

Use of the Federal Endangered Species Act in Alaska: A Cautionary Note

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THE ESA PROCESS

- Public petition or agency initiation
- 90-Day finding
- 12-Month status review
- Proposed decision
- Final decision
- Designation of critical habitat
- Establishment of recovery team and development of recovery objectives
- Uplisting, downlisting, or delisting.



Current Status of Listings in Alaska



Federally Listed Endangered Species

Short-tailed albatross - USFWS

Eskimo curlew – USFWS (likely extinct)

Aleutian shield fern - USFWS

Steller sea lion (western DPS) - NMFS

Bowhead whale - NMFS

Fin whale – NMFS

Beluga whale (Cook Inlet DPS) - NMFS

Humpback whale - NMFS

**Other rare species: North Pacific right whale,
Blue whale, Sei whale, and the
Leatherback turtle - NMFS**



Federally Listed Threatened Species

Spectacled eider - USFWS

Steller's eider (AK breeding DPS) – USFWS

Polar bear - USFWS

Northern sea otter, southwest Alaska DPS - USFWS

Steller sea lion, eastern DPS - NMFS



Species currently under federal consideration for listing

Pacific walrus - USFWS

Yellow-billed loon – USFWS

Kittlitz's murrelet – USFWS

Red knot – USFWS

Marbled murrelet - USFWS

Ice seals (2 species) - NMFS

SE Alaska herring – NMFS



Alaska ESA Examples



Aleutian Canada Goose

Photo: Roy Lowe

Aleutian Canada Goose



Steller Sea Lion



Polar Bear



***Beluga Whales
in Cook Inlet***





Aleutian Canada Goose

Photo: Roy Lowe

Aleutian Canada Goose

- Species had declined dramatically and was projected to continue to decline with a real threat of extinction
 - *Predation by introduced foxes was identified as the main threat*
 - *Loss of overwintering habitat also identified as a threat*
- Listed as endangered in 1967
- Recovery Plan adopted in 1974
- Did not define critical habitat
- Down-listed to threatened in 1990
- De-listed in 2001 as recovered





Steller Sea Lion

- Species had declined significantly (~80%) due in part to illegal killings and regime shifts
- Listed as threatened in 1990
- Critical habitat established in 1993
- Western DPS was up-listed to endangered in 1997
- Fishery BiOp prepared as part of Section 7 consultation
 - *Fishing was restricted beginning in 1998*
- Recovery Plan adopted in 1992 and revised in 2008
 - *Recovery objectives established*
 - *Grow at 3% per year for 30 years*
 - *Growth must occur throughout historic range*
 - *Threats must be eliminated and monitored*
 - *Research needs identified:*
 - *Total estimated cost ~\$430 million*





Steller Sea Lion

- **Current Status**
 - Eastern DPS: Remains threatened
 - Recovery objectives have been achieved
 - State submitted a petition to delist
 - Western DPS: Remains endangered
 - Population at ~ 73,000 animals and growing overall
- **Draft Fishery BiOp for wDPS recently released**
 - *Further fishing restrictions proposed in western Alaska*
 - *State has submitted extensive comments questioning process and foundational science*

Begs the question: Is the wDPS still endangered? Should new fishing restrictions be adopted?





Polar bear

- Environmental groups petitioned USFWS to list polar bears as endangered due to possible climate change impacts
- May 2008, USFWS listed polar bears as threatened based on:
 - *Models that indicate that climate change will result in a decline of sea ice habitats*
 - *Speculation that lost habitat will threaten currently healthy populations with extinction over the next 50-100 years*
 - *This despite the fact that polar bears remain at all time record numbers and many of underlying hypotheses and underlying assumptions in the models remain untested*





Polar bear

- Legal Status
 - *The State is challenging the decision to list the bear as threatened. We believe the decision was premature and based on speculative model outcomes*
 - *The case has been consolidated in district court in Washington DC. A decision is expected next year.*
- Section 4d rule
 - *Defines the scope of the Section 7 consultation process*
 - *Relies on the MMPA and limits use of Section 7 for GHG regulation*





Polar bear

Current Happenings

Proposal to designate over 200,000 square miles as critical habitat which will trigger adverse modification assessments. The State has submitted extensive comments questioning the approach and economic assessment.

