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August 16, 2024

Via Email (ITP.tyson.moore@noaa.gov)

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

**Re: Proposed Incidental Harassment Authorization for Hilcorp Alaska, LLC
Production Drilling Support in Cook Inlet, Alaska**

Dear Ms. Harrison:

This letter responds to the National Marine Fisheries Service's ("NMFS") notice of a proposed incidental harassment authorization ("IHA") for Hilcorp Alaska, LLC production drilling support in Cook Inlet, Alaska, and an associated draft environmental assessment ("EA"). 89 Fed. Reg. 60,164 (July 24, 2024) ("Notice"). On August 2, 2023, Hilcorp Alaska, LLC ("Hilcorp") submitted an application requesting the proposed IHA, and we appreciate NMFS's comprehensive review and consideration of that application. The tug-towing activities described in Hilcorp's application are an essential component of natural gas production drilling that is a critical source of the energy supply for southcentral Alaska. Hilcorp strongly supports prompt issuance of the proposed IHA and provides the comments attached to this letter to further inform NMFS's consideration of Hilcorp's application.

Hilcorp appreciates NMFS's consideration of these comments and timely completion of this regulatory process. If you have any questions, please do not hesitate to contact me at (907) 777-8363 or kyla.forbes@hilcorp.com.

Sincerely,

A handwritten signature in black ink that reads "Kyla Forbes".

Kyla Forbes
Environmental Specialist
Hilcorp Alaska, LLC

cc: Chuck Wheat, Hilcorp Alaska, LLC
Denali Kempel, Hilcorp Alaska, LLC

Attachment: Hilcorp Comments on Proposed IHA

Comment No.	Page	Federal Register Notice or Draft EA Text	Comment and/or Suggested Change
1	60180	...TTS can have effects on marine mammals ranging from discountable to serious...	Hilcorp requests that NMFS provide context for "serious" as used here and/or edit for better accuracy. NMFS has determined that all forms of TTS are Level B harassment, not Level A harassment, and the mildest form of hearing impairment due to sound (as discussed in subsequent text in the Notice). Those findings do not support a description of TTS as having "serious" effects.
2	60184	Here we find there is small potential for TTS over the course of tug activities but again, PTS is not likely due to the nature of tugging.	NMFS has also found PTS is not likely based on the modeling results discussed further below in the Notice (not just for the reasons described in the preceding text). Recommend making that more explicitly clear here.
3	60190	...three total pinning events are anticipated during the IHA period for production drilling.	Request clarification that a "pinning event" includes a second attempt on day 2 if the first pinning attempt is unsuccessful.
4	60191	Table 10 - Average Densities of Marine Mammal Species in Cook Inlet. Minke whale; density of 0.00004.	Minke densities are rounded differently than those in the IHA application - IHA: 0.00003 FR: 0.00004
5	60191	Table 10 - Average Densities of Marine Mammal Species in Cook Inlet. Beluga whale (MML - Entire Cook Inlet); density of 0.07166.	Please check the 0.07166 number. It does not align with the other beluga numbers provided in this table for parts of Cook Inlet.
6	60192	Table 11 - Amount of Estimated and Proposed Take by Level B Harassment, by Species and Stock for Hilcorp's Tug Towing, Holding, and Positioning of a Jack-Up Rig Activities	Recommend revising the title of this table and the labeling of the columns to refer to "Total Estimated Level B Exposures" and "Authorized Take by Level B Harassment". The amount of proposed authorized incidental take by Level B harassment exceeds the modeled exposure estimates for two reasons. First, the modeled exposure estimates are rounded up to the nearest whole number. Second, the modeled exposure estimates do not account for marine mammal group size. The numbers of proposed take, however, account for the potential exposure of a group of marine mammals to Level B harassment-level sound.
7	60192	Table 11 - Amount of Estimated and Proposed Take by Level B Harassment, by Species and Stock for Hilcorp's Tug Towing, Holding, and Positioning of a Jack-Up Rig Activities	Take Estimates are rounded slightly differently than those in the IHA application, but the total take requests are the same: <ul style="list-style-type: none"> •Humpback- IHA: 2.441, FR: 2.440 •Fin- IHA: 0.365, FR: 0.364 •Killer- IHA: 0.809, FR: 0.808 •Dall's- IHA: 0.181, FR: 0.180 •Harbor Seal- IHA: 354.477, FR: 354.476
8	60193	This would facilitate two sightings with a group size of five individuals, which represents the upper end of recorded group size in recent surveys conducted in Cook Inlet.	It would be more accurate to say "account for" instead of "facilitate."
9	60194 and 60195	However, Hilcorp will implement a number of mitigation measures designed to reduce the potential for and severity of Level B harassment and minimize the impacts of the project.	To improve accuracy, Hilcorp requests this language be changed to the following: "Additionally, Hilcorp will implement a number of mitigation measures designed to reduce the potential for and severity of Level B harassment and minimize the impacts of the project, which further reduces the already insignificant potential for Level A harassment."
10	60198	Given that marine mammals still frequent and use Cook Inlet despite being exposed to anthropogenic sound such as those produced by tug boats and other vessels across many years, these severe population level impacts resulting from the additional noise produced by tugs under load with a jack-up rig are not anticipated. The absence of any pinniped haulouts or other known home-ranges in the planned action area further decreases the likelihood of severe population level impacts.	Hilcorp requests changing this language to the following to improve accuracy and clarity: "Given that marine mammals still frequent and use Cook Inlet despite being exposed to anthropogenic sounds such as those produced by tug boats and other vessels across many years, and given that Hilcorp's activity will not cause repeated, sequential exposure or repetitious sounds, the types of impacts described above will not result from Hilcorp's activities. The absence of any pinniped haulouts or other known home-ranges in the planned action area further decreases the likelihood of any population level impacts." The best available information shows no potential for any population level impacts (not just the avoidance of "severe" impacts).
11	60200	When the predicted number of individuals to be taken is fewer than one-third of the species or stock abundance, the take is considered to be of small numbers.	Hilcorp recommends that NMFS expressly reference the Federal Register notice where this standard is identified and fully explained (89 Fed. Reg. at 31,488), include that reference in the record, and summarize that explanation in the final notice of IHA issuance.
12	60200	For all stocks whose abundance estimate is known, the amount of taking is less than one-third of the best available population abundance estimate (in fact it is less than 2 percent for all stocks, except for CIBWs whose proposed take is 5.38 percent of the stock; table 12). The number of animals proposed for authorization to be taken from these stocks therefore, would be considered small relative to the relevant stocks abundances even if each estimated take occurred to a new individual.	Hilcorp agrees that the proposed levels of incidental harassment reflect "small numbers" for each marine mammal stock. The percentages of authorized harassment compared to marine mammal stock size are far below one-third, as referenced in the Notice, and are also below the level (10%) that the Alaska District Court has found to constitute a "small number," with respect to Cook Inlet beluga whale harassment. See <i>Native Vill. of Chickaloon v. Nat'l Marine Fisheries Serv.</i> , 947 F. Supp. 2d 1031, 1052-53 (D. Alaska 2013). Hilcorp requests that NMFS clearly express its finding that the proposed incidental harassment levels for the proposed IHA constitutes a "small number" for each marine mammal stock, independent of NMFS's "one-third" standard. For example, the proposed authorized incidental harassment also constitutes a "small number" (for each stock) under the standard approved in <i>Native Village of Chickaloon v. NMFS</i> .

