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A Whale's Tale: Efforts To Save The Cook Inlet, Alaska Beluga Whale

Sara Edmonds
University of Maine School of Law

A WHALE'S TALE: EFFORTS TO SAVE THE COOK INLET, ALASKA BELUGA WHALE

*Sara Edmonds**

Animals are not brethren, they are not underlings. They are other nations, caught with ourselves in the net of life and time.

—Henry Beston

This noblest patrimony ever yet inherited by any people must be husbanded and preserved with care in such manner that future generations shall not reproach us for having squandered what was justly theirs.

—The Whig Almanac 1843

I. INTRODUCTION

In 1998, the National Oceanic and Atmospheric Administration (NOAA) became concerned about the status of the beluga whale[1] in Cook Inlet, Alaska. The National Marine Fisheries Service (NMFS) data indicated that the estimated population of beluga whales in the Cook Inlet region had been declining since 1994.[2] Results from annual surveys in 1998 revealed that the estimated beluga whale population was nearly fifty per-cent lower than 1994 estimates.[3] At the beluga whale's current fifteen percent rate of decline per year, "the Cook Inlet beluga whale stock would be reduced to fifty percent of its current level within five years. This level

* University of Maine School of Law, Class of 2002.

1. *Delphinapterus leucas.*

2. Regulations Governing the Taking and Importing of Marine Mammals; Threatened Fish and Wildlife; Cook Inlet Beluga Whales, 63 Fed. Reg. 64,228, 64,229 (Nov. 19, 1998) (to be codified at 50 C.F.R. pt. 216).

3. In 1994 the estimated beluga whale population was 653 and in 1998 it was 347. Designation of the Cook Inlet, Alaska, Stock of Beluga Whale as Depleted Under the Marine Mammal Protection Act (MMPA) and Response to Petitions, 64 Fed. Reg. 56,298, 56,298 (Oct. 19, 1999) (to be codified at 50 C.F.R. pt. 216) [hereinafter Designation and Response].

of removal is significant."[4] The primary source of the decline was determined to be the subsistence harvest conducted by Alaskan Natives.[5] After a comprehensive review of the Cook Inlet beluga whale's status, NMFS proposed that the beluga whale be designated as "depleted" under the Marine Mammal Protection Act (MMPA).[6] Once the beluga whale was designated as depleted, Alaskan Natives, represented by the Cook Inlet Marine Mammal Council (CIMMC), could not harvest another whale without first entering into a cooperative agreement with NMFS.[7] In addition to the co-management agreement, NMFS prepared an Environmental Assessment (EA) and a Draft Environmental Impact Statement (DEIS) so that management of the beluga whale could be conducted with the Alaskan Native Organizations (ANOs) beyond the year of the co-management agreement. Despite NMFS's actions to reduce the depletion of the beluga whale, there were environmental groups that believed NMFS did not go far enough. These groups sued to have the species declared as "endangered" under the Endangered Species Act (ESA). An ESA listing would require more stringent regulations than a "depleted" listing under the MMPA.[8] The groups' concerns raised some critical questions: did NMFS obtain enough information to correctly determined that the primary cause of the beluga whale's population decline was the subsistence hunting alone, making an ESA determination unwarranted; was the NMFS decision arbitrary and capricious because it failed to consider future impacts; and, is the subsistence hunt so important to the ANOs that they should be allowed to continue to hunt a depleted species?

This Comment evaluates the politics and implications of NMFS's decision to designate the beluga whale as depleted under the MMPA. First, this Comment explores the applicable laws concerning marine mammals, most particularly the MMPA and the ESA. Second, it will examine the history of the beluga whale, its role in the Alaskan Native hunt, and its declining numbers over the years. Third, in addition to studying *Cook Inlet Beluga Whale v. Daley,* this Comment will look in depth at NMFS's response to accusations that it was not aggressive enough in considering to list the beluga whale as endangered under the ESA. NMFS's consider-

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4. *Id.*

5. Regulations Governing the Taking and Importing of Marine Mammals; Threatened Fish and Wildlife; Cook Inlet Beluga Whales, 63 Fed. Reg. at 64,229.

6. Designation and Response, *supra* note 3, at 56,298, 56,303, 56,304.

7. Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 106-31, 113 Stat. 57.

8. Cook Inlet Beluga Whale v. Daley, 156 F.Supp. 2d 16 (D. D.C. 2001). *See also* Rose Ragsdale, *Suits Threaten E & P In Cook Inlet, Beaufort,* 78 PLATT'S OILGRAM NEWS, 2 (May 16, 2000).

ations of other factors that may have caused the beluga whale's decline are examined to determine why the beluga was designated as "depleted" rather than "endangered" or "threatened." Fourth, and finally, the importance of subsistence harvesting, and the restrictions on that harvest by Alaskan Natives are explored. After weighing the considerations on each side of the issue, this Comment concludes that NMFS took the appropriate action under the prevailing circumstances, and that NMFS's restriction on the ANOs' harvest was put in place after a careful weighing of the need for the beluga whale population to increase while also trying to preserve Alaskan Natives' historical tradition.

II. DESIGNATING "DEPLETED" AND "ENDANGERED" SPECIES

A. Marine Mammal Protection Act

Congress has concluded that "marine mammals have proven themselves to be resources of great international significance, esthetic and recreational as well as economic, and it is the sense of the Congress that they should be protected and encouraged to develop to the greatest extent feasible . . . ."[9] Congress has further recognized that "certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man's activities."[10] These species should not be permitted to diminish beyond the point that they cease to be a "significant functioning element in the ecosystem . . . ."[11] To address the concern over the depletion of marine mammals, Congress passed, in 1972, the MMPA, which took precedence over the ESA and dealt specifically with marine mammals.[12]

The primary goal of the MMPA "should be to maintain the health and stability of the marine ecosystem. Whenever consistent with this primary objective, it should be the goal to obtain an optimum sustainable population keeping in mind the carrying capacity of the habitat."[13] The MMPA is administered by NMFS, which is located within the National Ocean and

9. 16 U.S.C. § 1361(6) (1994).

10. *Id.* § 1361(1).

11. *Id.* § 1361(2).

12. *Id.* § 1361(1). For a general history of the early MMPA and the problems it encountered in early regulation *see* Nancy Kubasek et al., *Protecting Marine Mammals: Time For A New Approach*, 13 UCLA J. ENVTL. L. & POL'Y 1, 2 (1994/1995).

13. 16 U.S.C. § 1361(6).

Atmospheric Administration (NOAA) in the Department of Commerce.[14] The Secretary of Commerce delegated MMPA authority to NMFS.[15]

In keeping with the MMPA's goals, Congress established a general "moratorium on the taking and importation of marine mammals and marine mammal products . . . ."[16] The MMPA prohibits the "taking" of any marine mammal. A "taking" is defined as occurring when an animal is harassed, hunted, captured, or killed.[17]

Alaskan Natives are exempted from this general moratorium for species not listed as depleted under the MMPA.[18] Once a species is designated as depleted, however, NMFS is authorized to enter into cooperative agreements with Alaskan Natives to permit "the harvest of marine mammals for subsistence use."[19] In 1996, the Indigenous People's Council for Marine Mammals (IPCMM) expressed concern over the lack of framework for these co-management agreements.[20] After several workshops and drafting sessions, NMFS, the U.S. Fish and Wildlife Service, the U.S. Geological Survey, and IPCMM signed a Memorandum of Agreement (MOA).[21] The goals of this agreement were to assist in the development and implementation of co-management agreements, and to promote the health of marine mammal populations utilized for subsistence.[22] The MOA recommended that co-management agreements consider several factors: collection and analysis of marine mammal natural history and population data; development of co-management infrastructures; cooperation in enforcement efforts; the development and distribution of public education materials; incorporation of traditional knowledge into management decision making; and

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14. Eugene H. Buck, *Summaries of Major Laws Implemented by the National Marine Fisheries Service,* Congressional Research Service Issue Brief, *at* http://www.cnie.org/nle/leg-11.html (last visited Nov. 8, 2000).

15. *Id.*

16. 16 U.S.C. § 1371(a). There are exemptions to this moratorium. One exemption is given to Alaskan Natives (Indian, Aleut, or Eskimo residing in Alaska, and those who dwell on the coast of the North Pacific Ocean or the Arctic Ocean) providing the taking: (1) is for subsistence purposes; (2) is done for purposes of creating and selling authentic native articles of handicrafts and clothing; (3) in each case, is not accomplished in a wasteful manner. This exemption *does not apply to mammals listed as depleted* under the MMPA. *Id.* § 1371(b) (emphasis added).

17. *Id.* §§ 1372, 1362(13). This includes attempts to harass, hunt, capture, or kill any marine mammal. *Id.* § 1362(13).

18. *Id.* § 1371(b); *see also supra* text accompanying note 16.

19. *Id.* §§ 1388(a), 1388(b)(2).

20. NMFS, NOAA, MARINE MAMMAL PROTECTION ACT OF 1972 ANN. REP. 70 (1998).

21. *Id.*

22. *Id.* at 70–71.

training.[23] These guidelines assist in the making of uniform co-management agreements.

In order to protect certain species, the Secretary of Commerce has the authority to add or change a species' listing classification.[24] A species may be designated as "depleted" if it falls under one of three categories: (1) the Secretary has determined that a species or population stock has fallen below its optimum sustainable population (OSP); (2) a State that has authority for the conservation of a species has determined that the species is below its OSP; or (3) a species is listed as endangered or threatened under the Endangered Species Act.[25] OSP is the number of animals that will result in the maximum productivity of the population, keeping in mind the population's carrying capacity.[26] Once a stock falls below its OSP, measures should be taken to immediately replenish the stock.[27] Under the MMPA, NMFS must determine a stock species' carrying capacity for a given habitat or area and its maximum net productivity level. NMFS must then determine if the stock's current numbers fall below its OSP, or determine how far outside the range of numbers a stock's population falls.[28] Once a stock's population falls outside of those numbers, NMFS must make a determination whether to change the status of the species, either by designating it as depleted under the MMPA, by listing it as endangered or threatened under the ESA, or both.[29] Depletion designations under the MMPA need only be based on "the best scientific information available."[30] Before determining whether a stock should be designated as depleted,

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23. *Id.* at 71.

24. Regulations Governing the Taking and Importing of Marine Mammals; Threatened Fish and Wildlife; Cook Inlet Beluga Whales, 63 Fed. Reg. 64,228, 64,229 (Nov. 19, 1998) (to be codified at 50 C.F.R. pt. 216).

25. 16 U.S.C.§ 1362(1) (1994).

26. *Id.* § 1362(9). NMFS regulations clarify OSP as the population size which "falls within a range from the population level of a given species or stock that is the largest that may be supported within the ecosystem to its maximum net productivity level (MNPL). Maximum net productivity is the greatest net annual increment in population numbers or biomass resulting from additions to the population due to reproduction, less losses due to natural mortality . . . MNPL has been expressed as a range of values (generally 50–70% of K) determined theoretically by estimating what size stock in relation to the original stock size will produce the maximum net increase in population[.]" Designation and Response, *supra* note 3, at 56,303.

