that do not require special management.

**A. The Service Lacks Information Sufficient to Determine That Designation Is "Necessary"**

As a threshold matter, the Proposed Rule utterly fails to explain how the designation of critical habitat for the beluga whale is "essential to the conservation of the species," as required by the definition of critical habitat.<sup>7</sup> The ESA defines "conservation" as "the use of all methods

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<sup>3</sup> See H.R. Rep. No. 95-1625 at 25 (1978) (hereinafter "House Report").

<sup>4</sup> *Id.* at 10-12.

<sup>5</sup> See Legislative History of the Endangered Species Act at 880 (reprinting of House Consideration and Passage of H.R. 14104, with amendments, Oct. 14, 1978).

<sup>6</sup> House Report at 25 (emphasis added).

<sup>7</sup> As noted above, Congress intended that an area would be designated as essential if the loss of the area would "significantly decrease" the likelihood of conserving the species. *Id.*

and procedures which are *necessary* to bring any endangered species or threatened species to the point at which” the protections of the ESA are no longer required. 16 U.S.C. § 1532(3) (emphasis added). This language requires the Service to make a finding, supported by the best available commercial and scientific data, that any specific geographic area designated as critical habitat is “necessary” to bring the beluga “to the point at which the measures provided by [the ESA] are no longer necessary.” *Id.*

The Service here makes no such finding with respect to the beluga whale, nor could it. The Service’s own data shows:

- (1) That beluga whale habitat remains intact, functional, and capable of supporting recovery. *See, e.g.*, 73 Fed. Reg. 62,919, 62,921 (Oct. 22, 2008) (listing decision) (“[W]e have no data at this time to indicate that carrying capacity has decreased”).
- (2) That beluga whale declines are attributable to overharvest, not to habitat modification. 72 Fed. Reg. at 19,859 (“[T]he subsistence removals reported during the 1990s are sufficient to account for the decline observed in this population...”); NOAA Fisheries, *Conservation Plan for the Cook Inlet Beluga Whale* at 2 (Oct. 2008) (hereinafter “Conservation Plan”) (decline of population in mid-1990s “could be explained by subsistence harvest removals at a level that this small population could not sustain”); 65 Fed. Reg. 34,590, 34,592 (May, 31, 2000) (stating, in response to comment that entire decline should not be attributed to harvest alone, that status review “clearly shows that the harvest from 1994 through 1998, the period when reliable abundance estimates were available, was sufficient to account for the decline”); 72 Fed. Reg. 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.”); 64 Fed. Reg. 66,901, 66,902 (Nov. 30, 1999) (“[E]xisting information on fish runs, oil and gas activities, sewage problems, and other sources of contaminants ... suggests that beluga are not stressed by anthropogenic factors in Cook Inlet.”); 65 Fed. Reg. 38,778, 38,780 (June 22, 2000) (survey data from Rugh *et al.* (as in press in 2000) “do not support a conclusion that the range of CI beluga whales has been diminished by these activities,” referring to

municipal, industrial and recreational activities in upper Cook Inlet).<sup>8</sup>

- (3) That, since the delayed effects of overharvest ended, the beluga whale population in Cook Inlet has stabilized, if not increased, without the designation of critical habitat. Compare NOAA Fisheries Alaska Fisheries Science Center, *Status Review and Extinction Assessment of Cook Inlet Belugas* at 55 (Apr. 2008) (citing Litzky (2001) (attached)) (model shows it would take five to seven years after cessation of harvest for adult to juvenile ratio to recover)<sup>9</sup> with <http://www.fakr.noaa.gov/newsreleases/2009/cibeluga100609.htm> (Service's summary of population abundance

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<sup>8</sup> Inexplicably, in the 2007 ESA listing proposal, the Service cited the same survey by Rugh *et al.* (2000) but changed this language from “the data do not support a conclusion that the range of CI beluga whales has been diminished by these activities” to “[i]t is possible that the range of Cook Inlet beluga whales has been diminished by these activities, either individually or cumulatively.” Compare 65 Fed. Reg. at 38,780 with 72 Fed. Reg. at 19,857-58 (emphases added). While these two statements are not necessarily contradictory, since of course virtually anything is “possible,” the 2007 change clearly attempts to introduce doubt regarding the impact of municipal, industrial and recreational activities. The Service provides no rationale whatsoever for this change in interpretation and, as such, reliance on the more recent statement to suggest that such activities *may* have diminished the beluga whale's range would be arbitrary and capricious. Moreover, such equivocation is at odds with the best available science, as described repeatedly by the Service throughout the past decade (and even in the same 2007 proposed listing document), that “[n]o information exists” to conclude that beluga whale habitat modification has led to population declines. 72 Fed. Reg. at 19,858.

<sup>9</sup> See also State of Alaska Comments on ESA Beluga Listing, Encl. Overview at 1 (Aug. 3, 2007), available at [http://www.sf.adfg.state.ak.us/statewide/PDFs/NMFS\\_Beluga%20comments07-31-07Chapter1-Popln.pdf](http://www.sf.adfg.state.ak.us/statewide/PDFs/NMFS_Beluga%20comments07-31-07Chapter1-Popln.pdf) (“Growth within the population could not reasonably be expected until the breeding age component of the population stabilized, and this stabilization could not be expected for 5 to 7 years after unsustainable hunting ended.”); *id.* Encl. Ch. 1 at 6 (“[G]iven that the [harvest] moratorium took effect in 1999 and the previous four years' calves likely had a low survival rate, an expected growth rate increase might not even be expected for one full generation. This is consistent with the result of Litzky (2001) indicating that it would take 5 to 7 years to begin recovery.”); *id.* (“The anticipated recovery will be evident if continued increases in the count estimates occur in successive years beginning in 2005, not beginning in 1999.”).

data showing 15.5% population increase in the four years since 2005, a nearly 4% increase per year).

Under these circumstances, designation of critical habitat for the beluga whale is not “necessary” to recover the beluga whale.

