

# STATE OF ALASKA

## DEPARTMENT OF LAW

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January 12, 2009

### Certified Mail and Facsimile

The Honorable Carlos M. Gutierrez – Certified Receipt No. 70023150000020223757  
Secretary of Commerce  
United States Department of Commerce  
1401 Constitution Avenue, N.W., Room 5516  
Washington, DC 20230  
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Dr. James W. Balsiger – Certified Receipt No. 70023150000020223740  
Acting Assistant Administrator for Fisheries,  
National Marine Fisheries Service  
1315 East-West Highway  
Silver Springs, MD 20910  
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Re: Sixty Day Notice of Intent to Sue for Violations of the Endangered Species Act; improperly determining endangered status for a Distinct Population Segment of the beluga whale (*Delphinapterus leucas*) found in Cook Inlet, Alaska

Dear Secretary Gutierrez and Dr. Balsiger:

On behalf of the State of Alaska (“Alaska”), we are informing you of our intent to file a civil suit against the Secretary of Commerce and NOAA Fisheries/U.S. National Marine Fisheries Services (collectively, “NMFS”) for violations of the Endangered Species Act, 16 U.S.C. §§1531-1544 (“ESA”), and the Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.* (“APA”). This letter is delivered to you pursuant to the 60-day notice requirement of 16 U.S.C. §1540(g)(2)(C). Alaska intends to file a civil suit under 16 U.S.C § 1540(g)(1)(C) for the Secretary’s failure “to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary.” Specifically, Alaska seeks declaratory and injunctive relief as appropriate to correct and enjoin the continued actions by the Secretary in violation of the ESA and its implementing regulations by improperly listing a distinct population segment (“DPS”) of the beluga

whale found in Cook Inlet as in danger of extinction throughout its range and the listing of this DPS as an endangered species.<sup>1</sup> We will also seek legal fees and costs associated with the legal action.

On April 20, 2007, NMFS published a proposed rule to list beluga whales in Cook Inlet as an endangered species (72 FR 19854). On April 22, 2008, NMFS extended the deadline for a final determination to October 20, 2008 (73 FR 21578). This extension was made “for the purposes of soliciting additional data,” because several parties “questioned the sufficiency or accuracy of the available data used in the rulemaking,” and because NMFS “determined that substantial disagreement exists over a certain aspect of the data presented in the proposed rule,” the population trend of beluga whales in Cook Inlet (73 FR 62919). On October 22, 2008, NMFS published the final listing rule determining endangered status for the DPS of beluga whales in Cook Inlet under the ESA (73 FR 62919).

Under the ESA, a species is endangered if it is “in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6). An endangered determination is to be made by the Secretary “solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.” 16 U.S.C. § 1533(b)(1)(A).

The Secretary must consider whether a species is an endangered species upon considering any of the following factors: (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purpose; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. 16 U.S.C. § 1533(a) (1). One or more of NMFS’ findings violate the ESA because they were not made “solely on the basis of the best scientific and commercial data available,” which is a nondiscretionary mandate of the Secretary under 16 U.S.C. 1533 § (b)(1)(A), or the findings were made in a fashion that was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706 (2)(A).

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<sup>1</sup> Use of the term DPS in this letter does not mean that Alaska necessarily agrees with the finding by NMFS that beluga whales in Cook Inlet were properly determined to be a DPS.

In particular, the final rule in addressing factor D, the “inadequacy of existing regulatory mechanisms,” failed to properly consider the substantial regulation by the State and its political subdivisions of beluga habitat and food supply covering nearly every aspect of the environment affecting beluga whales in Cook Inlet, including water quality, oil and gas development, coastal and upland development, prey species management, cruise ship regulation, and port development, among many others. These laws, when considered together with existing federal regulations, ensure that beluga whales in Cook Inlet are well protected.

The finding regarding inadequacy of existing regulatory mechanisms violates the ESA because, among other things, NMFS does not identify the best available “scientific and commercial data” identifying the regulatory deficiencies that if addressed would benefit the recovery of beluga whales in Cook Inlet beyond the extensive existing federal, state, and local government laws affecting all aspects beluga habitat and food supply in Cook Inlet.

