

May 11, 2018

Ms. Jolie Harrison
Chief, Permits, Conservation and Education Division
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910



RE: Taking Marine Mammals Incidental to Alaska Liquefied Natural Gas (LNG) Project in Cook Inlet

Dear Ms. Harrison:

The Environmental Investigation Agency (EIA) is writing in response to the National Oceanic and Atmospheric Administration (NOAA) Fisheries' request for comments on a petition for regulations governing the taking of marine mammals (ITR) by the Alaska Gasline Development Corporation (AGDC) in Cook Inlet, Alaska. We are concerned that this ITR permit request will have a major impact on Cook Inlet's endangered population of beluga whales and we are troubled by the procedural errors that occurred during the public comment period which make it difficult to discern what the true impact of the proposed project would be on Cook Inlet belugas and which have harmed the substantive rights of interested parties in participating in the comment period. We therefore urge you to deny AGDC's petition.

Procedural Errors

Before we set out our substantive comments, we would like to raise serious concerns with the manner in which NOAA Fisheries conducted this comment period. Until April 27th, 2018, a draft version of the petition by AGDC dated 14 April 2017 was uploaded as the only supplemental document on NOAA Fisheries' website. As this comment period is only 30 days, stakeholders concerned about this project could not review the final petition for over half of the comment period. We downloaded both documents and conducted a comparison of them and our review indicates significant differences between the two versions of the petition, including: details of the workplan, sources of harassment, mitigation options and the total estimated take of belugas. Moreover, for the majority of the duration of the comment period the NOAA Fisheries' website listed May 9, 2018 as the closing date of the comment period, when in fact the comment period closes on May 11 according to the Federal Register. This error was only rectified on May 10.

Pursuant to Title 50 CFR §216. 104, prior to issuing any takes of small numbers of marine mammals NOAA Fisheries:

will invite information, suggestions, and comments for a period not to exceed 30 days from the date of publication in the Federal Register. All information and suggestions will be considered by the National Marine Fisheries Service in developing, if appropriate, the most effective regulations governing the issuance of letters of authorization or conditions governing the issuance of an incidental harassment authorization.¹

As a result of the errors described above, interested parties have not been able to fully effect their right to participate in the comment period.

¹ General Regulations Governing Small Takes of Marine Mammals Incidental to Specified Activities. 61 FR 15887 (April 10, 1996).

Substantive Concerns

The beluga whale population of Cook Inlet has declined from an estimated population of 1,300 in 1979 to just 328 individuals in 2016.² The population has not recovered as NOAA Fisheries predicted after the cessation of subsistence harvests in 2000 and it has continued to decline at an annual rate of 0.4 percent from 2004-2014.³ After the population was listed as Endangered under the Endangered Species Act in 2008, critical habitat for the population was designated in 2011 and in 2016 the first version of a Species Recovery Plan was published.⁴ The Cook Inlet beluga whales were also featured as a Species in the Spotlight in 2016 by NOAA Fisheries.⁵ The population also regularly captures the public's imagination and inspires citizen scientists, as occurred during last year's beluga count. We note these developments to emphasize the great consideration NOAA Fisheries has often given towards this population due to its serious depletion and the resources it has devoted towards its recovery.

Approval of AGDC's ITR is inconsistent with NOAA Fisheries' efforts to support the recovery of the Cook Inlet beluga whales. Given the precarious state of the population, and its continuing decline, approval of any new ITRs or incidental harassment authorizations (IHA) risks further unacceptable harm and should be deferred at least until the reasons for the population's decline are understood and effective recovery has been demonstrated. This recommendation has also been made repeatedly by the Marine Mammal Commission (MMC).⁶

Within the Recovery Plan, anthropogenic noise was classified as a threat of high relative concern. Underwater noise is also considered one of several cumulative effects or high stressors that constitute a separate threat to the Cook Inlet belugas.⁷ While some degree of habituation has likely occurred, sound from vessels or piling can cause temporary or permanent threshold shifts in beluga hearing, mask animal hearing and vocalizations, and lead to altered behavior or displacement from habitat.⁸ During previous pile driving activity near Knik Arm in Cook Inlet, beluga sightings remained consistent but sighting time decreased, as did foraging behavior. During active pile driving, belugas were more likely to travel through the affected areas, and juvenile sightings also decreased suggesting displacement and avoidance.⁹