Comment No.	Page	Federal Register Notice or Draft EA Text	Comment and/or Suggested Change
13	60200	Table 12 - Proposed Take to be Authorized as a Percentage of Stock Abundance. Beluga whale.	As NMFS describes in the footnote to this table, the current, best available abundance estimate for the Cook Inlet Beluga Whale stock is 331 animals. The MMPA requires NMFS to use the "best scientific information available." Accordingly, the body of the table (and corresponding calculated percentage) should use the abundance estimate of 331, not 279 (which is based on an outdated stock assessment report).
14	60202	Based on the description of the specified activity, the measures described to minimize adverse effects on the availability of marine mammals for subsistence purposes, and the proposed mitigation and monitoring measures, NMFS has preliminarily determined that there will not be an unmitigable adverse impact on subsistence uses from the POA's proposed activities.	Rather than refer to "POA's proposed activities," this should state that the "authorized harassment will not have an unmitigable adverse impact on subsistence uses" (if NMFS so concludes).
15	Section 4(a) of the Draft IHA	The Holder must monitor the project area to the maximum extent possible based on the required number of PSOs, required monitoring locations, and environmental conditions.	Hilcorp requests that NMFS delete this sentence. Hilcorp is not required to "monitor the project area to the maximum extent possible," but rather is required to monitor certain zones, according to the terms of the IHA.
16	Section 1.4.2 of the Draft EA	<p>The purpose of NMFS' Proposed Action is to authorize take under the MMPA of marine mammals incidental to Hilcorp's proposed activity. The acoustic stimuli from tugs under load with a jack-up rig has the potential to harass, as defined under the MMPA, marine mammals in and near the activity area. Twelve species of marine mammals may be taken by Level B (behavioral) harassment. No Level A harassment, mortality or serious injury is anticipated or authorized in the IHA. Therefore, the activity warrants an IHA from NMFS.</p> <p>The IHA, if issued, provides an exemption to Hilcorp from the take prohibitions contained in the MMPA. To authorize the incidental take of small numbers of marine mammals, NMFS must evaluate the best available scientific information to determine whether the take would have a negligible impact on marine mammals or stocks and whether the activity would have an unmitigable impact on the availability of affected marine mammal species for subsistence use. In addition, NMFS must prescribe, in an IHA, the permissible methods of taking and other means of effecting the least practicable adverse impact on the species or stocks of marine mammals and their habitat, paying particular attention to rookeries, mating grounds, and other areas of similar significance. If appropriate, NMFS must prescribe means of effecting the least practicable adverse impact on the availability of the species and/or stocks of marine mammals for subsistence uses. NMFS also must include requirements or conditions pertaining to monitoring and reporting. Thus, the purpose of NMFS' action—which is a direct outcome of Hilcorp's request for authorization to take marine mammals incidental to their proposed activities (specifically, tugs towing, holding, and positioning a jack-up rig)—is to evaluate the information in Hilcorp's application pursuant to the MMPA and 50 CFR 216 and issue the requested ITA, if appropriate.</p>	Hilcorp requests that NMFS delete the second paragraph of this section. The purpose of the action is correctly stated in the first sentence of the first paragraph of this section. The second paragraph is unnecessary, describes things that are not the "purpose" of the action, and, at the end, incorrectly states the purpose to be something else (i.e. "to evaluate information in Hilcorp's application...").
17	Section 2.5 of the Draft EA	<p>In coordination with Hilcorp, NMFS considered whether other alternatives could meet the purpose of and need for the project while supporting Hilcorp's proposal to use tugs to tow, hold, and position a jack-up rig in middle Cook Inlet and Trading Bay, Alaska. In developing the Action, two variations of the Preferred Alternative were identified during the preparation of the IHA. The two variations of the Preferred Alternative were issuing the IHA without mitigation, monitoring, and reporting required by NMFS, and exploring alternative technologies to accomplish Hilcorp's objectives. However, NMFS determined these alternatives did not meet the purpose and need for the Action or merit further analysis for the reasons noted below. Thus, the analyses of alternatives in this EA are limited to the Preferred Alternative and the No Action Alternative.</p> <ul style="list-style-type: none"> ● Not requiring mitigation, monitoring, or reporting would be in violation of the MMPA and its implementing regulations ● NMFS is not aware of alternative techniques available that would allow Hilcorp to move the jack-up rig to various well sites without generating noise, which is the primary activity that has the potential to take marine mammals by harassment. 	"Alternative technologies to accomplish Hilcorp's objectives" cannot be alternatives to the proposed action, and this language in the Draft EA should be modified accordingly. The proposed action is NMFS's authorization of incidental harassment. NMFS does not authorize, or otherwise have jurisdiction over, Hilcorp's activities. Thus, alternatives to Hilcorp's activities, such as the use of alternative technology, cannot be alternatives in the NEPA review of the issuance of the IHA. Although NMFS has no authority to require Hilcorp to use alternative technologies, Hilcorp may, of course, use such technologies voluntarily.



