



October 4, 2019

*Via Email and U.S. Mail*

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**RE: Petition to Revoke the Letter of Authorization and Incidental Take Regulations Allowing Hilcorp Alaska LLC to Take Marine Mammals Incidental to Oil and Gas Operations in Cook Inlet**

Pursuant to 5 U.S.C. § 555(e), the Center for Biological Diversity and Cook Inletkeeper hereby petition the National Marine Fisheries Service (“NMFS”) to revoke the letter of authorization and regulations the agency issued under the Marine Mammal Protection Act (“MMPA”), 16 U.S.C. § 1371(a)(5)(A), authorizing Hilcorp Alaska LLC (“Hilcorp”) to take marine mammals incidental to its oil and gas operations in Cook Inlet for the next five years. *See* 84 Fed. Reg. 37,442 (July 31, 2019); 50 C.F.R. § 217.163.

As the Center and Cook Inlet have repeatedly stated to NMFS, including in comments on the agency’s proposed take authorizations for Hilcorp’s oil and gas activities in the Inlet, NMFS should not allow any take of Cook Inlet belugas until and unless it can ensure the conservation and recovery of this highly imperiled species, which is among one of the most endangered whales in the world. Likewise, scientific experts, including the federal Marine Mammal Commission, have repeatedly warned that noise pollution from oil and gas activities in the Inlet

is likely to push Cook Inlet beluga whales closer to extinction. The Commission has advised NMFS that it should not authorize such activities, including Hilcorp’s, while this highly imperiled species continues to decline.

Nevertheless, in July 2019, NMFS issued regulations and a letter of authorization (“LOA”) to Hilcorp, allowing the company to take numerous species of marine mammals, including Cook Inlet beluga whales, incidental to its oil and gas activities in the Inlet. Since the agency issued the authorizations, Hilcorp has begun seismic airgun blasting, expanding oil and gas activity in the Inlet into yet more beluga habitat.

New information reveals that Hilcorp has been operating the seismic vessel *Polarcus Alima* and ramping up at night under a revised LOA signed on September 20, 2019 (but only published in the Federal Register today) in violation of NMFS’s incidental take regulations. NMFS’ incidental take regulations do not provide for nighttime operations. Furthermore, four Cook Inlet beluga whales have been found dead in the last two weeks, highlighting the continued decline and vulnerability of this population. As such, Hilcorp’s operations may be having—and likely are having—more than a negligible impact on the highly imperiled Cook Inlet beluga whale. The MMPA therefore requires NMFS to revoke the LOA and incidental take regulations. *See* 16 U.S.C. § 1371(a)(5)(B)(ii), (D)(iv). Moreover, this new information demonstrates that NMFS cannot ensure that its authorization of Hilcorp’s oil and gas activities to take marine mammals will not jeopardize critically endangered Cook Inlet beluga whales, as required by the Endangered Species Act (“ESA”). *See id.* § 1536(a)(2). NMFS’s failure to revoke the LOA and incidental take regulations will deprive the species of the protections to which it is both legally entitled and desperately needs, and constitutes a violation of the MMPA and ESA.

## **I. Cook Inlet Beluga Whales Are Critically Endangered**

Cook Inlet beluga whales are critically endangered and threatened by oil and gas exploration, including Hilcorp’s operations. NMFS itself has stated that the removal of even one Cook Inlet beluga whale will impede the recovery of this species.<sup>1</sup> Cumulative and synergistic impacts—including most notably noise—pose serious threats to these belugas.<sup>2</sup>

Cook Inlet beluga whales are in a precarious state with a declining population trend and no signs of recovery. In 2015, Cook Inlet belugas became one of NMFS’s eight “Species in the Spotlight,” which prioritizes those species at the highest risk of extinction. NMFS considers these Species in the Spotlight a “recovery priority #1.” A recovery priority #1 species is one whose extinction “is almost certain in the immediate future because of a rapid population decline or habitat destruction, whose limiting factors and threats are well understood and the needed management actions are known and have a high probability of success, and is a species that is in conflict with construction or other developmental projects or other forms of economic activity.”<sup>3</sup>

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<sup>1</sup> NMFS, Stock Assessment Report: Beluga Whale (*Delphinapterus leucas*) Cook Inlet Stock (December 30, 2018) (“even one take every 2 years may still impede recovery”).

<sup>2</sup> *See* Francis, C.D. and J. R. Barber. 2013. A Framework for understanding noise impacts on wildlife: an urgent conservation priority, *Front Ecol Environ* 2013; 11(6): 305–31.3.

