

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

STATE OF ALASKA,)
1031 W. 4th Avenue, Suite 200)
Anchorage, AK 99501)

Plaintiff,)

v.)

JANE LUBCHENCO, in her official capacity)
as Administrator, National Oceanic and)
Atmospheric Administration,)
1401 Constitution Avenue NW, Room 5128)
Washington, DC 20230;)

NATIONAL MARINE FISHERIES)
SERVICE,)
1315 East West Highway)
Silver Spring, MD 20910;)

GARY LOCKE, in his official capacity as the)
United States Secretary of Commerce,)
1401 Constitution Avenue NW)
Washington, DC 20230)

Defendants.)

CIVIL ACTION NO.:

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

INTRODUCTION

1. Plaintiff State of Alaska (“Alaska” or the “State”) brings this action to challenge the listing by Defendants Jane Lubchenco, Administrator of the National Oceanic and Atmospheric Administration; the National Marine Fisheries Service; and Gary Locke, United States Secretary of Commerce (collectively, “the Service”) of a distinct population segment (“DPS”) of the beluga whale in Cook Inlet, Alaska, under the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531–1544. *See Endangered Status for the Cook Inlet Beluga Whale, Final Rule*, 73 Fed. Reg. 62919-62930 (Oct. 22, 2008) (the “Final Rule”).

2. Alaska brings this action (1) under Section 11 of the ESA, 16 U.S.C. § 1540(g)(1)(C), to address the Defendants’ failure to perform duties under ESA Section 4, 16 U.S.C. § 1533; and (2) under the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701–706, to address Defendants’ failure to comply with legal requirements not otherwise actionable under ESA Section 11, and to otherwise challenge the relevant agency decisions as arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law, and without observance of procedures required by law.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction), 16 U.S.C. § 1540(g) (Endangered Species Act citizen suit provision), and 5 U.S.C. §§ 702, 706 (Administrative Procedure Act).

4. Alaska satisfied the written notice requirement of the Endangered Species Act citizen suit provision. 16 U.S.C. § 1540(g)(2). Over sixty days ago, by letter dated January 12, 2009, Alaska gave written notice to the Service and the individually named Defendants (by letter addressed to their predecessors in office) of the Defendants’ failure to perform certain duties

under 16 U.S.C. § 1533. *See* attached Ex. A (copy of letter). The Defendants have not remedied the violations set forth in the letter.

5. An actual, justiciable controversy now exists between Alaska and the Defendants, and the requested relief is proper under 28 U.S.C. §§ 2201–2202, 5 U.S.C. §§ 701–706, and 16 U.S.C. § 1540(g).

6. The federal government has waived sovereign immunity in this action pursuant to 5 U.S.C. § 702, and 16 U.S.C. § 1540(g).

7. Alaska has exhausted all administrative remedies.

8. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) because this action is brought against officers of agencies of the United States in their official capacities and against the Service. Further, actions and decisions challenged by this lawsuit were made, at least in part, in the District of Columbia. Alaska maintains an office in the District of Columbia.

PARTIES

Plaintiff

9. Alaska is a sovereign state, which has an interest in the management, conservation, and regulation of all wildlife and other natural resources within its jurisdiction, including the beluga whale and its habitat. Alaska Const. Art. VIII, §§ 1, 2, 4; Alaska Stat. § 16.05.020. As a steward of its wildlife resources, Alaska directly manages wildlife and habitat through its Departments of Fish and Game, Natural Resources, and Environmental Conservation. The Alaska Comprehensive Wildlife Conservation Strategy contains affirmative conservation measures, including cooperation with other government agencies through research, monitoring, and conservation practices designed to protect and conserve beluga whales, part of the State's

treasured wildlife heritage, throughout the State and to avoid the need for the species to be listed under the ESA.

10. Section 307 of the Coastal Zone Management Act, 16 U.S.C. § 1456, requires the State to review most federal activities and federally permitted activities affecting any land or water use or natural resource within the state's coastal zone to ensure that federally permitted activities are consistent with standards and policies of the Alaska Coastal Management Program ("ACMP"). The State has implemented the ACMP (Alaska Stat. §§ 46.39.010-.900; §§ 46.40.010-.210) to ensure the orderly, balanced utilization and protection of the resources of the coastal area consistent with sound conservation and sustained yield principles. The ACMP includes statewide standards found at Alaska Administrative Code, Title 11, Part 8, Chapter 112, and district coastal management plans which describe the proper and improper uses and activities with respect to natural resource development and conservation within the coastal zone. These standards also govern the uses and activities, and resources and habitats that are part of a proposed project. These standards include statewide standards and requirements set forth in approved district coastal management plans for habitat and subsistence, both of which are considered during consistency reviews.

