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To: Mayor Edward S. Itta

Through: Harold Curran, CAO

From: Bessie O'Rourke, Borough Attorney

Date: February 16, 2011 (update of April 13, 2010 Memo)

Re: Coastal Zone Management Planning, State Consistency Determinations and the Endangered Species Act

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Question:

What is the relationship between the Endangered Species Act (ESA) and the Alaska Coastal Management Program (ACMP)? Does the listing of a species or designation of critical habitat under ESA have to go through a consistency review under ACMP?

Short answer:

Listings and critical habitat designations with "effects" on "uses" or "resources" of Alaska's coastal zone probably should undergo a consistency review, although the federal agency involved in the decision may have some latitude in determining whether there really are "effects." The agency may choose to designate less area as critical habitat if a state or municipality has strong habitat protection laws in place.

A. ESA

ESA seeks to protect threatened or endangered species by requiring the appropriate agency (either the U.S. Fish and Wildlife Service (FWS) or the National Ocean and Atmosphere Administration (NOAA), National Marine Fisheries Service (NMFS), collectively, "the Service") to "list" and designate critical habitat for imperiled species.[1] Consultation with the Service is required when a federal activity (or one requiring federal approval) may put a listed species in jeopardy or may adversely modify the species's critical habitat.[2]

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[1] *See* Section 4 of ESA, 16 U.S.C. 1533(b).

[2] *See* Section 7 of ESA, 16 U.S.C. 1536(a)(2).

B. Consistency Reviews

ACMP is the state program authorized under the federal act, Coastal Zone Management Act (CZMA).[3] CZMA includes a consistency review requirement, which is slightly different depending on whether a federal agency itself is carrying out an activity or the federal agency is permitting or licensing an activity.[4] Since listings and critical habitat designations are made by the Service itself, this memo will focus only on the consistency review requirements for federally conducted activities (not those for permits).

The triggering mechanism for a consistency determination is whether a federal activity has "reasonably foreseeable effects" on the land, water, "use," or "natural resource" of the state's "coastal zone" (sometimes referred to as the "effects test").[5] The sections below will discuss the significance of each of these terms.

1. The Coastal Zone

CZMA concerns a state's "coastal zone," which is limited to waters and lands "in proximity to the shorelines . . . to the outer limit of State title and ownership under the Submerged Lands Act" (three nautical miles).[6] CZMA excludes federal land (such as the Arctic National Wildlife Refuge and the National Petroleum Reserve Alaska and the outer continental shelf (OCS)) from the term "coastal zone."[7]

But an activity on federal lands may still be subject to consistency reviews if it "affects any land or water use or natural resource of the coastal zone."[8] This language comes from Congress's 1990 amendment to CZMA, in response to a Supreme Court decision that had narrowed the scope of consistency reviews.[9] The amendment clarifies that federal agency activities (no matter where they are located) are subject to a consistency review if they affect a use or resource of the coastal zone.[10] The focus "should be on coastal effects, not on the nature of the activity."[11]

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[3] *See* 16 U.S.C. 1456(c) (1)(A) ("Each Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs."); *see generally*, A.S. Chapter 46.40 (the Alaska Coastal Management Program).

[4] *Compare* 16 USC 1456 (c)(1)(A) (federal activities) *with* (c)(3)(A) (federal licenses or permits).

[5] *See* 16 U.S.C. § 1456(c); 15 C.F.R. 930.11(g); 930.30; 930.31(a).

[6] 16 U.S.C. § 1453(1).

[7] *See* 16 U.S.C. § 1453(1); H. Rep No. 92-1544, reprinted at 1972 U.S.C.C.A.N. 4822 ("The Conferees also adopted the Senate language in this section which made it clear that Federal lands are not included within a state's coastal zone.")

[8] 16 U.S.C. § 1456(c)(1)(A)

[9] *See Secretary of the Interior v. California*, 464 U.S. 312 (1984) (determining that consistency reviews did not cover federal activities occurring outside the coastal zone, such as OCS lease sales).

