



# Endangered Species Act Alaska Update

Alaska's Efforts to Reform the ESA  
November 15, 2011

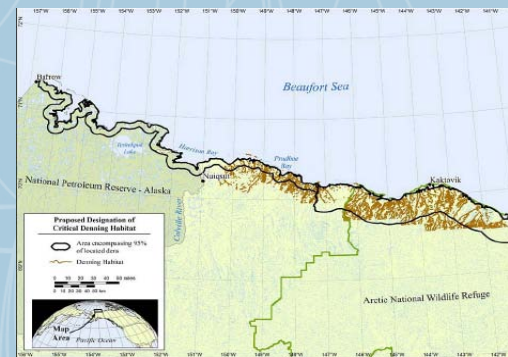
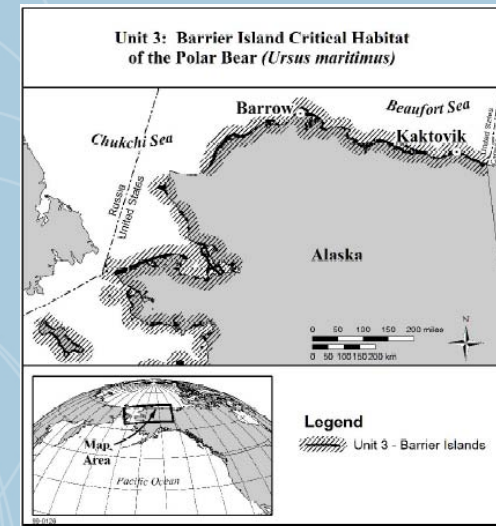
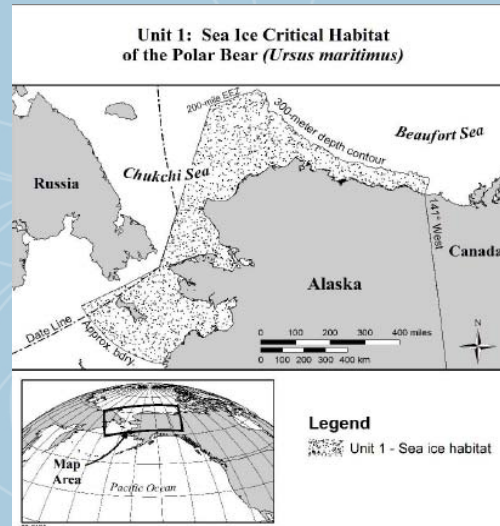
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# Endangered Species Act Update

- Climate change-based listings, and related critical habitat designations, for currently abundant arctic species, pose new resource use challenges
- The ESA regulatory process, particularly as interrelated with NEPA and MMPA regulatory process, poses important schedule discipline and substantive legal challenges
- Change and uncertainty, conflicting and competing priorities, and new listings and critical habitat designations will continue to be confounding factors

# Polar Bear Critical Habitat

- Dec. 7, 2010 (75 FR 76086)
- 187,000 square miles
  - Sea ice habitat
  - Terrestrial denning habitat
  - Barrier Island habitat
- Service admits no conservation benefit
  - ESA and MMPA adequately protective
  - FWS will not use to regulate GHG emissions
- Service recognized O&G activities are not a threat



