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Via Facsimile to (907) 269-6697

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Phone: (907) 269-6698

**Re: Knik Arm Crossing Final Environmental Impact Statement: Cook Inlet
Beluga Whale**

Dear Ms. Fauber:

Defenders of Wildlife, Center for Biological Diversity, Cook Inletkeeper, Alaska Center for the Environment, Friends of the Anchorage Coastal Wildlife Refuge, North Gulf Oceanic Society, Dr. Sylvia Brunner and Alaska Community Action on Toxics respectfully submit the following comments on the Knik Arm Crossing Final Environmental Impact Statement ("FEIS"). 73 Fed. Reg. 3464 (Jan. 18, 2008). The FEIS unquestionably falls short of the requirements of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.* We specifically write to address the significant impacts this project will have on the Cook Inlet beluga whale, which are not fully addressed in the FEIS. Furthermore, the Federal Highway Administration ("FHWA") has, to date, failed to meet its duty pursuant to the Endangered Species Act ("ESA"), 16 U.S.C. 1531 *et seq.*, to confer with the National Marine Fisheries Service ("NMFS") regarding the impacts of the project on the beluga whale and to assess available means of minimizing such impacts. See 16 U.S.C. § 1536(a)(4). For the reasons set forth below, and because the Knik Arm bridge would not meet the needs of the Upper Cook Inlet region, we again urge the FHWA to select the No Action Alternative. At a minimum before proceeding with an action that may irreparably harm the already critically imperiled Cook Inlet beluga whale, the FHWA must complete a supplemental Environmental Impact Statement which fully considers the issues raised prior to the DEIS and below.

The Cook Inlet Beluga Whale

The Cook Inlet beluga whale population has been in decline since at least the 1970s—suffering a dramatic decline in the mid to late 1990s—and today shows no sign of recovering to its historic population level. In the Cook Inlet the beluga faces many threats that may reduce the current population further, pushing it over the precipice into extinction. Such threats include, but

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are not limited to, natural sources of mortality such as strandings, disease, and predation, natural reductions in available habitat, anthropogenic noise, various kinds of industrial activities, the construction of human infrastructure in sensitive habitats, toxic contamination from industrial and urban sources, disturbances from vessel traffic, competition for prey from fishing, reduction in the availability of prey species, and other as yet unidentified stressors. The population is especially vulnerable to adverse impacts from single events, such as a large-scale stranding or a catastrophic oil spill, and to contagious disease because these extremely social whales congregate to hunt, mate and rear their young.

The Cook Inlet population of beluga whales was first identified as potentially requiring the special protections of the ESA nearly twenty years ago. 53 Fed. Reg. 33,516 (Aug. 31, 1988). But it was not until 2000 that NMFS took action to protect the species, initially listing the whale as "depleted" under the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. § 1361 *et seq.* See 65 Fed. Reg. 34,590 (May 2000). NMFS predicted that restrictions on Alaska Native hunting imposed by regulations pursuant to the MMPA would lead to the recovery of the Cook Inlet beluga whale population. NMFS, Subsistence Harvest Management of Cook Inlet Beluga Whales Final Environmental Impact Statement (2003); 69 Fed. Reg. 17,973 (Apr. 6, 2004) (regulations governing taking of Cook Inlet beluga whales by Alaska Natives for subsistence purposes).

Since that time however, the Cook Inlet beluga whale population has shown no signs of recovery. As a result, on April 20, 2006, a number of groups listed above petitioned NMFS to list the beluga as "endangered" under the ESA. The petition summarized the natural history of the beluga whale, the information available on the Cook Inlet population of beluga whales, and the current and future threats to the viability of the Cook Inlet beluga whale population and to its habitat. In response to this petition, NMFS published a 90-day finding that the petition presented substantial scientific or commercial information indicating that the petitioned action may be warranted, and initiated a status review of the species. 71 Fed. Reg. 44,614 (Aug. 7, 2006). NMFS subsequently proposed the Beluga for listing on April 20, 2007. 72 Fed. Reg. 19,854 (Apr. 20, 2007).