In addition, NMFS violated the ESA and APA by: (1) failing to adequately consider other conservation or protection efforts by Alaska or its political subdivisions in making the listing determination; (2) failing to provide to Alaska’s agencies an adequate written justification under 16 U.S.C § 1533(i) for those portions of NMFS’ final rule not consistent with the Alaska agencies’ comments; (3) failing to properly document or support its determination under the applicable policy and consistent with recent Ninth Circuit authority that the beluga whales in Cook Inlet comprise a distinct population segment within the definition of a “species;” and (4) failing to provide a public review and comment period on significant studies and documentation used to support the listing, including the April 2008 and October 2008 status reviews and other items or information used by NMFS to resolve “substantial disagreement” over certain aspects of the data presented in the proposed rule.

Additional details supporting our claims are referenced in the comments by Alaska, submitted to NMFS on or about July 31, 2007 and incorporated herein by this reference. The description of measures by political subdivisions of Alaska are included in their charters and ordinances of record and in their respective comments submitted during the comment period on the proposed final rule.

**A. Other Conservation and Protection Efforts by Alaska, its Political Subdivisions, and Others Were Not Adequately Considered**

Under the ESA, NMFS must consider conservation measures being made by “any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other

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conservation practices, within any area under its jurisdiction, or on the high seas.” 16 U.S.C. § 1533(b)(1)(A). Such consideration is a nondiscretionary mandate of the Secretary under 16 U.S.C. § 1533(b)(1)(A). NMFS purported to undertake such a review in the rulemaking at page 62928 in summarizing and addressing “Efforts Being Made to Protect The Species.”

In its comments, Alaska submitted extensive information on the ongoing and planned conservation efforts by state and local entities. See Alaska’s comments, Ch. 3. Overall, Alaska submitted 30 pages of comments on ongoing and planned conservation efforts by state and local entities. NMFS summarized its evaluation of those efforts as follows:

In developing our final listing determination, we have considered the best available information concerning conservation efforts and any other protective efforts by states or local entities for which we have information. We conclude that existing conservation efforts do not provide sufficient certainty of effectiveness to substantially ameliorate the level of assessed extinction risk for Cook Inlet beluga whales. 73 FR 62919, 62928.

Beyond this conclusory assertion, NMFS does not document that it adequately considered the extensive provisions contained in the laws and regulations of Alaska and its political subdivisions addressing all aspects of beluga habitat and food supply and did not explain why these efforts will not be effective. These provisions, together with the final subsistence regulations and agreements in place addressing subsistence harvest of beluga whales in Cook Inlet, preclude the need to list the species at this time. Because NMFS did not document for the final rule that such conservation efforts were adequately considered, the final rule should be withdrawn.

**B. NMFS Did Not Adequately Respond Under Section 4(i) to Alaska’s Comments**

Under the ESA, if NMFS issues a final regulation that conflicts with comments submitted by a state agency (which under the Act means “any state agency, department, board, commission, or other governmental entity which is responsible for the management and conservation of fish, plant, or wildlife resources within a state”), then NMFS “shall submit to the State agency a written justification for [its] failure to adopt regulations consistent with the agency’s comments.” 16 U.S.C. § 1533(i) (“Section 4(i)”).

Similarly, in the promulgation of the ESA listing regulations in 1984, the Service noted that the requirement in 50 C.F.R. § 424.18(c) that implements Section 4(i) requires

“that State agencies be adequately informed of the basis for any action that is not in agreement with that agency’s recommendation.” 49 FR 38900, 38906 (Oct. 1, 1984).

NMFS has taken an action and adopted a final rule that is not consistent with the Alaska state agencies’ comments and failed to specifically address Alaska’s comments (in the rule or by separate letter). Any post-decision-provided Section 4(i) justification that may later be received is inconsistent with statutory and congressional intent to seriously consider the advice of state agencies in the Federal regulatory process. Because a post-decision rationalization by NMFS of its decision in response to Alaska’s comments is insufficient to comply with Section 4(i), the final rule should be withdrawn.

Alaska also puts NMFS on notice of Alaska’s intent to challenge the adequacy of any Section 4(i) response that NMFS may ultimately provide to Alaska.

