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

CENTER FOR BIOLOGICAL
DIVERSITY,

Plaintiff,

v.

WILBUR ROSS, in his official capacity
as Secretary, Department of Commerce;
CHRIS OLIVER, in his official capacity
as Assistant Administrator, NOAA
Fisheries; NATIONAL MARINE
FISHERIES SERVICE,

Defendants.

Case No. _____

**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
(16 U.S.C. § 1533, 5 U.S.C. §§ 701-706)**

INTRODUCTION

1. The Center for Biological Diversity (Center), an environmental organization that works to protect imperiled wildlife species and their habitats, challenges the failures of the Secretary of Commerce and the National Marine Fisheries Service (collectively, NMFS) to comply with the nondiscretionary obligations set forth in the Endangered Species Act, 16 U.S.C. §§ 1531–1544 (Act). Specifically, NMFS has failed to designate “critical habitat” for the Arctic subspecies of ringed seal (ringed seal) and the Beringia distinct population segment (DPS) of the bearded seal (bearded seal) (collectively, ice seals) . *Id.* §§ 1533(a)(3), (b)(6)(A)(ii), (b)(6)(C). NMFS’s failure to designate critical habitat violates its mandatory duty under the Act, *see id.*, and deprives these imperiled animals of vitally important protections in their most essential habitat areas.
2. Ringed and bearded seals depend upon Arctic sea ice to mate, reproduce, rear their young, and forage for food. Ongoing and anticipated reductions in sea ice from climate change pose a significant threat to the survival of both species. In addition to climate change, oil exploration, shipping, and commercial fishing threaten both species.
3. In light of these significant threats, and following the Center’s petition to protect ice seals under the Act, NMFS listed both seals as “threatened” species under the Act in 2012. 77 Fed. Reg. 76706 (Dec. 28, 2012) (ringed seals), 77 Fed. Reg. 76740 (Dec. 28, 2012) (bearded seals). NMFS did not designate critical habitat for either species.

4. Having listed the ice seals on December 28, 2012, the Endangered Species Act required that NMFS designate critical habitat no later than December 28, 2013. Yet NMFS still has not done so.

5. The Endangered Species Act can provide lifesaving habitat protections for these imperiled ice seals, but only if NMFS complies with its mandates. Because NMFS is in violation of the Endangered Species Act and the Administrative Procedure Act (APA) by failing to timely designate critical habitat for the ice seals, the Center brings this action. The Center requests declaratory relief and an order requiring NMFS to issue rules designating critical habitat to safeguard the Arctic habitat the ice seals need to survive in the wild.

JURISDICTION AND VENUE

6. Plaintiff brings this action under the Endangered Species Act, 16 U.S.C. §§ 1533, 1540(g), and the APA, 5 U.S.C. § 706.

7. The Court has jurisdiction over this action under 28 U.S.C. § 1331 (federal question jurisdiction), 28 U.S.C. § 1346 (United States as a defendant), 16 U.S.C. § 1540(c) (actions arising under the Endangered Species Act), 16 U.S.C. § 1540(g) (citizen suit provision of the Endangered Species Act), and 5 U.S.C. § 702 (APA).

8. The relief sought is authorized under 28 U.S.C. § 2201 (declaratory relief), 28 U.S.C. § 2202 (injunctive relief), 16 U.S.C. § 1540(g) (citizen suits under the Endangered Species Act), and 5 U.S.C. § 706(1) (relief under the APA).

9. The Center provided formal notice to NMFS of its intent to file suit under the Endangered Species Act on March 14, 2019, more than 60 days prior to filing this complaint, consistent with the Act's statutory requirements. 16 U.S.C. § 1540(g)(2). Because NMFS has not remedied the legal violations outlined in the notice, an actual, justiciable controversy exists between the parties within the meaning of the Declaratory Judgment Act. 28 U.S.C. § 2201.

10. Venue is proper in the United States District Court for the District of Alaska according to 28 U.S.C. § 1391(e)(1)(B) because the area that is the subject of this action, the ice seal's Arctic habitat, is in Alaska.