27. 16 U.S.C. § 1361(2).

28. Designation of the Cook Inlet, Alaska, Stock of Beluga Whale as Depleted Under the Marine Mammal Protection Act (MMPA), 65 Fed. Reg. 34,590, 34,596 (May 31, 2000) (to be codified at 50 C.F.R. pt. 216).

29. *Id. See also* Regulations Governing the Taking and Importing of Marine Mammals; Threatened Fish and Wildlife; Cook Inlet Beluga Whales, 63 Fed. Reg. at 64,228–64,229.

30. 16 U.S.C. § 1383b(a)(2).

NMFS conducts a review of the species, considering its current status, distribution, abundance and trends, food habitats, and biohealth and reproductive parameters.[31] To ensure a review is comprehensive, NMFS must post a notice in the Federal Register requesting that any interested party submit information and comments regarding the stock's status.[32] NMFS then uses the status review to track the stock species' decline.[33] Based on that decline, NMFS proposes whether to list the species.[34]

In addition to a status review, NMFS must also complete a stock assessment report for each marine mammal that occurs in the United States' jurisdictional waters.[35] Each stock assessment contains descriptions of the following: the stock's geographic range; estimates of the minimum population, the current Maximum Net Productivity Level (MNPL), and current population trend; estimates of the annual mortalities caused by man, prey, or other factors; commercial fisheries that interact with the stock; a rating of the stock as either strategic or nonstrategic; and an estimate of the stock's Potential Biological Removal level (PBR).[36] Each stock assessment must be reviewed and revised on a schedule, which is based on the status of the stock.[37]

A conservation plan must also be made "as soon as possible" for any stock designated as depleted.[38] The purpose of the conservation plan is to restore the species to its OSP.[39] Each year, the Secretary specifies in an annual report what measures were taken to prepare and implement the conservation plan.[40]

Although the MMPA is the main instrument utilized by NMFS to control the decline of certain marine mammals, NMFS may also list a

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31. Regulations Governing the Taking and Importing of Marine Mammals; Threatened Fish and Wildlife; Cook Inlet Beluga Whales, 63 Fed. Reg. at 64,228–29.

32. 16 U.S.C. § 1383b(a)(2).

33. Regulations Governing the Taking and Importing of Marine Mammals; Threatened Fish and Wildlife; Cook Inlet Beluga Whales, 63 Fed. Reg. at 64,228–29.

34. *Id.*

35. 16 U.S.C. § 1386(a).

36 *Id.* The MMPA expresses the PBR as "the maximum number of animals, not including natural moralities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its [OSP]." 16 U.S.C. § 1362(20). PBR's replaced NMFS's previous concept of a zero mortality rate. PBRs were estimated based on information collected during the species' stock assessment report from 1988 to 1993. Susan C. Alker, Comment: *The Marine Mammal Protection Act: Refocusing the Approach to Conservation,* 44 UCLA L. REV. 527, 545 (1996).

37. 16 U.S.C. § 1386(c)(1).

38. *Id.* § 1383b(b)(1)(c).

39. *Id.* § 1383b(b)(2).

40. *Id.* § 1383b(b)(3).

species under the ESA if it believes that such an action is warranted under the circumstances.

B. Endangered Species Act

The Endangered Species Act (ESA) has been described as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation."[41] The purpose behind the ESA is to save certain species from extinction.[42] In its effort to halt the rate of extinction of certain species, the ESA established a "broad framework for identifying species that are in danger of, or threatened with, extinction."[43] The responsibility for listing species under the ESA lies with the Secretary of the Interior and the Secretary of Commerce.[44]

The ESA defines those species that qualify as endangered or threatened.[45] "Endangered" species are those that are in danger of extinction throughout all, or a significant portion, of their range.[46] "Threatened" species are those that are likely to become endangered within the foreseeable future.[47] The ESA contains provisions for the listing of species as endangered or threatened.[48]

The ESA spells out five factors which must be considered in determining whether a species should be listed as "endangered": (1) the species' habitat is in present, or threatened, danger of destruction; (2) overutilization for commercial, recreational, scientific or educational purposes; (3) disease or predation threatens the species; (4) existing regulations are inadequate; and (5) there are manmade factors affecting a species' existence.[49] Before the species is listed, a status review is conducted. That status review must be based on the best scientific information available.[50] A critical habitat must also be designated based on the best scientific information available,

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41. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 176 (1978).

42. James C. Kilbourne, *The Endangered Species Act Under The Microscope: A Closeup Look From A Litigator's Perspective,* 21 ENVTL. L. 499, 500 (1991).

43. *Id.*

44. *Id.* at 502.

45. 16 U.S.C. §§ 1532(a)(6), (20) (1988).

46. *Id.* § 1532(a)(6). Species includes any subspecies of fish or wildlife, and any distinct population segment. *Id.* § 1532(a)(16).

47. *Id.* § 1532(a)(20).

48. *Id.* § 1533(a).

49. *Id.* §1533(a)(1). When Congress enacted the ESA, there were express prohibitions applicable to endangered species, but not threatened species. Congress determined that there should be some flexibility to adopt such protective measures as needed based on the individual circumstances of each species. Kilbourne, *supra* note 42, at 521.

50. 16 U.S.C. § 1533(b)(1)(A).

taking into account any relevant impacts.[51] Any proposed regulation must be posted in the Federal Register, giving notice of, and inviting comments on, the proposed regulation.[52] A determination must be made and published in the Federal Register listing the status of the species as either endangered or threatened, along with any final regulations that accompany that determination.[53] Every five years, the list of endangered or threatened species must be reviewed, updated, and published in the Federal Register.[54]

Whenever any species is listed, regulations may be imposed that prohibit certain actions involving the species or its habitat.[55] The ESA was amended in 1973 to require recovery plans for listed species in order to "promote the conservation of the species."[56] A recovery plan is a focal point in the effort to conserve and recover a listed species.[57] Recovery plans are technical, scientific documents prepared by biological experts[58] that identify specific actions that must be taken to conserve and recover a particular species.[59] A recovery team, composed of individuals from the federal, state, and private sectors, carries out these recovery plans.[60]

The ESA places certain obligations on federal agencies. It imposes a mandate to insure that any action authorized, or carried out, by an agency is not likely to "jeopardize the continued existence of any endangered species or threatened species," or result in the destruction of that species' habitat.[61] Each agency must consult with the appropriate Secretary regarding the effects of any planned action that would affect any listed species.[62] As part of that consultation the agency may have to prepare a

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51. *Id.* § 1533(b)(2).

52. *Id.* § 1533(b)(5)(E). If any party files a request, a hearing may also be conducted within 45 days of the notice publication. *Id.* § 1533(b)(5)(A)(i).

53. A decision must also be made concerning the species' habitat. *Id.* at § 1533(b)(6)(A).

54. *Id.* § 1533(c). The review should contain the basis for which the review was relied. In addition, a determination of any species based on that review should be stated, such as whether its status should be removed or changed. *Id.*

55. *Id.* § 1533(d).

56. *Id.* § 1533(f). *See also* Kilbourne, *supra* note 42, at 524. A report must be given every two years on the status of developing and implementing such recovery plan to the Committee on Environment and Public Works of the Senate, and the Committee on Merchant Marine and Fisheries of the House of Representatives. 16 U.S.C. § 1533(f)(3).

57. Kilbourne, *supra* note 42, at 524.

58. *Id.* at 525.

59. *Id.*

60. *Id.*

61. 16 U.S.C. § 1536(a)(2).

62. *Id.* § 1536(a). For species under the Secretary of the Interior, the agency must consult the Fish and Wildlife Service. For those species under the jurisdiction of the Secretary of Commerce, the agency must consult NMFS. Kilbourne, *supra* note 42, at 526.

biological assessment, from which a biological opinion may be prepared by the consulting agency in response to the proposed action.[63] This consultation process can be long and consist of many levels of review. The process requires an agency to determine the scope of the action area, the impact on the species' habitat, and to provide regulatory mechanisms to make several determinations including: early consultation, biological assessment, and the necessity for conferences to assess impacts on the listed species.[64]

C. National Environmental Protection Act

The National Environmental Policy Act (NEPA) is a statute that requires government agencies to weigh the potential impacts of their actions, before taking such action.[65] Under NEPA, an agency must prepare an Environmental Impact Statement (EIS) for any "major federal action" significantly affecting the quality of the environment.[66] An EIS must contain the following information: 1) the environmental impact of the proposed action; 2) any adverse environmental impacts that cannot be avoided if the proposed action is implemented; 3) alternatives to the proposed action; 4) the relationship between local short-term uses and the maintenance and enhancement of long term productivity; and 5) any irreversible and irretrievable commitments of resources which would be involved in the proposed action.[67] After an EIS is drafted, it must be circulated and made available for comments before it becomes final.[68]

NEPA is procedural rather than substantive in nature. Challenges under NEPA require a reviewing court "simply to ensure that the procedure

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63. Kilbourne, *supra* note 42, at 526–27.

64. For a through and detailed account of agency obligations and the conference regulations *see id.*, *supra* note 42, at 530–72.

65. The purpose of NEPA is to "declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man. . . ." 42 U.S.C. § 4321 (1970).

66. *Id.* § 4332(2)(C). Major federal action "includes actions with effects that may be major and which are potentially subject to Federal control and reponsibility. . . . Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals." 40 C.F.R. § 1508.18 (1998).

67. 42 U.S.C. § 4332(2)(C). Before an EIS is written, an Environmental Assesment (EA) is conducted. If the EA shows that an EIS is not warranted, a Finding Of No Significant Impact (FONSI) is issued. 40 C.F.R. §§ 1501.3, 1508.9, 1501.4, 1508.13 (1998).

68. 40 C.F.R. § 1503.1 (1998).

[was] followed . . . [and] resulted in a reasoned analysis of the evidence before it, and that the . . . evidence [was made] available to all concerned."[69] All that is required from an agency under NEPA is that the it give "reasonable consideration to all significant impacts."[70]

D. Administrative Procedure Act

Under the Administrative Procedure Act (APA), any person that is adversely affected as a result of an agency decision may have that agency's decision reviewed by a court.[71] A suit challenging an agency decision will succeed only if it proves that the decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[72] An agency's rule is considered arbitrary or capricious if it failed entirely to consider important aspects of the problem, or offered an explanation counter to the evidence before the agency.[73] The scope of review is narrow under the APA and the "court is not to substitute its judgment for [that of] the agency."[74] The agency's decision will stand as long as the agency examined all of the relevant data, and articulated a satisfactory explanation for its actions, including a "rational connection between the facts found and the choice made."[75]

County of Suffolk v. Secretary of the Interior[76] provides one example in which an agency's actions were upheld as not arbitrary or capricious. In *County of Suffolk*, the Second Circuit had to determine if an EIS contained sufficient information concerning the environmental consequences of selling a particular tract of land for oil and gas leases.[77] The trial court

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69. Friends of Endangered Species v. Jantzen, 760 F. 2d 976, 986 (9th Cir. 1985).

