

**2/17/11  
DISCUSSION:  
FEDERAL  
REGULATORY  
ISSUES  
AFFECTING  
ECONOMIC  
DEVELOPMENT IN  
ALASKA**

<TARGET><BILL></BILL><SUBJECT>2-17-11 DISCUSSION  
FEDERAL REGULATORY ISSUES AFFECTING ECONOMIC DEVELOPMENT  
IN ALASKA</SUBJECT><COMM>HFIN27</COMM></TARGET>

Alaska State Legislature  
HOUSE FINANCE COMMITTEE

Agenda

1:30 PM

Thursday, February 17, 2011

Discussion: Federal Regulatory Issues Affecting Economic  
Development in Alaska

John J. Burns, Attorney General, Department of Law

Daniel S. Sullivan, Commissioner, Department of  
Natural Resources

North Slope Borough Mayor, Edward S. Itta

Rex Rock Sr., President and CEO, Arctic Slope Regional  
Corporation

Possible Testifiers from **Arctic Slope Regional Corporation:**

Rex A Rock Sr., President and CEO

Tara Sweeney V. P. of External Affairs and Communications

Note that the testimony of Mayor Itta and Rex Rock is in the  
Backup.

**Discussion of Federal Regulatory Issues Affecting Economic Development  
in Alaska  
(with AG John Burns, DNR Commissioner Dan Sullivan and Rex Rock)  
Thursday, February 17, 2011 – 1:30 p.m.  
House Finance Committee Room 519  
State Capitol, Juneau**

Thank you, Mister Chairman and members of the committee. My name is Edward Saggan Itta. I serve as Mayor of the North Slope Borough. I am a whaling captain and hunter from Barrow, also a husband, father and grandfather. They say I'm an elder, but in my mind I'm still a young buck. I'm sure some of you know the feeling.

I'm grateful for the chance to speak with you this afternoon, because the topic of federal regulation is one in which the state's interests and the borough's are almost in complete alignment. I think this fact has been largely overlooked in the noise of occasional moments of **dis**agreement we may have.

So I'd like to set the record straight by touching on three issues that are at the top of our list when it comes to development: NPR-A, Endangered Species and offshore development. And I should start by saying that —for us— **resource** development and **economic** development are one and the same. We don't have commercial fishing or timber or much tourism. The economic development in our communities is **all** driven by oil and gas activity, so we are **even more** dependent on resource development than the state.

At the same time, North Slope residents understand that the cash economy and our subsistence economy are interdependent. As a

whaling captain, I need my snow machine and it needs gas. So we need economic development in order to pursue our subsistence activities.

These are important realities for me as I think about the future of our communities along the Arctic coast. I worry about their economic future at the same time as I worry about the future of our bowhead whaling tradition. I ask myself, "Is there a way that the nation's energy needs and the state's revenue needs and our local economy and the ancient whaling practices that guide our Inupiaq culture can all be accommodated in the Arctic?"

I have decided that the answer is "Yes." Together with the state and industry, we have **already** proven that multiple uses **can** be accommodated **onshore**. And we share the same frustrations over the roadblocks that now stand in the way of the few remaining new onshore prospects. The 1002 area of ANWR appears to be a lost cause, because environmental groups have successfully made it a rallying point for saving the polar bear and the caribou, of which there are only about half a million roaming around the North Slope.

You'd think that a **petroleum reserve** would have a somewhat lower barrier to entry, but what's happening in NPR-A is starting to look like a stealth version of the ANWR experience. The bridge over the river channel to Conoco's CD-5 development is the gateway to NPR-A from the east. That project went through a very difficult process that finally resulted in an agreement everyone could live with — the company, the community, and the regional and village corporations that have title to lands in the area.

Then at the 11<sup>th</sup> hour, the Corps of Engineers stopped the project in its tracks by denying a final permit. I met with agency officials in Washington several times — from Secretary Salazar on down — **trying** to get CD-5 back on track. We didn't immediately achieve our goal, but I **do** believe that Conoco will ultimately get access across that river channel. I just hope they're willing to stick around long enough to see it through.

But here is the real challenge: As a diverse group of stakeholders, can we work together closely enough so the CD-5 experience is not repeated? We **cannot** allow NPR-A to become another 1002 area, since it is the only remaining untapped North Slope acreage that has not been walled off by a refuge designation. The North Slope Borough can be an effective ally in this effort, but we really need to have better communication with the State. Attorney General Burns was in Barrow the other day to discuss how we can coordinate the message, but up until now the State's interest in what **we** can bring to the table has been **really low**. Unless there's a relationship through which we can craft an appropriate message, we are missing out on our best shot at future onshore development.

One way in which the borough is trying to help is through our involvement as a cooperating agency in the current process for creating a new Integrated Activity Plan for NPR-A. This is the context in which we've heard about this new type of designation called "wild lands." The "wild lands" idea has the fingerprints of environmental NGO's all over it, and it could lead to large areas of NPR-A being set aside for **consideration** as wilderness areas. The Borough has never been afraid

to engage in planning and permitting. The kicker with wild lands is that **any lands set aside for consideration will be managed as wilderness until a determination is made.** We could end up with a lot of de facto wilderness area in NPR-A if that program goes forward.

This is another one where all stakeholders need to have a united approach and a united message, which is only possible as a result of healthy and consistent communication. That's how we will **all** know where the **sticking points** are for **each stakeholder**, and we can work together to accommodate our respective concerns. When we're up against these powerful federal agencies, we have to do a lot more than **blame and complain.** We've got to play to our strengths by presenting a united front that recognizes the core concerns of industry, the State, the borough, tribal governments, and local residents.

We create a united front by capitalizing on our areas of agreement. They are many, and by working on them side by side, we develop a level of trust that allows us to work through issues where we **may not** have complete agreement.

We've done this on the North Slope with ESA listings. The borough and the North Slope's regional corporation, ASRC, look at the world through different prisms, because our organizational missions are different. But we've recently been talking about the consequences of multiple species being listed in the Arctic.

The ESA scenarios that may confront us are in fact pushing us onto common ground, although we sometimes we get there on different paths. When it comes to ESA listings, the borough's mandate for

community development makes us very nervous about the potential effects of listings on things like Kaktovik's need to build a new runway. The agency promised us that the Critical Habitat area for polar bears would not include our villages, but when the maps were released, sure enough **three** of our villages were in the middle of critical habitat.

ASRC is equally concerned about the likelihood of critical habitat designations stifling development opportunities. So we joined together in announcing our notice of intent to sue the government over the Critical Habitat Designation for the polar bear. And the regional tribal organization, ICAS, joined with us in this case, because we all share a deep concern for the future of our subsistence hunting activities under the thumb of federal regulators. It came as no surprise to us that, in early discussions of a polar bear recovery plan, the **first item** favored by most NGO's was to limit the subsistence take of polar bears.

So our regional government, our regional corporation and our regional tribal organization — which all come at issues from different directions — came together because of our underlying concern about something we all value deeply, namely, our subsistence traditions.

I mention this because I see a parallel opportunity for industry, the State, the borough and others to come together so that Alaskans can benefit from **offshore development** and have a meaningful voice in federal decisions that will affect us all.

For example, there is nothing preventing oil produced offshore from being tankered to market instead of processed onshore and fed into the pipeline. Tankering oil out of the Beaufort seems unlikely, due

to geography, but the Chukchi is a different story. If it leaves by tanker, the State gets no economic benefit, fewer jobs are created here, and we've got tankers plowing through Arctic ice day in and day out. It's a bad deal all the way around, and I've been promoting a federal requirement for pipelines to shore on all OCS oil production for the past two years.

In fact, I developed a set of eight OCS policy points that I've been shopping around in D.C. since the spring of 2009. They are included in the handouts you should have. I've also been meeting with Pete Slaiby and the folks at Shell quite a bit, trying to sell them on these ideas. To Shell's credit, they have engaged with us extensively, and we've now got agreement on a number of these policy points, including ocean discharge and baseline science. We recently signed a joint science agreement with Shell that will ramp up baseline science research in the Arctic, focusing on issues of concern to local residents. This program does not delay exploration, but it supercharges the science effort, which is in everyone's best interest. A copy of that agreement is also in your packet.

Shell has come a long way toward addressing the most critical concerns of our communities. In fact, Pete has told me that he will work with us to reach our goal on most of the eight policy points. So I was disappointed when EPA did not issue the very last permit that is keeping Shell out of the water this summer. I lobbied the Assistant EPA Administrator last month in Washington on this, because I think Shell has earned the right to start their exploration program.

If by any chance you ever heard me speak about OCS development during my first term as mayor, then what you're hearing from me today may come as a surprise. You see, Pete Slaiby and I may disagree on plenty of things, but we have both decided that we can get closer to our respective goals by **engaging** and **building trust** than we can by duking it out in court or going our separate ways and leaving all the decisions to federal agencies. That is not in **our** best interest, nor is it in **Shell's**.

By the same token, the State and the borough may not agree on everything, but that is a reason for **more** dialogue, not less. When it comes to these big rulemaking processes on NPR-A or Endangered Species, or the OCS, we all lose if we are not working together.

Where has the State been in these negotiations and rulemaking tussles? For all practical purposes, the State has not been an effective advocate, except to say they support development and oppose anything that slows the process. I do not make this comment to you casually, but after much consideration. And I am **not only** referring to the current administration as this seems to be the consistent message for a few decades.

It is not, however, **realistic to talk exclusively about economics** in the context of proposed development. Nor is it **effective**. And it sends a message that the State is **not really interested** in engaging. The federal government has an obligation to protect Alaska Natives. My suggestion is that the State broaden its vocabulary so it is talking about issues like OCS in comprehensive terms that include impacts to coastal communities.

I want to point out to you a memo in the packet the Borough has provided. The memorandum analyzes the ability of the State and the Borough to use the coastal zone management program to push back against critical habitat designations and other federal decision that impact our coastal regions. I raise this issue because we cannot afford to ignore any tool that might be of use. If the message is all about development it will fall on deaf ears.

You'll recall how in the late '60s and early '70s, the State had an oil field at Prudhoe Bay, but no access for a pipeline. It took a meeting of minds among diverse interest groups to overcome that extreme challenge. Offshore development is different, but it again holds substantial challenges for a diverse collection of interests. Will the State willingly join together in pursuit of a common goal this time around? I hope so, because that's how Alaskans will be able to get the **best** results **across the board**. We can create scenarios where **multiple** interest groups win, but they **must** be founded on **mutual trust**, which grows out of honest and continuous communication.

Thank you very much for allowing me to speak to you today.

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# Alaska Department of Natural Resources



FEDERAL REGULATORY ISSUES  
AFFECTING ECONOMIC  
DEVELOPMENT IN ALASKA

2/17/11



# SOA's Duty: Maximize Resource Development Consistent with the Public Interest

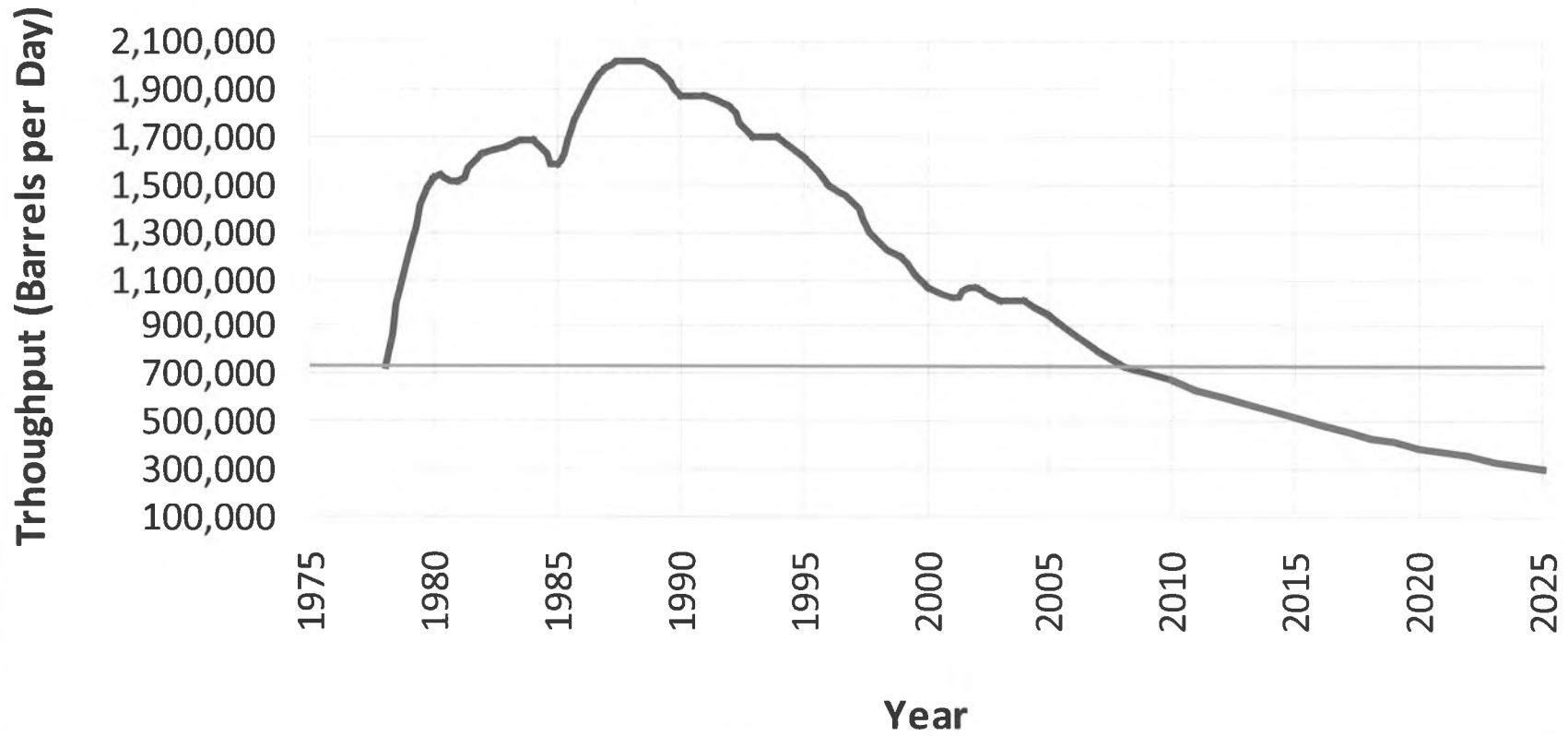


- Article 8, Section 1 of the Alaska Constitution provides that “it is the policy of the State to encourage the settlement of its land and the development of its resources by making them available for maximum use consistent with the public interest.”
- Article 8, Section 2 provides that the “legislature shall provide for the utilization, development, and conservation of all natural resources belonging to the State, including land and waters, for the maximum benefit of its people.”
- AS 38.05.180(a) provides that “the people of Alaska have an interest in the development of the state's oil and gas resources to maximize the economic and physical recovery of the resources; maximize competition among parties seeking to explore and develop the resources; maximize use of Alaska's human resources in the development of the resources”

# Top Priority: Arresting TAPS Decline



## January Average Throughput

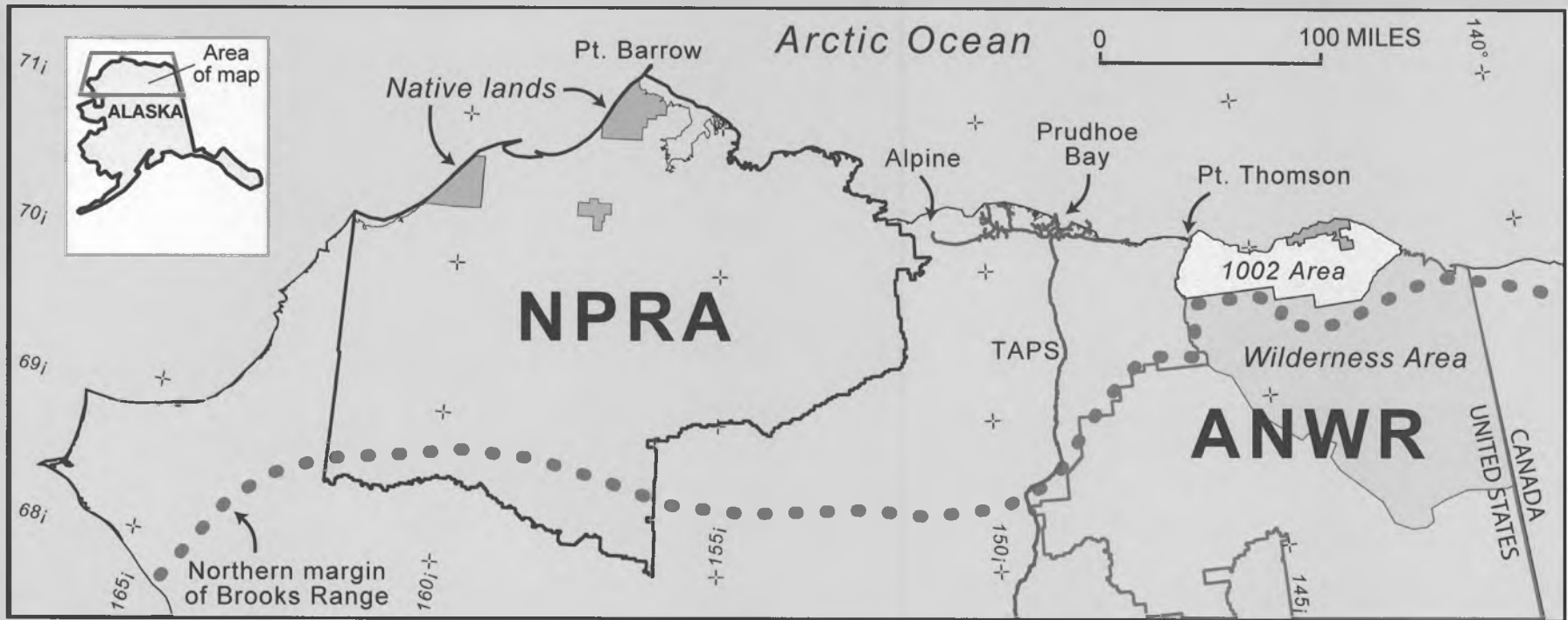


# Importance of Partnership



- Overcoming challenges hinges on partnership
- Federal Government moving from protecting environment to proactively shutting-down resource development
- Recent federal decisions have delayed or vetoed critical projects

# State Lands: Surrounded By Feds



# Specific Development Plans Delayed or Vetoed



- CD-5
- OCS Exploratory Drilling
- OCS Moratorium
- Point Thomson EIS Delays

# Broader Policies Jeopardizing Future Development



- NPR-A Wildlands
- ANWR National Monument
- ANWR Wilderness Designation
- ESA – Polar Bear Critical Habitat Designation

# Solutions



- Re-double efforts with Obama Administration
- Act as a cooperating agency
- Educate public about shut-downs and delays
- Encourage congressional action
- Last resort: Litigation

# Alaska Department of Law



Federal Regulatory Issues Affecting Economic  
Development in Alaska 2/17/11



# Law's Mission



- ✦ **Continue to Advance Core Services**
  - **Fostering Responsible Development is a Core Service**
- ✦ **State-Federal Relations**
  - Areas where state and federal cooperation is working well
  - Areas where a core state interest requires federal challenge



## General Examples where State-Federal Cooperation is Working Well



- Department of Environmental Conservation's (DEC) air permitting program
- DEC assumption of National Pollutant Discharge Elimination System (NPDES) permit program under the federal Clean Water Act
- Cleanups at federal facilities under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and other federal and state laws

## Specific Examples of State Cooperation with Federal Programs



- Defended Army Corps of Engineers Clean Water Act permit authorizing disposal of mine tailings, allowing Kensington Mine to open
- Worked with EPA to incorporate revised DEC regulations into Red Dog Mine Clean Water Act permit
- Intervened on side of U.S. in *Point Hope v. Salazar* and *Center for Biological Diversity v. U.S.*
  - Outer Continental Shelf cases
    - challenging the OCS 5-year plan
    - challenging to OCS Lease Sale 193 (Chukchi Sea)
    - Challenging Shell's Beaufort and Chukchi Sea OCS exploration plans
- Supported U.S. Forest Service authorization of Logjam timber sale

# Areas Where a Core State Interest Requires Challenge Because of Federal Overreach



- **Endangered Species Act**
  - U.S. Fish and Wildlife Service
    - Species listings
    - Critical habitat designations
- **Clean Water Act**
  - Environmental Protection Agency
    - Wetlands fill permit 404 (b) and (c) elevated scrutiny
      - CD-5
      - Tanana River Bridge
- **Wilderness and “Wild Lands” designations**
  - Bureau of Land Management
    - Designations could tighten permit requirements
- **ANWR Comprehensive Conservation Plan “wilderness” study**
  - U.S. Fish and Wildlife Service
- **OCS drilling “moratorium”**
  - Department of Interior
- **Clean Air Act**
  - Environmental Protection Agency
    - Offshore oil and gas exploration
      - Shell Beaufort Sea drilling plans
      - State air permitting primacy
- **Effect of Presidential Executive Order adopting a National Oceans Policy**

# Endangered Species Act



- Comprehensive Strategy
  - ✦ Challenging unwarranted listings
  - ✦ Challenging unwarranted critical habitat designations
- Listings and designations can affect
  - Shipping
  - transportation
  - oil and gas development
  - mining
  - commercial, sport and subsistence fishing and hunting

# Endangered Species Act



- Listing petitions

- Polar bears
- Beluga whales in Cook Inlet
- Steller sea lions
- Humpback whales
- Pacific walrus
- Seals (ringed and bearded)
- SE Alaska Pacific herring



- Critical Habitat Designations

- Polar bear
- Cook Inlet Beluga whale

# Endangered Species Act



- Pending Lawsuits and appeals
  - Polar bears
  - Beluga whales
  - Steller sea lions
  - Humpback whales
  - Ribbon seals



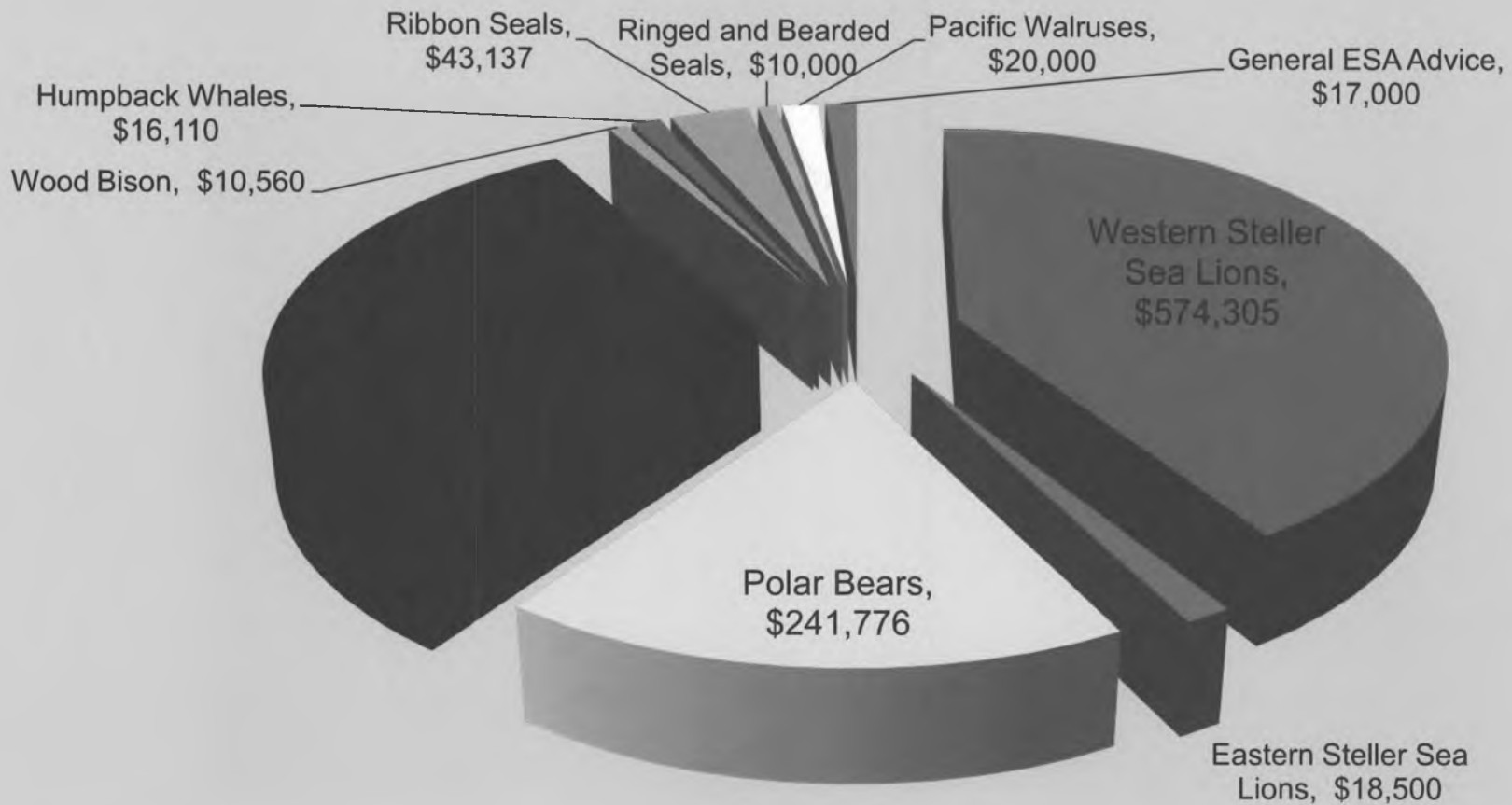
# Endangered Species Act



- Threatened lawsuits
  - State's notice of intent to sue to challenge 187,000 square miles of critical habitat designation for polar bear