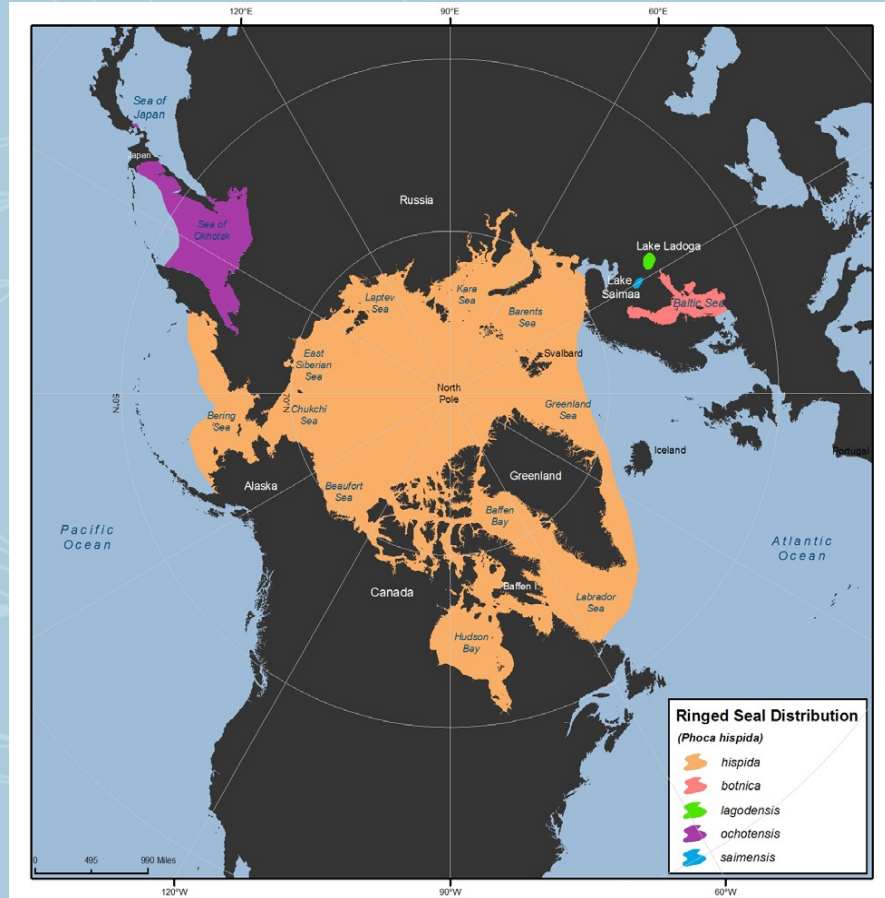
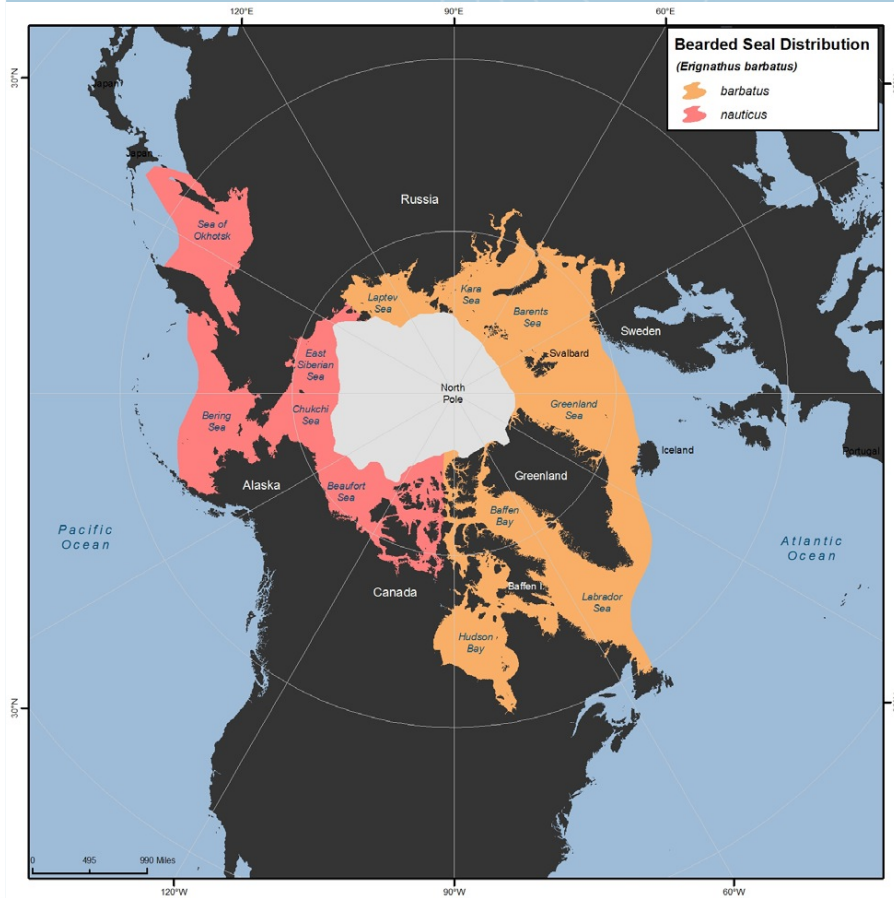
# Cook Inlet Beluga Whale Critical Habitat (proposed)

