

**1/26/10
OVERVIEW:
ENDANGERED
SPECIES
ACT**

<target><bill></bill><subject>1-26-10 OVERVIEW ENDANGERED
SPECIES ACT</subject><comm>HFIN26</comm></target>

Alaska State Legislature
HOUSE FINANCE COMMITTEE

Agenda
1:30 PM

Tuesday, January 26, 2010

Overview on Endangered Species Act

Presenters:

~~—~~ Dan Sullivan, Attorney General, Department of Law

~~—~~ Craig Tillery, Deputy Attorney General, Department of Law

~~—~~ Brad Meyen, Staff Attorney, Department of Law

~~—~~ Doug Vincent-Lang, Special Projects Coordinator, Department
of Fish and Game

— Faqulik Hepa, Director, Department of Wildlife Management,
North Slope Borough

George Vakalis, Manager, Municipality of Anchorage

— Representative H. Lewis

~~—~~ Andy Mack, Assistant

Special
Assistant
— you
external
attorney

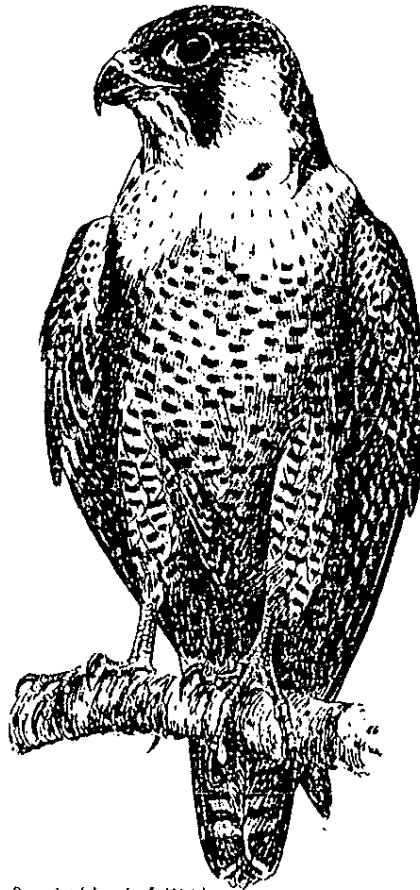
ENDANGERED SPECIES!

CAN WE AFFORD THEM?

In recent months numerous articles have been published that praise the Endangered Species Act. This is no coincidence, but rather a careful orchestration aimed at the current proceedings in Congress on the reauthorization of this law. Most of these articles address only one side of this extremely complex matter, leaving the average reader with a wrong impression based on partial information. And that, of course, is how public opinion is manipulated. A short synopsis of the history of this federal law is in order to understand the points raised here.

HISTORY OF THE ENDANGERED SPECIES ACT

Prior to 1966, when the original Endangered Species Act (ESA) was signed into law by President Johnson, only a few laws affected species on the federal level, such as the Lacey Act of 1900 and the Migratory Bird Treaty Act of 1918. Most such laws affected the states' rights to wildlife management. During the 1960s, when many consequential federal environmental laws came into existence, the principles of protecting specific species were implemented. The original Endangered Species Act of 1966 was the first major action to preserve endangered species on a national level. Several congressional actions followed: The Endangered Species Conservation Act of 1969 added to the species list and broadened federal involvement in wildlife protection. The main impact was not domestic, but international. The Endangered Species Act of 1973 was the



Peregrine falcon by F. Weick.
The Alaska construction industry pays \$25 million yearly for the peregrine falcon program.

most consequential of all. Coupled with the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), which made the United States a signatory partner of this international agreement in 1973, it provides comprehensive protection to all endangered and threatened plants and animals.

Subsequently there were amendments

which had more specific consequences:

- The amendments of 1978 added consideration of critical habitat to the Act.
- The amendments of 1979 directed the federal government to ensure that its actions are not likely to jeopardize the existence of any species.
- The amendments of 1982 eliminated all economic considerations from the species listing process.
- The amendments of 1988 created a mechanism to monitor species which were candidates for listing.

