

# The Endangered Species Act: Species Listings and Implications for Development in Alaska

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# Species Listings: Implications and Opportunities to Engage

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- Listings and Petitions to Watch:
  - Polar Bear
  - Beluga Whale
  - Walrus
  - Seals
- Opportunities to Engage
- Implications for Existing Projects, Development



# Agency Roles

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- U.S. Fish & Wildlife Service
  - terrestrial and freshwater species, plants (polar bear, walrus)
- National Marine Fisheries Service
  - marine species
- Charged with listing species, enforcing the “take” prohibition, and consulting with other federal agencies

# Key Definitions

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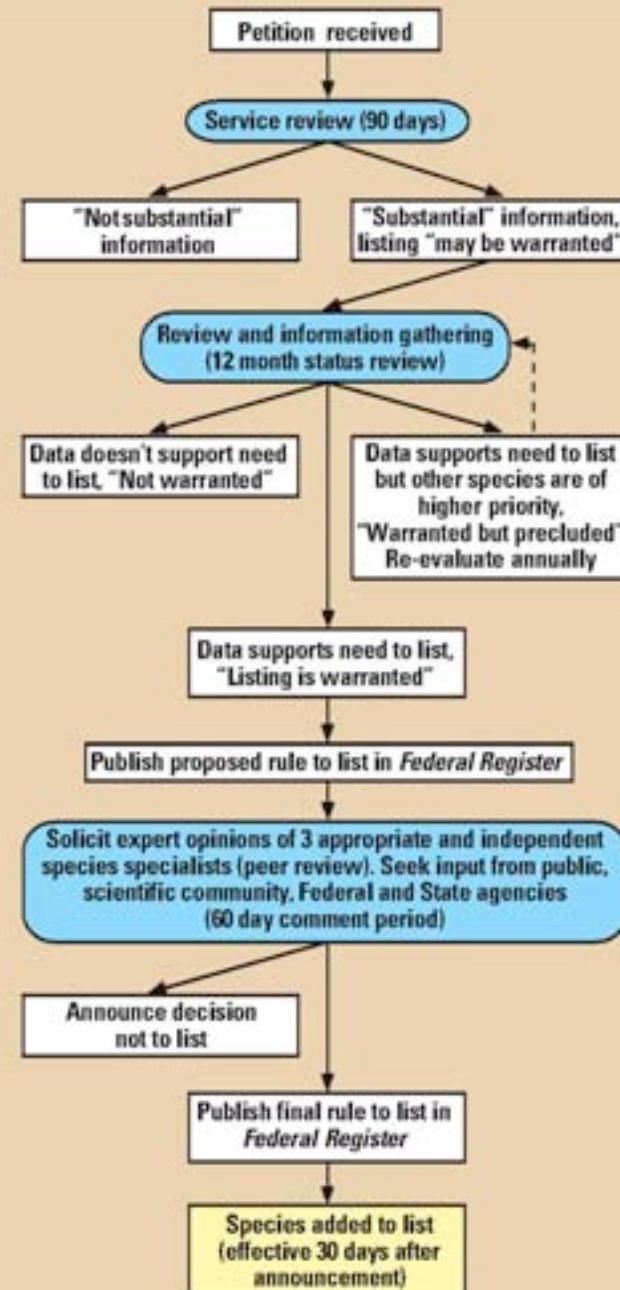
- Endangered
  - Any species in danger of extinction throughout all or a significant portion of its range
  - “Take” automatically prohibited
- Threatened
  - Any species likely to become endangered in the foreseeable future
  - Take can be prohibited through 4(d) rule
    - Section 4(d) allows rules for conservation of species
    - 4(d) rules extend take prohibition, but may include “limits”
- Critical Habitat
  - Specific geographic areas with physical and biological features essential to the conservation of a listed species

# ESA Listing Steps

- Petition
- 90-day finding on Petition
- Species status review  
–12-month finding
- Proposed listing
- Final listing