[10] *See* 15 C.F.R. § 923.33(b) (even though States may not directly regulate Federal lands, Federal activities on these lands are nonetheless subject to consistency determination if their activities on the Federal land will affect the State coastal zone).

[11] *Coastal Zone Management Act Federal Consistency Regulations*, 65 Fed. Reg. 77,124 (Dec. 8, 2000) (codified at 15 C.F.R. Part 930).

Congress's substitution of the language "**of** the coastal zone" for "**in** the coastal zone"[12] arguably means that the use or resource does not necessarily have to be **in** the coastal zone at the time of consideration to be considered "**of** the coastal zone." In other words, if a project has an effect on a polar bear that is sometimes **in** the coastal zone but sometimes **outside** the coastal zone, a consistency review could still be required, since the polar bear could be considered a resource **of** the coastal zone.[13]

2. Federal Activities

CZMA itself does not define a "federal activity." Legislative history suggests that Congress intended to include "all Federal agencies conducting or supporting activities in the coastal zone to administer their programs consistent with approved State management programs except in cases of overriding national interest as determined by the President."[14] There are no explicit exemptions in CZMA for ESA determinations. [15] Likewise, there is no language in ESA or ESA regulations[16] specifically excluding species listings and critical habitat designations from CZMA consistency determinations.

CZMA regulations define federal agency activity as "any functions performed by or on behalf of a federal agency in the exercise of its statutory responsibilities."[17] The term includes "a range of activities where a Federal agency makes a proposal for action initiating an activity or series of activities when coastal effects are reasonably foreseeable, e.g., a Federal agency's proposal to physically alter coastal resources, a plan that is used to direct future agency actions, a proposed rulemaking that alters uses of the coastal zone."[18]

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[12] *See* 16 U.S.C. 1456 (c)(1)(A); 1456 (c)(3)(A); 1456 (c)(3)(B) (emphasis added).

[13] A statement in the Federal Register supports this argument:

> A federal action occurring outside the coastal zone may cause effects felt within the coastal zone (regardless of the location of the affected coastal use or resource). For example, a State's fishing or whale watching industry (which are coastal uses) could be affected by federal actions occurring outside the coastal zone. Thus, **the effect on a resource or use while that resource or use is outside of the coastal zone could result in effects felt within the coastal zone**. However, it is possible that a federal action could temporarily affect a coastal resource while that resource is outside of the coastal zone, e.g., temporary harassment of a marine mammal, such that resource impacts are not felt within the coastal zone.

Coastal Zone Management Act Federal Consistency Regulations; Final Rule, 65 Fed. Reg. 77130 (Dec. 8, 2000) [emphasis added].

[14] S. Rep. No. 92-753 (1972), reprinted in 1972 U.S.C.C.A.N. 4776, 4792 The House Conference Report provided, "[The Conferees] also agreed that as to Federal agencies involved in any activities directly affecting the state coastal zone and any Federal participation in development projects in the coastal zone, the Federal agencies must make certain that their activities are to the maximum extent practicable consistent with approved state management programs." H. Rep. No. 92-1544 (Oct. 5, 1972), reprinted in 1972 U.S.C.C.A.N. 4822, 4824.

[15] S. Rep. No. 92-753, at 4792 ("The Committee does not intend to exempt Federal agencies automatically from the provisions of this Act.").

[16] *See* 50 C.F.R. 424.

[17] 15 C.F.R. 930.31(a).

[18] *Id.*

An action that is not deemed consistent may still be allowed if the President exempts the activity from compliance.[19]

3. Reasonably Foreseeable Effects

As discussed above, the triggering mechanism for a consistency determination is whether a federal activity "affects" the land or water use or natural resource of the state's coastal zone. If the federal agency determines its activity has "no effects on any coastal use or resource . . . then the Federal agency is not required to coordinate with State agencies" to conduct a consistency review.[20]

CZMA does not define or qualify the term "affect."[21] The House Committee Report on the 1990 CZMA amendments does not place a threshold on "affects," although it notes Congressional concern about "cumulative and secondary effects."[22] The Report describes secondary effects as including "growth inducing effects and other effects related to induced changes in the pattern of land use."[23]