The increasing contribution of new anthropogenic sources of noise pollution to the list of existing impacts to Cook Inlet belugas has led many experts to hypothesize that the reason the population is not recovering is because they are suffering "death by a thousand cuts."¹⁰ Consequently recommendation 62 of the Recovery Plan calls for a comprehensive approach for the allocation of takes, including a cumulative cap based on a percentage of the current abundance. A similar recommendation to consider takes cumulatively rather than individually in a region is identified in NOAA's roadmap for underwater noise. While NOAA Fisheries has accepted this recommendation and previously declared its intention to prepare a cumulative Environmental Impact Statement (EIS) for oil and gas activities for Cook Inlet covering multiple years, this has been postponed. Instead, citing a reduction in requests and funding issues, a one-year Environmental Assessment

² Shelden, K. E. W., R. C. Hobbs, C. L. Sims, L. Vate Brattström, J. A. Mocklin, C. Boyd, and B. A. Mahoney. 2017. Aerial surveys, abundance, and distribution of beluga whales (*Delphinapterus leucas*) in Cook Inlet, Alaska, June 2016. AFSC Processed Rep. 2017-09, 62 p. Alaska Fish. Sci. Cent., NOAA, Natl. Mar. Fish. Serv., 7600 Sand Point Way NE, Seattle WA 98115

³ Ibid.

⁴ National Marine Fisheries Service. (2016). Recovery Plan for the Cook Inlet Beluga Whale (*Delphinapterus leucas*). National Marine Fisheries Service, Alaska Region, Protected Resources Division, Juneau, AK.

⁵ NOAA Fisheries. (2018). Species in the Spotlight: the Cook Inlet Beluga Whale. Available at: <https://www.fisheries.noaa.gov/video/species-spotlight-cook-inlet-beluga-whale>

⁶ Marine Mammal Commission (2017). Response to notice of intent to prepare an environmental assessment for the issuance of annual incidental take authorizations.

⁷ NMFS 2016

⁸ Ibid.

⁹ Kendall, L. S., & Cornick, L. A. (2015). Behavior and distribution of Cook Inlet Beluga Whales, *Delphinapterus leucas*, before and during pile driving activity. *Marine Fisheries Review*, 77(2), 106-115.

¹⁰ Ibid.

of oil and gas activities was conducted for only the 2018 season which fails to capture the cumulative impact of proposed oil and gas activities on Cook Inlet belugas.¹¹

AGDC's request, in the final draft petition (which we note again was only available for the second half of the comment period), to take 32 belugas per year from 2019-2024 is equivalent to nearly ten percent of the population. Considering that the population has failed to recover, we believe ten percent is far too high a figure. Moreover, AGDC's basis for its take levels raises further questions. For instance, beluga whale density at the mainline offloading facility is estimated at 0.0368 animals/square mile, but at the adjacent marine terminal it is estimated at 0.000158 animals/square mile, approximately 233 times smaller. It is unclear how such dramatically different estimates can represent "average densities" within a kilometer of one another.

We also note that ten percent has been considered an acceptable level of takes for this population in other permit requests for other projects in the Inlet and we are concerned that it fails to take into account the cumulative impact of the proposed project in conjunction with other existing and proposed projects, all of which seek to harass belugas from this critically endangered population.¹²

Currently two other incidental harassment authorizations are active for Cook Inlet in 2018, one for 40 individuals from Hilcorp/Harvest Alaska's Cook Inlet Pipeline Cross Inlet Extension Project, and a second five-year authorization from 2016-2021 to Apache for 30 individuals pursuant to seismic survey activity.¹³¹⁴ While Apache has vacated Cook Inlet, the permit remains valid until 2021 and relevant for any potential cumulative effects analysis.¹⁵