Developing recovery plan. State is participating in this effort.





Beluga Whales in Cook Inlet

- Beluga whales over-harvested in early to mid 1990s
- In 1998, NMFS initiated a status review
- In 2000, NMFS determined the whales are not in danger of extinction and choose to not list under ESA (population at this time was about 375 whales)
- NMFS instead listed the whales as depleted under the MMPA
- In October 2008 NMFS listed beluga whales as endangered based on:
 - *population was not increasing as fast as expected after harvest was regulated*
 - *the population had a greater than 1% chance of going extinct within 100 years*





Beluga Whales in Cook Inlet

Where are we now?

- *The State is challenging the decision to list beluga whales in Cook Inlet as endangered. We feel the decision is premature in that their own model results show that the population had less than a 1% chance of extinction in the next 50 years. We also question use of projections out to 300 years.*
- *There is a proposal to designate critical habitat. We have submitted extensive comments questioning the scientific approach used to justify the proposed designation and have questioned the economic analysis estimating the impact of the proposed designation.*
- *A recovery team has been established to develop a recovery plan.*



ISSUES WITH THE CURRENT IMPLEMENTATION OF THE ESA



What is appropriate when modeling the populations being considered for listing?

- **Should model outcomes alone lead to listing decisions? Should there be a requirement that a population is actually in a state of significant decline? Should underlying assumptions be tested?**
- **How far into the future can population trends be reasonably predicted –**
10 years, 50 years, 100 years, 300 years?
- **What is a reasonable level of extinction risk –**
1%, 10%, 20%, 25%



For climate related listings:

- **Should a species be precautionary listed solely based on model results of future threats? If so, what species could not be listed due to climate change?**
- **Should a species be listed even if the cause (climate change) cannot reasonably be addressed by the ESA?**
- **Assuming climate is changing ecosystems, how should critical habitat be established and defined?**
- **How would recovery objectives be written, especially for species at currently healthy levels but are projected to decline based solely on model results?**



For recovery objectives:

- **Are recovery objectives set too high?**
- **Can threats ever be completely removed?**
- **MMPA and ESA have different criteria for de-listing. Should ESA recovery standards be the same as those for de-listing under MMPA?**
- **Should recovery plans contain non-population objectives that must be met?**