The listing was updated in 1991, adding still more species and habitats to the list of protected areas. In addition to these legislative actions, a multitude of court cases mandated directives and regulations. The most consequential and noteworthy was the *Hill* decision by the U.S. Supreme Court in 1978, which shut down the Tellico Dam project in Tennessee because of the endangered snail darter fish. Basically it states that cost and economic consequences are of no concern when the welfare of endangered species is at risk. The court made it clear that conservation is not to be sacrificed for any other cause, and viewed the value of endangered species as "incalculable."

There are many examples of extreme costs associated with the effects of the ESA after the snail darter case. The question of ecology vs. economy was most highly publicized in the case of the spotted owl in the Pacific Northwest. This issue, which came to light in 1988, is one that virtually all Americans have heard of by now.

There is no question that the ESA and its amendments have had great political implications and have cost American tax-

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payers, businesses, and individuals billions of dollars in implementation and enforcement. These costs are rarely discussed in the media, so let me tell you a bit about what it costs to Alaska.

ENDANGERED SPECIES IN ALASKA

Compared with other areas, Alaska has only a few species listed as "endangered" or "threatened," and thus few species have cost the state money for ESA compliance. Some of these species live in remote areas with little human contact, like the short-tailed albatross, which breeds on a remote island off Japan and visits Alaskan waters in the North Pacific; and the Aleutian Canada goose (which is not a separate species, but rather a geographic form of the abundant Canada goose), which breeds on some of the remote Aleutian islands. Another species, the Eskimo curlew, was last seen in Alaska more than 100 years ago and is nearly extinct, with only a few remaining in Canada.

Recently the spectacled eider has been added. It has distribution along the western and northern coasts. The effects of its listing are not yet clear. The only plant protected, the shield fern, is limited to a few spots in the Aleutians.

The bald eagle is protected both by the ESA and the Bald Eagle Protection Act of 1940, amended in 1959. Since 1962, it also has been protected by the Migratory Bird Act. Three separate American laws, plus CITES, protect this species. It is our national emblem and most Americans are very supportive of its special status. There is no doubt that protection of this species has had an economic impact. Because its distribution is limited, however, only a few activities in a few isolated areas have been affected, primarily logging and mining.

The best-known case is the peregrine falcon, which lives throughout Alaska and is represented by three subspecies: *Falco Peregrinus Pealei* in the Aleutians, *Falco Peregrinus Tundrius* in the tundra areas of western and northern Alaska, and *Falco Peregrinus Anatum* in the interior and rest of Alaska. The peregrine falcon and its various forms have a worldwide distribution. This species showed an alarming decline in the late 1950s and 1960s. It was ultimately discovered that the widespread use of pesticides, especially DDT, poisoned the prey birds and in turn affected the

falcons' ability to reproduce. The decline was steep and dramatic. In the late '60s and early '70s, the use of these chemicals was banned in most industrial nations. The results were positive and breeding populations recovered quite well, in many cases to original levels. Many authors give credit for this recovery to the effects of the ESA. Most bird-of-prey specialists, however, cite the control of pesticides as the reason.



Author Henry Springer is executive director of the AGC of Alaska.

SPECIES PROTECTION IS MISSING WHERE IT'S MOST NEEDED: THE THIRD WORLD

Peregrines are migratory birds. Some Alaskan peregrines winter in South America. A food supply uncontaminated by pesticides is just as important in the winter as it is during the summer breeding season. To compound the problem, many of the Alaskan prey birds also winter in tropical countries and may be exposed to poisoning. Significantly, some seed-eating prey birds may absorb quantities of pesticides and store them, in concentrated form, in their fat deposits. As a result, peregrines could be ingesting the poison in a concentrated dosage. This points to one of the great dilemmas in the whole question of protecting endangered species.