PARTIES

11. Plaintiff Center for Biological Diversity is a national, nonprofit conservation organization incorporated in California and headquartered in Tucson, Arizona, with offices throughout the United States, including Arizona, California, Colorado, Florida, Hawai'i, Idaho, Minnesota, Nevada, New Mexico, New York, North Carolina, Oregon, Washington, and Washington, D.C., and in Mexico. The Center works through science, law, and policy to secure a future for all species, great and small, hovering on the brink of extinction. The Center has more than 69,000 active members across the country, including Alaska. The Center and its members are concerned with the conservation of imperiled species, including the ringed seal and bearded seal, through effective implementation of the Endangered Species Act. The Center brings this action on behalf of itself and its members.

12. The Center's members include individuals with recreational, scientific, professional, aesthetic, spiritual, and ethical interests in the ice seals and their habitat. They have visited areas vital to the survival of the ice seals to observe them and enjoy the beauty of their Arctic habitat, and they have concrete plans to do so again.

13. NMFS's failure to comply with the Endangered Species Act's nondiscretionary deadline to designate critical habitat for ice seals denies vital protections that the species need to survive and recover. For example, while NMFS withholds final critical habitat designations, oil exploration and development activities continue to expand and impact the ice seals' remaining habitat. Critical habitat is necessary to ensure that oil and gas activities and other federally permitted activities do not result in the adverse modification or destruction of the ice seals' essential habitat areas.

14. Until NMFS protects the ice seals' critical habitat under the Act, the Center's and its members' interests in the species and their habitats are injured. These injuries are actual, concrete injuries presently suffered by the Center's members. NMFS's inaction caused these injuries, which will continue to occur unless this Court grants relief.

15. The relief sought herein—an order compelling NMFS to designate critical habitat—would redress these injuries by protecting the ringed and bearded seals' habitat before it can be further degraded or destroyed. Conserving the ice seals and their habitat would mean that the Center and its members can continue to pursue their educational, scientific, recreational, aesthetic, and spiritual interests in them. The Center and its members have no other adequate remedy at law.

16. Defendant Wilbur Ross is the Secretary of the U.S. Department of Commerce. As Secretary of Commerce, he has the ultimate responsibility to administer and implement the provisions of the Endangered Species Act for the ringed and bearded seals, including timely designation of critical habitat, and to comply with all other federal laws applicable to the Department of Commerce. The Center sues Defendant Ross in his official capacity.

17. Defendant Chris Oliver is the Assistant Administrator for Fisheries at NMFS and has responsibility for implementing and fulfilling the agency's duties under all applicable federal laws including the Endangered Species Act and APA. Mr. Oliver is sued in his official capacity.

18. Defendant United States National Marine Fisheries Service (NMFS) is a federal agency within the Department of Commerce. The Secretary of Commerce has delegated his authority to administer the Endangered Species Act for most marine wildlife to NMFS. 50 C.F.R. § 402.01(b). This authority encompasses timely compliance with the Endangered Species Act's mandatory deadlines to designate critical habitat.

STATUTORY AND REGULATORY FRAMEWORK

19. The Endangered Species Act “represent[s] the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1978). “Congress intended endangered species be afforded the highest of priorities.” *Id.* at 174. Accordingly, the Act's purpose is to “provide a program for the conservation of . . . endangered species and threatened species” and “to provide a

means whereby the ecosystems upon which endangered . . . and threatened species depend may be conserved.” 16 U.S.C. § 1531(b).

20. To that end, the Endangered Species Act requires NMFS to protect imperiled species by listing them as “endangered” or “threatened.” *Id.* § 1533(a)(1). A species is endangered if it “is in danger of extinction throughout all or a significant portion of its range.” *Id.* § 1532(6). A species is threatened if it is “is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* § 1532(20).

21. Once a species is listed, it receives a host of important protections designed to prevent its extinction and aid its recovery, including one of the most crucial protections—safeguards for its “critical habitat.” *Id.* § 1533(a)(3)(A).