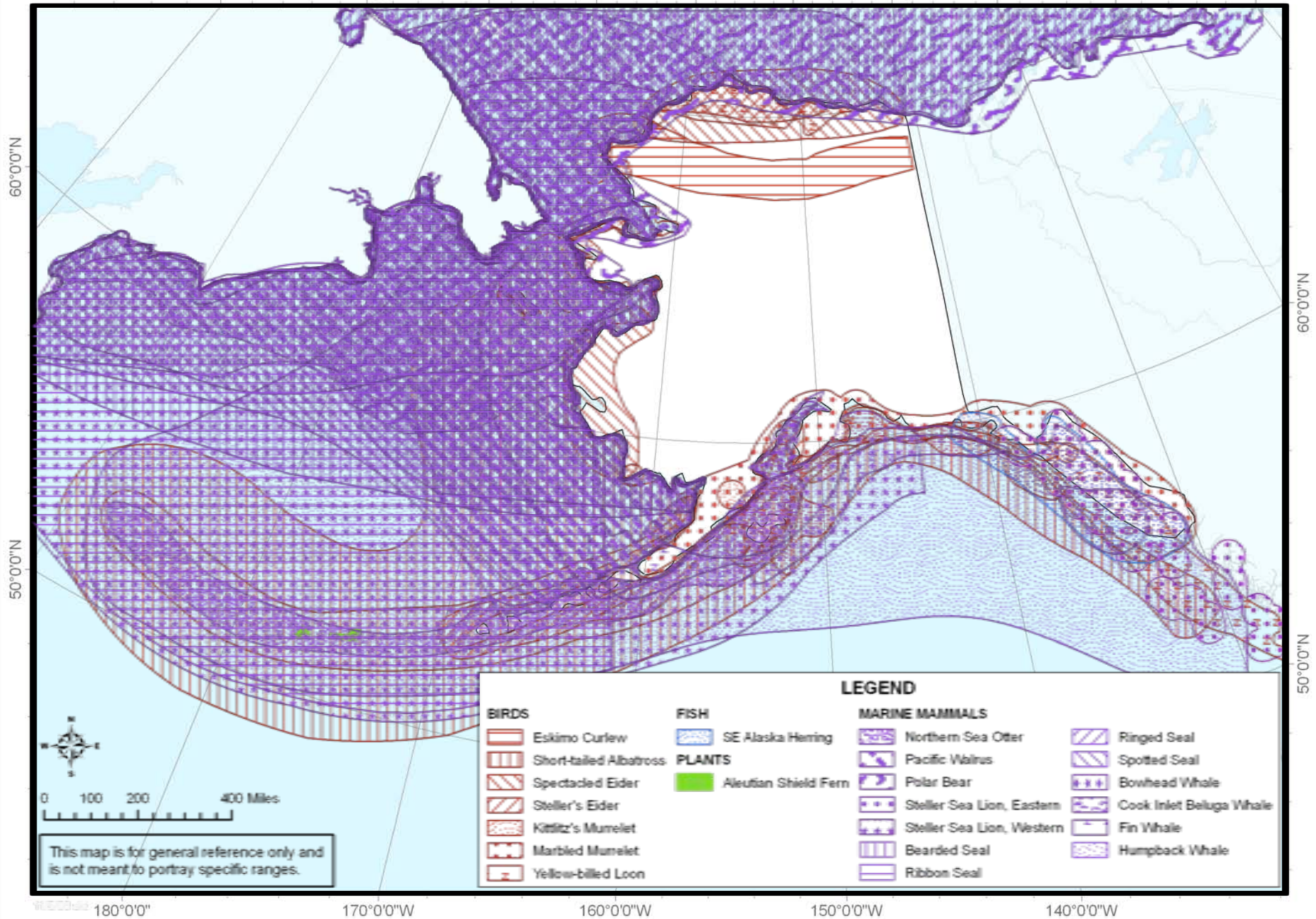
WHAT HAPPENS AFTER LISTING?

- **Section 9:** Prohibits the “take” of a listed species. Under Section 3 take includes “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect or attempt to engage in any such conduct”.
- **Section 7:** For projects that have a federal “nexus”, federal agencies need to consult with NMFS or USFWS on any project that may affect a listed species or its critical habitat.
 - Biological assessment (“likelihood to effect” decision)
 - BiOp (with “JAM” finding and resultant incidental take statement and minimization measures).
- **Section 10:** For projects that have “incidental take” but no federal nexus.
 - Habitat Conservation Plans (HCP) to minimize and mitigate impact of incidental take
 - Incidental take permits w/ approved HCP

These are applicable throughout a species' range



Range of Listed or Candidate Species



Consultation Process Issues

As more species are listed the more likely:

- recovery objectives will conflict*
- critical habitat needs will conflict*



Legal Considerations

- *All agency decisions are subject to citizen litigation, from listing decisions to critical habitat designations, to JAM authorizations.*
- *This has the potential to slow resource development projects, and place decisions in the hands of judges.*



It is easier to list than delist a species

- About 2,000 plants and animals are currently listed as threatened or endangered under ESA
- An additional 300+ species are being considered for listing
- To delist, the agency must determine that:
 - *a species must be no longer in danger of becoming extinct*
 - *the threats facing it have been eliminated and are monitored*
- Since inception, only 46 species de-listed, of which only 20 have been recovered (~1%)



Summary

- Listing decisions will affect resource development in Alaska
 - *Example: Steller sea lion mitigation measures*
- Listing decisions and implementation should be based on reasonable conclusions:
 - *Real declines and tested models*
 - *Reasonable time frames for population projections*
 - *Reasonable levels of extinction risk*
 - *Reasonable recovery objectives and goals*



Thank you.

Questions?

