

# The Polar Bear Story

An Endangered Species Act Primer  
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**Jeff Leppo**  
Stoel Rives LLP



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## Polar Bear Listing – Key Agency Decisions

- ESA listing decision (threatened) – 73 Fed. Reg. 2812 (May 15, 2008)
- Interim special 4(d) rule – 73 Fed. Reg. 28306 (May 15, 2008)
- Final special 4(d) rule – 73 Fed. Reg. 76249 (Dec. 16, 2008)
- Proposed designation of critical habitat – 74 Fed. Reg. 56058 (Oc. 29, 2009)



# Polar Bear Listing – Agency Findings

1. Polar bears are a sea ice dependent species.
2. The link between sea ice reduction and global climate change has been established.
3. Reduction in sea ice is occurring now and is likely to continue to occur within the foreseeable future (defined as 45 years).
4. The link between sea ice reduction and polar bear population reduction has been established.
5. The impacts on polar bear populations will vary, but all populations are likely to be adversely affected within the foreseeable future.
6. The rate and the magnitude of the predicted changes in sea ice will make adaptation by polar bears unrealistic.
7. There are no currently known regulatory mechanisms that directly and effectively address reduction in sea ice habitat.



# Polar Bear Listing Precedents

- The first ESA listing of a species in advance of any observed decline in abundance or distribution
- The first ESA listing directly premised upon climate change
- The first agency regulatory decision finding an unqualified link between climate change and GHG emissions
- Proposed critical habitat is unprecedented in size (larger than the State of California)



## Regulatory Dilemma: Indirect Regulation of GHG Emissions Through the ESA

“While the legal standards under the ESA compel me to list the polar bear as threatened, I want to make clear that this listing will not stop global climate change or prevent any sea ice from melting. Any real solution requires action by all major economies for it to be effective. That is why I am taking administrative and regulatory action to make certain the ESA isn’t abused to make global warming policies.

.....

“Listing the polar bear as threatened can reduce avoidable losses of polar bears. But it should not open the door to use of the ESA to regulate greenhouse gas emissions from automobiles, power plants, and other sources. That would be a wholly inappropriate use of the ESA law. The ESA is not the right tool to set U.S. climate policy.”

**U.S. Department of Interior Secretary Kempthorne**

**May 14, 2008**



## Section 7 – Consultation Guidance

“[W]here the effect at issue is climate change in the form of increased temperatures, a proposed action that will involve the emission of GHG cannot pass the ‘may effect’ test [of 50 C.F.R. § 402.14(a)] and is not subject to consultation under the ESA and its implementing regulations.” (DOI Solicitor 2008)



# Section 9 - Polar Bear 4(d) Rule

- 50 C.F.R. § 17.40(q)
- The take prohibitions of the ESA do not apply to activities conducted in compliance with the Marine Mammal Protection Act (MMPA)
- The take prohibitions of the ESA do not apply to activities conducted in compliance with the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)
- The take prohibitions of the ESA do not apply to any activities conducted outside of those portions of existing polar bear habitat located within U.S. jurisdiction





## ***In re Polar Bear Endangered Species Act Listing and § 4(d) Rule Litigation***, Misc. Action No. 08-764 (EGS)(D.D.C.)

- Listing claims: the polar bear should not be listed under the ESA, and the polar bear should be listed under the more dire category of endangered.
- 4(d) claims: the 4(d) rule should be invalidated because it violates the ESA, NEPA and the APA, and the “Alaska gap” in the 4(d) rule is arbitrary.
- Trophy import claims: the listing decision should not be a bar to the import by hunters of polar bear trophies lawfully taken in Canada.
- Critical habitat claim (settled): FWS must designate critical habitat by June 30, 2010.
- MMPA claim (settled): FWS must adopt guidelines for the safe deterrence of polar bears.



# Interim Court Decision

“The term ‘endangered species’ means any species which is in danger of extinction throughout all or a significant portion of its range[.]”

Endangered Species Act, 16 U.S.C. § 1532(6).

“The federal defendants contend that, as a matter of law, an ‘endangered species’ must be in imminent danger of extinction. The Court rejects the federal defendants’ erroneous conclusion that an imminence requirement is mandated by the plain meaning of the statute. Because the federal defendants failed to acknowledge ambiguities in the definition of an endangered species, . . . the Court must remand the Listing Rule to the agency to treat the statutory language as ambiguous.”