<sup>3</sup> Species in the Spotlight Priority Actions: 2016–2020 Cook Inlet Beluga Whale *Delphinapterus leucas*, at 1, n.1 (2015).

The Service developed five-year action plans for each of the eight species that outline short-term efforts vital for stabilizing their populations and preventing their extinction. The first of the “Key Actions Needed 2016–2020” in NMFS’s Cook Inlet Beluga Whale 5-Year Action Plan is “Reduce the Threat of Anthropogenic Noise in Cook Inlet Beluga Whale Habitat.”<sup>4</sup>

The species’ recovery plan, finalized by NMFS in December 2016, concludes that there is a high concern about the impacts of noise on beluga whales. The Plan notes that Cook Inlet beluga whale’s “high auditory sensitivity . . . and dependence upon sound to navigate, communicate, and find prey and breathing holes in the ice make belugas vulnerable to noise pollution, which may mask beluga signals or lead to temporary or permanent hearing impairment.”<sup>5</sup> The Plan summarized that noise threats to the belugas can also cause habitat degradation, is localized and range-wide, is continuous, intermittent, and seasonal, is increasing overall, and is of high relative concern. It notes that, “[i]n the long term, anthropogenic noise may induce chronic effects altering the health of individual CI belugas, which in turn have consequences at the population level.”<sup>6</sup> The U.S. Marine Mammal Commission has repeatedly recommended that NMFS “defer issuance of incidental take authorizations and regulations until it has better information on why the population has not showed signs of recovery . . . and has a reasonable basis for determining that authorizing additional takes by harassment would not contribute to or exacerbate [the species’] decline.”<sup>7</sup>

Furthermore, at least four dead Cook Inlet beluga whales were reported last month.<sup>8</sup> These deaths, which constitute roughly one percent of the entire population using the latest minimum population estimate of 311 animals,<sup>9</sup> demonstrate just how precarious the survival and recovery outlook of Cook Inlet beluga whales is. These new numbers should be included in the agency’s determination of whether Hilcorp’s activities will have more than a negligible impact on the species or jeopardize its continued existence.

## **II. The LOA’s Inconsistency with the Incidental Take Regulations Requires NMFS to Revoke Hilcorp’s Take Authorization and Incidental Take Regulations**

The modified Letter of Authorization rolls back protections that are mandated by the Incidental Take Regulations. Specifically, the modified LOA allows operations in the dark when visibility of marine mammals is limited. This is not allowed under the Incidental Take Regulations. Thus, the LOA is contrary to the regulatory mandates of the MMPA.

Hilcorp’s July 31, 2019 LOA required Hilcorp to “implement shutdown zones/ exclusion zones (EZs) with radial distances as identified in any LOA issued under §§ 216.106 of this chapter and 217.166.”<sup>10</sup> The LOA required Hilcorp to conduct pre-activity monitoring to “ensure

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<sup>4</sup> *Id.* at 4.

<sup>5</sup> National Marine Fisheries Service, Recovery Plan for the Cook Inlet Beluga Whale, Dec. 2016 at III-3.

<sup>6</sup> *Id.* at II-52.

<sup>7</sup> Peter O. Thomas, Executive Director, Marine Mammal Commission letter to Jolie Harrison, Chief of Permits and Conservation Division, National Marine Fisheries Service (Aug. 5, 2019).

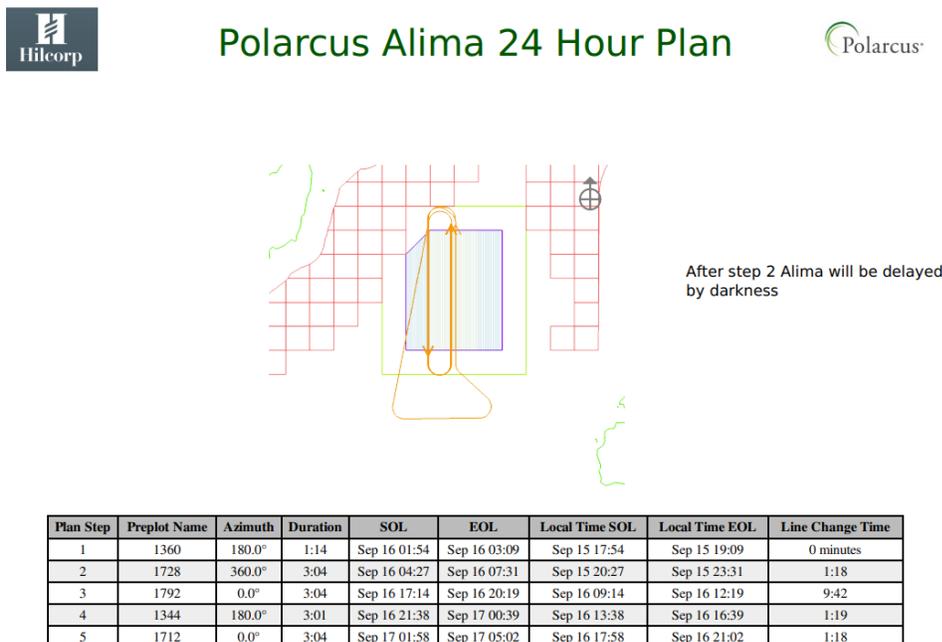
<sup>8</sup> *See, e.g.*, CIBW Sightings, <https://www.cookinletbelugas.com/cibw-sightings> (click on tab for 2019, then last tab for 9/27, reporting approximately six “stranded” beluga whales sighted from Rocky Point)