The greatest needs for protection and action are not in North America, but in

most of the Third World. The number of species increases significantly toward the temperate and tropical areas. Another factor that complicates effective measures: most species in northern and southern climates have a wide distribution, while species in the tropics have very limited distribution and often occupy tiny niches. This makes them extremely vulnerable to any change in their habitat. It is, however, exactly these areas that are economically poor. The precious local resources are used and misused at an alarming rate. Effective protection cannot be enacted without a global approach. This takes money. Much is spent in the United States and abroad—but not where it is needed the most.

ALASKA CONSTRUCTION INDUSTRY PAYS \$25 MILLION YEARLY FOR THE PEREGRINE FALCON PROGRAM

Even discounting the actual federal and state money spent to enforce the ESA, the costs associated with the peregrine falcon are staggering. Exact figures are difficult to compile because cost accounting is not done for individual species. A few examples, however, will illustrate the implications:

In the taiga (scattered tree growth) areas of Alaska—about three-fifths of the state—peregrines nest primarily on rock outcrops found along the river systems. They also use riparian (river bank) areas for their social activities and hunting. Riparian habitats produce the highest percentage of biomass for prey animals, nearly all of them birds. Alaska's Department of Highways lost most of its sources of gravel and other material because the environmental impact statements showed a conflict with provisions of the ESA. The average yearly construction expenditure for heavy construction for both public and private works is in excess of \$600 million. About 40 percent is used in areas influenced by the presence of peregrine falcons. Considering that the increased cost of procuring material from alternate and upland sources amounts to about 5 percent of the contract work, the cost to the construction industry to comply with the provisions of the ESA for this species alone amounts to about \$12 million per year.

In addition, preconstruction costs associated with public hearings, research and the preparation of environmental im-

(continued)

fact statements have risen steadily and can be estimated at 1 to 3 percent of total project costs, depending on the type and size of the project. The total preconstruction cost per year in Alaska is in excess of \$100 million, adding another \$2 million to the associated cost. The various operating budgets contain funding for research, management and enforcement of such agencies as the U.S. Fish and Wildlife Service, Bureau of Land Management, Alaska Department of Fish and Game and the University of Alaska. These will add another half-million dollars.

During the construction of the Alyeska pipeline, expenditure of more than \$10 million could be directly attributed to the problems associated with peregrine falcons, including realignment of roads and of the pipeline, plan changes, restriction of activities in some areas and prohibition to operate within certain time frames in others, especially during the critical summer months.

These restrictions continue, because the law demands it.

Government officials and bureaucrats are often blamed for these restrictions. That is not fair! Granted, in some cases they make one-sided decisions, but it is clear that Congress did not provide any mechanism by which to consider cost factors. Congress made it clear that it is not the species alone that is to be protected, but any factor contributing to its welfare as well. This includes numerous human influences and habitat alterations.

But back to the Alaska peregrines. Disregarding the demands of the ESA and disregarding cost as a factor, what would have happened to this species without the ESA? Of course it is speculative, but there is no doubt about the following facts:

1. The peregrine population declined because of the use of pesticides and in some populations because of mercury. It recovered when use of these chemicals was prohibited.
2. There are many remote areas in Alaska with suitable habitat that is little influenced by human activity. About two-thirds to three-quarters of Alaska's breeding population is included.
3. Many other species compete with peregrines for suitable nesting sites. These include gyrfalcons, rough-legged hawks, golden eagles and ravens. The peregrine, as a migratory bird, arrives late, and very often the best sites are already occupied by these species. The

non-migratory birds arrive earlier, are larger and more aggressive, and usually prevail. In some areas, especially around rural settlements, ravens have increased dramatically, and they definitely affect the breeding efforts of peregrines. Peregrines are pushed to secondary, less favorable sites and I believe this has a more negative impact on the breeding success than most human activities.

I believe the peregrine population in Alaska would be at about the present level even without the ESA. Granted, some birds along the traveled river and road systems would be affected, but they are affected now to the same degree.

