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**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA**

STATE OF ALASKA,

Plaintiff,

v.

KEN SALAZAR, in his official capacity as the
United States Secretary of the Interior;
ROWAN W. GOULD, in his official capacity
as Acting Director of the United States Fish
and Wildlife Service; and UNITED STATES
FISH AND WILDLIFE SERVICE,

Defendants.

CIVIL ACTION NO.:

**COMPLAINT FOR DECLARATORY
JUDGMENT AND INJUNCTIVE
RELIEF (16 U.S.C. §§ 1533, 1535,
1540(g); 5 U.S.C. §§ 553, 701-706)**

INTRODUCTION

1. Plaintiff State of Alaska (“Alaska” or the “State”) brings this action against Defendants Ken Salazar, United States Secretary of the Interior; Rowan W. Gould, Acting Director of the United States Fish and Wildlife Service; and the United States Fish and Wildlife Service (collectively the “Service” or “Defendants”) to challenge the final designation by the Service of critical habitat for the polar bear under the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-1544. *See Designation of Critical Habitat for the Polar Bear (Ursus maritimus) in the United States, Final Rule*, 75 Fed. Reg. 76086-76137 (Dec. 7, 2010) (the “Final Rule”).

2. Alaska brings this action under (1) Section 11(g)(1)(C) of the ESA, 16 U.S.C. § 1540(g)(1)(C), to address the Service’s failure to perform mandatory duties under ESA Section 4, 16 U.S.C. § 1533(a), (b), (i), and the ESA’s implementing regulations, 50 C.F.R. §§ 424.12-.13, .18-.19; and (2) under the Administrative Procedure Act (“APA”), 5 U.S.C. § 553, to address the Service’s failure to comply with the procedural requirements of that statute and non-compliance with ESA legal requirements otherwise not actionable under the ESA.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction); 28 U.S.C. §§ 2201-2202 (declaratory judgment); 16 U.S.C. § 1540(g) (ESA citizen suit provision); and 5 U.S.C. §§ 701-706 (APA).

4. Alaska satisfied the written notice requirement of the ESA citizen suit provision. 16 U.S.C. § 1540(g)(2). Over 60 days ago, by letter dated December 21, 2010, Alaska gave written notice to the Service and to the individually named Defendants of the Defendants’ failure to perform certain duties under 16 U.S.C. § 1533. *See* attached Ex. A (copy of letter). The Defendants have not remedied the violations set forth in the letter.

5. An actual, justiciable controversy now exists between Alaska and the Defendants, and the requested relief is proper under 28 U.S.C. §§ 2201-2202, 16 U.S.C. § 1540(g), and 5 U.S.C. §§ 701-706.

6. The federal government has waived sovereign immunity in this action pursuant to 16 U.S.C. § 1540(g) and 5 U.S.C. § 702.

7. Alaska has exhausted all administrative remedies.

8. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) because this action is brought against officers of agencies of the United States in their official capacities and against the Service. Plaintiff State of Alaska is located within this District, and a substantial part of the events or omissions giving rise to the claims made here occurred in this District. Specifically, the critical habitat designated by the Service is located within this District and is the subject matter of the claims raised here. Further, the Service's Marine Mammals Management Office, Alaska Region, is located within this District in Anchorage, Alaska, and was the lead office for the Final Rule. *See* 75 Fed. Reg. at 76132.

PARTIES

Plaintiff

9. Alaska is a sovereign state with an interest in managing, conserving, and regulating wildlife and other natural resources within its jurisdiction, including the polar bear and its habitat. Alaska Const. Art. VIII, §§ 1, 2, 4; Alaska Stat. § 16.05.020. The State of Alaska participates in the direct management of its wildlife resources and state lands and waters comprising the habitat for such wildlife, including the polar bear, through its Department of Fish and Game, Department of Natural Resources, and Department of Environmental Conservation.

10. Alaska’s legal title and regulatory interests in its natural resources extend beyond its land area to the State’s offshore submerged lands and waters. *See* 43 U.S.C. §§ 1301, 1311; *see also* 75 Fed. Reg. at 76121 (“the waters of the State of Alaska extend seaward from the mean high tide line for . . . 3 nautical miles”). Thus, Alaska’s sovereign interests in its wildlife resources and its management of those resources extend to coastal areas, including a large portion of the polar bear critical habitat designated by the Service.

11. The Alaska Comprehensive Wildlife Conservation Strategy contains affirmative conservation measures—including international agreements and cooperation with other government agencies through research, monitoring, and conservation practices—for the protection of and conservation of wildlife, including the polar bear. These measures, which were approved by the Service, are designed to protect and conserve the polar bear throughout Alaska and to avoid the need to designate critical habitat for the species under the ESA. The Alaska Department of Fish and Game, Division of Wildlife Conservation provides for monitoring and research of polar bears and their habitat.

12. The Alaska Coastal Management Program (“ACMP”) includes statewide standards governing natural resource development and conservation in the coastal zones of Alaska, including specific standards for habitats. Section 307 of the Coastal Zone Management Act, 16 U.S.C. § 1456, requires the State to review most federal activities and federally permitted activities affecting resources within the State’s coastal zone, and to ensure that state-permitted activities are consistent with standards and policies of the ACMP. The State has implemented the ACMP through Alaska Stat. §§ 46.39.010-.900; §§ 46.40.010-.210, Alaska Admin. Code. Title 11, Part 8, Chapter 112, and district coastal management plans.

13. Alaska and its interests in the management of its State wildlife resources and habitat, and the development of its State natural resources, land management, transportation projects, municipal government, and other activities, are harmed by the Service's designation of critical habitat for the polar bear. Alaska's interests and ability as a sovereign to manage its wildlife resources and develop appropriate mitigation and conservation measures for the polar bear and its habitat within Alaska's lands and waters have been displaced by the federal government's actions and regulatory programs, including enhanced potential liability for the State and for State-undertaken or approved projects, under the ESA.