Via Electronic Mail

August 23, 2024

Jolie Harrison, Chief
Permits and Conservation Division
Office of Protected Resources
National Marine Fisheries Service
ITP.tyson.moore@noaa.gov

Re: Taking Marine Mammals Incidental to Hilcorp Alaska, LLC Production Drilling Support in Cook Inlet, Alaska, 89 Fed. Reg. 60,164 (July 24, 2024)

The Center for Biological Diversity submits the following comments to the National Marine Fisheries Service (“NMFS”) on a proposed incidental harassment authorization (“IHA”) that would allow Hilcorp, Alaska LLC (“Hilcorp”) to take critically endangered Cook Inlet beluga whales and other marine mammals during its oil and gas operations in Cook Inlet, Alaska. Specifically, NMFS is proposing to allow Hilcorp take of 12 species of marine mammals incidental to its use of tug boats to tow, hold, and position a jack-up rig to support production drilling at platforms in middle Cook Inlet and Trading Bay, Alaska between September 2024 and September 2025.¹ NMFS has also indicated that it may issue a second IHA to Hilcorp for these same activities on an expedited basis.²

Granting the IHAs as proposed would be unlawful on several grounds. NMFS’s own Recovery Plan for Cook Inlet beluga whales lists noise from tugboats as *the highest* noise threat to this critically endangered species, yet the fail proposed IHAs fail to seriously grapple with this key fact. As both we and the Marine Mammal Commission have repeatedly emphasized to NMFS, the agency should defer issuance of incidental take of Cook Inlet belugas unless and until NMFS has a better understanding of the reasons the species is not only failing to recover. Until it does so, NMFS has no rational basis for concluding that any amount of take constitutes a “negligible impact” to the species. Moreover, the process by which NMFS is proposing to authorize take is contrary to the Marine Mammal Protection Act (“MMPA”); and the IHAs fail to comply with the substantive requirements of the MMPA by including arbitrary negligible impact and small numbers determinations and by failing to ensure the least practicable adverse impact on Cook Inlet belugas and the other species or stocks to be taken. Issuing the IHAs without remedying these errors would constitute a gross abdication of the agency’s legal obligations.

¹ 89 Fed. Reg. at 60,164.

² *Id.*

I. NMFS Cannot Issue “Successive” IHAs Without a Comprehensive Analysis and Cannot Issue “Renewed” IHAs under the MMPA

NMFS’s proposed process does not comport with the plain language of the MMPA. Section 101(a)(D)(i) plainly states that IHAs valid for periods of not more than one year.³ Yet here, the agency proposes what is potentially a series of IHAs for the next two years without conducting a comprehensive analysis of the impacts of the take across all two years.