70. North Slope Borough et al v. Andrus, 642 F. 2d 589, 599 (D.C. Cir. 1980) (citing Vermont Yankee Power Corp. v. N.R.D.C., 435 U.S. 519, 553 (1978)).

71. 5 U.S.C. § 702 (1966).

72. *Id.* § 706(2).

73. *See* Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Automobile Ins. Co., 463 U.S. 29, 43 (1983) (stating that the court "will . . . 'uphold a decision of less than ideal clarity if the agency's path may be reasonably discerned'").

74. *Id.* "NEPA does not require that we decide whether an [EIS] is based on the best scientific methodology available, nor does NEPA require us to resolve disagreements among various scientists as to methodology." Friends of Endangered Species v. Jantzen, 760 F. 2d 976, 986 (1985).

75. Motor Vehicles Mfrs. Ass'n, 463 U.S. at 43 (quoting Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

76. 562 F.2d 1368 (2nd Cir. 1977).

77. *Id.* at 1372. The Department of the Interior was in the process of determining whether to authorize a program for oil and gas exploration, and had to decide what tracts would be leased for exploration. *Id.*

ruled that the EIS should have projected *all* possible pipeline routes, evaluated the environmental impacts on those routes, and determined the acceptability of those routes under state and local laws.[78] In reviewing the agency's decision, the appellate court stated that an EIS "need not be exhaustive to the point of discussing all possible details bearing on the proposed action."[79] The agency need only show that it has in good faith considered enough evidence to enable the decision maker to fully consider the environmental factors involved, and that it has made a reasonable decision.[80] In overruling the trial court's findings, the circuit court noted that the EIS repeatedly noted that state and local authorities would control any onshore developments.[81] The court further observed that the EIS discussed, in detail, the environmental risks involved in transporting any oil that may be discovered.[82] The court ruled that the EIS did not need to project each and every hypothetical situation in order to adequately evaluate environmental impacts, but only needed to provide enough "information that appears reasonably necessary under the circumstances for evaluation of the project."[83] The Circuit court overruled the District court's decision and vacated the injunction.[84]

The court also had to decide a similar issue in *Bays' Legal Fund v. Browner*.[85] The court in *Bays'* had to decide whether the possibility of future harm makes an EIS an inadequate tool in agency decision making. The EPA had completed a Supplemental Environmental Impact Statement (SEIS) to determine the effects a municipal sewage discharge tunnel would

78. *Id.* at 1374. The court also found that the EIS did not adequately address the feasibility of pipelining oil to shore, alternative leasing of less environmentally hazardous tracts, or the option to postpone leasing until further exploration had been performed. *Id.*

79. *Id.* at 1375.

80. *Id.*

81. *Id.* at 1376.

82. *Id.* at 1377. The agency had further decided that the project was too massive for one single EIS, and decided that the project would be broken into three stages, with an EIS and an evaluation by the Secretary of the Interior prepared for each stage. The first stage, with the preparation of a programmatic EIS, discussed whether to accelerate the leasing program. The second EIS discussed what specific areas would be leased. In the third stage, a detailed EIS was prepared for each potential sale area. It is the EIS for the 3rd stage that the court had to review. *Id.*

83. *Id.* at 1378 (quoting Natural Resources Defense Council v. Calloway, 524 F.2d 79, 88 (2d Cir. 1975)). Trying to project the various routes a pipeline may take before judging the potential impacts on the area would not yield any practical information, and would amount "to a meaningless exercise. . . . It is impossible to determine where in the field the pipelines would originate." Burlington Trucklines, 562 F.2d at 1378. It would also require specificity that would not have been possible at that stage. *Id.* at 1380.

84. *Id.* at 1391.

85. 828 F. Supp. 102 (D. Mass. 1993).

have on endangered species in the Massachusetts and Cape Cod bays.[86] The EPA concluded that the species would not suffer any adverse impact from the Boston Harbor cleanup project.[87] The court stated that agency actions would be upheld as long as the agency "considered the relevant factors and articulated a rational connection between the facts found and the choice made."[88] The court stated that all relevant issues had been addressed, and the experts had concluded that insufficient information was available at the time to know, to any degree of certainty, the effect the tunnel would have on any food source even though every expert had urged that further research be performed.[89] The court ruled that the experts had put everyone on notice of the potential threat, and *if* concrete evidence ever came to light, the construction of the tunnel would have to be reconsidered.[90] The likelihood of an adverse impact on a listed species must become evident before agency actions must cease.[91] The court concluded that the "EPA's SEIS was thorough and voluminous and provided ample support for its conclusion that the tunnel project would not have a significant impact on the listed species in the bay."[92]

Challengers to NMFS's decision that the Alaskan beluga whale was adequately protected under the MMPA and, therefore, did not warrant an ESA listing would need to assert that the agency was arbitrary and capricious in its ruling, and further prove that the agency did not obtain enough information to adequately render its decision.

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86. *Id.* at 106. The right whale, humpback whale, fin whale, sei whale, blue whale, the Kemp's ridley turtle, leatherback turtle, and hawksbill turtle all inhabit the bay's waters. *Id.* at 105.

87. *Id.* at 106. A second biological conclusion was made, which reached the same conclusion. *Id.* at 107.

88. *Id.* at 107.

89. *Id.* at 109. One of the plaintiff's concerns was the possibility of decreased food sources as a result of tunnel construction. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at 113. *See also* North Slope Borough v. Andrus, 642 F. 2d. 589, 601 (D.C. Cir. 1980) ("There is no valid allegation that the EIS disguises or distorts the potential for cumulative harms; to the contrary, the statement points out clearly the existence of the compound problem. There is certainly sufficient notice there to presume that the decision making process would have —and did—incorporate concern for cumulative impacts. We think it highly significant that there is no argument that there was existing information which the EIS failed to identify.").

III. THE DECLINE OF THE BELUGA WHALE

The beluga whale is a small, toothed mammal in the Monodontide family.[93] Belugas inhabit the Arctic and subarctic, and occur seasonally in the regions of Russia, Greenland, and North America.[94] "In Alaska, beluga whales are found in marine waters from Yakutat to the Alaska-Canada border in the Beaufort Sea."[95] There are five distinct stocks of beluga whales: the Beaufort Sea, eastern Chukchi Sea, eastern Bering Sea, Bristol Bay, and Cook Inlet.[96] Beluga whales can reach lengths of twelve to fifteen feet, although some have been sighted at lengths of sixteen to twenty feet.[97] Belugas weigh between 1,360kg and 1,500kg depending on their sex.[98] The dorsal fin, a characteristic of most whales, is missing on the beluga, and belugas also do not produce a visible "blow" when they surface, which makes them difficult to see.[99]

A female beluga typically gives birth to one calf at a time, every two to three years.[100] The mothers give birth to calves in different areas of

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93. NMFS, NOAA, ENVIRONMENTAL ASSESSMENT, CO-MANAGEMENT AGREEMENT BETWEEN THE NATIONAL MARINE FISHERIES SERVICES AND THE COOK INLET MARINE MAMMAL COUNCIL FOR THE YEAR 2000, 6 (2000) [hereinafter ENVIRONMENTAL ASSESSMENT]. The cetacean order, includes the suborder odontocetes (toothed whales), and contains the delphinoidea superfamily, under which the monodontidae belongs. The beluga's common named derives from the Russian word for white, although this is somewhat of a misnomer. Alaskan Eskimo know the beluga whale by other names, such as *Puuqzaq* (Siberian Yupik), *Cetuaq* (Central Yupik), and *Sisuaq* (Inupiat). *See* Alaska Dept. of Fish & Game, *Beluga Whale, at* http://www.state.ak.us/adfg/notebook/marine/beluga.html (last modified July 24, 2000) [hereinafter ADF&G].

94. National Marine Mammal Laboratory, *Detailed Information about Beluga Whales, at* http://nmml.afsc.noaa.gov/education/cetaceans/beluga2.htm (last modified October 31, 2000).

95. NMFS, NOAA, DRAFT, FEDERAL ACTIONS ASSOCIATED WITH MANAGEMENT AND RECOVERY OF COOK INLET BELUGA WHALES, ENVIRONMENTAL IMPACT STATEMENT 15 (2000) [hereinafter DRAFT EIS].

96. *Id.* at 15. Because the depleted rating applies only to the Cook Inlet stock, it is the only stock that will be discussed.

97. *See* ADF&G, *supra* note 93. *See also* DRAFT EIS, *supra* note 95, at 15; ENVIRONMENTAL ASSESSMENT, *supra* note 93, at 7; National Marine Mammal Laboratory, *supra* note 94.

98. ENVIRONMENTAL ASSESSMENT, *supra* note 93, at 7.

99. DRAFT EIS, *supra* note 95, at 16. A dorsal fin would be a hindrance during the winter because the beluga lives in loose packs of ice located in the Arctic, and a dorsal fin would allow their much needed body heat to escape. In place of a fin, belugas have a tough dorsal ridge, which can be used to break up ice, allowing them to surface for breathing purposes. National Marine Mammal Laboratory, *supra* note 94.

100. ADF&G, *supra* note 93. Beluga whales have a gestation period of about fourteen months, and generally give birth in the months of May to July, although they have been reported calving as early as April and as late as August. *Id.*

Cook Inlet during different times of the year.[101] At birth, beluga whales are a dark blue-gray, or brownish gray color.[102] As the calf becomes an adult, the color gradually changes, and the whale becomes white.[103] A beluga calf may initially nurse for twelve to eighteen months, but may also nurse for another year once it begins to eat solid food.[104] Beluga whales are social animals that migrate, hunt, and interact together.[105] Belugas typically travel in small pods of four to ten, but can be found in much larger groups.[106] In Cook Inlet, groups of ten to one hundred animals can be observed during the summer months.[107] Belugas can be seen in shallow coastal waters, often barely deep enough to cover their bodies.[108] Some belugas migrate seasonally, while others stay in the same area year-round.[109] Belugas return to the upper Cook Inlet in April and May, following the fish migrations.[110] Belugas are opportunistic and feed on a wide variety of animals.[111] In addition to being prey for killer whales, belugas are hunted by Alaskan Natives for subsistence purposes.

Some of the first Alaskan Natives reported to inhabit the Cook Inlet area were the Dena'ina (Tanaina) Athabascans.[112] Historically, the

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101. *See* ENVIRONMENTAL ASSESSMENT, *supra* note 93, at 7. Alaskan Natives had described sightings of calving in the areas within Cook Inlet from the northern Kachemak Bay in April and May, to the mouths of the Beluga and Susitna Rivers in May, and in Chickaloon Bay and Turnagain Arm in the summer. *Id.*

102. *See* DRAFT EIS, *supra* note 95, at 16. *See also* ADF&G, *supra* note 93.