THE \$35,000 BIRDS

We as humans have an obligation to address conservation in a prudent manner, and I believe that we have to use financial resources to do this. However, I also feel that the expenditures related to the ESA in Alaska are excessive and that the money could be put to better use. None of Alaska's species is in serious trouble and all are afforded sufficient protection under other state and federal laws. Of the 500 to 600 pairs of peregrines in Alaska, perhaps 200 may be directly affected to some degree by human activity. That results in a cost of about \$35,000 per bird per year. During the Middle Ages, when the peregrine falcon was a favored hunting bird of nobility, good birds were worth their weight in gold. In today's market that would amount to \$15,000 per bird. The price has gone up! Oil companies and other large corporations do not worry much about the cost as a factor, because they recover all expenses through tariffs and sales of their products. Most people do not realize the effects and the resulting cost to everyone. But the bottom line is that *everyone* pays.

CRITICAL POINTS FOR REAUTHORIZATION OF THE ENDANGERED SPECIES ACT

The Endangered Species Act is up for re-authorization before Congress. The stakes are high. The political differences between the executive and legislative branches of the federal government, and the composition of Congress make the outcome uncertain. However, changes are probable. It is to be hoped that a reasonable balance can be achieved and cooler heads prevail. I believe that the following factors should be addressed:

1. Economic factors must play a role

in the listing and decision-making process.

2. The scientific problem of legally defining what constitutes a "species" must be clearly addressed. This is one of the major flaws in the ESA's present form. The inclusion of "bio-diversity" since the Rio Summit makes it even more pressing. There have been about 1 million species identified, of which about 75 percent are insects. Very little is known about most of them. Congress needs to set some limits on how far down the list we can reasonably go.

3. Congress must consider the problem of "local" distribution within the United States versus total distribution beyond our boundaries. Some species are rare in the United States, but common elsewhere. It does not make sense to spend a disproportionate amount of money when it is urgently needed for more critical cases.

4. Congress must address the question of compensation for reduced value of private property and the social effects and consequences.

5. Our role in global affairs needs to be clearly defined. Some of our present forms of "eco-imperialism" are uncalled for and in many cases work against serious conservation efforts by other countries. Examples include efforts to save elephants, argali sheep and many other African and Asian species.

BACK TO THE ORIGINAL QUESTION: ENDANGERED SPECIES—CAN WE AFFORD THEM?

This is a decision we must make, first as individuals and then as a nation. But you cannot make a rational decision until you have all the facts before you. It is unfortunate that various groups on both sides of the issue polarize it according to their own philosophies. One-sided articles appear in the press. This article may seem one-sided, but it covers factors rarely mentioned.


The Endangered Species Act has many merits, but in its present form it is not affordable—not by us and certainly not by the nations who need it most: those of the Third World. We *must* think globally when it comes to preservation efforts, ecology and affordability.

Congress needs to hear from all of us. It's up to you.

—By Henry Springer, executive director, AGC of Alaska. Reprinted from *The Alaska Contractor*, Fall 1995.

National Marine Fisheries Service

4 D Rules and Comments from members of the CRWC.

© Federal Register 12/30/99 4 D Rules 

© 4DRules Comments

Some one liners of the 4 D Rules

The 4D rules are an ESA mechanism for protecting threatened as opposed to endangered species. They propose a means by which states, tribes, government entities, developers, private citizens & others can obtain assurances that activities they authorize or conduct are permissible under the Act. There are 3 proposed rules and only the one covering steelhead concerns us.

The Steelhead 4 D rule would apply the "Take" prohibitions to all of our actions. 13 entities on the west coast that have what is described as a "Limit" will not be subject to the take prohibitions. As of September 1998 there were 243 incidental take permits & 200 Habitat Conservation Plans (HPC's) in various stages of development. MPWMD, Cal-Am and certain other CV stakeholders are already negotiating their own section 10 take permits and/or HPC's. If this matter is of concern to those above surely it follows that we should be also concerned!