Instead, NMFS says it will issue the IHA provided the activities and mitigation measures are the same and “[a] preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized.”⁴ This makes clear that NMFS is considering its negligible impact determination in isolation based on the take to occur under each individual IHA, rather than the entirety of the take NMFS is proposing to authorize. This is contrary to the conservative, precautionary nature of the MMPA. NMFS should analyze and mitigate the total take it is proposing to authorize across all two years.

Courts have instructed that in making its negligible impact determinations, NMFS must consider the total take it is authorizing.⁵ By chopping up its evaluation of Hilcorp’s oil and gas activities in the Inlet, NMFS is evading the comprehensive negligible impact analysis required by the statute. Similarly, without considering the total take, NMFS has no way of ensuring that its authorizations comport with the other distinct standards of the MMPA, such as that they contain measures that will ensure “the least practicable adverse impact” on the marine mammals to be taken, including critically endangered Cook Inlet beluga whales.⁶

NMFS’s proposal to “renew” the IHA via an expedited process is also unlawful. The MMPA is clear on the timing of when the agency must publish a proposed authorization—45 days after receipt of an application—and the duration of the public comment period—30 days after publication.⁷ The legislative history of the 1972 Act demonstrates that Congress viewed a robust notice and comment process as central to the agency’s implementation of the incidental take authorization process. “As approved by the Committee, the [MMPA] involves a number of basic concepts,” one of those concepts being that “the public is invited and encouraged to participate fully in the agency decision-making process.”⁸ When NMFS adheres to this process, “the public is assured of the right to be informed of actions taken or proposed.”⁹

With respect to NMFS’s proposal to allow only a 15-day comment period for an application to extend the IHA by another year, the legislative history of the 1994 Amendments clearly demonstrates Congress intended NMFS to provide a full 30-day comment period in this scenario: “[I]n some instances, a request will be made for an authorization identical to one issued the previous year. In such circumstances, the Committee expects the Secretary to act expeditiously in

³ 16 U.S.C. § 1371(a)(5)(D)(i).

⁴ 89 Fed. Reg. at 60,202.

⁵ See *Conservation Council for Hawaii v. NMFS*, 97 F. Supp. 3d 1210, 1221 (D. Hawai’i 2015).

⁶ See 16 U.S.C. § 1371(a)(5)(A)(i)(II), (D)(ii)(I).

⁷ *Id.* § 1371(a)(5)(D)(iii).

⁸ H.R. Rep. No. 92-707, at 4151 (1972), reprinted in 1972 U.S.C.A.N. 4144, 4151.

⁹ *Id.* at 4146.

complying with the notice and comment requirements,” specifically established by the statute.¹⁰ The agency lacks discretionary authority to interpret the statute otherwise, whether by regulation, by policy, or on a permit-by-permit basis as it purports to do here.

Providing a clear and legally adequate justification for its purported new reauthorization process is especially important considering the burden the foreshortened comment period places on interested members of the public to review not only the original authorization and supporting documents but also the draft monitoring reports, the renewal request, and the proposed renewed authorization and then to formulate comments, all within 15 calendar days. Especially given that NMFS apparently intends the new reauthorization process to become the rule rather than the exception,¹¹ it is incumbent on the agency to set forth, via proposed regulation or policy document, its rationale for this new process and to allow public comment.

II. NMFS’s Small Numbers Determination Is Arbitrary

NMFS’s small numbers determination is improper. It is based on a patently unlawful interpretation of what constitutes a small number and fails to consider that even a relatively small number of take of critically endangered Cook Inlet beluga whales can be more than small considering the species highly imperiled status.

A. NMFS’s Interpretation of Small Numbers as One-Third of the Population Is Unlawful

In the Federal Register notice, NMFS states that, in making its small numbers determination “NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in [its] determination of whether an authorization is limited to small numbers of marine mammals.”¹² NMFS then explains that “[w]hen the predicted number of individuals to be taken is fewer than one third of the species or stock abundance ... the take is considered to be of small numbers.”¹³

Interpretation of small numbers as one third of the entire population—or roughly 33 percent—is the very definition of unreasonable. It is contrary to both plain meaning of the phrase “small numbers” and the MMPA’s species-protective purpose. Indeed, courts have repeatedly held that because the MMPA seeks to protect marine mammals, NMFS must interpret the statute in light of that primary conservation aim.¹⁴

¹⁰ H.R. Rep. No. 103-439, at 29 (1994).

¹¹ NMFS has issued notice of this new reauthorization process for a multitude of permits. *See, e.g.*, 84 Fed. Reg. 8312 (Mar. 7, 2019); 84 Fed. Reg. 8316 (Mar. 7, 2019); 84 Fed. Reg. 11,508 (Mar. 27, 2019); 84 Fed. Reg. 13,246 (Apr. 4, 2019); 84 Fed. Reg. 14,200 (Apr. 9, 2019); 84 Fed. Reg. 15,598 (Apr. 16, 2019); 84 Fed. Reg. 17,384 (Apr. 25, 2019); 84 Fed. Reg. 17,784 (Apr. 26, 2019); 84 Fed. Reg. 17,788 (Apr. 26, 2019); 84 Fed. Reg. 18,346 (Apr. 30, 2019); 84 Fed. Reg. 18,495 (May 1, 2019); 84 Fed. Reg. 18,801 (May 2, 2019); 84 Fed. Reg. 18,809 (May 2, 2019); 84 Fed. Reg. 20,336 (May 9, 2019).