Federal Law Requires that the FHWA Consider the Impact of the Project on the Cook Inlet Beluga Whale

NEPA, the "basic national charter for protection of the environment," 40 C.F.R. § 1500.1(a), requires that when a federal agency proposes to undertake, or permit, an activity "significantly affecting the quality of the human environment," it must first prepare an Environmental Impact Statement ("EIS") to review the effects of the proposed action and to consider reasonable alternatives. 42 U.S.C. § 4332(2)(C); *see also* 40 C.F.R. § 1500.2. NEPA ensures "the agency . . . will have available, and will carefully consider, detailed information concerning significant environmental impacts" and "guarantees that the relevant information will be made available to the larger [public] audience." *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). NEPA requires that such environmental information and review be provided "before decisions are made and before actions are taken." 40 C.F.R. § 1500.1(b); *see also Found. for N. Am. Wild Sheep v. United States Dep't of Agric.*, 681 F.2d 1172, 1181 (9th Cir. 1982) ("NEPA expresses a Congressional determination that procrastination on environmental concerns is no longer acceptable.").

The ESA, in turn, requires that “[e]ach federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed”—such as the Cook Inlet beluga whale. 16 U.S.C. § 1536(a)(4). This conference is intended to “assist in identifying and resolving potential conflicts at an early stage in the planning process.” 50 C.F.R. § 402.10(a). The culmination of such a conference is the documented “advisory recommendations” from NMFS to the action agency, “on ways to minimize or avoid adverse impacts.” 50 C.F.R. § 402.10(c), (e).

Discussion

I. The FHWA Fails to Address Properly the Impacts on the Cook Inlet Beluga Whale

There are a number of impacts to the Cook Inlet’s beluga whales that will result from the construction and operation of the proposed Knik Arm Bridge that are of serious concern, yet the FEIS understates the challenges the whale faces and minimizes or ignores information indicating that the bridge may drive the whale to extinction. The FEIS also fails to address adequately the numerous comments highlighting the significant flaws in the DEIS. *See, e.g.*, NMFS, Comments on the Knik Arm Crossing Draft EIS (Nov. 17, 2006) (“NMFS 2006”); Marine Mammal Commission, Comments on the Knik Arm Crossing Draft EIS (Nov. 17, 2006) (“MMC 2006”); Department of the Interior, Comments on the Knik Arm Crossing Draft EIS (Nov. 17, 2007) (“DOI 2006”). Thus, while the FHWA has generally “identified the relevant environmental concern,” *Grand Canyon Trust*, 290 F.3d at 340-41, it has failed to take a “hard look” at those issues. *National Wildlife Federation v. Norton*, 332 F. Supp.2d 170, 182 (D.D.C. 2004; *see also Center for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 508 F.3d 508, 526-27 (9th Cir. 2007) (Agency FEIS violates NEPA by depriving decision makers and the public of a reasonably thorough discussion of the impacts of proposed bridge).

To begin with, Marine Mammal Commission (“MMC”) commented previously that “some of the optimistic conclusions made in the DEIS may stem from a basic misunderstanding of the status of the Cook Inlet beluga whale.” MMC 2006, at 2. This has not been addressed in the FEIS. Specifically, the FEIS still states that “[f]or the past several years the [beluga whale] population was thought to have stabilized, with an estimated 300 to 500 beluga whales now inhabit Cook Inlet.” *See* FEIS, 3-211. This summary is patently inconsistent with the conclusions reached by IUCN-The World Conservation Union, which determined that the population is “critically endangered.” Lowry, L., G. O’Corry-Crowe, and D. Goodman. 2006. *Delphinapterus leucas* (Cook Inlet population). In IUCN 2006. 2006 IUCN Red List of Threatened Species. Indeed, despite properly acknowledging that the population continues decline, the FEIS fails to mention the IUCN’s conclusion that “the underlying growth rate is so low that there is a 71% probability that if present conditions persist the population *cannot withstand any take*, and will decline in the future.” *Id.* (emphasis added).

