

Thursday, August 7 - the Protected Resources Committee will review NMFS' proposed list of fisheries (LOF) and develop comments for Council consideration and action. The Council will convene to review and discuss proposed measures (adjustment mechanism for stock status determination criteria) for Framework 2 to the Dogfish FMP; report on regular business; receive an update on the status of NMFS' MRIP; receive Committee Reports; and, consider and address any continuing or new business.

Although non-emergency issues not contained in this agenda may come before the Council for discussion, these issues may not be the subject of formal Council action during these meetings. Council action will be restricted to those issues specifically listed in this notice and any issues arising after publication of this notice that require emergency action under Section 305(c) of the Magnuson-Stevens Act, provided the public has been notified of the Council's intent to take final action to address such emergencies.

#### Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aid should be directed to M. Jan Bryan, (302) 674-2331 ext 18, at least 5 days prior to the meeting date.

Dated: July 15, 2008.

**Tracey L. Thompson,**

*Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*  
[FR Doc. E8-16436 Filed 7-17-08; 8:45 am]

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

RIN 0648-XG36

#### Small Takes of Marine Mammals Incidental to Specified Activities; Port of Anchorage Marine Terminal Redevelopment Project, Anchorage, Alaska

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice; issuance of incidental harassment authorization.

**SUMMARY:** In accordance with the regulations implementing the Marine Mammal Protection Act (MMPA), notification is hereby given that NMFS has issued an Incidental Harassment

Authorization (IHA), to the Port of Anchorage (herein after "Port") and the U.S. Department of Transportation Maritime Administration (herein after "MARAD") to take small numbers of marine mammals, by Level B harassment, incidental to the first year of construction of its Marine Terminal Redevelopment Project (herein after "Project") at the Port, Anchorage, Alaska.

**DATES:** Effective from July 15, 2008 – July 14, 2009.

**ADDRESSES:** A copy of the IHA, application, and Environmental Assessment (EA) prepared for this action are available by writing to Michael Payne, Chief, Permits, Conservation, and Education Division, Office of Protected Resources (OPR), National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910-3225, or by telephoning the contact listed here (**FOR FURTHER INFORMATION CONTACT**) or online at: <http://www.nmfs.noaa.gov/pr/permits/incidental.htm>. Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address.

**FOR FURTHER INFORMATION CONTACT:** Jaclyn Daly or Jolie Harrison, Office of Protected Resources, NMFS, (301) 713-2289.

#### SUPPLEMENTARY INFORMATION:

##### Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (Secretary) to allow, upon request, the incidental, but not intentional, taking of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) if certain findings are made and regulations are issued or, if the taking is limited to harassment, notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings may be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for certain subsistence uses, and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such taking are set forth. NMFS has defined "negligible impact" in 50 CFR 216.103 as: an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

Under 50 CFR 216.104(b) of NMFS' implementing regulations for the MMPA, NMFS must publish in the **Federal Register** a notice of a proposed IHA or a notice of receipt for a request for the implementation of regulations governing the incidental taking. Information gathered during the associated comment period is considered by NMFS in developing, if appropriate, IHAs and regulations governing the issuance of Letters of Authorizations (LOAs) for the proposed activity.

#### Summary of Request

On February 20, 2008, NMFS received a complete application from the Port and MARAD requesting a one-year IHA to take, by Level B harassment, up to 34 Cook Inlet beluga whales (*Delphinapterus leucas*), 20 harbor seals (*Phoca vitulina*), 20 harbor porpoises (*Phocoena phocoena*), and 20 killer whales (*Orcinus orca*) incidental to the Project. The content and proposed mitigation in the application was a result of numerous discussions between the applicants and NMFS. Harassment to marine mammals could result from exposure to noise from pile driving. While dredging and use of other heavy machinery (tugs, dump scowls, barge mounted hydraulic excavators or clamshell equipment) are also associated with the Project, these activities are not expected to result in harassment as marine mammals, in particular beluga whales.

NMFS prepared an EA for the proposed action which thoroughly analyzes and discusses potential impacts on marine mammals and their habitat from the Project. Harassment from pile driving associated with the Project may result in short-term, mild to moderate behavioral and physiological responses. Anticipated behavioral reactions of marine mammals include altered headings, fast swimming, changes in dive, surfacing, respiration, and feeding patterns, and changes in vocalizations. Physiological impacts are expected to be mild stress responses. However, NMFS has determined harassment would be limited to Level B, will result in a negligible impact to affected marine mammal species or stocks, and will not have an unmitigable adverse impact on the availability of such species or stock for the taking for subsistence purposes.

#### Specified Activities

A detailed description of the Project can be found in the application and the NMFS prepared EA. However, for purposes of this notice, a summary of activities is provided. According to the

application, the Project is designed to upgrade and expand the Port by replacing aging and obsolete structures and provide additional dock and backland areas. Located on the east bank of Knik Arm in upper Cook Inlet, the 129-acre port is operating at or above sustainable practical capacity. The expansion of the Port is necessary to adequately support the economic growth of Anchorage and the state of Alaska through 2025. The port currently serves 80 percent of Alaska's populated area, and it handles over 90 percent of consumer goods sold within the Alaskan Railroad distribution area (the Alaska Railroad runs from Seward through Anchorage, Denali, and Fairbanks to North Pole, with spurs to Whittier and Palmer (locally known as "The Railbelt").

According to the application, the existing dock can no longer be widened nor salvaged due to its advanced age and state of disrepair. The dock supporting the three cranes today was completed in 1961. Its projected life expectancy was 25–30 years; therefore, a new port is in order. Construction necessitates use of impact and vibratory pile drivers to install open cell sheet, 36 inch steel, and H- piles to construct the waterfront bulkhead structure that will facilitate increased dock space and the fendering system. In-water pile driving would occur between April– October, annually, until the new port is completed (2012). The new dock face will include 7,430 ft (2,265 m) of vertical sheet pile wharf and 470 ft (143 m) for a dry barge berth; however, the entire sheet pile wall will extend 9,893 ft (3,015 m) parallel to the shore. The completed marine terminal will include seven modern dedicated ship berths; two dedicated barge berths; rail access; modern shore-side facilities; equipment to accommodate cruise passengers, cement bulk, roll on/roll off and load on/load off cargo, containers, general cargo, Stryker Brigade Combat Team deployments, general cargo on barges,

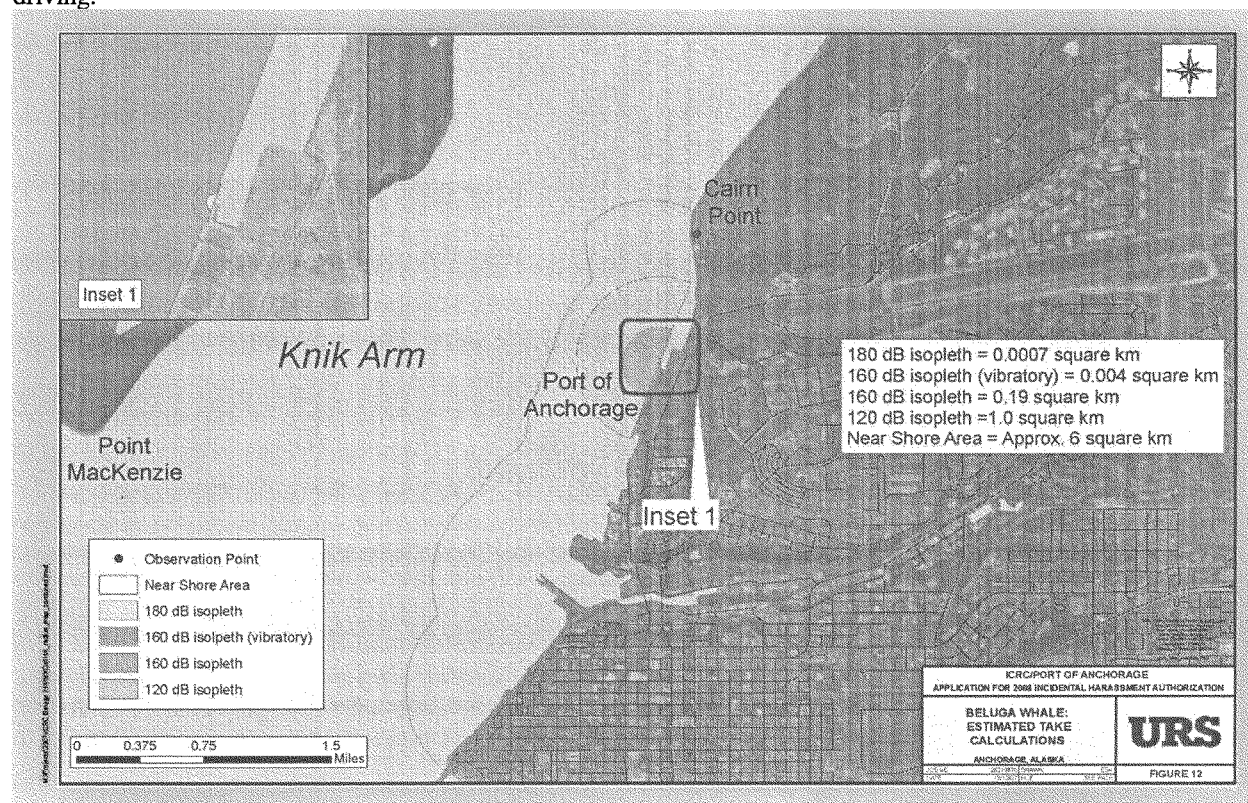
and petroleum, oils, and lubricants; and additional land area to support expanding military and commercial operations.