103. DRAFT EIS, *supra* note 95, at 16. It takes a beluga calf anywhere from four to nine years to mature and become an adult depending on the sex of the species. *See* ADF&G, *supra* note 93. *See also* ENVIRONMENTAL ASSESSMENT, *supra* note 93, at 16.

104. National Marine Mammal Laboratory, *supra* note 94.

105. DRAFT EIS, *supra* note 95, at 16.

106. *Id.* The exact social distinctions and structure are unknown. However, it is known that males often swim together in pods of eight to ten, while females swim only with the calves. Males often swim abreast of each other, often rolling simultaneously to breathe. *See* ADF&G, *supra* note 94. *See also* DRAFT EIS, *supra* note 95, at 16.

107. DRAFT EIS, *supra* note 95, at 16.

108. *Id.* at 17.

109. *Id.* It is unknown whether the Cook Inlet stock migrates seasonally, and if so, to where it migrates. Sightings in the late 1970's and in 1997 give some indication that certain whales stay in the Cook Inlet region year-round. *Id.*

110. *Id.*

111. *Id.* at 18.

112. Captain Cook's journal contained entries concerning the Cook Inlet Athabascans. He concluded that they were trading with the Russians, who established a trading settlement at "Tuiunuk," a village that was later destroyed. Between 1836 and 1849, half of the region's Indians died from a smallpox epidemic. A major outpost was established in Tyonek in 1875 by the Alaska Commercial Company. In 1880, the village "Tyonok" contained 117 residents, 109 of which were Athabascans. Tyonek would become known for its gold deposits and salt mines. In 1915, the Tyonek Reservation (also known as the Moquawkie

Dena'ina Indians lived in an area that surrounded Cook Inlet.[113] Tyonek is a Dena'ina Indian village that practices a subsistence lifestyle.[114]

The Dena'ina hunted the beluga, which was one of several marine mammals that provided the Dena'ina with a rich supply of resources.[115] Dena'ina hunted the beluga between May and August at the mouths of rivers and streams.[116] Prior to the 1940s, belugas were an important part of the Dena'ina's diet.[117] The beluga provided a source of meat and oil that proved useful to the Dena'ina.[118] The entire whale was utilized: the meat was cut into strips and dried; the blubber rendered into oil; sinew was used to make ropes and string; the stomach provided a container; the intestines were made into gut parkas; the teeth and ivory were made into various items; and the bones were made into native art and handicrafts.[119] The original hunting methods involved using the tidal flats in the Susitna Delta.[120] During low tide, the Dena'ina erected dead spruce trees as beluga spearing trees (*yuyqul*) in the mud.[121] Many ropes were attached to each spruce tree, and five or more hunters would pull each rope to lift the tree up.[122] The hunters then secured the ropes to stakes, and climbed into the *yuyqul* to wait for the beluga to swim by with the incoming tide.[123] The hunters would then harpoon the beluga.[124] Between the 1930s and 1940s, six or seven belugas were killed per year.[125] Between the 1940s and late 1970s, hunting of the beluga whale diminished as the increased population of moose in the area drew more attention from the hunters.[126] The beluga whale hunt was reestablished in 1979 in Tyonek.[127]

Indian Reservation) was established, but that status was revoked in 1971. Alaska Dep't of Community and Econ. Dev., *Tyonek, at* http://www.dced.state.ak.us/mra/CF_BLOCK.cfm (last visited March 9, 2001).

113. ENVIRONMENTAL ASSESSMENT, *supra* note 93, at 13.

114. Alaska Dep't of Community and Econ. Dev., *supra* note 112.

115. ENVIRONMENTAL ASSESSMENT, *supra* note 93, at 14.

116. *Id.* at 15.

117. *Id.* at 16.

118. *Id.* at 14.

119. *Id.*

120. *Id.* at 15.

121. *Id.* The Dena'ina method of hunting the beluga seems to be unique, and not borrowed from the Eskimo or Alutiiq people. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 16.

126. *Id.*

127. *Id.*

Now the Cook Inlet is comprised of three different kinds of hunters: the Dena'ina of Tyonek; hunters not originally from the village, but who have moved there and made the Cook Inlet their home; and visitors to the Cook Inlet who come from other parts of the state.[128] The Tyonek harvest has been modest, with three whales taken in 1979, one whale taken between 1981 and 1983, and an average of one to two whales taken each year over the next decade.[129] The total number of belugas taken in hunts was much higher; one potential reason being an increase in the overall number of hunters. The takes of one or two belugas in 1983 rose to thirty in 1993, hit a peak of one hundred twenty-three in 1996, and decreased to forty-two in 1998.[130] These figures represent the total take based on all households that participated in the hunts, not just those in Tyonek.[131] The CIMMC also expressed the belief that the non-local hunters were experiencing a higher number of losses due to the fact that they were unfamiliar with local hunting conditions.[132]

Belugas are no longer hunted with traditional *yuyquil* and harpoons on tidal flats. Now, from the months of April to October, belugas are hunted near the mouths of rivers by hunters using motorboats and high-powered rifles.[133] The Dena'ina no longer utilize the whole whale: the flippers and tail are taken because they are considered a delicacy; the mukluk, the layer of fat under the skin, is taken in large strips; the blubber is taken in square chunks; and, only the meat from the back and ribs is removed.[134]

In 1998, NMFS became concerned about the declining number of Cook Inlet beluga whales. In a notice published in the Federal Register, NMFS declared that a status review of the beluga would be conducted in response to the "increasing amount of information reveal[ing] serious threats to [the beluga] population."[135] When the beluga whale was believed to have been

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128. *Id.* Of the six Cook Inlet Treaty Tribes, only the tribe of Tyonek regularly harvests beluga whales. *Id.*

129. *Id.* at 16–17.

130. R.C. FERRERO ET AL., ALASKA MARINE MAMMAL STOCK ASSESSMENTS 79 (2000 Revision). NFMS estimated that Alaskan Natives were harvesting an average of seventy-seven whales per year between 1995 and 1997. Cook Inlet Beluga Whale v. Daley, 156 F. Supp. 2d 16, 18 (D. D.C. 2001).

131. R.C. FERRERO ET AL., *supra* note 130, at 79.

132. *Marine Mammal Protection Act of 1972: Hearing Before the House Committee On Resources, Subcommittee On Fisheries Conservation, Wildlife And Oceans*, 106th Cong. (2000) (prepared testimony of Daniel Alex, Director, Cook Inlet Marine Mammal Council).

133. ENVIRONMENTAL ASSESSMENT, *supra* note 93, at 17.

134. *Id.* The remaining carcass is either left on site or used for dog food. "In Tyonek, the mukluk, blubber, and meat are shared throughout the village." *Id.*

135. Regulations Governing the Taking and Importing of Marine Mammals; Threatened Fish and Wildlife; Cook Inlet Beluga Whales, 63 Fed. Reg. 64,228, 64,229 (Nov. 19, 1998)

depleted to dangerously low numbers, NMFS looked to the Native hunt as the main cause. Because the Cook Inlet beluga whale is geographically, and more importantly, genetically isolated from the other four beluga stocks, human disturbances could dramatically affect the population.[136] The Cook Inlet beluga could be particularly vulnerable because "summer concentrations of this beluga population are exposed to the largest industrialized coastal area and to the largest human component in Alaska."[137] NMFS's main concern with the beluga decline was the Alaskan Natives' subsistence harvest.[138] The purpose of the agency's first notice was to inform the public that a status review was being conducted and to invite those interested to submit comments.[139]

Surveys concluded that beluga numbers had been declining since NMFS had begun collecting information on the whale's numbers. Based on aerial surveys, beluga abundance numbers were calculated from 1994 to 2000, and were estimated respectively to be 653, 491, 594, 440, 347,[140] 357,[141] and 435.[142] The surveys indicated that the beluga's abundance had

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(to be codified at 50 C.F.R. pt. 216).

136. *Id.* Geographically, the stock is found primarily in the upper Inlet during ice free periods, concentrating at the mouths of rivers. Genetic analyses conducted by NMFS indicate that the Cook Inlet beluga is genetically isolated from the other four stocks. Environmental Impact Statement for Federal Activities to Recover the Cook Inlet, Alaska, Stock of Beluga Whale, Including the Management of a Subsistence Harvest, 64 Fed. Reg. 66,902, 66,902 (Nov. 30, 1999). Basically, genetic studies found that the Cook Inlet belugas were not interbreeding with the other stocks. Nancy Lord, *Two Worlds, One Whale, at* http://www.findarticles.com (last visited Sept. 14, 2001).

137. Regulations Governing the Taking and Importing of Marine Mammals; Threatened Fish and Wildlife; Cook Inlet Beluga Whales, 63 Fed. Reg. at 64,229.

138. *Id.*

139. NMFS immediately received petitions to list the species as either depleted or endangered. NMFS would not make that determination until the status review was completed. *See* Regulations Governing the Taking and Importing of Marine Mammals; Endangered and Threatened Fish and Wildlife; Cook Inlet Beluga Whale, 64 Fed. Reg. 17,347 (April 9, 1999).

140. Designation and Response, *supra* note 3, at 56,303. The abundance estimates were calculated based on actual beluga sightings conducted during aerial surveys. Actual sightings from 1994–2000 were 281, 324, 307, 264, 193, 217, and 184 respectively. DAVID J. ROUGH, ET AL., AERIAL SURVEYS OF BELUGA IN COOK INLET, ALASKA 11 (2000).

141. FERRERO ET AL., *supra* note 130, at 77.

142. Even though this abundance estimate is larger than the one in 1999, and the aerial counts were larger in 1999 than in 2000, it does not necessarily represent an increase in the population total. The most likely explanation lies in the statistical variability from one year to the next. NMFS, NOAA, *2000 Cook Inlet Beluga Whale Abundance Estimate, at* http://www.fakr.noaa.gov/protectedresources/whales/beluga/abunda (last visited March 2, 2001).

declined forty-five percent from 1994 to 1999.[143] These numbers put the beluga below its OSP, and therefore, qualified the beluga as "depleted" under the MMPA.[144] Based on the beluga's declining numbers, NMFS proposed that the beluga be designated as "depleted" under the MMPA.[145] NMFS prepared a programmatic EIS to evaluate activities in the region and to determine possible solutions to ensure the beluga's recovery, including a restriction on the Alaskan Natives' subsistence harvest.[146]

In 1999, Congress passed Public Law 106-31,[147] which stated that any taking of beluga whales would be a violation of the MMPA unless done through a cooperative agreement with NMFS.[148] With the passage of that law, NMFS could effectively manage the Alaskan Native harvest and correct what NMFS had determined to be the primary cause of the beluga's decline. While no agreement was made in 1999, the Alaskan Natives and NMFS came to an agreement in 2000 with the CIMMC, an association that represents the Cook Inlet Treaty Tribes and Alaskan Natives.[149] This agreement allowed the Alaskan Natives to strike one whale.[150] The agreement also outlined harvest practices that Alaskan Natives were required to follow: only whaling boats and captains authorized by permit could participate in the harvest, with an elder, or experienced hunter directing the hunt; each vessel had to be equipped with certain equipment; the hunt had to occur within ten miles of the mouth of the Susistna River; the hunt could not occur until after July 15, so that the risk of striking pregnant females was lessened; no hunter could take a beluga calf; hunting had to occur in shallow water; the sale of beluga whale parts was prohibited; the lower jaw bone had to be removed from the whale within twenty-four hours of the harvest and given to NMFS within three days of the harvest; a harvest report had to be given to CIMMC, or NMFS, within

143. FERRERO ET AL., *supra* note 130, at 77.

144. Designation and Response, *supra* note 3, at 56,303–04.

145. *Id.* at 56,298. This proposal would later be codified at 50 C.F.R. § 216.15 (2000).