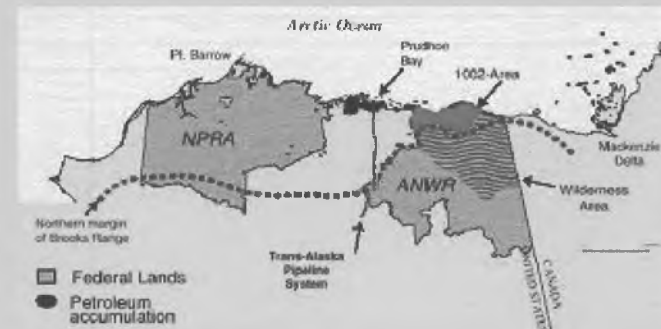
# ESA FY11 Budget Expenditures (\$1,396,875)



# Assisting DNR and DEC in requesting prompt federal review of NPR-A challenges



- Challenges to petroleum exploration in the National Petroleum Reserve-Alaska (NPR-A)
  - Clean Water Act wetlands fill permit for CD-5 project



# Advising DNR on response to BLM Wilderness and “Wild Lands” designations



- Interior Secretary Salazar ordered the evaluation of **72 million+ acres of federal land in Alaska for wilderness characteristics, potentially** allowing federal government to create de-facto wilderness in Alaska without congressional oversight
  - ✦ Affects permitting and right of way determinations
  - ✦ Changes the multiple use mandate otherwise applicable to BLM lands



# Advising Governor on ANWR wilderness plan

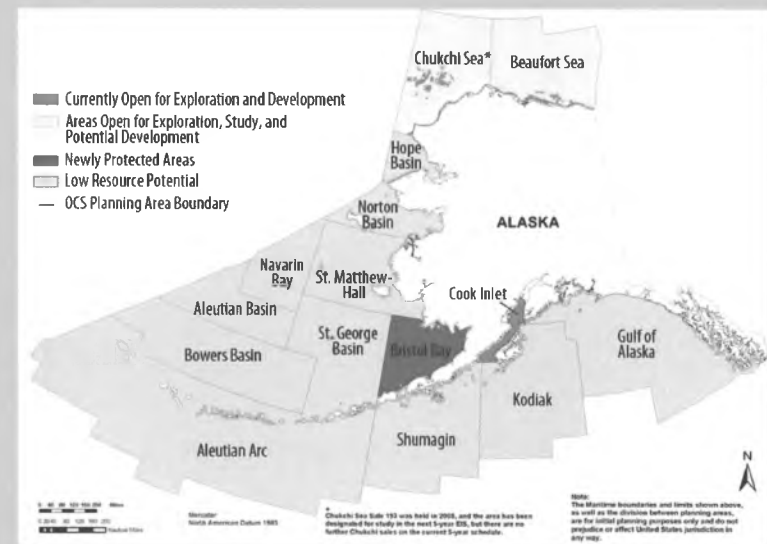


- U.S. Fish and Wildlife Service revised the Arctic National Wildlife Refuge (ANWR) Comprehensive Conservation Plan, evaluating wilderness
  - ✦ Dept. of Law provided legal advice to Governor who wrote President Obama urging him to respect ANILCA



# Challenged Interior's purported imposition of a "moratorium" on development in Alaska OCS

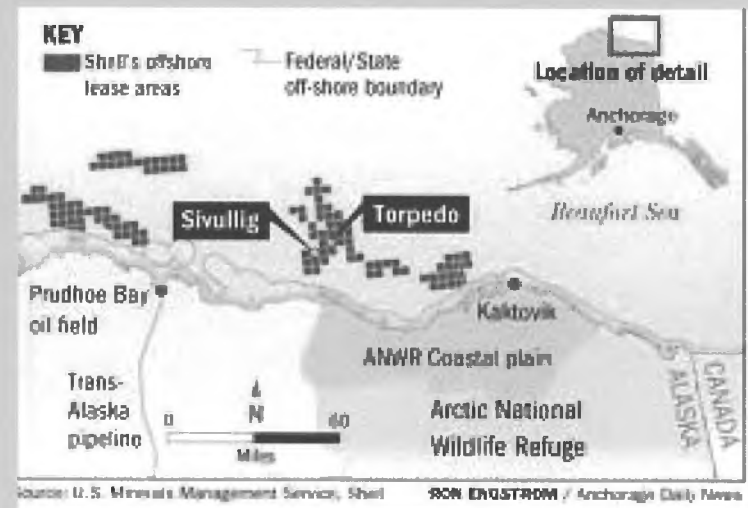
- In *Alaska v. Salazar*, based on Interior's unequivocal denial of a "moratorium," clarity achieved



## Assisting DEC's request for prompt EPA action on Shell's Clean Air Act permit application



- Environmental Appeals Board (EAB) remanded Shell's application for further work
  - EAB questioned EPA's analysis of impacts of nitrogen dioxide emissions from drill ships
  - Shell now postponing plans to drill exploratory wells this summer



# Challenges and Opportunities



- Support--as legally appropriate--**responsible resource development**
  - ✦ Develop a comprehensive long term development strategy
    - Endangered Species Act
      - Unwarranted listings
      - Unwarranted designations of critical habitat
    - Outer Continental Shelf exploration
      - Challenges when warranted
    - Clean Air and Water Acts
      - Challenges when warranted

# Challenges and Opportunities



- Develop a 5-year **interdepartmental** plan
- Coordinate and cooperate
  - ✦ Legislative and executive branches of state government
  - ✦ All executive agencies
    - Department of Natural Resources
    - Department of Environmental Conservation
    - Department of Commerce Community and Economic Development
    - Department of Law
    - Department of Fish and Game

# Challenges and Opportunities



- Cooperate and coordinate with stakeholders **outside and inside** state government
  - Municipalities
  - Boroughs
  - Native corporations and tribes
  - Other states
    - ✦ Washington and Oregon joined to de-list the Stellar sea lions
  - Allies like National Association of Attorneys General and Association of Fish and Wildlife Agencies



Alaska State Legislature  
House Finance Committee  
February 17, 2011

Written Testimony  
of  
ARCTIC SLOPE REGIONAL CORPORATION  
by  
Rex A. Rock, Sr., President and CEO

Co-Chair Stoltze and Co-Chair Thomas, and distinguished members of the committee, thank you for inviting me to speak today to discuss the topic of federal regulatory issues affecting economic development in Alaska.

My name is Rex Allen Rock, Sr., and I am the president and CEO of Arctic Slope Regional Corporation, or ASRC. ASRC is Alaska's largest Alaskan-owned company, with approximately 10,000 employees nationwide, of which approximately 4,000 are Alaskan jobs. ASRC represents 11,000 Iñupiat shareholders of Alaska's North Slope region, and we have been successful in striking a balance between representing the business interests with the subsistence needs of our shareholders. ASRC has five major business lines: 1) energy support services, 2) petroleum refining and marketing, 3) government services, 4) construction, and 5) resource development.

Our business portfolio illustrates that any changes in the regulatory climate will have an impact on our family of companies and the communities within which we do business. Simply put, a draconian federal regulatory climate will negatively impact Alaska's economy.

There are several overreaching federal policies that aim to lock up Alaska's North Slope from oil and gas development, or that have a chilling effect on business investment opportunities in the Arctic.

Under the auspices of the "Great Outdoors Initiative" the Obama Administration has put extreme pressure on our communities, region and State.

ASRC is seeing this pressure from a variety of places within the federal government, like the Department of Interior, the Environmental Protection Agency, National Marine Fisheries Service and National Oceanic and Atmospheric Administration.

As you know, the Department of Interior, using the Endangered Species Act, recently designated an area larger than the state of California as critical habitat for polar bears. Further, they are planning to set aside additional areas on the North Slope potentially covering millions of acres both on- and off-shore. In fact, the polar bear critical habitat designation covers 3.6 million acres of onshore area alone. Significant efforts are under

way by the Administration or Congress to designate vast areas of our homeland as Wildlands within NPR-A; there is consideration of National Monument or Wilderness status for places like ANWR. These designations threaten the responsible resource development that we depend upon for community survival and a safe, sustainable economy.

This concerns ASRC, and should concern all lawmakers. Earlier this week the President released his budget and it included \$15 million for the Bureau of Land Management's National Landscape Conservation System, including special areas, such as designated Wilderness, Wilderness Study Areas, National Monuments, and National Conservation Areas.<sup>1</sup>

Millions of acres on the North Slope are already locked up as Wilderness, National Parks or similarly restrictive status, and these efforts threaten to "paint us into a corner" within our own region. This danger is made worse by the current production decline faced by the Trans Alaska Pipeline System. With most prospective areas on-shore either off-limits or at risk of becoming off-limits, we are unable to offset the dramatic production decline of the existing oilfields. This decline is not just a lingering tail of decreasing production, but will become a "brick wall" when the pipeline reaches its mechanical limits and is unable to move production.

Again, this concerns ASRC and should concern all lawmakers. Our concern is further heightened by the Administration's interest to shift nearly \$43 million to the energy and mineral sectors for inspection costs which will make it even more costly to do business in Alaska.<sup>2</sup>

In addition to the ongoing assault from the Department of Interior, we face similar difficulties with the Environmental Protection Agency, or EPA. We have to write to the EPA to get a 'seat at the table' for consultation and coordination. This is a seat that Alaska Native Corporation's already have but is not acknowledged by the EPA or other federal agencies for that matter. We are finding ourselves in the position of having to tell the federal agencies what their responsibilities are by law and reminding them that we need to be included in the process.

We are also concerned about the additional cost that an operator will have to bear under the new regulatory reporting for oil and gas facilities under the Greenhouse Gas Reporting program for methane and carbon dioxide emissions. We know that the new program imposes significantly more reporting requirements at additional cost to the operators on the North Slope. Any additional regulatory burden placed through

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<sup>1</sup> Bureau of Land Management Press Release Monday, February 14, 2011 titled, "President Proposes \$1.13 Billion for BLM in Fiscal Year 2012 To Protect Resources and Manage Uses of Public Lands."

<sup>2</sup> Bureau of Land Management Press Release Monday, February 14, 2011 titled, "President Proposes \$1.13 Billion for BLM in Fiscal Year 2012 To Protect Resources and Manage Uses of Public Lands."



additional GHG reporting or consultation over critical habitat designation adds costs to existing operation at a time of increasing declines in production. As you are aware, we have vast coal resources in the northwest Arctic and any additional regulations on emissions puts a shadow over our ability to ever bring this high-quality vast resource to market.

At the end of the day the ripple effect of higher costs, lower throughputs and time delays are felt more acutely on the North Slope first. We are the bellwether of the State's economy.

For North Slope communities, this represents a clear and present danger. We have no other economy in our region. We continue to ask ourselves, how will our grandchildren, clear snow from our roads, maintain our schools, and operate the real-world infrastructure that makes our villages safe and viable into the future without development opportunities?

Those of us who have served in the North Slope Borough government need no explanation when the news discusses Alaska's dependence on the oil and gas industry. Our villages are at the "tip of the spear" on this issue. Decline in production equates to a decline to our well-being as the people of the North Slope.

Our analysis suggests that there is no positive benefit to these sweeping designations. In fact, we see the initiatives and federal over-reach as a numbers game; the Administration wants more 'wilderness areas' designated and Alaska has become the easy target for the agencies to meet an unstated goal. Animal species do not recognize boundaries, and the "wildness" of our lands already exists in abundance.

This is not only an issue of the onshore; with proposed 'Marine Spatial Planning' we will see a similar 'carve up' of our oceans. The Oceans Policy Task Force needs to include vital stakeholders from the North Slope into the Coastal and Marine Spatial Planning process. Changes in our coastlines and off-shore areas could negatively impact our traditional subsistence and economic opportunities.

Daily we deal with the onslaught of new federal programs, initiatives, and management plans. We are inundated with the need to respond and we can barely keep up. As we step back and take a long-range view, what we really see are efforts that will lead to the extinction of our communities and lifestyles on the North Slope while protecting areas and species that science says do not need protections at this time. We are fundamentally being attacked by the federal government; and to what purpose? The areas being set aside or are proposed to be set aside have no access; chances of large portions of the American public ever viewing these areas are remote.

**Our message that we are delivering as loudly as we can is that we live on lands that we did not spoil, among species whose numbers we did not threaten, backed against an ocean whose resources we can measure but not develop.**

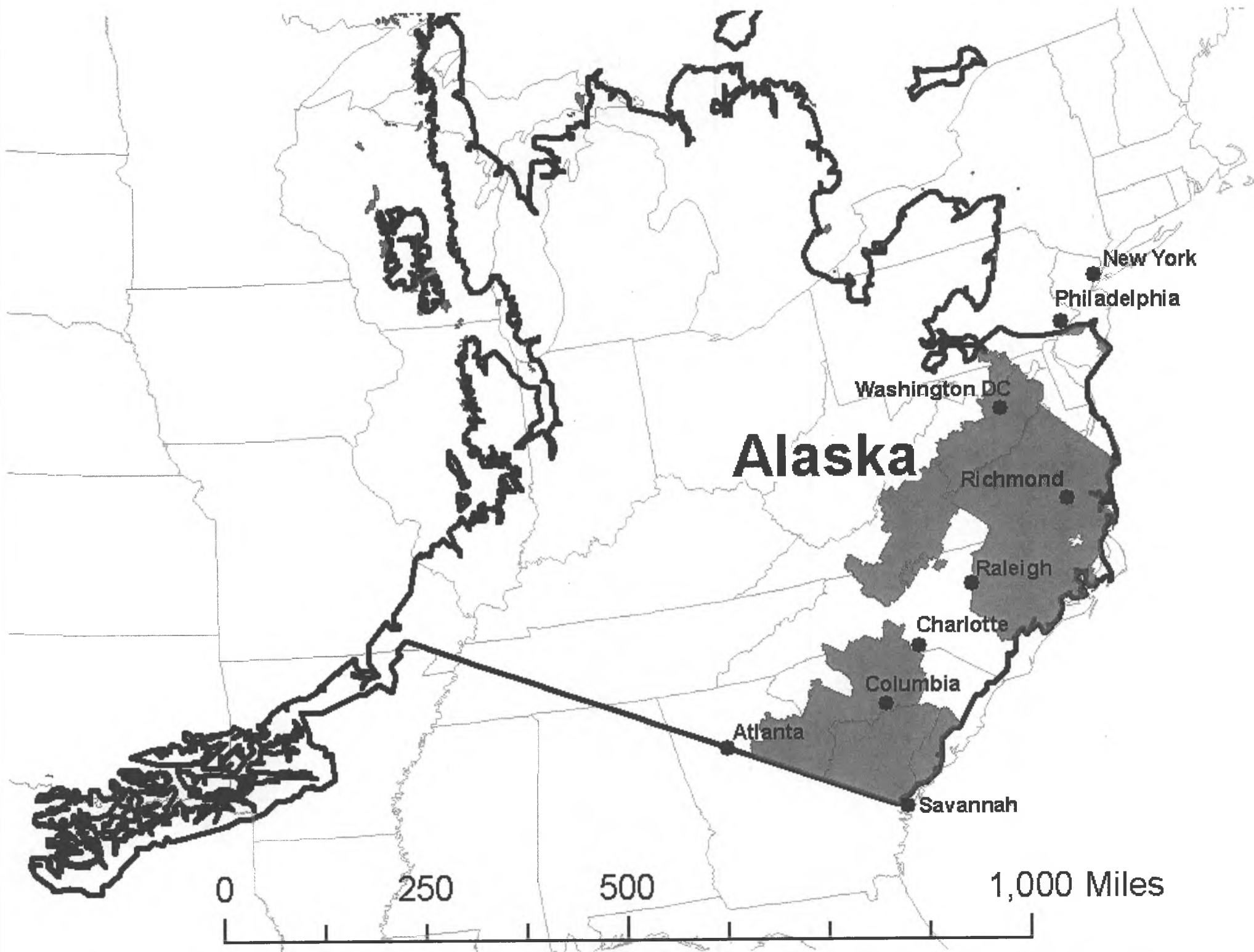
We are literally painted into a corner by people who think they are doing us a favor. These same people would like to place us under a bell jar and deny us the same economic freedoms enjoyed by people in the lower 48 for centuries.

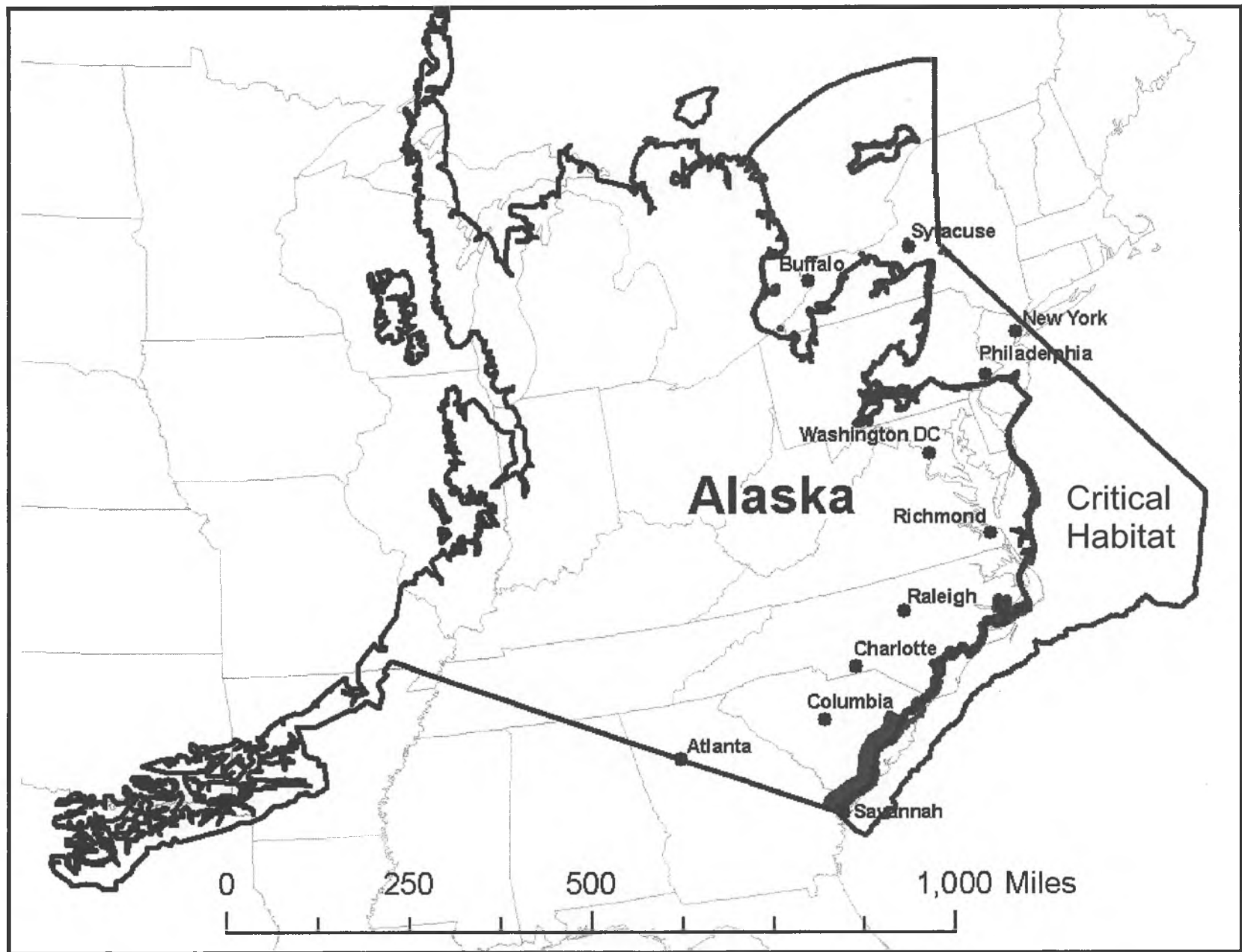
We have always been a hard-working and resilient people, taught by our elders to be as self-sufficient as possible, working together. Looking back at testimonies regarding development as far back as several generations, our people have always wanted to be involved and a part of the solution rather than standing on the sidelines and watching.

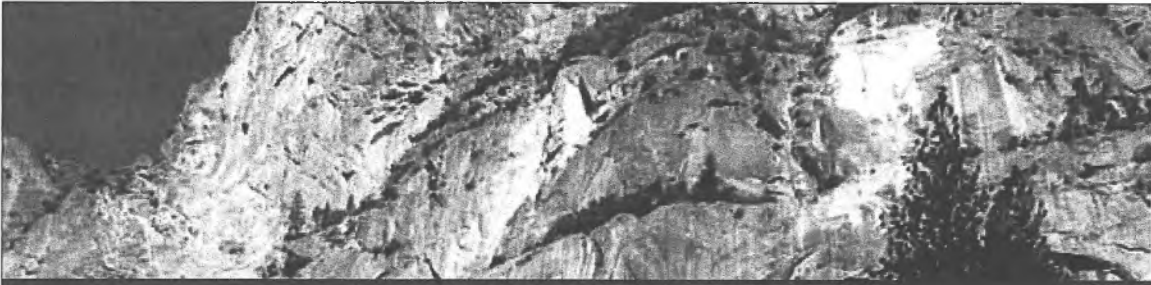
We have used resource development to better our communities and avoid excessive dependence on federal social programs. Now, in an era when Alaska's Native people are accused of over dependence on federal programs, the same federal government is essentially pulling the rug out from under us and the taking away the ability to fulfill the intent of the Alaska Native Claims Settlement Act. Onshore and offshore, designations will take away the tools and ability promised us to improve our quality of life in our region. There is certain irony that the federal government is scrutinizing Alaska Native Corporations within the federal procurement system while removing the opportunities promised to us through our land and resource entitlement of ANCSA.

Thank you for the opportunity to provide you with this information today. On behalf of ASRC, I look forward to working with you to progress this state into the future.









America's  
Great Outdoors:  
A Promise to Future Generations

February 2011

*Executive Summary*



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# America's Great Outdoors: A Promise to Future Generations

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## Executive Summary

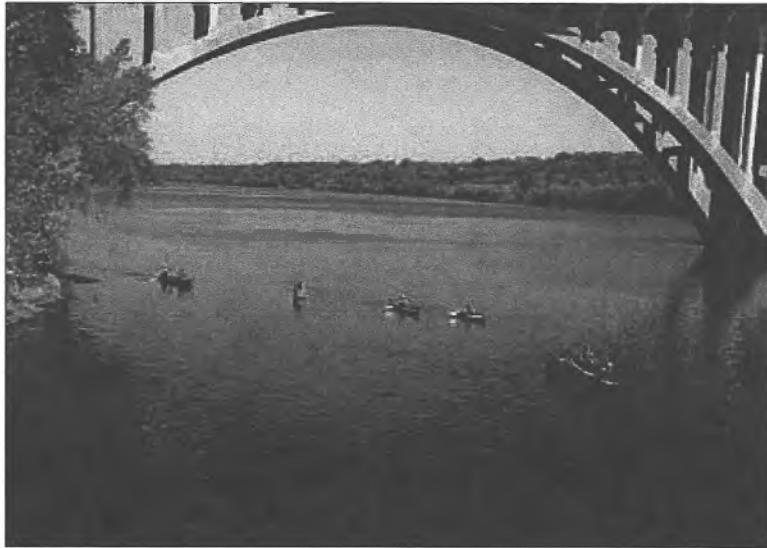
From the snow-capped peaks of Washington's Cascade Mountains to the white sand beaches of Florida's Gulf Coast, and the vast expanses of forests, grasslands, rivers, lakes, farms, and rangeland that lie between, America boasts a stunning array of magnificent lands and waterways. Our appreciation for these special places is rooted in the natural environment as well as in the rich diversity of people, stories, and traditions that have become associated with them over the course of our history. Since our earliest beginnings, the lands, coasts, rivers, forests, and mountains and the resources they hold have helped to define who we are as a people and as a nation. They have also been a source of America's wealth, providing places to reflect, relax, recreate, and create lasting memories with friends and family.

However, Americans today have become increasingly disconnected from our great outdoors. We find ourselves cut off from the natural and cultural inheritance that has shaped our lives and history. Our natural resources remain central to our economic vitality, yet they are under intense pressure from development and fragmentation, unsustainable use, pollution, and impacts from a changing climate.

On April 16, 2010, President Obama launched the America's Great Outdoors (AGO) Initiative and charged the Secretaries of the Departments of the Interior and Agriculture, the Administrator of the Environmental Protection Agency, and the Chair of the White House Council on Environmental Quality to develop a 21<sup>st</sup>-century conservation and recreation agenda that addresses these challenges.<sup>1</sup> AGO takes as its premise that lasting conservation solutions should rise

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<sup>1</sup> President Obama instructed the lead agencies to coordinate with the Departments of Defense, Commerce, Housing and Urban Development, Health and Human Services, Labor, Transportation, and Education; and the Office of Management and Budget to develop this report.



from the American people—that the protection of our natural heritage is a non-partisan objective shared by all Americans. Through listening sessions and outreach, AGO launched a robust public conversation about the future of conservation in America.