<sup>9</sup> *See* M. Muto et al, BELUGA WHALE (*Delphinapterus leucas*): Cook Inlet Stock, NOAA-TM-AFSC-393, <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-species-stock> (updated population estimate of 311 beluga whales).

<sup>10</sup> LOA § 5(f)(a) (although the exclusion zone was not identified in the LOA).

that the EZ is clear of marine mammals, and activities may only commence once observers have declared the EZ clear of marine mammals.”<sup>11</sup> Further, “[a] determination that the EZ is clear must be made during a period of good visibility (i.e., the entire EZ must be visible to the naked eye).”<sup>12</sup> The “naked eye” is defined as “the eye unaided by any instrument that changes the apparent size or distance of an object or otherwise alters visual powers.”<sup>13</sup> The LOA required that “[o]perations must shut down completely if a beluga whale is sighted within the relevant Level B harassment isopleth.”<sup>14</sup> With respect to air gun ramp up, “If the complete EZ has not been visible for at least 30 minutes prior to the start of operations, ramp up must not commence.”<sup>15</sup>

On September 14, 15, 16, 17, 18, 19, and 20, Hilcorp indicated it was operating at night but not ramping up after nightfall. *See, e.g.* Figure 1 (“[a]fter step 2 Alima will be delayed by darkness.”).



**Figure 1.** Screenshot from Hilcorp, Cook Inlet Seismic Updates Polarcus Alima 24 Hour Plan, available at <http://www.hilcorp.com/3dsurvey/> (September 16, 2019).

However, starting on September 22 and continuing through September 30, Hilcorp posted its plans to conduct seismic activities through nightfall, including ramping up in the middle of the night, with no similar restriction that the surveys “will be delayed due to darkness.” *See, e.g.* Figure 2.

<sup>11</sup> *Id.* § 5(g)(b).

<sup>12</sup> *Ibid.*; *see also id.* § 6 (b) (“Activities must only commence when the entire EZ is visible to the naked eye and can be adequately monitored. If conditions (e.g., fog) prevent the visual detection of marine mammals, activities must not be initiated.

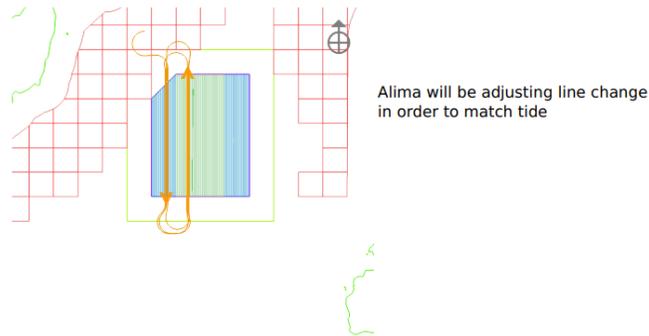
<sup>13</sup> *Naked eye*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/naked%20eye> (last visited Oct. 2, 2019).

<sup>14</sup> LOA § 5(g)(f).

<sup>15</sup> *Id.* § 5(h)(e).



