

# Endangered Species Act Issues in Alaska

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# Suite of Relevant Laws

- Endangered Species Act of 1973
- Marine Mammal Protection Act of 1972
- Administrative Procedure Act
- National Environmental Policy Act
- Alaska Endangered Species Act

# ESA Section 4:

## Listing and Critical Habitat Processes

- Using the “best scientific and commercial data available” (i.e., new research not required):

US Fish & Wildlife Service or National Marine Fisheries Service (depending on species) determines “whether any species is an endangered species or a threatened species because of any of the following five factors:”



# ESA Section 4:

## Listing (and delisting) factors

- (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
- (B) overutilization for commercial, recreational, scientific, or educational purposes;
- (C) disease or predation;
- (D) the inadequacy of existing regulatory mechanisms;
- (E) other natural or manmade factors affecting its continued existence.

# Endangered or Threatened?

- “*Endangered*”- a species “in danger of extinction throughout all or a significant portion of its range”
- “*Threatened*”- a species “likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range”



# Listing Not Limited to “Species”

- Provisions in Act and Service policies allow listing of categories other than a “full” species:
  - Species, subspecies, Distinct Population Segments (DPS)
  - Example: Steller sea lions --
    - Eastern DPS – initially listed as Threatened; delisted in 2012
    - Western DPS: still listed as Endangered

# What happens after listing?

Section 7: If a project with a federal “nexus” (permit or funding) “may affect” a listed species or its critical habitat, federal agency must consult with USFWS or NMFS

Section 9: Prohibits “take” of a listed species: Illegal to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct. ” Some “take” exceptions:

- Alaska Native subsistence harvest – marine mammals
- For threatened species, Service can specify other exceptions in a Section 4(d) rule



# Federally Listed - Endangered

- Short-tailed albatross
  - Eskimo curlew
  - Aleutian shield fern
  - Steller sea lion, western DPS
  - Bowhead whale
  - Fin whale
  - Cook Inlet beluga whale
  - Humpback whale
  - Other species with Alaska habitat:
    - N. Pacific right whale, blue whale,
    - Sei whale, sperm whale, leatherback turtle
- FWS
- NMFS





# Federally Listed - Threatened

## FWS:

- Spectacled eider
- Steller's eider (AK breeding pop)
- Polar bear
- Northern sea otter, southwest Alaska DPS
- Wood Bison (and as NEP)

## NMFS:

- Ringed Seals (certain subspecies)







# Pending Reintroductions:

- Wood bison –
  - ADF&G worked with USFWS to issue 10(j) and 4(d) rules giving management authority to State
  - Special category under Threatened:
    - Nonessential Experimental Population
    - Management Plan complete: reintroduction to Innoko/Lower Yukon will occur soon
- Steller's eider –
  - USFWS working to reintroduce in Yukon-Kuskokwim Delta

# Under Consideration for Listing

- Pacific walrus
  - Alexander Archipelago wolf
  - Alaska yellow-cedar
  - Seals in Iliamna Lake
- } FWS
- } NMFS

# Delisted

- Arctic Peregrine falcon - 1994
- Aleutian Canada Goose - 2001
- Eastern DPS, Steller sea lion – 2012
- Central North Pacific stock, humpback whale?
  - State submitted petition in 2014; decision due soon



# Listing Not Warranted

(State research contributed to most)

- Yellow-billed loon
- Kittlitz's murrelet
- Queen Charlotte goshawk (in Alaska)
- Prince of Wales flying squirrel
- SE Alaska herring
- Pinto abalone
- Ribbon seal
- 43 species of Alaska corals

# Current Issue: Climate Change

- *Listings based on climate change:*
  - Polar bear – projected loss of sea ice within 50 years
  - Bearded seal – loss of sea ice within 100 years
  - Ringed seal – [same as bearded]
- *Petitions based on climate change*
  - Alaska yellow-cedar
  - Seals in Iliamna Lake
  - Pacific Walrus

# Climate Change Listing Concerns:

- Precautionary listing of ice-dependent species: e.g., polar bear, ice seals
  - Limited evidence of current declines
  - Models predict possible extinction 45 to 100 years in the future
    - Appropriate timeframe for modeling?
- Recovery
- Critical Habitat



# Climate Change Listing Concerns:

- How to develop recovery objectives for species at currently healthy levels but projected to decline?
- How should critical habitat be designated if species range is projected to change?
- ESA provides few additional protections beyond existing MMPA protections
  - ➔ Listings based on climate change warrant a different approach?

# Current Issue: Critical Habitat

- Expansive designations:
  - Polar bear: ~187,000 square miles (vacated)
  - Ringed seal (proposed): ~350,000 square miles
- ESA Section 3: Critical habitat means “the specific areas within the [occupied] area [where biological and physical features] *essential* to the conservation of the species” are found
- ESA Section 5: “critical habitat shall not include the entire geographical area which can be occupied by the ... species”
- Unlike for listing, critical habitat designation required to consider economic impacts
  - Secretary has discretion to exclude areas



# State Strategy - Political

- Build partnerships
  - Association of Fish and Wildlife Agencies
  - Western Association of Fish and Wildlife Agencies
  - Western Governor's Association
- Participate in a state-federal ESA Joint Task Force
- Bring concerns to Congress



# State Strategy - Research

- Conduct research on at-risk or listed species to improve knowledge
- Develop conservation actions
  - Less expensive and easier to develop than ESA requirements
- Primary goal of State Wildlife Action Plan and Wildlife Diversity Program
- Large proportion of funding from federal sources (e.g., Section 6 funding from the Services, with 25% State match required). Future funding levels uncertain.

# State Strategy – Research

*Examples of highly relevant research:*

- Yellow-billed loon
- Pacific walrus
- Western DPS Steller sea lion
- Cook Inlet beluga whale
- Alexander Archipelago wolf
- Southeast Alaska herring
- Seals in Iliamna Lake
- Black oystercatcher
- Bats in Alaska
- Rusty blackbird



# State Strategy – Participate Fully in the ESA Process

- Provide data and information for status reviews
  - Example: review of Steller sea lion critical habitat
- Submit comments on proposed actions
- Participate in recovery planning
- Submit delisting petitions
  - Eastern DPS Steller sea lion
  - Central North Pacific DPS, humpback whale

# State Strategy - Legal

- Challenge listing and critical habitat decisions the State believes are scientifically or legally deficient and unwarranted (e.g., bearded seal)
- Intervene in court cases in which the state has an interest (e.g., ribbon seal, IHA Permits, Western DPS Steller sea lion).

# Current State Litigation

- Polar bear
  - Critical habitat: struck down/remanded to USFWS
    - 187,000 square miles;
    - 8% state lands
  - USFWS has appealed
- Bearded seal (Beringia DPS)
  - Threatened listing: struck down/remanded
  - NMFS has appealed



# Example: Bearded seal listing

- Successful challenge in U.S. District Court:
  - Lack of information/data on connection between projected loss of sea ice and habitat needs
  - Very large current population (approximately 155,000 animals)
  - No indication of current decline
  - Remanded to NMFS; under appeal

# U.S. District Court, Alaska District Judge Beistline:

"An unknown, unquantifiable population reduction, which is not expected to occur until nearly 100 years in the future, is too remote and speculative to support a listing as threatened. If [the court] were to hold otherwise, such a holding could logically render every species in the arctic and sub-arctic areas potentially 'threatened.'"

- ❖ State considering joining similar litigation challenging ringed seal listing



Thank you -  
Questions?