Oddly, the Service limits its inquiry as to whether an area is essential to the conservation of the species to those areas that are *unoccupied*. See 74 Fed. Reg. at 63,082 (asking “Are there any areas outside those currently occupied that are essential to the conservation of the species?”). However, the ESA requires the Service to apply this same inquiry to occupied areas as well. The Service’s authority to designate occupied habitat, just like unoccupied habitat, is limited to “specific areas . . . essential to the conservation of the species.” 16 U.S.C. § 1532(5)(A); *cf.* 16 U.S.C. § 1532(5)(A)(ii) (authorizing designation in “specific areas outside the geographical area occupied by the species” that are “essential for the conservation of the species”). The Service’s failure to consider whether these areas are essential to the conservation of the species is thus contrary to the ESA.<sup>10</sup> Furthermore, if the Service performed the required analysis, it could not reasonably conclude that broad swaths of Cook Inlet are “necessary” for conservation of the species when the Service itself has found no evidence that the carrying capacity of Cook Inlet has decreased or that habitat is related to the beluga whale’s decline.<sup>11</sup> 73 Fed. Reg. at 62,921; 72 Fed. Reg. at 19,858-59.

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<sup>10</sup> The obligation to consider whether designation of occupied specific areas is essential to the conservation of the species applies regardless of how the Service parses the language of the statute. While the term “essential to the conservation of the species” in subsection (5)(A)(i) arguably modifies “physical and biological features,” those physical and biological features are still necessarily tied to “specific areas within the geographical area occupied by the species.” 16 U.S.C. § 1532(5)(A). Thus, under any plausible reading, the Service is required to determine that the specific areas it designates are necessary for the conservation of the beluga whale.

<sup>11</sup> While RDC agrees that Cook Inlet habitat will support recovery, we believe that carrying capacity has likely decreased as a result of non-anthropogenic factors, namely, the constant release of fine silts from glaciers which are filling Cook Inlet at a steady rate, and that the Service should adjust the number of whales needed to meet recovery goals accordingly. Nevertheless, we agree with the Service’s statements on carrying capacity insofar as they confirm that anthropogenic factors have had no impact on beluga whale habitat that would necessitate a critical habitat designation.

**B. The PCEs Identified in the Proposed Rule Are Overly Broad and the Service Has Not Identified Specific Areas Where They Can Be Found**

In addition to failing to show the necessity of designating broad swaths of Cook Inlet as critical habitat, the Service's Proposed Rule does not comply with the ESA's requirement that the identified essential biological features (or PCEs) must be "found" in the areas proposed for designation. 16 U.S.C. § 1532(5)(A) (limiting critical habitat to "specific areas within the geographical area occupied by the species . . . on which are found those physical or biological features . . . essential to the conservation of the species"). As explained below, the Proposed Rule violates this statutory mandate for at least three reasons: (1) the PCEs are defined so broadly as to make them impossible to identify; (2) the Proposed Rule fails to identify the specific areas where the identified PCEs are found; and (3) the Proposed Rule would designate areas around existing structures and ongoing human activities that likely do not contain any of the five PCEs identified – a problem that the public, including RDC, could better address if the Service had described the PCEs in a manner allowing such an evaluation.

**1. The Beluga PCEs Are Defined So Broadly as to Preclude Meaningful Identification**

The purpose of designating critical habitat is to identify, and locate geographically, those areas that are essential to conserving a threatened or endangered species. At least four of the five<sup>12</sup> identified PCEs are crafted so broadly as to defy meaningful location, and thus cannot reasonably be "found" within the specific geographic areas.<sup>13</sup>

*First*, the Service includes as a PCE "[t]he absence of toxins or other agents of a type or amount harmful to beluga whales." While, no doubt, every species needs the "absence of toxins or other agents" that are harmful to *that species*, this PCE provides no meaningful guidance as to which habitats in Cook Inlet are essential to the beluga. The Proposed Rule provides no information on which toxins are of concern, where they are located, what levels would be

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<sup>12</sup> Although the Proposed Rule identifies five PCEs, the Service's *Draft RIR/4(b)(2) Preparatory Assessment/IRFA for the Critical Habitat Designation of Cook Inlet Beluga Whale* at 2-5 (Nov. 17, 2009), identifies a sixth PCE for "[p]redator escape terrain." This error is significant because either: (1) the draft economic analysis is flawed for improperly considering a PCE that does not exist; or (2) the Proposed Rule is flawed because it failed to make a finding at all with respect to this sixth PCE.

<sup>13</sup> The first PCE regarding anadromous fish streams does give a specific geographic area (within five miles); however, that distance is not supported by scientific data showing that any or all of these areas within a five mile radii are "essential" to the beluga whale.



considered harmful and, critically, where an “absence of toxins” is found. This is particularly troubling given that the Cook Inlet beluga whale has the lowest concentrations of common toxins among beluga stocks in Alaska, Greenland, Arctic Canada and the Saint Lawrence,<sup>14</sup> thus calling into question the need for such a PCE in the first instance.

*Second*, the Service includes as a PCE the “[a]bsence of in-water noise at levels resulting in the abandonment of habitat by Cook Inlet beluga whales.” As a preliminary matter, the Service has conceded that noise is not an appropriate PCE. In its final critical habitat rule for the Southern Resident Killer Whale, 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 fact that, here, the Service is attempting to define a habitat impact as one that results in *a whale’s abandonment* of an area highlights that any putative impact is to whales, not to their habitat.

Furthermore, even if noise were a habitat impact, this PCE is as meaningless as the “absence of toxins” PCE because it provides no basis, at the time of critical habitat designation, to determine whether a particular area has this PCE, what level of noise results in abandonment of habitat, what constitutes “abandonment,” where such noise is occurring, or where the “absence” of that noise is found. Equally troubling, the critical habitat designation provides no basis to account for potential sources of noise that are not stationary, such as aircraft, ships and tidal bores.

Moreover, the Proposed Rule fails to account for the current baseline noise levels in many of the areas where the beluga whale occurs. Ambient noise levels in Cook Inlet range from 80 to 150 dB re 1  $\mu$ Pa (Blackwell and Greene 2002; Blackwell 2005; URS 2007; Scientific Fishery Systems 2009). Yet there is no evidence that these high levels of ambient noise currently deter beluga whales from these areas. Given the apparent non-essential nature of quiet habitat in reality, this PCE should be eliminated from any final rule. While it is not warranted, if the Service does include such a PCE in its final designation, it must either identify a 150 dB level to account for existing high ambient noise across much of Cook Inlet or, alternatively, identify only those limited, specific geographic areas where the Service can reasonably conclude, based on actual data, that some lower ambient noise level currently occurs. RDC suggests that either of these options will result in a PCE that provides no benefit to beluga whales.