11. The Service's listing of the beluga whale in Cook Inlet as an endangered species will have a significant adverse impact on Alaska because additional regulation of the species and its habitat under the ESA will deter or delay activities such as commercial fisheries, oil and gas exploration and development, transportation, and tourism within and off-shore of Alaska, and may also impact operations at military installations. The State and its municipalities rely on tax and royalty revenues from these activities and related commerce to provide services for their citizens, and many Alaskans rely on these activities for employment.

12. Municipal governments located on or near coastal areas within the range of the beluga whale, which are political subdivisions of the State of Alaska under Alaska Statutes, Title 29, will be adversely affected by the listing because the listing and resulting regulatory measures will interfere with the municipalities' efforts to provide public services to Alaska residents and impact their land use planning, platting, waste water disposal, and regulatory activities.

13. Alaska has standing to bring this action, and the challenged agency decisions are final and ripe for review by this Court.

Defendants

14. Defendant Gary Locke is the Secretary of the United States Department of Commerce ("Commerce") and is being sued in his official capacity. The Secretary is responsible for the administration of the ESA as it is applied to certain marine mammals including beluga whales.

15. Defendant Jane Lubchenco is the Administrator of the National Oceanic and Atmospheric Administration ("NOAA") and is being sued in her official capacity. The Administrator is also responsible for the administration and the implementation of the ESA as it is applied to certain marine mammals including beluga whales.

16. Defendant United States National Marine Fisheries Service ("NMFS") is a federal agency within Commerce and NOAA that has been delegated the responsibility for implementing the ESA as it is applied to certain marine mammals. Beluga whales are marine mammals within the jurisdiction of Commerce, NOAA, and NMFS.

LEGAL BACKGROUND

A. Endangered Species Act

17. ESA Section 4(a) requires the Secretary of Commerce to determine by regulation whether species of fish, wildlife or plants are “threatened” or “endangered” under specified criteria, and if so, to list such species as threatened or endangered as appropriate. 16 U.S.C. § 1533(a)(1). Section 4(a) also requires the Secretary to designate by regulation “critical habitat” to the maximum extent prudent and determinable for such listed species. *Id.* § 1533(a)(3). Regulations concerning listing determinations and critical habitat designations must be promulgated in accordance with the requirements of Section 4(b) of the ESA and the procedural requirements of Section 553 of the APA, 5 U.S.C. § 553.

18. The Secretary’s authority to determine “endangered” or “threatened” listing status for a species, 16 U.S.C. § 1533(a), “does not confer discretion to ignore the required procedures of decisionmaking.” *Bennett v. Spear*, 520 U.S. 154, 172 (1997). The duty to make a listing determination must be made

solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.

16 U.S.C. § 1533(b)(1)(A).

19. Under ESA Section 3(16), the term “species” includes “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” 16 U.S.C. § 1532(16).

20. To list a species, the Secretary must find that one or more of the five statutory listing factors are present: (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. 16 U.S.C. § 1533(a)(1).

21. If the Secretary determines that designating a species as endangered or threatened is warranted, he must publish the determination in the Federal Register, along with the complete text of a proposed regulation to implement such a determination. *See* 16 U.S.C. § 1533(b)(5).

22. Under ESA Section 4(d), when a species is listed as threatened rather than endangered, “the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species.” 16 U.S.C. § 1533(d). Also, the Secretary may, but is not required to, “by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a)(1),” the ESA’s take prohibition for fish or wildlife species listed as endangered. *Id.* § 1533(d).

23. Any publication in the Federal Register of a final regulation listing a species as endangered under the ESA must include a summary of the data upon which the regulation is based and must show the relationship of the data to the regulation. *See* 16 U.S.C. § 1533(b)(8).

24. Under ESA Section 4(i), if “a State agency . . . files comments disagreeing with all or part of the proposed regulation, and the Secretary issues a final regulation which is in conflict with such comments . . . the Secretary [must] submit to the State agency a written justification for [the] failure to adopt regulations consistent with the agency’s comments.” 16 U.S.C. § 1533(i).