## Polarcus Alima 24 Hour Plan



Plan Step	Preplot Name	Azimuth	Duration	SOL	EOL	Local Time SOL	Local Time EOL	Line Change Time
1	1248	180.0°	3:41	Sep 21 23:09	Sep 22 02:51	Sep 21 15:09	Sep 21 18:51	28 minutes
2	1584	0.0°	3:56	Sep 22 05:16	Sep 22 09:13	Sep 21 21:16	Sep 22 01:13	2:25
3	1232	180.0°	3:39	Sep 22 12:08	Sep 22 15:48	Sep 22 04:08	Sep 22 07:48	2:55
4	1568	360.0°	3:56	Sep 22 18:50	Sep 22 22:46	Sep 22 10:50	Sep 22 14:46	3:01
5	1216	180.0°	3:38	Sep 23 00:30	Sep 23 04:08	Sep 22 16:30	Sep 22 20:08	1:43
6	1552	360.0°	3:56	Sep 23 07:12	Sep 23 11:08	Sep 22 23:12	Sep 23 03:08	3:03

**Figure 2.** Screenshot from Hilcorp, Cook Inlet Seismic Updates Polarcus Alima 24 Hour Plan, available at <http://www.hilcorp.com/3dsurvey/> (September 30, 2019).<sup>16</sup>

What was not public knowledge until today was that NMFS condoned this nighttime activity on September 20 when it issued a new LOA to Hilcorp.<sup>17</sup> NMFS proposed modifying the LOA on August 16, 2019,<sup>18</sup> followed by a thirty-day public comment period. It released a pre-publication notice on October 3 without the modified LOA, and then published the notice in the Federal Register and LOA on its website on October 4, 2019.<sup>19</sup> The approval of nighttime seismic surveying with ramp up violates the overarching five-year incidental take regulations issued by NMFS in July, which do not permit nighttime ramp up.<sup>20</sup>

Instead, the “mitigation requirements” of the incidental take regulations (which the July 31, 2019 LOA mirrored) require a determination that the EZ is clear “during a period of good visibility (i.e., the entire EZ must be visible to the naked eye).”<sup>21</sup> Hilcorp is further directed by

<sup>16</sup> Hilcorp’s Cook Inlet Seismic Updates Polarcus Alima 24 Hour Plans through September 30, downloaded from <http://www.hilcorp.com/3dsurvey/>, are provided as Attachment 1.

<sup>17</sup> An email from John H. Martin, U.S. Department of Justice, Environment & Natural Resources Division to Julie Teel Simmonds, Center for Biological Diversity (dated September 26, 2019) stated “NOAA has not yet made a final decision on that amendment, but it is reasonable to anticipate that the agency will soon publish a decision in the next week or two.” (Attachment 2).

<sup>18</sup> NMFS, Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Oil and Gas Activities in Cook Inlet, Alaska, Notice; request for comments on modification of Letter of Authorization, 84 Fed. Reg. 41,957 (August 16, 2019).

<sup>19</sup> See NMFS, Notice; issuance of modified Letter of Authorization, Oct. 3, 2019, <https://s3.amazonaws.com/public-inspection.federalregister.gov/2019-21692.pdf>; NMFS, Notice; issuance of modified Letter of Authorization, 84 Fed. Reg. 53,119 (October 4, 2019); Year 1 modified LOA, available at <https://www.fisheries.noaa.gov/webdam/download/97570114>.

<sup>20</sup> 50 C.F.R. §§ 217.160-167.

<sup>21</sup> 50 C.F.R. § 217.164 (g)(3).

the regulations to ensure that “[i]f the complete EZ has not been visible for at least 30 minutes prior to the start of operations, ramp up must not commence.”<sup>22</sup> The regulations make no exception for nighttime operations. NMFS cannot permit via an LOA what is not permitted by the underlying take regulations, which provide the governing standards for Hilcorp’s operations. In fact, the October 4 notice admits as much when it states that “NMFS has issued a modified LOA... provided the mitigation, monitoring and reporting requirements of the rulemaking are incorporated.”<sup>23</sup> Furthermore, the revised LOA contains numerous conclusions that are not supported by best available science or even a rational basis, including those related to the effects of ramp ups on marine mammals<sup>24</sup> and the calculation, monitoring, and extrapolation of take at night. Nor does the LOA consider the recent death of beluga whales, and how that may impact the agency’s small numbers and negligible impact analysis under the MMPA. The LOA is unlawful and must be revoked. Additionally, we petition NMFS to revoke the incidental take regulations for new analyses based on the changed conditions of Hilcorp’s operations at night and the continued declining status of Cook Inlet beluga whales.