The result is a call for a grassroots approach to protecting our lands and waters and connecting all Americans to their natural and cultural heritage. AGO seeks to empower all Americans—citizens, young people, and representatives of community groups; the private sector; nonprofit organizations; and local, state, and tribal governments—to share in the responsibility to conserve, restore, and provide better access to our lands and waters in order to leave a healthy, vibrant outdoor legacy for generations yet to come.

#### **A Conservation Legacy**

The AGO report builds on the legacy of Americans who have taken up the mantle of conservation to protect our unique natural heritage. Throughout our history, conservation actions have been grounded in the premise that our natural heritage belongs to the people and that access to it and its protection are basic American values. Communities have long been catalysts for and champions of action to protect the places they cherish, whether majestic national parks and forests, iconic working lands, or city green spaces.

America's leaders have acted to secure the future of our natural heritage out of a keen awareness that it inspires us as a people and sustains us as a nation. During the Civil War, President Abraham Lincoln protected the magnificent resources of California's Yosemite Valley by setting aside lands that would eventually become part of our third national park. At the turn of the 20<sup>th</sup> century, President Theodore Roosevelt furthered the concept of federal protection of public natural and cultural resources by protecting some 230 million acres as national forests, parks, wildlife refuges, and preserves and by establishing national monuments. In the

1930s and 1940s President Franklin Delano Roosevelt championed conservation and development of our natural resources to put Americans back to work during the Great Depression.

### **Conservation in the 21<sup>st</sup> Century**

America's Great Outdoors builds on this nation's long history of actions taken to conserve our natural heritage. What has resulted is a nationwide system of public lands—both large and small and including parks, wildlife refuges, forests, wilderness areas, scenic seashores, hiking trails, protected waters, and recreation areas. America's homesteads, farms, and ranches have contributed to our heritage as well by preserving working landscapes, supplying food and fiber, protecting woods and watersheds, keeping air and water clean, and providing wildlife habitat. Historic and cultural sites have helped to educate us and to remind us of our roots. Together, our public, private, and tribal lands and waters embody one of our nation's founding principles: the right of all Americans to enjoy and benefit from America's natural treasures and the obligation to pass that heritage along to future generations.

Fulfilling that promise—and the shared obligation—to preserve and protect our natural and cultural heritage for present and future generations is one of the daunting challenges for 21<sup>st</sup>-century America. Busy lives and limited access to clean, safe, open spaces discourage many Americans from taking part in outdoor activities. The nearly 80 percent of Americans who live in or near cities find it particularly difficult to connect with the outdoors.<sup>2</sup> The outdoors has increasingly lost its relevance in the lives of our children, who now spend only half as much time outside as their parents did, but who spend an average of seven hours a day using electronic devices. Studies show that access to the outdoors can help reverse the obesity epidemic that has tripled among our children in the last generation. They show that time spent in nature can reduce stress and anxiety, promote learning and personal growth, and foster mental and physical health.

We have also grown from a nation of 92 million people 100 years ago to 308 million today, and the Census Bureau projects that our population will grow to nearly 400 million in the next 40 years. Land and natural resource development have fragmented our lands, disrupted natural systems, and imperiled productive farmland and woodlands. One out of three acres that has been developed in the United States was developed from 1982 to 2007.<sup>3</sup> Annually, we now lose about 1.6 million acres of our working farms, ranches, and forests to development and fragmentation.<sup>4</sup> Many of our rivers, lakes, coasts, and streams are polluted. Fish advisories and beach closures occur frequently. Our natural legacy faces new challenges, including new types of pollution and a changing climate, whose full consequences are yet to unfold.

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<sup>2</sup> United Nations World Urbanization Prospects: The 2007 Revision.

<sup>3</sup> USDA Summary Report: 2007 National Resources Inventory.

<sup>4</sup> Ibid.



LOS ANGELES CONSERVATION CORPS PHOTO

### **A National Conversation about Conservation and Stewardship**

Over the summer of 2010, AGO launched extensive public conversations about conservation. Senior administration officials held 51 public listening sessions all across the nation, 21 of them specifically with youth. More than 10,000 Americans participated in the live sessions and more than 105,000 comments were provided. Americans from across the country shared specific and creative ideas about conservation, recreation, and connecting people to the outdoors. They were farmers, ranchers, teachers, parents, young people, and representatives of land trusts, recreation and conservation organizations, historic preservation groups, faith communities, the private sector, as well as state, local, and tribal governments. All ethnic groups, political parties, and age groups joined the public listening sessions or submitted their ideas in letters, online, or through social media sites.

Through the AGO listening sessions and public input process, we learned that there is a powerful consensus across America that outdoor spaces—public and private, large and small, urban and rural—remain essential to our quality of life, our economy, and our national identity. Americans communicated clearly that they care deeply about our outdoor heritage, want to enjoy and protect it, and are willing to take collective responsibility to protect it for their children and grandchildren. In fact, they are already doing so. They are restoring rivers and streams, building and improving hiking trails and bike paths, ensuring the long-term conservation of their private lands, sponsoring beach and roadside cleanups, planting trees and gardens, and restoring migratory bird habitat and populations.

Tens of thousands of young people are participating in youth conservation organizations taking hold from coast to coast. State governments, tribes, and local communities are working together to establish parks, trails, and environmental education centers. Farmers and ranchers, conservation organizations, hunters and anglers, private businesses, public agencies,

## America's Great Outdoors Vision Statement

Americans envision a future in which:

*All children, regardless of where they live, have access to clean, safe outdoor places within a short walk of their homes or schools, where they can play, dream, discover, and recreate.*

*Americans participate in the shared responsibility to protect and care for our unique natural and cultural heritage for the use and enjoyment of future generations.*

*Rural lands—our working farms, ranches, and forests—are conserved and restored through incentives and local partnerships.*

*Our national parks, national wildlife refuges, national forests, and other public lands and waters are managed with a renewed commitment to sound stewardship and resilience.*

*Our natural areas and waterways, whether publicly or privately owned, are reconnected, healthy, and resilient and support both human needs and the wildlife that depend on them.*

*Communities work together to restore and protect healthy rivers and lakes to provide recreational opportunities and to contribute significantly to a vibrant economy.*

and others are forming innovative partnerships to conserve millions of acres that benefit communities, wildlife, recreation, and local economies. But we need to do more.

Americans today are calling for a 21<sup>st</sup>-century approach to conservation. That approach must help us to protect the places and the resources that we value. It must help us achieve greater health and well-being as individuals and as a nation. It must also recognize the economic challenges we face as a government and a nation. We must be wise in how we spend taxpayer dollars, and also recognize the significant economic benefits produced by protecting and restoring our natural and cultural heritage and by promoting outdoor recreation and land stewardship. Today, Americans recognize that pitting a healthy environment against a healthy economy is a false choice—we must and can have both. By investing in our natural wealth and heritage, we can create jobs associated with recreation and land stewardship, while passing on a vital natural legacy to our children and grandchildren.

Most profoundly, Americans have called for a new vision of conservation for the 21<sup>st</sup> century—one that builds on the traditions of the last century but also recognizes the challenges and changing circumstances of the new century.

This report to the President contains three chapters: Connecting Americans to the Great Outdoors; Conserving and Restoring America's Great Outdoors; and Working Together for America's Great Outdoors. It also includes a special section, *Youth and America's Great Outdoors: What We Heard from America's Young People*. Each chapter includes goals, recommendations, and actions that aim to deliver on this vision in real and tangible ways. Woven throughout is the basic tenet that the federal government must be a better partner and supporter of local conservation efforts. It must empower communities to realize their conservation goals through technical assistance, access to resources, and the science for sound decision-making. It must maximize conservation benefits from taxpayer dollars; catalyze private sector investment; and reconnect with and engage Americans about the importance of our outdoor resources.

### **Continuing the Conversation, Fulfilling the Promise**

The national conversation President Obama began in April will reinvigorate America's enjoyment, conservation, and stewardship of our outdoors. It will also join the ingenuity, passion, and grounding of the American people with the leadership responsibilities and resources of the federal government to achieve the shared vision. Working together, we will ensure that our children and their children have the opportunity to enjoy and benefit from America's irreplaceable natural legacy.

In the coming months and years, as we work together to implement the recommendations in this report, the conversation with Americans will continue and broaden. We will honor those who have come before us, and we will leave a lasting legacy for those who will come after us.

## Chapter 1: Connecting Americans to the Great Outdoors

### 1. Provide Quality Jobs, Career Pathways, and Service Opportunities

**What we heard:** The importance of job and service-based learning opportunities related to protecting and restoring the outdoors was a constant theme raised in AGO listening sessions, especially in the 21 sessions devoted to youth. Our citizens want to work on America's public lands and waters, but they expressed frustration with the hiring processes.

**GOAL A** **Develop quality conservation jobs and service opportunities that protect and restore America's natural and cultural resources.**

Jobs and service opportunities provide both meaningful ways to protect and restore the outdoors and to make conservation relevant, especially to young people. Conservation, restoration, and recreation offer quality job and service opportunities and also spur economic growth for local communities, regions, and the nation as a whole. President Obama has called on all Americans to participate in the nation's recovery and renewal through jobs and service. Americans can help ensure that our natural heritage is passed on to future generations.

**Recommendation 1.1:** Catalyze the establishment of a 21<sup>st</sup>-Century Conservation Service Corps to engage young Americans in public lands and water restoration.

**Recommendation 1.2:** Work with the Office of Personnel Management to improve career pathways and to review barriers to jobs in natural resource conservation and historic and cultural preservation.

**Recommendation 1.3:** Improve federal capacity for recruiting, training, and managing volunteers and volunteer programs to create a new generation of citizen stewards and mentors.

### 2. Enhance Recreational Access and Opportunities

**What we heard:** Federal agencies provide exceptional recreational opportunities and facilities on more than 635 million acres of land that receive over a billion visits each year.<sup>5</sup> State, county, and municipal entities also manage thousands of parks, natural areas, and historic

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<sup>5</sup> USDA report on Major Uses of Land in the United States, 2002.

sites that are enjoyed daily by tens of millions of people nationwide. In addition, many private landowners provide access to their lands for recreation. Nevertheless, many public comments focused on barriers to recreation access and enjoyment on public lands.

**GOALA Increase and improve recreational access and opportunities.**

*“City transportation and general transportation is lacking. We need better public transportation to get around to different areas in the city, and we need shuttles that take people to outdoor spaces further away.”* (Listening Session Participant, Albuquerque, NM)

Despite the many opportunities for quality outdoor recreation on public lands and waters, better integration, alignment, coordination, and targeting of recreational resources and opportunities on public land is called for. At the same time, partnership and assistance must be provided to support local, state, and tribal efforts to enhance recreation and conservation through existing programs and through new venues, such as First Lady Michelle Obama’s *Let’s Move!* initiative aimed at combating childhood obesity.

**Recommendation 2.1:** Support outdoor recreation access and opportunities on public lands by establishing a Federal Interagency Council on Outdoor Recreation (FICOR).

**Recommendation 2.2:** Support community-based efforts to increase access to outdoor recreation.

**3. Raise Awareness of the Value and Benefits of America’s Great Outdoors**

**What we heard:** The outdoor experience has lost its currency for many Americans because of busy schedules, shifting cultural norms, financial barriers, and the lure of new technology. AGO listening session participants spoke about the need to make the outdoors desirable and relevant to America’s young people, and to redefine the “great outdoors” to include not just iconic places but neighborhood and city parks, community gardens, and school yards as well. Participants observed that their experiences in nature and at historic places inspired a lasting connection and, for some, lifelong careers and commitment to service in the outdoors.

**GOALA Cultivate stewardship and appreciation of America’s natural, cultural, and historic resources through innovative awareness-raising partnership initiatives and through education.**

Our citizens are increasingly disconnected from nature and the outdoors. Our children, in particular, are losing a primary point of early exposure to nature and natural systems that can spark a child’s imagination and drive to become a scientist, innovator, conservationist, poet, or community leader. This situation calls for an integrated and technologically innovative campaign to make the outdoors relevant and exciting to our citizens once again and to install a shared stewardship responsibility.

**Recommendation 3.1:** Launch a public awareness initiative to show that experiencing America’s great outdoors is fun, easy, and healthy.

**Recommendation 3.2:** Work with the Department of Education and other federal agencies to align and support programs that advance awareness and understanding of the benefits of nature.

**Recommendation 3.3:** Promote and support replicable programs that teach about and connect children and families with their natural and cultural heritage.

#### 4. Engage Young People in Conservation and the Great Outdoors

**What we heard:** In 21 youth-specific AGO listening sessions, young people from all across the nation shared their passion, energy, and commitment—and their frustrations—about the condition of our great outdoors. The youth participation in AGO had a tremendous impact on the themes of this report and influenced its recommendations. To honor and capture the youth voice, a separate pullout report, “Youth and America’s Great Outdoors,” was prepared.

**GOAL A** **Build stewardship values and engage youth in conservation and recreation.**

*“We need a philosophical change of what the great outdoors is. We don’t need to go out west or to some faraway place. It can be a little stream, out your door, even if it’s in the city. It exists where we exist.”* (Listening Session Participant, Hyde Park, NY)

As we look to protect America’s great outdoors for the enjoyment of current and future generations, it is imperative that we continue to specifically engage, empower, and learn from our young people. Many of our youth are already participating in the protection and enhancement of our natural resources and want to help address the challenges of connecting with the outdoors. We will capitalize on their willingness and enthusiasm.

**Recommendation 4.1:** Engage young people in the implementation of AGO.

## Chapter 2: Conserving and Restoring America's Great Outdoors

### 5. Strengthen the Land and Water Conservation Fund

**What we heard:** The Land and Water Conservation Fund (LWCF), the primary source of federal funding for states and federal agencies to protect and conserve America's national treasures and to promote outdoor recreation, is primarily generated from outer continental shelf oil and gas drilling activities. During the AGO listening sessions, many participants supported full funding of the LWCF and suggested that LWCF funding could be more effectively used if it was strategically focused on specific project types and/or locations.

**GOAL A** **Invigorate the LWCF to better meet conservation and recreation needs.**

*"As a grandmother, who with my late husband, enjoyed our great outdoors, I want the next generation to enjoy America's great outdoors too. As a former grant writer for a tri-state council of governments, I have been privileged to see the fruits of the LWCF in numerous small towns in our area."* (Listening Session Participant, Missoula, MT)

Meeting the 21<sup>st</sup>-century conservation and recreation needs of our nation requires both an increase in funds and changes in the administration of the LWCF. Although LWCF revenue collection is authorized up to \$900 million, congressional appropriations have been provided at this level only twice during its more than 45-year history. The demand for LWCF funds for federal land acquisition and state grants programs far exceeds funding levels appropriated by Congress. The successful implementation of AGO will require both a more strategic investment of funds from both the state and federal sides of the LWCF and better coordination among other federal grant and aid programs linked to the AGO initiative.

**Recommendation 5.1:** Provide full funding for LWCF programs.

**Recommendation 5.2:** Focus a portion of federal LWCF funds on projects that achieve AGO goals related to large-scale land conservation, urban parks and community green spaces, and river restoration and access.

**Recommendation 5.3:** Broaden guidelines for Statewide Comprehensive Outdoor Recreation Plans (SCORPs) to align with AGO priorities.

### 6. Establish Great Urban Parks and Community Green Spaces

**What we heard:** Urban parks and community green spaces today play an important role providing places for recreation, quiet, and restoration, but these benefits are not enjoyed equally by all our citizens. Barriers to use of these open spaces include fear of crime or violence, remote locations

and lack of transportation, pollution and deteriorating infrastructure, and cultural sensitivities. Americans want to partner with the federal government at the local level to create or enhance green spaces and outdoor recreation, and they want access to federal technical know-how, knowledge, and funding to support local community efforts.

**GOAL A** Create and enhance a new generation of safe, clean, accessible great urban parks and community green spaces.

*“Urban parks create jobs, spur growth, increase property value, prevent obesity, clear pollution, and build community. Yet they’re often dismissed as frivolous in hard times and remain severely underfunded. How can we change the perception that they are not just a “nice thing to have” but an essential part of our urban infrastructure.”*

(Listening Session Participant, Washington, DC)

Urban parks and community green spaces contribute to the social, physical, and emotional health of America’s communities and are among the few public places where citizens can recreate close to home. Parks and green spaces also generate economic benefits for communities, from higher property values to increased recreation and tourism and a resulting improved business environment.

**Recommendation 6.1:** Establish the AGO Great Urban Parks and Community Green Spaces initiative by targeting increased funding for the NPS *LWCF stateside grant program* to leverage investment in new and enhanced urban parks and community green spaces.

**Recommendation 6.2:** Support and align federal agency programs and initiatives to promote the creation, expansion, and enhancement of urban parks and community green spaces.

**Recommendation 6.3:** Target technical assistance support to communities to create and enhance urban parks and community green spaces.

**Recommendation 6.4:** Connect people with urban parks and community green spaces.

## 7. Conserve Rural Working Farms, Ranches, and Forests Through Partnerships and Incentives

**What we heard:** A growing awareness exists that protecting our natural and cultural heritage requires an “all-lands” approach, i.e., working across all ownerships types across a landscape. Participants made it clear that farmers, ranchers, and forest owners are eager to help and are taking steps to protect our great outdoors, but they emphasized that conservation and stewardship must make economic sense. Participants want AGO to foster, catalyze, and partner in community-level efforts on working lands to conserve and strategically connect the nation’s landscapes and watersheds. Citizens suggested that the federal government should expand tools for landowners; conservation and historic preservation groups; and state, local, and tribal governments to conserve lands through voluntary, incentive-based approaches. One of the most frequent recommendations was to maintain the enhanced tax deduction for conservation easements.

**GOAL A Catalyze large-scale land conservation partnership projects through economic incentives and technical assistance.**

AGO will support and catalyze landscape-scale conservation on working lands efforts by using LWCF funds and existing revenue sources and grant programs, and by improving coordination and alignment in use of technical and financial resources among federal, state, tribal, and local governments and other partners. Emphasis will be placed on using science-based tools and technology to leverage resources to achieve the maximum benefit to landscapes and resources from dollars spent.

**Recommendation 7.1:** Support collaborative landscape conservation through competitive processes, including increases in LWCF funding and other programs.

**Recommendation 7.2:** Support landscape partnerships by targeting existing federal dollars, policies, and other resources toward conservation of private and tribal working lands and coordinating expenditures, where appropriate, across federal agencies.

**GOAL B Significantly increase the pace of working farms, ranches, and forest lands conservation.**

In signing the Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010, President Obama extended the enhanced tax incentive deduction for landowners who donate conservation easements through December 31, 2011. Extending the enhanced deduction beyond 2011 would further bolster land conservation and resource protection, especially on working lands.

**Recommendation 7.3:** Extend the enhanced deductions for conservation easement donations beyond 2011.

**GOAL C Increase financial incentives for land stewardship for farmers, ranchers, forest landowners, and tribes.**

Conservationists and landowners alike agree on the need to maintain traditional markets for food, fiber, and wood products from agriculture and forestry, and also to create new sources of revenue from working lands. Developing markets for environmental services and benefits provided by private lands will create new sources of income that reward landowners for stewardship and for keeping these working lands in agricultural and forestry uses.

**Recommendation 7.4:** Develop and expand new markets, including those for the environmental services provided by working lands, for local agricultural or sustainable forest products, sustainable energy, and others.

**Recommendation 7.5:** Support financial and other incentives to encourage access for hunting, fishing, hiking, recreation, and other outdoor activities on or across private working lands.

**Recommendation 7.6:** Promote tools such as safe harbor agreements that provide certainty to landowners who agree to carry out stewardship activities that benefit fish and wildlife and protect water resources.

## 8. Conserve and Restore our National Parks, Wildlife Refuges, Forests, and other Federal Lands and Waters

**What we heard:** Nearly 30 percent of lands in the United States are managed and protected by the federal government<sup>6</sup> and offer people opportunities to make personal connections to the outdoors. They provide essential ecosystem services, such as drinking water and reduction of greenhouse gases, sustaining people and some of our most iconic wildlife species. Federal public lands generate billions in economic activity and millions of jobs. Listening session participants noted that some federal lands contain exceptional natural, cultural, or historic features that require special protection. They acknowledged that the many natural and human-created threats facing our nation's federal lands and waters, from disease infestations to climate change, require proactive management.

**GOAL A** **Conserve, restore, and manage federal lands and waters to ensure access and enjoyment for future generations while contributing to the protection of a larger natural and cultural landscape.**

*“Our vision... is for the federal government to act as the catalyst for federal, state, tribal, and local agencies and private interests to work together across America to protect a network of critical ecosystems, natural resource areas, and recreation lands from the inner city to wild lands.” (Written comment)*

Ensuring that our nation's forests, grasslands, and other ecosystems are resilient must increasingly guide federal land and water management. In all cases, federal lands management must be consistent with their designations and ensure their long-term health. Decisions must be developed through sound science and implemented with ongoing monitoring and adaptive management. In turn, management actions, such as controlling invasive species and planting native vegetation, can provide jobs for local individuals and businesses. Federal land managers should continue to work closely with neighboring public and private landowners, especially where doing so can provide mutual benefit and improve habitat connectivity, natural resilience, recreational access, and corridors for wildlife.

**Recommendation 8.1:** Manage federal lands and waters within a larger landscape context to conserve and restore ecosystems and watershed health.

**Recommendation 8.2:** Manage federal lands and waters to increase their resilience to climate change.

**Recommendation 8.3:** Manage federal lands and waters to create and protect critical wildlife corridors and maintain landscape connectivity in collaboration with other public and private stakeholders.

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<sup>6</sup> USDA report on Major Uses of Land in the United States, 2002.

**GOAL B Advance national, regional, and community-supported efforts to preserve and enhance unique landscapes, natural areas, historic sites, and cultural areas while ensuring openness and transparency in any land designations.**

America is endowed with a vast array of natural and cultural features that reflect the character of our communities and our nation. Some federal lands contain iconic natural and cultural features that require unique protection. As economic pressures, development, effects of climate change, and other factors mount to threaten the sustainability of heritage resources, locally led partnership initiatives can guide broader decision-making efforts to preserve these unique places for future generations. The process for increased federal protection of existing federal lands should be accompanied by transparency in approach and public involvement.

**Recommendation 8.4:** Engage the public to identify and recommend potential sites on existing federal lands for protection under the 1906 Antiquities Act.

**Recommendation 8.5:** Identify potential areas for congressional designation that have strong local support.

**GOAL C Protect America's historic and cultural resources.**

Historic preservation can have benefits beyond protecting resources. It can serve as a catalyst to reinvigorate communities and economies while instilling pride in local history and traditions. Historic preservation and cultural resources protection can support local businesses, increase job opportunities, and revitalize both urban and rural communities.

**Recommendation 8.6:** Provide financial and technical support to states and local communities, tribes, and private sector organizations for historic preservation and cultural resources protection.

**Recommendation 8.7:** Continue to protect and interpret historic sites and cultural landscapes on federal lands.

## 9. Protect and Renew Rivers and Other Waters

**What we heard:** During the AGO listening sessions, participants expressed a passion for our waterways, knowledge of their economic and ecological importance, and enthusiasm for their conservation. Americans encouraged the federal government to help community efforts to enhance recreational opportunities in their local waterways and adjacent green spaces; to help increase community access to rivers and lakes for recreation; to support community-based protection and enhancement of the nation's waters; and to improve coordination among federal agencies.

**GOAL A Empower communities to connect with America's great outdoors through their rivers and other waterways.**

Americans are working together to establish recreational opportunities on their rivers and other waterways and to access their local aquatic resources and adjacent green spaces. AGO will help empower local communities to restore and connect with their rich water-based natural resources.

**Recommendation 9.1:** Establish the AGO National Recreational Blueway Trails Initiative to increase access to recreation.

**Recommendation 9.2:** Facilitate recreational access to the nation's waterways.

**GOAL B Support restoration and conservation of rivers, bays, coasts, lakes, and estuaries for recreation, healthy fisheries, and wildlife habitat.**

*"Water should be a pillar of AGO, project reconnect and restore [to] connect Americans to land and water resources through education and recreation."* (Listening Session Participant, Washington, D.C.)

The federal government should integrate federal water resources projects with locally driven watershed protection efforts and expand support for community-based restoration and conservation of water resources. These locally supported restoration projects may result in enhanced fish passage, habitat restoration and connectivity, water-based recreation, flood control, traditional uses, and adjacent land-based recreation.

**Recommendation 9.3:** Enhance and restore local waterways and the surrounding land by partnering with state, local, and tribal government, and the private sector to support community efforts.

**Recommendation 9.4:** Coordinate and align federal water resource management programs and resources.

## Chapter 3: Working Together for the Great Outdoors

### 10. Make the Federal Government a More Effective Conservation Partner

**What we heard:** Public comments confirmed that effective partnerships will be critical to the success of the AGO Initiative. People across the nation called for better collaboration between the public and private sectors to help citizens realize the benefits of connecting to the outdoors. Americans expressed their desire for better communication and coordination among federal agencies and better delivery of services to the public to achieve these goals for enhanced conservation and outdoor recreation across our country. A common theme in nearly all of the listening sessions and public comments was that the federal government can be more efficient and effective even without additional resources.