25. ESA Section 11(g) provides that “any person may commence a civil suit on his own behalf . . . against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 4 which is not discretionary with the Secretary.” 16 U.S.C. § 1540(g)(1)(C).

26. ESA Section 10(e) provides for regulation by the Secretary of subsistence hunting of threatened and endangered species by Alaska Natives. *See* 16 U.S.C. § 1539(e).

B. Marine Mammal Protection Act

27. The Marine Mammal Protection Act (“MMPA”), 16 U.S.C. §§ 1361-1423h, prohibits the take and importation of all marine mammals, including beluga whales, *id.* § 1362(6), and addresses protection of habitat and collection of biological information. The MMPA provides for the regulation of hunting, including subsistence hunting, of marine mammals by Alaska Natives. *See* 16 U.S.C. § 1371(b).

28. The MMPA provides for certain prohibitions in regard to species or stocks that are “depleted.” For purposes of the MMPA, “the term ‘depletion’ or ‘depleted’ means any case in which –

- (A) the Secretary, after consultation with the Marine Mammal Commission and the Committee of Scientific Advisors on Marine Mammals established under subchapter III of this chapter, determines that a species or population stock is below its optimum sustainable population;
- (B) a State, to which authority for the conservation and management of a species or population stock is transferred under section 1379 of this title, determines that such species or stock is below its optimum sustainable population;
- (C) a species or population stock is listed as an endangered species or a threatened species under the Endangered Species Act of 1973 [16 U.S.C. § 1531 et seq.].

16 U.S.C. § 1362(1).

C. Administrative Procedure Act

29. The APA provides for judicial review of final agency action by persons “aggrieved” by such action. 5 U.S.C. § 702. The actions reviewable under the APA include “preliminary, procedural, or intermediate agency action or ruling . . . on the review of the final agency action,” such as the Final Rule here. *Id.* § 704. The APA also provides standards applicable when a federal agency proposes and adopts final rules and regulations. *Id.* §§ 553, 551(4). Specifically, agencies must provide “[g]eneral notice” of any “proposed rule making” to the public through publication in the Federal Register. That notice must include “(1) a statement of the time, place, and nature of the public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.” *Id.* § 553(b). An agency’s responsibility to consider public comments on a proposed rulemaking is required by 5 U.S.C. § 553(c).

30. Under the APA, a reviewing court shall “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). A reviewing court shall also “hold unlawful and set aside agency action, findings, and conclusions found to be . . . without observance of procedure required by law.” 5 U.S.C. § 706(2)(D).

FACTUAL BACKGROUND

A. The Beluga Whale

31. Beluga whales (*Delphinapterus leucas*) are cetaceans medium in size and belong to the group known as “toothed whales.”

32. The worldwide distribution of beluga whales includes the Arctic and sub-Arctic waters of North America, Greenland, Europe, and Asia. They are a single species classified as *Delphinapterus leucas*; no taxonomic subspecies has been identified in published scientific writings. Over 63,000 beluga whales inhabit the waters off the Alaska coast.

33. The Final Rule identifies five stocks of beluga whales in Alaska: Beaufort Sea, eastern Chukchi Sea, eastern Bering Sea, Bristol Bay, and Cook Inlet. *See* 73 Fed. Reg. at 62920. A population stock is not the same as a DPS for purposes of the ESA.

34. Beluga whales are important for subsistence purposes to Alaska Natives and the subsistence harvest of marine mammals such as beluga whales is provided for in the ESA and MMPA.

B. Listing Decision

35. NMFS reported a decline of nearly 50% in abundance estimates for beluga whales in Cook Inlet between 1994 (653 whales) and 1998 (347 whales), with the decline mostly attributed to subsistence harvest through 1998. 73 Fed. Reg. at 62920. In November 1998, NMFS initiated a status review of beluga stock in Cook Inlet. *See* 63 Fed. Reg. 64228.

36. During 1999, the steep population decline stopped following the voluntary suspension of subsistence harvest and a temporary legislative moratorium on Native American harvest of Cook Inlet belugas. *See* Pub. L. No. 106-31, § 3022, 113 Stat. 57, 100 (May 1999). The moratorium was made permanent in December 2000. *See* Pub. L. No. 106-553, § 627, 114 Stat. 2762, 2762A-108 (Dec. 2000).