NMFS should be cutting no corners given the plight of Cook Inlet beluga whales and Hilcorp’s documented history of safety violations and accidents. According to the Alaska Oil and Gas Conservation Commission (“AOGCC”), Hilcorp has a documented pattern of safety violations and disregard for compliance with the law in Alaska. As documented by AOGCC, Hilcorp had more than two dozen violations over a 3.5-year period—so many that the agency concluded that “disregard for regulatory compliance is endemic to Hilcorp’s approach to its Alaska operations.”<sup>25</sup>

In addition to these actions and violations documented by AOGCC, the federal Pipeline and Hazardous Materials Safety Administration (“PHMSA”) has sent Hilcorp numerous warning letters for probable violations of pipeline safety regulations in Alaska since November 2015.<sup>26</sup> The probable violations include violations of reporting requirements, failure to institute adequate procedures to inspect its pipelines, and failure to conduct required inspections, among others.<sup>27</sup>

On top of these numerous safety violations, Hilcorp has had multiple leaks and spills in its current drilling operations in Alaska. For example, on February 7, 2017, Hilcorp reported a

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<sup>22</sup> *Id.* § 217.164 (i)(5).

<sup>23</sup> 84 Fed. Reg. at 53,122.

<sup>24</sup> *See, e.g.* Forney, K., B.L. Southall, E. Slooten, S. Dawson, A.J. Read, R.W. Baird, and R.L. Brownell, Jr., Nowhere to go: noise impact assessments for marine mammal populations with high site fidelity, *Endang Species Res* 32: 391–413, 2017.

<sup>25</sup> AOGCC, Decision and Order Re: Failure to Test BOPE After Use, Milne Point Unit I-03, PTD 1900920, Other Order 109, Docket No. OTH-15-029 at 3 (May 3, 2016); *see also* AOGCC, Decision and Order Re: Failure to Notify of Changes to an Approved Permit & Failure to Maintain a Safe Work Environment, Milne Point Unit J-08A, PTD 1991170, Docket No. OTH-15-025, Other Order 116 at 2-3 (Mar. 3, 2017); AOGCC, Decision and Order Re: Failure to Notify of Changes to an Approved Permit, Milne Point Unit J-01A, PTD 1991110, Docket No. OTH-15-030, Other Order 117 at 4 (Mar. 21, 2017).

<sup>26</sup> *See* PHMSA, Operator Information, Federal Inspection and Enforcement Data: Hilcorp Alaska, LLC, Enforcement Action Details (updated Sept. 5, 2017) (listing warning letters) [https://primis.phmsa.dot.gov/comm/reports/operator/OperatorIE\\_opid\\_32645.html?nocache=8279#\\_EnforcementActions\\_tab\\_2](https://primis.phmsa.dot.gov/comm/reports/operator/OperatorIE_opid_32645.html?nocache=8279#_EnforcementActions_tab_2).

<sup>27</sup> *Id.*

natural gas leak in Cook Inlet.<sup>28</sup> The source of the leak, which was 98.67 percent methane, was later identified as an 8-inch transmission pipeline, and a flow analysis conducted after Hilcorp discovered the leak revealed that the pipeline began leaking in late December 2016.<sup>29</sup> Hilcorp was unable to investigate or repair the leak for nearly four months due to broken ice, tidal flows, and limited daylight.<sup>30</sup> It is estimated that the pipeline leaked 193,000 (at its lowest leakage rate) to 325,000 (at its highest leakage rate) of cubic feet of natural gas every day until the leak was finally reported repaired on April 14, 2017.<sup>31</sup> Hilcorp also had multiple other incidents in Cook Inlet during 2017, including a spill of oil-based drilling mud from its Steelhead platform in the Trading Bay oil field,<sup>32</sup> an ongoing natural gas release from the Steelhead platform pipeline to shore,<sup>33</sup> and a crude oil spill from its Anna platform in the Upper Inlet near Granite Point.<sup>34</sup>

Hilcorp also had numerous accidents from its operations on the North Slope. For example, “in February 2015, Hilcorp spilled nearly 10,000 gallons of crude oil and produced water onto 40,000 square feet of arctic tundra and gravel pad. The spill resulted from a leak in the bottom of a pipeline from Hilcorp’s Milne Point Tract 14 production line.”<sup>35</sup>

Hilcorp’s safety and environmental problems are not limited to Alaska.<sup>36</sup> In July 2016, 4,200 gallons of crude oil reportedly spilled from a Hilcorp Energy pipeline near Lake Grande Ecaille, part of Barataria Bay in the Gulf of Mexico.<sup>37</sup> In March 2017, the Coast Guard responded to a natural gas and oil leak that spilled hundreds of gallons of oil from an abandoned well owned by Hilcorp Energy on the lower Mississippi River, according to the *Times-Picayune*.<sup>38</sup> Additionally, Hilcorp Energy is currently the defendant in a federal lawsuit in

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<sup>28</sup> PHMSA, In the Matter of Hilcorp Alaska, LLC, CPF No. 5-2017-0004S, Notice of Proposed Safety Order (Mar. 3, 2017).

