

# North Slope Borough

## OFFICE OF THE MAYOR

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*Edward S. Itta, Mayor*



March 12, 2009

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Public Comments Processing  
Attn: RIN 1018- AW29,  
Division of Policy and Directives Management,  
U.S. Fish and Wildlife Service,  
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Comments submitted electronically via: <http://www.regulations.gov>

RE: Proposed Harvest Regulations for Migratory Birds in Alaska during the 2009 Season,  
50 CFR Part 92 [FWS-R7-MB-2008-0099; 91200-1231-9BPP L2] RIN 1018-AW29

Dear Mr. Armstrong:

The North Slope Borough (NSB) appreciates this opportunity to comment on the December 18, 2008 proposed regulations for the 2009 Migratory Bird Subsistence Harvest. We also appreciate the re-opening of the comment period and extension of the deadline to allow adequate time for preparation of our comments and for public hearings in Barrow, Wainwright, Point Lay and Point Hope. Thank you especially for making the effort to return to Point Lay for a second hearing.

While we appreciate your willingness to reach out to the people that these regulations will affect, we are concerned that the proposed regulations may not be based on the best science, do not adequately consider the health and customs of the Inupiat, and may increase rather than reduce the mortality rates of threatened eider.

Like you, we want to ensure that Steller's eiders continue to inhabit the North Slope. Even though Steller's eiders are not an important subsistence resource, our culture depends on other migratory birds and a healthy environment. Our subsistence culture is also rooted in the freedom it offers subsistence users to provide for their families without disturbance from outside forces. Subsistence hunting is more than just the process of obtaining food. It is an aesthetic and spiritual experience that requires subsistence users to follow traditional knowledge and the laws of nature, or risk destroying the resources on which our culture depends. Restrictions on the ability of subsistence users to regulate their own actions are, in themselves, a negative impact on the subsistence experience.

That said, we recognize the need for measures to avoid jeopardizing the survival of Steller's eiders. We agree that the wanton killing of threatened Steller's eiders last year is a tragedy that must not be repeated. But we disagree that the proposed regulations or the planned law enforcement activities will serve to increase the population of threatened eiders or even avoid jeopardizing the existence of the current population. We believe that migratory birds, including Steller's eiders, can only be protected by working together in a manner that respects our people, our culture, and our traditional knowledge.

### **Best Available Science**

Executive Order 12866 requires agencies to base their decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation or guidance document.<sup>1</sup>

Management plans for fish and wildlife on the North Slope work best when they are based on both Western scientific knowledge and traditional/local knowledge. While scientists often rely on models that are based on limited observations of a species, traditional knowledge is based on a more holistic approach that uses direct observations of the environment over many generations. Local people live in the North Slope year round. They observe the environment through a variety of seasons and conditions. Over many generations, the observations have assimilated into the basic knowledge and values held today.

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<sup>1</sup> Exec. Order No. 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993) at 1(b)(7), as amended by Exec. Order No. 13258, 67 Fed. Reg. 9385 (Feb. 26, 2002) and Exec. Order No. 13422 (Jan. 18, 2007) 72 Fed. Reg. 2763 (hereafter cited as "Executive Order 12866").

An example regarding the bowhead whale population illustrates how traditional knowledge can complement science. During the 1970s, observations of bowhead whales migrating past Point Barrow were limited to times when the lead in the ocean ice was open. This practice led scientists to substantially undercount the number of whales. Local residents suggested that the bowhead population was much larger because they knew that some whales migrated under the ice and farther offshore than an observer could see. While the local knowledge was initially discounted by scientists, the observations were eventually confirmed, and the population estimate for bowhead whales increased.

The Steller's eider population assessment was apparently based upon or justified by a mathematical model (which was not referenced in the proposed regulations or published) rather than any traditional knowledge. FWS personnel indicated that the model was discussed in "Analysis of the current status of the Alaska-breeding population of the Steller's Eider" by Ted Swem and Angela Matz, Fairbanks Fish and Wildlife Field Office (July 2, 2008) ("the Analysis"). The Analysis indicates that, "All surveys suffer from either from [sic] low detections of Steller's eiders, since they are so rare, or from low areal extent (as in the Barrow foot surveys), so statistical power to detect changes in population size is minimal."<sup>2</sup>

The Analysis was based on the assumption that there is no permanent immigration or emigration of Steller's eiders between Russian and Alaskan populations, which "may be incorrect, and if so, probability of extinction of the Alaska-breeding population may be overestimated."<sup>3</sup> Survival estimates were generated from capture-recapture sampling in only a few molting and wintering areas, yet there may be movement between these and other areas.<sup>4</sup> The Analysis does not consider movement between these and other areas. The Analysis also acknowledges that the reproduction rates in the population observed may not be representative of reproductive rates in other populations on the Arctic coastal plain.<sup>5</sup>

The model used in the Analysis is discussed in "Population Viability Analysis for Alaska Breeding and Pacific Populations of Steller's Eider," by Jonathan Runge (November 11, 2004). The model estimates the number of eiders based on the number of females seen in one day near Barrow, which "may drastically underestimate the number of females in the region."<sup>6</sup>

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<sup>2</sup> Swem and Matz at p. 2.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 3.

<sup>5</sup> *Id.*

<sup>6</sup> Runge at 6.