### **C. The DPS Determination Is Not Properly Documented**

NMFS “reaffirmed” its DPS determination for the beluga whale in Cook Inlet as part of its listing process and provided a separate rulemaking section and conclusion on “Determination of Species Under the ESA,” 73 FR at 62926. The ESA defines the term “species” to include “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” 16 U.S.C. § 1532(16). Although the statute does not define the term “distinct population segment,” NMFS and the U.S. Fish and Wildlife Service (“FWS”) have jointly adopted a policy statement guiding their evaluation of whether a population group should be treated as a DPS. The DPS policy sets forth two primary factors for consideration: (1) the discreteness of the population segment in relation to the remainder of the species to which it belongs, and (2) the significance of the population segment to the species to which it belongs. DPS Policy, 61 FR 4722, 4725 (Feb. 7, 1996).

The discreteness factor is satisfied if a population segment is “separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors,” or if a population’s boundaries are marked by international borders. *Id.* The significance factor is analyzed under four non-exclusive factors: (1) whether the population persists in a unique or unusual ecological setting; (2) whether the loss of the population would cause a “significant gap” in the taxon’s range; (3) whether the population is the only surviving natural occurrence of a taxon; and (4) whether the population’s genetic characteristics are “markedly” different from the rest of the taxon. *Id.* A population qualifies as a DPS if it is both discrete and significant. *Id.* If a population is deemed to be a DPS, the inquiry then proceeds to whether it is endangered or threatened. *Id.*

NMFS first found the Cook Inlet population to be discrete “because it is markedly separated from other populations of the same species.” 73 FR at 62926.

Under the significance factor, NMFS relied on two of the four non-exclusive factors: (1) persistence in an ecological setting that is unique; and (2) whether the loss of the discrete population segment would result in a significant gap in the range of the species. *Id.* NMFS determined that Cook Inlet is a unique biological setting because it supports the southernmost of the five extant beluga populations in Alaska, and is the only water south of the Alaska peninsula, or within the Gulf of Alaska, that supports a viable beluga whale population. NMFS also claimed that the ecological setting of Cook Inlet was unique based on its incised glacial fjord setting, the large tidal exchanges, and its true estuary. NMFS asserts that no similar habitat exists in Alaska or elsewhere in the United States. On the second factor, because the Cook Inlet population is separated from other beluga populations, NMFS “determined that the loss of the Cook Inlet beluga population segment may result in the complete loss of the species in the Gulf of Alaska, resulting in a significant gap in the range with little likelihood of immigration from other beluga population segments into Cook Inlet.” 73 FR at 62926.

These two determinations are inadequately documented in the final rule. The Ninth Circuit recently reviewed the FWS’ application of the DPS policy in *Northwest Ecosystem Alliance v. U.S. Fish and Wildlife Service*, 475 F.3d 1136, 1138 (9<sup>th</sup> Cir. 2007). In that case, the court upheld the FWS’ determination that the Washington population of the western gray squirrel did not qualify as a distinct population segment. The court specifically reviewed the FWS’ application of three of the four non-exclusive significance factors, including the “ecological setting” and “significant gap” factors that NMFS relied on here.

The *Northwest Ecosystem Alliance* court noted that the uniqueness of the habitat should be tied to some feature of importance for the species. Here, NMFS essentially asserts that Cook Inlet is important because it contains the southernmost beluga population, is an incised glacial fjord, and experiences large tidal exchanges in a true estuary. But NMFS does not explain how that geological setting interacts either with important characteristics of the beluga whale or is significant for the survival and recovery of the beluga whale. NMFS’ explanation of the purported significance of this ecological setting and uniqueness to the species was not adequately considered in the final rule.

Next, NMFS does not explain why the loss of the Cook Inlet population might create a significant gap in the range of the species. “Significant” in this context has its commonly understood meaning, which is “important.” *Northwest Ecosystem Alliance*, 475 F.3d at 1146. While the Cook Inlet population may be, as was the Washington gray

squirrel population in *Northwest Ecosystem Alliance*, an isolated, peripheral population at the southern portion of the subspecies' range, that alone may not mean that its loss creates a significant gap in the range of the species. By this measure, NMFS failed to establish the necessary "significance" to classify beluga whales in Cook Inlet as a DPS.

Because NMFS failed to adequately document compliance with its own DPS policy in determining that the Cook Inlet population constitutes a DPS under the ESA, and because of the other violations described above, the final rule should be withdrawn.