The regulations clarify that the term "effect" includes direct and indirect (cumulative, incremental) effects.[24] The only threshold for "effect" in the regulations is that the effect must be (1) more than "de minimis"[25] and (2) "reasonably foreseeable."[26] The regulations require federal agencies to "broadly construe the effects test to provide State agencies with a consistency determination . . . and not a negative determination . . . or other determinations of no effects."[27]

"Reasonably foreseeable" is not defined.[28] The determination of whether something is a reasonably foreseeable effect is a factual determination made on a case-by-case basis by the federal agency.[29]

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[19] 16 U.S.C. § 1456(c)(1)(B)

[20] 15 C.F.R. 930.33(a)(2).

[21] *Compare* CZMA, 16 U.S.C. § 1456(c) with the National Environmental Policy Act, 42 U.S.C. § 4332(C) (requiring that a federal activity must "significantly" affect the quality of the human environment.); Comprehensive Environmental Response, Compensation, and Liability Act § 106 allows for response when there is an "imminent and substantial endangerment." 42 U.S.C. § 9606 (2008); the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6977, 6973 (allowing for Federal or private actions when there is an "imminent or substantial endangerment").

[22] Coastal Zone Act Reauthorization Amendments of 1990, 136 Cong. Rec. H8068, 8078 (1990)

[23] *Id.*

[24] 15 C.F.R. 9.30.11(g) (definition of effects); *see also* 15 C.F.R. § 930.15(a).

[25] The state and federal agency may concur, as the result of a consistency review, that an activity is "de minimis *De minimis* means "expected to have insignificant direct or indirect ... coastal effects." 15 C.F.R. § 930.33(a)(3)(ii). Activities with de minimis effects can be excluded from consistency reviews "if a Federal agency and State agency have agreed" after a review that involve public participation. *Id.; see also* 65 Fed. Reg. 77,135.

[26] 15 C.F.R. 9.30.11(g) (definition of effects); *see also* 15 C.F.R. § 930.15(a).

[27] 15 C.F.R. 930.33(d).

[28] *See* 65 Fed. Reg. 77,130 ("Congress envisioned that Federal-State coordination through consistency would be interactive. Thus, the application of consistency, the varied State management programs, the analysis of effects, and the case-by-case nature of federal consistency precludes fast and hard definitions of effects and what is reasonably foreseeable.").

Courts have held that a "reasonably foreseeable" impact is one that is "sufficiently likely to occur that a person of ordinary prudence would take it into account in reaching a decision."[30] While the "agency need not foresee the unforeseeable," the agency is required to engage in "some degree of forecasting." [31]

4. Exemption for environmentally beneficial activities.

Federal regulations allow state and federal agencies to "agree to exclude environmentally beneficial Federal agency activities (either on a case-by-case basis or for a category of activities) from further State agency consistency review."[32] *Environmentally beneficial activity* is defined as "an activity that protects, preserves, or restores the natural resources of the coastal zone."[33] The State agency "shall provide for public participation . . . for the State agency's consideration of whether to exclude environmentally beneficial activities."[34]

But federal regulations also provide that "[a]n action which has minimal or no environmental effects may still have effects on a coastal use (e.g., effects on public access and recreational opportunities, protection of historic property) or a coastal resource, if the activity initiates an event or series of events where coastal effects are reasonably foreseeable."[35] In other words, just because an action has no negative environmental impact does not necessarily mean it has no effect on a coastal use.

Alaska statutes and regulations do not speak directly to projects that have environmentally "beneficial" impacts or a lack of negative impacts.[36] Alaska regulations do allow projects that have been determined to be "generally consistent" (on the B-list) or "categorically consistent" (on the A-list) with ACMP, but neither of these lists pertains to federal activities (only permits).[37] Thus, there appear to be no statutory or regulatory exemptions under Alaska law for federal activities pursuant to ESA.

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[29] *See* 65 Fed. Reg. 77,125.

[30] *E.g., Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992).