For threatened species there are nine "Take" prohibitions. Take is defined as harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt any such conduct. What leads to "Take". Destroying or altering the habitat of listed salmonids. Removing large woody debris i.e., moving fallen trees. riparian canopy, dredging, discharge fill material (dumping), draining, ditching, road construction, bridges, culverts and so on & so on. Violating fed or state clean water act discharge permits, applying pesticides. Diverting water through an unscreened or inadequately screened diversions when juvenile salmonids are present. Physically disturbing or blocking the streambed where spawners or redds are present. Blocking fish passages thru fills, dams or impassable culverts. You get the picture!!

If you will recall we talked about the "hammer" that was bringing us together. This is it! The 4 D rules committee having read through these Federal Register 28+ pages of rules concluded:

There is little that one can challenge NMFS on as it relates to the above but there is plenty of opportunity to educate all stakeholders and particularly riparian property owners of the need to

be aware of the prohibitions. CDFG has a considerable amount of control over the state of play with their Fishery Management Evaluation Plan (FMEP).

Public opinion at the hearing on Feb. 2 was that NMFS & US Wildlife were not doing enough to protect the threatened species. Few spoke about the financial burden on property owners & users. NMFS appears prepared to negotiate HCP's and Section 10 take authorities which will permit some take but within the overall umbrella of a watershed group and its peer pressure on those who might become involved in a prohibition. These section 10 permits do not authorize "kill" but permit restoration work, fish rescues & other work within strict controls & limits.

In my opinion the CRWC needs to consider whatever comments may dissuade NMFS from taking a hands off posture as a result of public outcry that not enough is being done to protect the threatened species.

1. Recognize the need to make the permit application process easier. They say it may take 3 + years to get a HPC in place.
2. To recognize in a speedy manner any grassroots efforts to police ourselves.
3. Recognize that not one size fits all. Acknowledged the validity of the Regulatory Flexibility Act, arrange for a Initial Regulatory Flexibility Analysis that would provide financial relief in implementing the provisions of the ESA 4D rules if there is undue hardship.
4. NMFS says as there is no need for record keeping there is no need for regulatory relief.
5. Anyone who is undertaking work instream would in my opinion be wise to record all events & action (photograph records). Any temporary stream diversion would require rescue of juveniles to a safe location while work is in process. This applies I would think to Redlegged frogs.
6. Although MPWMD may be in a position to advise owners on streambank restoration and any other in stream work grant money is available to help. It can be obtained more easily through a properly structured watershed council that has a HPC in place.
7. Not only comments to NMFS from the council but from individuals too.
8. There is the technical aspect of control of events to be commented on also. Carmel river & tributaries can & will dry up through drought years. This also occurs when overpumping and diversions occur. There is nothing in the 4D rules that takes natural occurrences into consideration, such as escarpments falling into the river and causing diversions changes in water courses, flood etc. The rules talk about what constitutes a take. No clarity on the cause. How does one establish the status quo without mapping & photography of the sites. These are the primary concerns I have. Kallie, seems to imply that we are dealing with a benevolent caretaker. All I can say is that if I was a property owner I would be concerned at the open endedness of these rules and would seek clarification of my concerns to be incorporated in the final rules.
9. I do not accept the notion that we should be unconcerned because of governments inability or failure to enforce the laws. We have come together because of our appreciation of the Carmel Watershed and our desire to preserve or restore the river & habitat. We must believe

that it is our intention to do all we can to achieve this. Obtaining clarity of the ground rules by commenting on some or all of the above is just plain good business sense.

10. There are real differences of opinion on the meaning of "restore & restoration". Bearing in mind that NMFS & USWL think in terms of restore it might have made more sense to ask them for their definition. The Webster Encyclopedic Unabridged Dictionary of the English Language (I hasten to add a US publication), among other definitions shows "to bring back to a state of health, soundness or vigor".

Clive R. Sanders
Chair 4D Rules Committee

February 8 2000

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Last updated April 3 2000 by Clive Sanders.

1-26-10

SUMMARY OF ESA STATUS REGARDING ARCTIC SPECIES

ENDANGERED SPECIES:

- **Eskimo Curlew** – Listed March 11, 1967. Medium-sized shorebird. Last sighting off the coast of Texas in 1962.
- **Bowhead Whale** – Listed June 2, 1970. NOAA found in favor of designating critical habitat for the Bering Sea Stock of Bowhead Whales on May 22, 2001. No critical habitat has yet been designated.

