

Written Statement to the Endangered Species Act (ESA) Congressional Working Group
US House of Representatives

The Endangered Species Act: Time for Needed Reform

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Congress passed the Endangered Species Act (ESA) as a tool to ensure that species would not become extinct. The act was meant as the ultimate safeguard and has been used successfully to prevent extinctions where species were in significant decline and facing immediate risk of extinction, and when the threats to the species' survival were imminent and easily identifiable and manageable.

An example of the successful application of the act in Alaska was the Aleutian Canada (Crackling) Goose, for which the main threats were identified to be predation by foxes and loss of overwintering habitat. This species was recovered and removed from the ESA, notably without designation of critical habitat. Recent ESA actions, however, have caused concern about how the ESA is being applied in Alaska and elsewhere.

Recently, species in Alaska and elsewhere have been listed based solely on speculated risks despite currently healthy numbers. This is best exemplified by the decision by the USFWS to list the polar bear as a threatened species worldwide. The polar bear was listed as a threatened species based on models that hypothesized that climate change will result in a decline of sea-ice habitat, and on speculation that lost habitat will threaten currently healthy populations with extinction over the next 50–100 years. This listing was made despite the fact that the polar bear population remains at all-time record numbers, and many underlying hypotheses and assumptions in the models are proving wrong. For example, vital rates of polar bears in the Chukchi Sea, an area that has experienced significant sea ice loss, have not changed over 30 years. We are very concerned with the precedent this ruling has set. For example, the recent action by the National Marine Fisheries Service to list ringed seals, which currently number in the millions, and the proposed action to list wolverines in the lower 48 states are based solely on this precautionary precedent.

Alaska is concerned about the use of the precautionary principle in these listing decisions. This approach, coupled with the use of studies based upon modeling (rather than observational science, such as accurate species population counts), has the effect of removing species from state jurisdiction and extending critical habitat into areas requiring extensive ground-truthing. In some instances, such listed species are at a healthy population level and are expected to remain healthy for decades into the future (e.g., wolverines and ringed seals). Listings based on climate change modeling make it difficult for the federal government and the states to identify a recovery timeline or plan for management of the listed species. We also believe it is imperative that underlying assumptions within models be tested before they are used to list a species.

For listing decisions made to address possible climate impacts, we question if the act should be used to list species based solely on model results of future threats such as climate change. Ultimately, what species could not be listed due to future threats such as climate change?

Another issue is a threshold question regarding when it is necessary to list a species. In the past, species were listed based on relatively high risks of extinction within the near term future (10-20 years). Recently, however, federal agencies have begun lowering the level of acceptable risk and extending the period of “foreseeable future” into the distant future. An example is the beluga whale in Cook Inlet. The National Marine Fisheries Service listed the beluga whale as an endangered species based on modeling that showed that the population had a greater than 1% chance of going extinct beyond 50 years. Put another way, the models predicted that the population had up to a 99% probability of NOT becoming extinct within the next half century. Their decision to list was based on modeled extinction probabilities out to 300 years! We feel the decision is unjustified at this time. We are also extremely concerned with the use of model projections out to 300 years.

This raises the question as to whether species that have low risks of extinction within the immediate future should be listed at all. It also raises the questions as to how far into the future can population trends be reasonably predicted—10 years, 50 years, 100 years, or 300 years? Finally, what is a reasonable level of extinction risk—1%, 10%, 20%, or 25%?

We are also concerned with how recovery goals are being designed and used. For example, the recovery goal for delisting Steller sea lions in western Alaska numbers over 100,000 animals. Despite the population currently numbering over 73,000 animals and growing overall across its range, in 2010 NMFS released a Biological Opinion that found that fishing in some areas of the Aleutians continues to jeopardize the stock and adversely modify its habitat, and has adopted new closures and restrictions to fishing in the western Aleutians. The State questions whether these restrictions are justified in light of the stock now numbering over 73,000 animals, is

growing overall across its range, and the lack of substantial data showing that fishing is jeopardizing Steller sea lions or adversely modifying their habitat. The State has challenged this decision.

Another example is the northern sea otter. In this case, the USFWS recommended threshold for delisting is 103,417 otters. We question whether a population of over 100,000 sea otters is really necessary **before** delisting can occur. We note that the recovery objective for the southern sea otter is much lower (the average population must exceed 3,090 for 3 years) and appears aimed at removing the risk of near term extinction rather than attainment of long term recovery to some historic level of abundance or supportable carrying capacity.

As if this is not enough, this plan also includes an ecosystem based criteria. This criterion states that “*sea otters must be sufficiently abundant to either maintain, or bring about, a phase shift to the kelp-dominated state.*” So not only must sea otters number over 100,000, but kelp must be also be restored, before delisting could occur. We believe it is inappropriate to establish criteria which stipulate that listed species (in this case sea otters) could not be delisted, despite the fact that they had attained a desired population goal, unless an ecosystem goal (in this case a target level of kelp forests) is also restored. This is beyond the scope of species recovery.

Finally, the criterion which states that “*All known threats are being adequately mitigated*” is problematic. All populations face a multitude of threats that potentially impact their growth rate in varying degrees throughout time. The key question is whether the overall impact of the threats in combination is negatively impacting the growth rate. If the population is meeting its desired growth rate, the influence individual threats have is somewhat irrelevant. Inclusion of criteria for single threats allows such criteria to be used as a de facto veto on down or delisting decisions regardless of overall population health. As such, it is inappropriate to include specific criteria for each known threat that could prevent down or delisting if overall the population is meeting stated growth rate objectives.

In total, these recovery goals raise the question of whether recovery objectives are being set too high. Should recovery measures reflect the minimal number required to remove the risk of extinction, or be set to a number that represents some level of historic abundance or full recovery? Can threats ever be completely removed? Should recovery plans contain non-population objectives that must be achieved (e.g., greenhouse gas emission targets)? We believe that ESA recovery goals and objectives should appropriately be designed to remove the risk of extinction in the near future, not recover the population to some level of past abundance or

supportable carrying capacity. Once the threat of extinction in the near-term foreseeable future is removed, the species should be delisted and ESA protections should be removed.

Alaska supports reform of the ESA to ensure the act is following the original intent of Congress. As such we are working with other entities to seek changes at the legislative, regulatory and policy levels. Alaska supports the Western Governors' Association Policy Resolution 13-08 and hopes that the recommendations therein are adopted. It is our hope that such broad based bipartisan efforts will lead to needed reform.

In closing, these examples point to how recent application of the ESA has stretched the original intent of this well intentioned act. We are challenging what we believe are unwarranted applications of the act, in the hope of bringing the act back to its original intent. We are also concerned that the act is increasingly being used as a land management planning tool rather than a species recovery act. Along these lines, we also welcome legislation to fix the act. We believe reform is needed.

Why is it important to address these questions? Because once a species is listed and critical habitat is established, any action that potentially jeopardizes the species or adversely modifies its habitat is subject to federal consultation under the ESA. Also, each action is subject to litigation at little risk to the litigants. Some litigants actually make a living out of suing on procedural issues. This has the real and proven potential to stop or slow resource development projects, and place management decisions in the hands of judges.