- Nearshore foraging and calving (Area 1)
- Near and offshore feeding and transit (Area 2)
- Economic analysis estimates under \$600K in impacts
- Underestimates costs, delays, regional impact

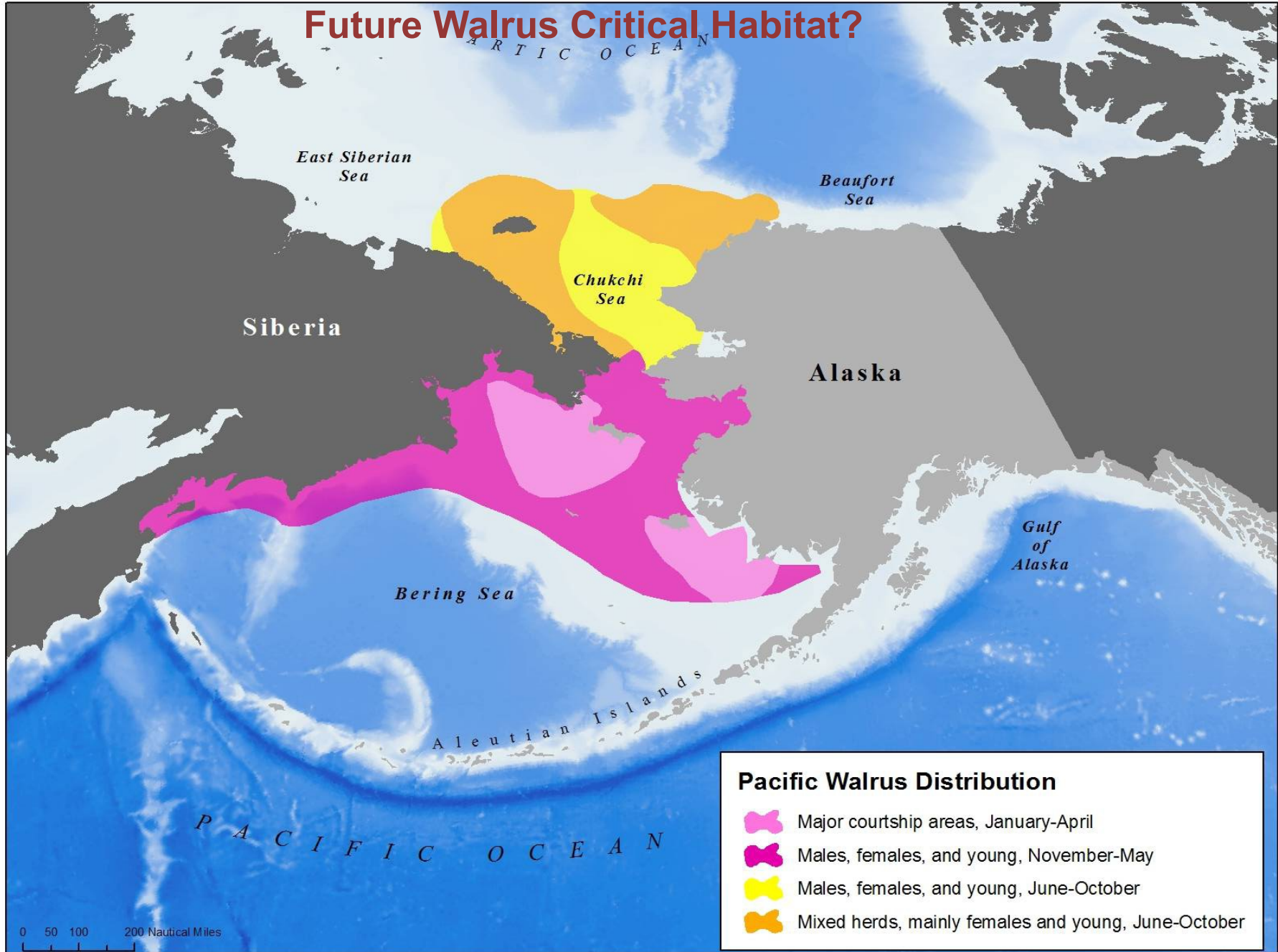


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# Potential Bearded & Ringed Seal Habitat