22. Critical habitat includes specific areas occupied by the threatened or endangered species with “physical or biological features . . . essential to the conservation of the species and . . . which may require special management considerations or protection,” as well as specific areas unoccupied by the species that “are essential for the conservation of the species.” *Id.* § 1532(5)(A). “Conservation” of a species means “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the Act] are no longer necessary.” 16 U.S.C. § 1532(3). Accordingly, critical habitat includes areas that require proper management to ensure a listed species will not simply survive but also recover.

23. Protecting critical habitat is necessary to protect and recover many listed species, particularly those that have become endangered or threatened because of historical and ongoing habitat loss or degradation. Thus, Section 7 of the Endangered Species Act requires all federal agencies to ensure their actions do not “jeopardize the continued existence” of any listed species or “result in the destruction or adverse modification” of their remaining “critical habitat.” *Id.* § 1536(a)(2).

24. Additionally, as NMFS has recognized, critical habitat designations provide other benefits, including opportunities for public education and involvement, which help make the public, state agencies, and local governments more aware of the plight of listed species and conservation actions needed to aid in species recovery. *See, e.g.*, 76 Fed. Reg. 20,180, 20,191 (April 11, 2011) (discussing benefits of designating critical habitat for Cook Inlet beluga whales).

25. To ensure species at risk of extinction receive these essential habitat protections in a timely manner, Congress prioritized designating critical habitat. *Id.* § 1533(a)(3), (b)(6); *see also id.* § 1531(b) (statutory directive to “provide a means whereby the ecosystems upon which endangered . . . and threatened species depend may be conserved”). NMFS is required, “to the maximum extent prudent and determinable,” to designate critical habitat for a species “concurrently with making a determination” that it is endangered or threatened,” *id.* § 1533(a)(3)(A), (b)(6)(C), and within one year of issuing a rule proposing critical habitat. *Id.* § 1533(b)(6)(A)(ii).

26. If critical habitat is “not . . . determinable” at this mandatory decision point, NMFS may extend the deadline to designate critical habitat by “no more than one additional year,” at which point it must publish a final regulation “based on such data as may be available at the time.” *Id.* § 1533(b)(6)(C)(ii). Designation of critical habitat is not determinable when “[d]ata sufficient to perform required analyses are lacking; or . . . [t]he biological needs of the species are not sufficiently well known to identify any area that meets the definition of ‘critical habitat.’” 50 C.F.R. § 424.12(a)(2).

27. Designating critical habitat is “not prudent” when: (1) “the species is threatened by taking or other human activity,” such as commercial collecting, and identifying critical habitat would increase the degree of that threat; or (2) “designation of critical habitat would not be beneficial to the species” because, for instance, habitat destruction is not a threat to the species. *Id.* § 424.12(a)(1).

28. NMFS must make critical habitat designations based on “the best scientific data available.” 16 U.S.C. § 1533(b)(2).

29. If NMFS finds it is not prudent to designate critical habitat or that critical habitat is not determinable, it must “state the reasons for not designating critical habitat in the publication of proposed and final rules listing a species.” 50 C.F.R. § 424.12(a).

30. Time has proven the wisdom of Congress’ requirement that the Service designate critical habitat for listed species. Studies show that species with critical habitat are more than twice as likely to be in recovery than those without it.

31. But the Endangered Species Act does not safeguard a species' critical habitat until NMFS designates it. Accordingly, it is imperative that NMFS meticulously follow the Act's procedures and deadlines to ensure it designates critical habitat in a timely manner.

FACTS GIVING RISE TO PLAINTIFF'S CLAIMS FOR RELIEF

32. NMFS acknowledges that the best available science demonstrates that the earth will continue to warm throughout this century and that the warming will cause a dramatic loss of sea ice and snow cover in the Arctic. The best available science also shows that such losses will likely cause a precipitous decline in the ringed and bearded seal populations and that both species will disappear from most of the places they currently live within the foreseeable future.