14. The Service's designation of critical habitat imposes additional requirements on the management of State lands and resources, and imposes requirements on oil and gas activities, transportation, and other projects that would deter others from pursuing such activities, resulting in decreased State tax, royalty, and other revenues, and increased costs to the State. As a result, Alaska's lands and resources, and the State's management, conservation, and development of same, have been or imminently will be burdened by the critical habitat designation for the polar bear. A decline in revenues from oil and gas development and other activities will have substantial negative consequences for the State's finances.

15. The injuries to Alaska's interests are fairly traceable to the Service's decision to designate critical habitat for the polar bear and are redressable by this Court.

16. Alaska has standing to bring this action, and the challenged agency decisions are final and ripe for review by this Court.

Defendants

17. Defendant Ken Salazar is the Secretary of the United States Department of the Interior ("DOI") and is being sued in his official capacity. The Secretary is responsible for the

administration of the ESA, and is ultimately responsible for the Final Rule and for the DOI's compliance with federal law, including the ESA and APA.

18. Defendant Rowan W. Gould is the Acting Director of the United States Fish and Wildlife Service and is being sued in his official capacity. The Director is responsible for the administration and the implementation of the ESA and APA as they are applied to the polar bear and its habitat in the Final Rule.

19. Defendant United States Fish and Wildlife Service is a federal agency within the DOI that has been delegated the responsibility for implementing the ESA and APA, and is the federal agency that promulgated the Final Rule. Polar bears are marine mammals within the jurisdiction of the DOI and the Service.

LEGAL BACKGROUND

A. Endangered Species Act

20. Section 4(a)(3)(A) of the ESA requires the Secretary of the Interior to designate by regulation "critical habitat" for species listed as threatened or endangered under the Act to the "maximum extent prudent and determinable." 16 U.S.C. § 1533(a)(3)(A). Regulations concerning critical habitat designations must be promulgated in accordance with the requirements of Section 4(b) of the ESA, 16 U.S.C. § 1533(b), and the ESA's implementing regulations at 50 C.F.R. § 424.12, .18-.19. Regulations designating critical habitat also must be promulgated in accordance with the procedural requirements of Section 553 of the APA, 5 U.S.C. § 553. *See* 16 U.S.C. § 1533(b)(4).

21. The ESA defines "critical habitat" as "the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of Section [4 of the ESA], . . . 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 protections.” 16 U.S.C. § 1532(5)(A)(i); *see also* 50 C.F.R. § 424.12(b).

22. “Special management considerations or protection” are “any methods or procedures useful in protecting physical and biological features of the environment for the conservation of listed species.” 50 C.F.R. § 424.02(j).

23. The “physical or biological features” that satisfy the ESA’s requirements for critical habitat must be “found” on occupied land or waters for that area to be eligible for critical habitat designation. 16 U.S.C. § 1532(5)(A)(i); *see also* 50 C.F.R. § 424.12(b).

24. Critical habitat may include “specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of [section 4 of this Act]” only “upon a determination by the [Service] that such areas are essential for the conservation of the species.” 16 U.S.C. § 1532(5)(A)(ii); *see also* 50 C.F.R. § 424.12(e) (Service “shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species”).

25. Except in those circumstances determined by the Service, “critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.” 16 U.S.C. § 1532(5)(C).

26. The Service’s designation is required to be based on “the best scientific data available after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat.” 16 U.S.C. § 1533(b)(2); *see also* 50 C.F.R. § 424.12.

27. The Service may exclude any area from designation as critical habitat if the Service determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless the Service determines, based on the best scientific and commercial data available, that excluding such area as critical habitat would result in the extinction of the species concerned. 16 U.S.C. § 1533(b)(2); *see also* 50 C.F.R. § 424.19.

28. ESA Sections 4(a)(3)(A) and 4(b)(6)(C)(ii) direct the Service to designate “critical habitat” to the maximum extent prudent and determinable for species listed as endangered or threatened under the Act. 16 U.S.C. §§ 1533(a)(3)(A), (b)(6)(C)(ii). A critical habitat designation is not “prudent” when either or both “[s]uch designation . . . would not be beneficial to the species” or the species “is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species.” 50 C.F.R. § 424.12(a)(1).

29. If the Service decides to designate habitat of a listed species as critical habitat, it must publish the decision in the Federal Register, along with the complete text of a proposed regulation to implement such a decision. *See* 16 U.S.C. § 1533(b)(5); *see also* 50 C.F.R. § 424.18.

30. Any publication in the Federal Register of a final regulation designating critical habitat for a listed species must include a summary of the data upon which the regulation is based and must show the relationship of the data to the regulation; and “such summary shall, to the maximum extent practicable, also include a brief description and evaluation of those activities (whether public or private) which, in the opinion of the Secretary, if undertaken may adversely modify [critical] habitat, or may be affected by such designation.” *See* 16 U.S.C. § 1533(b)(8); *see also* 50 C.F.R. §§ 424.18-.19.

31. Under ESA Section 4(i), if “a State agency . . . files comments disagreeing with all or part of the proposed regulation, and the [Service] issues a final regulation which is in conflict with such comments . . . the [Service must] submit to the State agency a written justification for [the] failure to adopt regulations consistent with the agency’s comments.” 16 U.S.C. § 1533(i); *see also* 50 C.F.R. § 424.18(c).

32. ESA Section 6 requires that “[i]n carrying out the program authorized by this [Act], the [Service] shall cooperate to the maximum extent practicable with the States.” 16 U.S.C. § 1535(a); *see also* 59 Fed. Reg. 34274 (July 1, 1994) (Notice of Interagency Cooperative Policy Regarding the Role of the State Agencies in Endangered Species Act Activities).

33. Under ESA Section 4(b)(5)(A)(ii), the Service is to give actual notice of a proposed regulation (including the complete text of the regulation) to “the State agency and each State in which the species is believed to occur, and to each county or equivalent jurisdiction in which the species is believed to occur, and invite the comment of such agency, and each such jurisdiction, thereon.” 16 U.S.C. § 1533(b)(5)(A)(ii); *see also* 50 C.F.R § 424.16(c)(1)(ii).