Installation of the sheet pile is a multi-phased process and requires the use of impact and vibratory pile driving. The process is as follows: (1) a template defining the curvature and shape of the cell face is placed on the ocean floor in the correct location; (2) the template is secured in place using up to four temporary pipe-piles, approximate driving time for each pile is 5 minutes; (3) adjacent sheet piles are then placed and "stabbed" over approximately half of the template, less if tidal currents are high at the time. Stabbing involves driving the pile a nominally short distance at reduced hammer energy to set the bottom of the pile deep enough into the soil to hold it in place while the next adjacent pile is started. Stabbing depths would be less than five feet, at reduced vibratory hammer energy; (4) once a pile-group is "set" on the template, the piles are driven in a stair-step method advancing one pile five feet, then moving the hammer to the next pile, advancing that pile five feet, moving to the next and so on. This process is repeated at 5-foot intervals without resting until all the sheet piles are at design depth. Advancing the sheet pile in increments reduces driving strain on the interlocks and provides better vertical placement control; (5) the next sheet pile-group is then "set" on the template with reduced energy in the adjacent location and the process repeated; and (6) tail walls that are driven in-water may similarly be driven in groups as well. During the "stabbing" process, the Port has indicated that shut-down is not practicable. If the sheet pile wall is not secured in the ground before ceasing pile driving, it could easily break free, especially during periods of stronger currents. A free-floating sheet pile is both dangerous to the construction workers and could become a navigational hazard.

Therefore, mitigation measures would apply to all pile driving operations except during the stabbing phase when a low, reduced energy vibratory hammer is used.

The Port has indicated that approximately 550 hours of impact pile driving and 368 hours of vibratory pile driving will occur during the IHA timeframe. Using the best scientific data available, NMFS has determined that Level A harassment could occur if a pinniped or cetacean is exposed to sound levels at or above 190 and 180 dB re 1 micro Pascal, respectively. For pulsed sounds, such as impact pile driving, exposure to sound levels at or above 160 dB re 1 micro Pascal (but below Level A harassment thresholds) could result in Level B harassment. For continuous noise (non-pulsed), such as vibratory pile driving, the Level B harassment threshold is 120 dB re 1 micro Pascal. Based on an acoustic study conducted at the Port in October 2007, it is expected that average sound levels of impact driving will be approximately 177 dB re 1 micro Pascal at 19m in the frequency range of 100–15,000 Hz and vibratory pile driving sounds will be approximately 162 dB re 1 micro Pascal at 20m in the frequency range of 400–2,500 Hz. Further empirical data were collected to identify Level A and Level B harassment isopleths (Figure 1). For impact pile driving, the 190, 180, and 160 dB re 1 micro Pascal isopleths are approximately 10m, 20m, and 350m from the pile hammer. Vibratory driving isopleths for 190 and 180 dB re 1 micro Pascal are both less than 10m, and 120 dB re 1 micro Pascal is 800m from the pile hammer. For comparative purposes, the distance across the Arm from the Port to Port MacKenzie (on the west side of Knik Arm) is approximately 4.88 km. The distance to the west bank directly across the Arm from the Port is approximately 4.17 km.

Figure 1: Level A and Level B harassment isopleth distances at the Port of Anchorage for impact and vibratory pile driving.



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### Marine Mammals and Habitat Affected by the Activity

Cook Inlet is utilized by several species of marine mammals; however, upper Cook Inlet marine mammal species diversity is limited. The Cook Inlet beluga whale is the most prevalent marine mammal in the action area. Harbor seals, harbor porpoises, and killer whales are also found in upper Cook Inlet but sporadically and in low density. While Steller's sea lions (*Eumetopias jubatus*) are present in lower Cook Inlet to some degree, there have been no reported sightings of this species in Knik Arm. Only four Steller sea lions have been sighted since 1999 in the Susitna River mouth area (Barbara Mahoney, personal communications, June 20, 2008); therefore, Steller's sea lions are not anticipated to be affected by the Project and will not be included in any MMPA authorization for the proposed action nor considered in more detail in this analysis. More information on Alaskan marine mammals can be found at (<http://www.fakr.noaa.gov/protectedresources>).

### Beluga Whales

A detailed description of Cook Inlet beluga whales can be found in the application, EA, and the proposed IHA

**Federal Register** notice (73 FR 14443, March 18, 2008) and summaries of status, distribution, habitat use, and hearing are provided here. The Cook Inlet beluga whale population is a discrete population comprised of approximately 375 individuals (NMFS, unpubl. data) as of 2008. This stock was listed as depleted under the MMPA and was proposed for listing as endangered under the ESA on April 20, 2007 (72 FR 19854). On April 22, 2008, NMFS published a notice in the **Federal Register** announcing a 6-month extension (to October 20, 2008) on the determination for listing the Cook Inlet beluga whale DPS as endangered under the ESA (73 FR 21578).

In general, Cook Inlet beluga whales utilize Knik Arm during the spring, summer, and fall months and retreat to lower, ice-free portions of Cook Inlet during the winter. From April through November whales concentrate at river mouths and tidal flat areas, moving in and out with the tides (Rugh *et al.*, 2000). In Knik Arm, beluga whales generally are observed arriving in May and often use the area all summer, feeding on the various salmon runs and moving with the tides. There is more intensive use of Knik Arm in August and through the fall, coinciding with the coho salmon run. Whales will gather in

Eagle Bay (approximately 16 km north of the Port) and elsewhere on the east side of Knik Arm on the low tide. During high tides, beluga whales are generally concentrated around prime feeding habitats in the upper reaches of the Arm. No prime feeding habitats are located directly around the Port.

Beluga whales frequently move in and out of deeper water and between feeding, calving, and nursery areas throughout the mid and upper Inlet. Open access to and between these areas is important. Knik Arm, Turnagain Arm, Chickaloon River and the Susitna River delta areas are used extensively. Besides localized prime foraging areas, it is possible these sites provide for other biological needs such as calving or molting but this has not been confirmed. Such use of habitat has been reported elsewhere in Alaska, although there is not adequate information to identify these calving and molting habitat attributes to Knik Arm. Further, only the upper reaches of Knik Arm, beginning at Eagle Bay, have been identified as prime foraging area, not the area around the Port.

Opportunistic beluga whale sightings at or near the Port have been reported for years to the NMFS Alaska Region (AKR) (NMFS, unpubl. data). Sighting data have been collected by Port

authorities on land or crew aboard commercial vessels (e.g., tugs). Although behavioral data were not collected for all sightings, available reports indicate that traveling is the prevalent behavior of beluga whales around the Port. Out of the 60 sightings that had behavioral data associated with them, 47 groups, including individuals, were reported traveling. Other behaviors noted included feeding (n=4), possible feeding (n=2), transversing Knik Arm (n=3), and association with vessels (n=4) where n is equal to the number of groups sighted. Interestingly, two groups associated with vessels were highly vocal and the crew reported vocalization resonating through the tug. Based on these data, habitat use around the Port from April–October has been determined to be primarily traveling. Whales are using this area as a corridor to access the upper reaches of Knik Arm where fish runs are prevalent in the summer months. Dedicated beluga whale surveys around the Port have also indicated that the greatest use of habitat around the Port is during or around low tide (Funk *et al.*, 2005, Ramos *et al.*, 2006, Cornick and Kendall, 2007).

Beluga whales are characterized as mid-frequency odontocetes but are able to hear an unusually wide range of frequencies, covering most natural and man-made sounds. The hearing frequency range of this species is believed to be between 40 Hz–150 kHz with keen hearing at 10–100 kHz. Above 100 kHz, sensitivity drops off very quickly (Au, 1993), and below 16 kHz the decrease in sensitivity is more gradual at approximately 10 dB per octave (White *et al.*, 1978; Awbrey *et al.*, 1988). Peak sensitivity range of this species is outside of most industrial sounds but studies have shown that beluga whales can hear and react to such low frequency noise, dependent upon intensity (i.e., decibels). However, masking of their high frequency communication and echolocation signals is likely limited when exposed to lower frequency sounds (Thomas *et al.*, 1990). In addition, beluga whales are well adapted to change frequencies and intensities of their own calls to compensate for masking effects (Au *et al.*, 1985, Lesege *et al.*, 1999, Scheifele *et al.*, 2005).