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<sup>14</sup> Becker *et al.* (2000) compared tissue levels of total PCBs, total DDT, chlordane compounds, hexachlorobenzene, dieldrin, mirex, toxaphene, and hexachlorocyclohexene. In addition, hepatic concentrations of cadmium and mercury were lower in the Cook Inlet population compared to Arctic Alaska populations.

*Third*, the Service includes a PCE for “[p]rimary prey species.” While these PCEs are no doubt “found” *somewhere* within the 3,016 square mile area designated as critical habitat (at least during some part of the year), the Service provides no meaningful basis to determine where these PCEs are found or where the essential feeding areas for the prey species are located. Nor does the Service provide any explanation for how it intends to deal with the fact that some of these PCEs are highly migratory. These migratory species by definition are not tied to a specific geographic area. Does the Service intend to treat these species as PCEs for the beluga whale when they leave the designated critical habitat areas and are “adversely modified or destroyed” by *upriver* sport-fishermen or by commercial fisheries *outside* of Cook Inlet?

RDC anticipates that other commenters on the Proposed Rule will urge the Service to designate upriver systems and salmon spawning areas as beluga whale critical habitat on the theory that migratory salmon, a proposed PCE, can be found in these upriver areas. The Service cannot grant such a request because:

- To the extent these upriver areas are beyond where the Service has evidence of beluga occurrence, those areas are not beluga whale “habitat.” For this same reason, these upriver areas cannot qualify as “unoccupied” beluga habitat either – these areas are not beluga “habitat” of any kind. The fact that some fish species that beluga whales consume travel to those areas does not make those areas beluga habitat; it makes those areas fish habitat.
- Even if upriver areas where belugas do not occur could somehow be considered unoccupied beluga habitat based solely on the presence of beluga prey, those areas still do not qualify as beluga critical habitat because the “area itself” is not “essential” to the beluga. *See The Cape Hatteras Access Pres. Alliance v. U.S.F.W.S.*, 344 F.Supp. 2d 108, 119 (D.D.C. 2004) (“[W]ith unoccupied areas, it is not enough that the areas features be essential to conservation, the area itself must be essential”); *see also* 50 C.F.R. § 424.12(e) (allowing designation of unoccupied areas only where “such areas are essential to the conservation of the species”). Thus, even if the protection of the PCE (migratory salmon) in the upriver areas were essential to the beluga, designation is still not appropriate because the upriver “area itself” is not essential to the beluga.
- Even if the Service could designate areas that have never been or ever will be beluga habitat (which it cannot) and even if the Service could plausibly conclude that the upriver “area itself” is essential to the beluga (which it cannot), the Service still cannot designate critical habitat upriver because there is no reason to believe these upriver fish runs are not being adequately managed. This is especially true given that the Service does not know the amount of fish required to sustain the beluga population. *See Conservation Plan* at 46 (“The amount of

fish required to sustain this population is unknown.”). For all of these reasons, designation of upriver areas as beluga whale critical habitat is “simply beyond the pale of the statute.” *See Cape Hatteras*, 344 F. Supp. 2d at 123.

*Fourth*, the Service’s PCE for “[u]nrestricted passage between critical habitat areas” is nonsensical and circular. The Service must use PCEs to define critical habitat, not the other way around. Currently, there is no critical habitat designated for the beluga whale and therefore no possible way for there to be “passage between critical habitat areas.” Moreover, by designating passage *between* critical habitat *as* critical habitat, there cannot be any such thing as an area *between* critical habitat in the first instance.

Even assuming the Service meant to describe this PCE as the “unrestricted passage between *other PCEs*,” a proposition that at least makes some sense, an unrestricted passage PCE still is not reasonably identifiable because the location of the “other PCEs” is not identified in the Proposed Rule. Simply put, for passage between two or more areas to be deemed “essential,” the Service must identify *where* those areas are and *why* specific passage areas between them is “essential.” The Service cannot use an “unrestricted passage” PCE as a tool to extend critical habitat to every place the beluga whale may travel without having shown that such areas are indeed necessary for their conservation.

The Service has apparently overlooked its own regulations on this point, which explain how it should address a situation where “several habitats, each satisfying the requirements for designation as critical habitat, are located in proximity to one another.” 50 C.F.R. § 424.12(d). This regulation reasonably allows the Service to designate the area between closely associated but separate patches of critical habitat. Critically, this provision is not available to the Service here because it has not identified the specific areas of critical habitat where each of the other, non-“passage” PCEs occur.<sup>15</sup>

Taken together, these four open-ended PCEs evince an attempt to draw a wide map around areas of habitat that the beluga may or may not need. This broad brush approach does not provide an opportunity for meaningful public comment and suggests that the Service would have more closely followed its regulations if it found that critical habitat was “not determinable.” Moreover, it cannot be reconciled with the plain language of the ESA or Congress’ intent in defining critical habitat so that it is construed narrowly and only where such habitat is indeed necessary for a species’ conservation.

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<sup>15</sup> If the Service had designated these specific areas, it would also become readily apparent where the critical transit routes for the beluga whale are located. It simply cannot be that the beluga whale needs unrestricted access to *every* part of Areas 1 and 2 in order to transit between PCEs.

## 2. The Proposed Rule Fails to Identify Specific Locations Where the Individual PCEs Are Found

Because of the broad nature of these PCEs the Proposed Rule does not, and indeed cannot, identify where the individual PCEs are located. Instead the Proposed Rule merely states, without justification, that “[a]ll of these features are found or identified within the areas proposed as critical habitat.” 74 Fed. Reg. at 63,087. This assertion does not satisfy the ESA’s requirements for two reasons.

Principally, the *assertion* of a finding, without justification or explanation, is not the equivalent of *making* a finding. As the D.C. Court of Appeals has explained:

When a statute requires an agency to make a finding as a prerequisite to action, it must do so. Merely referencing a requirement is not the same as complying with that requirement. And stating that a factor was considered – or found – is not a substitute for considering or finding it.

*Gerber v. Norton*, 294 F.3d 173, 186 (D.C. Cir. 2002) (internal quotation marks and citations omitted). Here too, the Service’s assertion that the PCEs “are found” in the designated areas is no substitute for “considering or finding it.” The blanket assertion that these PCEs are present, *somewhere*, within the broad contours of the 3,016 square mile designation misses the point. The Service is required to identify the specific areas where *each PCE is present*. The Service here did not even attempt to identify where these PCEs are found and, as such, the Service has not met its statutory obligations under the ESA.