Furthermore, the FEIS provides little justification for the conclusions reached about the beluga’s use of the project site and the Knik Arm generally. The Knik Arm Bridge and Toll Authority (“KABATA”) has conducted a one-year study of beluga whale movements in Knik Arm and at the proposed construction site, through LGL Alaska Research Associates, Inc. FEIS, at 3-212

(LGL 2006). The limited scope of this study, however, undermines the conclusions drawn by FHWA about beluga whale habitat-use patterns in and around Knik Arm. See MMC 2006, at 3. As the MMC notes, "at least some of the results of the LGL 2006 report may not be as clear-cut as portrayed" by the FHWA and thus the conclusions "may be an artifact of several possible biases in the studies."¹ *Id.* Relying principally on the LGL 2006 report ignores other available information which demonstrates that not only is the entire reach of the Knik Arm important habitat for beluga whale feeding, resting, and predator avoidance but should be considered a "high-use area[]." See MMC 2006, at 4.

Given the FHWA's failure to describe properly the beluga's use of the Knik Arm—or the true status of the species, and its vulnerability to the effects of the project—the FEIS predictably misstates the potential impacts of the bridge's construction on the species. For example, the FEIS fails to address fully the potential direct impacts of bridge construction on the whales' behavior in the vicinity of the bridge. See FEIS, 4-251-252. The assertion that the bridge and construction activities will affect beluga movements "more" than other activities, such as feeding or resting, simply because "most of the whale sightings within the Study Area were associated with whales transiting in and out of the Knik Arm" highlights the unreliability of assumptions made based on the LGL report. Indeed, as the MMC noted in its comments on the DEIS, "data presented . . . show a substantial amount of observed resting and feeding activity at the two sites closest to the project area." MMC 2006, at 4-5. Had FHWA properly accounted for the whale's use of the construction site, rather than dismissing these impacts, the FHWA could have fully addressed the impact on whale behavior and the resulting impact on the population as a whole.

The FEIS's shortcomings are not solely based on the FHWA's misinterpretation of the whale's status, however. The FEIS also fails to address the many direct impacts the project will have on the species. For example, the project could directly impact beluga prey species. Beluga whales depend on the health of anadromous fish runs in Cook Inlet. These runs, already threatened by continued development, and by the loss of upland habitat in Cook Inlet that is important for the health of anadromous streams, will be impacted by the project. See, e.g., FEIS, at 4-231. However, the FEIS fails to discuss the impact this may have on the belugas which use the Knik Arm as a primary feeding area. FEIS, at 4-252 (concluding "Because fish passage would not be expected to be adversely affected by the bridge abutments, no adverse impacts to beluga foraging would be expected."); see also NMFS 2006, at 2 ("The proposed bridge would adversely affect habitat for

¹ The MMC notes:

Among other possible explanations for the observed results were that (1) there was less sighting effort at many locations during the winter (none at West Crossing and Fort Richardson; see p. 4-3 of the report), (2) sighting conditions were recorded as being poorer during that period, December-March [], (3) sea ice was present during November-February, which likely reduced detection rates [], and (4) the surfacing behavior of whales changed beginning in November in such a way that it would likely reduce sighting rates[]. These factors suggest that the LGL shore-based observations may not provide an unbiased measure of seasonal whale occurrence.

MMC 2006, at 3.

Pacific salmon in Knik Arm”); DOI 2006, at 5-6. Further highlighting the potential impact on the beluga, NMFS has also noted that the “nutritional effects due to the loss of Knik Arm salmon as a prey source and the competition for the few remaining preferred feeding habitat areas in the upper Inlet could substantially reduce the potential for recovery of this depleted population.” NMFS 2006, at 1.