#### Harbor Seals

Harbor seals are not listed as “depleted” under the MMPA or listed as “threatened” or “endangered” under the ESA. Harbor seals haul out on rocks, reefs, beaches, and drifting glacial ice, and feed in marine, estuaries, and occasionally fresh waters (Bigg 1969, 1981). In Alaska, commonly eaten prey

include walleye, pollock, Pacific cod, capelin, eulachon, Pacific herring, salmon, octopus, and squid. They are generally non-migratory, with local movements associated with such factors as tides, weather, season, food availability, and reproduction; however, some long-distance movements have been recorded from tagged animals with juveniles traveling farther than adults (Lowry *et al.* 2001). The major haul-out sites for harbor seals are located in Lower Cook Inlet with the closest identified harbor seal haul-out site to the Port approximately 25 miles south along Chickaloon Bay in the southern portion of Turnagain Arm. However, harbor seals have been observed occasionally around the Port. In 2004–2005, 22 harbor seal sightings were reported over a 13-month period comprising of 14,000 survey hours. From these surveys, it is estimated that harbor seals occur in a density of approximately 1.7 animals per month in Knik Arm (LGL unpubl. data).

Pinniped hearing is dependent upon the medium (i.e., air or water) in which they receive the sound. Most pinniped species have essentially flat audiograms from 1 kHz to 30 50 kHz with thresholds between 60 and 85 dB re 1 micro Pascal. At frequencies below 1 kHz, thresholds increase with decreasing frequency (Kastak and Schusterman, 1998), that is, the sound must be louder in order to be heard. Harbor seals in-water and in-air display significant disparities between hearing capabilities with hearing 25 30 dB better underwater than in air (Kastak and Schusterman, 1994).

#### Harbor Porpoise

Harbor porpoises are found within Cook Inlet but in low abundance, especially in Knik Arm. Currently, the population estimate for the Gulf of Alaska harbor porpoise stock is 41,854 with a minimum population estimate of 34,740 (Angliss and Outlaw, 2006). However, density of harbor porpoise in Cook Inlet is only 7.2 per 1000 square kilometers (Dahlheim *et al.*, 2000). The highest monthly count in upper Cook Inlet between April and October is 18 (Ramos *et al.*, 2006). Interactions with fisheries and entanglement in gear is the prime anthropogenic cause of mortality for this stock (mean annual mortality of 67.8) (Angliss and Outlaw, 2006). Harbor porpoises are not killed for subsistence reasons.

Harbor porpoise have the highest upper-frequency limit of all odontocetes studied. They have a hearing range of 250 Hz–180 kHz with maximum sensitivity between 16–140 kHz. There is no available data on high frequency cetacean reactions to pulse sounds (e.g.,

impact pile driving); however, numerous studies have been conducted in the field (Culik *et al.*, 2001; Olesiuk *et al.*, 2002; Johnston, 2002) and laboratory (Kastelein *et al.*, 1995, 1997, 2000) for non-pulse sounds. The results of these studies demonstrate the harbor porpoise are quite sensitive to a wide range of human sounds at very low exposure levels: approximately 90 – 120dB re: 1μPa. However, most of these studies involved acoustic harassment devices (e.g., pingers) in the range of 10 kHz which is 6–7 kHz greater than most industrial sounds, including pile driving.

#### Killer whales

Killer whales in the Gulf of Alaska are divided into two ecotypes: resident and transient. Transients, or mammal-eating killer whales, are the only ecotype believed to occur in upper Cook Inlet. Killer whales are more common in lower Cook Inlet (at least 100 sightings from 1975 to 2002), but in the upper Inlet, north of Kalgin Island, sightings are infrequent (18 sightings have been noted from 1976–2003) (Sheldon *et al.* 2003). Most observed killer whale/beluga whale interactions were in the upper Inlet; however, killer whale predation on beluga whales in Cook Inlet appears to be random and does not appear to be an influential factor on beluga distribution (Hobbs *et al.*, 2006). However, a decrease in killer whale seal and sea lion prey in the Gulf of Alaska could result in killer whales moving from the southern portion of the Inlet to the northern portion in search of beluga prey.

The hearing of killer whales is well developed and this species exhibits complex underwater communication structure. They have hearing ranges of 0.05 to 100 kHz, which is lower than many other odontocetes. Peak sensitivity is around 15 kHz. Mammal-eating killer whales (i.e. transients) limit their vocal communication and often travel in silence. This is in contrast to the very vocal fish eating (i.e., resident) killer whale pods who are constantly vocalizing. The difference for this behavior is that fish do not possess the advanced hearing capabilities as the target marine mammals, who can hear or eavesdrop on mammal eating killer whale calls and escape from being prey (Deecke *et al.*, 2005).

#### Habitat

Knik Arm is comprised of narrow channels flanked by large tidal benches composed of sand, mud, or gravel depending on location. Tides in Cook Inlet are semidiurnal, with two unequal high and low tides per tidal day (tidal

day = 24 h 50 min). The mean diurnal tidal range varies from roughly 6 m (19 ft) at Homer to about 9.5 m (30 ft) at Anchorage (Moore *et al.* 2000). Because of Knik Arm's predominantly shallow depths and narrow widths, tides here are greater than in the main body of Cook Inlet. The range of tides at Anchorage is extreme at about 29 feet and the observed extreme low water is 6.4 feet below mean low low water (MLLW) (KABATA 2007). Maximum current speeds in Knik Arm, observed during spring ebb tide, exceed 7 knots (12 feet/second). These extreme physical characteristics of Knik Arm increase ambient sound level.

The habitat directly affected from the Project is the 135 acres of intertidal and subtidal wetlands filled to become useable land and facilitate the bulkhead structure and fendering systems of the dock. In addition, noise will be emitted into the waters surrounding the Port which will lead to some degree of temporary habitat degradation. With respect to habitat analysis, NMFS considered the impact elimination and degradation of this area would have to marine mammals (see Impacts to Habitat). That is, would the elimination and degradation of habitat impact the biological or physical environment to the extent that is would have an impact on marine mammals directly in the form of acoustic harassment, and indirectly, in the form of reducing availability of prey?

#### **Potential Effects of Activities on Marine Mammals**

Marine mammals use sound for vital life functions, and introducing sound into their environment could be disrupting to those behaviors. Sound (hearing and vocalization/ echolocation) serves 4 main functions for odontocetes (toothed whales and dolphins). These functions include (1) providing information about their environment; (2) communication; (3) enabling remote detection of prey; and (4) enabling detection of predators. Sounds and non-acoustic stimuli will be generated and emitted into the aquatic environment by vehicle traffic, vessel operations, roadbed construction, and vibratory and impact pile driving. The distances to

which these sounds are audible depend on source levels, ambient noise levels, and sensitivity of the receptor (Richardson *et al.*, 1995). The **Federal Register** notice for the proposed IHA and the EA discuss in detail the potential impacts to marine mammals from exposure to pile driving.

The implementation of the Project would result in the loss of intertidal and subtidal habitat used by marine mammals and exposure to loud noise could result in behavioral and mild physiological changes in marine mammals. Based on the activities described in the application, NMFS has determined that only in-water pile driving is likely to result in an adverse affect to marine mammals. Based on the best available science, as described in the EA, marine mammals exposed to pile driving noise at and above NMFS determined harassment thresholds, have the potential to undergo mild to moderate short term behavioral and physiological reactions. Anticipated behavioral reactions of marine mammals include altered headings, fast swimming, changes in dive, surfacing, respiration, and feeding patterns, and changes in vocalizations. Short-term stress response could include increase in stress hormone levels (e.g. norepinephrine, epinephrine, and dopamine). Beluga whales are expected to become accustomed to pile driving noise (Gisiner, 1998); however, they may slightly alter habitat usage so that the middle or west side of Knik Arm, where noise from pile driving would attenuate to baseline background levels, would be used more frequently as a migratory route to the northern feeding grounds.

While dredging and fill compaction would also result in noise emittance into the environment, sound levels are not expected to result in harassment of marine mammals. Dredging has been occurring at the Port for decades and marine mammals, specifically beluga whales, have become habituated to this activity as indicated by their observed interaction with dredges and other commercial vessels (NMFS unpubl. data). Fill compaction requires the use of a vibratory pile driver; however, absorption of sound by the fill and sheet

pile wall would reduce sound levels below harassment level thresholds. Because Cook Inlet is an already noisy environment (ambient levels around 115–133 dB (Blackwell 2004)), and with habituation likely and the required mitigation measures described below, NMFS believes harassment to marine mammals, including beluga whales, from pile driving will have a negligible impact on the affected species or stock of marine mammals.

Several aspects of the planned monitoring and mitigation measures for this project are designed to detect marine mammals occurring near pile driving and to avoid the chance of them being exposed to sound levels which could result in injury or mortality (see Mitigation section). NMFS does not expect Level A harassment to occur.

#### **Number of Marine Mammals Affected**

NMFS has authorized the take, by Level B harassment only, of 34 Cook Inlet beluga whales, 20 harbor seals, 20 harbor porpoises, and 20 killer whales over the course of the 1- year IHA. Because potential harassment to the Cook Inlet beluga whales was a concern, the Port was required, under mitigation in their initial U.S. Army Corps of Engineers (USACE) permit, as recommended by NMFS, to obtain three years of sighting data around the Port prior to construction. Data were collected during all months pile driving would take place (April-October) and included information on beluga whale abundance, group size and composition, behavior, presence related to tidal cycle, and use of the area by commercial vessels (Funk *et al.*, 2005, Ramos *et al.*, 2006, Cornick and Kendall 2007). These data were then compiled to calculate estimated monthly densities and expected monthly take based on pile driving hours (Table 1). A more detailed derivation of take numbers can be found in the application and EA prepared by NMFS for this action. While the calculated take estimate for beluga whales (21 for both impact and vibratory pile driving combined) is less than those authorized, take numbers were slightly inflated to compensate for natural ecology and behavior of beluga whales (e.g., large group size).