The Service may believe that these issues can be sorted out, and the presence or absence of PCEs can be determined, during subsequent ESA Section 7 consultations. *See* 16 U.S.C. § 1536(a)(2). That is, in each subsequent Section 7 consultation the Service will determine on a case-by-case basis which PCEs are present in a given area (if any) and the impact of any proposed project on those PCEs. But as the D.C. District Court explained in *Cape Hatteras*, such a procedure: (a) improperly over-designates critical habitat, (b) “wrongfully shifts the burden of initiating designation decisions from the Service to future stakeholders,” and (c) “creates a whole new procedure, taking designation out of the notice and comment rulemaking process.” 344 F. Supp. 2d at 124. Indeed the entire purpose of identifying “specific areas” on which PCEs are “found” is defeated by a blanket critical habitat designation that relies on future processes to sort out which habitat is indeed “critical.”

**3. Areas Around Existing Structures and Ongoing Human Activities Do Not Contain PCEs Necessary for the Service to Designate Critical Habitat**

For the reasons discussed above, the Service's total failure to identify the specific locations where individual PCEs are actually present makes it difficult for RDC to meaningfully comment on whether the PCEs are present, or not, in particular areas in which our members may be affected. Nonetheless, it should be abundantly clear that many or all of the PCEs, as ill defined as they are, are unlikely to be present adjacent to existing structures or in areas where significant human activity currently occurs. As the Service is aware, it cannot designate areas as critical habitat in the hope that these areas may one day provide the PCEs for which they are designated, but instead such PCEs must currently exist in order for an area to be designated as critical. *See Cape Hatteras*, 344 F.Supp. 2d at 123 (Service cannot rely on "hope," but "must rely on facts in the record").

The Proposed Rule appropriately 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 because these structures do not contain PCEs. *See Cape Hatteras*, 344 F.Supp. 2d at 122 (rejecting broad designation of land where PCEs were not actually found). However, manmade structures are not the only areas within the Service's 3,016 mile swath that do not contain the PCEs. The PCEs are also unlikely to exist in areas immediately surrounding these structures, or in areas near ports, oil and gas operations, pipelines, shipping facilities, existing National Pollutant Discharge Elimination System ("NPDES") outfalls, and within shipping lanes.<sup>16</sup> Nor can the Service reasonably find that these areas are necessary to ensure that whales have unrestricted access to other PCEs.

Had the Service properly described the PCEs in a manner that allowed the public to know what the PCEs are and where they are found, RDC would provide detailed information here addressing the purported presence of specific PCEs in specific areas where our members operate. The Service's failure to provide such information deprives RDC and other members of the public the opportunity to meaningfully evaluate and comment on the Proposed Rule. Notwithstanding this significant flaw in the Proposed Rule, RDC asserts that the five PCEs are unlikely to be "found" anywhere near existing structures and areas where significant human activity occurs.

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<sup>16</sup> The fact that beluga whales may use such areas does not make them "critical." If it did, critical habitat designations would be a simple exercise in determining the current range of the population. Instead, the Service is required to distinguish between beluga whale *habitat*, where the whales may occur, and *critical* habitat, where specifically identified biological features occur that are essential to the whales.

### C. Proposed Areas Do Not Require Special Management Consideration or Protections

The Service's errors in failing to identify the location of the PCEs are further compounded by the Proposed Rule's summary conclusion that the (indeterminable) PCEs present in these (unidentified) areas may require special management considerations or protections. As explained above, 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. *Cape Hatteras*, 344 F.Supp.2d at 124. As with any statutory requirement, the Service must do more than merely reference the requirement, or state that it is "found." *Gerber*, 294 F.3d at 186.

The Service's special management determination with respect to each PCE is simply not supportable. With respect to the intertidal waters PCE, the Service speculates that this PCE could be modified by hypothetical future dredging, channel realignment, dikes or other structures. The Proposed Rule then concedes that the Clean Water Act ("CWA") already regulates these areas for the features essential to the beluga such as fishery areas and spawning and breeding areas. The Proposed Rule then *relies* on these existing protections to conclude that the intertidal PCE may require *special* management. This makes no sense. The CWA already protects this PCE. If the Service believes that this protection is not adequate, and that "special" management would be required, it is obligated to explain this potential unmet management need. But evidence of existing management cannot, by itself, provide evidence of a need for special management.

The Service makes an identical illogical leap with respect to (1) the prey species PCE (fisheries are managed therefore may require special management); (2) the absence of toxin PCE (releases of toxins are managed under the CWA NPDES program and therefore may require special management consideration); and (3) the unrestricted passage PCE (in-water structures are regulated under the CWA and therefore may require special management). Paradoxically, with respect to the absence of noise PCE, the Service concludes that "[n]o specific mechanisms presently exists to regulate in-water noise" and that therefore this PCE may require special management as well.<sup>17</sup> Thus, under the interpretation put forward in the Proposed Rule, both the presence of an existing management regime and the absence of an existing management regime equally lead to the same conclusion: special management may be required.

The Service's position that both adequate management and inadequate management provide evidence of the need for "special" management effectively writes the word "special" out of the statute. Under this position, every PCE would require special management, because every

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<sup>17</sup> This statement is also inaccurate. The Marine Mammal Protection Act is frequently used to regulate in-water noise.

PCE either is already adequately managed, or it is not. The agency cannot interpret the word “special” in a manner that renders the word superfluous. *See, e.g., Bennett v. Spear*, 520 U.S. 154 (1997) (interpretation must give effect to “every clause and word of a statute”). The term “special” is commonly defined as “distinguished by some unusual quality: uncommon; noteworthy, extraordinary.” *See Webster’s Third New International Dictionary* 2186 (2002). Where, as here, all the PCEs are adequately managed, the Service cannot designate critical habitat absent evidence that some additional, uncommon, extraordinary and hence “special” management may be required.<sup>18</sup>

Not only is the Service’s special management finding conclusory and contradictory, but it is contrary to the evidence regarding the status of the beluga whale. Habitat considerations are neither the source of the beluga whale’s decline nor an impediment to its recovery. Quite the contrary, the Service’s own data shows that beluga whale habitat remains intact, functional, and capable of supporting recovery. 73 Fed. Reg. at 62,921 (“[W]e have no data at this time to indicate that carrying capacity has decreased.”) (listing decision).

