

# ENDANGERED SPECIES ACT IMPLICATIONS FOR ALASKA

Presented by:  
Jeff Leppo  
Stoel Rives LLP



# ESA – Implications for Alaska

---

- ESA Overview
- Alaska Listing Status
- Implications for Alaska

# What is the ESA?

---

- Authorizes Secretaries of Interior and Commerce to
  - (1) list species
  - (2) designate critical habitat
  - (3) implement programs and regulations to conserve such species
- Federal agencies must not jeopardize listed species nor adversely modify designated critical habitat

# What is the ESA?

---

- Procedural and substantive requirements
- Implemented by U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (the “Services”)

# Key Definitions

---

## *Endangered*

- Any species in danger of extinction throughout all or a significant portion of its range

Bowhead whale  
(*Balaena mysticetus*)



# Key Definitions

---

## *Threatened*

- Any species likely to become endangered in the foreseeable future



Spectacled Eider  
(*Somateria fischeri*)

# Key Definitions

---

## *Critical Habitat*

- Specific geographic areas with physical and biological features essential to the conservation of a listed species

# Key Definitions

---

## *Take*

- Includes harassing, harming, injuring or killing listed species
- Harm includes significant habitat alteration which actually kills or injures fish or wildlife by significantly impairing essential behavioral patterns

# ESA Listing

---

Identifying species for possible designation as endangered or threatened

- A citizen may petition the FWS or NMFS
- The Services may identify species through internal studies and discussions

# ESA Listing Process

---

- Use best available scientific and commercial information
- Use peer-review to ensure sound science and sound decision-making

# ESA Listing Steps

---

- Petition
- 90-day finding on Petition
- Species status review –12-month finding
- Proposed listing
- Final listing
- Designation of critical habitat
- Recovery plan

# ESA Listing Criteria

---

1. Present or threatened destruction, modification, or curtailment of species range or habitat
2. Over-use for commercial, recreational, scientific, or educational purposes
3. Disease or predation
4. Inadequacy of existing regulatory mechanisms
5. Other natural or man-made factors affecting continued existence of species

# Critical Habitat

---

- Use best scientific data to identify areas essential to conservation of species, and that may require special management consideration or protection
- Economic impact analysis required; areas may be excluded from protection based upon that analysis
- Notice and public comment on proposed designation
- Designation does not create a park or preserve, but does complicate activities within the habitat area

## Section 7 Consultation

---

- Requires federal agencies to
  - Conduct programs to conserve endangered and threatened species
  - Ensure that actions they authorize, fund or carry out are not likely to jeopardize the continued existence of listed species, or adversely modify critical habitat

## Section 7 Consultation

---

- If agency action may affect a listed species or critical habitat, the agency must initiate consultation with the Services
- Private entities are affected by Section 7 when their activities require federal permits or authorizations, or federal funding

# Formal Consultation

---

- Biological opinion evaluating the action
- Two possible outcomes
  1. No jeopardy opinion - federal action not likely to jeopardize species or adversely modify critical habitat
    - Issuance of *incidental take statement*
    - Imposition of *reasonable and prudent measures* to minimize take

# Formal Consultation

---

2. Jeopardy Opinion - federal action likely to jeopardize species or to adversely modify critical habitat
  - Identifies *reasonable and prudent alternatives* that avoid jeopardy or adverse modifications

