



Alaska Energy & Environmental Policy Update

October 29, 2009

With identification of polar bear critical habitat, federal Endangered Species Act rulings are forming a new regulatory landscape for federal, state and Native lands in Alaska. The Department of the Interior has engaged in a fast-moving, sweeping review of federal management of subsistence hunting and fishing in rural Alaska. And proposed revisions to the Small Business Administration's 8(a) rules, issued yesterday, may well re-shape the landscape for Alaska Native businesses and their partners. Other policy developments of interest to fellow Alaskans are covered below in this issue of the Alaska Energy & Environmental Policy Update. Please feel free to pass it along!

ADMINISTRATION

With Pending Designation of Polar Bear Critical Habitat, Federal Endangered Species Act Rulings Further Define New Federal Regulatory Environment in Alaska

On October 22, 2009, the U.S. Fish and Wildlife Service (USFWS) announced its proposal to designate approximately 200,541 square miles as critical habitat for the polar bear under the Endangered Species Act (ESA). USFWS will accept public comments on the proposed critical habitat designation through December 28, 2009, and is required to make a final decision by June 30, 2010.

The majority of the proposed polar bear designated critical habitat is land owned by the United States and the State of Alaska. However, a significant amount of the proposed designated critical habitat is Alaska Native-owned land.

The proposed critical habitat focuses on protecting sea ice habitat, barrier island habitat, and terrestrial denning habitat along the North Slope of Alaska. Sea ice habitat is located over the continental shelf at depths of 300 meters or less and extends between approximately 30 miles and 200 miles offshore from the mainland. Barrier island habitat includes coastal barrier islands and spits along Alaska's coast. Terrestrial denning habitat includes lands within about 20 miles of the northern coast of Alaska between the Canadian border and the Kavik River and within about 5 miles between the Kavik River and Barrow.

For maps of the proposed polar bear critical habitat, please visit this link:
<http://www.fws.gov/home/feature/2008/polarbear012308/pdf/MapstoprintCH1009.pdf>



The designation of critical habitat increases the protections afforded to the polar bear and the amount of federal oversight associated with activities that may affect the polar bear and its habitat.

Pursuant to section 7 of the ESA, federal agencies must consult with USFWS on any federal action that may jeopardize the continued existence of the polar bear or destroy or adversely modify its critical habitat. While federal agencies are currently required to consult on federal actions affecting polar bears to determine whether the action will jeopardize the species, after the designation of critical habitat the consultation requirement will be expanded to include consideration of critical habitat. This requirement applies to all activities that require a federal permit or have federal involvement or control, such as oil and gas development. This consultation requirement may lengthen the permitting process and may result in the imposition of additional conditions on a proposed project.

The proposed critical habitat designation for the polar bear is another step in the expanding application of the ESA in Alaska. In addition to the polar bear, in the past two years, the USFWS and National Marine Fisheries Service have taken actions with respect to the ESA status of other species in Alaska, notably ice seals, the Pacific walrus, the northern sea otter, and the Cook Inlet beluga whale. As more attention is paid to the impacts of climate change on a national and global scale, advocacy groups are likely to continue to use the ESA as a mechanism to address the impacts of climate change in Alaska.

Revisions to 8(a) Contracting Rules May Re-Define Native Business Opportunities

The U.S. Small Business Administration (SBA) published draft regulations yesterday proposing major changes to the SBA's 8(a) federal contracting program. The announcement initiates a 60-day public comment period, closing on December 28, 2009.

While the proposed changes follow a hearing held this summer by U.S. Senator Claire McCaskill (D-MO) regarding Native firms' contracting privileges, the SBA's proposed revisions have been in the works for many months, apparently triggered more by the various GAO reports over the past few years than the McCaskill hearing.

SBA's draft rules propose changes in a large number of areas. One of the proposed changes that is significant for Alaska Native Corporations (ANCs) involves modifications to the rules on joint ventures, when 8(a) owned firms team with non-8(a) firms to obtain 8(a) contracts. The proposed revisions would limit the amount of work that a non-8(a) large business that is a mentor to an 8(a) firm could perform on an 8(a) sole source contract. Currently, a joint venture between a tribally or an ANC-owned concern and a non-8(a) business concern must, as a whole, perform at least 50 percent of the contract, and the 8(a) participant must perform "a significant portion" of the contract. The proposed rule defines "significant portion" by providing that the 8(a) participant would have to perform at least 40 percent of the portion of the contract being performed by the joint venture. Thus if the joint venture is performing 50 percent of the contract, the 8(a) firm would have to perform at least 20 percent of the total contract. The proposed rule would also bar the non-8(a) joint venture partner from performing any work on the contract as a subcontractor to the joint venture prime contractor. SBA explains that the proposed



change is intended to prevent large businesses and other non-8(a) firms from reaping the bulk of the benefits of sole source contracts intended for tribally-owned or ANC-owned 8(a) participants.