34. When critical habitat is designated for a species such as the polar bear, federal agency action that may affect that designated habitat becomes subject to the consultation provisions of Section 7(a)(2) of the ESA, 16 U.S.C. § 1536(a)(2). Each federal agency is obligated to insure that any action authorized, funded, or carried out by such agency “is not likely to . . . result in the destruction or adverse modification of [critical] habitat.” *Id.* § 1536(a)(2). The obligations to participate in Section 7(a)(2) consultation and to insure no destruction or adverse modification of critical habitat apply both to federal actions of interest to

the State, as well as to State and nonfederal activities that are subject to federal permitting requirements or receive other federal funding or authorization.

35. ESA Section 11(g) provides that “any person may commence a civil suit on his own behalf . . . against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 4 which is not discretionary with the Secretary.” *Id.* § 1540(g)(1)(C).

B. Administrative Procedure Act

36. The APA provides for judicial review of final agency action by persons “aggrieved” by such action. 5 U.S.C. § 702. The actions reviewable under the APA include “preliminary, procedural, or intermediate agency action or ruling . . . on the review of the final agency action,” such as the Final Rule here. *Id.* § 704.

37. The APA also provides standards applicable when a federal agency proposes and adopts final rules and regulations. 5 U.S.C. § 553. Specifically, agencies must provide “[g]eneral notice” of any “proposed rule making” to the public through publication in the Federal Register. That notice must include “(1) a statement of the time, place, and nature of the public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.” *Id.* § 553(b). An agency’s responsibility to consider public comments on a proposed rulemaking is required by 5 U.S.C. § 553(c).

38. Under the APA, a reviewing court shall “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” *Id.* § 706(2)(A). A reviewing court shall also “hold

unlawful and set aside agency action, findings, and conclusions found to be . . . without observance of procedure required by law.” *Id.* § 706(2)(D).

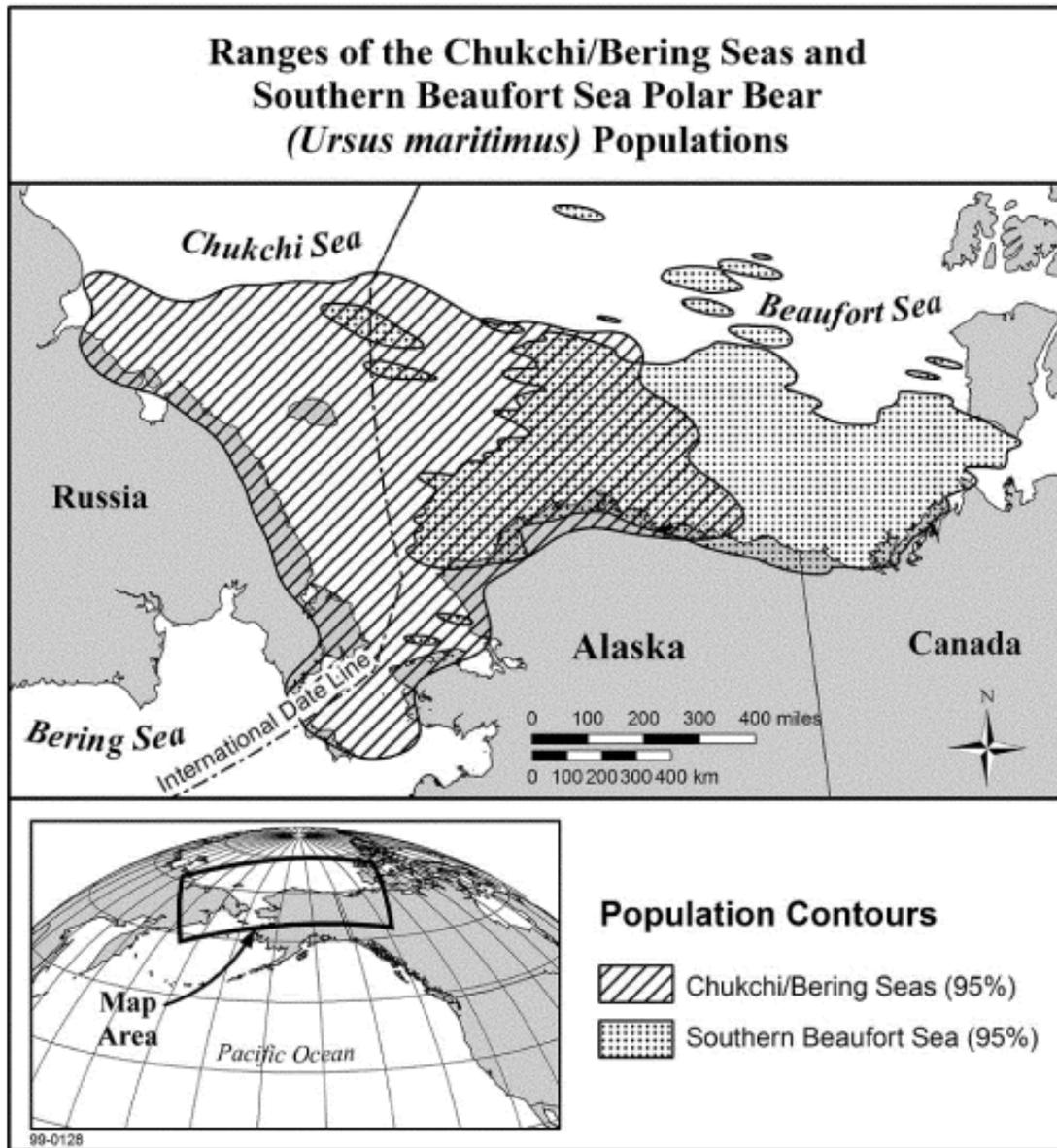
FACTUAL BACKGROUND

A. Polar Bear Habitat

39. Polar bears (*Ursus maritimus*) are distributed throughout the ice-covered waters of the circumpolar Arctic. 75 Fed. Reg. at 76086. In the United States, polar bears occur in Alaska and adjacent State, Territorial, and United States waters. *Id.* For management and research purposes, polar bears are divided into nineteen subpopulations worldwide. *See* 73 Fed. Reg. 28212, 28215 (May 15, 2008). The subpopulations of polar bears most closely associated with Alaska are the Southern Beaufort Sea and Chukchi-Bering Seas subpopulations, which are shared with Canada (Southern Beaufort Sea) and Russia (Chukchi-Bering Seas). 75 Fed. Reg. at 76088.