Further, Runge expressed little confidence in the model's ability to predict extinction: "The wide 95% confidence interval for the count-based quasi-extinction probabilities shows that we can place very little confidence in the point estimates of quasi-extinction probability."<sup>7</sup>

Lack of confidence in data on Steller's eiders is also expressed in FWS's decision to list the Steller's eider as threatened: "the variance in repeated counts in specific areas is too high to identify statistically significant population trends"<sup>8</sup>; as well as in FWS's Environmental Assessment associated with the proposed regulations: "Because Alaska-breeding Steller's eiders occur at very low densities, there is not sufficient information to estimate population size or detect population trends."<sup>9</sup>

The above studies provide little support for FWS's statement in the introduction to the proposed regulations that, "the Alaska-breeding population of Steller's eiders has a very high probability of becoming extirpated within 10 years without immediate concerted actions designed to reduce adult mortality."<sup>10</sup>

Traditional knowledge indicates that there were never very many Steller's eiders on the North Slope. Hunters believe that the population is small, but not declining. This perspective is consistent with the suggestion in the Runge paper that the Alaska breeding population may simply be an outlier that is maintained by frequent supplementation from the greater Pacific population.<sup>11</sup> FWS should base its regulations on the hundreds of years of collective knowledge held by the North Slope people, rather than a few years worth of data or the unexplained killings of Steller's eiders during 2008.

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<sup>7</sup> Runge at 9.

<sup>8</sup> Endangered and Threatened Wildlife and Plants; Threatened Status for the Alaska Breeding Population of the Steller's Eider, 62 Fed. Reg. 31749 (June 11, 1997), codified at 50 C.F.R. 17.11(h).

<sup>9</sup> Managing Migratory Bird Subsistence Hunting in Alaska: Hunting Regulations for the 2009 Spring/Summer Harvest (Dec. 12, 2008) at 12 (hereafter, "the Environmental Assessment"). The Environmental Assessment continues, "Further, the concentration area at Barrow, which contains a significant proportion of Steller's eiders detected on the entire Alaska coastal plain in most years, may be under-sampled because: 1) the scale of the concentration is too small to be adequately represented in the sampling regime; and 2) a portion of the concentration area is excluded because the area near the Barrow airport cannot be flown due to aviation safety concerns."

<sup>10</sup> Migratory Bird Subsistence Harvest in Alaska; Harvest Regulations for Migratory Birds in Alaska during the 2009 Season, 73 Fed. Reg. 76995 (Dec. 18, 2008) (to be codified at 50 CFR Part 92).

<sup>11</sup> Runge at 9.

The FWS relies on inadequate data for understanding previous harvests of Steller's eiders. FWS uses recall harvest surveys to estimate how many Steller's eiders have been shot in the past. These recall surveys are fraught with problems. Hunters are interviewed months after their hunts and they may not remember how many birds were shot. There is also the persistent problem with species identification. People may not know the names for the birds they are hunting. If not, someone might report taking Steller's eiders when in fact they caught another species. As with the biological data, the harvest data are filled with many uncertainties. Using unreliable data will often lead to making faulty decisions.

NSB appreciates FWS's precautionary approach to protecting threatened eiders despite the lack of certainty of a declining population or harvest estimates. But, as this letter indicates, FWS fails to take a precautionary approach to preserving the health and culture of the North Slope people.

FWS should interview native elders as well as those who currently hunt migratory birds to get a better idea of the population trends of threatened eiders and how often those birds are taken. If FWS chooses to create future models assessing the population of Steller's eiders, the model, the input data, and the results should be made available to the public. Additionally, the model and its results should be scientifically peer-reviewed.

### **Source of Decline**

Traditionally, Spectacled and Steller's eiders have not been hunted as a food source.<sup>12</sup> Elders today indicate a preference for Common and King eiders and geese over Steller's eiders. Aside from the Steller's eider shooting mortalities that occurred last summer, there is little evidence suggesting that subsistence hunting on the North Slope is the source of any population decline. The shooting of the eiders in 2008 was not about subsistence. Subsistence hunters would have taken the birds home. FWS says that it has "monitored subsistence harvest for the past 15 years through the use of annual household surveys in the most heavily used subsistence harvest areas, e.g., the Yukon-Kuskokwim Delta."<sup>13</sup> But subsistence harvest patterns on the North Slope have not been adequately documented, especially for species that may be harvested at very low numbers.

There is a broad range of potential sources for the population decline of Steller's eiders that may also be obstacles to recovery. These include: development, mortalities along migration routes and in nesting areas; predation by foxes, gulls, ravens, and jaegers; pollution; changes in the

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<sup>12</sup> Based on traditional knowledge. See also 62 Fed. Reg., *supra*, at 31748 ("relative to many other waterfowl species, Steller's eiders have not been an important sport or subsistence species").

<sup>13</sup> 73 Fed. Reg. *supra*, at 76995.

marine environment associated with climate change; and impacts from scientific studies. Traditional knowledge indicates that a bird may move away from its eggs or young if it senses that the eggs or young have been in contact with humans. FWS's studies result in extensive human contact with eggs and young. If the eider population is facing jeopardy such that not a single bird can be incidentally taken, then FWS should avoid further research in the area. NSB requests a report from FWS indicating how many threatened eiders it has incidentally taken each year during its research.