Finally, the Service’s special management finding has to be reconciled with its own economic analysis. The Service’s economic analysis indicates that some projects may have to be modified to protect critical habitat. But, tellingly, that same analysis identifies no project modification for: (a) oil and gas activities; (b) mining operations; (c) transportation projects; (d) other large scale projects; (e) water quality projects; or (f) power projects – that are not otherwise “coextensive” with existing regulatory obligations. *See Draft RIR/4(b)(2) Preparatory Assessment/IRFA for the Critical Habitat Designation of Cook Inlet Beluga Whale* (“Draft RIR”) at Table 6-28 (Nov. 17, 2009). In other words, for this broad array of projects, the Service cannot identify any project modifications that would occur as a result of critical habitat designations that would not otherwise occur anyway.

Under the circumstances presented here, where the beluga whale’s habitat is intact and functioning under existing management, and where the Service is unable to identify anticipated project modifications that would not already result from existing management, the Service cannot support a finding that special management protections may be required.

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<sup>18</sup> The Service’s additional attempt to buttress the special management finding by stating that “none of these management regimes is directed at the conservation and recovery needs of the Cook Inlet Beluga whale” (74 Fed. Reg. at 63,088) would similarly render the special management requirement superfluous. That statement is equally true of every conceivable PCE for every conceivable listed species, because outside of the ESA, there are no other management regimes “directed at the conservation and recovery needs” of listed species.

## **II. The Service Should Decline to Designate Habitat on the Basis of Its 4(b)(2) Analysis**

Even if the required statutory elements for designating critical habitat were properly met (which as explained above, they were not), the Service should exercise its discretion under Section 4(b)(2) of the ESA to exclude the areas around structures and near areas of significant human activity, including projects that are currently proposed. Section 4(b)(2) of the ESA 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.” 16 U.S.C. § 1533(b)(2). The Service produced its Draft RIR to comply with this requirement. As explained below, however, the Draft RIR is seriously flawed and significantly underestimates the economic impact of the critical habitat designation. Properly evaluated, the economic impacts of the Proposed Rule outweigh the benefits of designation, especially in the areas around existing structures and near significant ongoing human activity, and require the Service to conclude that exclusion is appropriate under Section 4(b)(2).

### **A. The Service’s Economic Analysis Is Fundamentally Flawed and Reliance on It Is Unlawful**

Despite designating 3,016 square miles of critical habitat, including numerous oil and gas facilities, major port operations, shipping lanes, power projects, commercial fishing operations, and major transportation projects, the Draft RIR concludes that the beluga whale critical habitat designation will have only minor economic impacts and that “the anticipated benefits outweigh the anticipated costs.” Draft RIR at 8-1. The Service’s Draft RIR fails to consider significant potential impacts of a critical habitat designation and must be revised to more accurately reflect the real economic threat posed by such a designation.

As noted previously, the activities of RDC’s members are not the cause of the beluga whale’s decline nor an ongoing threat to the whale’s recovery. Nevertheless, an independent study commissioned by RDC demonstrates that the beluga whale critical habitat designation has the potential to result in economic impacts on RDC’s members ranging from \$39.9 million and \$399 million annually. *See* Resource Dimensions, *Preliminary Investigation of Economic Impacts* at 2 (Mar. 3, 2010) (hereinafter “RDC EA”) (attached). Over a ten year period (the length of time utilized by the Draft RIR) the present value of that lost production at a 3 percent discount rate is \$340.3 million to \$3,403.6 million, and at a 7 percent discount rate is \$280.2 million to \$2,802.4 million. These numbers are conservative and do not take into account, for example, the \$400-\$600 million that the Anchorage Water and Wastewater Utility (“AWWU”) may be required to spend to upgrade its facilities. Even the most conservative estimate of \$280.2 million over ten years, representing an impact of only a one percent reduction in Cook Inlet region output, is sufficiently significant to warrant broad exclusions. At the same time, the Draft RIR significantly overestimates the potential benefits of the critical habitat designation by relying on speculative benefits that have no reasoned evidentiary basis. *See* RDC EA at 6-10.



As a result, the Service's cost-benefit analysis, as well as its conclusion that "the anticipated benefits outweigh the anticipated costs," is seriously flawed and must be significantly revised.

### **1. The Draft RIR Significantly Underestimates the Economic Impact of the Beluga Whale Critical Habitat Designation**

The Draft RIR significantly underestimates the economic impact of the Proposed Rule by focusing on the incremental administrative cost of considering critical habitat in a Section 7 consultation. While administrative expenses are no doubt *a cost*, they are certainly not the only cost of the designation, nor are they the only cost that is capable of being readily quantified. RDC conducted a study that gathered information from its members on the anticipated impacts of critical habitat designation. That analysis identified a number of other economic impacts of the critical habitat designation including monitoring requirements, project slippage, loss of production, uncertainty, non-market costs, and project modification costs.

Specifically, the RDC EA calculated the following anticipated *annual* impacts, on a sector-by-sector basis, that would likely flow directly from the critical habitat designation:

- **Oil and Gas Industry:** Impacts on the oil and gas industry from the critical habitat designation would range from \$13.9 million to \$138.8 million. In fact, considering secondary effects, total economic activity in the region could be impacted by \$20.5 million to \$204.7 million. This reduction would represent a loss of between 51 and 515 jobs and between \$5 million and \$50.4 million in labor income. These impacts are conservative and do not include impacts to future development and exploration projects, or account for how the loss or delay of such future development activities will decrease revenue to the state and boroughs and lead to fewer jobs, higher utility bills, and lower Permanent Fund Dividends for all Alaskans, as 25% of all royalties are paid to the Permanent Fund. Companies that provide seismic exploration or other services related to oil and gas exploration and development may experience significant economic impacts. In addition, these estimates do not include the significant regulatory hurdles likely to be faced by the oil and gas industry related to Alaska Pollutant Discharge Elimination System ("APDES") discharge permits. 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. *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)). Under that process, EPA will provide the Services an opportunity to review and comment on draft permits. EPA will "use the full extent of its CWA authority" to object to a permit that is "likely ... to result in the destruction or adverse

modification of critical habitat.” *Id.* at 48. New individual and general APDES permits within the beluga whale critical habitat designation are expected to be subjected to this scrutiny, potentially resulting in significant additional permitting processes and the imposition of measures by the State to address perceived impacts to federally designated critical habitat.