37. In January 1999, the State of Alaska Department of Fish and Game submitted a petition to NMFS to designate the stock of beluga whales in Cook Inlet as depleted under the MMPA. The Service issued a final rule on May 31, 2000, designating beluga whales in Cook

Inlet as depleted under the MMPA because the abundance estimate fell below the optimal sustainable population level. *See* 65 Fed. Reg. 34590 (May 31, 2000). This allowed the process to begin for regulating harvest and included formal rulemaking hearings before an administrative law judge and a recommended decision.

38. The only exclusion to the moratorium on Native Alaskan subsistence harvest was through a co-management agreement between NMFS and Alaska Native Organizations. Regulations on “Taking of the Cook Inlet, Alaska Beluga Stock by Alaska Natives” have since been adopted. *See* 73 Fed. Reg. 60976 (Oct. 15, 2008).

39. In March 1999, NMFS received two petitions to list beluga whales in Cook Inlet as endangered under the ESA. On June 22, 2000, the Service published a final rule, determining that beluga whales in Cook Inlet were not in danger of extinction nor likely to become endangered in the foreseeable future. *See* 65 Fed. Reg. 38778 (June 22, 2000).

40. This earlier 2000 decision by the Service not to list the beluga whale in Cook Inlet was judicially challenged and upheld. *Cook Inlet Beluga Whale v. Daley*, 156 F. Supp. 2d 16 (D.D.C. 2001).

41. In March 2006, NMFS initiated a status review of beluga whales in Cook Inlet. *See* 71 Fed. Reg. 14836 (Mar. 24, 2006). In April 2006, NMFS received a petition from Trustees for Alaska to list beluga whales in Cook Inlet under the ESA. On August 7, 2006, the Service published in the Federal Register a determination that the petition presented substantial scientific information indicating that the petitioned action may be warranted. *See* 71 Fed. Reg. 44614 (Aug. 7, 2006). On April 20, 2007, the Service “concluded the Cook Inlet beluga whale constitutes a distinct population segment (DPS) that is in danger of extinction throughout its

range,” and published a proposed rule to list belugas under the ESA. *See* 72 Fed. Reg. 19854, 19854 (Apr. 20, 2007) (the “Proposed Rule”).

42. By letter dated July 31, 2007, Alaska provided comments in response to and in disagreement with the Proposed Rule. Alaska provided the Service with, among other relevant information, scientific and commercial data supporting a determination that listing of beluga whales in Cook Inlet was not warranted because nothing had changed with respect to the potential threats to beluga whales since the Service’s 2000 determination that listing was unwarranted. Alaska provided the Service with information demonstrating that the stock of beluga whales in Cook Inlet is sufficiently recovering from unsustainable harvest during the early 1990s, and regulatory mechanisms are providing effective protection to ensure conservation of the species. The information provided by the State indicated that the beluga numbers are stable and that growth within the population could not reasonably be expected until the breeding age component of the population had stabilized following the unsustainable harvest that ended in 1999.

43. On April 22, 2008, the Service extended the deadline for a final determination on the petitioned action until October 20, 2008. The extension followed a request by the Alaska Department of Fish and Game, and others, for a 6-month delay due to disagreement regarding the sufficiency or accuracy of the available data, in particular, the population trend of beluga whales in Cook Inlet. *See* 73 Fed. Reg. 21578 (Apr. 22, 2008).

44. On October 15, 2008, the Service published the final Conservation Plan for the Cook Inlet Beluga Whale, issued pursuant to the MMPA.

45. On October 22, 2008, the Secretary published the Final Rule listing the Cook Inlet beluga whale as endangered under the ESA, 73 Fed. Reg. 62919.

46. This determination was made without identifying new or different information that would justify changing the conclusion made in 2000 (at the time listing was determined not warranted), that the decline had resulted from unsustainable harvest. *See* 73 Fed. Reg. at 62920.