#### **GOAL A Improve federal government performance as a conservation partner.**

Now is the time for the federal government itself, with its many agencies and programs for conservation and recreation, to improve how it works with all stakeholders. What is called for is a more holistic, focused approach in the use of existing authorities, processes, and procedures across all agencies in order to be better at connecting people to the outdoors and conserving our natural heritage. The goals of the AGO Initiative can be better achieved by strategically aligning existing federal resources, authorities, and funding. An intergovernmental council of senior officials will continue the dialogue with the American people and report to the President.



*“Inconsistency across agencies, confusing bureaucratic processes and administrative hurdles, rules and regulations that often seem punitive, are poorly explained, and change with land ownership boundaries: these are all obstacles to many people who seek to visit the outdoors. Much of this could be addressed through better communication, both between agencies and from agencies to local communities and the public.”* (Listening Session Participant, Lander, WY)



**Recommendation 10.1:** Establish the interagency AGO Council to achieve more cooperation and collaboration among federal agencies engaged in conservation and recreation.

**GOAL B Amplify the impact of the AGO Initiative by creating the Partnership for AGO.**

The President charged the leaders of the AGO Initiative to “Build upon State, local, private, and tribal priorities for conservation . . . and determine how the federal government can best advance those priorities through public-private partnerships . . .” Public-private partnerships can be nimble and innovative in distributing information and expertise, leveraging investment, inspiring children, broadcasting successful and replicable models, and building public awareness. The Partnership for AGO established through congressionally chartered foundations and composed of diverse leaders—representing philanthropy, the private sector, conservation, historic preservation, state and local governments, tribes, recreation, educational institutions, and community groups—will amplify the impact of AGO.

**Recommendation 10.2:** Launch the Partnership for AGO.

America's Great Outdoors: A Promise to Future Generations  
February 2011  
Executive Summary

Produced by:  
Council on Environmental Quality  
Department of Agriculture  
Department of the Interior  
Environmental Protection Agency

In partnership with:  
Department of Commerce  
Department of Defense  
Department of Education  
Department of Health and Human Services  
Department of Housing and Urban Development  
Department of Labor  
Department of Transportation  
Office of Management and Budget

The full report, *America's Great Outdoors: A Promise to Future Generations*, which includes a special youth report, summaries of federal government programs and effective partnerships and programs, and the Presidential Memorandum on America's Great Outdoors may be downloaded at [www.doi.gov/AmericasGreatOutdoors](http://www.doi.gov/AmericasGreatOutdoors).

Photos: (Cover) *WildLink Bridge* Program, Yosemite National Park, CA; (Page 2) Mississippi National River and Recreation Area, MN; (Page 4) AGO Listening Session, Rio de Los Angeles State Park, CA; (Page 15) Grant-Kohrs Ranch National Historic Site, MT (Page 16) Central Park, NY.

January 17, 2011

**VIA FEDERAL EXPRESS**

Ken Salazar  
Secretary of the Interior  
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Rowan W. Gould  
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**Re: Sixty-Day Notice of Intent to Sue Relating to Critical Habitat Designation for the Polar Bear, 75 Fed. Reg. 76,086 (December 7, 2010)**

Gentlemen:

This letter is submitted on behalf of Arctic Slope Regional Corporation (“ASRC”), NANA Regional Corporation, Inc. (“NANA”), Bering Straits Native Corporation (“Bering Straits”), Calista Corporation (“Calista”), Tikigaq Corporation, Olgoonik Corporation, Inc., Ukpeaġvik Iñupiat Corporation, Kuukpik Corporation, Cully Corporation, Kaktovik Inupiat Corporation, and the Iñupiat Community of the Arctic Slope (collectively, the “Alaska Native Interests”) and the North Slope Borough (“Borough”)<sup>1</sup> to notify you of their intent to sue the United States Fish and Wildlife Service (“Service”) due to its failure to satisfy and comply with certain statutory requirements of the Endangered Species Act (“ESA”) when it recently designated critical habitat for the polar bear. The Alaska Native Interests and the Borough provide this 60-day notice letter pursuant to Section 11(g) of ESA, 16 U.S.C. § 1540(g), insofar as it may apply.

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<sup>1</sup> ASRC, NANA, Bering Straits, and Calista are Alaska Native Regional corporations created by the Alaska Native Claims Settlement Act of 1971 (“ANCSA”). *See* 43 U.S.C. § 1606. They are the four Regional corporations directly impacted by the critical habitat designation, covering all 32 Alaskan communities in or near the designated land. Tikigaq Corporation (Point Hope), Olgoonik Corporation, Inc. (Wainwright), Ukpeaġvik Iñupiat Corporation (Barrow), Kuukpik Corporation (Nuiqsut), Kaktovik Inupiat Corporation (Kaktovik), and Cully Corporation (Pt.Lay) are all village corporations in the area created under ANCSA. *See id.* § 1607. The Iñupiat Community of the Arctic Slope is an Alaska Native regional tribal government under the Indian Reorganization Act of 1934, as amended. *See* 25 U.S.C. § 461 *et. seq.*; 75 Fed. Reg. 60,810, 60,813 (Oct. 1, 2010). The Borough is the unit of local government spanning the North Slope of Alaska.

## **BACKGROUND**

For thousands of years before the Service was founded, Alaska Natives successfully coexisted with polar bears as the primary conservation stewards of the Arctic. As the Service has repeatedly recognized, Alaska Natives have been “instrumental” in a wide array of conservation efforts for the species.<sup>2</sup> As the Service has also repeatedly recognized, the imposition of added government regulations under ESA will not address the primary threat to polar bears – the loss of sea-ice due to climate change.<sup>3</sup>

Despite the fact that Alaska Natives and Borough residents did not cause and cannot halt the climate change at issue, and that Alaska Natives have consistently been the Service’s staunchest ally in a variety of entirely voluntary conservation efforts, the Service has elected to impose added unnecessary regulatory burdens through the 187,157 square mile critical habitat designation that will disproportionately harm those people who share habitat with polar bears and whose livelihood depends on those lands. This includes, for example, the residents of local villages in the affected area (including, but not limited to, Barrow, Kaktovik, Kotzebue, Wainwright, Point Hope, and Point Lay).<sup>4</sup> It also includes the Congressionally-created Alaska Native Regional and Village corporations in the area who are employers, landowners, lessors of subsurface rights, and business partners with oil and gas companies and others working in the

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<sup>2</sup> See, e.g., 75 Fed. Reg. 76,086, 76,099 (Dec. 7, 2010) (“*The Native community has been instrumental* in assisting us with scientific studies; contributing to the success of the Marking, Tagging and Reporting Program; managing the southern Beaufort Sea population through the Inuvialuit/Inupiat Agreement of 1988; and more recently in the formation and implementation of the U.S./Russia Bilateral Agreement for the Conservation of the Alaska/Chukotka Polar Bear Population. The working relationships that we have developed over the past 20 plus years have often provided the framework for other Service field offices and other agencies wishing to work in Alaska Native communities.” (emphasis added)).

<sup>3</sup> See, e.g., 73 Fed. Reg. 76,249, 76,263 (Dec. 16, 2008) (“Nothing within our authority under section 4(d) of the ESA, above and beyond what we have required in this final special rule, would address the threat to polar bears from loss of sea ice habitat.”).

<sup>4</sup> We note that the Service has specifically stated in several places in the critical habitat designation that “[o]nly the North Slope communities of Barrow and Kaktovik overlap with the proposed critical habitat designation. . . .” 75 Fed. Reg. at 76,096-97 (comments 30, 34, and 35) and 76,128 (excluding Barrow and Kaktovik as communities “which are the two formally defined Native coastal communities that overlap with the polar bear critical habitat designation”). However, the maps that accompany the designation do place the villages and townships of Kotzebue, Wainwright, Point Hope and Point Lay within Unit 3, Barrier Island Critical Habitat. The maps and text references should be corrected to specifically provide that these villages and townships are not within designated critical habitat areas. An elemental principle of fairness and good relations is that there must be absolutely no uncertainty whether an organized community or land conveyed to Alaska Native individuals, tribe or corporation is or is not within designated critical habitat.

region.<sup>5</sup> As described in earlier public comments, the Service's unjustified and arbitrary refusal to allow even exceedingly modest exclusions from the designation will adversely impact longstanding relationships with the Alaska Native community.<sup>6</sup> It is an affront to Alaska Natives' sovereignty and flatly inconsistent with the partnership the Service had sought to build with our people.

The critical habitat designation for polar bears is, by far, the largest in history. In response to the proposed designation, representatives from the Alaska Native Interests requested some minimal exclusions:

- (1) Alaska Native-owned lands, including allotments to Alaska Natives and villages. This is substantially less than 1% of the designated area (0.58%).
- (2) Current and proposed local and regional energy development projects, including transportation corridors to them. These include, for example, the Western Arctic Coal Fields, 1002 area of ANWR, the Alpine Field, the Badami Unit, and the barrier islands around the village of Kivalina.<sup>7</sup>

Regrettably, the Service's determination failed to recognize the critical importance of Native-owned lands and assorted energy development projects to the well-being of residents and Alaska Natives state-wide. In particular, the Service dramatically underestimated the economic impact of the designation and, relatedly, failed to consider that even relatively modest economic impacts could disrupt the fragile economic condition of the affected communities. This disruption could force Alaska Natives to abandon their ancestral villages in order to find work and support their families.

The Alaska Native Interests and the Borough have actively sought to provide guidance to the Service during the recent court-ordered ESA actions, including:

- Public comments from ASRC and the Borough on the proposed critical habitat designation (Dec. 12, 2009);
- Public comments from NANA (July 6, 2010);

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<sup>5</sup> See 43 U.S.C. §§ 1606, 1607.

<sup>6</sup> For example, at the June 17, 2009, public hearing in Barrow, George Olemaun (speaking as acting Borough Mayor) reiterated the Borough's request that villages and surrounding areas be excluded from the critical habitat designation. USFWS, *Polar Bear Critical Habitat Designation Proposal Public Testimony* at 7 (June 17, 2009). Richard Glenn of ASRC echoed the Borough's concern that five villages should not become critical habitat. *Id.* at 12.

<sup>7</sup> Alaska Native Interests also noted that additional exclusions may be warranted in the future depending on the economic and cultural needs of residents and interested business partners as new information becomes available.

- Public comments from ASRC on the proposed critical habitat designation (July 6, 2010);
- Public comments from the Borough (July 6, 2010);
- Public comments from Kuukpik Corporation (July 6, 2010);
- In 2008, ASRC intervened to defend the Service’s actions in listing the polar bear as a “threatened” species and in the promulgation of the “4(d) Rule.” *Ctr. for Biological Diversity v. Kempthorne* (CV-08-1339-CW) (N.D. Calif.). This case was later transferred to the U.S. District Court for the District of Columbia.

The public comments referenced above are incorporated here by reference.

### **THE DEPARTMENT OF INTERIOR’S UNIQUE DUTY TO ALASKA NATIVES**

We are disappointed that the Department of Interior (the “Department”) has essentially ignored many long-term needs of Alaska Natives during this rulemaking process. The critical habitat designation here is doubly disappointing because it flies in the face of the Department’s repeated proclamations that it would give special consideration to Alaska Natives, especially when it came to ESA and climate change issues.

Secretarial Order No. 3289, entitled Addressing the Impacts of Climate Change on America’s Water, Land, and Other Natural and Cultural Resources, requires the Department to “[a]ddress the impacts of climate change on American Indians and Alaska Natives, for whom the Department holds trust responsibilities on behalf of the Federal government.” *Id.* § 1. The Order states that “[c]limate change may disproportionately affect” Alaska Natives and their lands “because they are heavily dependent on their natural resources for economic and cultural identity.” *Id.* § 5. In recognizing the Department’s “primary trust responsibility” for the Federal government for Alaska Natives, the Order confirms that “[t]ribal values are critical to determining what is to be protected, why, and how to protect the interests of their communities.” *Id.*

As is widely recognized, the critical habitat designation is driven entirely by climate change. Alaska Natives are being disproportionately impacted by the designation and, as the Department’s economic analysis recognizes, Alaska Natives living on the North Slope are heavily dependent on their natural resources for survival. To the extent that the critical habitat designation impairs our ability to benefit from our resources, including our subsurface rights, Alaska Natives will suffer. Our communities depend on responsible natural resource development for jobs, vital tax revenues, royalties, and dividends for Native shareholders. Alaska Native shareholders already struggle with high unemployment rates.<sup>8</sup> Our tribal values

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<sup>8</sup> There are four Alaska Native Regional Corporations directly impacted by the critical habitat designation (ASRC, Bering Straits, Calista, and NANA). As the Department’s Economic Analysis noted: “With respect specifically to the Alaska Native population of these Corporations, however, the unemployment rate is *more than twice the state average*.”

(continued . . .)

include, at their most basic level, building and maintaining vibrant communities so that we can hand down our traditions to succeeding generations. The critical habitat designation is not expected to result in a single additional conservation measure to help polar bears,<sup>9</sup> but it carries the risk of significantly impacting our local communities and economies. We are asking that you reconsider the Department's failure to provide reasonable exclusions to the largest critical habitat designation in history. The Department's current stance provides essentially no benefit to the polar bear while disproportionately harming Alaska Natives.

The designation is also inconsistent with Executive Order No. 13175, 65 Fed. Reg. 67,249 (Nov. 9, 2000). The critical habitat designation is a policy that "has tribal implications" because it has substantial direct effects on Alaska Native communities. *Id.* § 1. The Department had an obligation to consult with Alaska Native leaders as to the need for the critical habitat designation and any alternatives that would limit the scope of that designation or otherwise preserve the prerogatives and authority of Alaska Natives. *Id.* § 3(c)(3). Here, the Department had a choice about whether to grant the reasonable exclusions (less than one percent of the total designation) sought by the Alaska Native Interests. There was no "need" to designate critical habitat for polar bears on the lands that the Alaska Native Interests wanted excluded from the designation. There were alternatives here that would have preserved the Alaska Natives' prerogatives and authority: namely, providing modest exclusions that would help enable Alaska Natives to continue their efforts towards economic independence and self-reliance. *See id.* § 2(c) (supporting Alaska Natives' self-determination).<sup>10</sup>

The Department's decision is also at odds with other policies and orders that Alaska Natives had relied upon.<sup>11</sup> Secretarial Order No. 3225 (Jan. 19, 2001) states that "[t]he participation of affected Alaska Natives will be ensured to the maximum extent practicable in *all aspects of the management* of subsistence species that are candidate, proposed or listed species under the ESA *and their habitat . . .*" *Id.* § 3 (emphasis added). When regulations are needed

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(. . . continued)

*Employment opportunities in this region are very limited.*" Economic Analysis of Critical Habitat Designation for the Polar Bear in the United States, Final Report (Oct. 14, 2010), at 2-6 (emphasis added).

<sup>9</sup> *Id.* at ES-5.

<sup>10</sup> The Department is required to consult with Alaska Native corporations on the same basis as Indian tribes under Executive Order No. 13175. *See* Pub. L. 108-199, 118 Stat. 452, as amended by Pub. L. 108-447, 118 Stat. 3267.

<sup>11</sup> *See, e.g.,* Tribal Consultation, Memorandum of Nov. 5, 2009, 74 Fed. Reg. 57,881 (Nov. 9, 2009) ("History has shown that failure to include the voices of tribal officials in formulating policy affecting their communities has all too often led to undesirable and, at times, devastating and tragic results. By contrast, meaningful dialogue between Federal officials and tribal officials has greatly improved Federal policy toward Indian tribes. Consultation is a critical ingredient of a sound and productive Federal-tribal relationship.").

to address habitat protection programs, “full consultation with the affected Alaska Natives will occur during the development and implementation of such regulations.” *Id.* Consultation is not simply informing Alaska Natives what the Department plans to do; we were and are entitled to meaningful consultation on a government-to-government basis. *Id.* § 4. That simply has not happened here.<sup>12</sup>

### ESA VIOLATIONS

The ESA requires that the Service designate critical habitat “on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular habitat as critical habitat.” 16 U.S.C. § 1533(b)(2). The Act generally defines critical habitat as those areas that are occupied by the species and which contain features that are essential to the conservation of the species, and that may require “special management considerations or protection.” 16 U.S.C. § 1532(5)(A)(i). The Secretary’s obligation for designating critical habitat is also constrained by the directive in the ESA that any such designation be accomplished “to the maximum extent prudent and determinable,” 16 U.S.C. § 1533(a)(3)(A), a phrase not further defined in the Act itself. A designation will not be prudent if it “would not be beneficial to the species.” *See* 50 C.F.R. § 424.12(a)(1)(ii). Also, the Secretary is afforded the ability to exclude areas from designation upon a determination that the benefits of excluding the area outweigh the benefits of so designating the area as critical habitat, provided that such exclusion will not result in the extinction of the species. 16 U.S.C. § 1533(b)(2). For the reasons stated below, the Service failed to meet these obligations in designating such a vast expanse of geographic area as critical habitat without properly weighing the best scientific data available, failing to properly exercise authority to exclude Alaska Native lands and communities, and failing to properly conduct the required consideration of economic impacts to Alaska Native interests.

1. *The Service failed to properly exercise its authority to balance the purported conservation benefits to polar bears of the designation of critical habitat with the economic effects and “other impacts” of excluding those areas. Accordingly, the Service’s designation of polar bear critical habitat is arbitrary, capricious and an abuse of discretion, and violates ESA Section 4(b)(2), 16 U.S.C. § 1533(b)(2).*

The Service failed to determine whether the benefits associated with the inclusion of Native-owned lands and certain proposed energy projects are outweighed by the benefits derived from their exclusion, as required by 16 U.S.C. § 1533(b)(2). While the Service included an entire section devoted to “Tribal Lands – Exclusions Under Section 4(b)(2) of the Act,” in its final rule designating the critical habitat, it failed to distinguish the town sites of Barrow and

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<sup>12</sup> The Service’s Native American Policy (June 28, 1994) states that it recognizes the sovereign status of Native American governments and that its policy is aimed at “cultivating and maintaining effective partnerships between the Service and Native American governments[.]” *Id.* at 3. The Service promises to consult with Native American governments on wildlife resource matters of mutual interest to the extent allowed by law. *Id.* at 5.

Kaktovik (which were excluded from the designation) from other Native-owned lands (which were not excluded from the designation).<sup>13</sup> The Service did not perform the required balancing test *at all* with respect to Native-owned lands generally, and we intend to challenge the failure to specifically exclude other Native lands and communities from the designation.

Even as described by the Service, the “benefits” of including Native-owned lands and villages are essentially non-existent: According to the Service, the first “benefit” of inclusion is costly consultation under Section 7 of the ESA whenever any project has a federal nexus in order to ensure that any resulting actions do not result in the destruction or adverse modification of designated critical habitat. The second “benefit” of inclusion is that the designation “may provide educational benefits by informing land managers of areas that are essential to polar bears.”<sup>14</sup>

As to the first “benefit” of inclusion, Native-owned lands and villages constitute just 0.58% of the total polar bear critical habitat designation, and their exclusion would therefore not appreciably diminish the value of critical habitat for the species. Even if all of the Native-owned lands were excluded, polar bears would still have more than 186,000 square miles of critical habitat left: 99.42% of the contemplated designation.<sup>15</sup> When justifying the exclusion of the U.S. Air Force radar sites, the Service noted that the lands in question that “overlap with the polar bear critical habitat designation are less than 1 percent of the total polar bear critical habitat designation.”<sup>16</sup> Likewise, Barrow and Kaktovik’s exclusion were justified as being less than one percent of the total designation.<sup>17</sup> The same is true for all Native-owned lands – they represent less than one percent of the total polar bear critical habitat designation at issue. These are lands that were conveyed pursuant to federal laws for a specific congressionally-established purpose: to serve the purpose of the economic betterment of Alaska Natives. As such, the purpose of these particular federal land conveyances did not receive adequate consideration by the Service. Further, Alaska Natives and Borough residents have for generations, undertaken measures to preserve polar bears and cooperate formally and informally with the Service in conservation projects in numerous commissions, international agreements, and deterrence programs. More than any people on earth, Alaska Natives have learned to coexist with polar bears and share the land with them, as reflected in thousands of years of history and current ongoing projects on the

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<sup>13</sup> See 75 Fed. Reg. at 76,127-29.

<sup>14</sup> *Id.* at 76,128.

<sup>15</sup> See *Butte Envtl. Council v. United States Army Corps of Engineers*, 2010 WL 2163186 (9<sup>th</sup> Cir. June 1, 2010) (finding that 0.26% of slender Orcutt grass habitat was a “very small percentage of the total critical habitat” and its loss would not appreciably diminish the capability of the critical habitat to satisfy essential requirements of the species).

<sup>16</sup> 75 Fed. Reg. at 76,124.

<sup>17</sup> *Id.* at 76,129.

North Slope. Excluding Native-owned lands would lawfully recognize this cooperation and would not cause any increased threat to polar bears.

As to the second “benefit” of inclusion – education – any conceivable value has already been achieved in terms of notifying land managers about areas that are essential to polar bears. When these lands were listed as potentially qualifying for critical habitat status on October 29, 2009, the land managers were put on notice. This has been perhaps the most widely-publicized critical habitat designation in history, and certainly it has been for Alaska. In addition, although providing general information is not a substitute for meaningful and required government-to-government consultation, Alaska Natives and Borough residents received information from the Service during outreach programs, meetings, and public hearings.<sup>18</sup> The Alaska Native community and Borough residents are well aware of the areas utilized by polar bears. Excluding these villages and Native-owned lands from the designation will not result in a loss of any educational benefit obtained. The Service does not need to educate Alaska Natives about where polar bears like to den and hunt.

When assessing a possible exclusion of Barrow and Kaktovik from the designation, the Service expressly confirmed that “[t]he continued cooperation with the Native communities in northern and western Alaska is essential for the conservation of polar bears in Alaska. Excluding the Native-owned lands for these two villages will enhance the partnership efforts which have taken many years to develop between the Federal government and the Native communities.”<sup>19</sup> The Service also concluded that “The benefit of sustaining current and future partnerships outweighs the extra outreach efforts associated with critical habitat and the additional section 7 requirements under the Act.”<sup>20</sup> These statements are true, however, for *all* Native-owned lands and communities – not just the two villages of Barrow and Kaktovik.

In addition, the Service failed to consider that the viability of Barrow and Kaktovik – and all Alaska Native communities– depends at least in part on Alaska Natives’ ability to develop their natural resources that were provided by Congress through enactment of ANCSA.

Because the Service failed to fully consider an important impact of the polar bear critical habitat designation and failed to discharge a statutory condition precedent to critical habitat designation, the final rule designating such critical habitat is invalid as a matter of law.<sup>21</sup> The Service’s only reference to a potential exclusion of Native-owned lands does not perform the required balancing test (or, at a minimum, does so in an arbitrary and capricious way). In response to a comment, the Service indicated that the Secretary would not exclude undeveloped Native Village and Corporation lands because (1) it was uncertain whether and when there would be future development of those lands, and (2) there are educational benefits of informing land

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<sup>18</sup> *See id.* at 76,131-32.

<sup>19</sup> *Id.* at 76,128.

<sup>20</sup> *Id.*

<sup>21</sup> *Bennett v. Spear*, 520 U.S. 154, 172 (1997).

managers about areas that may be essential to polar bears.<sup>22</sup> As explained above, any educational benefit from a possible designation has already been obtained. Whether or not future development of these lands is certain, there are still substantial benefits associated with excluding the lands, as explained in the Alaska Native Interests' and the Borough's prior comments. Implementing the requested exclusions would allow for continued cooperation on polar bear conservation efforts both domestically and internationally and an increased likelihood that the Alaska Natives will be able to benefit from their natural resources, as provided under ANCSA and the Alaska Native Allotment Act of 1906, as amended (the "Allotment Act").

The Service expressly requested public comment on whether it should use its authority under Section 4(b)(2) to exclude certain areas from designation, whether there would be adverse social reactions to the designation that might undermine the conservation benefits of the proposed designation, and whether the proposed designation would have adverse effects on Native cultures and villages.<sup>23</sup> In response, the Alaska Native Interests' comment letters offered compelling and detailed information about the adverse economic impacts that the designation would have unless the requested exclusions were granted, and the comment letters described how those impacts would harm Native cultures and villages that depend on the income from those natural resources for basic needs. Those letters also explained that Alaska Natives' cooperative relationships with the Service would be compromised by the overreaching designation.<sup>24</sup> Yet, nowhere in the final rule does the Service actually make a finding that the benefits of including the lands in question outweigh the benefits of excluding them from designation as critical habitat as required by Section 4(b)(2), despite requesting comments on this specific issue. In light of the provisions of Section 4(b)(2), providing express authority to exclude lands, the Service's own request for public comment on this very issue, the detailed and geographically specific exclusion requests, and the associated detailed rationale, including the Service's admission that there are no anticipated or foreseeable conservation benefits from the designation of polar bear critical habitat, the Service's failure to engage in a balancing analysis and to rationally explain its conclusion is arbitrary, capricious, an abuse of discretion and a violation of the ESA. Indeed, had the Service lawfully conducted the comparison required by Section 4(b)(2) based on the record established in this rulemaking, it could only have concluded that exclusion of these lands is warranted.

