



THE STATE
of ALASKA
GOVERNOR MICHAEL J. DUNLEAVY

Department of Fish and Game

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October 30, 2019

Chris Oliver
Assistant Administrator for Fisheries
NOAA Fisheries
1315 East-West Highway
Silver Spring, MD 20910

RE: Designation of humpback whale critical habitat under the Endangered Species Act in waters off Alaska

Dear Mr. Oliver:

I am writing in reference to NOAA Fisheries' October 9, 2019, publication of a proposed rule to designate critical habitat (CH) for the endangered Western North Pacific distinct population segment (DPS) and the threatened Mexico DPS of humpback whales. We are currently reviewing the proposed rule along with the draft economic analysis, ESA Section 4(b)(2) report, and biological report to inform the State of Alaska's comments on the proposed rule.

As previous correspondence on this issue described, we have concerns about NOAA Fisheries' proposed designation of humpback whale CH. First, the proposed CH in Alaska waters is expansive and will result in additional regulatory burdens and direct and indirect costs that are significantly underestimated in the draft economic analysis. Second, the draft biological report does not consider that the expansive CH designation is likely to dilute the overall conservation benefits from the action. We relayed these concerns to NOAA Fisheries prior to publication of the proposed rule to designate CH, but it is unclear if this information was considered in the development of the rule.

Our initial review of the documents has prompted several technical and procedural questions about the proposed designation of CH for humpback whales. I would like to request a meeting with NOAA Fisheries staff prior to the proposed rule comment deadline of December 9, 2019, to discuss these issues. This meeting could take place by teleconference or in conjunction with one of the public hearings scheduled in Alaska for the proposed critical habitat designation. I believe this meeting will help us more effectively develop comments on the proposed rule by providing an opportunity to further discuss NOAA Fisheries' rationale for the proposed CH designation and the analytical frameworks for the supporting analyses.

Also, in response to the Tellico Dam decision by the U.S. Supreme Court, *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), Congress amended the Endangered Species Act in a number of ways, including by providing a statutory definition of "critical habitat." Notably, Congress did not adopt the Services' regulatory definition. Congress was concerned that the agencies' "regulatory definition could conceivably lead to the designation of virtually all of the

habitat of a listed species as its critical habitat.” H.R. Rep. No. 95-1625, at 25 (1978). Yet this appears to have occurred in Alaska with this designation.

We welcome the opportunity to work with NOAA Fisheries on this CH designation effort. I appreciate your attention to this matter and look forward to further discussion on this issue.

Sincerely,



Doug Vincent-Lang
Commissioner

cc: Sam Rauch—Deputy Assistant Administrator, NOAA Fisheries
Jim Balsiger—Regional Administrator, NOAA Fisheries Alaska Regional Office
Eddie Grasser—Director, ADF&G Division of Wildlife Conservation
Chris Krenz—Wildlife Science Coordinator, ADF&G Division of Wildlife Conservation
Tracey Gotthardt—Coordinator, DWC Threatened, Endangered, and Diversity Program
Lori Polasek—Coordinator, DWC Marine Mammal Program
Moirra Ingle —ESA Coordinator, DWC Threatened, Endangered, and Diversity Program
Rachel Baker, Deputy Commissioner, ADF&G