146. Environmental Impact Statement for Federal Activities to Recover the Cook Inlet, Alaska, Stock of Beluga Whale, Including the Management of a Subsistence Harvest, 64 Fed. Reg. 66,901 (Nov. 30, 1999).

147. Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 106-31, 113 Stat. 100.

148. *Id.* That moratorium was later extended indefinitely in Public Law 106-553. NMFS, *Moratorium Extended to Prohibit Hunting of Cook Inlet Beluga Whales, at* http://222.fakr.noaa.gov/newsrelease/01_04_akr.html (last visited March 2, 2001).

149. There are nine Tribally Authorized Organizations. AGREEMENT BETWEEN THE NATIONAL MARINE FISHERIES SERVICE AND THE COOK INLET MARINE MAMMAL COUNCIL FOR THE CO-MANAGEMENT OF THE COOK INLET STOCK OF BELUGA WHALE FOR THE YEAR 2000 1 (2000).

150. *Id.* at 2.

thirty days of the harvest; and any unauthorized strikes were to count against subsequent strike allocations.[151]

In NMFS's draft EIS, all of the factors that could have contributed to the whale's decline were examined, from commercial fisheries and noise, to predation and disease.[152] Nevertheless, NMFS still concluded that the harvest by the Alaskan Natives was the primary cause of the whale's decline.[153] To alleviate the decline, NMFS proposed six alternatives: (1) no harvest of beluga whales until they had recovered to their OSP; (2) allow Alaskan Natives to strike only one whale per year until they reached their OSP; (3) allow one strike per year for eight years, and then raise the strike to two whales per year; (4) allow two strikes annually until the beluga recovers to its OSP; (5) allow a fixed percentage of whales to be struck based on the recruitment rate; (6) or take no action to establish either a harvest plan or harvest limits.[154] NMFS endorsed the fourth alternative, which allowed Alaskan Natives to harvest two whales annually until the whale reached its OSP.[155] In addition to its recommendation, NMFS estimated the whale's carrying capacity (K) and its OSP.[156] NMFS used these estimates to calculate how long it would take the beluga to recover under each alternative.[157] NMFS calculated the beluga's carrying capacity for the Cook Inlet region at 1,300 whales.[158] NMFS considered the stock recovered when it reached a population abundance of 780 whales.[159] If the Alaskan Natives were not allowed to conduct an annual harvest it was determined that the beluga would recover by 2022.[160] If the Alaskan Natives were allowed to harvest two belugas annually, the stock would recover by 2025; this represented a thirteen percent delay in recovery

151. *Id.* at 3–4. The marking and reporting definitions are spelled out in 50 C.F.R. 216.23 (2000).

152. DRAFT EIS, *supra* note 95, at 38–60.

153. *Id.* at 38.

154. *Id.* at 6–7.

155. *Id.* at 7.

156. To examine the mathematical formula used to calculate recovery results, and to view the formula results, *see id.* at 30–33.

157. NMFS concluded that only alternatives one and four would be viable. *Id.* at 33–38.

158. Using the OSP formula of sixty percent of K, the recovery range of the beluga would be 780 to 1,300. Designating the Cook Inlet, Alaska, Stock of Beluga Whale as Depleted Under the Marine Mammal Protection Act (MMPA), 65 Fed. Reg. 34,590, 34,596 (May 31, 2000) (to be codified at 50 C.F.R. pt. 216). *See also* Taking of the Cook Inlet (CI), Alaska, Stock of Beluga Whales by Alaska Natives, 65 Fed. Reg. 59,164, 59,166 (Oct. 4, 2000) (to be codified at 50 C.F.R. pt. 216).

159. DRAFT EIS, *supra* note 95, at 30. *See also* Taking of the Cook Inlet (CI), Alaska, Stock of Beluga Whales by Alaska Natives, 65 Fed. Reg. at 59,166.

160. DRAFT EIS, *supra* note 95, at 31.

time.[161] Under the latter alternative, the beluga would recover while allowing Alaskan Natives to carry on a historical tradition.

IV. CONTROVERSIES SURROUNDING NMFS DEPLETED RATING

After giving notice in the Federal Register that the DEIS was completed, a hearing was scheduled concerning NMFS's decision and conclusions.[162] Any party affected by NMFS's proposed regulation was allowed to present testimony and evidence before Administrative Law Judge Parlen McKenna, who would make recommendations regarding NMFS's regulations.[163]

A. Other Factors Contributing To The Whales' Decline

1. Oil Pollution

Environmental groups and individual citizens were concerned that NMFS concluded too quickly that the subsistence harvest was the sole reason for the whale's decline.[164] These groups wanted NMFS to consider other factors that could have had an impact on the whale's decline.[165] One area of concern was the oil and gas industry.[166] Environmental groups argued that there was no current information available concerning the effects of oil spills or oil leases on beluga whales.[167] NMFS responded by

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161. *Id.*

162. In particular, three factors would be discussed at the hearing: (1) the carrying capacity of the beluga stock; (2) the current population of beluga whales; and (3) whether the Alaskan native harvest should be restricted to two whales. Taking of the Cook Inlet (CI), Alaska, Stock of Beluga Whales by Alaska Natives, 65 Fed. Reg. at 59,167. *See also Public Hearing Regarding the Proposed Regulations And Draft EIS*, (March 8, 2001), *available at* http://www.fakr.noaa.gov/protectedresources/whales/beluga/beluga.

163. Taking of the Cook Inlet (CI), Alaska, Stock of Beluga Whales by Alaska Natives, 65 Fed. Reg. at 59,167. At the completion of this Comment, Judge McKenna had yet to publish his decision.

164. Designating the Cook Inlet, Alaska, Stock of Beluga Whale as Depleted Under the Marine Mammal Protection Act (MMPA), 65 Fed. Reg. 34,590, 34,592–94 (May 31, 2000) (to be codified at 50 C.F.R. pt. 216).

165. *Id.* at 34,592.

166. *Id.*

167. NMFS conceded that it "lacks the information needed to 'accurately predict the effect of an oil spill on beluga whales.'" Therefore, commenters claimed, NMFS could not conclusively dismiss oil-based impacts on beluga whales. They also claimed NMFS relied on "antiquated spill data." Letter from Bob Shavelson, Executive Director, *Cook Inlet Keeper*, to Donna Wieting, Chief, *National Marine Fisheries Service, Office of Protected Resources, Marine Mammal Conservation Division* 3 (November 26, 2000) (on file with

stating that it recommended that certain tracts in the upper Cook Inlet region be set aside because these areas may be important feeding, calving, molting, and mating grounds for the beluga.[168] The leasing of those tracts was in fact halted by court action.[169] NMFS also stated that it would continue to evaluate oil and gas activities in the future.[170]

There was further concern over potential oil and other hazardous substances spilling and impacting the health of beluga whales.[171] Reports estimated that 21,000 barrels of oil were spilled in the Inlet in the decade between 1965 and 1975, and 10,000 barrels were spilled in the late 1970s.[172] In July of 1987 the oil tanker, *Glacier Bay*, struck a rock near Nikiski, Alaska, and spilled between 1,350 and 3,800 barrels of crude oil into the Inlet.[173] An oil spill, and its residual effects, could have a harmful impact on whales, as belugas are commonly found in the area of the most recent spill.[174] If oil spills were to occur, and if belugas inhaled enough vapors, their health could be affected.[175]

There was no reliable data, however, on the effects of petroleum vapors on cetaceans, as data only existed on the amount of vapors proving fatal to humans.[176] Any impact that oil spills would have on beluga whales is speculative because there is no direct data describing any changes in behavior of, or deleterious effects on, beluga whales caused by such spills. Rather, there exist only generalizations based on current knowledge.[177]

NMFS); Letter from Kris Balliet, Alaska Region Director, *Center for Marine Conservation*, to Donna Wieting, Chief, *National Marine Fisheries Service, Office of Protected Resources, NMFS* 3 (November 27, 2000) (on file with NMFS); Designation and Response, *supra* note 3, at 56,300 (commenting on concerns about oil and gas leasing).

168. Designation and Response, *supra* note 3, at 56,300.

169. *Id. See also, 126 Gas And Oil Leases Withdrawn To Protect Imperiled Alaskan Beluga Whale* (May 25, 2000), *available at* http://www.biologicaldiversity.org/swcbd/alerts/238-786.htm.

170. *Id.*

171. Regulations Governing the Taking and Importing of Marine Mammals; Endangered and Threatened Fish and Wildlife; Cook Inlet Beluga Whales, 65 Fed. Reg. 38,778, 38,784 (June 22, 2000) (to be codified at 50 C.F.R. pt. 216, 223 and 224) [hereinafter Regulations Governing . . . Beluga Whales].

172. *Id.*; DRAFT EIS, *supra* note 95, at 45–47.

173. *Id.*

174. If a whale comes into contact with, or ingests, oil it could be put into respiratory distress. The spill could also displace whales and force them from their feeding source. "The most likely effects would be irritation of the respiratory membranes and absorption of hydrocarbons into the bloodstream." Regulations Governing . . . Beluga Whales, *supra* note 171, at 38,784–85.

175. *Id.* at 38,785.