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<sup>22</sup> See 75 Fed. Reg. at 76,098 (responding to Comment 37).

<sup>23</sup> See 75 Fed. Reg. 24,545, 24,546 (May 5, 2010).

<sup>24</sup> The Service flatly asserts that the establishment of critical habitat does not prohibit development, but "simply ensures consultation with Federal action [sic] agencies on actions that may affect designated critical habitat if a Federal nexus in the project exists. Therefore, we do not expect that the designation of critical habitat for polar bears in Alaska, as mandated by the Act, will jeopardize the working relationships that we have developed over the past 20 years." 76 Fed. Reg. at 76,100. This statement ignores the comments from the Alaska Native Interests confirming that those working relationships *will* be jeopardized.

2. *The Service did not reasonably consider the actual economic impact and other relevant impacts of designating the identified areas as critical habitat. This renders the Service's designation of critical habitat arbitrary and capricious and violates ESA Section 4(b)(2), 16 U.S.C. § 1533(b)(2).*

Critical habitat designations by the Service may only be made after taking into account economic and other relevant impacts.<sup>25</sup> The Service's economic analysis, however, stubbornly ignores unfavorable data, does not consider the economic purposes of ANCSA, and is so deeply flawed that it fails to provide the required assessment of these impacts.

Specifically, the Service's economic analysis grossly underestimates the significant additional costs of conducting Section 7 consultations and fails to account at all for other costs, including among others, the high probability of litigation involving any matters of economic development in the Arctic, project delay, project slippage, deferred production or closure, uncertainty and risk.<sup>26</sup> Conservatively, the Service's economic analysis underestimates reasonably identifiable and certain economic impacts attributable to the Service's designation of polar bear critical habitat of between tens of millions and billions of dollars.

The Service did not properly or adequately consider the economic purposes of the conveyances in the Arctic to Alaska Natives, which, founded as they are on Federal Indian law, do not stand on the same basis as ordinary commercial land conveyances. The Service should have considered the Congressionally-established economic purposes for these land conveyances, whether they occur under ANCSA or the Allotment Act. In each case, the conveyance to the Alaska Native Interests was mandated by federal law, and the primary basis of the conveyance was to provide for the betterment, including the economic betterment, of Alaska Natives. The Service failed to properly consider these purposes, which are fundamental as a matter of federal law, when it conducted its economic analysis.

3. *The Service's designation of critical habitat, assessment of economic impact, and decision not to exclude certain areas from the critical habitat designation are not consistent with the best science mandate of the ESA. The Service's designation of critical habitat is therefore arbitrary and capricious, and violates ESA Section 4(b)(2), 16 U.S.C. § 1533(b)(2).*

Critical habitat designations must be made on the basis of the best available science and commercial data. An important purpose of this best science mandate "(if not indeed the primary

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<sup>25</sup> 16 U.S.C. § 1533(b)(2).

<sup>26</sup> As noted in ASRC's public comments on the proposed critical habitat designation (July 6, 2010), it was expected that environmental advocacy groups would use the critical habitat designation in litigation to challenge development in the Arctic. This expectation has already been realized. On January 13, 2011, the Center for Biological Diversity announced that it had formally notified the Department that it intends to sue the Department for "its failure to protect polar bear critical habitat from harmful oil and gas development in Alaska." See Press Release, Center for Biological Diversity (January 13, 2011).

one) is to avoid needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives.”<sup>27</sup>

The Service has violated the best science mandate of the ESA in numerous respects, including the following:

- The Service has failed to exclude appropriate areas from the critical habitat designation.
- The Service has over-designated vast areas as critical habitat.
- The Service has failed to assess the economic impact of its designation and to assess other relevant factors.

4. *The Service improperly designated vast areas that lack the physical and biological features “essential to the conservation of the species.” This was arbitrary and capricious and violated ESA Sections 3(5)(A), 16 U.S.C. § 1532(5)(A), and 4(a)(3), 16 U.S.C. § 1533(a)(3).*

The ESA defines critical habitat as “specific areas within the geographical area occupied by the species . . . 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.” 16 U.S.C. § 1532(5)(A)(i) (emphasis supplied). The features that satisfy the Act’s requirements are called Primary Constituent Elements (“PCEs”). 50 C.F.R. § 424.12(b)(5).

PCEs must be “found” on occupied land before that land can be eligible for critical habitat designation.<sup>28</sup> These PCEs must be actually present at the time of designation; lands cannot be designated on the expectation that the PCEs will be present at some time in the future.

The final critical habitat designation, which is larger than 48 states, includes huge areas that do not contain any biological or physical attributes essential to conservation of the polar bear species. For example:

- The designation of nearly 180,000 square miles identified as critical sea ice habitat is defined to include areas that have so little sea ice during certain seasons of the year that these areas are, functionally, ice-free open water, and other areas that have such limited summer ice concentrations that they serve as, at most, marginal habitat rather than critical habitat.

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<sup>27</sup> *Bennett*, 520 U.S. at 176-77.

<sup>28</sup> See 16 U.S.C. § 1532(5)(A)(i); *The Cape Hatteras Access Preservation Alliance v. U.S. Department of Interior*, 344 F. Supp. 2d. 108, 122 (D.D.C. 2004) (“the Service may not statutorily cast a net over tracts of land with the mere hope that they will develop PCEs and be subject to designation”).

- The designation of 5,657 square miles of the North Slope coastal plain as terrestrial denning critical habitat for the polar bear encompasses an area over 99 percent of which is not suitable for polar bear denning.
- The designation of terrestrial denning critical habitat and barrier island critical habitat includes areas in close proximity to pre-existing industrial activity, communities,<sup>29</sup> residents, and regular human activity that are either unsuitable for denning or other sensitive polar bear behaviors or will have no impact on those behaviors. With respect to organized communities and surrounding lands, such a designation is inconsistent with assertions by the Service that these areas generally do not have the necessary PCEs for polar bear denning, resting and feeding<sup>30</sup> and that polar bears are actively deterred from communities. It is logically inconsistent to determine that an area is “essential” for the conservation of a listed species but is also an area for which there are active deterrence programs fully recognized and supported by the Service. Moreover, there is no explicit determination that the areas within and surrounding these communities are essential for the conservation of the species.
- The designation of barrier island critical habitat, including a one-mile “no disturbance zone” includes barrier islands, barrier island habitat and surrounding areas that lack suitable topography or other habitat features essential to the conservation of polar bears.

The Service has violated the ESA in designating areas that do not possess physical or biological features essential to the conservation of the species.

5. *The Service improperly designated areas that do not require special management measures, either now or in the foreseeable future. This was arbitrary and capricious and violated ESA Sections 3(5)(A), 16 U.S.C. § 1532(5)(A), and 4(a)(3), 16 U.S.C. § 1533(a)(3).*

To qualify as critical habitat, lands must not only be occupied by the species at the time it is listed, but must also contain those physical and biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protections.<sup>31</sup>

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<sup>29</sup> See footnote 4.

<sup>30</sup> See 75 Fed. Reg. at 76,128 (“In addition, Native communities, which consist of relatively dense core areas of human habitation in remote locations along the northern and western coasts of Alaska, generally do not have the necessary PCEs for polar bear denning, resting and feeding. Children and adults can be active during all of the daylight hours in the summer and during the periods of complete darkness in the winter. Polar bears are actively deterred from the Native communities for both human and bear safety.”).

<sup>31</sup> 16 U.S.C. §1532(5)(A)(i) (emphasis supplied).

Most, if not all, of the lands designated as critical habitat require no special management considerations or protections, and therefore do not meet the required criteria for critical habitat designation. Initially, the Service has fundamentally failed to explain *why* special management considerations or protections may be required. The Service may designate critical habitat only if it first makes a finding that the listed species habitat “may require” special management considerations or protections.<sup>32</sup> The Service has recognized that the conservation measures being implemented under the Marine Mammal Protection Act (“MMPA”) and the ESA are already expected to sufficiently avoid potential destruction or adverse modification of polar bear habitat.<sup>33</sup>

The Service also may not satisfy its statutory obligations by relying on speculative future concerns. Although the word “may” indicates that the need for special management “need not be immediate, it is mandatory that the specific area designated have features which, in the future, may require special consideration or protection.”<sup>34</sup> That determination, like every part of a critical habitat decision, must be based on the best science mandate of the ESA. If the data show – as they do here – that there is no current or reasonably identifiable future unmet need with regard to polar bear habitat management, the Service cannot satisfy its statutory obligations and therefore should not designate critical habitat.

6. *The Service’s 187,157 square mile designation exceeded the maximum extent prudent for polar bears. This was arbitrary and capricious and violated ESA Section 4(a)(3), 16 U.S.C. § 1533(a)(3).*

The scope of the Service’s designation is subject to a “prudence” limitation. The Service may only designate critical habitat to the extent “prudent and determinable.”<sup>35</sup> Under the Service’s regulations, “[a] designation of critical habitat is not prudent when ... [s]uch designation of critical habitat would not be beneficial to the species.”<sup>36</sup> This is one of those rare circumstances where designating an additional 0.58% of lands (owned by Alaska Natives) and villages would not be beneficial to polar bears.<sup>37</sup>

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<sup>32</sup> See *The Cape Hatteras Access Preservation Alliance*, 344 F. Supp. 2d at 124 (Service cannot designate critical habitat without making “mandatory” finding that special management may be required).

<sup>33</sup> See 75 Fed. Reg. at 76,103.

<sup>34</sup> *The Cape Hatteras Access Preservation Alliance*, 344 F. Supp. 2d at 124-25 (internal quotation marks omitted).

<sup>35</sup> 16 U.S.C. § 1533(a)(3)(A).

<sup>36</sup> 50 C.F.R. § 424.12(a).

<sup>37</sup> With respect to the villages, as noted previously, it is illogical in the extreme, and therefore not prudent, to place lands for which there are active polar bear deterrence programs into no disturbance or other critical habitat designations.

The Service should only undertake designation of critical habitat when that action provides a net benefit for the species.<sup>38</sup> Here, it is hard to identify any real benefits of designating critical habitat for polar bears. By the Service's own assessment, designating nearly 200,000 square miles of critical habitat will not mitigate or remove climate change, the primary threat to polar bears. Certainly, with respect to the miniscule percentage of the designation that the Alaska Native Interests sought to have excluded, any benefit is at best nominal.

Rather than provide a benefit to the bears, the Service's decision has adversely affected the working relationship that the Service has had with the Alaska Native community and Borough residents, the only day-to-day conservationists for polar bears. Harming that relationship – and thereby diminishing the benefits that polar bears receive from many voluntary conservation efforts – will adversely affect polar bears. The scope of the Service's designation may provide a disincentive for residents and Alaska Natives to continue implementing voluntary conservation efforts. Thus, the designation of Native-owned lands and villages is not beneficial to the species – it provides no conservation benefit to the bear, does not address the underlying issue of receding sea ice, but undermines the continuance of conservation measures voluntarily undertaken by residents and Alaska Natives.<sup>39</sup>

Alaska Natives feel that the Service has not carefully considered their concerns, as is required, and that as a result, their serious concerns have been marginalized. When representatives of the Alaska Native Interests demonstrated that the financial impact of the critical habitat designation could run into the tens or even hundreds of millions of dollars – which would effectively cripple many Alaska Native communities – those concerns were dismissed as speculative. Alaska Natives will be less willing to voluntarily assist the Service in conservation efforts when the Service perfunctorily dismisses our bedrock concerns that our communities are being put at risk by a totally unnecessary and counterproductive critical habitat designation. If the Department and the Service want us to build positive relationships and view them as partners, they must start treating us like partners and acknowledge our legitimate concerns.

Thank you for considering this notice. We look forward to discussing how our concerns may be addressed. If you have any questions regarding this notice, please do not hesitate to contact the undersigned.

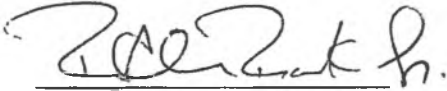
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<sup>38</sup> 49 Fed. Reg. 39,800, 39,803 (1984).

<sup>39</sup> Compare Proposed Rule To List the Ozark Hellbender Salamander as Endangered, 75 Fed. Reg. 54,561, 54, 577 (Sept. 8, 2010) (finding that designating critical habitat for the Ozark Hellbender Salamander was “not prudent” because the critical habitat designation would increase the degree of threat to the species “and, at best, provide nominal benefits” for it). See also *Missouri ex rel. Nixon v. Sec’y of Interior*, 158 F. Supp.2d 984, 987 (W.D. Mo. 2001) (noting that the Service must balance the benefits derived from designating critical habitat against the potential adverse consequences to the species from increased public antagonism and other threats).

Sincerely,

ARCTIC SLOPE REGIONAL CORPORATION



By: Rex Rock, Sr.

Its: President

NORTH SLOPE BOROUGH

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By:

Its:

NANA REGIONAL CORPORATION, INC.

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By:

Its:

BERING STRAITS NATIVE CORPORATION

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By:

Its:

CALISTA CORPORATION

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By:

Its:



Sincerely,

ARCTIC SLOPE REGIONAL CORPORATION

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By:  
Its:

NORTH SLOPE BOROUGH

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By:  
Its:

NANA REGIONAL CORPORATION, INC.

  
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BERING STRAITS NATIVE CORPORATION

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CALISTA CORPORATION

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By:  
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Sincerely,

ARCTIC SLOPE REGIONAL CORPORATION

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By:  
Its:

NORTH SLOPE BOROUGH

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By:  
Its:

NANA REGIONAL CORPORATION, INC.

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By:  
Its:

BERING STRAITS NATIVE CORPORATION

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By: *Gail R. Schubert*  
Its: *President & CEO*

CALISTA CORPORATION

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By:  
Its:

Sincerely,

ARCTIC SLOPE REGIONAL CORPORATION

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By:  
Its:

NORTH SLOPE BOROUGH

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Its:

NANA REGIONAL CORPORATION, INC.

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Its:

BERING STRAITS NATIVE CORPORATION

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By:  
Its:

CALISTA CORPORATION

*Marcia R. Davis*

By: MARCIA R. DAVIS  
Its: GENERAL COUNSEL

TIKIGAQ CORPORATION

  
By: TIKIGAQ CORPORATION, President  
Its:

OLGOONIK CORPORATION, INC.

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By:  
Its:

UKPEAGVIK IÑUPIAT CORPORATION

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By:  
Its:

KUUKPIK CORPORATION

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By:  
Its:

IÑUPIAT COMMUNITY OF THE ARCTIC SLOPE

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By:  
Its:

TIKIGAQ CORPORATION

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By:  
Its:

OLGOONIK CORPORATION, INC.

*Jane Childress*  
By:  
Its: *President*

UKPEAGVIK IÑUPIAT CORPORATION

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KUUKPIK CORPORATION

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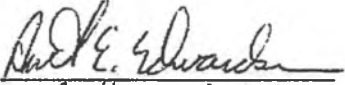
TIKIGAQ CORPORATION

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By:  
Its:

OLGOONIK CORPORATION, INC.

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By:  
Its:

UKPEAGVIK INUPIAT CORPORATION

  
By: Anthony E. Edwardson  
Its: President

KUUKPIK CORPORATION

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By:  
Its:

INUPIAT COMMUNITY OF THE ARCTIC SLOPE

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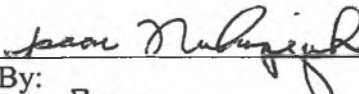
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UKPEAGVIK IÑUPIAT CORPORATION

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Its:

KUUKPIK CORPORATION

  
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Its: Pres.

IÑUPIAT COMMUNITY OF THE ARCTIC SLOPE

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TIKIGAQ CORPORATION

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OLGOONIK CORPORATION, INC.

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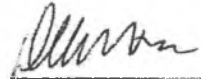
IÑUPIAT COMMUNITY OF THE ARCTIC SLOPE

*Drew Lampe* *1-12-2011*  
By:  
Its:

KAKTOVIK INUPIAT CORPORATION

  
 By: Phil. P. Tikluk Jr  
 Its: PRESIDENT

CULLY CORPORATION



By: DOLLY NORTON

Its: President / CEO



## PRESS RELEASE

January 17, 2011

**CONTACT:**

Ty Hardt  
Director of Communications  
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### **ARCTIC SLOPE REGIONAL CORPORATION FILES INTENT TO SUE OVER POLAR BEAR CRITICAL HABITAT DESIGNATION**

#### Designation Needlessly Hurts Communities and Economy

ASRC and the North Slope Borough are leading a coalition of Alaska Native groups from the North Slope, Northwest and Southwest Alaska to notify the Department of the Interior of their intent to seek judicial relief for the department's violation of the Endangered Species Act. The plaintiffs believe the federal government broke the law when it ignored the concerns of the Alaska Native community and designated more than 187,000 square miles as critical habitat for polar bears on Alaska's North Slope. That's an area larger than the state of California.

The letter, signed by Arctic Slope Regional Corporation, the North Slope Borough, the Iñupiat Community of the Arctic Slope, Kaktovik Iñupiat Corporation, Kuukpiq Corporation, Ukpeaġvik Iñupiat Corporation, Olgoonik Corporation, Inc., Cully Corporation, Tikigaq Corporation, the Bering Straits Native Corporation, NANA Regional Corporation and Calista Corporation was sent to the Department of the Interior on Monday. Federal law requires a 60-day notification before a lawsuit is officially filed. It is the coalition's hope that the Secretary of the Interior use this time to address the potential plaintiffs' concerns.

"This is a poor attempt to legislate climate change through regulation," said Rex Rock, Sr., President and CEO of ASRC. "The Department has recognized that the designation will not have any impact on the primary threat to polar bears – the loss of sea-ice habitat – but it could cripple our communities."

Worldwide populations of polar bears have gone from around 12,000 in the late '60's to anywhere between 20 and 25,000 today.

An independent economic analysis into the Critical Habitat Designation found the financial burden to the State of Alaska, North Slope Borough and ASRC could reach into the billions. As an example, a 1% reduction in oil production within the CHD could lead to a loss of more than 200 jobs and nearly \$100 million in output statewide. Over the past 5 years, an average of 85% of Alaska's revenue – outside of federal and investment income – has come from the oil and gas industry. Almost half of the North Slope oil production comes from an area within the Critical Habitat Designation.

"The Critical Habitat Designation does not get at the problem of melting sea ice, so it won't help the polar bear," said North Slope Borough Mayor Edward S. Itta. "It will only restrict normal community growth in our villages and threaten access to our traditional subsistence hunting areas. As a solution, this completely misses the mark."

The State of Alaska filed a similar 60-day notice in late December over its intention to sue the federal government.

Copies of the letter sent to Interior Secretary Ken Salazar and other materials are available by request.

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### **About ASRC**

Arctic Slope Regional Corporation is owned by and represents the business interests of the Arctic Slope Iñupiat. Since opening enrollment in 1989 to Alaska Natives born after 1971, the corporation's shareholder base has nearly tripled, growing from the 3,700 original enrollees to around 11,000 today. Corporate headquarters are based in Barrow, Alaska, with administrative and subsidiary offices located in Anchorage and throughout the United States. ASRC, along with its family of companies, is the largest Alaskan-owned company, employing approximately 10,000 people worldwide. The company has four major business segments: petroleum refining and marketing, government technical services, energy services and construction industries.

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**adn.com**

Anchorage Daily News

**Habitat designation threatens rural life****COMPASS: *Other points of view***

By TARA SWEENEY

(01/22/11 17:53:41)

The Department of Interior's recent critical habitat designation for polar bears should concern all Americans. The department's decision is flawed; it is a poor attempt to legislate climate change through regulation, a failure of national security policy and simply bad federal Indian policy.

Last week 11 Alaska Native groups and the North Slope Borough filed a 60-day intent to sue the Department of Interior over the designation of nearly 200,000 square miles as "critical habitat" for polar bears in Alaska. To put this into perspective, this designation is larger than the state of California, covers three Arctic seas and stretches up to 20 miles inland.

The department violated the Endangered Species Act when it ignored Alaska Natives' concerns and improperly designated this habitat for polar bears.

First, it failed to balance purported conservation benefits for polar bears against the economic effects of excluding Alaska Native lands from the designation. The "benefits" of including Native-owned lands are essentially nonexistent. The harm of including our lands could cripple our communities.

Second, the department failed to accurately assess the economic and other impacts of this designation. Its analysis grossly underestimated the impacts on Native villages and responsible economic development. Further, it failed to include key factors like litigation, project delay, deferred production, project closure and uncertainty. According to independent experts the costs could be in the tens of millions of dollars -- impacting jobs, tax revenues and community development projects in over 30 Alaskan villages that are in or near designated lands.

The department chose to effectively flash-freeze our communities in time by designating a swath of land and ocean of unprecedented proportion not essential to the conservation of the species.

Ironically, the department admits that this designation will not have any impact on the primary threat to polar bears -- loss of sea-ice habitat due to climate change.

Nongovernmental organizations, or NGOs, like the Center for Biological Diversity have made no apologies for using the vehicle of lawsuits to scare agencies to the quick. The NGOs have the agencies right where they want them, backpedaling and jittery.

While these seem like isolated acts, when aggregated these actions catapult the quality of life in rural Alaska back to Third World conditions and lock up and shut down the United States' largest oil and gas province. This is a matter of national security.

Alaska's resources are an important part of the nation's energy supply, and our own government is choking this supply. The U.S. will be forced to import energy resources from hostile regions like the Middle East or Venezuela. This is a defective approach to domestic energy policy and a clear and present danger to Alaska Native communities.

This critical habitat designation is an affront to Alaska Natives. The history of Alaska Natives is part of the fabric of federal Indian policy, and the Obama administration fails to recognize this important point.

Alaska's Inupiat and Yup'ik people have never ceded our lands in war; our battlefield has been in the halls of Congress and in the courtrooms. While our historical relationship with the federal government may be different than that of our American Indian relatives in the Lower 48, one should not become indifferent to our struggles. Federal policies that adversely affect Alaska, its people and resources affect the nation.

The Department of Interior's designation of nearly 200,000 square miles of polar bear critical habitat, in combination with other administration policies, may well be the 21st century's version of removal and termination for Alaska Natives. The department dramatically underestimated the economic impact of the designation and failed to consider the fragile economic conditions of remote villages. This, in concert with other cumulative impacts of government policy disruption, may force Alaska Natives to abandon our ancestral villages in search of new work to support our families.

NGOs, seemingly operating under their own twisted Manifest Destiny, are moving to lock up Alaska's rural coastal communities. It is bad federal Indian policy.

Tara Sweeney is an Inupiaq Eskimo from Barrow and senior vice president of external affairs for Arctic Slope Regional Corp., headquartered in Barrow.

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JUNEAU LIAISON OFFICE**

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**NORTH SLOPE BOROUGH**  
*Government and External Affairs*



**Andrew Mack**  
*Special Assistant to the Mayor*

# North Slope Borough

## Arctic Offshore Oil and Gas Development Policy Positions

### Summary

#### Baseline Science

Provide funding for scientific research to gather adequate baseline data prior to new offshore activity. Support a collaborative approach to research and data sharing, such as the North Slope Science Initiative (NSSI). Tie specific research requirements to industrial activity.

#### Stricter Regulation

Require OCS production to use pipelines to shore-based facilities rather than tanker transportation. Require MMS to apply regulations and stipulations more vigorously. Improve standards in the leasing process. Require negotiation of CAAs with NSB for other marine mammals species.

#### Cumulative Impacts

Require detailed discussion of area-wide cumulative impacts in EIS/EA documents, including socio-cultural impacts. Stipulate limits on the number of projects allowed in an area at one time.

#### Revenue Sharing

Revenue sharing to offset impacts should be included in all phases of development, including pre-lease seismic and sampling work. Use the NPR-A model for early funding. Broaden acceptable uses for CIAP funds.

#### Discharge/Emissions

Require zero-volume discharge standards in arctic waters. Require reinjection of all cuttings, muds, produced waters and other byproducts of exploration and development. Write subsistence considerations into the Clean Water Act. Do not allow "disaggregation" as a strategy to avoid obtaining a Clean Air Act PSD permit.

#### Oil Spill Prevention and Response

Spill prevention and response are twin concerns in the OCS. Spill prevention efforts should be viewed as an investment that pays dividends in avoiding the costs of a spill. Best available technology related to undersea pipelines is an example of a worthy spill prevention investment. Spill response should be anchored in provable cleanup technologies, and real-world demonstrations of cleanup capabilities should be required before activity begins.

#### Coast Guard Presence

Offshore development and increasing vessel traffic point to the need for an effective U.S. Coast Guard presence. Congress should fund a year-round Coast Guard station with oceangoing and airborne response capabilities.

#### Compulsory Marine Pilotage

Add a provision in federal law that requires state-licensed Alaska marine pilots on qualified vessels in the Beaufort or Chukchi Seas.

## North Slope Borough Arctic Offshore Oil and Gas Development Policy Positions

### Baseline Science

*Provide funding for scientific research to gather adequate baseline data prior to new offshore activity. Support a collaborative approach to research and data sharing, such as the North Slope Science Initiative (NSSI). Tie specific research requirements to industrial activity.*

Evaluation of impacts from oil and gas development has to start with an understanding of conditions prior to new activity. This understanding comes from a robust data set that should be gathered in anticipation of development. Baseline science is crucial to any assessment of change over time from natural and industrial causes. Mitigation measures are evaluated against this baseline data and best practices are established over time with its confirmation.