40. The Southern Beaufort Sea subpopulation occurs south of Banks Island and east of the Baille Islands, Canada; ranges west of Point Hope, Alaska; and includes the coastline of Northern Alaska and Canada up to approximately 25 miles inland. *Id.* at 76088. The Chukchi-Bering Seas subpopulation is widely distributed on the sea ice in the Chukchi Sea and northern Bering Sea and adjacent coastal areas in Alaska and Russia. *Id.* The eastern boundary of the Chukchi-Bering Seas subpopulation is near Colville Delta, and the western boundary is near Chauniskaya Bay in the Eastern Siberian Sea. *Id.* The Chukchi-Bering Seas subpopulation extends into the Bering Sea, and its southern boundary is determined by the annual extent of pack ice. *Id.* There is overlap between the two subpopulations near their shared boundaries, with bears from either subpopulation occasionally mixing.

41. The following figure illustrates the ranges of the Southern Beaufort Sea and Chukchi-Bering Seas subpopulations of polar bears. *Id.* at 76088 (figure).



42. Sea ice has historically been an important habitat element for polar bears. *Id.* at 76086, 76088. Over most of their range, polar bears have remained on sea ice year-round or spend only short periods on land. *Id.* at 76089. Pack ice has been the primary summer habitat for polar bears in the United States. *Id.* Near-shore ice, where open water and polynyas occur, has been the preferred habitat during winter and spring. *Id.* In the Beaufort Sea and Chukchi State of Alaska v. Salazar Complaint

Sea areas of Alaska, polar bears may occupy maternal dens on land during the winter. *Id.* As sea ice changes, however, distribution of polar bears within their range has changed, with more bears being found on land and on sea ice off the continental shelf.

43. Polar bears from the Chukchi-Bering Seas subpopulation have typically used terrestrial den sites in Russia. *Id.* at 76090. The primary denning habitat for polar bears in the Southern Beaufort Sea subpopulation is on the relatively flat topography of the coastal area on the North Slope of Alaska and the pack ice. *Id.* Denning habitat is characterized by topographic features that catch snow in the fall and early winter. *Id.* at 76090-91. Most polar bear dens in Alaska occur relatively near the coast, along the coastal bluffs and river banks of the mainland as well as on barrier islands and on the drifting pack ice. *Id.* at 76090.

B. Critical Habitat Designation

44. On May 15, 2008, the Secretary published a final rule listing the polar bear under the ESA as a “threatened” species throughout all of its worldwide range. *See* 73 Fed. Reg. 28212, 28292-93 (May 15, 2008).¹ A “threatened” species is “any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. § 1532(20). The Service also published separate conservation regulations for the polar bear pursuant to Section 4(d) of the ESA. 73 Fed. Reg. 28306 (May 15, 2008) (interim final § 4(d) rule); 73 Fed. Reg. 76249 (Dec. 16, 2008) (final § 4(d) rule). The Section 4(d) rule provides the applicable prohibitions and exceptions for the polar bear as a listed threatened species in lieu of the prohibitions and exceptions that would otherwise apply under 50 C.F.R. § 17.31(a) and (b). *See* 50 C.F.R. § 17.31(c).

¹ Alaska and others have judicially challenged the Service’s listing determination for the polar bear. *See, e.g., State of Alaska v. Salazar, et al.*, No. 1:08-cv-1352, *combined with other proceedings in MDL proceeding* Misc. Action No. 08-0864 (EGS) (D.D.C.) (Alaska complaint filed Aug. 4, 2008).

45. In the Final Rule designating critical habitat, the Service claimed to have determined at the time of the final listing rule that designating critical habitat for the polar bear was prudent. *See* 75 Fed. Reg. at 76093 (final critical habitat rule). But the final rule listing the polar bear as threatened does not contain such a determination, *see* 73 Fed. Reg. at 28251, 28297-98, and the proposed critical habitat rule requested comments on the issue of whether designation was prudent, *see* 74 Fed. Reg. 56058, 56058 (Oct. 29, 2009).

46. In response to a lawsuit filed by the Center for Biological Diversity against the Service for failing to designate critical habitat for the polar bear concurrently with the listing, the Service issued a proposed rule to designate critical habitat for the polar bear in the United States. *See* 74 Fed. Reg. 56058-56086 (Oct. 29, 2009) (“Proposed Rule”). *See also* 75 Fed. Reg. at 76091.

47. On December 28, 2009, Alaska provided comments in response to and in disagreement with the Proposed Rule. Alaska provided the Service with, among other relevant information, scientific and commercial data concerning (1) data on sea ice predictions; (2) detailed data on regulatory mechanisms, including conservation programs within Alaska, which precluded the need to designate critical habitat; (3) detailed data on areas that should have been excluded from designation because of the economic and other impacts of specifying such areas as critical habitat; and (4) information demonstrating that not all of the areas proposed for critical habitat designation contained those physical or biological features essential to the conservation of the species or that required special management considerations or protection.

48. The Service published a document making available the “Draft Economic Impact Analysis” of the proposed critical habitat designation on May 5, 2010, and reopened the public comment period on the Proposed Rule. *See* 75 Fed. Reg. 24545-24549 (May 5, 2010); *Economic*

Analysis of Critical Habitat Designation for the Polar Bear in the United States, Draft Report (“Draft Economic Impact Analysis”) (Mar. 15, 2010), available at http://alaska.fws.gov/fisheries/mmm/polarbear/pdf/polar_bear_dea.pdf (last visited Feb. 10, 2011).

49. On July 6, 2010, Alaska provided additional comments in response to and in disagreement with the Proposed Rule and Draft Economic Impact Analysis. Alaska provided the Service with, among other relevant information, additional scientific and commercial data including (1) detailed data on the potential economic impacts that would result from the proposed critical habitat designation; and (2) detailed data on areas that should have been excluded from designation because of the economic and other impacts of specifying such areas as critical habitat.