Another proposed provision that would impact ANC-owned 8(a) firms would require any firm owned by a tribe, ANC, Native Hawaiian Organization, or Community Development Corporation to report, as part of its annual review submission, information on how its 8(a) participation has benefited the tribal or other community. In the Federal Register announcement of the proposed regulations, SBA stated that this was in response to criticism it received from GAO and the Inspector General that SBA did not adequately track the extent to which individual Alaska Natives benefited from the firm's participation in the 8(a) program.

The proposed regulations also would clarify that board members of tribal or ANC firms seeking 8(a) certification do not have to submit their tax returns as part of the 8(a) application. A requirement that board members submit their tax returns, which has been applied inconsistently by different SBA offices in the past, did not provide SBA with any relevant information, while discouraging qualified people for agreeing to serve on the boards of tribal and ANC 8(a) firms.

Another major proposed change would prohibit a new 8(a) firm owned by a tribe or ANC, for the first two years of its 8(a) term, from receiving 8(a) contracts in secondary NAICS codes that are the primary NAICS codes of another 8(a) firm owned by the tribe or ANC (or a former 8(a) firm that had left the program within two years). SBA explains that "having one business take over work previously performed by another does not advance the business development of the two distinct firms." (SBA already prohibits a tribe or ANC from having a second 8(a) firm with the same primary NAICS code as another one owned by that tribe or ANC.)

A proposed beneficial change would make it clear that the treatment of mentor/protégé joint ventures as small businesses, even if the mentor is a large business, would apply to Federal subcontracts as well as to Federal prime contracts. This will particularly help ANC 8(a) joint ventures when they apply for work at Department of Energy laboratories, such as Los Alamos, where operation of the laboratories is contracted out to universities or large companies. Because the awarding entity is the university or large company, rather than DOE, the actual procurement contracts awarded by the entities administering those laboratories are treated as Federal subcontracts rather than as Federal contracts, and it has been unclear whether they could treat the ANC mentor/protégé joint venture as a small business.

The draft regulations contain numerous other proposed changes, some of which would apply to ANCs along with all other 8(a)s and some of which are not relevant to ANCs. The SBA would amend the 8(a) rules to add Native Hawaiian Organizations to the list of 8(a) concerns exempted from sole source contract threshold limitations, but only for DOD contracts, raise standard competitive threshold amounts to \$5.5 million and \$3.5 million for manufacturing and all other contracts, respectively, clarify reporting requirements, and permit non-profit business entities to serve as mentors. SBA also proposes to tighten-up application procedures for participation in the 8(a) Business Development program and clarify SBA discretion to terminate or early graduate a firm from the Program where an owner claiming disadvantaged status is determined to be no longer disadvantaged.



Other changes and clarifications proposed by SBA address size regulations, mentor/protégé program rules, requirements for joint ventures, procurement classification, the nonmanufacturer rule, financial reporting requirements, and guidelines for requesting a size determination.

Questions regarding the special rights of Indian tribes and ANCs under SBA's 8(a) contracting program can be directed to Alan Mintz, alm@vnf.com, Rick Agnew, raa@vnf.com, Dan Press, dsp@vnf.com, Jonathan Simon, jxs@vnf.com, or to any other member of Van Ness Feldman's Indian Law or Alaska Native Law practices.

DOI Initiates Subsistence Management Review for Rural Alaska

Kim Elton, Director of Alaska Affairs at the Department of the Interior (DOI), announced on October 23 that DOI will launch a comprehensive review of federal management of subsistence rights for rural Alaskans.

The Alaska National Interest Lands Conservation Act (ANILCA) of 1980 established a subsistence priority for rural Alaska residents. Title VIII of ANILCA established that the Secretaries of the Interior and Agriculture would not manage subsistence on federal lands so long as Alaska state law remained consistent with the federally-mandated rural priority. During the 1980s, the State of Alaska maintained a subsistence preference for rural Alaskans. In 1989, however, in *McDowell v. State of Alaska*, the Alaska Supreme Court ruled that state's rural subsistence preference violated the equal access clauses of Alaska's constitution.