¹² 89 Fed. Reg. at 60,200.

¹³ *Id.*

¹⁴ *See, e.g., Committee for Humane Legislation v. Richardson*, 540 F.2d 1141, 1148 (D.C. Cir. 1976); *NRDC v. Pritzker*, 828 F.3d 1125 (9th Cir. 2016).

Yet NMFS fails to provide *any* reasoning for its finding that harming one out of every three animals is a “small” number. That explanation is especially lacking considering courts have previously held that “a definition of ‘small number’ that permits the potential taking of as much as 12% of the population of a species is plainly against Congress’ intent.”¹⁵

The same is true here. NMFS’s interpretation of small numbers to be 33 percent of a species’ or stock’s abundance contravenes the plain meaning of “small.” The plain meaning of “small” is “little or close to zero” or “limited in degree.”¹⁶ Nearly one out of every three animals in a marine mammal species or population is not close to zero or limited in number or degree.

Moreover, in including the “small numbers” standard in the MMPA, Congress made clear that it intended this provision to be a separate check on NMFS’s ability to authorize incidental take.¹⁷ Congress explained that while it was not including a specific numerical limit, it intended NMFS limit takes to “infrequent, unavoidable” occurrences.¹⁸ The taking of up to 33 percent of a population is not “infrequent” or “unavoidable,” as Congress intended.

B. NMFS’s Small Numbers Determination for Cook Inlet Beluga Whales Is Improper

NMFS’s small numbers determination for Cook Inlet beluga whales also fails to consider the highly imperiled status of the species. What is “small” is not necessarily the same in all contexts, but must be considered against the status of the species and whether the percentage take for each affected species will ensure that population levels are maintained at or restored to healthy population numbers. NMFS’s approach does not do so. Rather, for Cook Inlet belugas, NMFS simply assumes that take is “small” simply because the take to be authorized by the IHAs is below an arbitrary 33 percent threshold.¹⁹

III. NMFS’s Negligible Impact Determination Is Improper

NMFS’s negligible impact determination is improper in numerous respects. NMFS does not understand why the Cook Inlet beluga whale population is not recovering. As such, NMFS has no rational basis on which to conclude that additional harassment by noise—which NMFS has identified as a high threat to the species in the Recovery Plan—has a negligible impact on the species. While stating that it will “assess the number, intensity, and context of estimated takes by evaluating this information relative to population status,”²⁰ NMFS then proceeds to overlook that Cook Inlet belugas are among the most highly endangered animals under the agency’s jurisdiction to protect.

Indeed, the agency’s findings that “[m]arine mammal densities are low in the project area,” that the impacted area includes only “a limited, confined area of any given stock’s home range,” and “that the specified activity would not create a barrier to movement through or within important

¹⁵ *NRDC v. Evans*, 364 F. Supp. 2d 1083, 1104 (N.D. Cal. 2003).

¹⁶ Small, Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/small> (accessed May 27, 2022).

¹⁷ *See, e.g., CBD v. Salazar*, 695 F.3d 893, 903 (9th Cir. 2012) (citing legislative history).

¹⁸ H.R. Rep. No. 97-228, at 19 (Sept. 16, 1981), *as reprinted in* 1981 U.S.C.C.A.N. 1458, 1469.

¹⁹ *See* 89 Fed. Reg. at 60,200.

²⁰ *Id.* at 60,197.

areas,”²¹ fail to properly recognize the unique threat that noise pollution poses to Cook Inlet beluga whales.²² It also discounts the best available science for Cook Inlet belugas—including from NMFS itself—which indicates, for example, that belugas have been observed in April and May at Trading Bay engaged in probable mating behavior; and are regularly seen feeding in the Tyonek area from June to September.²³

NMFS’s conclusion is particularly arbitrary considering the activity under the IHAs will occur entirely within an area NMFS has designated as a “biologically important area” year-round for Cook Inlet belugas;²⁴ and will also occur in federally designated critical habitat for Cook Inlet belugas, where NMFS has recognized the importance of quiet areas for the whale’s survival and recovery.²⁵ Additionally, scientists have repeatedly pointed to the cumulative impacts of multiple stressors as a likely reason for the species’ dire status, and NMFS itself has recognized that its approach of evaluating the impacts of incidental take “on the basis of an individual activity in isolation,” fails to account for “creeping normality (e.g., death by a thousand cuts).”²⁶ That is just what NMFS’s approach does here. The arbitrary nature of the agency’s approach is particularly glaring, considering it is proposing to potentially authorize two IHAs for the same activity, yet segments its negligible impact determination for each IHA in isolation.