176. *Id.*

177. DRAFT EIS, *supra* note 95, at 45.

Previous studies had indicated that if an oil spill were to occur, the effects on the whales would be negligible.[178] It was determined that "[n]o significant impact on beluga whales can be attributed to oil spills or production in [Cook Inlet] despite high levels of oil production, refining, and transport within the inlet and its watershed."[179]

2. Noise Pollution

Noise was also a concern possibly affecting belugas because the upper Cook Inlet represents one of the most industrialized and urbanized regions of Alaska, where noise levels may be high.[180] Commentators and petitioners noted that NMFS should monitor seismic activity by the oil industry, in addition to noise from vessel traffic.[181]

Certain commercial entities were able to obtain permits for incidental takings if they could show that the level of taking would have *only negligible* effects on the beluga population, in addition to having no adverse impact on the availability of whales for the Alaskan Natives' subsistence harvest.[182] NMFS did note a high level of commercial shipping activity creating noise in the region.[183] Despite the noise levels, sound signals in the ocean are detectable by marine mammals only "if the received level of the sound exceeds a certain detection threshold."[184] Sound signals may not be detected by marine mammals if the signal is weaker than the background noise.[185] NMFS concluded that the beluga has shown a tolerance for the noise emanating from vessel traffic.[186] NMFS decided to

178. Studies have proven that the cetacean skin is a formidable barrier to the toxic effects of petroleum. Whales were also observed during the *Exxon Valdez* spill in Prince William Sound. The studies showed that the cetaceans made no efforts to alter their behavior in the presence of oil. Regulations Governing . . . Beluga Whales, *supra* note 171, at 38,785.

179. *Id.*

180. DRAFT EIS, *supra* note 95, at 50.

181. Designation and Response, *supra* note 3, at 56,300–01.

182. *Id.* at 56,300. NMFS noted that it would uphold this policy. *Id.*

183. *Id.* at 56,301.

184. DRAFT EIS, *supra* note 95, at 50. Belugas have a well-developed sense of hearing and echo-location. Belugas hear over a large range of frequencies, from about 40-75 Hertz to 30-100 kilohertz. *Id.* at 16.

185. This is an important concept in understanding the effects of noise on whales because: (1) the background noise plays a part in whales detecting industrial noise; and (2) if industrial noise increases the level of background noise, it may prevent the whales from communicating with each other. *Id.* at 50.

186. Designation and Response, *supra* note 3, at 56,301. *See also* Regulations Governing . . . Beluga Whales, *supra* note 171, at 38,787.

continue monitoring recreational vehicle noise, and considered taking action if it became evident that this traffic had an adverse impact on the beluga.[187] Various studies on the noise produced by oil and gas drilling have suggested that belugas are relatively unaffected by these activities.[188] Hearing is a critical sense to beluga whales, and high levels of noise may have adverse impacts. Evaluating and predicting human made noise on marine mammals, however, is difficult.[189] The extent to which noise from the Cook Inlet area has had an impact on the beluga and their distribution is unclear.[190] There is no indication that noise in the Cook Inlet area is having such an effect on the beluga to the degree that it is disturbing their forage to feeding sites.[191]

3. Food Sources

NMFS also studied the food sources of the beluga to ensure that the lack of any food source was not having an adverse impact on the species.[192] This is an ongoing project, and the data that NMFS now has is neither conclusive, nor complete.[193] It is known that killer whales are a predator of the beluga.[194] Concerns about increased numbers of killer whales in Cook Inlet does not necessarily present a major threat to the beluga's survival.[195] Killer whales also feed on salmon, a common food source for beluga whales, and the increased sightings of killer whales could be attributed to their following the salmon migration.[196] In order for killer whale predation to be a significant factor in the beluga's decline, the total mortality due to the predation would have to be near the level of recruitment in the population.[197] The data has indicated that natural mortality in the beluga population does not exceed the level considered normal for other

187. Designation and Response, *supra* note 3, at 56,301.

188. Regulations Governing . . . Beluga Whales, *supra* note 171, at 38,787. Playbacks of oil production noise were done to study the reactions of whales. *Id.*

189. *Id.* at 38,788.

190. *Id.*

191. *Id.*

192. Designation and Response, *supra* note 3, at 56,301.

193. *Id.*

194. Regulations Governing . . . Beluga Whales, *supra* note 171, at 38,781.

195. *Id.* "No quantitative data exists on the level of removals from this population due to killer whale predation or its impact." *Id.*

196. *Id.*

197. *Id.*

cetaceans, and therefore, killer whale predation is not likely to have a significant impact on beluga recovery.[198]

4. Disease

NMFS also studied the effects of disease on Cook Inlet beluga whales.[199] NMFS divided data into those diseases that occur in beluga whales generally, and those diseases that are specific to the Cook Inlet beluga.[200] Belugas are susceptible to bacterial infections, endoparasitic infections, and parasites.[201] Even though these diseases cause strandings and deaths, nothing has indicated that the occurrences of these diseases has had a measurable impact on the total beluga population's health and survival.[202]

B. Cook Inlet Beluga Whale v. Daley and the ESA Determination

The deadline to determine whether the Cook Inlet beluga whale should have been designated as endangered under the ESA expired.[203] Environmental groups represented by Trustees for Alaska, concerned with the agency's slow progress, filed suit against NOAA.[204] They challenged NMFS's decision not to list the beluga as endangered under the ESA.[205] In challenging NMFS's decision, the petitioners were required to prove that NMFS's decision was arbitrary and capricious considering all the information the agency had obtained.[206]

NMFS published in the Federal Register the factors it considered in making its determination not to list the beluga as endangered or threatened.[207] Four factors contributed to NMFS's decision. First, Congress enacted legislation that prohibited the Alaskan Native subsistence harvest unless a cooperative agreement was signed between NMFS and the

198. *Id.*
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. OFFICE OF PROTECTED RESOURCES, NOAA, *Update on the Conservation of Cook Inlet Belugas,* MMPA BULLETIN, 2nd/ 3rd Quarter 13 (2000).
204. Cook Inlet Beluga Whale v. Daley, 156 F.Supp. 2d 16 (D.D.C. 2001). *See also,* Ragsdale, *supra* note 8.
205. *Id.*
206. *Id.* at 16. *See also* 5 U.S.C. § 706(2)(A) (1994); County of Suffolk v. Secretary of the Interior, 562 F.2d 1368, 1375 (1977).
207. Regulations Governing . . . Beluga Whales, *supra* note 171, at 38,778–90.

Alaskan Native Organizations (ANOs).[208] Without Pub. Law 106-31, NMFS could not have restricted any subsistence harvest of beluga whales.[209] Second, the completed survey data indicated over a forty percent decline in the abundance between 1994 and 1998.[210] This data "provided the necessary scientific support to designate the [Cook Inlet] beluga whale stock as depleted under the MMPA."[211] Third, NMFS completed the analysis of the abundance survey, and concluded that when there was no harvest in 1999, the abundance estimate was set at 357, while the year before, when there was a harvest, the abundance estimate was set at 347.[212] Although not completely conclusive, the data did indicate that controlling the harvest may be an "effective mechanism to promote recovery of the stock."[213] Fourth, a "scoping meeting" was held to consider the environmental impacts of federal programs that promoted recovery of the beluga whale specifically by control of the subsistence harvest.[214] After the meeting, NMFS concluded that any federally approved harvest plan would constitute a major federal action under NEPA, and would, therefore, require an EIS that would evaluate the possible impacts that any NMFS action would have on the environment.[215]

The plantiffs argued that NMFS's decision not to list the whale as endangered under the ESA was arbitrary and capricious because the agency improperly applied the law and facts to the five factor set of determinations under the ESA.[216] First, plaintiffs argued that the beluga whale met the first requirement under the ESA because there existed a "present or threatened destruction, modification, or curtailment of [the beluga's] habitat or range."[217] Specifically, the current distribution of the beluga population

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208. *Id.* at 38,778. *See also* Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 106-31, 113 Stat. 1999.

209. Regulations Governing . . . Beluga Whales, *supra* note 171, at 38,778–79.

210. *Id.* at 38,779.

211. *Id.*

212. *Id.*

213. *Id.* More conclusive evidence of recovery will come after three to five years of controlling the harvest. *Id.*

214. *Id.*

215. *Id.*

216. Cook Inlet Beluga Whale v. Daley, 156 F. Supp 2d 16, 16 (D.D.C. 2001). The plantiffs also argued that NMFS failed to apply the best scientific data available, and improperly considered political and economic factors. *Id.* Petitioners argued that the beluga whale meets the requirements of an endangered or threatened species under the ESA, and therefore, should be listed. Regulations Governing . . . Beluga Whales, *supra* note 171, at 38,780.

217. Cook Inlet Beluga Whale v. Daley, 156 F. Supp. 2d at 19; Regulations Governing . . . Beluga Whales, *supra* note 171, at 38,780.

had been reduced from its historic high, and current descriptions of the beluga's range largely limited them to Cook Inlet.[218] NMFS acknowledged that a significant portion of the beluga's habitat had been modified by municipal, industrial and recreational activities.[219] Even though these activities concerned NMFS, there was no evidence indicating that the beluga's range had been diminished by these activities.[220] The beluga occupied the same overall range they always had, and any concern with the beluga's shift to the upper Cook Inlet in the summer could have been the result of other factors, including the beluga's preference for staying within the area of its feeding range.[221] The court ruled that despite the change in habitat, the best available data requirement did not demand that NMFS conduct further testing to determine the effects that various activities had on the beluga's population.[222]

Second, it was argued that the beluga met the second requirement under the ESA, an "overutilization [of the beluga] for commercial, recreational, scientific or educational purposes."[223] Overharvesting by Alaskan Natives was one example of overutilization for commercial purposes. It was impossible to distinguish between those whales killed during the harvest for subsistence purposes and those killed as part of a subsistence harvest and then sold commercially.[224] Even though both forms of mortality were important, there were provisions in the MMPA that permitted a limited number of edible products to be sold in Alaskan native villages.[225] There was concern that the sale of beluga products to meet the cultural demand for traditional foods would be included as part of any successful long-term conservation strategy.[226]

The court ruled that the plaintiffs had not met their burden. The plaintiffs failed to show that any threat of overutilization had been stopped

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218. Cook Inlet Beluga Whale v. Daley, 156 F. Supp. 2d at 19; Regulations Governing . . . Beluga Whales, *supra* note 171, at 38,780.

219. Cook Inlet Beluga Whale v. Daley, 156 F. Supp. 2d at 19; *see also* Regulations Governing . . . Beluga Whales, *supra* note 171, at 38,780.

220. Regulations Governing . . . Beluga Whales, *supra* note 171, at 38,780.

221. *Id.* at 38,780–81.

222. Cook Inlet Beluga Whale v. Daley, 156 F. Supp. 2d at 19–20.

223. *Id.* at 20; Regulations Governing . . . Beluga Whales, *supra* note 171, at 38,780.