The Departments of Interior and Agriculture assumed management authority over subsistence hunting and fishing on federal lands in Alaska on July 1, 1990. In 1995, in *Katie John v. United States*, the Ninth Circuit Court of Appeals held that federal "public lands" include navigable waters in which the federal government has a reserved water right. In January 1999, the Departments issued a final rule implementing the *Katie John* decision, expanding the federal subsistence priority to all waters within the boundaries of 34 identified federal areas, including waters that pass through inholdings within the 34 areas and inland waters adjacent to the exterior boundaries of these areas.

For years, Alaska Native leaders have charged that the federal government has failed to protect the rural subsistence priority. In particular, Native leaders have argued that the Federal Subsistence Board, a multi-agency group tasked with managing the subsistence priority, has failed to properly balance the needs of subsistence users with commercial and sport uses.

Mr. Elton indicated last week that DOI would take steps to better ensure protections for subsistence users on Alaska lands under federal management, developing a new "subsistence roadmap" through consultation with rural Alaskans. Mr. Elton indicated that DOI hopes to develop the new federal management strategy before the next meeting of the Federal Subsistence Board, scheduled for January 12-14, 2010.



Mr. Elton has clarified that DOI Special Assistant for Alaska Affairs Pat Pourchot, who is based in Anchorage, will head up the review. DOI intends to proceed by holding a series of meetings with stakeholder groups throughout Alaska.

Senators Begich and Murkowski both indicated they support the federal review.

EPA Comment Period Closes on Proposed Permit for Chukchi Exploration

The Environmental Protection Agency (EPA) Region 10 (Alaska, Washington, Idaho and Oregon) closed the public comment period on October 20 for Shell Offshore Inc.'s application for a Clean Act Air PSD Permit. Shell is seeking permission from EPA to conduct limited exploration on its lease holds in the Chukchi Sea. Comments will be posted on the EPA website at www.epa.gov/region10. The permit will allow Shell to conduct very limited exploration on the Arctic outer continental shelf and will address all air emissions from Shell's floating drilling rig and attendant support vessels.

Tongass National Forest Remains at Center of National Roadless Debate

The U.S. Department of Agriculture is reviewing timber sales planned on Southeast Alaska's Kupreanof and Suemez Islands. The Central Kupreanof sale would require 15 miles of new roads and the Sue timber sale would require 2.2 miles of new roads. Both proposals include inventoried roadless areas that would have been subject to President Clinton's 2001 roadless rule, which President Obama pledged to uphold on the campaign trail. The Tongass was exempted from the roadless rule in 2003.

The Obama Administration has not yet clearly indicated whether the Tongass National Forest will be fully subject to the 2001 roadless rule. However, at a recent meeting of the Tongass Futures Roundtable in Anchorage, Department of Agriculture Deputy Undersecretary Jay Jensen suggested that the Forest Service plans to get out of the "old growth business", a policy that, if implemented strictly, would stifle the Forest Service's efforts to continue providing the small timber sales that support Southeast Alaska's remaining timber industry. Tongass Forest managers have observed that there is currently no market for second growth trees harvested from the Tongass.

Newly Nominated or Appointed

Pending formal appointment by the U.S. Secretary of Commerce, Joel Neimeyer will replace George Cannelos as the federal co-chair of Alaska's Denali Commission. Mr. Neimeyer, of Yupik descent, is a shareholder in the Calista and Akiak Native Corporations, and is regarded for his strong history of working for rural Alaska villages on issues ranging from economic development to rural health.

On October 8, the U.S. Senate confirmed Harris Sherman as Undersecretary of the Department of Agriculture (USDA) for natural resources and environment. Mr. Sherman will supervise policy development for and the operations of the U.S. Forest Service and the Natural Resources Conservation Service. Mr. Sherman takes the place of former USDA undersecretary Mark Rey.



CONGRESS

Senator Boxer Legislation Serves as Basis for Ongoing Climate Change Debate

Sen. Barbara Boxer (D-CA), Chairman of the Senate Committee on Environment and Public Works (EPW), released a 925-page version of the Kerry-Boxer climate and energy bill, also known as S. 1733 or the “Clean Energy Jobs and American Power Act of 2009.” This “Chairman’s Mark” will serve as the basis for EPW mark ups, which are expected to begin in the next few weeks. The Chairman’s Mark introduces significant changes to the original language of S. 1733, as well as climate change legislation introduced in the House, known as the Waxman-Markey proposal.

Senator Murkowski, who serves as ranking member of the Senate Energy and Natural Resources Committee, indicated that she would “keep my mind open” about her vote on a cap-and-trade bill, provided the legislation includes sufficiently robust provisions supporting domestic oil and gas development and nuclear energy.