[31] Scientists' Inst. for Public Information, Inc. v. Atomic Energy Comm'n, 481 F.2d 1079, 1092 (C.A.D.C. 1973).

[32] 15 C.F.R. 930.33(a)(4).

[33] *Id.*

[34] *Id.*

[35] 15 C.F.R. 930.33(a)(1).

[36] See generally, 11 AAC 110; A.S. 46.40.96.

[37] See 11 AAC 110.700--110.730; ABC Lists *available at* http://dnr.alaska.gov/coastal/acmp/Clawhome/ABClist/ABClisthome.htm.

C. Application of CZMA/ACMP Consistency Review Requirements to Species Listings and Critical Habitat Designation under ESA

1. Federal Activity

In determining the application of consistency review procedures to ESA activities such as listing a species or designating critical habitat, it first must be determining whether the listing or designation constitutes a "federal activity" subject to CZMA. Listing or designation alone would not "physically alter coastal resources."[38] But it would "direct future agency actions" by requiring consultation (and possibly mitigation measures), and it is a "proposed rulemaking"[39] that could alter uses of the coastal zone by curtailing those that would put the species in jeopardy or adversely modify habitat.

2. Reasonably Foreseeable Effects on Uses or Resources

It next must be determined whether it is reasonably foreseeable that a listing or designation could "affect" the land, water, "uses" or "resources" of the coastal zone.

a. Species Listings.

A species such as the polar bear could be considered a "resource" of the coastal zone, since it does spend some time in the coastal zone, and listing of the bear could have an "effect" on the bear. The listing of the bear could also affect a "use" of the coastal resource, such as seismic activity, if the use requires federal approval, and if federal approval may be withheld if the use could put the bear in jeopardy of extinction. Thus, we think it is reasonable to assume that a listing would require a consistency review.

b. Critical Habitat Designation

The effects test seems clearer in the context of critical habitat located within the coastal zone. It seems reasonably foreseeable that designation of critical habitat will affect the land as well as uses on the land, since those that would adversely modify the habitat would not be allowed. Thus, we think critical habitat designation could require a consistency review. This could be the case even if the designation is environmentally beneficial, since it could affect some other coastal use.[40]

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[38] *Quoting* 15 C.F.R. 930.31(a).

[39] *Quoting* 15 C.F.R. 930.31(a).Listings and designations may both be considered "rulemaking." *See Conservancy of Southwest Florida v. U.S. Fish and Wildlife Service*, 2010 WL 5140729 (M.D. Fla. Nov. 12, 2010) (referring to rulemaking for designating critical habitat for Florida panthers); *Wyoming State Snowmobile Ass'n. v. U.S. Fish and Wildlife Service*, 2010 WL 3743933 (D.Wyo. Sep. 10, 2010) (referring to rulemaking for designating critical habitat for lynx); *Carpenters Indus. Council v. Salazar*, 2010 WL 3447243 (D.D.C. Sep. 01, 2010) (referring to rulemaking for designating critical habitat for northern spotted owl); *Wildearth Guardians v. Kempthorne*, 592 F.Supp.2d 18 (D.D.C. 2008) ("Under the normal listing procedures, the Secretary lists a species by promulgating a regulation after undertaking formal rulemaking pursuant to the procedures set forth in the ESA").

[40] *See* 15 C.F.R. 930.33(a)(1).

c. Other ESA Actions

Recovery plans (under Section 4 of ESA[41]) that contain significant conditions, prescriptions, or restrictions could also be subject to consistency reviews.

3. Real-Life Application to Polar Bear Critical Habitat

We have not found any court cases specifically pertaining to species listings and critical habitat designations, although at least one commentator has suggested that consistency reviews would apply to ESA decisions, [42] and the Service has, in the past, applied consistency reviews to at least some of its listings.[43] And other restrictive offshore and coastal land use designations, such as "Marine Sanctuary" designations, are subject to CZMA consistency determinations.[44]

David Kaiser (Federal Consistency Coordinator, NOAA Office of Ocean and Coastal Resource Management) said that consistency reviews could be required for either a species listing or a critical habitat designation if the agency determines the action has an "effect."[45] He said this determination was made on a case-by-case basis.