The federal government should enable baseline science before activity commences and should commit to collaborative research, data sharing and analysis through an organization such as NSSI, which brings together scientists from federal, state and local agencies, as well as industry and other organizations for just this type of collaboration.

Pre-leasing activities should mirror the approach that BLM has taken in NPR-A with its pre-activity study program. The needs are even greater offshore because the risks are greater. NEPA requires that MMS determine what effect any development scenario will have on the environment. Without adequate baseline science, such a determination is suspect and can be easily challenged.

Areas of incomplete baseline data include:

1. Air quality
2. Water quality
3. Marine mammal migration and habitat
4. Subsistence impacts
5. Health impacts.

The Borough is by no means alone in recognizing large data gaps in Arctic Ocean science. In its most recent multi-sale Draft EIS for the Beaufort and Chukchi Seas, MMS identified numerous areas in which data is insufficient. We look forward to working with the federal government in pursuit of increased research and better understanding of offshore areas.

## North Slope Borough Arctic Offshore Oil and Gas Development Policy Positions

### Stricter Regulation of OCS Operations

*Require MMS to apply regulations and stipulations more vigorously. Require OCS production to use pipelines to shore-based facilities rather than tanker transportation. Improve standards in the leasing process. Require negotiation of CAAs with NSB for other marine mammals species.*

Alaskans and NSB residents have a lot to gain from new oil and gas development – especially the infrastructure associated with long-term jobs, maximized use of TAPS, and a healthy tax base. OCS development could add substantially to the North Slope’s infrastructure, or it could bypass it entirely. It all depends on how the resources are transported to market. If they are piped to shore-based facilities and fed into existing or planned pipelines, then Alaskans can reap their fair share of economic stimulus from development in adjacent waters – even without federal revenue sharing.

However, there is no inherent barrier to producing oil from self-contained rigs and transporting the product by tanker to distant markets. Nor does any law or lease sale stipulation prevent oil companies from choosing that approach if it is in their economic interest. This must be resolved prior to development.

In the past decade, MMS has been increasingly lax in its interpretation of laws and enforcement of regulations as the nation’s overseer of planning and operations for offshore development. Environmental concerns have been routinely ignored and impact assessments conducted with little vigor. In fact, the litigation that halted Shell’s exploration plan was rooted in MMS’ decision to substitute an EA for a full EIS, which requires little or no public input. Another example is the elimination of “Stipulation 5” from the pending draft EIS for arctic lease sales. This stipulation establishes a consultation process aimed at avoiding conflict between industry operations and subsistence activities.

The Conflict Avoidance Agreement (CAA) process has played a valuable role in bringing together developers and subsistence bowhead whaling communities to ensure that company operations do not compromise traditional subsistence whaling activities. This model should be extended to include other marine mammal species on which the Inupiat depend for nutritional and cultural survival. NSB should represent local concerns in CAA negotiations regarding these other species.

MMS planning, review and oversight of leasing processes need a thorough overhaul so as to honor the intent of existing laws and regulations. A guiding principle in this effort should be that MMS lease agreements must, at a minimum, meet or exceed standards set forth in the MMPA.

## North Slope Borough Arctic Offshore Oil and Gas Development Policy Positions

### Cumulative Impacts

*Require detailed discussion of area-wide cumulative impacts in EIS/EA documents, including socio-cultural impacts. Stipulate limits on the number of projects allowed in an area at one time.*

Each discreet development activity has specific effects on air and water quality, marine life, habitat, and nearby communities. In combination with other projects or activities, an individual project can have unanticipated additional impacts. Cumulative effects can be significant, not only in areas of intensive development, but also where there is gradual expansion or infill.

Dramatically increasing impacts from climate change add a new dimension to any discussion of cumulative impacts and should be factored into the cumulative impacts review process. No single entity has the responsibility for comprehensive planning for oil and gas development in arctic waters and coastal areas.

The process for cumulative effects analysis and management is hampered by the absence of a coordinated review of planned industrial activities by all permitting agencies. A global, coordinated analysis should be required in the EIS/EA process. This analysis should consider limiting the number of projects in the region.

Cumulative impacts studies should include an overall analysis of the arctic region as a whole, including analysis of the Beaufort and Chukchi Seas.

Because of the sudden and significant level of impacts due to climate change in the Arctic, development should be phased gradually to allow for adequate study of the combined environmental effects.

Impacts to the health, social structure and culture of communities should also be subjected to substantial analysis.

## North Slope Borough Arctic Offshore Oil and Gas Development Policies

### OCS Revenue Sharing

*Revenue sharing to offset impacts should be included in all phases of development, including pre-lease seismic and sampling work. Use the NPR-A model for early funding. Broaden acceptable uses for CIAP funds.*

Beyond three miles, the OCS is controlled by the federal government. State and local governments have very little input in decisions. Local communities bear all the direct risks of offshore development – environmental, social, cultural and economic – yet they receive very little in exchange. This is deeply disconcerting to us, because it suggests that the federal government either doesn't place much value on our ancestral connection to the ocean, or it doesn't recognize the risks to our most important subsistence food supply. The ocean is the cradle of our culture. It is where we most need to have a voice, yet we have almost none.

The Federal Government has a long established policy of sharing revenues from mineral leases with state and local governments. Any new revenue sharing program should be based on existing programs that acknowledge impacts and risks to local communities. A federal OCS program could provide direct payments to municipalities, as in the Gulf of Mexico Energy Security Act of 2006. If funds are not distributed directly to local governments, the NPR-A Impact Aid program offers another model, although it has been susceptible to state legislative interference in the disbursement of funds. The program could be improved if proof of impact by coastal communities were established in federal law and not required as a component of funding in the state appropriation process.

The authorized uses of revenue sharing funds should be as broad as those defined in the NPR-A Impact Aid program, but not restricted to particular issues like the Coastal Impact Aid Program (CIAP).

Any revenue sharing program should acknowledge that impacts begin before lease sales occur and extend beyond completion of the development project.

## North Slope Borough Arctic Offshore Oil and Gas Development Policy Positions

### Discharge and Emissions

*Require zero-volume discharge standards in arctic waters. Require reinjection of all cuttings, muds, produced waters and other byproducts of exploration and development. Write subsistence considerations into the Clean Water Act. Do not allow "disaggregation" as a strategy to avoid obtaining a Clean Air Act PSD (Prevention of Significant Deterioration) permit.*

#### Discharge

The use of world-class technologies in arctic waters should be accompanied by world-class environmental standards. Zero-volume discharge is required in the northern region of the Barents Sea and in state waters of the Beaufort Sea, where it has proved to be both technically feasible and cost effective. Technological options that could satisfy the zero volume discharge requirement include use of a separate injection well, backside injection of an exploration well, or barging to shore, as is done in state waters.

The zero volume discharge requirement should also apply to sanitary waste, gray water and ballast water, as these will pollute the sea where our residents hunt for food. Traditional knowledge among subsistence whalers indicates that no amount of sanitary waste should be dumped in the ocean, as any type of human scent causes deflection of the whale migration. The Clean Water Act should be amended to protect subsistence activities by requiring zero volume discharge in all exploration and production activities.

The Borough is actively engaged in analysis of discharge options through a panel of its Scientific Advisory Committee, which is working with agencies and industry to identify preferred discharge policies.

#### Emissions

OCS operators are currently able to avoid the use of best available air pollution control technology in many cases. This is accomplished through a strategy of "disaggregation," in which companies artificially divide their operations into "separate" pollution sources so as to stay below the threshold that triggers a technical review aimed at determining the best pollution control technology. Disaggregation should not be allowed. All emissions associated with a company operation should be considered under a single Clean Air Act permit. This is the best way to assure that the best available technology is required under appropriate circumstances.

## North Slope Borough Arctic Offshore Oil and Gas Development Policy Positions

### Oil Spill Prevention and Response

*Spill prevention and response are twin concerns in the OCS. Spill prevention efforts should be viewed as an investment that pays dividends in avoiding the costs of a spill. Best available technology related to undersea pipelines is an example of a worthy spill prevention investment. Spill response should be anchored in provable cleanup technologies, and real-world demonstrations of cleanup capabilities should be required before activity begins.*

Spill *prevention* must have the greatest emphasis in arctic waters. It can save industry from having to deal with spill response, which is likely to achieve only partial success in remote, icebound waters of the Arctic Ocean. Spill prevention includes three actions covered in the following pages: stricter regulation of OCS operations, compulsory marine pilotage with independent reporting duties, and a significant Coast Guard presence in the Arctic Ocean.

Spill prevention measures must also be built into undersea pipelines, including corrosion prevention systems, corrosion monitoring systems and leak detection systems. Recent experience in the Prudhoe Bay field demonstrates the need for these measures.

Adequate spill *response* should include a demonstration of industry's ability to retrieve spilled oil in broken or refreezing ice conditions during the transitional periods of spring and autumn. Purposely spilling a small amount of oil in representative conditions is worth the risk of minor contamination in order to prove the true extent of industry's spill response readiness. Allowing OCS development without such a demonstration means we are accepting substantial risk on the basis of a wish and a promise. As national policy, this is fundamentally irresponsible. A phased approach to a real-world demonstration could start with a laboratory prototype as a first step.

Spill response equipment should conform to "best available technology" standards.

The Borough's Scientific Advisory Committee is completing its final report on spill prevention and response.

## North Slope Borough Arctic Offshore Oil and Gas Development Policy Positions

### Coast Guard Presence

*Offshore development and increasing vessel traffic point to the need for an effective U.S. Coast Guard presence. Congress should fund a year-round Coast Guard station with oceangoing and airborne response capabilities.*

Effective oil spill prevention and response in the Arctic Ocean are predicated on active monitoring of vessel traffic and swift emergency response capability in times of crisis. The U.S. Coast Guard plays a primary role in these activities in other coastal oil provinces, and extreme arctic conditions justify an important role for the Coast Guard in the Beaufort and Chukchi Seas.

Increased needs for navigation aid placement, vessel traffic management, ship compliance inspections, security considerations and emergency response capability clearly suggest that enhanced federal safety infrastructure and maritime resources need to be committed to this region. These needs include an expansion of the Marine Exchange with real-time data sharing that includes the NSB, the Barrow Arctic Science Consortium (BASC) and AEWC.

As sea ice continues to recede and make way for greater vessel access, international maritime shipping, tourism and commercial fishing may also add to marine traffic and increase the need for an expanded U.S. presence in arctic waters.

## North Slope Borough Arctic Offshore Oil and Gas Development Policy Positions

### Compulsory Marine Pilotage

*Add a provision in federal law that requires state-licensed Alaska marine pilots on qualified vessels in the Beaufort or Chukchi Seas.*

Vessel traffic is increasing in the highly sensitive marine environment of the Chukchi and Beaufort Seas as oil companies show unprecedented interest in offshore prospects and shippers eye the rapidly receding ice pack with visions of an arctic shipping route. This intensifying interest in commercial uses of the Arctic Ocean causes North Slope residents grave concerns about the risk of oil spills and other industrial accidents. Among the most promising ways to minimize shipping accidents in the Beaufort or Chukchi Seas is to require the use of state-licensed marine pilots on all "qualified vessels" entering these waters. Federal regulations already allow the state to declare compulsory marine pilotage in federal waters. The Borough would like to see this state primacy codified in federal law.

Currently, the Arctic has state-licensed pilotage only in the nearshore state waters. Beyond the three-mile limit, there is only a voluntary system for ships that may be associated with oil and gas exploration, seismic testing, maritime shipping, tourism or any other commercial interest. This gives little comfort to North Slope residents, since almost all the industrial activity proposed for arctic waters would occur outside the current compulsory pilotage areas. Expanded compulsory pilotage is an important first step toward policies that will protect Alaska's arctic waters and preserve the traditional way of life for the whaling culture of the North Slope.

The State of Alaska recently issued a notice of a proposed regulatory change to extend compulsory state pilotage beyond three miles in the Chukchi and Beaufort Seas. This proposal faces strong resistance from industry. The NSB believes that licensed marine pilots with Alaskan experience will increase safety through their extensive knowledge of local conditions. They are clearly best suited to the task of navigating Beaufort and Chukchi waters. This precautionary approach will help to reduce the risk of accidents, and the use of marine pilots who independently report to the state will help to decrease residents' anxiety over increased offshore activity.

Compulsory marine pilotage is required in all other Alaskan waters. Surely the waters of the Arctic are just as precious.

## Additional References

### Baseline Science

*Cumulative Environmental Effects of Oil and Gas Activities on Alaska's North Slope Committee on the Cumulative Environmental Effects of Oil and Gas Activities on Alaska's North Slope, National Research Council, National Academies Press, ISBN: 0-309-50625-5, (2003) Chapters 1 & 10, <http://www.nap.edu/catalog/10639.html>*

*Alaska Annual Studies Plan Final FY 2009, US Dept of Interior, MMS <http://www.mms.gov/alaska/ess/essp/sp2009.pdf>*

*Arctic Research and Monitoring - Toward a Strategy for the Chukchi and Beaufort Seas A Final Report on the January 23, 2009 Workshop with additional analysis by Dr. Craig Dorman, retired University of Alaska vice-president for Research, <http://www.aaos.org/> [http://www.doc.aaos.org/other\\_meetinas/2009/040109Draft\\_summarv.doc](http://www.doc.aaos.org/other_meetinas/2009/040109Draft_summarv.doc) [http://www.doc.aaos.org/other\\_meetinas/2009/040109Draft\\_report.doc](http://www.doc.aaos.org/other_meetinas/2009/040109Draft_report.doc)*

*Environmental Assessment of the Alaskan Continental Shelf, Interim Synthesis: Beaufort/Chukchi, August 1978, US Dept. of Commerce, NOAA & US Dept. of Interior, BLM [http://www.mms.gov/alaska/reports/1970rpts/bf\\_chk\\_syn78/BK\\_CHK\\_syn78\\_1.pdf](http://www.mms.gov/alaska/reports/1970rpts/bf_chk_syn78/BK_CHK_syn78_1.pdf)*

*Priority baseline or benchmark data needs for the Beaufort and Chukchi seas, North Slope Borough, Department of Wildlife Management, Compiled by Robert Suydam, Cheryl Rosa, and Craig George (April 2009) – Internal Document available through Government Affairs*

*Included are priority baseline or benchmark data needs for the Beaufort and Chukchi seas. These needs were prioritized based on our professional experience and based on concerns we have repeatedly heard from elders and experienced hunters on the North Slope.*

*Comments on Draft Environmental Impact Statement (DEIS) – Beaufort Sea and Chukchi Sea Planning Areas – Oil and Gas Lease Sales 209, 212, 217, and 221, Christopher Winter, CRAG Law Center for AEWC, March 30, 2009, pages 21 – 22, [AEWC\\_Comments\\_on\\_DEIS.pdf](#)*

### Stricter Regulation

*Alaska Wilderness League, et al. v. Dirk Kempthorne, et al., 07-71457, United States Court of Appeals for the Ninth Circuit, DOI No. 2007-152 Opinion, Filed November 20, 2008, Before Judge DW Nelson <http://www.morelaw.com/verdicts/case.asp?n=07-71457&s=AK&d=38052>*

*Arctic Offshore Oil and Gas Guidelines, Arctic Council 2009, Protection of the Arctic Marine Environment Working Group, April 29, 2009 <http://arcticportal.org/uploads/F7/aC/F7aCQhSrOfC4y9XlaHWZpw/Arctic-Guidelines-2009-13th-Mar2009.pdf>*

*Stipulation No.5. Conflict Avoidance Mechanisms to Protect Subsistence Whaling and Other Subsistence-Harvesting Activities. From Beaufort Sea Sale 202:*

*From Arctic Multi-Sale Appendix F: Information to Lessees. Transportation of Hydrocarbons.*

## **Cumulative Impact**

*Cumulative Environmental Effects of Oil and Gas Activities on Alaska's North Slope Committee on the Cumulative Environmental Effects of Oil and Gas Activities on Alaska's North Slope, National Research Council, National Academies Press, ISBN: 0-309-50625-5, (2003) Chapters 6-9, and 11, <http://www.nap.edu/catalog/10639.html>*

*"Does the Ocean Need Zoning?", Scientific American, Allison Winter, Greenwire, April 10, 2009 <http://www.scientificamerican.com/article.cfm?id=does-the-ocean-need-zoning>*

*Consideration of Cumulative Impacts in EPA Review of NEPA Documents, US EPA, Office of Federal Activities (2252A), EPA 315-R-99-002/May 1999 <http://www.epa.gov/compliance/resources/policies/nepa/cumulative.pdf>*

*The Arctic Policy Review, "Oil Spill Cleanup Tests", North Slope Borough, Anchorage, Alaska September 1983, <http://www.ebenhopson.com/apr/September%201983/Sept1983.pdf>*

*"Cumulative Impacts Analysis Under NEPA", Dan Fitzgerald Esq., North Slope Borough, May 2009 Internal Document – available from Government Affairs*

This is a legal analysis performed at the North Slope Borough's request related to NEPA Cumulative Impacts analysis, including the most recent literature and the Ninth Circuit Court ruling.

*Oil and Gas Assessment – Pre-publication edition – AMAP- An Arctic Council working group, March 2009 Final version of Chapter 5 & 7 – Scientific Findings and Recommendations, <http://www.amap.no/oqa/>*

## **Revenue Sharing**

*National Petroleum Reserve-Alaska (NPR-A) Impact Mitigation Program Grant Program, Report to the Second Session of the Twenty-Fifth Alaska Legislature, January 2008, Attachments 42 USC Chapter 78, Alaska Statutes (AS 37.05.530) Alaska Regulations (03 AAC 15) <http://www.commerce.state.ak.us/dcra/pub/NPRA2008AR.pdf>*

**White Paper – Local Governments and OCS Revenue Sharing, NSB Government Affairs, 2008**  
**Internal Document – available from Government Affairs**

An internal White Paper used to provide background information compiled on various issues including Federal Revenue Sharing programs, NPR-A Impact Aid program, Coastal Impact Assistance Program (CIAP) and the proposed OCS Fairness Act.

**Coastal Impact Assistance Program (CIAP), <http://www.mms.gov/offshore/CIAPmain.htm>**

## **Discharge/Emissions**

**Norwegian Environmental Regulation of Offshore Oil and Gas Activities, Final Report for North Slope Borough, Dan Fitzgerald Esq., April 2009**  
**Internal Document – available from Government Affairs**

This internal document was compiled at the North Slope Borough's request to provide detailed background information and improve our understanding of the Norwegian regulatory structure, especially as it relates to offshore development.

**Oil and Gas Assessment – Pre-publication edition – AMAP – An Arctic Council Working Group, March 2009 Final version of Chapter 5 & 7 – Scientific Findings and Recommendations, <http://www.amap.no/oqa/>**

**In re: Shell Offshore, Inc., Order Denying Review in Part and Remand in Part, OCS Appeal Nos. 07-01 & 07-02, Decided September 14, 2007**

**Shell Offshore Inc., Kulluk Drilling Unit, Permit No. R10OCS-AK-07-01, Petition for Review**

## **Oil Spill Prevention and Response**

**The Arctic Coastal Zone Management Newsletter, May 1978, "The lessons of Brest – NSB Planners prepare for the impossible." <http://www.ebenhopson.com/czm/1978cz/May78.pdf>**

**Svalbard 2006 Experimental Oil Spill Under Ice: Remote sensing, Oil weathering under arctic conditions and assessment of oil removal by in-situ burning, DF Dickins, SINTEF, April 2006**  
**<http://www.mms.gov/tarprojects/569/SummaryFieldReport.pdf>**  
**<http://www.mms.gov/tarprojects/569/Memo in-situ burnina.pdf>**

**Joint industry program on oil spill contingency for Arctic and ice covered waters. Full Scale Offshore field experiment 2009, FEX 2009 Handbook. April 3, 2009 JIP Oil in Ice: <http://www.sintef.no/Projectweb/JIP-Oil-In-Ice/>**

*Oil and Gas Assessment – Pre-publication edition – AMAP– An Arctic Council Working Group, March 2009 Final version of Chapter 7 – Scientific Findings and Recommendations, Findings 6-10*  
<http://www.amap.no/oa/>

*Attached is a report from 2004 by David Dickins of DF Dickins Associates, LLC. The report was prepared for The Prince William Sound Oil Spill Recovery Institute (OSRI) and the United States Arctic Research Commission (USARC).* <http://www.arctic.gov/files/OilInIceReport.pdf>

## Coast Guard Presence

*Operation Salliq 2008: The Coast Guard Arctic Initiative  
A Summer Remembered, By: Rear Admiral Gene Brooks*  
<http://www.piersystem.com/qo/page/780/27987/>

*Healy Mapping Mission - Arctic Land-grab- National Geographic. Apr 15, 2009*  
<http://nam.nationalgeographic.com/2009/05/healy/funk-text>

*UNITED STATES ARCTIC RESEARCH COMMISSION ANNUAL REPORT FISCAL YEAR 2006:*  
<http://www.arctic.gov/files/annualreport-01-30-08.pdf>

## Compulsory Marine Pilotage

*A Career as a Marine Pilot, Paul Kirschner, US Coast Guard Proceedings, Fall 2008*  
[http://homeport.uscg.mil/myca/portal/ep/contentView.do?channelId=-18262&contentId=142367&programId=12870&programPage=%2Fep%2Fprogram%2Feditorial.jsp&pageType=11328&contentType=EDITORIAL&BV\\_SessionID=@@@@1605449122.1242240365@@@&BV\\_EngineID=ccccadehehakeImcfiaqcfdfhdahj.0](http://homeport.uscg.mil/myca/portal/ep/contentView.do?channelId=-18262&contentId=142367&programId=12870&programPage=%2Fep%2Fprogram%2Feditorial.jsp&pageType=11328&contentType=EDITORIAL&BV_SessionID=@@@@1605449122.1242240365@@@&BV_EngineID=ccccadehehakeImcfiaqcfdfhdahj.0)

*North Slope Borough Resolution Serial No. 5-2009 – A Resolution supporting the expansion of compulsory Marine Pilotage in areas offshore northern Alaska., 'nsb marine pilots resolution.pdf'*

*Pilotage in the United States, American Pilot's Association, Washington DC, 2006,*  
<http://www.americanpilots.org/PilotageInUS.aspx>

*Alaska Statutes are passed by the legislature. Regulations (also called the Alaska Administrative Code) are rules adopted by the board to implement, interpret, and make specific the statutes. Both statutes and regulations have the force of law. AS 08.62 and regulations 12 AAC 56 specifically govern marine pilotage. AS 08.01 - 08.03 and regulations 12 AAC 02 apply to all professions regulated by the division.* <http://www.dced.state.ak.us/occ/pub/MarineStatutes.pdf>

Collaborative Research Agreement  
By and Between  
The North Slope Borough and  
Shell Exploration & Production Company

RECITALS

WHEREAS, in accordance with the Memorandum of Understanding signed by (i) Peter E. Slaiby on 26 January 2010, on behalf of Shell Exploration & Production Company ("Shell"), and (ii) the Honorable Mayor Edward S. Itta on 5 February 2010, on behalf of the North Slope Borough ("Borough"), a home rule municipality organized under the laws of the State of Alaska, the foregoing Parties have confirmed their general interest in conducting scientific studies with particular focus on marine mammals, seabirds, fisheries, acoustics, oceanography (physical and biological), and community health and socioeconomics related to the Beaufort and Chukchi Seas. In addition, the entities confirmed their joint interest in conducting particular studies to (i) further understand and address the impacts of oil and gas exploration activities on the marine ecosystem and its ability to support marine mammals and other marine resources whose health and numbers are intimately connected to Iñupiat culture and means of subsistence and (ii) continue to assess the effectiveness of mitigation to protect subsistence resources and activities;

WHEREAS, both the Borough and Shell advocate for additional baseline science research to refine their understanding of the arctic marine ecosystem in order to guard the Arctic Ocean's ecological integrity and biodiversity, maintain the sustainable subsistence use of the living and non-living resources of the arctic environment, and enable responsible decision-making and government permitting of offshore oil and gas activities in the Chukchi and Beaufort Seas;

WHEREAS, the Borough believes that baseline research projects with a broader temporal and spatial range would provide information related to some fundamental Iñupiat concerns related to international shipping traffic, changing ice and climate conditions, and other global effects of industrial activity no matter the source;

WHEREAS, the Borough possesses extensive experience in overseeing and conducting baseline research on the biological, physical, and human environment, and is capable of integrating traditional knowledge and incorporating the concerns of the North Slope residents in the design and implementation of relevant baseline science research.

THIS AGREEMENT ("Agreement"), made this 24th day of September, 2010 ("Effective Date") by and between the Borough and Shell, comprises the following:

ARTICLE I. TERM OF AGREEMENT

- A. *Aggregate Term.* Subject to paragraph B below regarding annual renewals of the term of this Agreement, this Agreement shall be for a term of five calendar years.

- B. *Annual Terms.* Subject to Article VI (H), which addresses the Parties' rights to terminate this Agreement, the Parties will mutually decide whether to renew this agreement annually. The decision to renew this Agreement should be made within (90) ninety days of the expiration of each calendar year during the term of the Agreement.
- C. *Scope of Agreement.* All Articles in this Agreement apply only to baseline research projects to be carried out pursuant to the provisions of this Agreement, but shall not be construed in any way to apply to studies or analyses completed or initiated by either of the Parties outside of this Agreement.