**D. NMFS Failed to Provide for Additional Public Comment for Supplemental Status Review, Analysis of 2008 Survey Data, and Further Supplemental Status Review.**

NMFS created and evaluated, and later relied on in its listing decision, several documents after the close of the public comment period on August 3, 2007. Those items included the April 2008 status review, the October 2008 supplemental status review, NMFS' analysis of 2008 survey data, and preparation of an abundance estimate for 2008. NMFS noted that it had extended the period for issuing the rule by six months "for the purposes of soliciting additional data." 73 FR at 62919. Several parties, including the Alaska Department of Fish and Game, "questioned the sufficiency or accuracy of the available data used in the rulemaking." *Id.* NMFS "determined that substantial disagreement exists over a certain aspect of the data presented in the proposed rule," specifically "disagreement remained over the population trend of beluga whales in Cook Inlet, and whether the population is demonstrating a positive response to the restrictions on subsistence harvest imposed in 1999." *Id.* Alaska requested a six month extension to allow NMFS to obtain and consider additional information but did not waive any applicable requirement for additional public comment, and in fact offered assistance in assessing and evaluating beluga abundance data for 2008. (Letter dated December 24, 2007 from Denby S. Lloyd, Commissioner, Alaska Department of Fish and Game to Dr. William Hogarth, Assistant Administrator for Fisheries, National Oceanic and Atmospheric Association).

Generally, ESA Section 4 mandates that NMFS determine a species listing decision through notice and comment rulemaking. See 16 U.S.C. § 1533(a)(1). The required notice and comment rulemaking procedures include those prescribed by the federal Administrative Procedure Act, 5 U.S.C. § 553, in addition to the specific notice and comment procedures set out in the ESA. See 16 U.S.C. § 1533(b)(4)-(6). The NMFS' obligation to comply with these notice and comment rulemaking procedures is mandatory and not discretionary. *See, e.g., Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1395, 1402-1404 (9th Cir. 1995); *see also Center for Biological Diversity v. Norton*, 240 F.Supp.2d 1090, 1106-1107 (D. Ariz. 2003).

NMFS should have re-opened the public comment period to allow public review and comment on the supplemental status review and related items. This lack of opportunity for public review and comment on critical information and to receive the benefit of public review of the data prejudiced Alaska by not allowing public comment or the expertise of other parties to be considered. Because the need for the information from the analysis of the 2008 survey data was important enough to extend the date for the final listing determination, it was similarly important to re-open public review and comment, and therefore, the final rule should be withdrawn to obtain public comment on the new survey data.

### **E. APA Claims**

Although APA related claims are not subject to the requirement of the 60-day notice provision, additionally or in the alternative, we believe that the Secretary's actions in issuing the final rule listing beluga whales in Cook Inlet as endangered were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706 (2)(A). The arbitrary and capricious nature of the decision is demonstrated by the listing of a DPS without adequately supporting this designation and ignoring the substantial conservation measures protecting beluga whale habitat and food supply through laws by Alaska and its political subdivisions. The Secretary's finding of inadequacy of existing regulatory mechanisms under 16 U.S.C. § 1533(a)(1)(D) simply ignores these substantial measures under the laws of the state and its political subdivisions to protect beluga whale habitat and food supply which together with subsistence harvest regulation and agreements are sufficient to ameliorate the need to list the species under 16 U.S.C. § 1533 (b)(1)(A). We reserve the right to raise all available APA and ESA claims and to rely on the entire administrative record. Because the Secretary selectively relied on new information obtained after the close of public comment, we also reserve the right to rely on available information outside the official administrative record, when pursuing Alaska's claims under this notice to sue.

In summary, the ESA authorizes Alaska to file suit for the Secretary's failure to perform any nondiscretionary act relating to 16 U.S.C. § 1533. 16 U.S.C. § 1540(g)(1)(C). The 60-day notice is intended to provide you an opportunity to correct the actions taken in violation of the ESA by withdrawing the listing of the beluga whale distinct population segment in Cook Inlet as endangered. We appreciate your consideration of the claims described in this notice and hope that the Secretary will quickly act to resolve these issues.

The Honorable Carlos M. Gutierrez

January 12, 2009

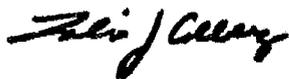
Dr. James W. Balsiger

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Please contact me with any questions or to discuss these matters.

Sincerely,



Talis J. Colberg  
Attorney General

cc: Robert D. Mecum, Acting Administrator, Alaska Regional Office, NMFS