But when the Borough suggested that the polar bear critical habitat designation be subjected to a consistency review,[46] FWS said that none was required.[47] FWS did not specifically rely on the "environmentally beneficial activity" exception or assert that affects were "de minimis." Rather, FWS said that "the designation of an area as critical habitat does not itself negatively impact the way in which the land is being utilized, nor does such a designation directly affect the coastal zone of Alaska."[48]

FWS said that consistency reviews would "be required for specific Federal activities that use or impact the coastal zone in a reasonably foreseeable manner, such as construction projects,

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[41] 16 U.S.C. 1533(f)(1).

[42] J.B. Ruhl, *Biodiversity Conservation and the Ever-Expanding Web of Federal Laws Regulating Nonfederal Lands: Time for Something Completely Different?* 66 U. COLO. L. REV. 555 (1995)

[43] *See Critical Habitat Designation for the Endangered Leatherback Sea Turtle*, 75 Fed. Reg. 319 (Jan. 5, 2010 (revision of critical habitat for the endangered leatherback sea turtle subjected to consistency review); Letter from James W. Balsiger, NOAA, to Randy Bates, Alaska Division of Coastal and Ocean Management (Apr. 19,2010) (indicating that NOAA finds a proposed critical habitat for the endangered Cook Inlet beluga whale to be consistent with ACMP).

[44] Under 15 C.F.R. 922.23, the designation of a National Marine Sanctuary is expressly defined as a "Federal Activity, which, if affecting the State's coastal zone, must be undertaken in a manner consistent to the maximum extent practicable with the approved State coastal zone program . . ."

[45] Personal communication between Barrett Ristroph and David Kaiser (Feb. 10, 2011).

[46] Borough's comments on Proposed Critical Habitat Designation for Polar Bears (July 6, 2010).

[47] *See Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Polar Bear (Ursus maritimus) in the United States; Final Rule*, 75 Fed. Reg. 76103, (Dec. 7, 2010)

[48] *Id.*

permitting, and other development."[49] In other words, projects that require consultation with the Service because they might adversely modify habitat could be subject to consistency reviews, but FWS did not see the critical habitat designation itself as being subject to a consistency review.

Tom Evans (the FWS staff person who is listed as the contact for the critical habitat designation) suggested during a phone call that ACMP was a defunct program, such that consistency review requirements did not really need to be addressed.[50] David Kaiser said (also during a phone call) that it was "the agency's call" to conclude that the polar bear critical habitat designation need not go through a consistency review.[51]

If the designation were litigated on the basis that no consistency review was done, a court would probably accord FWS (or any other federal agency making this decision) a deferential standard of review.[52] If, anywhere in the record, FWS stated that the designation would be "environmentally beneficial," since it is "an activity that protects, preserves, or restores the natural resources of the coastal zone,"[53] a court might agree with this finding. Similarly, a court might agree with a FWS finding find that the effects are so insignificant as to be "de minimis" and not subject to a review.[54]

But it is not clear whether the State of Alaska agreed that the designation was "de minimis" or "environmentally beneficial" or provided for public participation on the matter, as required by the CZMA regulations.[55] Neither the State's July 6, 2010 comments on the critical habitat designation nor those from December 28, 2009 on the same discuss the applicability of ACMP or CZMA.

D. Other Factors of Critical Habitat Designations

While species listings are based on purely biological factors, the Service must consider "the economic impact, and any other relevant impact" of specifying any particular area as critical

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[49] *Id.*

[50] Personal communication between Emma Pokon and Tom Evans (Feb. 10, 2011).

[51] Personal communication between Barrett Ristroph and David Kaiser (Feb. 10, 2011).