Similarly, the FEIS fails to address properly the potential for both short-term and long-term harm and harassment to the beluga from construction noise. As the FEIS notes, the adverse effects of construction activities could include “avoidance, changes in resting or feeding cycles, displacement from habitat, alertness, masking of sounds and changes in vocal behavior, changes in swimming or diving behavior, altered direction of movement, and physical injury.” FEIS, at 4-252. Acknowledging these impacts, the FHWA then concludes generally that “[d]isplacement of beluga whales by noise would not be permanent and would not be expected to have long-term effects.” *Id.* This conclusion is wholly unsupported. The Cook Inlet beluga whales are particularly adapted to the “turbid and regularly darkened waters of the Cook Inlet and are almost wholly dependent on their acoustic environment.” NMFS 2006, at 1. Accordingly, as NMFS points out: “Man-made noise has the *capacity to harass and injure these whales.*” *Id.* (emphasis added). NMFS, unlike the FHWA, recognized that “[a]ny change in the use of Knik Arm by beluga whales, and especially the upper Arm, due to the Knik Arm bridge *would be expected to have direct and measurable adverse effects on this population.*” *Id.* (emphasis added).

Furthermore, the FEIS fails to account adequately for potential indirect impacts from the project. For example, the FEIS attempts to qualify the impact of “vehicular noise” from the bridge by noting that “[e]vidence shows that beluga whales habituate to various types of activities.” FEIS, at 4-255. The FEIS notes that “[whales] have been regularly seen at the Port of Anchorage, approaching the Port during dredging and construction activities, . . . and they have been seen under and near the vehicular bridge at Knik River at the head of Knik Arm.”² *Id.* The FEIS thus concludes that “beluga whales would be expected to adapt to the changes and may continue to use habitat in the Study Area.” However, beluga whales are negatively affected by anthropogenic noise throughout the Inlet and as NMFS notes, “[o]perationally, the bridge and its supports may present a source of continuous noise.” NMFS 2006, at 1. NMFS previously acknowledged that although in fact disturbed by the noise, whales may “continue to use some [noisy] areas for feeding and traveling because these areas are critical to their survival.” 65 Fed. Reg. at 38,788. Moreover, there is evidence that when using these areas, the beluga’s behavior has been affected. NMFS 2006, at 1 (noting that belugas seen near the Port of Anchorage have decreased surfacing intervals).

The FEIS also asserts, again without any justification, that shore development, triggered by the bridge’s existence, will not impact the whales. Specifically, the FEIS finds that “[r]esidential, commercial and industrial development along the western shoreline of the Knik Arm” and the associated use of the shoreline, “would have no adverse impact on beluga behavior in nearshore waters.” FEIS, at 4-255. NMFS, in contrast, found this type of development would result in “unquantifiable indirect impacts to these whales.” NMFS 2006, at 1.

² NMFS directly disputes the validity of this statement, noting that there is only one reported incident of a lone beluga coming close enough to the Knik River bridge to be seen by motorists, in 2003. NMFS 2006, at 1-2.

The FEIS finally notes that the cumulative effects of bridge project and past, present and reasonably foreseeable projects and operations will negatively impact the Cook Inlet's beluga whales. FEIS, at 4-320; see 40 C.F.R. § 1508.7. However, the FEIS's analysis fails to provide the "quantified or detailed information" necessary to ensure that the required "hard look" has been taken. *Klamath-Siskiyou Wildlands Center v. Bureau of Land Mng't*, 387 F.3d 989, 993-94 (9th Cir. 2004) "General statements about possible effects and some risk do not constitute a hard look absent a justification regarding why more definitive information could not be provided." *Id.* ("The analysis must be more than perfunctory; it must provide a useful analysis of the cumulative impacts of past, present, and future projects."). The FEIS draws its broad conclusions about the negative cumulative impact to the species, from a general discussion that does not constitute a hard look at the problem.

This beluga population is exposed to the largest industrialized coastal area in Alaska. As a result, the current threats to beluga whale habitat include both habitat loss from development, and habitat loss through displacement from conflict with other human-caused activities. NMFS acknowledged seven years ago that "[b]ecause Cook Inlet belugas are geographically isolated, perturbations that are humanly-induced could have a dramatic effect on the population." 63 Fed. Reg. at 64,229. Industrial, commercial and residential developments and associated activities all may result in the degradation of the available habitat for Cook Inlet beluga, whale prey species and of the marine environment upon which Cook Inlet beluga whales depend.³ Industrial activities, such as port usage, oil industry related activities (*e.g.*, drilling, seismic testing),⁴ onshore and offshore municipal and industrial pollution discharges, U.S. Army Corps of Engineer port-related dredging activities in Cook Inlet, and vessel traffic—particularly in light of the Municipality of Anchorage's proposed port expansion⁵ and the recent construction of Port MacKenzie—all result in the diminishment of available habitat for Cook Inlet beluga whales. These impacts, which are adversely affecting both beluga whales and the species they prey upon, should have been examined in the FEIS.