Later:

- Designation of  
critical habitat
- Recovery plan



# ESA Listing Criteria

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1. Present or threatened destruction, modification, or curtailment of species range or habitat
2. Over-use for commercial, recreational, scientific, or educational purposes
3. Disease or predation
4. Inadequacy of existing regulatory mechanisms
5. Other natural or man-made factors affecting continued existence of species

# Critical Habitat

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- Use best scientific data to identify areas essential to conservation of species, and that may require special management consideration or protection
- Economic impact analysis required; areas may be excluded from protection based upon that analysis
- Notice and public comment on proposed designation
- Designation does not create a park or preserve, but does complicate activities within the habitat area

# Polar bears

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- Threatened (May 15, 2008)
  - FWS cites decrease in sea ice
- 4(d) Rule (Interim final rule)
  - Applies take prohibition
  - Does not apply to activities in compliance with MMPA
  - Does not apply to activities outside of Alaska (*i.e.*, GHG emissions)
- Lawsuits
  - Enviro. groups: “threatened” status and 4(d) rule (N.D. Cal.)
  - State challenging listing (D.C.)
  - Industry groups seeking geographic expansion of 4(d) rule (D.C.)
  - Safari Club challenging import ban on sport-hunted trophies (D.C.)
- **Today!** Multidistrict Litigation Panel hearing venue arguments
- Next up:
  - Critical Habitat
  - Recovery Planning
  - Final 4(d) rule?
  - Redefining “indirect” effect



# Cook Inlet beluga whale

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- Endangered (October 22, 2008)
  - (No 4(d) rule)
- October listing cites failure to recover since harvest ended
- Still to come from NMFS:
  - Critical Habitat - within the year
  - Recovery Plan (see October Conservation Plan)