TABLE 1. CALCULATED EXPECTED TAKE FROM PILE DRIVING ACTIVITIES AT THE PORT OF ANCHORAGE FROM JULY 15, 2008 TO JULY 14, 2009.

Port of Anchorage Take Table – 2008/2009 IHA							
Month	Impact Hours	Vibratory Hours	Avg. Whales/hr/km <sup>2</sup> nearshore*	Area within 160 dB Im-pact (350m)	Expected Take (im-pact)	Area within 120 dB Vi-bratory (800m)	Expected Take (vibra-tory)
April	86	58	0.014	0.192	0.230	1.0048	0.809
May	60	39	0.006	0.192	0.064	1.0048	0.218
June	60	39	0.011	0.192	0.125	1.0048	0.423
July	86	58	0.004	0.192	0.066	1.0048	0.231
August	86	58	0.062	0.192	1.031	1.0048	3.633
September	86	58	0.043	0.192	0.718	1.0048	2.529
October	86	58	0.020	0.192	0.335	1.0048	1.179
Total*	550	368			8		13

\*The total number of authorized take is calculated by rounding up each take per month (e.g., a take of 0.230 animals in April is equal to 1 take).

Based on low sighting rates of other marine mammals around the Port, the number of other marine mammals that could be harassed from Project activities cannot be derived mathematically. Instead NMFS has estimated take to authorize a small number of takes, relative to the population size, for harbor seals (20), harbor porpoises (20), and killer whales (20).

#### Impacts to Habitat

As stated, NMFS considered habitat impacts in terms of marine mammal use and how the Project would affect marine mammal prey availability. The elimination of 135 acres of intertidal and subtidal habitat due to Port expansion would result in habitat loss and changes in this portion of Knik Arm. A new, extended dock face would replace existing acres of shallow slow moving water with deeper faster moving water across a sheer sheet pile face; however, models show current speed would not increase significantly. While these sheltered areas of slower moving water where juvenile fish tend to be more abundant would be eliminated, habitats with similar characteristics exist in other areas of Knik Arm. The clearer water microhabitats in the intertidal area that allow for visual feeding would be reduced but Houghton *et al.* (2005a,b) identified that these patches of clear water are random and also exist in the middle of the Arm. The concrete top deck of the extended dock would shade these naturally turbid waters which could further limit visual feeding opportunities for marine mammal prey; however, as shown in observations during the fish studies conducted at the Port, other waters surrounding the Port provide clear, less turbid waters in which feeding can take place.

Otoliths for juvenile Chinook salmon sampled between Cairn Point and Point Woronzof showed that 80–85 percent of the fish were of hatchery origin (interpolated from Table 12 of Houghton *et al.*, 2005a). This suggests that waters in this portion of upper Cook Inlet are very important to the hatchery produced Chinook salmon smolts from Ship Creek. The remaining 15–20 percent of the fish was not of hatchery origin suggesting that the area within the Project footprint also provides important habitat for wild Chinook, likely including fish from other Knik Arm tributaries. However, habitats in other portions of Knik Arm have the same or similar attributes which make them important nursery, rearing, and feeding areas (Houghton *et al.*, 2005a,b). Furthermore, Ship Creek is stocked and would be continually replenished, minimizing impact to prey availability. Due to the natural ecology of the fish in Knik Arm (i.e., using habitats other than those to be filled), mitigation measures set in place by the USACE permit, and the fact that Ship Creek is stocked yearly, abundance and survival rates of fish are expected to be high and therefore availability of those fish as beluga whale prey would not be significantly negatively impacted.

#### Effects on Subsistence Needs

Alaska Natives who reside in communities on or near Cook Inlet and some hunters who live in other Alaska towns and villages continue to subsistence harvest beluga whales. Until 1999, subsistence harvest of beluga whales was unregulated, which is believed to be the major reason for the recent beluga whale population decline. Since 1999, mandatory and voluntary moratoriums have been enacted prohibiting or minimizing take of beluga whales for subsistence needs. Since

2001, five beluga whales have been taken with none of those whales taken in 2006 or 2007. Scientists predicted that the beluga whale population would recover after the unregulated hunts ceased and a managed hunt was enacted. While the Cook Inlet beluga population appears to be on the increase since the lowest population estimate in 2006 when the population was estimated at 278 whales, this was only 2 years ago; therefore, a trend in recovery can not be discerned. While NMFS acknowledges that there are factors working against the recovery of the Cook Inlet beluga whale population in a manner scientists have yet to understand, NMFS is confident that, given mitigation, the small amount of harassment that whales could potentially be exposed to from the Project will not have an unmitigable adverse impact on the availability of beluga whales for subsistence uses. More information on use of beluga whales for subsistence purposes and proposed management plans can be found in the Cook Inlet Beluga Whale Subsistence Harvest Draft Supplemental Environmental Impact Statement (NMFS 2007).

#### Comments and Responses

On March 18, 2008, NMFS published in the **Federal Register** a notice of a proposed IHA for the Port and MARAD's request to take marine mammals incidental to the Project and requested comments regarding this request (73 FR 14443). During the 30-day public comment period, NMFS received comments from the Marine Mammal Commission (Commission); the Center for Biological Diversity (CBD) on behalf of the CBD, Trustees for Alaska, and Cook Inlet Keeper; and the Kenaitze Indian Tribe. The Commission and CBD provided comments on seven



major topics: (1) take numbers; (2) NMFS negligible impact determination; (3) specified activities; (4) cumulative impacts; (5) mitigation; (6) ESA requirements; and (7) NEPA requirements. Because comments provided by the Commission and CBD on these topics were similar, they are addressed here by category. Other comments and those submitted by the Kenaitze Indian Tribe are also addressed here.

#### Take Numbers

- The Commission believes that the manner in which takes are distributed among the population could be significant, that is, a single animal harassed 34 times could have different impacts than if 34 animals were harassed one time;

- CBD states that NMFS' "small numbers" definition is conflated with "negligible impact" and that NMFS conducts its analysis according to this "invalid standard"; CBD argues that "the Project would expose 12–14% of the population of Cook Inlet beluga whales (identified as 278 animals) to noise which could cause harassment and this level of take could not be considered small";

- "NMFS's estimate that 34 belugas may be harassed under the requested IHA in the first year is based on the assumption that sounds below 160 dB re 1 microPa (rms) do not constitute harassment for any cetacean"; "for example, [in a recent IHA for oil and gas exploration,] NMFS imposed a 120 dB safety zone for aggregations of bowhead whales based on its finding that 'bowhead whales apparently show some avoidance in areas of seismic sounds at levels lower than 120 dB'; and NMFS acknowledged in an IHA for the National Science Foundation "that belugas can be displaced at distances of up to 20 km from a sound source" and

- "given louder sources of noise are planned in subsequent years of the Project, over the life of the proposed regulations well over half and perhaps the entire beluga population is likely to be exposed to harassment level sounds."

*Response:* Based on beluga behavior and group dynamics, NMFS does not believe that either of the extremes provided by the Commission are likely to occur. Instead, it is probable that takes will be distributed somewhat evenly among exposed individuals with the possibility that some individuals may be taken slightly fewer or more times than others. Beluga whales are not all individually identifiable and it is impossible to determine exactly how many times each and every individual is potentially harassed. However, due to

beluga whale coloration disparities among different age classes, observers can identify how many times adults, juveniles, and calves are around the Port and have entered into the harassment zones.

NMFS no longer relies on its regulatory definition, which was found to be invalid by a U.S. District Court. Instead, NMFS addresses "small numbers" in terms of relative to the species or stock size. CBD's argument that NMFS can not make a small numbers determination since 12 percent of the population could be taken is faulty as CBD uses an outdated Cook Inlet beluga whale population estimate (i.e., 278) when the current population estimate is actually 375 whales. Therefore, 9 percent of the population could potentially be harassed under the IHA, which is small relative to the population size. CBD is also incorrect in the statement that the estimate of the number of beluga whales authorized to be taken was derived based on the assumption that exposure to sounds at or above 160 dB re 1 micro Pascal constitute a "take." NMFS estimated take numbers based on potential exposure to both pulse (i.e., impact pile driving) and continuous (i.e., vibratory pile driving) noise, which is discussed thoroughly in both the proposed IHA **Federal Register** notice (73 FR 14443) and the Port's application. NMFS has implemented a 160 dB and 120 dB re 1 micro Pascal harassment zone for impact and vibratory pile driving, respectively. NMFS used three years of monitoring data to predict beluga whale density around the Port and then estimated potential take based on both the 160 dB and 120 dB re 1 micro Pascal isopleths. A detailed description of how take was mathematically estimated can be found in the EA and the application. NMFS slightly inflated the number of whales authorized to be taken to account for realistic occurrences such as large groups; therefore, CBD is incorrect in stating the take numbers were underestimated.