Warren Matumeak, a Barrow elder, reports seeing predatory birds eating eider and other migratory bird eggs, year after year. FWS's listing of Steller's eider as threatened cited a study suggesting that arctic foxes (*Alopex lagopus*) may have contributed to the extirpation of Steller's eiders on the Yukon-Kuskokwim Delta by increasing predation pressure when major goose populations in the region crashed during the 1960s.<sup>14</sup> Another study indicated that of the 15 adult Steller's eiders found dead near Barrow between 1991 and 1994, seven were believed to have been killed by predators.<sup>15</sup> Additional actions from the FWS are needed to reduce predation on Steller's eiders.

### Scope of the Regulations

Threatened eiders are only present on the North Slope for a short period of time at the beginning of the migratory bird season, and then they only nest in certain areas near Barrow. Yet the proposed regulations apply to four villages (including Point Hope, 248 miles from Barrow) over the entire season. While the proposed regulations did not explain why Point Hope and Point Lay were included, FWS indicated at the public hearings on the North Slope that it considered data on known nesting sites dating back to 1986, and that this data included Point Hope and Point Lay.

This conflicts with the range described in more recent federal register publications.<sup>16</sup> The regulations should apply only for the time and places eiders are actually present. FWS should

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<sup>14</sup> 62 Fed. Reg., *supra*, at 31748.

<sup>15</sup> *Id.*

<sup>16</sup> See 73 Fed. Reg., *supra* at 76995: "The Alaska-breeding population of Steller's eiders now nests primarily only on the Alaska Coastal Plain, particularly around Barrow and at very low densities from Wainwright to at least as far east as Prudhoe Bay."; see also 62 Fed. Reg., *supra* at 31748: "On the North Slope, Steller's eiders historically occurred from Wainwright east, nearly to the United States-Canada border (Anderson 1913, Brooks 1915). The species may have abandoned the eastern North Slope in recent decades, but it still occurs at low densities from Wainwright to at least as far east as Prudhoe Bay. . . . All but two recent, known nests of Steller's eiders in Alaska have been near Barrow, which is the largest Native village in northern Alaska."; Environmental Assessment, *supra* at 10: "The Alaska-breeding population of Steller's eiders now nests primarily only on the Alaska coastal plain, particularly around Barrow and at very low densities from Wainwright to at least as far east as Prudhoe Bay."

not be able to close down the hunt at a time when threatened eiders are not even present. At the public hearings, FWS also justified including Point Hope and Point Lay in the proposed regulations because Steller's eiders migrate past those villages. This is not a valid point because these eiders also migrate along the entire coast of western Alaska. Including Point Hope and Point Lay in the proposed regulations but none of the other villages along the coast appears to be arbitrary.

The proposed regulations state that "Migratory bird hunting is not permitted within 1 mile of either side or end of Cakeeater/Gaswell, Nunavak and Freshwater Lake roads and any spur roads."<sup>17</sup> If there is an area closure for subsistence hunting in Barrow, it should only be along Cakeeater, Gaswell, and Freshwater Lake roads and only during times when Steller's eiders are present. If 2009 is not a breeding year for Steller's eiders, the road closures should not be implemented. Stevenson Road (i.e., the beach road) should not be included in the road closure. Spring hunting of King and Common eiders on the spring sea ice just west of Stevenson Road and late summer and fall hunting of these same birds at Duck Camp are essential traditional, cultural, and subsistence activities.

### **Implementation of the Regulations**

If road closures are implemented, it is not clear how FWS intends to enforce them, other than placing road signs in the area. A hunter may have difficulty discerning exactly where the road closure begins. To avoid confusion, please incorporate a map into the regulations showing the boundaries of the areas of closure. We are concerned about the potential treatment of a hunter who brings a duck from the unrestricted open area to a closed area. Would an agent issue the hunter a citation in this case? The possibility of a citation in such a case would be particularly problematic for hunters that live or travel in the closed areas.

The circumstances that would trigger an emergency closure of the hunt are vague. FWS indicates that it "will institute emergency closures if the Alaska subsistence harvest of migratory birds is deemed to cause an imminent threat to Steller's eiders in a specific geographic area during the spring migration or the summer breeding period."<sup>18</sup> We appreciate that FWS's decision must be based on a biological assessment, and that FWS would like to be flexible in order to adjust its regulation to the changing numbers of Steller's eiders in the area, but it is not clear what information FWS will use to determine that the subsistence hunt is causing an imminent threat to Steller's eiders. Without any criteria or set guidelines placed on a decision to close the hunt, there is nothing to stop arbitrary and capricious decision-making. The regulations should explain

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<sup>17</sup> 73 Fed. Reg., *supra* at 76998.

<sup>18</sup> *Id.* at 76995

how FWS would adjust its criteria for closure based on the populations of Steller's eiders in a given area. The regulations should also include the criteria FWS will use to determine the size of any area to be closed.

FWS should consider including specific exceptions to its regulations to allow additional hunting days in the event that bad weather prevents hunting on the scheduled days for the hunt or causes changes to the location of the migratory birds. FWS should also consider exceptions for elders, who may have difficulty traveling long distances to hunt.