# Marine Mammals - Incidental Take

---

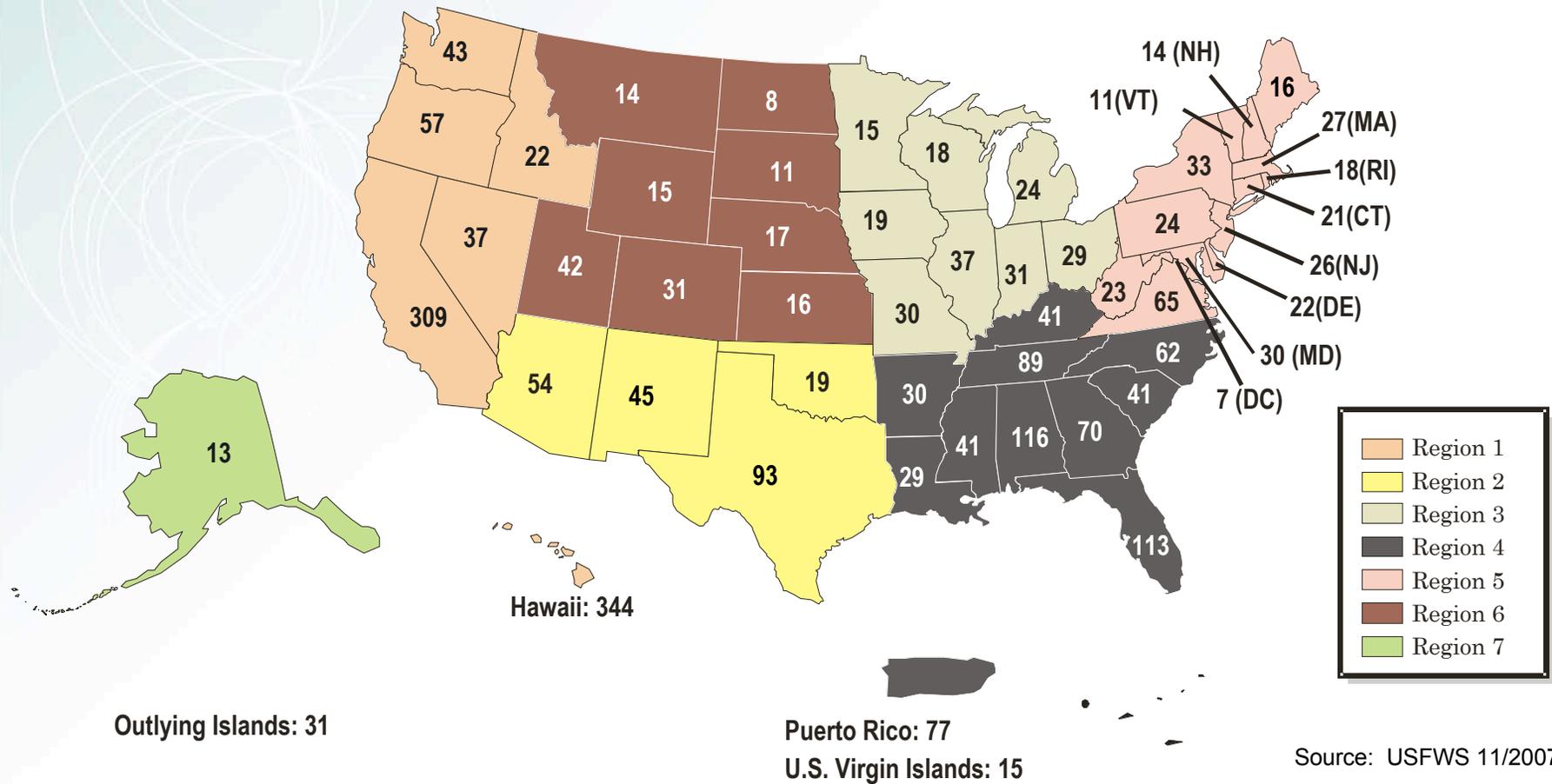
- Requires obtaining negligible impact determination under the Marine Mammal Protection Act (MMPA)
- Negligible impact means an impact that is not reasonably likely to have an adverse effect on annual rates of recruitment and survival
- No unmitigable adverse impact on availability of species for subsistence uses

# ESA Listing Status

---

- 1351 listed plant and animal species in the US
  - 1046 endangered species and 305 threatened species
  - 607 animals and 744 plants
  - Fish, birds, mammals, snails, clams, insects, reptiles, amphibians, crustaceans, arachnids and corals
- 4 animal species proposed
- 278 candidate species

# Listed Species By State



# ESA Listings - Alaska

- 6 marine mammals
  - Northern sea otter (DPS)
  - Steller sea lion (2 DPSs)
  - Bowhead whale
  - Fin whale
  - Humpback whale
- 4 birds
  - Short-tailed albatross
  - Spectacled eider
  - Steller's eider (DPS)
  - Eskimo curlew (extirpated)
- 1 reptile
  - Leatherback sea turtle
- 1 terrestrial mammal
  - Canadian Lynx
- 1 plant
  - Aleutian shield fern
- Others (uncommon)
  - Blue whale
  - North Pacific right whale
  - Sei whale
  - Loggerhead sea turtle
  - Green sea turtle
  - Sperm whale
- 1 Proposed species
  - Polar bear
  - Queen Charlotte goshawk (DPS)
- 2 candidate species
  - Cook Inlet beluga whale
  - Kittletz's murrelet
- Petitions Pending
  - Yellow-billed loon

# ESA Implications for Alaska



# Is the ESA being used to advance an anti-development agenda in Alaska?

---

- You bet it is!
- Happening now:
  - ESA petitions and critical habitat proposals
  - Litigation challenging essential federal regulatory programs and decisions
  - Litigation challenging federal permitting decisions
  - Climate change litigation
  - Litigation to invalidate MMPA NIDs

# Coming soon

---

- More petitions and listings
- More critical habitat proposals
- More section 7 consultations
- More lawsuits challenging essential federal regulatory programs and decisions, especially regarding climate change
- New: Agency enforcement actions to demonstrate attentiveness
- New: Citizen suits alleging takes based upon GHG emissions
- More stringent mitigation
- More lawsuits challenging your projects
- New: Lawsuits challenging section 7 determinations based upon adverse impacts to critical habitat

# The challenge you are facing

---

- Their Plan
  - Generate peer-reviewed articles and publicity
  - Petition for listings and critical habitat where you operate or hope to operate
  - Challenge essential federal programs
  - Challenge federal permits
- Their Resources
  - Well-funded
  - Large staffs generating science, and engaged in public outreach, funding development and public decision-making
  - Teams of lawyers
  - Full-time focus on these issues

# What is your plan?

---

How, when, and where are you engaged?

What resources are you devoting to these issues?