- **Pebble Project:** The Pebble Project is potentially one of the world’s largest copper/gold deposits and is currently in the design stage. When constructed, the project could employ thousands of rural Alaskans and bring critical 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. Restrictions imposed by the critical habitat designation could render the project unfeasible. At the very least, the designation could result in impacts ranging from \$5.7 million to \$57.2 million. Considering secondary effects, total economic activity in the region could decrease by \$7.9 million to \$78.7 million. This reduction could represent a loss of between 23 and 235 jobs and between \$1.8 million and \$17.7 million in labor income.
- **Chuitna Coal Project:** The Chuitna Coal Project is completing environmental and other studies as part of its NEPA analysis. When constructed, the project could create 350 new jobs, account for property taxes to Kenai Peninsula Borough of \$100 million over 25 years, royalties to the state of \$300 million over 25 years, and a Mining License Tax of \$120 million over 25 years. The critical habitat designation could derail this project entirely. At the very least this could lead to impacts of \$1.4 million to \$14.8 million. Considering secondary effects, total economic activity in the region could decrease by \$2.1 million to \$21.2 million. This reduction would represent a loss of between 8 and 82 jobs and between \$623,840 and \$6.2 million in labor income. Similar, adjacent coal projects and future coal and coal-to-gas liquefaction projects could be similarly impacted and result in costs above and beyond those identified here.
- **Port of Anchorage:** 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. Direct impacts attributable to this critical habitat designation will likely range from \$1.3 million to \$13.3 million. Considering only the most readily determinable secondary effects, total economic activity in the region could decrease by \$2.1 million to \$20.8 million. This reduction would represent a loss of between 10 and 103 jobs and between \$597,381 and \$6.0 million in labor income. These losses are conservative because they do not

include the potential to increase the costs of goods for nearly every Alaskan. Impacts associated with critical habitat designation at the port ultimately increase shipping costs, thereby increasing the costs of goods in Alaska. These impacts will continue to mount especially if the critical habitat designation delays or prohibits the Port's current expansion project.

- **Commercial Fishing:** Commercial fishing in upper Cook Inlet accounts for 5 percent of Alaska's ex-vessel salmon values. A mid-1990s estimate of commercial salmon fishing supported an estimated 500 average annual jobs in harvesting, processing, and indirect employment producing \$15 million in income. The Proposed Rule could lead to impacts of between \$222,630 and \$2.2 million. Considering secondary effects, total economic activity in the region could decrease by \$390,100 to \$3.9 million. This reduction would represent a loss of between 7 and 71 jobs and between \$87,205 and \$872,051 in labor income. Seafood processing would suffer even more impacts, ranging from \$2 million to \$20.4 million. Considering secondary effects, total economic activity in the region could decrease by \$4.2 million to \$41.6 million. This reduction would represent a loss of between 32 and 316 jobs and between \$771,557 and \$7.7 million in labor income.
- **Sport Fishing:** Sport fishing is an important part of the Cook Inlet regional economy. Non-resident, non-local sports fishermen spent \$193.3 million with a total economic impact of \$319.1 million. This economic activity supports an estimated 2,345 jobs in the region with labor income of \$76 million. The impact of the critical habitat designation due to restrictions on sport fishing could easily range from \$1.9 million to \$19.3 million. Considering secondary effects, total economic activity in the region could decrease by \$3.1 million to \$31.9 million. This reduction would represent a loss of between 23 and 117 jobs and between \$759,852 and \$7.6 million in labor income and, aside from economic impacts, could restrict residents and visitors from partaking in one of the principal recreational activities in Southcentral Alaska.

These significant economic impacts, which are documented and explained in the RDC EA, *must* be accounted for in the Service's analysis. *See* 16 U.S.C. § 1533(b)(1)(A) (designation must consider "best scientific and commercial data available"); RDC EA 23-49.

In addition to the economic impacts identified within the RDC EA, there are a number of important potential impacts that the Service must consider which, for a variety of reasons, were not included in the RDC EA numbers:

- **AWWU Discharges:** AWWU handles the wastewater for Anchorage, particularly from the John M. Asplund Wastewater Treatment Facility at Point Woronzof. Critical habitat designations could require the expenditure of \$400 to \$600 million to upgrade AWWU's facilities, potentially tripling Anchorage resident's wastewater bills.
- **Knik Arm Bridge and Toll Authority ("KABATA"):** The Knik Arm Bridge could provide a quick transportation link between the growing communities of the Matanuska-Susitna ("Mat-su") Borough and Anchorage as well as reduced travel time to Denali National Park and Fairbanks. This link could significantly reduce carbon emissions due to less travel time for commuters. The project is estimated to cost \$564 million. To date, KABATA has spent \$2.5 million on beluga studies. The critical habitat designations may impact investment from consortia and may lead to additional construction seasons. KABATA has estimated that a critical habitat designation could result in project delays. Moreover, limitations on construction as a result of a critical habitat designation 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.
- **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 Area 1 habitat. Critical habitat designations could impact flight patterns, military operations, equipment and troop delivery, and ultimately threaten national security with limited benefit to the whales. Although the Service is proposing to exclude the Eagle River Flats Impact Area of Fort Richardson, that will not alleviate all impacts associated with military operations including troop transport and over-flight.

- **Energy Infrastructure:** Most of the electric power for Anchorage is supplied through existing cables that pass under Cook Inlet, and those cables must be maintained, and occasionally replaced. The ability to repair, maintain and install new subsea cables (for example, from the proposed Fire Island Wind Project) and subsea pipelines for natural gas is critical to a reliable energy infrastructure in Southcentral Alaska. Designation of critical habitat could lead to additional process or delay in approvals for such critical infrastructure management, or lead to noise restrictions or other requirements that could significantly increase the costs of such activities regardless of whether beluga whales are themselves impacted by such activities.
- **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, a ferry terminal for service from Port MacKenzie to Anchorage and Tyonek, Chugach Electric's electric distribution and submarine cable maintenance, the telecommunication industry's fiber optic cables, and 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.
- **Tourism:** Tourism is a growing industry in Southcentral Alaska. Hotels, rental cars, other goods and services are consumed by visitors. Holland America Cruise Lines is planning to bring numerous cruise ships into the Port of Anchorage and Homer. Future moorings by the industry could be decreased or eliminated as a result of a critical habitat designation. 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.
- **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 or time and area restrictions, and ultimately raise the cost of all goods, and subsequent services, paid for by Alaskans. Any shipping delays will have particularly significant consequences for this area because shipping schedules are affected by tides and delays are compounded by the fact that Anchorage has minimal storage capacity for goods and must carefully coordinate shipping schedules.