In referring to NMFS' IHA that acknowledged displacement of beluga whales up to 20 km from the sound source, CBD fails to consider the science of sound and its propagation characteristics underwater (e.g., sound type, source level, water depth, and other factors contributing to sound propagation and marine mammal harassment potential. Therefore, their arguments regarding impacts to marine mammals from noise as well as Level A harassment potential are flawed and unsupported. The NSF report CBD refers to in its comments concerns beluga whale responses to seismic

surveys employing large moving ships operating an 8 airgun array configured as a four-G gun cluster with a total discharge volume of 840 in3 and a four Bolt airgun cluster with a total discharge volume of 2000 in3. The source output from that array was from 246 253 dB re 1 micro Pascal and Level B harassment sounds were expected to range from 4–7 kms. To compare potential reactions from that survey, or other seismic surveys, to stationary pile driving, which does not have a sound source level close to seismic survey output, is erroneous.

NMFS is unaware where the CBD obtained information that "louder sources of noise are planned in subsequent years of the project". The Port has not indicated that louder sound would be emitted into the environment in subsequent years. In fact, the Port has identified that impact pile driving hours will likely be reduced in subsequent years and be replaced by vibratory pile driving; therefore, sound levels will actually likely be reduced in future years as sound source level using an impact hammer is louder than a vibratory hammer. The Port must employ impact pile driving to obtain depths at which vibratory methods are not possible and once the piles are at this depth they will switch to vibratory methods.

#### Negligible Impact

- The Commission and CBD both argue that NMFS can not make a negligible impact determination because the "baseline status" of the Cook Inlet beluga whale population is "tenuous" and "is already having a more than negligible impact on this stock";

- The Commission argues that because this population of beluga whales is "dangerously low", "any increase in the level of disturbance experience by beluga whales in an important feeding area - regardless of how small the increase may be in and of itself- would have more than a negligible impact on the population of chances of recovery";

- CBD argues that NMFS has no scientific justification for its Level A harassment thresholds, citing to two marine mammal stranding events where seismic surveys were occurring and where received sound levels "were likely lower than 180 dB."

*Response:* NMFS' responsibility under section 101(a)(5)(d) of the MMPA is to authorize, subject to conditions as the Secretary may specify, the incidental but not intentional taking by harassment of small numbers of marine mammals of a species or population stock by US citizens while engaging in

a specified activity should the Secretary find, among other things, that such harassment will have a negligible impact on such species or stock. If such determination is made, there is no requirement that NMFS must deny an authorization request simply because the population is endangered or declining. NMFS acknowledges that the current status of the Cook Inlet beluga whale is below optimal levels, as it has been proposed for listing as endangered under the ESA, and that a variety of factors, including a previously unregulated subsistence harvest, coastal development, and introduction of anthropogenic noise into their environment, have been identified as potential factors contributing to the recent population decline, although no one factor has been identified as the sole cause. However, to comply with the MMPA and implementing regulations, NMFS is required to evaluate specific activities in relation to a species status, however small it may be, and make a finding as to whether the activity will have a negligible impact on that species or stock. Incidental take authorizations are not denied simply because a species is listed, proposed to be listed, or the population is in a deleterious state. NMFS determined, after careful review of the Project construction activities, beluga whale and fish monitoring studies, physical habitat models, background and pile driving acoustic studies, and a comprehensive review of literature regarding marine mammals and noise, that the Project will not result in an increased disturbance to marine mammals or their habitat such that would result in more than a negligible impact to the stock. Justification for these determinations can be found throughout Chapter 4 of the EA prepared by NMFS for this action.

NMFS has published several times in **Federal Register** notices that the evidence linking marine mammal strandings and seismic surveys remains tenuous at best (e.g., 73 FR 40512, July 15, 2008). No marine mammal strandings in the Arctic have been associated with exposure to seismic activity. Further, CBD provides no support for its assertion that the marine mammals involved in the referenced stranding events were exposed to sounds lower than 180 dB. Finally, this IHA does not involve authorization of harassment related to seismic activities. As explained in response to comments included in the "take numbers" category above, direct comparison of expected marine mammal reactions to

exposure from pile driving to seismic surveys would be difficult to make.

Based on the best available scientific literature investigating reactions of marine mammals to anthropogenically introduced sound and obtainable, unpublished data, anticipated reactions of beluga whales to pile driving sound are expected to be short term and behavioral and/or physiological (i.e., stress response) in nature. Mild to moderate behavioral reactions of marine mammals, including beluga whales, could involve short-term altered headings, fast swimming, changes in dive, surfacing, respiration, and feeding patterns, and changes in vocalization frequency and strength. As pile driving continues throughout the season and over the years, beluga whales are expected to habituate to these sounds as they have done for ship traffic. Further, given that travel is the primary behavior in the action area and that the west side of Knik Arm is approximately 4,170 m directly across from the Port, the width of the Arm marine mammals would be able to utilize where sound propagation from pile driving is below Level B harassment levels would be 3,820 m and 3,370 m for impact and vibratory pile driving, respectively. Based on these factors, and given that strict mitigation would be set in place (see Mitigation section), NMFS has made a finding that such activities will have a negligible impact on the Cook Inlet beluga whale stock.

#### *Specified Activities*

- Comments were received regarding NMFS obligation to specify all activities which could potentially result in harassment to marine mammals, specifically beluga whales.

*Response:* NMFS considered all activities identified as components of the Project and if each of the activities would result in harassment to marine mammals. Activities considered were: (1) pile driving, (2) dredging, (3) fill compaction, and (4) habitat destruction in terms of reducing availability of prey to marine mammals. As stated, pile driving is the only activity considered to result in potential harassment of marine mammals. While NMFS acknowledges that dredging releases sound into the environment, dredging has been occurring in the area for decades and beluga whales that utilize the area around the Port are most likely habituated to dredging operations as they have been seen interacting with these vessels on their own accord. Vibratory driving is required for fill compaction; however, the low source level of the hammer, combined with the fill and steel wall absorption

capabilities, will reduce much of the sound levels below NMFS harassment threshold levels. Finally, based on habitat attributes, modeling studies, and required mitigation that the Port would abide by under their USACE permit, NMFS determined that fill and noise from pile driving would not result in decreased availability of prey for marine mammals. Justification for these determinations can be found in the EA. The IHA also contains a mitigation measure that restricts dredging and all heavy machinery operations if an animal comes within 50 m of the equipment to avoid the small chance of physical injury.

#### *Mitigation*

- Comments argue that the proposed IHA **Federal Register** notice mentions several types of activities that may take marine mammals, nevertheless, the notice only proposed mitigation measures related to pile driving and any IHA and needs to address mitigation measures for every type of activity that might result in a take;

- "NMFS seems to be accepting as a given that only the very limited mitigation measures proposed by the POA will be applied"; and

- "NMFS could require that pile driving only be allowed during the winter months when beluga whales are less likely to be in the area."

*Response:* According to the MMPA section 101(a)(5)(D)(ii), an IHA shall prescribe, where applicable, permissible methods of taking by harassment pursuant to such activity, and other means of effecting the least practicable impact on such species or stock and its habitat. NMFS has discretion in prescribing appropriate mitigation for a specified activity. As stated in response to comment 3, NMFS does not identify activities other than pile driving as potentially resulting in acoustic-based harassment to marine mammals; in addition NMFS also implemented a 50 m safety shut down when marine mammals approach heavy machinery to prevent injury. The Port's complete application was a result of numerous discussions with NMFS and therefore already incorporated many of NMFS suggested mitigation measures. In addition, NMFS has imposed additional mitigation measures (e.g., calf shut down) to minimize impacts from pile driving. A detailed list of these mitigation measures can be found in this notice and Chapter 4 of the EA. CBD's comments do not acknowledge all mitigation measures identified in the proposed IHA **Federal Register** notice. NMFS also notes that discussion with the Port about pile driving during



winter, a the period of lowest habitat use around the Port by beluga whales, occurred, but due to dangerous drifting ice conditions and frozen ground, it is not practicable to carry out pile driving in winter.

#### *Cumulative Impacts*

- Both the Commission and CBD claim that the Port's application is largely confined to looking at the immediate effects of construction and NMFS' has a responsibility to responsibility to consider cumulative impacts of the Project. The CBD states "NMFS must consider these effects together with all other activities that affect these species, stocks and local populations, other anthropogenic risk factors such as oil and gas and other industrial development, climate change, and the cumulative effect of these activities over time." For example, the Commission links dredging and other Port development activities to increased sedimentation to which organic chemical may be absorbed by beluga whale prey and suggests it would be important to monitor contaminant availability, exposure, effects, and levels in the environment.

*Response:* Section 101(a)(5)(D) of the MMPA allows citizens of the United States to take by harassment, small numbers of marine mammals incidental to a specified activity (other than commercial fishing) within a specified geographical region if NMFS is able to make certain findings. NMFS must issue an incidental harassment authorization if the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses, and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring, and reporting of such takings are set forth. Under the MMPA, NMFS cannot issue an IHA if a negligible impact determination is not made for the specified activity.