The regulations do not provide notice of the penalties that will be imposed for violating the regulations. Due process requires notice not only of changes in the law, but also penalties imposed for violating a new law. "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose."<sup>19</sup>

### **Cultural conflicts**

Executive Order 12,866 provides, that, "as appropriate, agencies shall seek to harmonize Federal regulatory actions with related State, local, and tribal regulatory and other governmental functions."<sup>20</sup> The proposed regulations are not in harmony with the tribal traditions of self-regulations, nor do they correspond with traditional practices. For instance, hunters traditionally stop hunting after a particular event (birds beginning to pair up) rather than on a calendar date (as would be required by the regulations).

The proposed regulations state that, "No person shall at any time, by any means, or in any manner, possess or have in custody any migratory bird or part thereof, taken in violation of subpart C and D of this part."<sup>21</sup> A ban on possession of threatened eiders would mean that if a hunter saw a dead Steller's eider, the hunter would not be able to pick up the bird and use it. This conflicts with the traditional custom of avoiding food waste.

NSB requests clarification as to why the Steller's eider is not managed in the same way as the yellow-billed loon. At the request of the North Slope Borough Fish and Game Management Committee, the Co-management Council recommended allowing the subsistence use of yellow-

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<sup>19</sup> *E.E.O.C. v. Federal Express Corp.*, 513 F.3d 360 (4<sup>th</sup> Cir. 2008), quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996)

<sup>20</sup> Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Sept. 30, 1993) at 1(b)(9).

<sup>21</sup> 73 Fed. Reg., *supra* at 76998.

billed loons inadvertently entangled in subsistence fishing (gill) nets on the North Slope.<sup>22</sup> Like the yellow-billed loons, Steller's eiders are sometimes inadvertently killed. We need to do all we can to keep Steller's eiders from being inadvertently killed, but wasting birds should not be encourage either.

FWS acknowledges that yellow-billed loons are culturally important to the Inupiat for use in traditional dance regalia.<sup>23</sup> But it fails to recognize that many other migratory birds (excluding the Steller's eider) are important to the Inupiat in their *nalukataq* (the summer blanket toss festival), which is commenced by the serving of caribou, geese, and duck soups. Any closure of the migratory bird hunt would disrupt traditions that are an essential part of the Inupiat culture.

Alaska Native cultures have a common tradition of gathering the community together to share subsistence foods. It is considered an honor to bestow subsistence harvest on the community, whether it is the Athabascan tradition of the funeral potlatch, or in the Inupiat tradition of sharing subsistence foods with the community and visitors during *nalukataq*.

Alaska law places a high value on the rights of individuals to exercise their religion and culture. In *Frank v. State*,<sup>24</sup> the Alaska Supreme Court dismissed criminal charges against an Athabascan native who killed a moose in violation of hunting laws for the purpose of providing for a traditional Athabascan funeral potlatch. The court acknowledged that traditional Athabascan beliefs have blended with Christianity, resulting in a distinct religious practice. The court determined that the funeral potlatch was a religious ceremony, in which the role of moose meat is essential. The court concluded that the State did not meet its burden of proving a compelling state interest that would justify curtailing the religiously based practice.

While FWS may have a compelling interest to preserve the Steller's eider, the proposed regulations are not narrowly tailored to serve this interest. If FWS determines that the hunt should be curtailed to protect the Steller's eider, it should leave room for the Inupiat to continue their practice of *nalukataq*.

## **Law Enforcement and Hunter Searches**

During the past several years, there has been a dramatic increase in the number of law enforcement officers on the North Slope. In many cases, the interactions between these officers and our hunters have not been positive. Tensions and anger have mounted when officers

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<sup>22</sup> *Id.* at 76998.

<sup>23</sup> *Id.* at 76996.

<sup>24</sup> 604 P.2d 1068 (Alaska 1979).

carefully watched hunters through binoculars from a distant vehicle or approached hunters in unfamiliar, unexpected and sometimes inappropriate ways. We feel that law enforcement activities have contributed to the problems observed in 2008. In several cases it appears that one or two hunters became so angry, that they shot Steller's eiders and left them on the ground. There is no excuse for that type of behavior, but understanding what happened in 2008 will help us prevent similar situations from occurring in the future. There is a good chance that the law enforcement activities created a situation where hunters made bad decisions, decisions that would not have made if they had not had negative interactions with officers.

Section 5 of the Migratory Bird Treaty Act (MBTA)<sup>25</sup> provides in part that any employee of the Department of the Interior authorized to enforce the MBTA is empowered, **with a search warrant**, to search any place. There are exceptions to this rule where a warrant is not required by the Fourth Amendment, such as where an unauthorized object is in plain view or in an open field.<sup>26</sup> The unauthorized object itself must be in plain view—not just a container in which the unauthorized container is kept. In *U.S. v. Chester*,<sup>27</sup> the Fifth Circuit held that a hunting box could not be opened without search warrant unless its contents were in plain view or could be inferred from the container's outward appearance.<sup>28</sup>

As provided in FWS's Rules of Conduct for Law Enforcement, "Service officers must at all times guard and defend the rights and liberties the Constitution guarantees and not engage in any activity that would violate those rights."<sup>29</sup>

### Shooting hours

The proposed shooting hours are not appropriate for the North Slope of Alaska. The first time the sun sets during the summer is in early August. The days get shorter rapidly through August, but as the sun rises and sets it does so very slowly. Thus, there is a great deal of light well before sunrise and after sunset. We assume the proposed shooting hours are based on regulations for places well to the south of northern Alaska where the sun rises and sets very quickly. If shooting hours are implemented for the North Slope, they need to be established appropriately so as not to unnecessarily restrict subsistence hunters.

