

ESA Compliance in the Climate Change Era

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History of ESA Listings in Alaska



Three Phases of ESA Listings in Alaska

- Pre-1973 ESA listings
- Non-climate change related listings (1988 - 2008)
- Climate change listings (2008 - ?)



Phase One

Pre-ESA of 1973

- Whales – endangered (June 2, 1970): bowhead, fin, humpback
- Short-tailed albatross – endangered (June 2, 1970)
- Leatherback sea turtle – endangered (June 2, 1970), critical habitat (March 23, 1999 – not Alaska, but subject to September 26, 2007 petition to revise to include Alaska waters)

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- Eskimo curlew – endangered (March 11, 1967) (regarded as extinct)
- Aleutian goose – endangered (March 11, 1967; delisted March 20, 2001)



Phase Two

Non-climate change listings

- Aleutian shield fern – endangered (February 17, 1988)
- Steller sea lion – eastern and western populations – threatened (April 1990); western population – endangered (June 1997); critical habitat (August 1993, March 1999)
- Spectacled eider – threatened (May 10, 1993); critical habitat (February 6, 2001)
- Steller's eider – threatened (June 11, 1997); critical habitat (February 2, 2001)
- Northern sea otter – threatened (August 9, 2005)
- Black-footed albatross – 90-day finding (October 9, 2007)
- Cook Inlet beluga – endangered (October 22, 2008)



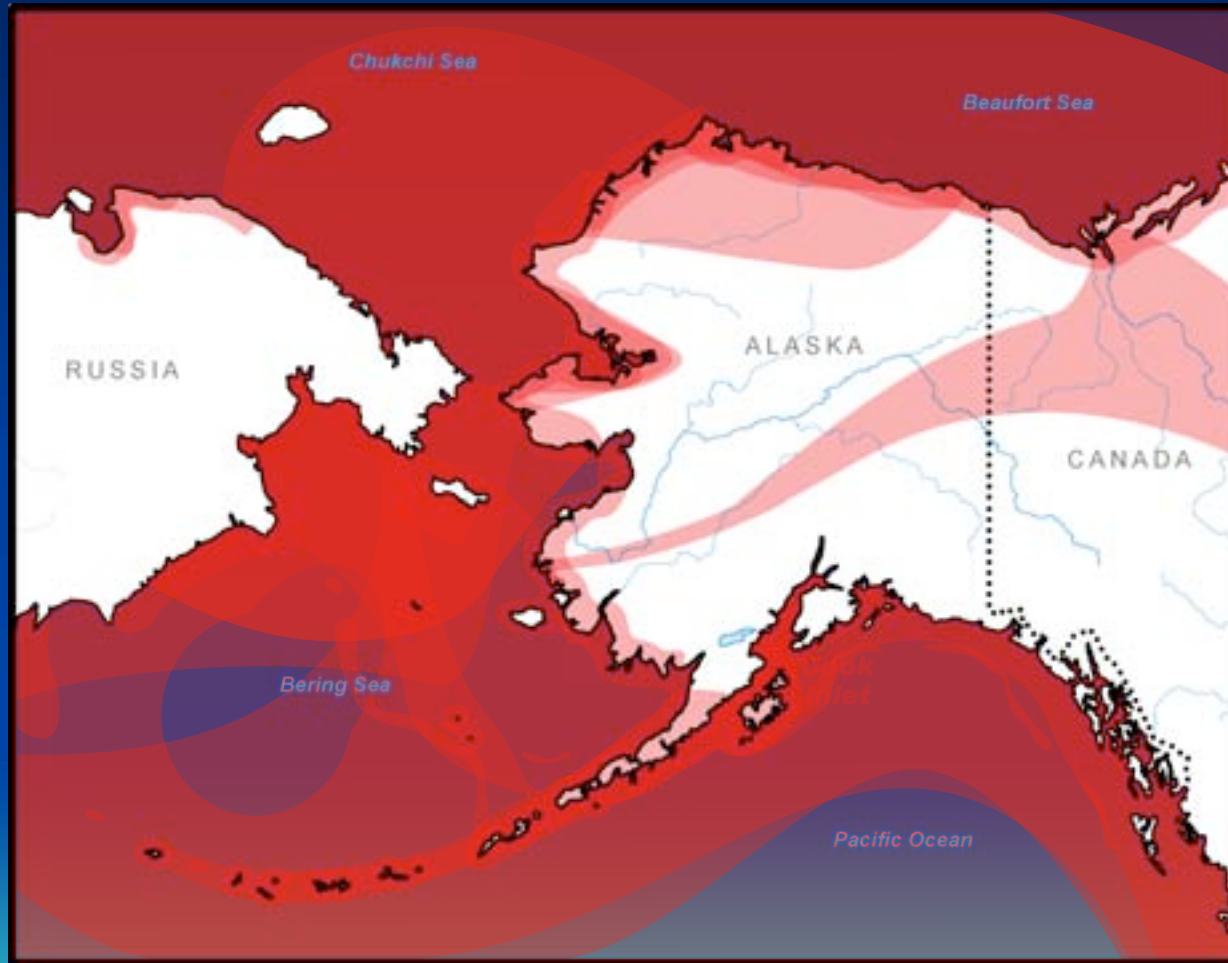
Phase Three

Climate Change-Related Listings and Petitions

- Kittlitz's murrelet (December 6, 2007) – candidate species with proposed elevation of listing priority from 5 to 2
- Pacific walrus – petition submitted (February 7, 2008)
- Ribbon seal – 90-day finding on petition (March 28, 2008)
- Polar Bear (May 15, 2008) – threatened
- Ringed, bearded and spotted seals – 90-day finding on petition (September 4, 2008)
- Yellow-billed loon – petition submitted (2004) – listing decision due mid-February 2009