Pursuant to NEPA, NMFS is required to analyze the potential environmental effects of its actions. As part of the NEPA analysis (e.g., an EIS or EA), NMFS is required to consider the direct, indirect and cumulative impacts resulting from the proposed action along with a reasonable range of alternatives, including the proposed action. To comply with NEPA, NMFS investigated the potential for cumulative impacts in its EA. NMFS gave careful consideration to a number of issues and sources of information and assessed the cumulative impacts from past, present, and reasonably foreseeable actions in upper Cook Inlet and the effects of

climate change in the context of the specified activity and impacts to marine mammals. NMFS recognizes that climate change is a concern for the sustainability of the entire Arctic ecosystem and has reviewed the available literature and stock assessment reports to support its negligible impact determination and finding of no significant impact. While NMFS acknowledges there is some uncertainty in the specific factors which have inhibited the Cook Inlet beluga whale population recovery, NMFS has determined that, via animals' natural reactions to avoidance of and habituation to loud sounds, the maintenance of a harassment free migration route to prime feeding ground, and comprehensive mitigation set in place for the Project, issuance of an IHA will result in a negligible impact to marine mammals. Any future coastal development projects, oil/gas and alternative energy exploration, or extraction activities in Arctic waters and permit reviews would be subject to similar analyses to determine how they may individually and cumulatively affect marine mammals.

The Port of Anchorage is a highly industrialized area and has been in operation for decades. Maintenance of the Port requires routine dredging. Despite dredging and other Port activities, to date analyses of Cook Inlet beluga samples have found contaminant loads lower or equal to the other Alaska beluga whale populations (with the exception of copper levels, for which the toxicological implications are unknown) (Becker, 2000). Based on these samples, there is no evidence that dredging and Port activities will result in a higher contaminant risk.

#### *ESA Requirements*

- Both the Commission and CBD provided comments concerning NMFS requirements, under the ESA, to initiate a conference under Section 7 and its implementing regulations and that the proposed action is likely to jeopardize the continued existence of Cook Inlet beluga whales, and

- The CBD argues that NMFS should refrain from issuing any take authorization until the ESA listing process is complete and consultation under Section 7 is undertaken.

*Response:* Both the Commission and CBD hint that a jeopardy conclusion would be reached if a conference opinion or Section 7 consultation was carried out; however, they provided no analysis to justify this statement. The ESA provides some protection for species which are proposed, but not yet listed, to be threatened or endangered.

Section 7(a)(4) and 50 CFR 402.10 require an action agency to "confer" with the Secretary when their actions are likely to jeopardize the continued existence of any species proposed to be listed under Section 4. The statute does not require a conference simply if the affected species is proposed to be listed as threatened or endangered, only if such action is likely to jeopardize. During the public comment period for the issuance of the USACE permit, NMFS AKR provided numerous comments and suggested, among other things, beluga whale mitigation measures. The USACE incorporated these suggested measures into their permit and therefore the NMFS AKR concurred that the action of the USACE (i.e., authorization to carry out Port construction activities) is not likely to jeopardize the continued existence of the Cook Inlet beluga whale; therefore a conference opinion was not deemed necessary. Because the impacts associated with NMFS' IHA are part of those already considered by the USACE (and NMFS has required additional mitigation in its IHA), NMFS OPR has determined that issuance of an IHA is also not likely to jeopardize the continued existence of the Cook Inlet beluga whale. If listed, Section 7 consultation may be required for this action and future rulemaking.

#### *NEPA Requirements*

- The MMC takes issue with NMFS' preliminary negligible impact determination in its proposed IHA FR, given the fact that NMFS had indicated it was going to prepare its own EA because additional analysis was needed over and above the Port's and MARAD's EA. MMC believes this is inconsistent with NEPA;

- The CBD argues that NMFS must make the EA available for public comment, an EIS should have been prepared, and direct and indirect impacts from the Project should be analyzed in an EIS; and

- The CBD states that the proposed IHA will likely affect Steller sea lions; therefore, a Section 7 consultation must be initiated.

*Response:* NMFS' MMPA preliminary negligible impact determination was based on the Port's MMPA IHA application, which included NMFS' recommended mitigation from preliminary discussions; NMFS' review of that application for completeness; supplemental information from the Port; and discussions with NMFS' AKR. The information from these sources was sufficient for NMFS to make its preliminary determination of negligible impact under the MMPA. With respect

to NMFS' NEPA responsibilities, NMFS determined additional NEPA analyses were necessary beyond the Port's EA; however, there is no requirement that NMFS complete an EA at the time it proposes its action. NMFS has prepared its EA and made a Finding of No Significant Impact.

Neither NEPA nor the CEQ regulations explicitly require circulation of a draft EA for public comment prior to finalizing the EA. The federal courts have upheld this conclusion, and in one recent case the Ninth Circuit squarely addressed the question of public involvement in the development of an EA. In *Bering Strait Citizens for Responsible Resource Development v. U.S. Army Corps of Engineers* (9th Cir. 2008), the court held that the circulation of a draft EA is not required in every case; rather, federal agencies should strive to involve the public in the decision-making process by providing as much environmental information as is practicable prior to completion of the EA so that the public has a sufficient opportunity to weigh in on issues pertinent to the agency's decision-making process. In the case of the Port's MMPA IHA issuance, NMFS involved the public in the decision-making process by publishing its notice of a proposed IHA for a 30-day notice and comment period and also notified the public of the availability of the Port's MMPA application and other NEPA documents written for the Project and the Knik Arm Crossing (73 FR 14443, March 18, 2008). The IHA application and FR notice contained information relating to the project and specifically requested information from the public. For example, the application and FR notice includes a project description, its location, environmental matters such as species and habitat to be affected by project construction, and measures designed to minimize adverse impacts to the environment. NMFS also incorporated, where appropriate, additional measures to reduce impacts to marine mammals resulting from the Project. The EA for this action is available at <http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications>.

While Steller sea lions are commonly seen in Lower Cook Inlet; their presence in upper Cook Inlet is rare. There have been only two opportunistic sightings of Steller sea lions in upper Cook Inlet since 1999 (Barbara Mahoney, email correspondence, June 20, 2008). Both sightings, comprising a total of four individuals, were near the mouth of the Susitna River. No Steller sea lions sightings have been reported around the Port or elsewhere in Knik Arm. As such,

NMFS believes its issuance of the IHA will have no effect on Steller sea lions.

The following comments were provided by the Kenaitze Indian Tribe:

- "We are opposed to the issuance of a one-year Incidental Harassment Authorization for the Port of Anchorage. The Cook Inlet is critical habitat for marine mammals, specifically beluga whales, harbor porpoise, killer whales, and harbor seals. Kenaitze and the Cook Inlet Marine Mammal Council (CIMMC) have requested the beluga be placed on the ESA in an effort to save this endangered species. CIMMC, which comprise of the seven tribes of the Cook Inlet, along with the Eskimo whalers who reside in the Cook Inlet, are restricted to one and a half beluga per year, i.e., one beluga whale one year and two beluga whales the next year. Our use does not comprise of want and waste";

- "The Kenaitze Indian Tribe questions the feasibility of the port of Anchorage expansion project, because there is a deep-water port in Whittier that does not have the silting problems as the Cook Inlet's Port of Anchorage. The deep-water port of Whittier has easy access to Anchorage via the Rail Road and/or tunnel access for trucking goods. The Port of Anchorage's estimated cost of construction is \$700,000, with no guarantees that it will not silt up again and cause more problems and money. During World War II the engineer built the Whittier Port because they also recognized the problems that would be incurred by building a port in Anchorage and because Whittier is close and accessible to Anchorage;" and

- "The damage that will be incurred to the marine mammals and environment is not worth the expense of the proposed re-construction of the Port of Anchorage."

*Response:* NMFS acknowledges the comments provided by the Kenaitze Indian Tribe; however, these comments are outside the scope of the NMFS jurisdiction when considering issuance of an incidental take authorization. Impacts to the availability of Cook Inlet beluga whales for subsistence hunting are addressed in this FR notice and the EA prepared for issuance of the Port's IHA. NMFS has determined that issuance of the IHA will not have an unmitigable adverse impact on the availability of marine mammals, including beluga whales, for taking for subsistence uses.