Moreover, NMFS’s negligible impact determination for all species relies, in large part, on the mitigation measures required under the IHAs.²⁷ However, these mitigation measures rely nearly exclusively on the ability of protected species observers to observe marine mammals.²⁸ Yet NMFS’s negligible impact determination contains no acknowledgment of the difficulty of actually observing marine mammals from vessels. The extreme tidal range, harsh weather, and turbid waters of Cook Inlet make visual observations of marine mammals even more difficult.²⁹ As one study put it: “Cook Inlet is a notoriously challenging place for conducting traditional vessel and aircraft-based visual surveys on a yearround basis due to frequent inclement weather

²¹ *Id.* at 60,199.

²² *See, e.g.,* Forney, Karin A. et al., Nowhere to go: noise impact assessments for marine mammal populations with high site fidelity, 32 *Endangered Species Research* 391 (2017); Castellote, M., et al., Anthropogenic Noise in Cook Inlet Beluga Habitat: Sources, Acoustic Characteristics, and Frequency of Occurrence. Alaska Department of Fish and Game, Final Wildlife Research Report (2016); Castellote, M., et al., Anthropogenic Noise and the Endangered Cook Inlet Beluga Whale, *Delphinapterus leucas*: Acoustic Considerations for Management, 80 *Marine Fisheries Review* 63 (2018); McHuron, E.A., et al, Modeling the impacts of a changing and disturbed environment on an endangered beluga whale population, 483 *Ecological Modeling* 110417 (2023); McGuire, T. L., et al., Patterns of mortality in endangered Cook Inlet beluga whales: Insights from pairing a longterm photo identification study with stranding records, 37 *Marine Mammal Science* 492 (2020); Brewer, A., et al., Communication in Cook Inlet beluga whales: Describing the Vocal Repertoire and Masting of Calls by Commercial Ship Noise, 154 *J. Acoust. Soc. Am* 3500 (2023).

²³ NMFS, ESA Section 7(a)(2) Biological Opinion on Hilcorp Alaska and Harvest Alaska Oil and Gas Activities, Cook Inlet, Alaska. NMFS Consultation Number: AKRO-2018-00381, June 18, 2019 at 69; NMFS, Recovery Plan for the Cook Inlet Beluga Whale (*Delphinapterus leucas*) (2016) at IX-45.

²⁴ NMFS, Cetacean and Sound Mapping: Biologically Important Areas, <https://experience.arcgis.com/experience/51a9e25c75a1470386827439a918e056> (accessed Aug. 23, 2024).

²⁵ 76 Fed. Reg. 20,180, 20,203 (April 11, 2011).

²⁶ Recovery Plan at VI-30.

²⁷ *See* 87 Fed. Reg. at 27,622.

²⁸ *See id.* (noting “Hilcorp will minimize potential exposure of marine mammals to elevated noise levels by not commencing operational activities if marine mammals are observed within the immediate starting area.”).

²⁹ *See, e.g.,* M. Castellote, et al. 2020. Seasonal distribution and foraging occurrence of Cook Inlet beluga whales based on passive acoustic monitoring. *Endang Species Res* 41: 225–243.

conditions, turbid silt-laden waters, and heavy seasonal ice cover that make the detection of belugas problematic.”³⁰

NMFS itself has acknowledged that lookouts are not as effective in mitigating acoustic impacts as time-area restrictions.³¹ Yet NMFS arbitrarily simply assumes the mitigation measures will be effective. Courts have held that NMFS may not choose the lesser mitigation option of lookouts to protect marine mammals from military sonar “especially knowing that many potential disruptions to marine mammal behavior will be difficult to detect or avoid through lookouts.”³² The same is true here.

IV. NMFS Fails to Ensure the Least Practicable Adverse Impact

NMFS’s proposed IHAs fail to ensure the “least practicable adverse impact” on Cook Inlet belugas, the other species or stocks to be taken, and their habitats. As courts have made clear, the least practical adverse impact requirement is a stringent standard.³³ The least practicable adverse impact mandate is “an independent threshold statutory requirement” that must be met in addition to the requirements that take authorizations have only a negligible impact and be only for small numbers of marine mammals.³⁴

NMFS’s proposed IHAs fail to meet this requirement as there are several practicable mitigation measures NMFS has not considered. For example, NMFS did not consider also requiring the use of passive acoustic monitors to help detect the presence of marine mammals. While NMFS has rejected the use of this equipment in other authorizations because of the supposed difficulty of its use in Cook Inlet, several recent studies have used it with greater success in the Inlet.³⁵

NMFS also failed to consider time-area restrictions on the use of tugs towing rigs, such as prohibiting their use during the time of year when Cook Inlet belugas are most likely to be in the area and engaging in essential behaviors. This could include, for example, a prohibition on activities in April and May at Trading Bay where and when Cook Inlet belugas have been observed engaged in probable mating behavior; or a prohibition on activities from July through September when belugas have been observed feeding in the area.³⁶

³⁰ Marc O. Lammers, et al., 2013. Passive acoustic monitoring of Cook Inlet beluga whales (*Delphinapterus leucas*). *J. Acoust. Soc. Am.* 134 (3), Pt. 2.