## ARTICLE II. STATEMENT OF OBJECTIVES

The Parties seek to collaboratively expand the baseline knowledge of the Arctic ecosystem, including human health, social and cultural conditions, through studies conducted under this Agreement.

## ARTICLE III. STEERING COMMITTEE

- A. *Establishment of Steering Committee.* Within ten (10) days of the Effective Date of this Agreement the Borough will solicit by letter nominees from each of the communities and parties identified in section A of Appendix A. Within thirty (30) days of the Borough receiving the names of qualified nominees the Mayor will (i) consider appointment of the nominees proposed by Shell, (ii) consider appointment of four (4) of the (10) ten independent scientists proposed by Shell, and (iii) consider the appointment of the nominees proposed from the Department of Wildlife Management and the village communities. For those positions that are not filled within eighty (80) days of the Effective Date, the Borough will repeat the process of soliciting nominees from the sponsoring Party or community as set forth in section A of Appendix A. The Mayor will consider appointment of all applicable nominees associated with an unfilled position within one hundred and twenty (120) days. This will constitute the Borough's best effort to establish a Steering Committee within one hundred twenty (120) days from the Effective Date.
- B. *Steering Committee Purpose.* The Steering Committee is the coordinating body responsible for establishing baseline science research study project needs and priorities as set forth in Appendix A.
- C. *Steering Committee Composition.* The Steering Committee will be composed of fourteen (14) representatives appointed as set forth in Appendix A.
- D. *Steering Committee Duties.* The Steering Committee will be responsible for carrying out the duties established for the Steering Committee as set forth in Appendix A.

## ARTICLE IV. ROLE OF THE NORTH SLOPE BOROUGH

A. The Borough shall undertake and be primarily responsible for the following:

- (i) Establish a Steering Committee.
- (ii) Prepare the first-year's Budget for Shell's approval pursuant to Article VIII.
- (iii) Prepare requests for proposal(s) ("RFP(s)") for baseline science research for distribution to independent qualified Third Parties. Alternatively, the Borough may prepare implementation plans by which the Borough would conduct to carry out the RFP.

Prior to sending an RFP(s) to Third Parties, the Borough will email the RFP(s) to a Shell scientist for Shell's review. Shell will have a period of ten (10) days from the date of emailing such RFP(s) within which to provide the Borough with its advice and recommendations regarding the content of such RFP(s).

- (iv) In coordination with the Steering Committee, conduct a Peer Review of the proposals received from Third Parties based on an RFP(s) referred to in Article IV.A. (iii). In the event the Borough determines it does not possess the qualified resources or expertise necessary to conduct such Peer Review, then the Borough will contract qualified independent Third Parties to conduct such Peer Review. A Shell scientist that is a member of the Steering Committee must be given the opportunity to participate in all Peer Reviews of RFP(s).
- (v) Perform the requirements of the Peer Reviewed proposal(s) or award a contract(s) for such proposal(s) to a Third Party in compliance with the Borough's relevant contracting and procurement ordinances, policies and guidelines.
- (vi) Assure through the review of proposals that respond to an RFP(s) or otherwise, that a methodology and detailed plan (including QA/QC) are an integral part of the Work Plan by which the Borough or a Third Party executes the collection, analysis and interpretation of raw data in order to assure that validated and reported data meets standards for reliability, accuracy, and proper formatting.
- (vii) Review research reports to ensure the highest quality science is conducted.
- (viii) During the second quarter of any calendar year following 2010, provide Shell with its recommendation regarding the annual budget it estimates is required to carry out baseline science research determined by the Steering Committee for the next calendar year.
- (ix) Notify Shell of its decision to approve one or more of the Peer reviewed proposals subject to Shell's response on funding. The information that the Borough provides to Shell will include the following:

- (a) An overview of the research proposal. Such overview shall include, but not be limited to: (i) description of the baseline science research proposal(s); (ii) study objectives and methodologies to be applied; (iii) anticipated results; (iv) baseline science research proposal budget and cost categories; (v) study timeline and key milestones; and (vi) summary of methods to maintain high data quality and integrity (QA/QC).
- (b) Identity of the party awarded the contract and/or authority to carry out the baseline science research project(s).
- (c) Identity of the top three (3) Third Parties that submitted qualified proposals to the Borough.
- (d) Process used to solicit Third Party proposals.
- (e) Criteria and scoring methodology used to evaluate proposals based on an RFP(s).
- (f) Summary of scoring of top three (3) Third Parties that submitted qualified proposals to the Borough.
- (g) Identify Third Parties disqualified from the selection process and give a summary of reasons in support of such disqualification.
- (h) Summaries of any external Peer Reviews related to baseline science research proposals.
- (x) The Borough shall work closely with the Steering Committee to enable the following:
  - (a) Development of a Peer Review process and identification of independent scientific and traditional knowledge reviewers that is appropriate for different types of research proposals. This process will include Peer Review of research design and related details to the final stages of academic or other appropriate Peer Review of the scientists' findings and conclusions.
  - (b) Consultation with independent subject matter experts as advisors to the Steering Committee, when such expertise is not available within the membership of the Steering Committee.
  - (c) Development and implementation of a plan to communicate validated results and scientific conclusions of baseline science research to North Slope village leaders and key stakeholders. This reporting may be through written reports, newsletters, town-hall meetings or another approach.

- (xi) Provide the Steering Committee an overview of the annual baseline science research implementation plan. Such plan shall provide the identity of the entities that will execute such studies and a summary overview of the number and types (i.e., consulting firm, university, etc.) of parties that submitted proposals for such studies.
- (xii) Establish the protocols that comply with the Borough's purchasing ordinance and that proposers will follow in submitting proposals for baseline science research and for implementing the contract that authorizes the research.
- (xiii) Prepare, negotiate and execute agreements in respect of (i) Peer Reviews, and/or (ii) baseline science research to be carried out by Third Parties.
- (xiv) Arrange for the timely sharing of Data derived from any baseline science research study with Shell and to the public as soon as the same are available under the terms of this Agreement and applicable law.
- (xv) Share Data derived from all baseline science research funded under this Agreement to the Data subcommittee of the Steering Committee established pursuant to Appendix A, section C(4)(d).

#### ARTICLE V. ROLE OF SHELL

##### A. Shell shall undertake and be primarily responsible for the following:

- (i) To review, make recommendations and give advice to the Borough in respect of Data and Reports to be disclosed to a Third Party or to be made publicly available pursuant to Article VI.A.
- (ii) To approve and fund the annual budget pursuant to Article VIII.
- (iii) To provide the Borough advice and recommendations regarding RFP(s) pursuant to Article IV.A.(iii).
- (iv) To provide the Borough advice and recommendations regarding Data and Reports pursuant to Article VI.A.
- (v) To review information about baseline science research proposals provided and recommended by the Borough pursuant to Article VIII.B.1.
- (vi) To approve the specific baseline science research proposal(s) that Shell funds pursuant to Article VIII.B. Once approved the Borough will manage any changes to the proposal or contract pursuant to its procurement procedures without further approval from Shell.

#### ARTICLE VI. GENERAL PROVISIONS

- A. *Public disclosure/publication policy.* The Parties acknowledge that the Borough is subject to laws mandating the availability to its citizens of public records unless federal, state or local laws prohibit or exempt the disclosure of public access to information.

In accordance with the provisions of this Agreement, the North Slope Borough Charter Article XVI, Sec. 16.070, and the North Slope Borough Municipal Code § 2.42.030, the Borough shall have the right to make Data, including raw data, publicly available only after validated findings and conclusions (i) have been submitted to the Parties within the context of a final report, or (ii) have been published in a peer reviewed scientific journal or (iii) presented at a public scientific conference, whichever is later.

Notwithstanding the foregoing provisions of this Article VI, the Parties, including a principle investigator, shall each have the right to disclose to a Third Party or make available to the public:

- (i) Data, unless analysis of such data in respect of the QA/QC methodology applied gives rise to significant uncertainty in the reliability of the findings and conclusions corresponding to such data. The Data subcommittee established at Appendix C(4)(d) will unilaterally determine if the raw data is significantly uncertain along with the findings and conclusions corresponding to that data. Only after that determination is made may the data be disclosed to a Third Party and the public.
- (ii) Data, including raw data, if compelled to do so by federal or state law, or by order of a court of competent jurisdiction, after notice to the other Party. In addition, the Parties shall each have the right to disclose as much of the Data as is necessary to the Bureau of Ocean Energy Management, Regulation & Enforcement and other relevant regulatory agencies for purposes of providing support for NEPA reviews or permitting approvals.
- (iii) Data following two (2) years from the day on which data sampling has been successfully completed as described in the investigator's research proposal and consistent with proposed methodology to ensure the highest data quality and integrity. Raw data (e.g., field notes, field data forms, etc.) that meets the time limits set out herein may be released upon request.

Prior to making available to the public or disclosing to a Third Party, any Data sets, including raw data upon request, any preliminary or final reports, presentations or abstracts (collectively or individually referred to as "Data and Reports"), the Borough shall send such Data and Reports to Shell for its review. Shell will have a period of 5 days from receipt of such Data and Reports within which to provide the Borough with its advice and recommendations regarding the content of such Data and Reports.

B. *Intellectual Property Management.* The Parties acknowledge that Shell possesses Confidential Information collected as part of its studies conducted in the Beaufort and Chukchi Seas that remain subject to confidentiality requirements. Data gathering outside this Agreement will include confidential and proprietary information which Shell is not obliged to share with participating scientists until such time that Shell and/or the federal government determine it is appropriate to disclose it to approved recipients. At such time, if Shell were to disclose to the participating scientists the confidential data, the participating scientists will be required to sign confidentiality agreements outlining requirements for use and disclosure of the data. The scientists' obligation to maintain confidentiality of Shell's data will last as long as those data are protected under federal or state law, or under confidentiality agreements with Third Parties, and as outlined in the confidentiality agreements, irrespective of the duration of this Agreement.

B.1. *New Data Sets.* Neither Party shall assert copyright or any other intellectual property rights in raw (not yet validated) data, or reports or summaries drafted and presented by scientists conducting the baseline science research pursuant to this Agreement.

C. *Data Ownership.* Data, including raw data derived from any baseline science research study carried out pursuant to this Agreement shall, in addition to the Third Party that carried out such study, be jointly owned by the Borough and Shell. The Borough may release such data to the public in compliance with this agreement, consistent with Article VI(A), and does not need Shell or Third Party authorization to release such data.

D. *Additional Collaborators.* Either Party may solicit the participation of additional collaborative research partners, where data gaps in their respective baseline science research have been identified and supplemental research, technical capability, and funds would enable the Parties to acquire the additional relevant data. If either Party obtains a commitment from a potential outside party, the Parties must decide whether to accept, and on what conditions such additional resources will be accepted. If the Parties do not agree to accept a commitment from a potential outside party, the Borough may complete the agreement with the outside party outside of this Agreement.

Any amendments to this Agreement to accommodate such additional collaborators shall be subject to mutual agreement of the Parties.

E. *Third-Party In-Kind Contributions.* Either Party may solicit contributions in-kind to further the objectives of this collaboration, provided that the Parties agree upon such in-kind contributions, subject however to any limitations or requirements imposed either by federal or state tax laws, and the applicable provisions of the Borough Charter or municipal code. If the Parties do not agree to such in-kind contributions the Borough may accept the contributions outside of this Agreement.

F. *Dispute Resolution.* This Agreement shall be governed by and construed in accordance with the laws of the State of Alaska, and venue for all actions or proceedings arising out of, in

relation to or in connection with this Agreement shall be exclusively in the Federal Courts located in the State of Alaska. If for any reason it is determined by a court that federal subject matter jurisdiction with respect to any such action or proceeding is not proper, jurisdiction and venue for such action or proceeding shall be exclusively in the State Courts of the State of Alaska located in Anchorage, Alaska.

- F.1. *Required Disclosure.* Neither Party will attempt to subject the other to liability for disclosure of information to the public, a state or federal governmental body or court if disclosure is required in order to comply with any ordinance, statute or governmental regulation, or court decree or order.
- G. *Amendment.* Either Party may provide written notice requesting an amendment to this Agreement, subject to the following conditions:
- (i) Before this Agreement expires, if either Party obtains additional third-party funding sources ("**Securing Party**") that would enable it to extend the duration or to expand the direct scope of any baseline studies already commenced under this Agreement, acceptance of such third-party funding would be subject to securing the prior written approval from the Parties which did not obtain such third-party funding ("**Non-Securing Parties**"). In the event such commitment is obtained by the Borough, the Non-Securing Party shall be under no obligation to commit additional funding. The Non-Securing Party shall have fourteen (14) days from receiving written notice from the Securing Party within which to approve the additional funding. The Borough may accept the additional third party funding and use it outside of the terms of this Agreement if a Non-Securing Party does not approve the additional funding.
  - (ii) If any proposed amendment will affect the progress or scope of research then underway, the Parties will mutually present to the Steering Committee a preliminary assessment of the expected impact. Any proposed modification of an existing contract must comply with the Borough's contracting, change order and amendment process.
- H. *Termination of Agreement or Suspension of Work.* Either Party may provide ninety (90) days written notice of its intent to terminate this Agreement, subject to the following conditions:
- (i) The amount of funds committed for a calendar year toward the completion of any given project funded by Shell will not be reduced, nor will any project then underway be terminated.
  - (ii) If catastrophic events destroy the scientists' ability to continue substantive work during any phase of the research project(s), the Parties will conduct a technical and funding analysis during the fourteen days following a catastrophic event. Thereafter, if the Steering Committee decides that a Suspension of Work rather than

the termination of this Agreement is in the public's best interest, the Parties will agree on the period of suspension and related conditions (if any).

- I. *Press Releases.* The Parties will agree in advance upon:
- (i) Any Press Release concerning data summaries, abstracts, presentations and scientific reports resulting from the studies conducted under this Agreement.
  - (ii) Any Press Release concerning the negotiations, entering into, and carrying out the terms of this Agreement.
  - (iii) Any other Press Release related to or regarding the baseline science research conducted pursuant to this Agreement and any statements giving credit to the scientists and their contributions.
- J. *Indemnification.* It is understood and agreed that this Agreement is solely for the benefit of the parties to the Agreement and gives no right to any other party. No joint venture or partnership is formed as a result of the Agreement.

The Borough, its successors and assigns, will protect, save, and hold harmless Shell its authorized agents and employees, from all claims, actions, costs, damages, or expenses of any nature whatsoever by reason of the acts or omissions of the Borough, its subcontractors, assigns, agents, contractors, licenses, invitees, employees, or any person whomever arising out of or in connection with any acts or activities authorized by this Agreement. The Borough further agrees to defend Shell and its authorized agents and employees in any litigation; including payment of any costs or attorney's fees for any claims or actions commenced thereon arising out of or in connection with acts or activities authorized by this Agreement. This obligation shall not include such claims, costs, damages, or expenses which may be caused by the sole negligence of Shell or its authorized agents or employees, provided, that if the claims or damages are caused by or result from the concurrent negligence of (a) Shell and its agents or employees, and (b) the Borough, its agents or employees, this indemnity provision shall be valid and enforceable only to the extent of the negligence of the Borough, or the Borough's agents or employees.

#### ARTICLE VII. 2011 BASELINE SCIENCE RESEARCH – SCOPE OF WORK

Prior to 1 November 2010, the Parties shall agree upon one or more baseline science research studies to be conducted in 2011. All or part of such study(ies) shall be funded out of the first-year Budget.

The provisions of Articles IV.A.(iii) through and including Article IV.A.(xv) shall apply with respective differences taken into consideration to such studies.

#### ARTICLE VIII. BUDGET

The Borough will submit a first-year Budget to Shell for its review and approval. Upon receipt of the Budget the Borough will present it to the Borough Assembly for appropriation. Acceptance of such first-year budget requires Shell's delivery of the funds to the Borough.

Beginning on April 1, 2011, and each anniversary thereafter, the Parties will develop and agree upon an annual Budget for the succeeding year, if any, for approval by the Parties. Such Budget shall take into consideration the annual budget proposed by the Borough in accordance with Article IV.A.(viii). Shell's approval of an annual Budget for 2011, and each succeeding calendar year thereafter, shall be confirmed in writing by giving written notice to the Borough prior to October 15, 2011 in respect of the Budget for 2011 and each anniversary thereafter.

A. *First-Year Funding.* As soon as practicable following approval by Shell of the first-year Budget proposed by the Borough, and with the aim to do so prior to September 30, 2010, Shell agrees to contribute an amount not to exceed \$2,000,000.00 (two million dollars) toward the funding of the establishment of the Steering Committee, capacity building, and first years study or studies, as collectively set forth in the first-year budget.

The Borough shall timely provide Shell with an invoice, including all relevant banking instructions to enable Shell to make such payment on or before September 30, 2010.

B. *Authorized encumbrance of Shell funding for RFP(s) and Shell advice and recommendations.*

B.1 Shell shall, within a period of ten (10) days following notification from the Borough pursuant to Article IV.A.(ix)(a), review each of the baseline science research award proposals and provide the Borough with Shell's advice and recommendations.

B.2 Within ten (10) days following receipt of such notice from the Borough pursuant to Article VIII.B.1 Shell shall confirm in writing to the Borough the specific baseline science research award proposal(s) it approves. No Shell funds may be used to fund a proposal(s) that it has disapproved pursuant to this paragraph.

B.3 Subject to Shell receiving an invoice from the Borough, Shell shall arrange funding of any calendar year Budget approved subsequent to the first-year Budget as follows:

On or before 15 January of an approved or renewed calendar year, Shell shall arrange for the transfer to the Borough of the full amount of the annual Budget approved in accordance with the second paragraph of Article VIII.

Notwithstanding the foregoing provisions of this Article VIII.B.3, if at the end of any calendar year there is an amount of Budget funds that have not been expended, then such Budget funds shall be carried forward into subsequent calendar years and used in compliance with this Agreement.

- C. *Payment of Costs and Expenses.* Except for funds committed to an approved Budget, each Party will bear the cost of its respective oversight activities.
- D. *Accounting.* To enable the continuation of any study that may be conducted for one year or more, irrespective of the Borough's fiscal year, the Borough will incorporate contract funds into its budget, processing all receipts, disbursements and carry-forwards through its grants accounting system. The Borough will provide Shell with quarterly financial reports which shall include a detailed reconciliation and accounting for approved Budget funds spent against the approved Budget cost categories at the level of detail appropriate to reasonably satisfy Shell's needs.

Notwithstanding the foregoing provisions of this Article VIII, in no event is Shell responsible for funding any activity in excess of the Budget(s) approved by Shell for any given calendar year, unless Shell agrees otherwise as evidenced in writing by giving notice to the Borough.

#### ARTICLE IX. SPECIFIC ASPECTS

A. *No Assignment.* Neither Party may assign this Agreement or any rights under it, except for the following reasons, provided that the Parties' obligations under this Agreement remain intact:

- (i) Shell's corporate structure changes, including mergers or divisions or assignment to another company within the same group of owners or to a Third Party in connection with that party's complete or partial takeover of Shell's assets and liabilities.
- (ii) If Shell exercises its right to assign its rights and responsibilities, any Publications will reflect its partial funding of the initial study.

B. *Force Majeure.* Neither Party shall be liable in damages to the other or have the right to unilaterally terminate this Agreement for any delay in performing hereunder if such delay or default is caused by Force Majeure, provided such Force Majeure event does not exceed 1 year in duration.

- B.1. *Force Majeure Coverage.* Neither the Borough nor Shell will be required to reimburse the other for failure to comply with its obligations under the Agreement, if the failure to perform is due to Force Majeure.

C. *Compliance with Laws.* In carrying out their respective obligations under this Agreement, the Parties will comply with applicable federal and state laws and Borough ordinances, including, subject to the limitations outlined in Article VI part A, Public Disclosure laws. All researchers and contractors will obtain regulatory permits required by federal or state law, or the Borough's municipal code, before commencing a research project.

D. *Benefits to Third Parties.* This Agreement is not intended to give any rights or benefits to Third Parties, or to authorize any individual or entity not a party to this Agreement the right to sue either Party for personal injury or property damage or any other cause.

E. *Personnel.* The Borough will retain only the additional scientists and support staff which are reasonably necessary to manage the steering committee, manage the funding, RFPs, and grant proposal reviews, and conduct the studies approved by Shell to be carried out by the Borough. Independent contractors will not be considered to be Borough employees.

F. This agreement is not intended to create, nor is it to be construed or otherwise characterized as creating, a partnership, association, or any other type of business entity between the Parties, or a separate governmental subdivision of the Borough.

G. *Notice.* All notices required under this Agreement shall be made to:

If to the North Slope Borough:

North Slope Borough  
Attn: Edward S. Itta, Mayor  
P. O. Box 69  
Barrow, Alaska 99723

If to Shell:

Shell Exploration & Production Company  
Attn: Pete Slaiby, Vice President, Shell Alaska  
3601 C Street, Suite 1000  
Anchorage, Alaska 99503

G.1. As regards those decisions to be made by the Parties as set forth in this Agreement, each Party will appoint a representative to make such decisions on its behalf.

G.2. The Steering Committee through its designee shall be responsible for notifying Shell and the Borough and requested attendees of the agenda, date, time and place of all Steering Committee meetings.

H. *Whole Agreement.* Any appendix to this Agreement is incorporated into and made a part of this Agreement as if fully set out. There exist no separate agreements, whether verbal or written, as to the intent, content, duration, or construction of this Agreement.

I. *Savings Clause.* If this Agreement is found by judicial construction to be invalid for any reason, the remaining portions of funding advanced by Shell or other parties that become funding parties of the objectives set forth in this Agreement, and which is not already spent, will be promptly returned to the corresponding Party.

J. *Conflict of Interest Clause.* All members of the Steering Committee have a duty and responsibility to conduct themselves in a professional manner in the performance of making recommendations, giving advice and making decisions in respect of aspects of this Agreement that are reserved for the Steering Committee, and to the extent (i) any member acts contrary to such expressed behaviors of conduct, or (ii) any member's personal interests

or concerns are inconsistent with such behaviors of conduct as a member of the Steering Committee, then such member may be replaced by mutual agreement of the Parties.

K. *Severability Headings.* If any part of this Agreement, including, but not limited to, any provisions, paragraph, clause, phrase or words, is found to be in conflict with applicable law, such part shall be inoperative, null and void insofar as it is in conflict with said law, but the remainder shall be given full force and effect.

*Headings.* The descriptive headings of the various parts, sections, paragraphs, and appendix have been inserted for convenience of reference only and shall in no way modify or restrict any of the terms and provisions of this Agreement.

#### ARTICLE X. DEFINITIONS

**“Borough”** means the North Slope Borough, a home rule municipality established in 1974 under Alaska law.

**“Budget”** means an itemized budget detailing all the costs and expenditures budgeted for the calendar year concerned. Such budget shall include the general costs associated with (i) baseline science research studies to be conducted during such year (itemized costs will be available after proposals are submitted and accepted), and itemized costs for (ii) travel and accommodation costs as set forth in Appendix A, (iii) administrative costs associated with Steering Committee meetings, special meetings and any subcommittee meetings (iv) capacity building and providing appropriately experienced staff and scientists to meet their obligations under this Agreement, and (v) any other reasonable costs and expenditures to execute the objectives of this Agreement.

**“Confidential Information”** means information that a Party withholds from public scrutiny as required or allowed by federal or state law, or pursuant to confidentiality agreements with Third Parties, and for the purposes of this Agreement includes Shell’s (i) statistical data, geophysical information that petroleum geologists can interpret as to existence of petroleum and mineral compositions in Shell’s specific Chukchi or Beaufort Sea leaseholds, (ii) internal plans and plan documents related to the specific leases, and all business documents that Shell considers vital to its competitive ability, and (iii) data, analysis and reports derived from data collected pursuant to environmental and biological baseline scientific studies conducted by Shell or one of its affiliates or through agreements with Third Parties.

**“Data”** means the QA/QC’d results (validated for completeness, correctness, and conformance with predetermined QA/QC standards) of surveys, studies, analyses, reports and any other information, obtained or generated pursuant to the baseline research studies conducted pursuant to this Agreement.

**“Force Majeure”** means events totally out of the Parties’ control, whether a natural disaster, acts of God, government restrictions, insurrections, act of war, or structural design failure of

equipment that was not and could not have been known to the scientists before use in a research phase, that prevent the scientists from completing a phase of the baseline research, the replication of which would require substantial expenditure of additional dollars and result in delay of the research beyond the termination date specified in the appendix detailing the research, and/or any other cause beyond the reasonable control of the Party whose performance is affected.

**"Party"** or **"Parties"** means the North Slope Borough and Shell, individually or collectively, as the case may be, and may include such other additional entities as may join the collaborative effort and sign this Agreement.

**"Peer Review"** means, according to the United States Office of Management & Budget guidelines, published December 15, 2004 as its Final Information Quality Bulletin for Peer Review, "an evaluation of a body of scientific or technical knowledge that typically synthesizes multiple factual inputs, data, models, assumptions, and/or applies best professional judgment to bridge uncertainties in the available information.

**"Press Release"** means any announcement made using any form of media to disseminate information on any aspect of this Agreement, its intent or substance, or the scientists' progress in or any draft, interim or final report written on any collaborative research.