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<sup>25</sup> 16 U.S.C. § 706, *et seq.*

<sup>26</sup> *U.S. v. Swann*, 377 F.Supp. 1305, 1307 (D.C.Md. 1974).

<sup>27</sup> 848 F.2d 520 (5<sup>th</sup> Cir. 1988).

<sup>28</sup> Compare with *U.S. v. Stallings*, 28 F.3d 58 (8<sup>th</sup> Cir. 1984) (defendant had no reasonable expectation of privacy in a tote bag that he left in an open field owned by another, without any indicia of ownership of the bag).

<sup>29</sup> 441 FW 1 (Nov.28, 2006), available at <http://www.fws.gov/policy/441fw1.html> at 1.10.

### **Lack of Tribal and AMBCC Input**

To effectively implement regulations on a practice that is of fundamental importance to the North Slope people, FWS must instill the North Slope people with some sense of ownership and responsibility for the regulations. While the summary of the proposed regulations indicates that they “were developed under a co-management process involving the Service, the Alaska Department of Fish and Game, and Alaska Native representatives,”<sup>30</sup> Alaska Natives were unaware of the scope of the proposed regulations until after FWS had already drafted them. The Alaska Migratory Bird Co-management Council’s (AMBCC) recommendations for 2009 regulations were no different than those for 2008—it never recommended implementing additional regulations on Steller’s eiders. If regulations are unilaterally implemented without input of AMBCC, this defeats the purpose of having such a council.

NSB disagrees with FWS’s assertion that, prior to the writing of the proposed regulations, FWS had “consulted with Alaska tribes and evaluated [“Government-to-Government Relations with Native American Tribal Governments” (59 FR 22951, and Executive Order 13175 (65 FR 67249; November 6, 2000))] for possible effects on tribes or trust resources,” and “determined that there [were] no significant effects.”<sup>31</sup>

Section 3 (c) of Executive Order No. 13,175<sup>32</sup> requires agencies undertaking considering policies that have tribal implications to

- (1) encourage Indian tribes to develop their own policies to achieve program objectives;
- (2) where possible, defer to Indian tribes to establish standards; and
- (3) in determining whether to establish Federal standards, consult with tribal officials as to the need for Federal standards and any alternatives that would limit the scope of Federal standards or otherwise preserve the prerogatives and authority of Indian tribes.

The order also prohibits agencies from promulgating any “regulation that has tribal implications, that imposes substantial direct compliance costs on Indian tribal governments, and that is not required by statute,” unless the Federal government provides the tribe with funds to cover the

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<sup>30</sup> 73 Fed. Reg., *supra* at 76994.

<sup>31</sup> *Id.* at 76998.

<sup>32</sup> Consultation and Coordination With Indian Tribal Governments, 65 Fed.Reg. 67249 (Nov. 9, 2000), 3 C.F.R. 304, 305 (2000), superseding Executive Order No. 13084.

cost; or the agency consulted with tribal officials **early in the process and includes a tribal summary impact statement in the federal register.**<sup>33</sup>

The FY 2004 Consolidated Appropriations Act (Section 161) required the Director of the Office of Management and Budget (OMB) to consult with Alaska Native corporations on the same basis as Indian tribes under Executive Order 13175. The Transportation, Treasury, and General Government Appropriations Act of 2005 amended the 2004 act to extend the requirement to consult ANCSA corporations to all federal agencies.<sup>34</sup> Thus, native corporations (including UIC) are entitled to consultation. . Consulting UIC is especially important because the proposed road closures near Barrow would be on UIC land.

Section 3 of the Department of the Interior's Secretarial Order No. 3225<sup>35</sup> provides additional guidance for consultation:

. . . When a species is negatively impacted by a subsistence take, the goal of the Departments will be to work collaboratively with Alaska Natives to craft cooperative agreements that will conserve the species, fulfill the subsistence needs, and preclude the need for regulations. The 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 . . .

FWS also has a Native American Policy,<sup>36</sup> which states that, "The Service will maintain government-to-government relationships with Native American governments. The Service will work directly with Native American governments and observe legislative mandates, trust responsibilities, and respect Native American cultural values when planning and implementing programs."<sup>37</sup> The Policy requires FWS to "consult with Native American governments on fish and wildlife resource matters of mutual interest and concern to the extent allowed by law. The

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<sup>33</sup> Exec. Order No. 13,175, *supra*, Section 5(b) on Consultation.

<sup>34</sup> S. 2806 [108th], Section 516.

<sup>35</sup> Endangered Species Act and Subsistence Uses in Alaska (Supplement to Secretarial Order 3206) (Jan. 19, 2001).