Moreover, other projects, including at least one intended seismic survey by Hilcorp in lease block 244, will likely request authorization to take additional belugas during the period of AGDC's IHA.¹⁶ Not considering the cumulative impact of all of these projects contradicts the Cook Inlet Beluga Recovery Plan and effectively ignores cumulative threats that may cause irreparable damage to this critically endangered beluga population. Given that "the number of ITA requests, or anticipated requests," have noticeably increased NOAA Fisheries must begin an Environmental Impact Statement for all potential sources of harassment, not limited to oil and gas activities.¹⁷

AGDC has also failed to fully substantiate their program of mitigation, which is based primarily on Protected Species Observers (PSO). While AGDC stated its plan to post observers during piling, the application notes that they are likely to be land based.¹⁸ As has been previously noted by MMC in other pipeline projects, this is not always the ideal vantage point and potentially far from the center zone of impact.¹⁹ More information is also needed as to the number of observers that will be employed, and their qualifications. Beluga whales lack dorsal fins, and a potential single land based observer will likely struggle to identify these relatively small cetaceans at a distance, especially during construction of the mainline pipe

¹¹ Notice of Intent To Prepare an Environmental Assessment on the Issuance of Incidental Take Authorizations in Cook Inlet, Alaska. 82 FR 41939. (August 17, 2018). Codified at 82 170.

¹² Alaska LNG (2018). Petition for Incidental Take Regulations for Construction of the Alaska LNG Project in Cook Inlet, Alaska. Available at: <https://www.fisheries.noaa.gov/action/incidental-take-authorization-alaska-gasline-development-corporation-liquefied-natural-gas>

¹³ Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the Cook Inlet Pipeline Cross Inlet Extension Project

¹⁴ Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Seismic Surveys in Cook Inlet, Alaska, 81 FR 47239. (July 20, 2013). Codified at 50 CFR 217. Available at: <https://www.federalregister.gov/documents/2016/07/20/2016-16695/taking-and-importing-marine-mammals-taking-marine-mammals-incidental-to-seismic-surveys-in-cook>

¹⁵ NOAA. (2018). Incidental Take Authorizations for Oil and Gas. Available at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-oil-and-gas>

¹⁶ Alaska LNG 2018

¹⁷ 82 FR 41939

¹⁸ Alaska LNG 2018

¹⁹ Marine Mammal Commission (2018). Response to Harassment Authorization incidental to pipeline installation by Harvest Alaska, LLC.

across Cook Inlet. In the similar case of Hilcorp/Harvest's IHA, NOAA Fisheries has acknowledged that "detection at these distances is problematic"²⁰

Significant Discrepancies in Requested Beluga Takes Between Draft and Final Petitions

Finally, we note with serious concern the significant difference in proposed beluga takes between the draft petition which was on the NOAA website for the first portion of the comment period, and the final petition which is there now. In the draft petition, AGDC anticipates a total of 151 beluga whale takes (44-46 percent of the population), including up to 77 in one year (2023). In the final petition, 32 beluga takes are requested annually (just under 10 percent of the population) and just 9.706 animals are anticipated to be taken over the course of the project. The original estimate is well above what NOAA Fisheries has previously considered "small numbers". This final take request instead appears calculated to align with Apache's permit, which has also been approved for just under 10 percent of the population.

It is unclear why the unmitigated take levels were adjusted so drastically given that AGDC's planned schedule of activities remains unchanged. Takes of belugas appear to have been recalculated using drastically different durations and ensonification areas for vibratory pile driving, impact pile driving, and anchor handling. Other sources of sound with an assessed impact, like exposure to airborne sound should the animal surface, have also been excised from the public version. Finally even the expanded and recalculated vibratory impact potentially understates the range of harassment, which belugas may respond to at distances of 70 kilometers.²¹

For the reasons outlined herein, we urge you to deny AGDC's petition.

Sincerely,

Daniel Hubbell
Policy Analyst
Environmental Investigation Agency

²⁰ Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the Cook Inlet Pipeline Cross Inlet Extension Project. 83 FR 19224. (May 2, 2018). Available at: <https://www.gpo.gov/fdsys/pkg/FR-2018-05-02/pdf/2018-09242.pdf>

²¹ Kendall & Cornick 2015