#### Mitigation Measures

Mitigation measures outlined in the IHA application and proposed **Federal Register** notice were a result of

numerous discussions between the applicants, the USACE, and NMFS. In addition, during NMFS' analysis of the proposed action, it implemented additional measures to further ensure that the Project would not result in more than a negligible impact to Cook Inlet beluga whales. Sound deterrent/minimization techniques such as bubble curtains were considered for mitigation; however, due to the strong current in Knik Arm (up to 11.2ft (3.4 m)/sec) these techniques would be inefficient. The Port has stated that they will work with pile driving contractors to learn of and implement new sound attenuation minimization techniques that would be applicable to the harsh Knik Arm environment. If such technology becomes available, NMFS may re-evaluate the potential impacts to marine mammals and adjust take numbers and mitigation accordingly, and consider these measures for future requests for incidental take authorizations. The following mitigation, monitoring, and reporting measures are required under the IHA:

#### *Scheduling of construction activities during low use period of beluga whales around the Port- Tidal Restrictions*

As discussed in Chapter 3 of the EA, tides have been shown to be an important physical characteristic in determining beluga movement within Knik Arm. Most beluga whales are expected to be foraging well north of the Port during the flood and high tide. However, these northern areas are exposed during the ebb and low tide; therefore, animals move south toward Eagle Bay and sometimes as far south as the Knik Arm entrance to avoid being stranded on mudflats. Based on the beluga whale monitoring studies conducted at the Port since 2005, beluga whale sightings often varied significantly with tide height at and around the Port (Funk *et al.*, 2005, Ramos *et al.*, 2005, Markowitz and McGuire, 2007). Beluga whales were most often sighted during the period around low tide and as the tide flooded, beluga whales typically moved into the upper reaches of the Arm. Opportunistic sighting data also support that highest beluga whale use near the Port is around low tide (NMFS, unpubl. data).

Due to this tidally influenced habitat use, impact pile driving, excluding work when the entire pile is out of the water due to shoreline elevation or tidal stage, shall not occur within two hours of either side of each low tide (i.e., from two hours before low tide until two hours after low tide). For example, if low tide is at 1 p.m., impact pile driving will not occur from 11 am to 3 pm.

Vibratory pile driving will be allowed to commence/continue during this time because its characteristics (continuous sound type and lower source level) are expected to elicit less overt behavioral reactions.

#### *Establishment of safety zones and shut-down requirements*

NMFS acknowledges that shut-down of reduced energy vibratory pile driving during the “stabbing” phase, as described in Chapter 1 of the EA, of sheet pile installation may not be possible due to concerns the sheet pile may break free and result in a safety and navigational hazard. Therefore, the following shut-down requirements apply to all pile driving except during the “stabbing” phase of the installation process.

#### *Safety Zones*

In October, 2007, the Port contracted an outside company to determine reliable estimates of distances for 190 (pinniped injury threshold), 180 (cetacean injury threshold), 160 (impact pile driving behavioral harassment threshold) and 120 dB (vibratory pile driving behavioral harassment threshold) isopleths from impact and vibratory pile driving. From this study, it has been determined that these isopleth distances are 10, 20, 350, and 800 m, respectively. Although the 190 and 180dB isopleths are within 20m for both types of pile driving, NMFS is establishing a conservative 200m mandatory shut-down safety zone which would require the Port to shut-down anytime a marine mammal enters this zone.

#### *Shut-Down for Large Groups*

To reduce the chance of the Port reaching or exceeding authorized take and to minimize harassment to beluga whales, if a group of more than five beluga whales is sighted within the relevant Level B harassment isopleth, shut-down is required.

#### *Shut-down for Calves*

Marine mammal calves are likely more susceptible to loud anthropogenic noise than juveniles or adults; therefore, presence of calves within the harassment isopleths will require shut-down. If a calf is sighted approaching a harassment zone, any type of pile driving will cease and not be resumed until the calf is confirmed to be out of the harassment zone and on a path away from such zone. If a calf or the group with a calf is not re-sighted within 15 minutes, pile driving may resume.

#### *Heavy machinery shut-downs*

For other in-water heavy machinery operations other than pile driving, if a marine mammal comes within 50 m of operations will cease and vessels will slow to a reduced speed while still maintaining control of the vessel and safe working conditions. Such operations include Port operated water based dump-scows (barges capable of discharging material through the bottom), standard barges, tug boats to position and move barges, barge mounted hydraulic excavators or clamshell equipment used to place or remove material.

#### *Exceedence of Take*

If maximum authorized take is reached or exceeded for the year, any beluga entering into the Level B harassment isopleths will trigger mandatory shut-down.

#### *Use of Impact Pile Driving*

In-water piles will be driven with a vibratory hammer to the maximum extent possible (i.e., until a desired depth is achieved or to refusal) prior to using an impact hammer.

#### *Soft start to pile driving activities*

A “soft start” technique will be used at the beginning of each pile installation to allow any marine mammal that may be in the immediate area to leave before pile driving reaches full energy. The soft start requires contractors to initiate noise from vibratory hammers for 15 seconds at reduced energy followed by 1-minute waiting period. The procedure will be repeated two additional times. If an impact hammer is used, contractors will be required to provide an initial set of three strikes from the impact hammer at 40 percent energy, followed by a one minute waiting period, then two subsequent 3 strike sets (NMFS, 2003). If any marine mammal is sighted within the 200 m safety zone prior to pile-driving, or during the soft start, the hammer operator (or other authorized individual) will delay pile-driving until the animal has moved outside the 200 m safety zone. Furthermore, if any marine mammal is sighted within a Level B harassment zone prior to pile driving, operations will be delayed until the animals move outside the zone in order to avoid take exceedence. Pile-driving will resume only after a qualified observer determines that the marine mammal has moved outside the 200m safety or Level B harassment zone, or after 15 minutes have elapsed since the last sighting of the marine mammal within the safety zone.

#### *In-water pile driving weather delays*

Adequate visibility is essential to beluga whale monitoring and determining take numbers. Pile driving will not occur when weather conditions restrict clear, visible detection of all waters within the Level B harassment zones or 200 m safety zone. Such conditions that can impair sightability and require in-water pile driving delays include, but are not limited to, fog and a rough sea state.

#### *Notification of Commencement and Marine Mammal Sightings*

The Port shall formally notify the NMFS AKR and OPR prior to the seasonal commencement of pile driving and would provide weekly monitoring reports once pile driving begins. The Port shall establish a long-term, formalized marine-mammal sighting and notification procedure for all Port users, visitors, tenants, or contractors prior to and after construction activities. The notification procedure shall clearly identify roles and responsibilities for reporting all marine mammal sightings. The Port will forward documentation of all reported marine mammal sightings to the NMFS.

#### *Public Outreach*

The Port will erect and maintain whale-notification signage in the waterfront viewing areas near the Ship Creek Public Boat Launch and within the secured Port entrance that is visible to all Port users. This signage will provide information on the beluga whale and notification procedures for reporting beluga whale sightings to the NMFS. The Port will consult with the NMFS to establish the signage criteria.

#### *Monitoring*

Marine mammal monitoring will be conducted by trained, dedicated observers at the Port during all times in-water pile driving is taking place and thirty minutes before pile driving commences to ensure no marine mammals are within the Level B harassment or shut down zones. All marine mammal sightings will be documented on NMFS approved marine mammal sighting sheets.

#### *Marine Mammal Monitoring*

Monitoring for marine mammals will take place concurrent with all pile driving activities and 30 minutes prior to pile driving commencement. One to two trained observer(s) will be placed at the Port at the best advantage point(s) practicable to monitor for marine mammals and will implement shut-down/delay procedures when applicable. The observer(s) will have no

other construction related tasks while conducting monitoring. Each observer will be properly trained in marine mammal species detection, identification and distance estimation and will be equipped with binoculars. At time of each sighting, the pile hammer operator must be immediately notified that there are beluga whales in the area, their location and direction of travel, and if shut-down is necessary.

Prior to the start of seasonal pile driving activities, the Port will require construction supervisors and crews, the marine mammal monitoring team, the acoustical monitoring team (described below), and all project managers to attend a briefing on responsibilities of each party, defining chains of command, discussing communication procedures, providing overview of monitoring purposes, and reviewing operational procedures regarding beluga whales. During in-water construction activities, the Port shall ensure that construction contractors delegate supervisory responsibility to include on-site construction personnel to observe, record, and report marine mammal sightings and response actions taken, to include shut-down or delay.

In addition to the Port's trained marine mammal observers responsible for monitoring the harassment zones and calling for shut-down, an independent beluga whale monitoring team, consisting of one to two land based observers, shall report on (1) the frequency at which beluga whales are present in the project footprint; (2) habitat use, behavior, and group composition near the Port and correlate those data with construction activities; and (3) observed reactions of beluga whales in terms of behavior and movement during each sighting. It is likely that these observers will monitor for beluga whales 8 hours per day/ 4 days per week but scheduling may change. These observers will work in collaboration with the Port to immediately communicate any presence of beluga whales or other marine mammals in the area prior to or during pile driving. The Port will keep this monitoring team informed of all schedules for that day (e.g., beginning vibratory pile driving at 0900 for 2 hours) and any changes throughout the day.

#### *Acoustic Monitoring*

The Port will carry out a one-time acoustic monitoring study upon commencement of seasonal in-water pile driving. This study will confirm or identify harassment isopleths for all types of piles used, including open-cell sheet piles and 36-inch steel piles, and

sound propagation levels during the "stabbing" process, as this phase operates at reduced energy. The acoustic study proposal shall be approved by NMFS prior to the start of seasonal in-water pile driving.

In addition, the Port will also install hydrophones (or employ other effective methodologies to the maximum extent possible) necessary to detect and localize passing whales and to determine the proportion of beluga whales missed from visual surveys. This study will be coordinated with the concurrent beluga whale monitoring program to correlate construction and operationally generated noise exposures with beluga whale presence, absence, and any altered behavior observed during construction and operations.