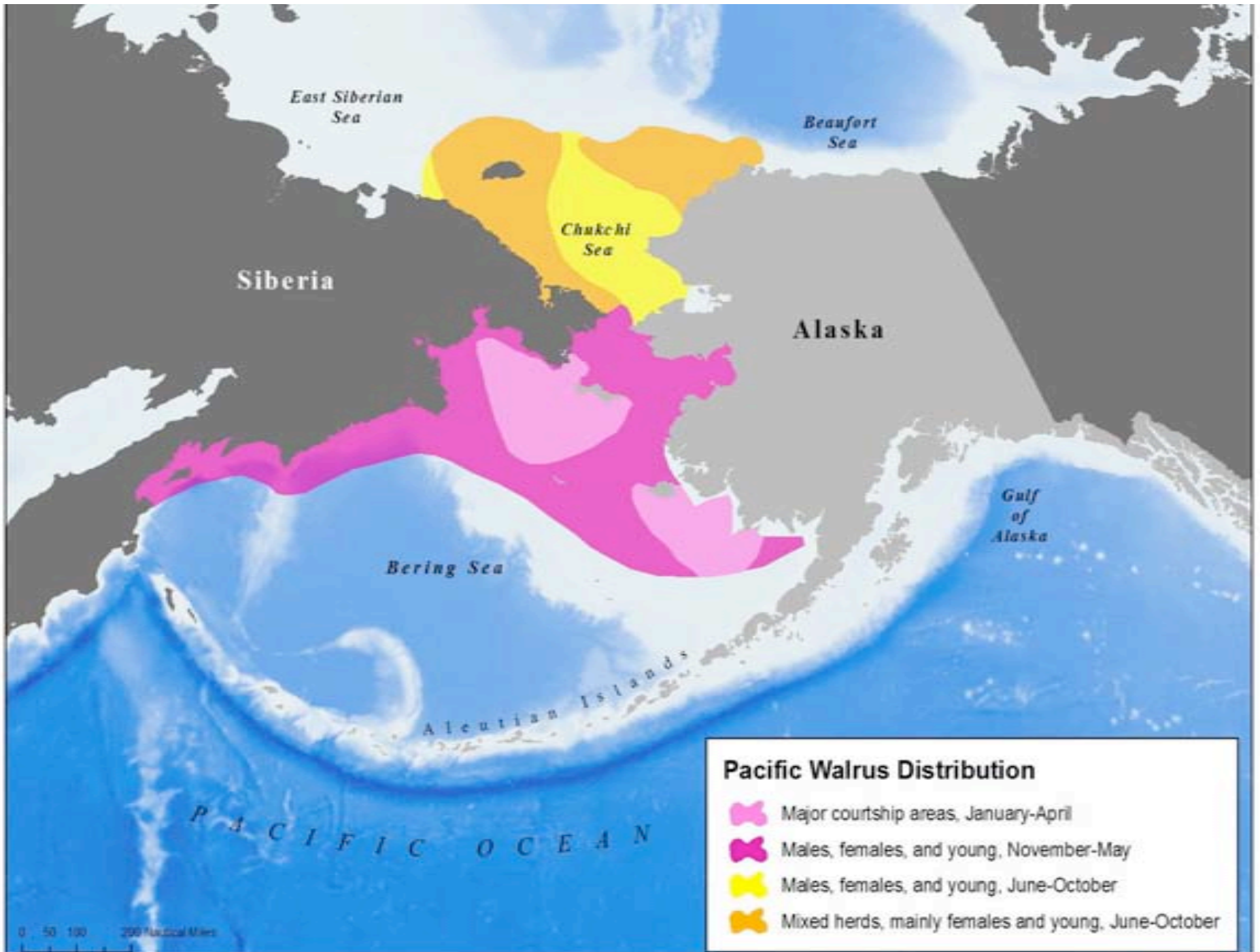


# Pacific walrus

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- CBD petition to list (Feb 2008)
- FWS 90-day finding delayed for funding
- CBD intent to sue (May 2008)
- FWS has funding, expect finding in early 2009





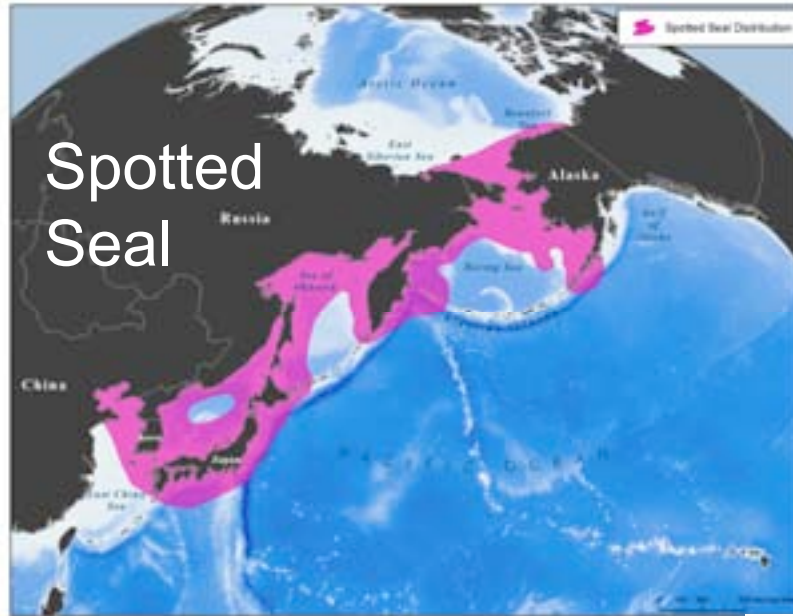
# Seals

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- Petition to list:
  - ribbon seal (March 2008)
  - ringed, bearded and spotted seals (May 2008)
- NMFS 90-day findings in May/Sept
  - listing may be warranted
  - 12-month status reviews underway
- Finding cites climate change, sea ice recession
- Species is currently healthy