50. In support of its July 6, 2010 comments, Alaska utilized an independent review and analysis of the potential economic effects of the Service’s proposed critical habitat designation. This analysis was performed by Econ One Research, Inc., and was provided to the Service with Alaska’s comments.

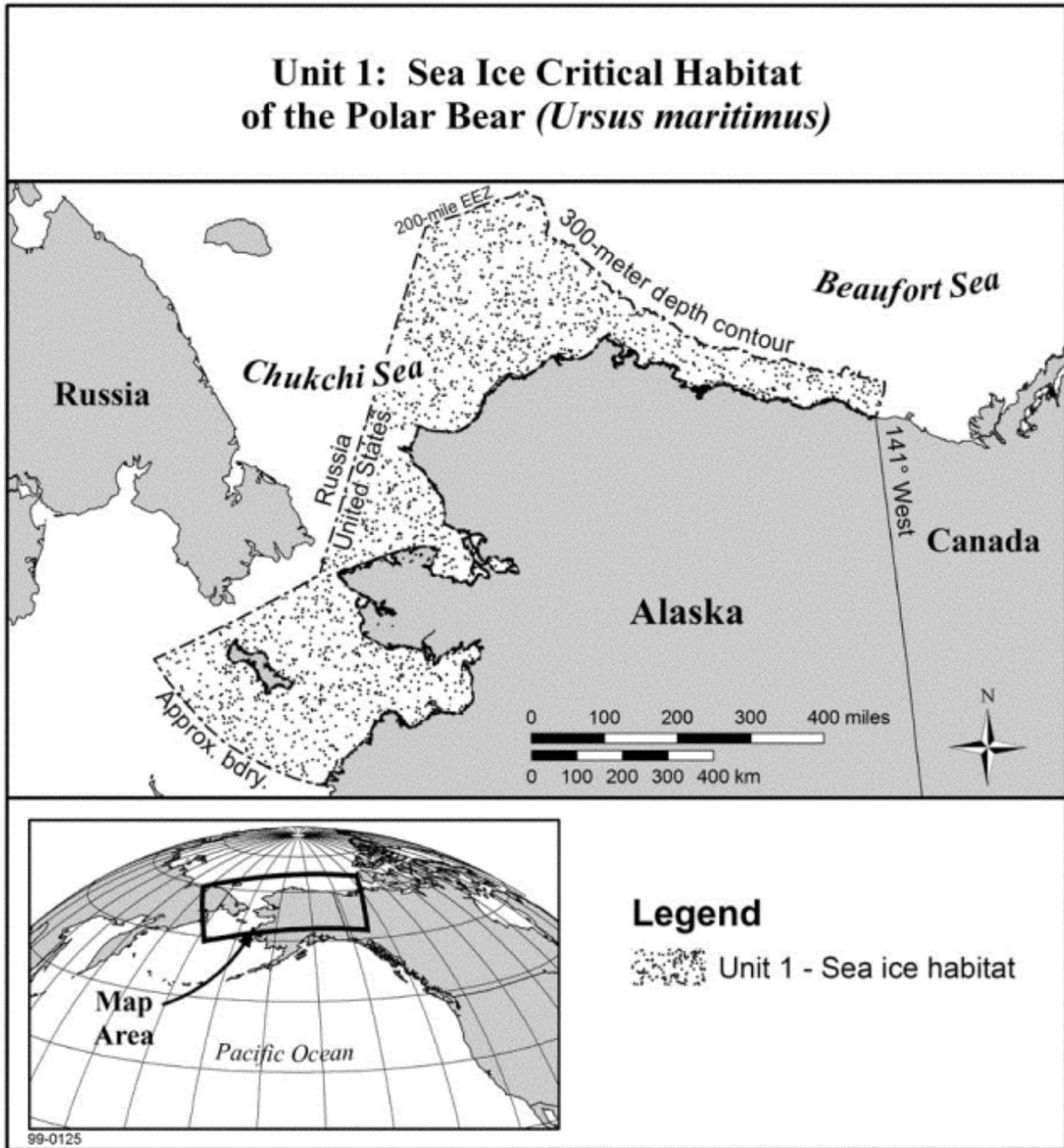
51. The Service published the Final Rule designating critical habitat for the polar bear and made available the Service’s “Final Economic Impact Analysis” on December 7, 2010. *See* 75 Fed. Reg. 76086-76137; *Economic Analysis of Critical Habitat Designation for the Polar Bear in the United States, Final Report* (“Final Economic Impact Analysis”) (Oct. 14, 2010), available at <http://www.regulations.gov/#!documentDetail;D=FWS-R7-ES-2009-0042-0253> (last visited March 1, 2011).

52. Based on its assessment of the physical and biological features essential to the conservation of the polar bear, the Service determined that the primary constituent elements (“PCEs”) for polar bears in the United States included: (1) sea ice habitat used for feeding, breeding, denning, and movements, which is sea ice over waters 300 meters or less in depth that occurs over the continental shelf with adequate prey resources (primarily ringed and bearded seals) to support polar bears; (2) terrestrial denning habitat, which includes topographic features, such as coastal bluffs and riverbanks, with suitable macrohabitat characteristics, which characteristics are (a) steep, stable slopes with heights from 1.3 to 34 meters, and with water or relatively level ground below the slope and relatively flat terrain above; (b) unobstructed, undisturbed access between den sites and the coast; (c) sea ice in proximity of terrestrial denning habitat prior to the onset of denning during the fall to provide access to terrestrial den sites; and (d) the absence of disturbance from humans and human activities that might attract other polar bears; and (3) barrier island habitat used for denning, refuge from human disturbance, and movements along the coast to access maternal den and optimal feeding habitat, including all barrier islands along the Alaska coast and their associated spits, within the range of the polar bear in the United States, and the water, ice, and terrestrial habitat within one mile of these islands (no-disturbance zone). 75 Fed. Reg. at 76115.