³ Cook Inlet is subject to many sources of contamination, including urban and agricultural run-off, industrial and military activity, and wastewater from the cities and towns around Cook Inlet that degrade beluga whale habitat. Specifically, a total of eleven communities discharge approximately 42 million gallons per day of treated municipal wastewater into Cook Inlet, yet NMFS acknowledges that "the additional suspended load from wastewater and the impacts of minimally treated wastewater on the beluga whales is unknown." NMFS, Draft Conservation Plan for the Cook Inlet Beluga Whale (*Delphinapterus leucas*), at v (2005).

⁴ Oil exploration, leasing and development also currently pose a threat to the marine environment beluga whales depend on. Oil development causes direct impacts to habitat, such as oil spills, which could devastate Cook Inlet beluga whales. NMFS recognizes that these activities could adversely impact the whale. See, *e.g.*, Draft Conservation Plan, at 40 (remarking that "geophysical seismic . . . has the potential to harass or harm marine mammals, including beluga whales."); *id.*, at 41-42 (discussing possible adverse impacts from oil spills).

⁵ As NMFS noted when acknowledging the Army Corps of Engineers' decision to permit the Anchorage Port expansion, over NMFS's objections, "[t]he port expansion project is large, controversial, and will have substantial environmental impacts that have not received adequate attention in the permitting process." Letter from Robert Mecum, Acting Administrator, Alaska Region, NMFS, to Col. Kevin Wilson, U.S. Army Corps of Engineers (Aug. 10, 2007).

II. The FHWA Has Failed to Comply with the Requirements of the ESA

As noted above, any federal agency proposing to take an action that is likely to "jeopardize the continued existence" of a species that has been proposed for listing must confer with the wildlife agency charged with the protection of such species, here NMFS. To "jeopardize" a species means to "engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." 50 C.F.R. § 402.02.

This standard is met here. The MMC has noted that "the population has declined since 1998 and, in all likelihood, is continuing to decline even without additional stressors such as construction of a large bridge in the vicinity of one of the key habitats used by the population." MMC 2006, at 2-3. NMFS, noting that the "proposed work would have significant adverse effects on belugas, and at a magnitude from which the small population might not recover," similarly concluded that "the preferred alternative could *threaten the recovery and conservation of the Cook Inlet beluga whale.*" NMFS 2006, at 2 (emphasis added).

NMFS has made FHWA aware of its responsibility to enter into a conference on the impacts of the project on the beluga. See FEIS, App. J, Meeting Record (May 18, 2007). As the project will likely jeopardize the continued existence of the beluga, and "the most conservative strategy is necessary to foster their recovery," NMFS 2006, at 2, the FHWA must initiate a conference with NMFS. See 16 U.S.C. § 1536(a)(4); 50 C.F.R. § 402.10.

Conclusion

The Cook Inlet beluga whale faces a suite of risks. The limited knowledge of this population's ecology, life history, and reproductive potential, as well as the uncertainty regarding current factors adversely affecting the population and its habitat require that any action that may cause the population additional stress be approached with extreme caution and rejected if it is possible that the species will be driven further to the brink of extinction. The Knik Arm Bridge is such a proposal. Yet, the FHWA has not addressed fully the potential impacts this project will have on the whale, and as a result, before any decision take may affect the whale can be made, FHWA must confer with NMFS and produce a Supplemental EIS. The Cook Inlet beluga, however, most likely cannot withstand the impact associated with the bridge; the FHWA's limited and incomplete analysis demonstrates as much. Therefore, we again urge that the FHWA adopt the No Action Alternative.

Sincerely,



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