In addition to these identified costs, there are any number of future, yet to be contemplated economic opportunities in Cook Inlet. A beluga whale critical habitat designation may well quash these projects before their inception, or result in scaled down or reduced

development proposals.<sup>19</sup> The Service's statements that few projects have been stopped due to ESA Section 7 consultations resulting in "adverse modification" findings fail to recognize that designation of critical habitat for the entire upper Cook Inlet creates a chilling effect on future economic projects in the region.

Faced with the prospect of additional regulatory hurdles imposed by the critical habitat designation, businesses may forego pursuing business opportunities in Cook Inlet. The Draft RIR must consider this cost.

Finally, the Service's Draft RIR must account for the additional litigation costs associated with the designation of critical habitat. Citizen groups can, and do, file lawsuits challenging projects based on their perceived impacts to critical habitat. Sometimes these lawsuits are successful in stopping a project. Sometimes they are not, and are wholly without merit. But in either case, these lawsuits impose significant economic costs on the order of hundreds of thousands of dollars. These costs are imposed both on the federal agencies who issue the permits and on the permit holders who are obligated to defend those permits. These costs must be considered in the Service's Draft RIR as well.

## **2. The Service's Draft RIR Significantly Overstates the Economic Benefits of the Beluga Whale Critical Habitat Designation**

The Service compounds its errors in *underestimating* the costs of the critical habitat designation by *overestimating* the benefits of the designation. The Draft RIR's entire benefits analysis rests on the premise that the beluga whale critical habitat designation has the "potential" to improve conservation of the beluga whale and its habitat. Draft RIR at 5-1. The Draft RIR refers to this incremental change as the "Hypothetical Avoided Degradation because of CHD." Draft RIR at 3-8, Fig. 3-2. Based on that hypothetical avoided habitat degradation, the Service proceeds to identify a number of "potential" benefits, many of which are centered around enjoyment or benefit from a "more pristine environment." Draft RIR at 7-3. For example, the Draft RIR notes that the oil industry may benefit from a designation because employees "may be willing to work in the area because of the natural beauty, environmental quality, and outdoor recreation opportunities available." Draft RIR at 7-2.

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<sup>19</sup> See, e.g., *Palila v. Hawaii Dep't of Land & Natural Resources*, 471 F. Supp. 985 (D. Haw. 1979) (enjoining state grazing operations to protect critical habitat); *Silver v. Babbitt*, 924 F. Supp. 976, 988 (D. Ariz. 1995) (enjoining harvest operation to protect spotted owl habitat); *Greenpeace v. National Marine Fisheries Serv.*, 106 F. Supp. 2d 1066 (W.D. Wash. 2000) (enjoining all fishing operations within stellar seal critical habitat).

The common problem with all of these purported benefits is that they are based on the unsupported premise that there will be some measurable benefit to the beluga whale or the environment that comes from the critical habitat designation. The Service has no data to support the existence of such a benefit, and on the contrary concedes that “none of these types of benefits has been studied in direct association with the CHD for the Cook Inlet beluga whale.” Draft RIR at 5-13. Without this predicate finding of actual measurable improvement attributable to the critical habitat designation, the identified potential benefits are all illusory. If there is no measurable environmental improvement, then there can be no employee retention benefits, no increased whale watching benefits,<sup>20</sup> no increases in welfare benefits to tourists, no increased benefit to other wildlife sharing the same habitat, no subsistence harvest benefits, and no passive use benefits. See Draft RIR at 7-12 (listing anticipated benefits).

But even if the Service could identify some measured environmental benefit from the designation, despite its concession that it has no data to support that finding, it is equally apparent that many of the identified benefits that the Service attributes to this more pristine environment are entirely speculative. For example, the purported benefit derived from Cook Inlet being “more attractive to workers” is completely hypothetical. The Service cites no data or studies to support this notion. Moreover, this proposition makes no sense when applied to Cook Inlet. Regardless of whether critical habitat is designated or not, Cook Inlet remains one of the most “pristine” areas in the United States. To the extent that some hypothetical worker is trying to decide whether to take a job in New York Harbor or Cook Inlet based on the quality of the natural environment, the designation of critical habitat for the beluga whale does not reasonably factor into that analysis.

Similarly, the Draft RIR’s assertion that protection of the beluga whale will provide benefit to commercial and sport fishing industries by incidentally protecting fish habitat is incredible. The Draft RIR points to no studies or data to support this relationship, nor does it otherwise explain how the beluga PCEs overlap with essential elements of fish habitat. On the contrary, these fish species *are a beluga prey species*. To the extent that the critical habitat designation actually leads to increased beluga whale numbers, those whales will eat more of the fish species in question. This calls into question the Service’s assumption that a designation would increase the number of fish available for commercial and sport fishing.

Because there is no factual basis for any of these benefits, the Draft RIR’s conclusion that the “anticipated benefits” outweigh the “anticipated costs” is arbitrary and contrary to the requirements of the ESA. Given the serious oversights in the Service’s economic analysis, RDC

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<sup>20</sup> There are no whale watching businesses in Cook Inlet, so no businesses capable of experiencing such an “increase” in any event.

requests that the Service revise its Draft RIR to reflect the information contained in the RDC EA and reissue its analysis for public comment prior to finalizing a critical habitat rule.

**B. Severe Economic Impacts – Which Provide No Benefit to Belugas – Warrant a Decision Not to Designate Critical Habitat**

Based on the impacts identified above and the lack of any significant benefits to the beluga whale from the designation, RDC requests that the Service act consistent with congressional intent and the ESA's explicit language and decline to designate critical habitat for the Cook Inlet beluga whale.