<sup>36</sup> The Native American Policy of the Fish and Wildlife Service (June 28, 1994), available at <http://www.fws.gov/nativeamerican/Native%20American%20Policy.pdf>

<sup>37</sup> *Id.* at 3.

goal is to keep Native American governments involved in such matters from initiation to completion of related Service activities.”<sup>38</sup>

We disagree that the September 14, 2007 letter from the Acting Assistant Secretary to Mr. Joe A. Garcia, President National Congress of American Indians, relieves FWS of its obligation to consult with tribes in this instance. In response to Garcia’s request for government-to-government consultation before adopting a Closure Policy, FWS’s letter stated,

It has long been the position of the Department that formal government-to-government consultation is inappropriate with regard to the Federal subsistence program because Congress made a conscious decision to base the subsistence preference in Title VIII of ANILCA on rural residency rather than on Native status.

First, the administration of the Department of Interior has changed, and it is not clear whether this letter accurately reflects the Department’s current position. Second, the executive and secretarial orders above do not qualify the consultation requirement with a caveat that the law under which a federal agency is acting must mention Native Americans. Even if the Alaska National Interest Lands Conservation Act (ANILCA) and MBTA apply to a group than contains non-Natives, Native Americans must be consulted if a policy has “tribal implications.” As discussed above, the proposed regulations have substantial direct effects<sup>39</sup> on the Inupiat—a tribe whose cultural identity has been intertwined with the migratory bird hunt for thousands of years.

The U.S. Supreme Court has ruled that classifications turning on the status of Native Americans are not racial biased or illegitimate when there is a legitimate non-racial purpose underlying the

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<sup>38</sup> *Id.* at 5.

<sup>39</sup> Executive Order 13,175 at Section 1(a) defines “policies that have tribal implications” as “regulations, legislative comments or proposed legislation, and other policy statements or actions that have substantial direct effects on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes.”

preference.<sup>40</sup> In this case, differential treatment of Native Americans is based on recognition of their political status as a government entity.<sup>41</sup>

The Garcia letter also stated that, “consultation is unnecessary because the adoption of the policy does not change existing practices. For that reason, it does not constitute an action that has a ‘direct, substantial effect’ on federally recognized tribes in Alaska. . . we do not believe that consultation is warranted.”

A FWS decision curtailing migratory bird hunting most definitely has a direct, substantial effect on federally recognized tribes in Alaska. It reduces access to subsistence food and contributes to food insecurity and distress. It threatens the culture built around the migratory bird hunt and nalukataq. At every public meeting held on the proposed regulations, tribal members testified that the proposed regulations would impact them severely. The tribes must therefore be consulted.

FWS personnel have stated that, while they do not believe that ANILCA and MBTA require tribal consultation, actions taken under the Endangered Species Act (ESA) would require such consultation. Although the proposed regulations were changed in late 2008 to avoid a “jeopardy” determination under ESA, FWS believes that this relationship to ESA is insufficient to trigger tribal consultation. FWS personnel have advised NSB that the only time Alaska Natives were entitled to formal consultation on migratory birds pursuant to ESA would have been in 1993 when Spectacled eiders were listed as threatened or in 1997, when the North American breeding population of Steller’s eiders was declared threatened. But unlike the notice for the 2009 proposed regulations,<sup>42</sup> the notices declaring the Spectacled and Steller’s eiders threatened did

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<sup>40</sup> *Morton v. Mancari*, 417 U.S. 535 (1974) (invalidating preferential treatment for Native Americans under a federal statute, held that Native Americans are a political class and as such are not subject to suspect classification scrutiny, which might have threatened affirmative action); *Doe v. Kamehameha Schools/Bernice Pauahi Bishop Estate*, 470 F.3d 827, (9th Cir. 2006) (en banc ruling that Hawaiian private school receiving no federal funds may provide a preference for Native Hawaiians in admissions not violative of § 1981 evaluating the policy under Title VII standards taking into account the inherently broad and societal focus of education);

<sup>41</sup> *Cf. Morton v. Mancari*, 417 U.S. 535 (1974).

<sup>42</sup> *See* 73 Fed. Reg., *supra* at 76997-76998:

#### Government-to-Government Relations With Native American Tribal Governments

In accordance with the President's memorandum of April 29, 1994, “Government-to-Government Relations With Native American Tribal Governments” (59 FR 22951), and Executive Order 13175 (65 FR 67249; November 6, 2000), concerning consultation and coordination with Indian Tribal Governments, we have consulted with Alaska tribes and evaluated the rule for possible effects on tribes or trust resources, and have determined that there are no significant effects. The rule will legally recognize the subsistence harvest of migratory birds and their eggs for tribal members, as well as for other indigenous inhabitants.

not indicate that consultation occurred.<sup>43</sup> NSB has submitted a request under the Freedom of Information Act for all records of any tribal consultation that may have taken place in 1997. The request is pending.

We appreciate FWS's efforts to meet informally with tribal members prior to the public hearings, but we are dismayed that FWS did not consult with any tribal government prior to promulgating the draft regulations.

We hope that FWS will not only communicate with tribes, but also work with the people of the North Slope to form a co-management regime similar to that described in the Yukon-Kuskokwim Delta Goose Management Plan. FWS states in the Federal Register, "The Service views the plan as an effective mechanism in providing for cooperative management of geese on the Yukon-Kuskokwim Delta, and has therefore applied similar provisions to the policy that applies throughout the remainder of the state."<sup>44</sup> In 1997, a Spectacled and Steller's eiders Recovery Plan was added as an attachment to the Yukon-Kuskokwim Delta Goose Management Plan.<sup>45</sup>

### **Need for a Revised Environmental Assessment and Health Impact Assessment**

FWS states that "[t]he annual regulations and options were considered in the Environmental Assessment [EA], 'Managing Migratory Bird Subsistence Hunting in Alaska: Hunting Regulations for the 2009 Spring/Summer Harvest,' issued December 12, 2008."<sup>46</sup> This EA was not published and subjected to public review, but was made available to NSB on request.