*In re Polar Bear ESA Listing and 4(d) Rule Litigation,*  
Judge Sullivan (November 4, 2010)



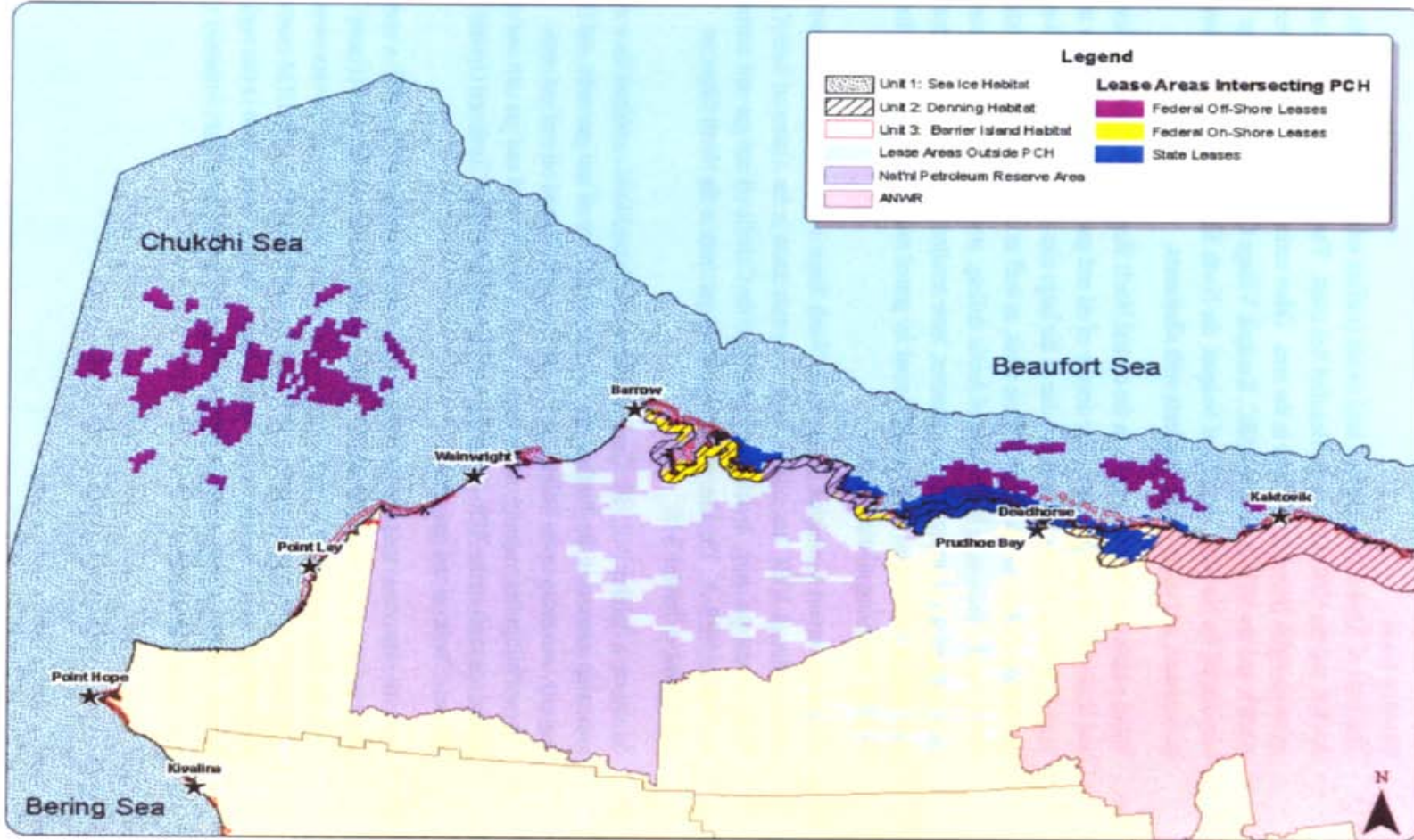
# Critical Habitat

“The term ‘critical habitat’ for a threatened or endangered species means – (i) the specific areas within the geographical area occupied by the species, at the time it is listed . . . on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection[.]”

Endangered Species Act, 16 U.S.C. § 1532(5)(A)(i)

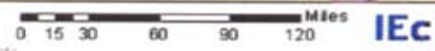


**EXHIBIT 3-12 EXISTING FEDERAL AND STATE OIL AND GAS LEASES WITHIN PROPOSED CRITICAL HABITAT**



Sources:

1. US Fish and Wildlife Service, Field Office; 2. U.S. Minerals Management Service; 3. U.S. Bureau of Land Management;
4. Alaska Dept. of Natural Resources; and, 5. Environmental Systems Research Institute, Inc. (ESRI)



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# Implications and Observations - National

- The ESA is not designed to address global climate change and to regulate GHG emissions
- The Center for Biological Diversity has been substantially more strategic, more nimble and more organized than industry or government
- CBD's policy goal of using the polar bear listing to goad government into adopting comprehensive climate change legislation is not currently achievable
- In the absence of a legislative solution, CBD will continue to actively pursue litigation and the courts
- The ESA mandates action – be very wary of decisions that list species but deny that the ESA grants authority to redress the underlying threats



# Implications and Observations - Alaska

- CBD is working VERY hard to impede oil and gas exploration and development in Alaska
- The latest quiver in CBD's arrow is critical habitat
- Designation of polar bear critical habitat (and critical habitat for other species) will increase regulatory scrutiny and burdens, will contribute to increased litigation and litigation risk, and will place exploration and development of Alaska North Slope resources at a competitive disadvantage
- Engaging in scientific studies and publishing the resulting data and conclusions, is essential