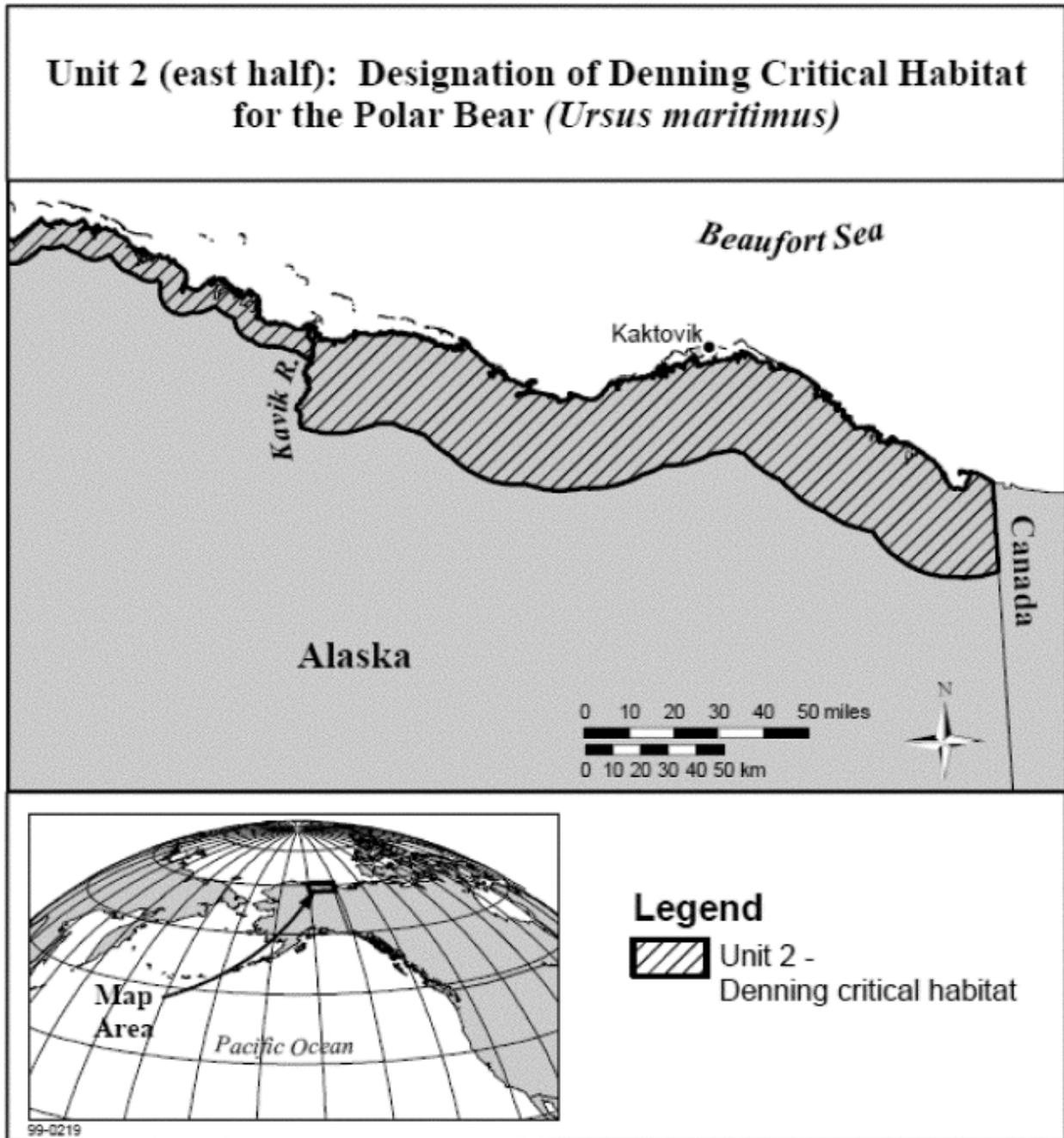
53. Based on those PCEs, the Service designated 187,157 square miles of critical habitat in Alaska and adjacent territorial and United States waters, an unprecedented area larger than any one of the 50 states, except for Texas and Alaska. *Id.* at 76086.

54. The Service designated as critical habitat all areas where sea ice may occur in water depths less than 300 meters, regardless of the actual presence of sea ice and seasonal and annual changes to sea ice, *id.* at 76121, 76133, as shown below. *Id.* at 76134 (figure).