The EA proposes regulations for subsistence hunters that are stricter than those of previous years. NSB is concerned that the FWS has failed to adequately consider the effects of the proposed ruling on public health and safety.

To determine the significance of potential impacts of a proposed action, the National Environmental Policy Act (NEPA) requires consideration of effects on the *human* environment,

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It is not clear why FWS included this statement if it does not believe that the proposed regulations trigger any consultation requirement.

<sup>43</sup> 62 Fed. Reg., *supra*, at 31748-31757.

<sup>44</sup> Notice of Updated Policy Regarding Harvest of Migratory Birds in Alaska Between March 10 and September 1, 64 Fed. Reg. 47512 (Aug. 31, 1999).

<sup>45</sup> *Id.* at 47514.

<sup>46</sup> 73 Fed. Reg., *supra*, at 76998.

including public health and safety.<sup>47</sup> This consideration must include direct, indirect, and cumulative effects, and must furthermore consider interrelated social, economic, and environmental effects in determining the degree to which the proposed action affects the human environment.<sup>48</sup>

FWS alludes to the importance of a traditional diet but fails to discuss how the “preferred alternative” (the proposed regulations) could affect the traditional diet of the Alaska Native people. The EA only analyzes the effect of an alternative to the proposed rule that would provide for the spring/summer subsistence hunt to be managed in the same way as the fall sports hunt:

Customary and traditional methods for taking migratory birds for subsistence in Alaska differ greatly from non-subsistence hunting. Birds are often the first new food supply available after an Alaskan winter. Subsistence users harvest birds not only for themselves and their immediate families but also share with other members of their community. The tradition of sharing is a critical element of the subsistence way of life. Birds are collected by the most efficient methods available, often following traditions within most Alaska Native cultures. The adoption of fall harvest regulations would require great changes to the customary and traditional use practices. If individual bag limits were imposed in addition to fall season methods and means, Alaskan subsistence communities may not be able to meet their nutritional needs.<sup>49</sup>

The EA does not recognize that these same impacts may occur under the “preferred alternative” (the proposed regulations) if residents’ access to migratory birds is restricted. The proposed restrictions could directly impact human physical health, as fifty-six percent of households in the North Slope obtain at least half of their food through subsistence.<sup>50</sup> FWS has presented no data

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<sup>47</sup> One of the stated purposes of NEPA is “to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man.” 42 U.S.C. § 4321. The federal government must “use all practicable means, consistent with other essential considerations of national policy” to “assure for all Americans safe, healthful, productive and aesthetically and culturally pleasing surroundings” *Id.* at §4331.

The regulations for implementing NEPA define the human environment as “the natural and physical environment and the relationship of people with that environment” 40 C.F.R. 1508.14. The regulations define effects subject to analysis as those that are “ecological, aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative.” *Id.* at §1508.8. In determining whether an effect is significant, an agency must evaluate the “degree to which the proposed action affects public health or safety.” *Id.* at §1508.27.

<sup>48</sup> *Id.* at §1508.14.

<sup>49</sup> Environmental Assessment, *supra*, at 34.

<sup>50</sup> (Data as of 2003.) North Slope Borough Comprehensive Plan, Background Report (2005), at 3-68 available at [http://www.north.slope.org/information/comp\\_plan/BackgroundReport06.pdf](http://www.north.slope.org/information/comp_plan/BackgroundReport06.pdf)

on consumption of migratory birds,<sup>51</sup> and the degree to which a change in consumption could impact the local diet.

Under Executive Order 12,898, agencies are directed to “collect, maintain, and analyze information on the consumption patterns of populations who principally rely on fish and/or wildlife for subsistence.”<sup>52</sup> These data are essential to a well-informed choice between alternatives, and could be readily collected without great expense. FWS must collect these data to make an adequately informed decision between alternatives.<sup>53</sup>

Hunting restrictions will likely raise the costs of hunting, as hunters will have to travel farther to obtain migratory birds, or rely on alternative sources of food (including other game that is more difficult to hunt). Injury is the second leading cause of death in the NSB, with rates far higher than the general U.S. population. This health disparity would be exacerbated if hunters are forced to go farther afield or take greater risks to harvest food for their families.<sup>54</sup>

This increased risks and costs likely to result from the proposed regulations may discourage subsistence hunting. Any action that decreases reliance on subsistence resources in the diet carries substantial health risks for the NSB population. The subsistence diet and lifestyle are the main factors protecting against many chronic diseases in Alaska Natives, including diabetes, high blood pressure, obesity, and cardiovascular disease, the risk of which would increase in proportion to dietary impacts of the proposed regulations.<sup>55</sup>

The proposed regulations would be superimposed on a planned Postal Regulatory Commission increase in bypass mail rates that is expected to take effect May 11, 2009.<sup>56</sup> Increased bypass mail rates will increase the cost of store-bought food substantially. Restricted access to

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<sup>51</sup> Harvests are an inadequate proxy for consumption according to nutritional researchers. See Wernham, A. Inupiat Health and Proposed Alaskan Oil Development: Results of the First Integrated Health Impact Assessment/ Environmental Impact Statement for Proposed Oil Development on Alaska's North Slope. *EcoHealth* 4, 500-513, 2007.