Compilation map *(All Species)*



Climate Change and the ESA

Questions

- Is the ESA adequately equipped to deal with the underlying cause of climate change, where the causal factors are dispersed, cumulative, and relate to species-specific problems in ways that are difficult to measure and evaluate?
- Regardless of whether the ESA is designed to address climate change effectively, will its current provisions be applied for this purpose?
- If so, how will the ESA respond for purposes of: listing/critical habitat, recovery planning, consultation process, jeopardy/adverse modification prohibition, take prohibition?



Listing

Section 4(a)(1) requires a determination of whether a species (which includes subspecies and distinct populations) is endangered or threatened.

Endangered means "is in danger of extinction throughout all or a significant portion of its range."

Threatened means "likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range."



Procedures for Listing

- Action by FWS or NMFS
- Petition by other party
- Subject to specific time frames



Five Factors for Listing

- Present or threatened habitat loss
- Overutilization of species
- Disease or predation
- Inadequacy of regulatory mechanisms
- Other natural or manmade factors

Note: Decisions must be based on best scientific and commercial data available. Economic impacts not relevant.



Critical Habitat

- Specific areas within the geographical area occupied by the species which
 - Contain physical and biological features essential to the conservation of the species
 - May require special management considerations or protection
- Specific areas outside of the area occupied by the species which are essential to the conservation of the species



Factors for Critical Habitat Designation

- Prudent and determinable
- Essential to conservation (recovery)
- May require special management
- Areas may be excluded if adverse consequences outweigh benefits of listing

Note: Economics considered



Take Prohibition

- Section 9(a)(1) prohibits take of endangered species. Take of threatened species depends on regulation.
- "Take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect."
- "Harm" means any modification of habitat that results in actual death or injury of species members by "significantly impairing behavioral patterns, including breeding, feeding, or sheltering."
- Under section 4(d), for threatened species, the Secretary may specify the nature or level of take that applies.



Consultation

- Section 7(a)(2) requires action agencies "in consultation with the Secretary" to insure that any federal action is not likely to jeopardize the continued existence of a species or result in the adverse modification of critical habitat.
- "Consultation" is the process by which jeopardy or adverse modification is determined, resulting in a biological opinion.
- Effects considered are direct, indirect, cumulative (the effects of future State or private activities, not involving federal actions, that are reasonably certain to occur in the action area).
- Previously completed consultations are required to be "reinitiated" for significant new information, take exceeding authorized levels, significant changes to the action, or new listings or critical habitat. The action agency must retain discretionary control and undertake affirmative action.



Jeopardy / Adverse Modification of Critical Habitat

- Once climate change is considered in consultation, what will the direct, indirect, or cumulative effects mean for the jeopardy/adverse modification prohibitions?
 - Jeopardy means, under 50 C.F.R. §402.02, "to engage in an action that reasonably could 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 reproduction, number, or distribution of that species."
 - Adverse modification has the same regulatory definition, but it has been invalidated by two courts of appeal and is now generally equated with a "recovery" standard.



August 2008 Proposed Consultation Regulation

- Shifts certain consultation duties to action agencies (e.g., determination of not likely to adversely affect, terminating consultation).
- Allows action agencies to group together "similar actions" for consultation purposes.
- Biological assessments may consist of information and documents prepared for other purposes.
- Confirms that "cumulative effects" under ESA are narrower than under NEPA (e.g., *excludes future federal actions* in same action area).
- Sets new causation standard for establishing "indirect effects" (e.g., causation must be "essential" and "reasonably certain" that the species effect will occur based on "clear and substantial information."



ESA, Climate Change and Alaska

What Lies Ahead

- The ESA is today an integral part of permitting in Alaska and will continue to increase in importance.
- Climate change will be a new "driver" for ESA application in Alaska.
- Alaska will be a key litigation battleground for defining how the ESA applies to climate change.
- New species are likely to be listed in Alaska because of climate change.
- New critical habitat is likely to be designated.



- A legal fight is likely over how climate change fits into consultation.
- A legal fight is likely over whether the production of fossil fuels and emissions of greenhouse gases constitute take or cause jeopardy and adverse modification.
- Jeopardy, adverse modification, and take will be more likely to be alleged from activities previously not an ESA problem as species alter their behavior, human activities change, or habitat diminishes as a result of climate change.