# Future Walrus Critical Habitat?



# ESA Litigation

- *In re Polar Bear ESA Listing and 4(d) Rule Litigation*, 2011 WL 2601604 (D.D.C. June 30, 2011) (polar bear ESA listing sustained (appeal filed))
- *In re Polar Bear ESA Listing and 4(d) Rule Litigation*, 2011 WL 5022771 (Oct. 17, 2011) (polar bear 4(d) rule sustained on ESA and APA grounds, but remanded for NEPA)
- *Center for Biological Diversity v. Salazar*, (D. Alaska Jan. 13, 2010), appeal docketed, No. 10-35123 (9<sup>th</sup> Cir.) (Polar bear incidental take regulations for oil and gas activities sustained against NEPA, ESA and MMPA claims; appeal pending)

# And More ESA Litigation

- *Center for Biological Diversity v. Lubchenco*, 758 F. Supp. 2d 945 (N.D.Cal. 2010) (ribbon seal not warranted decision sustained)
- *Alaska Oil and Gas Association v. Salazar* – (Case No. 3:11-cv-00025 RRB)(3 consolidated cases challenging the U.S. Fish & Wildlife Service’s designation of polar bear critical habitat; brought by the State of Alaska, 11 Native corporations and groups + North Slope Borough, Alaska Oil and Gas Association, and the American Petroleum Institute)



# MMPA/ESA Interface

- The MMPA provides a workable and lawful means of rationalizing both conservation of protected species and conduct of commercial/industrial activities
- MMPA authorizations are not required; however, more marine mammals are being ESA listed
- ESA “take” authorization of listed marine mammals cannot be obtained without MMPA “take” authorization (*i.e.*, without a negligible impact determination)
- ESA 4(d) rules provide mechanism to defer to MMPA for threatened species (e.g., polar bear 4(d) rule) but NMFS may be reluctant to do so

# ESA Listings - Alaska

- 8 marine mammals
  - Polar bear
  - Northern sea otter (DPS)
  - Steller sea lion (2 DPSs)
  - Bowhead whale
  - Fin whale
  - Humpback whale
  - Cook Inlet beluga whale (DPS)
- 4 birds
  - Short-tailed albatross
  - Spectacled eider
  - Steller's eider (DPS)
  - Eskimo curlew (extirpated)
- 1 terrestrial mammal
  - Canadian Lynx
- 1 plant
  - Aleutian shield fern
- Others (uncommon)
  - Leatherback sea turtle
  - Blue whale
  - North Pacific right whale
  - Sei whale
  - Loggerhead sea turtle
  - Green sea turtle
  - Sperm whale
- 3 candidate species
  - Pacific walrus
  - Kittlitz's murrelet
  - Yellow-billed loon
- 2 Proposed species
  - Ringed seal
  - Bearded seal

# Resource Development Challenges - 2012

- eNGO initiatives will continue to proliferate and to complicate Alaska resource development, but their strategies will evolve
- Every significant federal permitting decision, including project-specific decisions, are likely to be challenged
- ESA will continue to be a primary legal battleground (also NEPA, MMPA, CAA and CWA)
- Responsible federal officials will not be nimble in anticipating and responding to these circumstances
- Persistence will begin to prevail in 2012

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# Strategies for Success

- Be engaged – denial is not a successful business or legal strategy
- Schedule time for process and uncertainty
- Data and published science is power
- Where possible, build coalitions of government, industry, Native and other interests
- Do not expect to settle or compromise with eNGOs

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