[52] *See, e.g., Fisher v. Salazar*, 656 F.Supp.2d 1357, 1365-1366 (N.D.Fla. 2009) ("courts must be extremely deferential when an agency's decision rests on the evaluation of complex scientific data within the agency's technical expertise") *City Of Oxford, Ga. v. F.A.A.*, 428 F.3d 1346, 1352 (11th Cir.2005); *New York v. Reilly*, 969 F.2d 1147, 1152 (D.C. Cir.1992); *Chemical Mfrs. Ass'n v. EPA*, 870 F.2d 177, 199-200 (5th Cir.1989); *Am. Paper Inst. v. EPA*, 660 F.2d 954, 963 (4th Cir. 1981); *Ethyl Corp.*, 541 F.2d 1, 36-37 (D.C. Cir. 1976); *Massachusetts v. EPA*, 549 U.S. 497 (2007); *Appalachian Power Co. v. EPA*, 135 F.3d 791, 802 (D.C. Cir.1998) (per curiam).

[53] *Quoting* 15 C.F.R. 930.33(a)(4).

[54] *See* 15 C.F.R. 930.33(a)(3).

[55] The State agency must provide for public participation when considering whether to exclude environmentally beneficial activities and when considering a federal finding that an activity is "de minimis." 15 C.F.R. 930.33(a)(3-4).

habitat.[56] Thus, in designating critical habitat for the polar bear, the Service would need to consider designated uses and enforceable policies under ACMP. These uses and policies would be relevant to either "economic" or "other" impacts of a designation.

The Service would also need to take into account other existing regulatory measures (under federal, state, and local law) that protect a species and its habitat. Many of those who commented on the polar bear critical habitat designation suggested that the regulatory scheme in place was already adequate to protect the polar bear, such that no critical habitat designation was warranted. Responding to these comments, the Service stated that it had "reviewed the existing regulatory mechanisms at the international, national, State, and local level" and had determined that "there are no known regulatory mechanisms that are directly and effectively addressing reductions in the sea ice at this time. For example, regulations under the MMPA [Marine Mammal Protection Act] effectively deal with protection for polar bears but do not specifically protect polar bear habitat such as sea ice."[57]

It is possible that if a state or a municipality developed laws that specifically protected habitat, there would be less of a need for the Service to designate so much critical habitat. Rick Agnew, the lawyer representing the Borough in the matter of critical habitat designation, gave us several suggestions regarding actions the Borough could take that might, in the Service's view, reduce the need for critical habitat:

1. The Borough could develop a habitat conservation plan [HCP] (under Sec. 10 of the ESA[58]) designed to protect multiple species. Usually the Service approves HCPs for small, specific geographic areas. It then becomes very unlikely that these areas will be designated as critical habitat. It is possible that HCPs could also be put in place after critical habitat has already been designated, although the statute does not explicitly say this.
2. Some municipalities have "critical area" zoning, or state parks or reserves. The Borough could put a conservation easement on an area unlikely to be developed but providing good habitat for polar bears. The Borough recently instituted a conservation easement in order to get an Army Corps permit to create a water reservoir.[59]
3. For threatened species (but not endangered), the Service can develop rules[60] that limit application of ESA. This was done for the polar bear such that projects would not have to undergo ESA consultation just because they contribute to global warming.[61] The Borough

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[56] *Compare* 16 U.S.C. 1533(b)(1) (basis of determination for species listings) *with* 1533(b)(2) (basis of determination for critical habitat designations).

[57] *Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for the Polar Bear (Ursus maritimus) in the United States; Final Rule,* 75 Fed. Reg. 76,101 (Dec. 7, 2010)

[58] 16 U.S.C. 1539(b).

[59] An Ordinance Adopting a Conservation Easement on Tract 4 at Prudhoe Bay Amending the Official North Slope Borough Zoning Map to Show the Easement, Ord. No. 75-06-56 (July 6, 2010).

[60] Such rules are known as "4(d) Rules," referring to the provision for these rules in Section 4(d) of ESA (16 U.S.C. 1533(d)).

[61] *Endangered and Threatened Wildlife and Plants; Special Rule for the Polar Bear* ["Rule 4(d)"], 73 Fed. Reg. 28306 (May 15, 2008)

could propose a rule regarding critical habitat designation. For example, a rule could clarify what would constitute adverse modification and what would not.

4. The Borough could enter into some sort of cooperative agreement or special management agreement with the Service that would modify critical habitat.