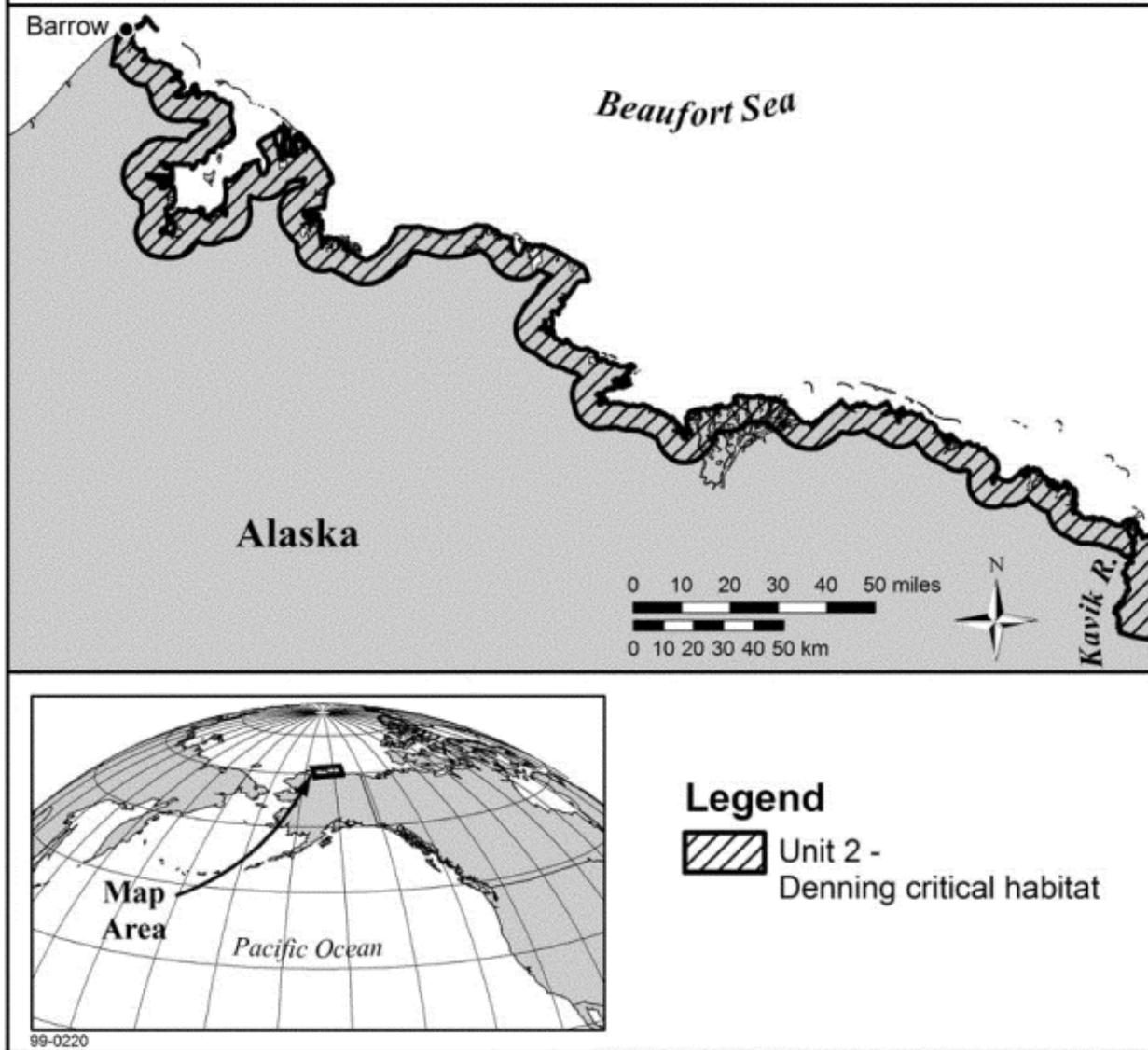
Approximately eight percent of this area consists of State-owned lands and waters. *Id.* at 76121 (Table 1).



55. The Service also designated 5,657 square miles of land along the northern coast of Alaska as terrestrial denning critical habitat for the polar bear, *id* at 76121-22, 76134, as shown on the following pages. *Id.* at 76135-36 (figures). Approximately 20 percent of this area consists of State-owned lands and waters. *Id.* at 76121, 76122.



Unit 2 (west half): Designation of Denning Critical Habitat for the Polar Bear (*Ursus maritimus*)



56. Additionally, the Service designated barrier island critical habitat consisting of barrier islands themselves and associated spits, and the water, ice, and any other terrestrial habitat within one mile of the islands, *id.* at 76122, 76136, as shown below. *Id.* at 76137 (figure). Approximately 64 percent of this area consists of State-owned lands and waters. *Id.* at 76121, 76122.

FIRST CLAIM FOR RELIEF
(Violation of the ESA and APA—Failure to Follow Required Procedures and Consider Relevant Factors for Critical Habitat Designation)

58. Alaska incorporates by reference each of the allegations in paragraphs 1 through 57.

59. ESA Section 4(b)(4) generally requires that critical habitat designations such as the one made by the Service here in the Final Rule be made consistent with the provisions of APA Section 553, 5 U.S.C. § 553, relating to notice and comment procedures for agency rulemaking. *See* 16 U.S.C. § 1553(b)(4). ESA Section 4(b)(8) requires that the Service include in a final listing determination a summary “of the data on which regulation is based and . . . the relationship of such data to such regulation.” 16 U.S.C. § 1533(b)(8).

60. In making the critical habitat designation for the polar bear, the Service did not properly comply with the critical habitat designation requirements and procedures under the ESA and the APA, *see, e.g.*, ¶¶ 20-37, *supra* and attached Ex. A; did not adequately consider all relevant factors; did not make a rational connection between the facts found and the choice made by the Service in its critical habitat designation; and did not observe all of the procedures required by law in making this designation.

61. Among other things, the Service failed to adequately determine that the designation of critical habitat was “prudent,” in violation of Sections 4(a)(3)(A) and 4(b)(6)(C)(ii), 16 U.S.C. §§ 1533(a)(3)(A), (b)(6)(C)(ii), and the Service’s regulations at 50 C.F.R. § 424.12(a)(1)(ii).

62. The Service also failed to adequately consider, as required by ESA Section 4(b)(2), 16 U.S.C. § 1533(b)(2), whether the benefits of excluding from the designated critical

habitat particular lands and waters requested by Alaska and others to be excluded outweighed the benefits of specifying those areas as designated critical habitat.

63. The Service failed to adequately consider this benefit weighing for the following areas, among others:

(a) All State land onshore and offshore between the Canning River (Arctic National Wildlife Refuge (“ANWR”)) boundary and the Colville River (National Petroleum Reserve, Alaska (“NPRA”)) boundary, which includes the following oil and gas units: Point Thomson, Arctic Fortitude, Badami, Beechey Point, Colville River, Dewline, Duck Island, Kuparuk River, Liberty, Milne Point, Nikaitchuq, Northstar, Ooguruk, Prudhoe Bay, Rock Flour, and Sakkan; and

(b) State and federal offshore oil and gas leases that have economic and national security interests.

64. The Service’s regulations also specify that “[a] designation of critical habitat is not prudent when . . . [s]uch designation of critical habitat would not be beneficial to the species.” 50 C.F.R. § 424.12(a)(1)(ii).

65. The Service failed to show in the Final Rule that the designation of critical habitat was prudent. Among other things, the Final Rule provides that the polar bear and its habitat are already well managed and conserved by Alaska, international agreements, conservation programs, and State and federal laws, including the MMPA, without a critical habitat designation. *See* 75 Fed. Reg. at 76093; *id.* at 76101 (listing laws and regulations addressing management and conservation of the polar bear); *id.* at 76118 (discussing the great level of protection for the polar bear provided under the MMPA).