THREATENED SPECIES:

- **Spectacled Eider** – Listed May 10, 1993. Large sea ducks that spend most of their life at sea. Critical habitat was issued on Feb. 06, 2001 and includes approximately 39,000 square miles.
- **Steller's Eiders** – Listed June 11, 1997. Small, marine duck. Although difficult to determine, USFWS has stated that population has been in relative decline. 2,839 square miles of land has been listed as critical habitat as of February 2, 2001.
 - Both are also protected under the MBTA. USFWS issued regulations designed to limit the harvest of both species in 2009, which include some restrictions on times of hunting.
- **Polar Bear** – Listed May 15, 2008. USFWS issued 4(d) special rule allowing for subsistence take, oil & gas activities, deterrence, and self defense. Multiple lawsuits have been brought and are pending in the D.C. Federal District Court. 200,000 square miles have been proposed for critical habitat designation and a final rule is expected by June 30, 2010. USFWS will develop guidelines for deterrence by March 31, 2010. The Borough previously filed comments on Dec. 28, 2009 protesting lack of consultation.
 - In its prior comments, the Borough indicated that it opposed listing of the polar bear due to insufficient data indicating the stock was actually declining (some reports point to the contrary). At the time of the comments, the Borough believed adequate protection measures were already in place and that listing would be premature based on existing data.

SPECIES UNDER CONSIDERATION:

- **Ice Seals** (including Bearded, Ringed, and Spotted) – Petition to list filed by Center for Biological Diversity on May 28, 2008. NMFS concluded, after conducting a status review, that listing of the species may be warranted. A proposed rule should have been issued by May 2009 but was never issued. The Center for Biological Diversity issued a notice of intent to sue. All three species are currently managed under the MMPA allowing for subsistence take, deterrence, and self defense.
 - For Bearded and Ringed Seals, NMFS will determine if listing is warranted by Nov. 1, 2010.
 - Spotted Seals in the Yellow Sea have been proposed to be listed by NMFS as a DPS.
- **Ribbon Seal** – Center for Biological Diversity filed a petition to list the species on Dec. 27, 2007. Determination that listing was not warranted issued on Dec. 30, 2008. Lawsuit has been brought challenging this decision. Currently managed under MMPA allowing subsistence take, deterrence, and self defense.
- **Pacific Walrus** – On Feb. 7, 2008, the Center for Biological Diversity filed a petition to list the walrus under the ESA. USFWS announced on Sept. 10, 2009 that listing may be warranted and is currently conducting a status review. A decision should be announced by Sept. 10, 2010.

Currently managed under the MMPA allowing subsistence take, deterrence, and self defense. Some non-lethal, incidental take is permitted for oil and gas activities.

- **Kittlitz's Murrelet** – Small bird found in the waters off the shore of Alaska. Listed as a candidate species on May 4, 2004 under the ESA. Because it is a candidate species, ESA's protections do not currently apply. AK Dept. of Fish and Game declined to list it as a state endangered or threatened species on April 7, 2009. These birds are not currently included as a species subject to subsistence harvest under the MBTA.
- **Yellow-Billed Loon** – Center for Biological Diversity filed a petition on March 30, 2004 to list the yellow-billed loon as threatened or endangered. On March 25, 2009, the USFWS concluded that listing the yellow-billed loon under the ESA is warranted but precluded by other higher priority listing actions and therefore, USFWS classified them as a candidate species under the ESA. Currently protected under the MBTA and no subsistence harvest is permitted. But, up to 20 loons per year taken inadvertently is acceptable.
- **Caribou** – International Fund for Animal Welfare filed a petition with USFWS on Sept. 15, 2009 to list two subspecies under the ESA. The two subspecies are only found in Canada, so USFWS will consider whether to list them as a foreign species. USFWS is required to determine whether listing may be warranted 90 days after receipt of the petition.