<sup>29</sup> *Id.* at 2-4.

<sup>30</sup> *Id.* at 7.

<sup>31</sup> S. Shankman, *Natural Gas Leak in Cook Inlet Stopped, Effects on Marine Life Not Yet Known*, Inside Climate News (Apr. 15, 2017), <https://insideclimatenews.org/news/14042017/hilcorp-alaska-cook-inlet-temporary-fix-made-pipeline>; Alaska Department of Environmental Conservation, Hilcorp Natural Gas Leak from 8-inch Pipeline, Situation Report #1 (Feb. 15, 2017); Alaska Department of Environmental Conservation, Hilcorp Natural Gas Leak from 8-inch Pipeline, Situation Report #3 (Mar. 1, 2017); Alaska Department of Environmental Conservation, Hilcorp Natural Gas Leak from 8-inch Pipeline, Situation Report #4 (Mar. 14, 2017); Hilcorp Alaska, LLC, Middle Ground Shoal Gas Leak Sampling and Monitoring Plan, Mar. 2017.

<sup>32</sup> S. Cochran, *Hilcorp Reports Another Spill in Cook Inlet*, Alaska Public Media (Aug. 11, 2017), <http://www.alaskapublic.org/2017/08/11/hilcorp-reports-another-spill-in-cook-inlet/>.

<sup>33</sup> R. McChesney, *Hilcorp shuts down third pipeline in Cook Inlet*, Alaska Public Media (April 7, 2017), <https://www.alaskapublic.org/2017/04/07/hilcorp-shuts-down-third-pipeline-in-cook-inlet/>

<sup>34</sup> Alaska Department of Environmental Conservation, Hilcorp Anna Platform Crude Oil Line Leak, Situation Report (SITREP), 4th and Final, (May 7, 2017) [http://dec.alaska.gov/spar/ppr/response/sum\\_fy17/170401201/17239909101\\_Hilcorp\\_Anna\\_Platform\\_Crude\\_Oil\\_Line\\_Leak\\_SITREP4andFINAL.pdf](http://dec.alaska.gov/spar/ppr/response/sum_fy17/170401201/17239909101_Hilcorp_Anna_Platform_Crude_Oil_Line_Leak_SITREP4andFINAL.pdf).

<sup>35</sup> EPA, News Release, BP Exploration Alaska and Hilcorp Alaska Settle with EPA and State of Alaska for North Slope Oil Spills (July 14, 2016), <https://www.epa.gov/newsreleases/bp-exploration-alaska-and-hilcorp-alaska-settle-epa-and-state-alaska-north-slope-oil>.

<sup>36</sup> See, e.g., Good Jobs First, <https://violationtracker.goodjobsfirst.org/parent/hilcorp-energy>.

<sup>37</sup> M. Schleifstein, Coast Guard reports 4,200-gallon crude oil spill in Barataria Bay, *The Times-Picayune* (July 26, 2016) [http://www.nola.com/environment/index.ssf/2016/07/coast\\_guard\\_reports\\_4200-gallo.html](http://www.nola.com/environment/index.ssf/2016/07/coast_guard_reports_4200-gallo.html).

<sup>38</sup> M. Schleifstein, Oil, gas leaking from abandoned Hilcorp wellhead: Coast Guard, *The Times-Picayune* (Mar. 22, 2017), <http://www.nola.com/environment/index.ssf/2017/03/>

Louisiana brought by an oystermen’s association alleging the company unlawfully engaged in a process called “prop-washing,” in which boat engines churn waters, cutting channels into the seafloor, destroying oyster beds in the process.<sup>39</sup> And a scientific study has linked the company’s fracking operations in Ohio to multiple earthquakes.<sup>40</sup> These are a significant number of safety and environmental incidents in a short period of time.

### **III. NMFS Has the Authority, and the Duty, to Grant the Petitioned Action and Revoke Its Incidental Take Authorization and Regulations**

NMFS has more than ample authority under the MMPA and ESA to grant the petitioned action and revoke Hilcorp’s incidental take authorizations. Indeed, the MMPA not only vests NMFS with such authority, but mandates that NMFS do so here in order to protect critically imperiled Cook Inlet beluga whales and ensure the strict standards of the MMPA and ESA are met.