³¹ *Pritzker*, 828 F.3d at 1133.

³² *Conservation Council*, 97 F. Supp. 3d at 1230.

³³ *NRDC v. Evans*, 364 F. Supp. 2d 1083, 1111 (N.D. Cal 2003).

³⁴ *Pritzker*, 828 F.3d at 1133; *see also Conservation Council*, 97 F. Supp. 3d at 1229.

³⁵ Lammers, et al. 2013; M. Castellote, et al. 2020; BOEM, Environmental Studies Program: Ongoing Study, Cook Inlet Beluga Acoustic Monitoring in Lower Cook Inlet (LCI) Rivers (AK-20-01), https://www.boem.gov/sites/default/files/documents/environment/environmental-studies/AK-20-01_0.pdf.

³⁶ *See* NMFS, ESA Section 7(a)(2) Biological Opinion on Hilcorp Alaska and Harvest Alaska Oil and Gas Activities, Cook Inlet, Alaska. NMFS Consultation Number: AKRO-2018-00381, June 18, 2019 at 69; Recovery Plan at IX-45.

Moreover, NMFS failed to consider requiring noise-quieting engines, such as electric tugboats.³⁷ This mitigation measure would also have the added benefit of reducing air pollution and greenhouse gas emissions from tugs.³⁸

NMFS also failed to consider an alternative that would require the use of drones, in addition to protected species observers, to detect the presence of marine mammals. Drones can detect marine mammals when humans cannot. NMFS's failure to consider these other measures are especially arbitrary considering NMFS has recognized that the primary mitigation measure it relies on—the use of observers—can be ineffective.³⁹

Moreover, NMFS's IHA once again adopts Hilcorp's proposal to implement a clearance zone of 1,500 meters around the centerpoint of the three-tug configuration,⁴⁰ which "is considerably smaller than the Level B harassment isopleth, which [can be] up to 2,154 meters or even more."⁴¹ Indeed, NMFS determined "that 3,850 m[eters] and 4,453 m[eters] are appropriate estimates for the extent of the Level B harassment zones for Hilcorp's towing, holding, and positioning activities when using three and four tugs, respectively."⁴²

V. Conclusion

NMFS's proposed IHAs are unlawful for the reasons described above. NMFS must remedy these legal errors before authorizing Hilcorp to take more marine mammals incidental to its oil and gas operations in Cook Inlet.

Sincerely,

/s/ Kristen Monsell

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³⁷ Electrek, First fully electric tugboat in US to set sail with more than 6 MWh of batteries, July 13, 2021, <https://electrek.co/2021/07/13/first-fully-electric-tugboat-in-us-to-set-sail-with-more-than-6-mwh-of-batteries/>; Marine Insight, World's First Rechargeable And Fully Electric Tugboat Reaches Operational Milestone, Sept. 22, 2021, <https://www.marineinsight.com/shipping-news/worlds-first-rechargeable-and-fully-electric-tugboat-reaches-operational-milestone/>.

³⁸ *See id.*

³⁹ *See Conservation Council*, 97 F. Supp. 3d at 1230.

⁴⁰ 89 Fed. Reg. at 60,195.

⁴¹ *E.g., Cook Inletkeeper v. Raimondo*, 533 F. Supp. 3d 739, 758–59 (D. Alaska 2021) (citing NMFS, ESA Section 7(a)(2) Biological Opinion on Hilcorp Alaska and Harvest Alaska Oil and Gas Activities, Cook Inlet, Alaska. NMFS Consultation Number: AKRO-2018-00381, June 18, 2019).

⁴² 89 Fed. Reg. at 60,189.



VIA EMAIL ONLY: ITP.tyson.moore@noaa.gov

August 23, 2024

Jolie Harrison, Chief
Permits and Conservation Division
Office of Protected Resources
National Marine Fisheries Service

Re: Comments on Hilcorp Alaska's Application for Marine Mammal Incidental Take Authorization for Oil and Gas drilling support activities in Cook Inlet, Alaska

Chief Jolie Harrison:

On behalf of Cook Inletkeeper and its more than 8,000 supporter across the Cook Inlet watershed; we urge you to deny Hilcorp Alaska's application for incidental take of marine mammals during production drilling support activities in Cook Inlet, Alaska.

The application seeks authorization to take 12 species of marine mammals, by Level B harassment, to conduct jack-up rig towing, holding, and positioning activities. The proposed take totals 433 individuals, including 15 instances of harassing and disturbing endangered Cook Inlet beluga whales. The drilling support activities will lead to exposure to elevated sound levels produced during tugs under load with the jack-up rig.