<sup>52</sup> Exec. Order No. 12,898, 59 Fed. Reg. 7629 (Feb. 16, 1994)

<sup>53</sup> 40 CFR § 1502.22

<sup>54</sup> Lamden M, Middaugh J, Dannenberg A. (1999). Injuries Associated with Snowmobiles in Alaska, 1993-1994. *Public Health Reports* 115: 48-53.

<sup>55</sup> Bjerregaard P, Young, T et al. (2004). Indigenous Health in the Arctic: as overview of the Circumpolar Inuit Population. *Scandinavian Journal of Public Health*. 32: 390-395; Murphy NJ, Schraer CD et al. (1995). Dietary change and obesity associated with glucose intolerance in Alaska Natives. *Journal of the American Dietetic Association*. 95:676-682.

<sup>56</sup> See Postal Service Price Changes, 74 Fed. Reg. 8124 (Feb. 23, 2009).

subsistence resources, high fuel costs, and marked increases in the costs of store bought foods may result in increases in food insecurity and hunger; as well as increased consumption of less expensive, low nutritional value store-bought foods. Poverty and food costs are strongly associated with poor dietary quality, because low-cost store-bought foods generally have low nutritional value.<sup>57</sup>

The proposed regulations pose a direct conflict with Inupiaq culture and self determination, with concerning implications for mental health and culture stress. Culture stress is a term used to refer to “the loss of confidence in the ways of understanding life and living that have been taught within a particular culture. It comes about when the complex of relationships, knowledge, languages, social institutions, beliefs, values, and ethical rules that bind a people and give them a collective sense of who they are and where they belong is subjected to change.”<sup>58</sup>

Subsistence hunting is the core of the Inupiaq culture and way of life. Limited hunting hours, road closures and the potential for emergency closures substantially decrease the opportunity for hunters to hunt migratory birds, and fundamentally conflicts with the traditional relationship between Inupiat hunters and natural resources. This conflict can cause significant culture stress. The EA should consider the implications of the proposed action for mental health in the NSB. Specifically, the EA should evaluate the baseline mental health status of affected communities, and the available data on how mental health could be impacted by the proposed ruling. Suicide rates in the NSB are among the highest in the U.S. Studies of Inuit populations indicate that measures of self governance and cultural continuity are among the most powerful determinants of suicide rates.<sup>59</sup> A co-management alternative – not considered in the EA – would greatly alleviate the risk of exacerbating mental health problems in affected communities.

## Overall Efficacy

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<sup>57</sup> Lambden, *supra*; J, Receveur O, Marshall J, Kuhnlein H. (2006). Traditional and Market Food Access in Arctic Canada is Affected by Economic Factors. *International Journal of Circumpolar Health*. 65 (4) 331-340; Vozoris N, Tarasuk V. (2003). Household Food Insufficiency is Associated with Poorer Health. *Journal of Nutrition*. 133: 120-126.

<sup>58</sup> Miller Chenier, Nancy. "Suicide Among Aboriginal People: Royal Commission Report (Canada)." *SMHAI - Suicide and Mental Health Association International*. 10 Mar. 2009, available at <http://suicideandmentalhealthassociationinternational.org/suiaborcanada.html>.

<sup>59</sup> Peter James Hutchinson, First Nation/State Relationships and First Nation Health: An Exploratory Analysis of Linkage Social Capital as a Determinant of Health, 2006 (paper presented at the 4th National gathering of Graduate Students at the University of Alberta, Edmonton); Chandler, M. J., & Lalonde, C. E. (2008). Cultural continuity as a protective factor against suicide in First Nations youth. *Horizons: A Special Issue on Aboriginal Youth, Hope or Heartbreak: Aboriginal Youth and Canada's Future*, 10(1), 68-72.

Protecting threatened eiders requires a cooperative effort between FWS and the people of the North Slope. Regulations developed with little input from the North Slope people and little consideration for local knowledge, customs, and tradition are unlikely to be effective. Furthermore, using law enforcement activities to conserve eiders is unlikely to be effective for either helping eiders or developing collaboration. Should people retaliate against the regulations by deliberately killing threatened eiders, no one's interests will be protected —neither FWS's, nor NSB's, nor the eiders'. FWS should collaborate with the North Slope people to agree on the best long-term method for protecting threatened eiders.<sup>60</sup> Implementing FWS's proposed regulations for 2009 is not the best approach.

Sincerely,



*Acting Mayor*

Edward S. Itta  
Mayor

cc Taqulik Hepa, Director, NSB Department of Wildlife Management  
Bessie O'Rourke, NSB Attorney  
Johnny Aiken, Director, NSB Department of Planning  
Andy Mack, NSB Mayor's Office  
Karla Kolash, NSB Mayor's Office

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<sup>60</sup> See Exec. Order No. 12866, 58 Fed. Reg. 51735 (Sept. 30, 1993) at 1(b) (3): "Each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public."