#### **A. The MMPA Vests NMFS with the Authority and Legal Obligation to Grant the Petitioned Action**

The MMPA provides NMFS with both the authority and the duty to revoke Hilcorp’s take authorizations. The MMPA’s “primary goal” is to “protect[] marine mammals” and “[t]he interest in maintaining healthy populations of marine mammals comes first” under the statute. *Kokechik Fishermen’s Ass’n v. Sec’y of Comm.*, 839 F.2d 795, 800, 802 (D.C. Cir. 1988). Specifically, in enacting the MMPA, Congress declared that marine mammals “have proven themselves to be resources of great international significance, esthetic and recreational as well as economic” and that they “should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintain the health and stability of the marine ecosystem.” *Id.* at § 1361(6). The MMPA seeks to maintain stable, functioning marine ecosystems, to secure and restore healthy marine mammal populations, *id.* § 1361(2), and to protect individual animals from harm. *See e.g., id.* §§ 1362(18)(A) (definition of “harassment” includes acts that affect “a marine mammal or marine mammal stock in the wild”) (emphasis added); 1372(b) (requiring that authorized take of a marine mammal be humane); *see also Animal Welfare Institute v. Kreps*, 561 F.2d 1002, 1007 (D.C. Cir. 1977) (“the MMPA is an unusual statute . . . motivated by considerations of humaneness towards animals, who are uniquely incapable of defending their own interests”).

To achieve these goals, the MMPA establishes a “moratorium on the taking” of marine mammals, 16 U.S.C. § 1371(a), and specifically prohibits “any person . . . or any vessel or other conveyance subject to the jurisdiction of the United States to take any marine mammal on the high seas”; “any person or vessel or other conveyance to take any marine mammal in waters or

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oil\_gas\_leaking\_from\_abandoned.html.

<sup>39</sup> *See, e.g.,* J. Dougherty, *Oysters vs. Oil: Hilcorp’s Bayou Battle*, The Revelator (May 24, 2017) <http://therevelator.org/oysters-oil-hilcorp-bayou-battle/>.

<sup>40</sup> *See, e.g.,* D. Hopey, *Study: Fracking Caused Earthquakes in Existing Faults in Ohio*, Pittsburgh Post-Gazette (Jan. 5, 2015) <http://www.post-gazette.com/powersource/consumers-powersource/2015/01/05/Fracking-caused-earthquakes-in-existing-faults-new-study-says/stories/201501050144>.

on lands under the jurisdiction of the United States”; and any person from “us[ing] any port, harbor, or other place under the jurisdiction of the United States to take or import marine mammals or marine mammal products.” *Id.* § 1372(a).

The statute broadly defines take to mean “to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.” *Id.* § 1362(13) (emphasis added). Harassment, in turn, is defined to include any acts that “has the potential to injure a marine mammal” or disrupt behavioral patterns, including migration, breathing, breeding, or feeding. *Id.* § 1362(13), (18)(A); *see also* 50 C.F.R. § 216.3 (further defining “take” to include “the restraint or detention of a marine mammal, no matter how temporary” and any act “which results in disturbing or molesting a marine mammal”). The take prohibitions apply not only to an intentional taking but also “a non-intentional or accidental act that results from, but is not the purpose of, carrying out an otherwise lawful action.” 50 C.F.R. § 229.2.

The MMPA contains limited exceptions to the otherwise broad prohibitions on the take of marine mammals. As relevant here, NMFS can issue a regulation and letter of authorization to permit takes incidental to a specified activity (other than commercial fishing) for a period of not more than five years. 16 U.S.C. § 1371(a)(5)(A). However, the agency may authorize only the take of “small numbers” of marine mammals, and only if it finds that the take “will have a negligible impact” on the marine mammal species to be taken. *Id.* § 1371(a)(5)(A)(i)(I). Moreover, if the agency authorizes take, it must also prescribe “means of effecting the least practicable adverse impact” on [the affected marine mammal species] and its habitat” and reporting and monitoring requirements. *Id.* § 1371(a)(5)(A)(i)(II)(aa), (bb).

In this way, the MMPA authorization is more than an exemption from liability for take—it includes mandatory mitigation measures that limit the impact of the take to the species. Indeed, as NMFS itself previously recognized, “the congressional choice of imposing an additional regulatory process before authorizing the incidental taking of listed marine mammals reflected a concern for the need for more safeguards.” 54 Fed. Reg. 40,338, 40,341 (Sept. 29, 1989).