47. Over three months after publication of the Final Rule, Alaska received, through a letter dated January 29, 2009, from Robert D. Mecum, Acting Administrator, Alaska Region, to Offices of the Commissioners (State of Alaska), a response purporting to respond pursuant to 4(i) of the ESA, to the comments Alaska submitted on the Proposed Rule. This 4(i) response merely identified the 2008 Status Review and Extinction Risk Assessment of the Cook Inlet Belugas, the 2008 Supplemental Review, and the listing determination of October 22, 2008 as the written response to comments submitted by the State of Alaska. However, neither the letter nor the referenced documents provided an adequate and reasoned justification for the Service's failure to adopt regulations consistent with the comments submitted by the State of Alaska.

FIRST CLAIM FOR RELIEF
(Violation of the ESA and APA—Failure to Follow Required Procedures and Consider Relevant Factors for Listing Determination)

48. Alaska incorporates by reference each of the allegations in paragraphs 1 through 47.

49. ESA Section 4(b)(1)(A) requires that the Service make a listing determine “solely on the basis of the best scientific and commercial data available to [it] after conducting a review of the status of the species.” 16 U.S.C. § 1533(b)(1)(A). ESA Section 4(b)(4) requires generally that listing determinations such as the one made by the Service here be made consistent with the provisions of APA Section 553, 5 U.S.C. § 553, relating to notice and comment procedures for agency rulemaking. *See* 16 U.S.C. § 1553(b)(4). ESA Section 4(b)(8) requires that the Service

include in a final listing determination a summary “of the data on which such regulation is based and . . . the relationship of such data to such regulation.” 16 U.S.C. § 1533(b)(8).

50. In making the determination to list a DPS of the beluga whale in Cook Inlet, the Service did not properly comply with these listing procedure requirements under the ESA and the APA, did not adequately consider all relevant factors, did not make a rational connection between the facts found and the choice made by the Service in its listing determination, and did not observe all of the procedure required by law in making this determination, rendering the Service’s listing decision arbitrary and capricious, an abuse of discretion, otherwise not in accordance with law, or without observance of procedure required by law, in violation of the ESA and the APA, and entitling Alaska to the relief requested below.

SECOND CLAIM FOR RELIEF
(Violation of the ESA—Failure to Consider State Efforts)

51. Alaska incorporates by reference each of the allegations in paragraphs 1 through 50.

52. ESA Section 4(b)(1)(A) requires that the Service make its listing determinations “after taking into account those efforts . . . being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species.” 16 U.S.C. § 1533(b)(1)(A). Specifically, the Service failed to adequately consider the substantial conservation efforts, programs, and regulatory mechanisms implemented by the State of Alaska and its political subdivisions, the federal government and Native subsistence agreements, 2008 Conservation Plan, and State actions, including habitat protection by the State of Alaska benefiting the beluga whale to ensure its protection and recovery from the reduction in its numbers through unsustainable harvest that had occurred prior to 1999.

53. The Service's failure to adequately consider the substantial efforts being made by Alaska and its political subdivisions, Native American groups, and others to protect the beluga whales in Cook Inlet violates ESA Section 4(b)(1)(A), 16 U.S.C. § 1533(b)(1)(A), and entitles Alaska to the relief requested below.

THIRD CLAIM FOR RELIEF
(Violation of ESA—Failure to Consider a Threatened Determination)

54. Alaska incorporates by reference each of the allegations in paragraphs 1 through 53.

55. Section 3(20) defines a “threatened species” as “any species which is likely to become an endangered species within the foreseeable future *throughout all or a significant portion of its range.*” 16 U.S.C. § 1532(20) (emphasis added).

56. In the Final Rule, the Service failed to adequately consider, as an alternative to the endangered status determination, whether beluga whales in Cook Inlet are “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range” given available information regarding the overall stability of the population of beluga whales in Cook Inlet following the cessation of unsustainable harvest and stringent regulation of such harvest.

57. In addition, the Final Rule acknowledged numerous uncertainties regarding the population projections and modeling of beluga whales in Cook Inlet, and the carrying capacity of Cook Inlet itself, and the current and future effectiveness of certain conservation measures, yet the Service failed to consider the alternative of making a threatened determination in light of the information indicating that the population of beluga whales in Cook Inlet is not currently endangered, even if NMFS concludes that the population is likely to become endangered in the foreseeable future.

58. The Service's failure to adequately consider whether beluga whales in Cook Inlet should have been determined to be threatened rather than endangered and thereby more likely to benefit by conservation regulations issued under Section 4(d), entitles Alaska to the relief requested below.