224. Regulations Governing . . . Beluga Whales, *supra* note 171, at 38,781.

225. *Id.*

226. *Id.* The co-management agreement between NMFS and the ANOs prohibits the sale of any beluga products. *See* NATIONAL MARINE FISHERIES SERVICE, AGREEMENT BETWEEN THE NATIONAL MARINE FISHERIES SERVICE AND THE COOK INLET MARINE MAMMAL COUNCIL FOR THE CO-MANAGEMENT OF THE COOK INLET STOCK OF BELUGA WHALE FOR THE YEAR 2000, 3 (2000).

by the "depleted" designation under the MMPA.[227] The court went on to rule that just because NMFS had listed populations that had been known to have historically low numbers in the past, it did not mean that NMFS was required to list the beluga under the ESA.[228] The beluga should have been listed under the ESA if its *current* population qualified as endangered or threatened, or if the current population continued to decline, despite the MMPA designation, to a level that would require listing under the ESA.[229] The plaintiffs, however, were "unable to point to anything . . . indicating that the current whale population is unsustainable if the harvest is indeed restricted successfully."[230]

Third, it was argued that because there was very little known about the beluga's susceptibility to disease, disease and predation should have been considered.[231] NMFS knew which diseases occurred in the Cook Inlet beluga whale, and which diseases occurred in the species as a whole.[232] The potential for disease does exist in beluga whales, but nothing indicated that these occurrences have had any measurable impact on the beluga, and, therefore, did not support an ESA designation.[233] The court upheld NMFS's determination, stating that the "plaintiffs [did] not [rebut] the agency's finding."[234]

The fourth factor considered under the ESA was the "[i]nadequacy of [e]xisting [r]egulatory [m]echanisms."[235] In particular there was concern with NMFS's ability to control the subsistence harvests; the co-management agreement provided no additional authority to prosecute violators of the MMPA.[236] NMFS disagreed that only an ESA listing could ensure compliance with the harvest limit.[237] The depletion finding was the first step in the regulatory process under the MMPA, and annual harvest levels

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227. Cook Inlet Beluga Whale v. Daley, 156 F. Supp. 2d at 20–21.

228. *Id.* at 20. The court also stated that NMFS did not violate its own agency precedent by not listing a species that has historically low numbers. *Id.*

229. *Id.* at 20.

230. *Id.* at 20. The court also stated that the plantiffs were unable to prove that a difference in experts proved that the NMFS's decision was arbitrary. An agency has the discretion to rely on the its own experts reasonable opinions, even if the court is persuaded by contrary views. *Id.* at 20–21.

231. *See Id.* at 21. *See also* Regulations Governing . . . Beluga Whales, *supra* note 171, at 38,781.

232. Regulations Governing . . . Beluga Whales, *supra* note 171, at 38,781.

233. *Id.* An analysis of disease and predator factors was discussed in this Comment, *supra* page 23.

234. Cook Inlet Beluga Whale v. Daley, 156 F. Supp. 2d at 21.

235. *Id.* at 20; Regulations Governing . . . Beluga Whales, *supra* note 171, at 38,782.

236. Regulations Governing . . . Beluga Whales, *supra* note 171, at 38,782.

237. *Id.*

could be agreed upon with further co-management agreements and enforced through federal regulations.[238] The process of controlling the subsistence harvest under the ESA was essentially the same as under the MMPA, and therefore, the ESA would not provide any better mechanism to ensure compliance with the harvest limit.[239] Again, the court agreed with NMFS, and ruled that the plaintiff's preference for the ESA listing over the MMPA designation as a tool to protect the beluga was not reason enough to require an ESA listing.[240]

Finally, there were concerns that the population was so small that certain man-made factors would provide serious danger to the beluga stock.[241] Some groups were concerned that controlling the subsistence harvest alone would not stop the beluga's decline.[242] Specifically, the plaintiffs argued that other factors such as oil spills and noise pollution, could put the beluga at risk, and pointed out that NMFS indicated that these other factors could contribute to the whale's decline.[243] NMFS disagreed, stating "the subsistence harvest of these whales accounts for the observed decline in the stock since 1994."[244] Other human activities *may* have had an effect on the beluga and its habitat, but no other activity had a known significant adverse effect on the beluga whale that would have placed it in danger of extinction in the foreseeable future.[245] "The habitat of the stock has not been, nor is it likely to be, destroyed, modified or curtailed in sufficient extent to cause the stock to be in danger of extinction."[246] The court agreed with NMFS's decision, concluding that an ESA listing was not "required simply because the agency is unable to rule out factors that *could* contribute to a population decline."[247] As a result, NMFS's determination

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238. *Id.*

239. *Id.*

240. Cook Inlet Beluga Whale v. Daley, 156 F. Supp. 2d at 21. "We have found nothing in the record, and plaintiff has identified nothing, showing that there are inadequacies in existing regulatory mechanisms or, if there were, what the effects of such inadequacies would be." *Id.*

241. *Id.* at 21; Regulations Governing . . . Beluga Whales, *supra* note 171, at 38,782. The commentaries were more seriously concerned with oil activities and noise pollution, which is discussed in this Comment, *supra* pages 20–23..

242. Regulations Governing . . . Beluga Whales, *supra* note 171, at 38,783.

243. "[T]he agency failed to adequately consider the cumulative effects of all of the potential factors combined with the small population size of the Cook Inlet Beluga Whale." Cook Inlet Beluga Whale v. Daley, 156 F. Supp. 2d at 21.

244. Regulations Governing . . . Beluga Whales, *supra* note 171, at 38,783.

245. *Id.*

246. *Id.* at 38,789.

247. Cook Inlet Beluga Whale v. Daley, 156 F. Supp. 2d at 22 (emphasis added). The court ruled that NMFS had a difficult decision to make, one where, although political

that an ESA listing was not warranted, was upheld by the court as neither arbitrary nor capricous.

IV. THE REASONABLENESS OF NMFS'S DETERMINATIONS

A. MMPA Determination

An EIS "is not an end in itself," but rather "a tool and a test to make sure that an agency takes a good 'hard look' at the pertinent environmental questions."[248] All that is required is that an EIS contain enough data to allow the agency to reasonably consider all the significant impacts of any proposed action.[249]

NMFS considered a multitude of factors that could have been responsible for the beluga's decline.[250] Some factors were unknown because of the lack of data on Cook Inlet beluga whales specifically. In the DEIS, NMFS stated:

> It seems likely that over time a qualitative effect from municipal, commercial and industrial activities in the Inlet on the water quality and substrate *may* [a]ffect [Cook Inlet] beluga whales. However, NMFS cannot, at this time, translate that qualitative likelihood into a statement of impact on the beluga whale population, or to the health of beluga whales in the Inlet. With the exception of subsistence harvest, none of the identified activities can be *directly* linked to the recent decline in [Cook Inlet] beluga whales, nor does any of the information available support a deleterious impact on the health of the beluga whales or any impact that would inhibit the recovery of the whales. Accordingly, NMFS concludes that the cumulative impacts of activities other than subsistence harvest are minimal.[251]

It has never been disputed that man's activities have harmed the marine mammal environment. In most cases, however, data on the potential impact

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considerations may have been lurking, there was no proof that listing was impermissibly affected by political considerations. *Id.*

248. North Slope Borough v. Andrus, 642 F.2d. 589, 599 (D.C. Cir. 1980) (emphasis omitted).

249. *Id. See also* Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976, 986 (9th Cir. 1985) (stating that "[o]ur task is simply to ensure that the procedure followed by the Service resulted in a reasoned analysis of the evidence before it, and that the Service made the evidence available to all concerned.").

250. The study of all potential cumulative impacts on the beluga from activities in the Cook Inlet are discussed in the DEIS. *See* DRAFT EIS, *supra* note 95, at 38–60.

251. *Id.* at 38 (emphasis added).

from other sources is incomplete and has not shown any conclusive link to the harm they pose to marine mammals in general. For example, data is scarce on the effects of low frequency sounds on marine mammals.[252] There is almost no quantitative evidence on how to assess the impact that low frequency sound has on marine mammals, and for the limited amount of data that does exist, it appears that low frequency sound is barely audible to whales.[253] The same is true regarding the effects of oil on marine mammals. The NRC concluded that no specific information existed that would enable it to completely assess the impact of oil on the environment.[254] The evidence regarding petroleum impacts was either circumstantial or insufficient.[255] Furthermore, the impact of oil on marine species has been inferred from observations made on a select number of different, but related, species.[256] Trying to contemplate any speculative impacts that various activities would have on the beluga whale would require a "crystal ball" determination that NEPA does not require.[257]

After studying all of the potential impacts, NMFS concluded that the subsistence harvest was the significant factor in the beluga's decline.[258] Accordingly, NMFS took measures to correct that impact. Listing the species under the ESA, even as an emergency listing, would not have necessarily provided a faster or more efficacious means to restore the beluga's numbers. NMFS's decision allowed it to take the necessary steps, in a timely manner, to alleviate the problem of the whales' decline. Designating the stock as depleted "provides the most expeditious and appropriate Federal response."[259] An emergency ESA listing would not have given NMFS immediate authority to restrict the Alaskan Native

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252. NATIONAL RESEARCH COUNCIL, LOW FREQUENCY SOUND AND MARINE MAMMALS: CURRENT KNOWLEDGE AND RESEARCH NEEDS 1 (1994).

253. *Id.* at 2. In 1998, the National Research Council (NRC) re-evaluated the conclusions it had reached in 1994. It again concluded that some of the whales studied showed no affect to sound transmissions. Although the NRC made strides in understanding the effect that low frequency sound had on some whales, it concluded that more research was needed. NATIONAL RESEARCH COUNCIL, MARINE MAMMALS AND LOW-FREQUENCY SOUND: PROGRESS SINCE 1994 3–5 (1999).

254. NATIONAL RESEARCH COUNCIL, OIL IN THE SEA: INPUTS, FATES, AND EFFECTS 1 (1985).

255. *Id.* at 6–7.

256. *Id.* (recommending that more data needs to be collected on several species).

257. County of Suffolk v. Secretary of the Interior, 562 F.2d 1368, 1378 (2nd Cir. 1977) (stating that an EIS need not be so encompassing that to prepare it would become either fruitless or impossible).

258. DRAFT EIS, *supra* note 95, at 40–41.

259. Designation and Response, *supra* note 3, at 56,299.

harvest.[260] "Rather, the formal rulemaking process identified in the MMPA must be followed, which typically takes 6–12 mo[nths]."[261] Members of the surrounding community supported NMFS's decision.[262]

An ESA listing would have had far-reaching consequences, and a huge impact on industry in the Cook Inlet region.[263] If the beluga is listed as endangered, a habitat would have will have to be designated and afforded special protection. As such, all projects within the beluga whale's habitat would have to been reviewed by federal agencies.[264] An ESA listing could force a great amount of scrutiny of many of the activities in the Cook Inlet region, ranging from commercial fishing to oil and gas extraction, and even wastewater treatment.[265] At this time, industry considers that type of oversight to be overkill.[266] Just because industry prefers the MMPA designation does not mean that NMFS cannot change the beluga's designation if NMFS collects more data that proves factors other than subsistence harvesting are contributing to the beluga's decline. NMFS's

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260. NMFS, NOAA, REPORT OF THE JOINT SCIENTIFIC REVIEW GROUP WORKSHOP, APRIL 13–14, 1999, SEATTLE WASHINGTON 4 (1999).