1-26-10

Testimony to the House Finance Committee
Taqulik Hepa, Director
Department of Wildlife Management
North Slope Borough
January 26, 2010

Thank you, Mr. Chairman and members of the Committee. I appreciate this opportunity to speak to you today on behalf of the North Slope Borough and Mayor Edward Itta. I would like to share our views on the listing of the polar bear and other species under the terms of the Endangered Species Act and its effects on our local government, our communities and our subsistence hunting practices.

The borough has been involved in the management of polar bears on a daily basis since 1988, when Alaskan and Canadian subsistence users established the Inuvialuit-Inupiat Polar Bear Management Agreement. Since then, Native hunters have managed the aboriginal harvest of polar bears along the Arctic coast based on annual quotas recommended by polar bear scientists and the traditional knowledge of experienced Inuit hunters.

This co-management program has emphasized protection of denning bears, females and cubs, and it relies on continuous harvest monitoring. As a result, the polar bear take has remained below established quota levels on average for the past 20 years. The North Slope Borough has embraced this conservation effort and continues to do so, because we care about the polar bear as a resident Arctic species and we consider it essential to the cultural and nutritional wellbeing of our people.

But hunting is not the primary interaction we have with polar bears. As the human population increases on the North Slope and polar bears spend more time onshore because of receding sea ice, the borough has found it necessary to establish a polar bear deterrence program for the protection of both bears and people. With authorization from the U.S. Fish & Wildlife Service, our Department of Wildlife Management operates polar bear patrols to prevent human/bear encounters in the coastal communities of Kaktovik, Nuiqsut, Barrow, Wainwright, Point Lay and Point Hope. These patrols require staff, vehicles and deterrence equipment, and the borough has always been expected to cover the costs, despite the federal responsibility for polar bear protection.

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So my first point is that if the federal government is concerned about polar bears, they should talk to us. North Slope people have a subsistence interest in the conservation of polar bears; we have centuries of traditional knowledge about the habits and health of the polar bear population; and the North Slope Borough has done more in recent decades to protect the species than any other governmental entity. We know how to manage the interaction of polar bears and people to limit harm to the bears while protecting the safety of a growing North Slope population. And I guess we're wondering why that doesn't seem to count for anything when it comes to setting policy on polar bears.

The North Slope Borough is very troubled about the expanding application of the Endangered Species Act as a way to protect polar bears and other listed species. The blunt force approach of the ESA is likely to have severe implications on our residents and communities – in terms of our continuing efforts to manage wildlife, our subsistence hunting practices (including such basic activities as coastal travel by snow machine or boat), and even routine infrastructure development.

Our concern is not only based on the sweeping nature of the ESA, but also on our recent experience with the U.S. Fish & Wildlife Service. In late 2008 in an effort to conserve Stellars Eiders, the North Slope Borough hammered out a MOA with the Service setting local conservation measures in place. Our hope was that the Service would focus on the biological needs of the species, outreach, and educational efforts. Unfortunately, the result was a season of intensive law enforcement activity. This is this punitive approach to wildlife management that first comes to mind as we consider the possibilities for an ESA management plan.

We don't know what specific restrictions the Feds will come up with. But having designated 200,000 square miles of critical habitat that includes our hunting grounds and travel routes and surrounds some of our communities, any restrictions are likely to compromise our freedom of movement through the area or our ability to improve our communities. For example, it is not hard to imagine that prohibited activities could include construction of the new runway that the village

of Kaktovik so desperately needs. If a polar bear den is identified near the community, the village may not be able to move their runway to higher ground in order to avoid being routinely swamped by storm surges, as it has been in recent years. That's just one example of a very justifiable public need that stands a good chance of getting derailed in the wake of this listing and the enormous critical habitat designation.

If polar bears were going to be hugely benefited by these restrictions on our daily lives, we could at least understand it. But the federal action on polar bears is based on rapid disappearance of the sea ice the bears depend on as a feeding platform. Unfortunately, there is nothing we can do on the North Slope to counteract that problem. Restricting our activity in a 200,000-square-mile area will not help the polar bear at all. It will only make life more difficult for people, local governments and commercial concerns.