#### **Reporting**

The Port is responsible for submitting monthly marine mammal monitoring reports that include all Port observer marine mammal sightings sheets from the previous month. The sighting sheets have been approved by NMFS and require the following details, if able to be determined: group size, group composition (i.e., adult, juvenile, calf); behavior, location at time of first sighting and last sighting; time of day first sighted, time last sighted; approach distance to pile driving hammer; and note if shut-down/delay occurred and for how long. If shut-down or delay is not implemented, an explanation of why will be provided (e.g., outside of harassment zone, entered harassment zone but shut-down restriction requirements not met (e.g., no beluga whale calves, small group, "stabbing" phase). In addition, the report will note what type of pile driving and other activities were occurring at and during time of each sighting and location of each observer. The monthly report, due to NMFS OPR and AKR no later than the 5th of each month, will include all sighting sheets from the previous month. The one-time acoustic monitoring study report will be due to NMFS 45 days from completion of the sound study. The independent beluga whale monitoring team shall supply their monthly reports to NMFS; however, a timeframe for submitting these reports is not specified. The independent beluga whale monitoring team will submit their reports to NMFS as they are prepared.

#### **Endangered Species Act**

A Section 7 consultation under the ESA is not required for the proposed action as no endangered or threatened marine mammals or other listed species occur within the Project area; therefore,

none will be affected by the proposed action. However, NMFS has proposed to list the Cook Inlet beluga whale stock as an endangered under the MMPA. The ESA provides some protection for species which are proposed to be listed as threatened or endangered. Section 7(a)(4) requires an action agency to "conference" with NMFS when its action is likely to jeopardize the continued existence of a species proposed for listing. NMFS AKR provided numerous comments and mitigation suggestions to the USACE regarding issuance of permit POA-2003-502-N which allows the Port to undertake Project activities. The NMFS AKR concurred with the USACE decision, as described in their EA, that the Project is not likely to jeopardize the continued existence of beluga whales; therefore, a conference opinion was not necessary. Because the impacts associated with the MMPA IHA are part of those already considered by the USACE and AKR, and this IHA imposes additional mitigation, NMFS OPR has determined that issuance of this IHA, which authorizes harassment to marine mammals, would also not jeopardize the continued existence of the Cook Inlet beluga whale stock; therefore, a conference is not necessary.

NMFS notes that the determination on listing the Cook Inlet beluga whale is scheduled to be made by October 20, 2008 (73 FR 21578, April 22, 2008). If listed, consultation may be required for this action.

#### **National Environmental Policy Act**

NMFS has, through NOAA Administrative Order (NAO) 216-6, established agency procedures for complying with NEPA and the implementing regulations issued by the Council on Environmental Quality. While the Port and MARAD and the USACE developed EAs identifying impacts to the affected human environment from the Project, NMFS also prepared its own EA. This EA focuses on potential impacts to marine mammals from the Project. This EA supports NMFS' determination that the Project, alone and in combination with other activities, will not have a significant impact of the affected environment.

#### **Conclusions**

NMFS has issued an IHA to the Port and MARAD for the take of marine mammals incidental to the Port's Marine Terminal Redevelopment Project over a one-year period. The issuance of this IHA is contingent upon adherence to the previously mentioned mitigation, monitoring, and reporting requirements.

NMFS has determined that pile driving could potentially result in harassment to marine mammals but such harassment will have a negligible impact on affected marine mammals and stocks. Therefore NMFS has authorized the taking of 34 beluga whales, 20 harbor seals, 20 harbor porpoises, and 20 killer whales. While behavioral modifications may be made by these species to avoid the resultant acoustic stimuli, when the natural reaction of marine mammals to loud sound, the already noisy background noise level of Knik Arm, habituation of beluga whales, and the required mitigation and monitoring are taken into consideration, NMFS does expect any long-term, significant alterations to marine mammal behavior that could impact vital life functions or decrease reproduction rates. Mitigation measures set forth in the USACE permit will minimize impact to habitat and therefore the effect on availability of prey for marine mammals. The activity will not have an unmitigable adverse impact on the availability of marine mammals for subsistence hunting. Mitigation measures are set in place to ensure no injury or mortality would occur. A conservative injury safety zone, shut down requirements, and soft-starts methods, in combination with diligent monitoring, will minimize adverse impacts.

#### Authorization

As a result of these determinations, NMFS has issued an IHA to the Port of Anchorage and the U.S. Department Maritime Administration, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: July 15, 2008.

**James H. Lecky,**

*Director, Office of Protected Resources,  
National Marine Fisheries Service.*

[FR Doc. E8-16489 Filed 7-17-08; 8:45 am]

BILLING CODE 3510-22-S

## DEPARTMENT OF DEFENSE

### Office of the Secretary

#### Renewal of Department of Defense Federal Advisory Committees

**AGENCY:** Department of Defense.

**ACTION:** Renewal of Federal Advisory Committee.

**SUMMARY:** Under the provisions of the Federal Advisory Committee Act of 1972 (5 U.S.C. Appendix, as amended), the Government in the Sunshine Act of 1976 (5 U.S.C. 552b, as amended), and 41 CFR 102-3.65, the Department of

Defense gives notice that it is renewing the charter for the Missile Defense Advisory Committee (hereafter referred to as the Committee).

The Committee is a discretionary federal advisory committee established by the Secretary of Defense to provide the Department of Defense and the Director, Missile Defense Agency independent advice and recommendations on all matters relating to missile defense, including system development, technology, program maturity and readiness of configurations of the Ballistic Missile Defense System. The Committee, in accomplishing its mission: (a) Conducted an assessment of the MDA's Capabilities-Based Acquisition approach; (b) made recommendations in the areas of Approach, Transition to Production and Sustainment, Block Names, and MDA-Managed Systems; (c) assessed the U.S. ballistic missile defense capabilities against a certain potential level of threat; and (d) set forth recommendation in the areas of Deterrence, Research and Development, and Combatant Commands and Services.

The Committee shall be composed of not more than 10 members, who are distinguished authorities in the field of national defense policy, acquisition and technical areas relating to Ballistic Missile Defense System Programs. Committee members appointed by the Secretary of Defense, who are not federal officers or employees, shall be appointed as experts and consultants under the authority of 5 U.S.C. 3109 and with the exception of travel and per diem for official travel, shall serve without compensation, unless otherwise authorized by the Secretary of Defense. The Secretary of Defense shall renew the appointments of these Special Government Employees on an annual basis. The Committee shall select the Chairperson from the total Committee membership.

The Committee shall be authorized to establish subcommittees, as necessary and consistent with its mission, and these subcommittees or working groups shall operate under the provisions of the Federal Advisory Committee Act of 1972, the Government in the Sunshine Act of 1976, and other appropriate federal regulations.

Such subcommittees or workgroups shall not work independently of the chartered Committee, and shall report all their recommendations and advice to the Committee for full deliberation and discussion. Subcommittees or workgroups have no authority to make decisions on behalf of the chartered Committee nor can they report directly to the Department of Defense or any

federal officers or employees who are not Committee members.

#### FOR FURTHER INFORMATION CONTACT:

Contact Jim Freeman, Deputy Committee Management Officer for the Department of Defense, 703-601-6128.

**SUPPLEMENTARY INFORMATION:** The Committee shall meet at the call of the Committee's Designated Federal Officer, in consultation with the Committee's chairperson. The Designated Federal Officer, pursuant to DoD policy, shall be a full-time or permanent part-time DoD employee, and shall be appointed in accordance with established DoD policies and procedures. The Designated Federal Officer or duly appointed Alternate Designated Federal Officer shall attend all committee meetings and subcommittee meetings.

Pursuant to 41 CFR 102-3.105(j) and 102-3.140, the public or interested organizations may submit written statements to the Missile Defense Advisory Committee membership about the Committee's mission and functions. Written statements may be submitted at any time or in response to the stated agenda of planned meeting of the Missile Defense Advisory Committee.

All written statements shall be submitted to the Designated Federal Officer for the Missile Defense Advisory Committee, and this individual will ensure that the written statements are provided to the membership for their consideration. Contact information for the Missile Defense Advisory Committee's Designated Federal Officer can be obtained from the GSA's FACA Database—<https://www.fido.gov/facadatabase/public.asp>.

The Designated Federal Officer, pursuant to 41 CFR 102-3.150, will announce planned meetings of the Missile Defense Advisory Committee. The Designated Federal Officer, at that time, may provide additional guidance on the submission of written statements that are in response to the stated agenda for the planned meeting in question.

Dated: July 11, 2008.

**Patricia L. Toppings,**

*OSD Federal Register Liaison Officer,  
Department of Defense.*

[FR Doc. E8-16412 Filed 7-17-08; 8:45 am]

BILLING CODE 5001-06-P

## DEPARTMENT OF DEFENSE

### Office of the Secretary

#### Board of Visitors Meeting

**AGENCY:** Defense Acquisition University, DoD.

**ACTION:** Board of visitors meeting.