261. *Id.*

262. "High harvest[s] have almost certainly caused or been a major contributor to the observed decline. For this reason, the ABWC thinks it is important to maintain the current level of one or two takes of Cook Inlet belugas until the population can recover." Letter from Rosewell L. Schaeffer, Sr., Chairman Alaska Beluga Whale Committee, to Chief, Marine Mammal Division, Office Protected Resources, National Marine Fisheries Service, 1 (Nov. 27, 2000) (on file with author). "The Sate of Alaska supports the approach proposed by the National Marine Fisheries Service to regulate the harvest of beluga whales in Cook Inlet. We agree that this action will provide the most effective means to increase the beluga whale population." Letter from Glenn Gray, Project Analyst, State of Alaska, Office of the Governor, Office of Management and Budget Division of Governmental Coordination, to Chief, Marine Mammal Division, Office of Protected Resource, NMFS, 1 (Nov. 27, 2000) (on file with author).

263. *See* Elizabeth Manning, *Cook Inlet Belugas Attain 'Depleted' Listing*, SCRIPPS HOWARD NEWS SERVICE, June 1, 2000.

264. *Id.*

265. *See* Doug O'Harra, *Beluga Touring Cook Inlet, Satellite Tracking Reveals Whale's Movement South, BELUGA Regulations Proposed,* ANCHORAGE DAILY NEWS, (Oct. 30, 2000), *available at* http://www.fakr.noaa.gov/protectedresources/whales/beluga/adn103000.html (last visited Nov. 10, 2000).

266. *Id.* Commentators stated that the DEIS was correct to conclude the subsistence harvest as the only cause for the beluga's decline. In evaluating the other factors, "NMFS has given adequate consideration to all of the factors that have been identified in past public comments as potentially having an impact on belugas . . . Chugach agrees . . . [that] none of the identified activities can be directly linked to the recent decline of beluga whales, nor do they have an adverse impact on whale health, nor do they inhibit the recovery of beluga whales." Letter from Svend A. Brandt- Erichsen, HellerEhrman, Attorneys for Chugach Electric Association, Inc., to Chief, Marine Mammal Division, Office of Protected Resources, National Marine Fisheries Service, 1 (Nov. 20, 2000) (on file with author).

current conclusion does not preclude it from modifying that conclusion in the future. NMFS's MMPA designation also does not mean that it will close its eyes to the surrounding area. Despite the fact that the MMPA does not require such consultations, NMFS stated that it would ask agencies and businesses planning work in Cook Inlet to consult with NMFS before taking any action.[267] It is apparent from the comments in the *Federal Register* that NMFS studied the surrounding area, but could not produce any evidence that activities in that area could pose a problem to the beluga. Under *Suffolk* and *Bays' Legal Fund,* it was correct for the court in *Cook Inlet Beluga Whale* to conclude that NMFS's activities should not have been considered arbitrary or capricious. As the court in *Suffolk* noted, for an agency to speculate on future impacts without specific data would be a futile exercise.[268] The beluga whale will now be studied and monitored until its stock recovers and regulations will be reviewed and modified when appropriate.[269] NMFS plans to continue to study the beluga and expand research programs in the upper Cook Inlet.[270] In particular, NMFS plans to investigate the beluga's movements and patterns, and conduct research on the beluga's behavior associated with disturbances from man-made activities to ensure that these activities do not have any harmful impact on the beluga stock.[271] Over the next few years, if the stocks' abundance estimates do not show evidence of a continued rise, then NMFS will have evidence indicating that the harvests alone may not be responsible for the whales decline, and can then take additional measures to correct that problem. "If the moratorium fails to control Native American harvesting in the future, ESA listing will be warranted. That much is agreed."[272] But the possibility of future impacts from any number of sources is not, in and of itself, sufficient evidence to conclude that certain actions would be more appropriate. The court communicated an important point to NMFS: it was not unreasonable under the circumstances to reach a conclusion based on the facts known, and take the appropiate action to alleviate the problem, even in the face of uncertainty and opposition.

Despite the court's conclusion, NMFS's actions may not have withstood scrutiny if it were not for the alternative listing available under the MMPA. The availability of alternative enforcement under the MMPA

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267. *See* Manning, *supra* note 263.

268. County of Suffolk v. Secretary of the Interior, 562 F.2d 1368, 1378 (2nd Cir. 1977).

269. Taking of the Cook Inlet (CI), Alaska, Stock of Beluga Whales by Alaska Natives, 65 Fed. Reg. 59,164, 59,168 (Oct. 4, 2000) (to be codified at 50 C.F.R. pt. 216).

270. DRAFT EIS, *supra* note 95, at 60.

271. *Id.*

272. Cook Inlet Beluga Whale v. Daley, 156 F. Supp. 2d 16, 20 (D.D.C. 2001).

allowed NMFS to protect the whale while still not classifying it as "endangered." If NMFS had taken the larger step of listing the beluga under the EPA without any further conclusive evidence that other factors were affecting the whale's decline, there is little doubt that others would have challenged that decision as arbitrary and capricious.

B. The Effect on Alaskan Natives

NMFS's DEIS evaluated the biological, social and cultural consequences of each alternative. Not allowing a harvest would ensure the beluga's recovery at the fastest rate, but it would also have biological and cultural impacts on Alaskan Natives and on the beluga habitat.[273] Biologically, the consequence would mean that the other marine mammals in the area, particularly the harbor seal, would have a greater burden placed upon their stocks.[274] Alaskan Natives would continue to harvest, and would still require traditional subsistence that seals provide. If they were not allowed to harvest the beluga whale they would have to increase the harvest of other marine mammals to make up the difference.[275] This could put a strain on other stocks and require an adjustment of any other management agreements that exist for other animals in that same region.[276]

Culturally, an entire generation would pass before Alaskan Natives would be allowed to pass on the tradition of the subsistence hunt for this animal.[277] The beluga whale has "provided for the Native people of the [Cook Inlet] for as long as anyone knows, well back into the archaeological record."[278] In Alaska, the subsistence lifestyle is a part of the culture and tradition of many families.[279] The State of Alaska supports subsistence practices because it nurtures a major part of the state's rural culture.[280] Marine mammals comprise about fourteen percent of the wild food harvested by rural families.[281] Subsistence activities unify many extended

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273. DRAFT EIS, *supra* note 95, at 33–34.

274. *Id.* at 34.

275. *Id.*

276. *Id.*

277. *Id.*

278. Nancy Lord, *supra* note 136.

279. Subsistence is defined as the "customary and traditional, non-commercial uses of wild resources, for a variety of purposes." ALASKAN DEPARTMENT OF FISH AND GAME, DIVISION OF SUBSISTENCE, SUBSISTENCE IN ALASKA: A SUMMARY 1 (1990). "Getting and sharing food, even in urban Alaska, even in the 21st century, is central to Native culture. Food is in many ways the currency of a subsistence economy, its gathering and preparing the work that people do." Nancy Lord, *supra* note 136.

280. *Id.*

281. Statewide, subsistence harvests comprise about two percent of the fish and game

families and small communities, as well as bring meaning and purpose to life in many communities.[282] Subsistence living "still expresses ancient spiritual linkages between humans, wild animals, and the land handed down by oral traditions."[283]

Alaskan Natives have expressed the importance of passing on their beliefs and traditions first hand, and that tradition would die if no hunting were to occur for many years.[284] Alaskan Natives believe that the importance of the hunt should be taught first hand and "without direct experience in this harvest, these skills may not be taught and passed on with the consequence that when hunting resumed after recovery, the low skill level of the hunters could result in inefficient and wasteful harvest practices."[285] If Alaskan Natives were not free to hunt the beluga whale, it would amount to one more loss, and represent yet another destruction of who the Alaskan Natives are and what they value.[286] NMFS has stated that one of its objectives is to provide an opportunity for traditional subsistence harvests that do not significantly increase the amount of time it will take the beluga to recover.[287] Controlling the subsistence hunt, while still allowing it to occur, would meet NMFS's objective. Allowing two strikes annually would increase the time of recovery by only three years. Culturally, this would mean that the teaching of the hunt would continue. Those Natives who had participated in past beluga hunts would now have the opportunity to share their experience with others.[288]

The beluga whale is not the only species whose harvest by Native Indians is being controlled or monitored. NMFS is working with the Alaska Eskimo Whaling Commission to monitor other whale subsistence

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harvested annually in Alaska. ALASKA DEPARTMENT OF FISH AND GAME, DIVISION OF SUBSISTENCE, SUBSISTENCE IN ALASKA: 1998 UPDATE 2 (1998). In addition to providing an important cultural tradition, subsistence harvests provide important sources of nutrition in many rural communities. *Id.* at 1.

282. ALASKAN DEPARTMENT OF FISH AND GAME, DIVISION OF SUBSISTENCE, SUBSISTENCE IN ALASKA: A SUMMARY 1, 4 (1990).

283. *Id.*

284. DRAFT EIS, *supra* note 95, at 34.

285. *Id.* at 35.

286. "It was not, for many of them, something they could easily accept." Nancy Lord, *supra* note 136.

287. Taking of the Cook Inlet (CI), Alaska, Stock of Beluga Whales by Alaska Natives, 65 Fed. Reg. 59,164, 59,166 (Oct. 4, 2000) (to be codified at 50 C.F.R. pt. 216).

288. The cultural benefits were discussed in Alternative 2. The selling of beluga products would be prohibited, but the intent of the harvest is to enrich and preserves the cultural traditions, and to ensure that the direct experience continue to be taught and passed on to future generations. *Id.*

harvests.[289] Each of these agreements shows NMFS's obligation not only to conserve marine mammals, but also to ensure that important tribal traditions continue.

The beluga whale is more than just a remote whale living in a remote area of the world. "[T]he Cook Inlet belugas have their own inherent value in the place they've inhabited exclusively for thousands of years. They belong to the world, and the world without them would be deeply impoverished."[290] Once NMFS became aware of the plight of the beluga, it had more to do than just recovering a species. It had to balance the survival of the beluga whale with the Alaskan Native's traditions of subsistence harvests. Certain environmental groups may believe that all of the power available to NMFS should be put toward saving the beluga whale at all costs. NMFS, however, cannot operate in such a vacuum. The beluga whale contributes to the Alaskan Natives just as it contributes to the rest of the ecosystem. That contribution must be acknowledged and balanced in the overall plan to recover the declining stocks. NMFS's decision to designate the beluga whale under the MMPA was one based on the current available information, not future possibilities. NMFS took the appropriate steps, based on the best scientific information available, to halt the beluga's decline. Because of NMFS's analysis, the beluga now has a chance of survival it did not possess before.

289. The bowhead whale, gray whale, northern fur seal, harbor seal, and sea lion are all monitored and/or managed through co-management agreements. NMFS, NOAA, MARINE MAMMAL PROTECTION ACT OF 1972 ANNUAL REPORT 71, 73 (1998).

290. Nancy Lord, *supra* note 136.