Spotted Seal



Ringed Seal



Ribbon Seal

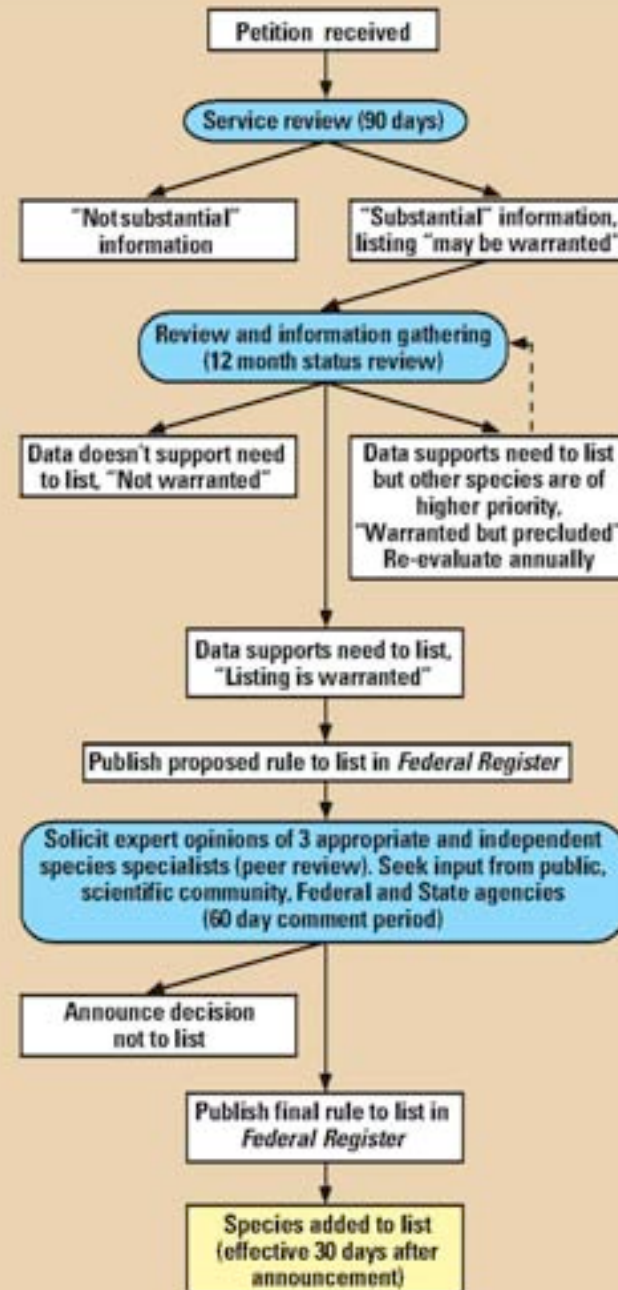


Bearded Seal



# Opportunities to Engage

- Before petition
- After petition
  - Walrus
- During 12-month status review
  - Seals
- On proposed listing
- On proposed designation of critical habitat
  - Cook Inlet beluga whales
- On draft recovery plan



# What else can you be doing?

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- Document effects to species under current regulatory structure
  - Species interactions?
  - Increased sightings?
  - Help close information gap
- Assess whether your activities are likely to “take”
- Pro-actively pursue MMPA authorizations and ESA section 7 consultations

# Is the ESA being used to advance an anti-development agenda in Alaska?

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- Yes.
- You can expect:
  - More petitions, listings and critical habitat proposals where you operate or hope to operate
  - Section 7 consultations and BiOps with more stringent terms and conditions
  - More lawsuits challenging your project authorizations
  - Agency enforcement actions to demonstrate attentiveness
  - Agency staff expecting more up-front mitigation
  - Lawsuits challenging activities based upon adverse impacts to critical habitat
- There is a path through this -
  - Think ahead, develop science
  - Proactively engage in listings
  - Be strategic about getting ESA and MMPA coverage

# What is your plan?

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How, when, and where are you engaged?

What resources are you devoting to these issues?