If the federal government really wants to protect the polar bear, it needs to address the issues of ocean warming and climate change. Nothing will be accomplished by restricting the ability of our communities to go about normal daily life. We are clearly not the cause of any serious threat to these species, and yet we could face civil and criminal liability under the ESA for any harm to a single polar bear, even though we are not having any effect on climate change or sea ice. This is not right.

In 2007, the North Slope Borough filed comments opposed to the listing of the Polar Bear under the ESA. We did so because – although we are

very concerned about sea ice retreat – we didn't think there was enough data on polar bears to justify a listing, and we don't think the ESA is the right tool to deal with climate change issues.

As we noted in our 2007 comments, we have observed the effects of the warming Arctic for many years. Sea ice is forming later in the fall, it is not as thick as it used to be, and it thaws earlier in the spring. Violent storms are now more frequent and more intense and they're happening both earlier and later in the year. So we are experiencing the effects of climate change. But as we wrote in our comments to Secretary Kempthorne, "the causes of a changing northern climate lie outside our region, and we firmly believe that any action to counter the warming trend must focus on those causes at their sources."

Unfortunately, it looks like the polar bear listing is going to be the wave of the future. For the first time in history, there is now the likelihood of a large number of other North Slope species being listed. The federal government has already listed at least 5 species on or near the North Slope and is considering at least 7 more. Based on our long experience with bowhead whales, cooperative management agreements for polar bears, and work with bird species such as spectacled and Steller's eiders, we believe most species can be managed best under the Marine Mammal Protection Act, the Migratory Bird Treaty Act, and – for the polar bear – our international conservation agreements. There are also state and federal wildlife laws and other international treaties that can be used as additional tools. We don't need ESA listings to create the best

possible conservation programs along the Arctic coast. And as I said before, no management plan in the Arctic is going to get at the source of receding sea ice, which is the specific problem.

We are also concerned that management under the ESA is driven by litigation, and ESA litigation is targeted at the federal government, ignoring any local consequences. Any person can bring litigation under the "citizen suit" provisions of the ESA, and local communities are little more than collateral damage in these actions. Our ability to participate in traditional activities gets thrown under the bus in the wake of broad federal actions resulting from this kind of litigation. It is not only unfair, it's completely unreasonable.

We are exploring ways to limit the risks to our communities. The Polar Bear Special Rule under section 4d of the ESA gives the federal government an opportunity to shield us from some liability. This special rule protects against liability for incidental takes authorized by the Marine Mammal Protection Act, and for self-defense and deterrence. We are worried, though, that litigations - to which we are not a party - in federal court could strike down the 4d Rule and the protection it provides.

Finally, I want to reiterate that in considering actions under the ESA, the Federal Government hasn't recognized the value of local and traditional knowledge. We know species such as polar bear and arctic seals better than anyone. We pay close attention to these animals and interact with

them almost daily. They are part of our culture, our food supply, and our way of life. We have worked with federal agencies on many Arctic species, and we've had notable successes, including the Alaska Eskimo Whaling Commission managing the endangered bowhead whale and the Alaska Nanuuq Commission managing polar bears.

Even so, our knowledge is often ignored in federal planning, and it was not fully considered in formal consultation before the polar bear listing. Mayor Itta testified at hearings, wrote letters, and spoke to Administration officials. Yet it's fair to say that the final analysis did not consider the experience and knowledge of the people most familiar with the species. So we don't believe there has been an adequate weighing of local and traditional knowledge in the early ESA decisions.

The North Slope Borough is glad to know that you are reviewing new and potential listings under the ESA, and we are grateful for the chance to speak on our behalf. There's no question in our minds that the ESA tackles complex problems with a giant hammer aimed in the wrong direction. It creates tremendous uncertainty for people in our isolated communities, and it may well lead to legal liability even though we are causing no harm to the species. There has to be a better way, and we are eager to work with you toward a more sensible solution.

ANDY
MACK