As discussed above, the economic costs of the critical habitat designation to RDC and its members are significant – the RDC EA estimates an annual impact of between \$39.9 million and \$399.0 million dollars, or between \$280.2 and \$3,403.6 million over the ten year period evaluated by the Service, depending on the discount rate applied (*see* Section II.A., above). At the same time, the *benefit* of critical habitat designation for the beluga is insignificant and unproved. The Service itself is only able to identify minor benefits to the beluga whale or third parties. But even those small benefits are overstated given that habitat decline, if any, is neither the source of beluga decline nor an impediment to its recovery, and given that the Service can identify few if any project modifications that will occur that would not already be required as a result of an ESA Section 7 consultation. Draft RIR at Table 6-28. Under these circumstances, a proper evaluation of the economic costs and benefits of the beluga whale critical habitat designation warrants excluding all of Cook Inlet from the critical habitat designation.

In the alternative, RDC requests that the Service, at a minimum, exclude not only manmade structures themselves, but also: (1) all NPDES and APDES permitted mixing zones;<sup>21</sup> and (2) all areas around structures and significant ongoing human activity, including but not limited to oil and gas platforms, docks, ports, shipping facilities and shipping lanes, as well as proposed structures described in Section II.A.1 above, where the Service cannot identify a properly defined PCE or where such activities are already adequately regulated and require no special management. Excluding these areas would not compromise whale conservation or recovery since these activities 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.

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<sup>21</sup> Excluding NPDES and APDES permitted mixing zones would avoid serious economic impacts to facilities that could be required as a result of EPA review and objections to APDES permits in critical habitat areas. *See supra*, Section II.A.1., first bullet.



### **III. The Service Should Engage in NEPA, Prepare a Statement of Energy Effects and Consult with Alaska Native Corporations**

RDC believes that NEPA is applicable to the designation of critical habitat. *See Catron County Board of Comm'rs v. U.S. Fish & Wildlife Serv.*, 75 F.3d 1429, 1436 (10th Cir. 1996). 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. Because the designation of critical habitat is a major federal action with significant impacts on the human environment, and because the Service has not engaged in any NEPA process, the Proposed Rule is unlawful.

RDC also disagrees with the Service’s finding that a Statement of Energy Effects is not required here. 74 Fed. Reg. at 63,093. Eighty percent of Southcentral Alaska’s electricity and most of its heating come from Cook Inlet natural gas. Executive Order 13211 requires that the Service prepare such a statement here because designation of critical habitat as proposed by the Service (1) is a “significant regulatory action” under Executive Order 12866 because it will, among other things, result in material adverse affects on the economy, sectors of the economy, productivity, and state, local, or tribal governments or communities;<sup>22</sup> and (2) as described in these comments, is likely to have a significant adverse effect on the supply, distribution or use of energy. *See, e.g.* RDC EA at 23-29 (economic impacts to oil and gas industry). Because the Service failed to prepare a Statement of Energy Effects, the Proposed Rule is unlawful.

Finally, RDC disagrees with the Service’s finding that designation of critical habitat “would not have tribal implications, nor affect any tribal governments or Native corporations.” 74 Fed. Reg. at 63,094. Alaska Native corporations are the largest private landowners in Alaska. These corporations and their shareholders (who are essentially co-extensive with Alaska’s Native community) could suffer significant economic impacts as a result of the Proposed Rule. For example, Cook Inlet Region, Inc. (“CIRI”) is evaluating a site on the west side of Cook Inlet for development of a 100 megawatt coal-to-liquid gas plant. Similarly, a growing number of Alaska Native corporations are partnering with the mining industry in resource development projects. As described in general above, these types of projects could be delayed, modified or worse as a consequence of a designation. The Service has no rational basis to assume that Alaska Native corporations will not be impacted.

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<sup>22</sup> *See* 58 Fed. Reg. 51,735, 51,738 (Oct. 4, 1993) (defining “significant regulatory action”).

#### IV. CONCLUSION

The Service has identified no sound scientific or even logical basis to conclude that designation of critical habitat is necessary for the Cook Inlet beluga whale's recovery – a finding mandated by the ESA's requirement that any identified PCEs be "essential" to a species' "conservation," defined in turn as actions "necessary" to allow a species to be de-listed. 16 U.S.C. § 1532(3). Habitat impacts are not responsible for the beluga whale population's decline, and habitat protections will have no measurable impact on the whale's recovery. As such, the Proposed Rule does not meet the most basic tenets of the ESA's critical habitat provisions.

Even if the designation were necessary, which it is not, the Service has failed to identify PCEs in terms of their specific geographic area or, in some cases, in terms of their actual elements. It has failed to recognize that areas near existing structures and significant human activity are unlikely to contain the PCEs however they are defined. The Service's improper and inconsistent "findings" regarding the "need" for special management where existing measures are both adequate and inadequate effectively write the requirement for such a finding out of the law entirely. Perhaps most importantly, however, without knowing where PCEs exist or even *what they are*, RDC and other members of the public are unable to meaningfully evaluate and comment on them as the law requires we be allowed to do.

Finally, all of these concerns are especially acute with respect to areas in and around ongoing and future human activities, where the economic impact of a critical habitat designation is conservatively estimated to be between \$39.9 million and \$399 million annually or between \$280.2 and \$3,403.6 million over a ten year period. In the face of such impacts – even the more conservative \$280.2 million estimate over ten years – RDC requests that the Service use its discretion to avoid unreasonably, arbitrarily and capriciously designating habitat that will provide inconsequential benefits while seriously harming the Alaskan economy.

In sum, the Proposed Rule is not justified based on the available data and is inconsistent with the ESA's clear standards and congressional intent. RDC requests that the Service revise and reissue its fundamentally flawed economic analysis and reissue a proposal that is based on the best available science, that properly identifies the locations and features of any purported "critical" habitat, that limits any such habitat to areas where special management is indeed necessary, and that properly weighs the benefits of a designation against the benefits of exclusion. Only by taking these steps will the Service afford RDC and other members of the public an opportunity to meaningfully comment on the Service's proposal.

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 me at (907) 276-0700.

Sincerely,



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

cc: Senator Mark Begich  
Senator Lisa Murkowski  
Congressman Don Young  
Governor Sean Parnell  
Jim Lecky, Protected Resources/NOAA Fisheries  
Doug Mecum, Acting Regional Director/NOAA Fisheries  
Douglas 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 Resource Development Council for Alaska.

Litzky, L.K. 2001. *Monitoring Recovery Status and Age Structure of Cook Inlet, Alaska Belugas by Skin Color Determination.*

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