For up-to-date coverage of major climate change-related policy developments, sign up to receive our weekly Climate Change Policy Update, [at our Sign Up/Subscribe page](#).

Senate Bill Would Permit Delegation of Federal Forestry Projects to State of Alaska

The Senate Subcommittee on Public Lands and Forests met October 29 to review legislation that would permit federal agencies to contract with states to manage certain projects on U.S. Forest Service and Bureau of Land Management (BLM) lands.

S. 1122, the “Good Neighbor Forestry Act,” permits federal agencies to enter into cooperative agreements to contract with state foresters to provide forest, rangeland, and watershed restoration and protection services on National Forest and BLM lands.

Authorized projects would include activities to treat insect infected trees, activities to reduce hazardous fuels, and other activities to restore or improve forest, rangeland, and watershed health, including fish and wildlife habitat. In Alaska, the new authority could prove particularly helpful to State efforts to combat the spruce bark beetle, which has progressively destroyed Alaska forestland since the early 1990s.

The legislative proposal builds on a pilot program established in Colorado under the 2001 Interior Department appropriations bill and, as drafted, applies only to Forest Service and BLM lands located west of the 100th meridian, which runs roughly from North Dakota to Texas.



House Passes Coast Guard Reauthorization Bill

Last week the U.S. House of Representatives passed, by an overwhelming majority, the Fiscal Year 2010 U.S. Coast Guard Reauthorization Bill. The bill provides the Coast Guard with a number of congressional priorities for its next fiscal year of operation. Alaska commercial fishing interests are pleased with the bill's inclusion of several important provisions. For example, the bill contains a rebuild and replacement section that will allow certain commercial fishing vessels operating in the Bering Sea Pollock fishery to replace a vessel or rebuild a vessel. Current law prohibits such revision and the fleet is now bordering on 30 years old. The bill also extends a moratorium on certain vessel wastewater discharge requirements to allow for a current study, being conducted by the EPA, to conclude. The moratorium is now extended to 2013. The bill now moves to the Senate for consideration.

Sealaska Bill Moves Forward with Hearing before Senate Subcommittee

On October 8, the Senate Subcommittee on Public Lands and Forests held a hearing on S. 881, the "Southeast Alaska Native Land Entitlement Finalization Act." Senator Mark Begich testified at the hearing in support of the bill, of which he is a cosponsor. Witnesses included BLM Deputy Director Marcilynn Burke, Department of Agriculture Deputy Undersecretary Jay Jensen, Sealaska board member Byron Mallott, and Southeast Alaska Conservation Council community organizer Bob Claus. Senator Lisa Murkowski, the bill's sponsor, addressed questions to each of the witnesses as Ranking Member of the Senate Committee on Energy and Natural Resources.

S. 881 would permit Sealaska Corporation, the regional Alaska Native Corporation for Southeast Alaska, to finalize Native land selections pursuant to the Alaska Native Claims Settlement Act (ANCSA). The legislation would amend ANCSA to permit Sealaska to select its remaining land entitlement from a revised pool of federal lands. Under current law, Sealaska is required to choose approximately 65,000 acres of remaining ANCSA entitlement lands within small "boxes" of land that were made available to Sealaska under ANCSA in 1971. No other Alaska Native Corporation was required to choose from within such boxes. The legislation would permit Sealaska to use part of its entitlement for sacred and cultural sites as well as alternative economic development sites, to be used for ecotourism and green energy development, and to select lands for economic development that are predominantly roaded.

Mr. Jensen expressed concern on behalf of the Department of Agriculture that the Sealaska bill would complicate U.S. Forest Service management of the Tongass National Forest under the current Tongass Land Management Program. Ms. Burke expressed the concern that the Sealaska bill could establish an unhelpful precedent by treating Sealaska differently than other regional Native Corporations. Senator Begich, who joined Senator Murkowski and other Committee Members on the dais after testifying, expressed disappointment with the Administration's testimony, observing that Sealaska was treated uniquely under ANCSA, and that circumstances in the Tongass National Forest have changed in 38 years. Senator Begich commented that the Administration should not confine its review of the proposal to "the narrow window, the bureaucracy, that says you can't set a precedent." "If that's the answer," Senator Begich commented, "that doesn't get to the core issue of what ANCSA was, which was all about



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managing the lands for the people. . . . I hope the Departments don't use precedent setting as the only reason [for having concerns with the legislation] . . . because that doesn't really cut it."

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