**"Public Disclosure"** means the release to Third Parties of information, whether verbal or written.

**"Publications"** means any paper or electronic compilation of articles, essays, reports, digests, and similar items, and includes brochures or newsletters written for dissemination to Third Parties for any reason.

**"Quality Assurance/Quality Control"** or **"QA"/"QC"** is the review of raw data to meet pre-determined guidelines for acceptability in analysis and data interpretation.

**"Quality Control (QC)"** means a system of routine technical activities, to measure and control the quality of data acquisition activities, using defined standards. The QC system is designed to ensure data integrity, correctness, and completeness; identify and address errors and omissions; and document and archive raw data, validated data, and record all QC activities. QC activities include general methods such as accuracy checks on data acquisition and calculations and the use of approved standardized procedures, measurements, methods, archiving information, and reporting.

**"Quality Assurance (QA)"** means an integrated system of management procedures involving planning, implementation, documentation, assessment, reporting, and quality improvement to ensure that data acquisition activities satisfy stated performance criteria. Reviews should be performed upon validated data following the implementation of QC procedures.

"Steering Committee" means that body of named individual natural persons who the Parties have agreed to perform certain duties and take certain decisions, as set forth in this Agreement, with respect to baseline research conducted pursuant to this Agreement.

"Suspension of Work" means the forced and temporary cessation of research required as a result of Force Majeure or catastrophic events for a period of time long enough to seriously compromise the Parties' ability to complete the whole of the Parties' collaborative research project or projects.

"Third Party" means any individual or entity other than the North Slope Borough or Shell, whether a natural person or not.


This the 2nd day of September, 2010.

NORTH SLOPE BOROUGH



Edward S. Itta, Mayor

SHELL EXPLORATION &  
PRODUCTION COMPANY



Susan Childs, Regulatory Affairs Manager <sup>SR</sup>  
Venture Support  
Integrator

Reviewed As To Form:

 9/22/10  
North Slope Borough Law Department

## APPENDIX A

### Steering Committee:

- A. *Creation & Term.* The Steering Committee shall be comprised of a total of fourteen (14) members appointed by the Mayor of the Borough. The candidates for mayoral consideration will be nominated as follows: two (2) nominees by Shell for two positions to be filled from Shell nominees; two (2) nominees by the Department of Wildlife Management to be filled from Borough nominees; five (5) nominees one each by the cities of Wainwright, Barrow, Point Hope, Kaktovik and Nuiqsut, and one (1) nominee by the Native Village of Point Lay to fill the respective village positions; and four (4) independent qualified scientists, the appointment of whom shall be made by the Borough Mayor from a list of ten (10) nominees provided by Shell.

In the event the Parties or a village with members on the Steering Committee elects to replace its member(s) on the Steering Committee they shall notify the Borough Mayor and the other members of the Steering Committee of the name and qualifications of the replacement nominee(s) for the Mayor to consider for appointment.

The initial term of each member on the Steering Committee shall be (5) five years.

The sponsoring party of each member of the Steering Committee may re-nominate its member to serve for additional term(s) of three (3) years.

In the event an appointed member of the Steering Committee is absent without being excused for more than two (2) meetings of the Steering Committee during any calendar year the sponsoring Party or community shall nominate a replacement whom the Mayor will consider for appointment.

A newly appointed member will serve out the term of his/her predecessor.

- B. *Purpose.* The Steering Committee shall act as the coordinating body responsible for establishing baseline science research needs and priorities such that the Parties will be able to (i) further understand and address the impacts of oil and gas exploration activities on the marine ecosystem and its ability to support marine mammals and other subsistence species whose health and numbers are connected to Inupiat culture and subsistence; and (ii) continue to assess the effectiveness of subsistence resource mitigation measures.
- C. *Duties.* The Steering Committee will be responsible for performing the following duties:
- (1) Setting the baseline science research agenda for each calendar year. Such agenda shall include but not be limited to identifying the research topics to be addressed within the context of any annual baseline research program; and setting the baseline science research program priorities;

- (2) Providing the Parties with its recommendations regarding the scope of baseline science research studies to be carried out during the next succeeding calendar year. Such recommendations shall be provided to the Parties before the end of the 3<sup>rd</sup> quarter of the calendar year preceding the calendar year in which all or any part of such studies are to be carried out;
- (3) Developing research and monitoring guidelines;
- (4) Collaborating with the Borough to enable the following:
  - (a) To consult with independent subject matter experts as advisors to the Steering Committee, when such expertise is not available within the membership of the Steering Committee.
  - (b) To develop and implement a plan by which validated results and scientific conclusions of baseline science research will be communicated to North Slope village leaders and key stakeholders. Such reporting may be through written reports, newsletters, town-hall meetings, or other means facilitated by the Borough under the direction of the Steering Committee.
  - (c) To establish subcommittees, if necessary, that may include non-steering committee members.
  - (d) To establish a Data subcommittee to review the quality of the data for a project that is questioned by a Party. This subcommittee will include (3) three members of the Steering Committee and the pertinent principle investigator or his designee. Of the Steering Committee members, one will be from Shell's two appointed nominees, one will be from Wildlife's two appointed nominees, and one will be from the independent scientific appointees. This subcommittee at the request of any Party will unilaterally determine if the Data for a project is significantly uncertain pursuant to Paragraph VI(A)(i). The subcommittee members will sign a confidentiality agreement with the Borough. The Steering Committee may assign other tasks to the Data subcommittee.
- (5) Determining the Chairmanship of the Steering Committee and the duties, roles and responsibilities of the Chairmanship, term of service, and how the Chairman will be selected.

*E. Duration.* The Steering Committee will be active until this Agreement expires or is terminated by its terms or until the last research project undertaken pursuant to this Agreement is completed, and final reports distributed to the Parties, whichever date is later.

F. *Meetings.* Within one hundred and fifty (150) calendar days from the Effective Date or such other period of time as the Parties shall agree, the Steering Committee will meet in Barrow, Alaska. Thereafter, the Steering Committee shall meet at least once during each quarter in Barrow, Alaska, or such other location in Alaska agreed to by the Steering Committee, provided the costs associated with holding a meeting of the Steering Committee at such location are within the Budget approved by Shell.

G. *Travel.* The annual Budget agreed by the Parties will include sufficient funds to cover reasonable (i) round-trip commercial transportation from each Steering Committee member's home, office or village of residence in Alaska to Barrow, Alaska or such other location in Alaska where the meeting of the Steering Committee is to be held, and (ii) room, board, and other reasonable expenses for the days during which the Steering Committee convenes.

H. *Decisions.*

- (1) *Quorum.* A quorum of the Steering Committee shall be established by representation of at least eight members, which shall include: at least one external scientist; at least one member each from Shell's and the Department of Wildlife's nominees; and at least one member who resides in a coastal village.
- (2) *Sub-Committees.* Sub-committees of the Steering Committee may be formed in order to facilitate the role and objectives of the Steering Committee; however, in no event shall any sub-committee have any decision-making role or authorization reserved to the Steering Committee or the Parties.
- (3) *Special Meetings.* Special meetings of the Steering Committee may be called by the Chairman of the Steering Committee by giving members at least seven days advance notice. Such notice shall include sufficient details (including any relevant documentation) of the agenda items to be discussed at such special meeting.
- (4) *Meeting Protocol, Record of Minutes & Decisions.* The Steering Committee will establish its own meeting protocol, including recording minutes of meetings and any decisions taken at such meetings.
- (5) *Decisions.* The Steering Committee shall use its best efforts to take decisions based on a consensus wherein the judgment or opinion reached by the members comprising a quorum of the Steering Committee shall prevail. The Steering Committee shall establish at its first meeting a decision-making methodology to default to in the event a decision cannot be reached by consensus.

# NORTH SLOPE BOROUGH

## DEPARTMENT OF LAW

P.O. Box 69

Barrow, Alaska 99723

Phone:(907) 852-0300

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**Bessie O'Rourke, Borough Attorney**



**To:** Mayor Edward S. Itta

**Through:** Harold Curran, CAO *HC*

**From:** Bessie O'Rourke, Borough Attorney *BORKE*

**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.<sup>1</sup> 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.<sup>2</sup>

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<sup>1</sup> See Section 4 of ESA, 16 U.S.C. 1533(b).

<sup>2</sup> 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).<sup>3</sup> 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.<sup>4</sup> 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”).<sup>5</sup> 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).<sup>6</sup> 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.”<sup>7</sup>

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.”<sup>8</sup> 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.<sup>9</sup> 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.<sup>10</sup> The focus “should be on coastal effects, not on the nature of the activity.”<sup>11</sup>

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<sup>3</sup> 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).

<sup>4</sup> Compare 16 USC 1456 (c)(1)(A) (federal activities) with (c)(3)(A) (federal licenses or permits).

<sup>5</sup> See 16 U.S.C. § 1456(c); 15 C.F.R. 930.11(g); 930.30; 930.31(a).

<sup>6</sup> 16 U.S.C. § 1453(1).

<sup>7</sup> 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.”)

<sup>8</sup> 16 U.S.C. § 1456(c)(1)(A)

<sup>9</sup> 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).

<sup>10</sup> 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).

<sup>11</sup> *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"<sup>12</sup> 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.<sup>13</sup>

## 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."<sup>14</sup> There are no explicit exemptions in CZMA for ESA determinations.<sup>15</sup> Likewise, there is no language in ESA or ESA regulations<sup>16</sup> 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."<sup>17</sup> 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."<sup>18</sup>

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<sup>12</sup> See 16 U.S.C. 1456 (c)(1)(A); 1456 (c)(3)(A); 1456 (c)(3)(B) (emphasis added).

<sup>13</sup> 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].

<sup>14</sup> 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.

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

<sup>16</sup> See 50 C.F.R. 424.

<sup>17</sup> 15 C.F.R. 930.31(a).

<sup>18</sup> *Id.*

An action that is not deemed consistent may still be allowed if the President exempts the activity from compliance.<sup>19</sup>

### 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.<sup>20</sup>

CZMA does not define or qualify the term “affect.”<sup>21</sup> 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.”<sup>22</sup> The Report describes secondary effects as including “growth inducing effects and other effects related to induced changes in the pattern of land use.”<sup>23</sup>

The regulations clarify that the term “effect” includes direct and indirect (cumulative, incremental) effects.<sup>24</sup> The only threshold for “effect” in the regulations is that the effect must be (1) more than “de minimis”<sup>25</sup> and (2) “reasonably foreseeable.”<sup>26</sup> 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.”<sup>27</sup>

“Reasonably foreseeable” is not defined.<sup>28</sup> 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.<sup>29</sup>

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<sup>19</sup> 16 U.S.C. § 1456(c)(1)(B)

<sup>20</sup> 15 C.F.R. 930.33(a)(2).

<sup>21</sup> 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”).

<sup>22</sup> Coastal Zone Act Reauthorization Amendments of 1990, 136 Cong. Rec. H8068, 8078 (1990)

<sup>23</sup> *Id.*

<sup>24</sup> 15 C.F.R. 9.30.11(g) (definition of effects); *see also* 15 C.F.R. § 930.15(a).

<sup>25</sup> 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.

<sup>26</sup> 15 C.F.R. 9.30.11(g) (definition of effects); *see also* 15 C.F.R. § 930.15(a).

<sup>27</sup> 15 C.F.R. 930.33(d).

<sup>28</sup> *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.”<sup>30</sup> While the “agency need not foresee the unforeseeable,” the agency is required to engage in “some degree of forecasting.”<sup>31</sup>

#### 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.”<sup>32</sup> *Environmentally beneficial activity* is defined as “an activity that protects, preserves, or restores the natural resources of the coastal zone.”<sup>33</sup> The State agency “shall provide for public participation . . . for the State agency’s consideration of whether to exclude environmentally beneficial activities.”<sup>34</sup>

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.”<sup>35</sup> 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.<sup>36</sup> 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).<sup>37</sup> Thus, there appear to be no statutory or regulatory exemptions under Alaska law for federal activities pursuant to ESA.

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<sup>29</sup> See 65 Fed. Reg. 77,125.

<sup>30</sup> E.g., *Sierra Club v. Marsh*, 976 F.2d 763, 767 (1st Cir. 1992).

<sup>31</sup> *Scientists' Inst. for Public Information, Inc. v. Atomic Energy Comm'n*, 481 F.2d 1079, 1092 (C.A.D.C. 1973).

<sup>32</sup> 15 C.F.R. 930.33(a)(4).

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> 15 C.F.R. 930.33(a)(1).

<sup>36</sup> See generally, 11 AAC 110; A.S. 46.40.96.

<sup>37</sup> 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.”<sup>38</sup> But it would “direct future agency actions” by requiring consultation (and possibly mitigation measures), and it is a “proposed rulemaking”<sup>39</sup> 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.<sup>40</sup>

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<sup>38</sup> Quoting 15 C.F.R. 930.31(a).

<sup>39</sup> 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”).

<sup>40</sup> See 15 C.F.R. 930.33(a)(1).

c. Other ESA Actions

Recovery plans (under Section 4 of ESA<sup>41</sup>) 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,<sup>42</sup> and the Service has, in the past, applied consistency reviews to at least some of its listings.<sup>43</sup> And other restrictive offshore and coastal land use designations, such as “Marine Sanctuary” designations, are subject to CZMA consistency determinations.<sup>44</sup>

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.”<sup>45</sup> 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,<sup>46</sup> FWS said that none was required.<sup>47</sup> 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.”<sup>48</sup>

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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<sup>41</sup> 16 U.S.C. 1533(f)(1).

<sup>42</sup> 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)

<sup>43</sup> 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).

<sup>44</sup> 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 . . .”

<sup>45</sup> Personal communication between Barrett Ristroph and David Kaiser (Feb. 10, 2011).

<sup>46</sup> Borough’s comments on Proposed Critical Habitat Designation for Polar Bears (July 6, 2010).

<sup>47</sup> 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)

<sup>48</sup> *Id.*

permitting, and other development.”<sup>49</sup> 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.<sup>50</sup> 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.<sup>51</sup>

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.<sup>52</sup> 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,”<sup>53</sup> a court might agree with this finding. Similarly, a court might agree with a FWS finding that the effects are so insignificant as to be “de minimis” and not subject to a review.<sup>54</sup>

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.<sup>55</sup> 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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<sup>49</sup> *Id.*

<sup>50</sup> Personal communication between Emma Pokon and Tom Evans (Feb. 10, 2011).

<sup>51</sup> Personal communication between Barrett Ristroph and David Kaiser (Feb. 10, 2011).

<sup>52</sup> *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).

<sup>53</sup> Quoting 15 C.F.R. 930.33(a)(4).

<sup>54</sup> *See* 15 C.F.R. 930.33(a)(3).

<sup>55</sup> 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.<sup>56</sup> 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.”<sup>57</sup>

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<sup>58</sup>) 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.<sup>59</sup>
3. For threatened species (but not endangered), the Service can develop rules<sup>60</sup> 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.<sup>61</sup> The Borough

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<sup>56</sup> 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).

<sup>57</sup> *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)

<sup>58</sup> 16 U.S.C. 1539(b).

<sup>59</sup> 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).

<sup>60</sup> 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)).

<sup>61</sup> *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.

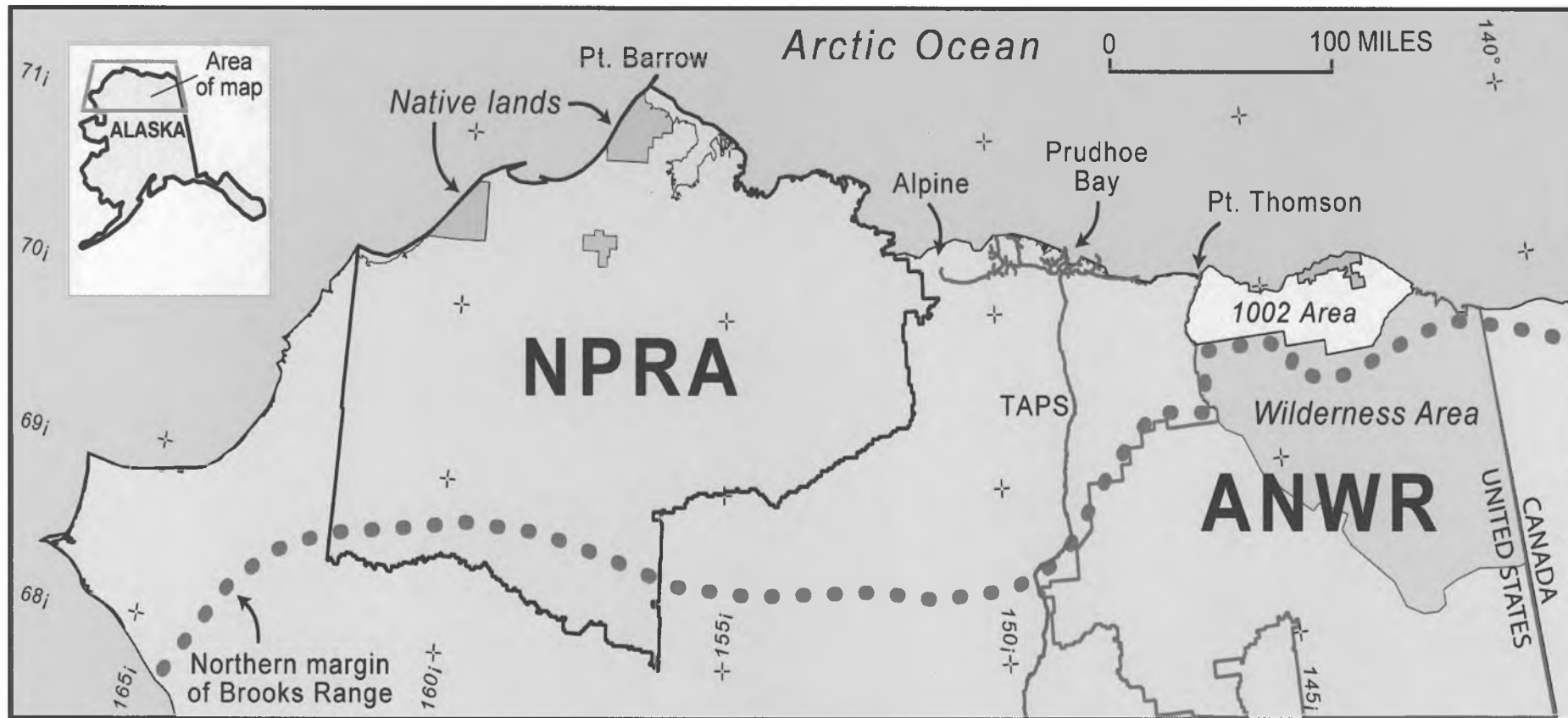


# North Slope Borough



***Presentation to the Alaska House Finance Committee  
2-17-11***

# The Arctic



## NPR-A

- Formerly known as the Naval Petroleum Reserve No. 4, the National Petroleum Reserve-Alaska is a vast 23-million acre area on Alaska's North Slope that has a history of nearly 100 years of petroleum exploration.
- In 1923, mindful of the land's conceivable petroleum value. President Harding set aside these 23 million acres as an emergency oil supply for the U.S. Navy. In 1976, in accordance with the Naval Petroleum Reserves Production Act, the administration of the reserve was transferred to the Department of the Interior, more specifically the Bureau of Land Management, and was renamed to what is now known as the National Petroleum Reserve-Alaska (NPR-A).
- Oil and gas leasing in the National Petroleum Reserve-Alaska (NPR-A) is authorized under the Naval Petroleum Reserves Production Act of 1976 (42 U.S.C.6501 et seq.), as amended and the Department of the Interior and Related Agencies Appropriation Act of 1981 (94 Stat. 2964).

## CD-5

- The political prospects for opening ANWR are no better than they were five years ago, and they may even be worse.
- The CD-5 represents approximately 5 million barrels of domestic oil production a year, 300 construction jobs, 100 operating jobs, and an infrastructure line that would likely lead to more exploration and development in the NPR-A. I hope that in the coming months the NSB, State Legislature, and the permitting agencies can work together to get this valuable project moving forward in an economically and environmentally responsible way.
- The government has so far blocked development by denying permits to cross the channel. We have not given up on this one yet, though, and we're still working with our delegation and the Secretary of the Interior to see what can be done.

## Critical Habitat Designation

- The North Slope Borough joined ASRC and other North Slope and Northwest Arctic entities in challenging the federal government's critical habitat designation of a vast area in our region.
- The sea ice is melting through no fault of ours. Nothing that residents of the region are doing is threatening the health of the polar bear. In fact, we have coexisted with and conserved the polar bear very successfully for millennia. In the course of our subsistence activities, we follow the terms of international agreements designed to protect the species.
- This will impact the lives of all Alaskans. From our perspective, it will do this primarily by complicating, delaying and possibly blocking the construction of basic community infrastructure, like airstrips and roads. Important community projects in our villages will be snared in the trap of regulations that flow from critical habitat designation.

# Offshore

I've tried to chart a path that doesn't deny the likelihood of offshore development in the very near future. Republican and Democratic administrations in Washington have supported it, as has Congress under the control of either party. The current administration supports offshore development, but not until all the right safeguards and mitigations are in place. They want to get the right balance and they are interested in our ideas for achieving that balance. We need to respond to it realistically so that we can make the very best of it, not for ourselves, but for the generations that come after us.



## NSB Arctic Offshore Oil & Gas Development Policy Positions

- *Baseline Science*
- *Stricter Regulation*
- *Cumulative Impacts*
- *Revenue Sharing*
- *Discharge/Emissions*
- *Oil Spill Prevention & Response*
- *Coast Guard Presence*
- *Compulsory Marine Pilotage*



North Slope Borough Mayor Edward Itta testifying during Interior Secretary Ken Salazar's visit to Alaska on April 14, 2009

## Baseline Science

- Provide funding for scientific research to gather adequate baseline data prior to new offshore activity.
- Support a collaborative approach to research and data sharing, such as the North Slope Science Initiative (NSSI).
- Tie specific research requirements to industrial activity.
- Collaborative Research agreement with Shell.

## Stricter Regulation

- Require OCS production to use pipelines to shore-based facilities rather than tanker transportation.
- Require BOEMRE to apply regulations and stipulations more vigorously.
- Improve standards in the leasing process.

## Cumulative Impacts

- Require detailed discussion of area-wide cumulative impacts in EIS/EA documents, including socio-cultural impacts.
- Stipulate limits on the number of projects allowed in an area at one time.
- Impacts to the health, social structure, and culture of communities should also be subjected to substantial analysis.

## Revenue Sharing

- Revenue sharing to offset impacts should be included in all phases of development, including pre-lease seismic and sampling work.
- Use the NPR-A model for early funding.
- Broaden acceptable uses for CIAP funds and require that lease revenues are primarily spent in the regions most affected.

## Discharge/Emissions

- Require zero-volume discharge standards in arctic waters.
- Require reinjection of all cuttings, muds, produced waters and other byproducts of exploration and development.
- Write subsistence considerations into the Clean Water Act. Do not allow “disaggregation” as a strategy to avoid obtaining a Clean Air Act PSD permit.



## Oil Spill Prevention & Response

- Spill prevention efforts should be viewed as an investment.
- Best available technology related to undersea pipelines is an example of a worthy spill prevention investment.
- Real-world demonstrations of cleanup capabilities should be required before activity begins.

## Coast Guard Presence

- Offshore development and increasing vessel traffic point to the need for an effective U.S. Coast Guard presence.
- Congress should fund a year-round Coast Guard station with oceangoing and airborne response capabilities.
- Increase funding for the U.S. Coast Guard to establish a year round presence in the Arctic.



## **Compulsory Marine Pilotage**

- Add a provision in federal law that requires state-licensed Alaska marine pilots on qualified vessels in the Beaufort or Chukchi Seas.
- Compulsory pilotage will help protect Alaska's arctic waters and preserve the traditional way of life for the whaling culture of the North Slope.

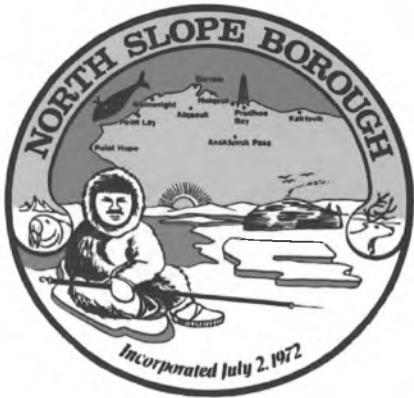
## Science Agreement with Shell

- This program will add significantly to our understanding about wildlife species and ecosystem conditions at the front end of the development process.
- It will increase our capacity to review and analyze a wide range of data.
- It will directly involve people from the villages, who will help to guide the program and identify questions that need to be answered.
- The program will allow us to incorporate traditional knowledge in the research process.





## Recent Communication with Secretary Salazar



I'm encouraged by the relationship the North Slope Borough has developed with the Department of the Interior and by the policy approach of President Obama's administration regarding offshore oil and gas exploration. It's a lot more balanced than we have seen in a long time, but there is still plenty of work to be done. I will continue to build positive relationships with officials at all levels of the State and Federal Government.

## Coastal Zone Management



- It gives local representatives a voice in decisions that will impact their communities.
- It helps to streamline the permitting process by getting issues out on the table early in the process and requiring agencies, industry and local groups to resolve their differences together.
- Lawsuits would be curtailed and local concerns would not be allowed to trump state or federal policies or agency authority.