FOURTH CLAIM FOR RELIEF
(Violation of ESA—Failure to Provide Adequate Justification to State Agency for Adopting Regulations Inconsistent with State Agency's Recommendation)

59. Alaska incorporates by reference each of the allegations in paragraphs 1 through 58.

60. Section 4(i) requires the Secretary to submit written justification to the State if a State agency submits comments disagreeing with a proposed regulation and the Secretary issues a final regulation in conflict with the comments. 16 U.S.C. § 1533(i).

61. Comments submitted by Alaska in response to the Proposed Rule disagreed with all or part of the proposed determination of beluga whales in Cook Inlet as a DPS and that if determined to be a DPS, disagreed with the listing of such DPS as threatened or endangered. Specifically, Alaska's review of current information found nothing to have changed regarding the potential threats evaluated by the Service in 2000 that should result in any different finding.

62. In this instance, Alaska received only a post hoc response from Robert D. Mecum, Acting Administrator, Alaska Region, over *three* months after the Service's promulgation of the final listing rule, and that response failed to describe the changes from 2000 to 2008 that warranted the listing of the beluga whale in Cook Inlet as endangered.

63. The post hoc response did not adequately provide the required "written justification for [the Service's] failure to adopt regulations consistent with the [Alaska state] agency's comments." 16 U.S.C. § 1533(i). This failure impairs Alaska's ability to respond to

the DPS determination and decision to list beluga whales in Cook Inlet as endangered, and harms Alaska's ability to regulate and manage its natural resources including lands, waters, fisheries, wildlife, and mineral reserves.

64. The Service's failure to respond in an adequate fashion to Alaska's comments to the Proposed Rule violates ESA Section 4(i), 16 U.S.C. § 1533(i), entitling Alaska to the relief requested below.

FIFTH CLAIM FOR RELIEF
(Violation of the APA—
Failure to Respond to Significant Comments)

65. Alaska incorporates by reference each of the allegations in paragraphs 1 through 64.

66. The APA requires an opportunity for public comment, and an agency response to significant public comments. 5 U.S.C. § 553(b), (c).

67. Alaska submitted, and the Secretary failed to adequately consider, incorporate, or respond to, detailed scientific and commercial information indicating that listing beluga whales in Cook Inlet as endangered was unwarranted.

68. The Secretary also failed to consider and adequately respond to the information documenting that Alaska, its political subdivisions, and Native Groups, have made significant efforts to protect beluga habitat and to reduce any potential effects from activities that would impact beluga whales and their habitat in Cook Inlet.

69. The Service's failure to respond to significant comments submitted by Alaska and others violates the APA, 5 U.S.C. § 553(b), (c), entitling Alaska to the relief requested below.

SIXTH CLAIM FOR RELIEF

(Violation of the APA—

Arbitrary and Capricious, Abuse of Discretion, Not in Accordance with Law)

70. Alaska incorporates by reference each of the allegations in paragraphs 1 through 69.

71. The Service’s conduct in issuing the Final Rule, as described in the preceding Claims for Relief was arbitrary and capricious, constituted an abuse of discretion, and was otherwise not in accordance with law.

72. Under the APA, this Court has authority to “hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” 5 U.S.C. § 706(2)(A), and to set aside an agency decision “without observance of procedure required by law,” 5 U.S.C. § 706(2)(D). Alaska is therefore entitled to the relief requested below.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment providing the following relief:

- A. Declare that Defendants violated the ESA and the APA;
- B. Declare that Defendants’ actions, as set forth above, are arbitrary and capricious, an abuse of discretion, and not in accordance with law;
- C. Vacate and set aside the Final Rule of October 22, 2008;
- D. Enjoin Defendants from relying on or enforcing the endangered status determination under the ESA for the beluga whale in Cook Inlet;
- E. Vacate and set aside any final rule to designate critical habitat based on the endangered determination under the ESA for beluga whales in Cook Inlet;

F. Vacate and remand with an order with instructions requiring full compliance with the ESA and APA;

G. Award Alaska its attorneys' fees and costs incurred in bringing and maintaining this action pursuant to Section 11(g) of the ESA, 28 U.S.C. § 2412, and other applicable authorities; and

H. Grant Plaintiff such other and further relief as the Court may deem necessary and appropriate.

DATED this 4th day of June, 2010.

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