In keeping with the overall purposes of the MMPA, its broad prohibition on take, and the limited, carefully prescribed exceptions on that prohibition, the MMPA also requires NMFS to revoke a previously issued incidental take authorization in certain situations. For example, the MMPA states that NMFS “shall withdraw, or suspend for a time certain” regulations issued under section 101(a)(5)(A) if, after opportunity for notice and comment, NMFS finds that the permitted taking “pursuant to one or more activities within one or more regions is having, or may have, more than a negligible impact on the species or stock concerned.” 16 U.S.C. § 1371(a)(5)(B)(ii). The requirement of notice and comment does not apply, however, if NMFS “determines that an emergency exists which poses a significant risk to the well-being of the species or stock concerned.” *Id.* § 1371(a)(5)(C)(i). Additionally, the MMPA requires that NMFS “modify, suspend, or revoke” one-year authorizations issued pursuant to section 101(a)(5)(D) when the take authorization could have more than a negligible impact on the species to be taken, or the permittee is not complying with applicable mitigation measures, reporting, monitoring, or other requirements. *Id.* § 1371(a)(5)(D)(iv).

The conditions for revoking the regulations and LOA are met here. First, the information described above shows that NMFS' LOA and Hilcorp's activities are not complying with NMFS's incidental take regulations. Second, NMFS' failure to enforce existing regulatory requirements intended to mitigate the impact of its activities on Cook Inlet belugas and other marine mammals means that Hilcorp's seismic airgun blasting, and the other oil and gas activities authorized under the regulations, may have more than a negligible impact on these animals. This is particularly true considering that the regulations NMFS issued in July 2019 were not sufficiently protective to begin with; the agency failed to consider the full scope of takes that would occur under Hilcorp's oil and gas activities in the Inlet; and the agency failed to properly consider the cumulative impacts of this new, authorized take in light of all the other stressors currently threatening the species' existence.

Considering the critically endangered status of Cook Inlet beluga whales, the recent loss of over one percent of the population, and Hilcorp's ongoing seismic airgun blasting without NMFS' full compliance with its own rule poses a significant risk to the well-being of the species. Accordingly, NMFS can—and indeed must—revoke the incidental take regulations and LOA immediately.

#### B. The ESA Vests NMFS With the Authority and Duty to Grant the Petitioned Action

NMFS also has the authority and the obligation to grant the petitioned action under the ESA. In enacting the ESA, Congress recognized that certain species “have been so depleted in numbers that they are in danger of or threatened with extinction.” 16 U.S.C. § 1531(a)(2). Accordingly, a primary purpose of the ESA is “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, [and] to provide a program for the conservation of such . . . species.” *Id.* § 1531(b).

To reach these goals, the ESA provides several important protections to listed species. For example, section 9 of the ESA prohibits any person, including any federal agency, from “taking” any endangered species without proper authorization through a valid incidental take permit. *Id.* § 1538(a)(1)(B). The statute broadly defines “take” as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” *Id.* § 1532(19). Additionally, section 2(c) of the ESA establishes that it is the “policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes [of the ESA].” *Id.* § 1531(c)(1).

Similarly, section 7(a)(1) mandates that all federal agencies, “utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species.” 16 U.S.C. § 1536(a)(1). The ESA defines “conserve” as “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.” *Id.* § 1532(3). Further, section 7(a)(2) of the ESA requires federal agencies to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or result in the destruction or adverse modification of [the critical] habitat of such species.” 16 U.S.C. §

1536(a)(2); 50 C.F.R. § 402.14(a). A likelihood of jeopardy exists when “an action . . . reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02. As the Supreme Court has stated, section 7 “substantially amplifie[s] the obligation of [federal agencies] to take steps within their power to carry out the purposes of” the ESA. *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 183-84 (1978) (citing 119 Cong. Rec. 42913 (1973)).

These provisions clearly provide NMFS with more than ample authority to revoke Hilcorp’s take authorizations, particularly considering the critically imperiled status of Cook Inlet beluga whales. Indeed, without revoking the authorizations, NMFS cannot ensure that its actions will not jeopardize Cook Inlet belugas, as required by the ESA. And like the MMPA, the ESA also permits NMFS to take action to protect endangered species without notice and comment “in regard to any emergency posing a significant risk to the well-being of any species.” 16 U.S.C. § 1533(b)(7).

#### **IV. Conclusion**

NMFS must grant the petitioned action and revoke the LOA and regulations authorizing Hilcorp to take marine mammals incidental to its oil and gas operations in Cook Inlet. Failure to do so would violate the MMPA and ESA and place critically endangered Cook Inlet beluga whales at yet greater risk of extinction.

Sincerely,

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