66. Also, the Service designated many areas as critical habitat that do not contain PCEs for the polar bear or for which special management considerations or protection are not required. For example, the Service designated areas of barrier island critical habitat, including a one-mile “no disturbance zone” related to this barrier island habitat, in areas that lack suitable topography or other habitat features essential to the conservation of the polar bear. The Service designated some barrier island habitat with little or no apparent documented use by polar bears in recent decades (for example, Norton Sound to Hooper Bay) that does not meet the criteria for critical habitat designation.

67. The Service’s Final Economic Impact Analysis for the critical habitat designation did not adequately consider the relevant factors under Section 4(b)(2), 16 U.S.C. § 1533(b)(2). Among other things, the Service specifically failed to adequately consider:

(a) the economic impacts of the additional ESA Section 7 consultations, 16 U.S.C. § 1536(a)(2), or portions of consultations and project requirements and modifications that the critical habitat standard imposes. *Id.*;

(b) the economic impact of the additional costs of litigation, project delay, project slippage, deferred production or closure, uncertainty and risk—*see, for example*, 75 Fed. Reg. at 76107 (Service states that “potential for indirect impacts, such as litigation, uncertainty, and project delays is real” but fails to analyze such impacts); and

(c) the economic impact to the oil and gas industry, construction and development, and commercial shipping and marine transportation—*see, for example*, 75 Fed. Reg. at 76106 (the Final Economic Impact Analysis “does not include a regional economic impact analysis of reduced oil and gas activity”); *id.* at 76126 (“[t]he economic impacts of

critical habitat designation on commercial shipping and marine transportation . . . were not estimated”).

68. The Service’s critical habitat designation and the Final Rule were therefore arbitrary and capricious, an abuse of discretion, otherwise not in accordance with law, or without observance of procedure required by law, in violation of the ESA and the APA, and entitling Alaska to the relief requested below.

SECOND CLAIM FOR RELIEF

(Violation of the ESA – Failure to Provide Adequate Justification to State Agency for Adopting Regulations Inconsistent with State Agency’s Recommendation)

69. Alaska incorporates by reference each of the allegations in paragraphs 1 through 68.

70. Section 4(i) requires the Secretary to submit written justification to the State if a State agency files comments disagreeing with a proposed regulation and the Secretary issues a final regulation in conflict with the comments. 16 U.S.C. § 1533(i); *see also* 50 C.F.R. 424.18(c).

71. Both sets of comments filed by Alaska in response to the Proposed Rule and the Draft Economic Impact Analysis disagreed with all or part of the proposed critical habitat designation for the polar bear.

72. The State has a unique interest in seeing that the information it submits to the Service is properly considered, evaluated, and responded to in the ESA critical habitat designation process. In this case, Alaska’s informational and data submittals, including specific comments and information submitted by Alaska on the Service’s proposed designation of critical habitat and draft economic impact analysis, were not adequately considered by or responded to by the Service in its critical habitat designation process for the polar bear.

73. Alaska has not received a response from the Service responding to Alaska's comments on the Final Rule and Final Economic Impact Analysis. Thus, the Service has not provided the required "written justification for [the Service's] failure to adopt regulations consistent with the [Alaska state] agency's comments or petition." 16 U.S.C. § 1533(i).

74. The Service's failure to adequately consider and to respond in an adequate fashion to Alaska's comments on the Proposed Rule and the Draft Economic Impact Analysis violates Section 4(i), 16 U.S.C. § 1533(i), entitling Alaska to the relief requested below.

THIRD CLAIM FOR RELIEF
(Violation of the ESA and APA – Failure to Cooperate With the State)

75. Alaska incorporates by reference each of the allegations in paragraphs 1 through 74.

76. The Service violated ESA Section 6, 16 U.S.C. § 1535(a), by failing to cooperate with Alaska to the maximum extent practicable in designating critical habitat for the polar bear.

77. This claim is brought pursuant to the judicial review provisions of the APA, 5 U.S.C. §§ 701-706.

78. This violation of ESA Section 6, 16 U.S.C. § 1535, is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, or without observance of procedure required by law, which has caused or threatens prejudice and injury to Alaska's rights and interests, is reviewable under the APA, 5 U.S.C. §§ 701-706, and entitles Alaska to the relief requested below.

FOURTH CLAIM FOR RELIEF
(Violation of the APA – Failure to Respond to Significant Comments)

79. Alaska incorporates by reference each of the allegations in paragraphs 1 through 78.

80. The APA requires an opportunity for public comment, and an agency response to significant public comments. 5 U.S.C. § 553(b), (c).

81. Alaska submitted, and the Secretary failed to adequately consider, incorporate, or respond to, Alaska's significant comments concerning the critical habitat designation.

82. The Service's failure to respond to significant comments submitted by Alaska violates the APA, 5 U.S.C. § 553(b), (c), entitling Alaska to the relief requested below.

FIFTH CLAIM FOR RELIEF

(Violation of the APA – Arbitrary and Capricious, Abuse of Discretion, Not in Accordance with Law)

83. Alaska incorporates by reference each of the allegations in paragraphs 1 through 82.

84. The Service's conduct in issuing the Final Rule, as described in preceding Claims for Relief, was arbitrary and capricious, constituted an abuse of discretion, and was otherwise not in accordance with law.

85. Under the APA, this Court has the authority to "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), and to set aside agency decision "without observance of procedure required by law." 5 U.S.C. § 706(2)(D). Alaska is therefore entitled to the relief requested below.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff State of Alaska respectfully requests that this Court enter judgment providing the following relief:

- i. Declare that Defendants violated the ESA and APA.

- ii. Declare that Defendants' actions, as set forth above, are arbitrary and capricious, an abuse of discretion, not in accordance with law, and without observance of procedure required by law.
- iii. Vacate and set aside the Final Rule of December 7, 2010.
- iv. Enjoin Defendants from relying on or enforcing the critical habitat designation under the ESA for the polar bear.
- v. Remand with an order containing instructions requiring full compliance with the ESA and APA.
- vi. Award Alaska its attorneys' fees and costs incurred in bringing and maintaining this action.
- vii. Grant Alaska such other and further relief as the Court may deem necessary and appropriate.

DATED this 9th day of March, 2011.

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