1. NMFS should not authorize any take of Cook Inlet beluga whales

Cook Inlet beluga numbers have declined by 75% from a population of approximately 1,300 whales in the 1970s. These unique whales are in trouble, and they have shown no signs of recovery since they were protected under the ESA in 2008. NMFS' most recent population estimate from 2021 and 2022 aerial surveys is 331 Cook Inlet beluga whales with the possibility of a slightly increasing population trend (0.2 – 0.9%), but recent changes in survey methods calls into question the reliability of using this approach to identify trends in population status. Previous to the 2021 and 2022 aerial surveys, "a declining trend of 2.3% per year was found to occur from 2008 to 2018." Moreover, advancements in integrated population modeling confirmed this negative trend in the Cook Inlet beluga population. A recent population viability analysis estimates that the population will decline at an average rate of 1.6% per year in the coming decades. NMFS has acknowledged that "the loss of more than one beluga whale annually could impede recovery.

In addition, NMFS acknowledges anthropogenic noise is one of the single greatest threats to Cook Inlet belugas and one of three threats listed in the recovery plan as a threat of highest relative concern to the species. The recovery plan states, for instance, that “[t]he effect of anthropogenic noise, particularly the combined effect of different sound sources occurring simultaneously or consecutively, has the potential to affect beluga acoustic perception, communication, echolocation, and behavior (such as foraging and movement patterns).” Furthermore, the long-term effects of such impacts “may induce chronic effects altering the health of individual [Cook Inlet] belugas, which in turn have consequences at the population level (i.e., decreased survival and reproduction).”

A precautionary approach is especially warranted here because the situation of the Cook Inlet belugas is dire. Because of the continued decline of Cook Inlet beluga whales and the lack of understanding regarding the main causes of mortality, the agency must not issue Hilcorp an authorization to take beluga whales.

2. NMFS must require mitigation to ensure the least practicable adverse impact on marine mammals and their habitat.

To the extent that NMFS is considering issuing the authorization, it must require mitigation to ensure the least impact on marine mammals. NMFS must evaluate additional mitigation beyond that proposed by the applicant to achieve “the least practicable adverse impact on marine mammal species, stock, and habitat..., paying particular attention to rookeries, mating grounds, and areas of similar significance.” NMFS may not rubber stamp the mitigation measures proposed by the applicant, but it must consider the practicality of other measures. For example, NMFS should adopt the following mitigation:

Improved look-outs for marine mammals: NMFS should require additional observers, and require a combination of drone and visual monitoring at all times. Tug towing rig activities during periods of low visibility or at night - even to accommodate a favorable tide - should not be permitted.

Additional monitoring: We recommend that NMFS consider additional monitoring to obtain better information about the marine mammal populations and distributions as well as impacts from the proposed activities to better inform future decisions.

3. NMFS must consider additional concerns with Hilcorp’s application.

a. Cumulative impacts of multiple take authorizations in Cook Inlet.

NMFS must consider whether the cumulative impacts from proposed activities in Cook Inlet will have a negligible impact on the area’s marine mammals. Specifically, NMFS must consider the cumulative impacts of noise in Cook Inlet, including noise impacts from vessels, Port of Anchorage pile driving and construction, construction of the Alaska LNG terminal, among other proposed activities. These noises are repeatedly impacting the same individuals, and it is imperative that

NMFS determine what activities or combinations of activities would exceed the cumulative negligible impact threshold. Indeed, we urge the agency to perform such an analysis before any additional MMPA authorizations are issued to take Cook Inlet beluga whales.

b. Hilcorp's poor record of safety and environmental compliance.

Offshore oil and gas activities are inherently dangerous, and, heightening the inherent risks, the applicant - Hilcorp Alaska, LLC- has a documented history of accidents and safety violations. This should counsel NMFS to consider Hilcorp's application and mitigation measures with heightened scrutiny.

According to the Alaska Oil and Gas Conservation Commission (AOGCC), Hilcorp has a documented pattern of safety violations and disregard for compliance with the law in Alaska. As documented by AOGCC, Hilcorp had more than two dozen violations over a 3.5-year period—so many that the agency concluded that “disregard for regulatory compliance is endemic to Hilcorp's approach to its Alaska operations.”

In one instance, AOGCC fined Hilcorp \$20,000 for failure to test crucial safety equipment — blowout prevention equipment — after using it to control a well. The agency characterized Hilcorp's communications about the underlying events as “misleading and incomplete,” finding that “critical factual information known to Hilcorp was not provided to AOGCC.”

Hilcorp's track record hasn't improved since 2022 - the last time NMFS gave Hilcorp authorization to take marine mammals in Cook Inlet. As recently as May 2023, AOGCC levied an unusually large fine against Hilcorp Alaska for violating an approved drilling process, and said the company continues to engage in a pattern of misbehavior that has led the agency to issue more than 60 enforcement actions against it. Accordingly, NMFS must consider this bad track record and provide rigorous oversight of Hilcorp Alaska.

4. Conclusion

For all of the above reasons, we strongly urge NMFS not to authorize the take of *any* Cook Inlet beluga whales. To the extent that NMFS is still considering take authorization, it must impose stringent mitigation measures to ensure the least adverse impact on protected species. As for NMFS' requesting comments on a possible one-time, 1-year IHA renewal, we reject the premise that this would be consistent with the MMPA and therefore, do not support this potential action.

Thank you for your consideration of these comments.

Sincerely,



Sue Mauger
Science Director