33. The ringed seal (*Phoca (pusa) hispida*), named for the small rings dotting its fur, is the smallest and most ice dependent of all Arctic seals. Unlike other seals, ringed seals dig caves in the snow to rest and give birth. These snow caves provide vital life functions — they conceal pups from predators and protect them from the extreme cold while nursing. Without these snow caves, ringed seal pups freeze to death or are eaten by polar bears or other animals. Sea ice and snow are necessary for ringed seals to build their caves. Diminishing ice and snow cover are the greatest threats to the survival of the species.

34. Like the ringed seal, the bearded seal (*Erignathus barbatus*) cannot live without sea ice. They breed, reproduce, raise their young and molt on sea ice; they use it as a platform for hunting. Without the right amount of sea ice in the right place at the right

time, bearded seals cannot perform these essential life functions. Scientists predict that the Arctic may have ice-free summers, a critical period for bearded seals, within a few decades.

35. Climate change is also likely to intensify other threats to ringed and bearded seals, including oil and gas development, contaminants and shipping.

36. In 2008, the Center submitted a formal petition, based on the best scientific studies available, to list three seal species, including ringed and bearded seals, under the ESA. The Center also requested that critical habitat be designated for these species concurrently with listing under the ESA.

37. On September 4, 2008, NMFS published a 90-day finding that the petition presented substantial scientific or commercial information indicating that the listing may be warranted. 73 Fed. Reg. 51615 (Sept. 4, 2008). On September 9, 2009, the Center filed suit challenging NMFS's failure to issue a 12-month finding on the petition. Pursuant to a settlement agreement, NMFS agreed to make 12-month findings for ringed and bearded seals no later than November 1, 2010.

38. On December 10, 2010, NMFS published 12-month findings proposing to list the ringed seal and bearded seal. 75 Fed. Reg. 77476 (Dec. 10, 2010) (ringed seals), 75 Fed. Reg. 77496 (Dec. 10, 2010) (bearded seals). The Arctic subspecies of the ringed seal and Beringia DPS of the bearded seal are found within the United States.

39. After NMFS failed to finalize the listings within one year as required by the ESA, the Center sued NMFS and in 2012, NMFS published final rules listing ringed and

bearded seals as threatened under the ESA. 77 Fed. Reg. 76706 (Dec. 28, 2012) (ringed seals), 77 Fed. Reg. 76740 (Dec. 28, 2012) (bearded seals).

40. Neither final rule included critical habitat designations for the newly listed species. Instead, both final rules stated that critical habitat was “not determinable” at the time. NMFS stated that it would “propose critical habitat for Arctic ringed seals in a separate rulemaking” and solicited information for that future critical habitat rulemaking. 77 Fed. Reg. at 76719. Similarly, NMFS stated that it would “designate critical habitat for the Beringia DPS in a subsequent rulemaking” and solicited information related to that future designation. 77 Fed. Reg. at 76765. No timelines for the critical habitat designations were provided.

41. NMFS subsequently issued a proposed rule to designate critical habitat for Arctic ringed seals in December 2014, 79 Fed. Reg. 73010 (Dec. 9, 2014), yet as of the date of this Complaint, NMFS has not finalized that proposal. NMFS has not proposed or finalized critical habitat for the Beringia DPS of bearded seals.

42. NMFS made no findings in either the proposed or final listing rules that designating critical habitat was “not prudent.” Indeed, NMFS proposed to designate areas for the ringed seal it identified as meeting the definition of critical habitat.

43. In 2013, the oil industry, the state of Alaska and others challenged the final listing rule in federal district court in Alaska, and the Center intervened to defend the listing. In 2014, the district court struck down the listing of the bearded seal, and in 2016 the same court vacated the ringed seal listing. In 2016 and then in 2018 the Ninth Circuit reversed

the district court rulings and reinstated ESA protections for bearded seals and ringed seals, respectively. *Alaska Oil and Gas Ass'n v. Pritzker*, 840 F.3d 671 (9th Cir. 2016) (bearded seals); *Alaska Oil and Gas Ass'n v. Ross*, 722 Fed. App. 666 (9th Cir. 2018) (ringed seals).

44. Under the Endangered Species Act, NMFS was required to designate critical habitat no later than one year after its finding that critical habitat was “not determinable” at the time of listing in December 2012, and no more than a year after proposing critical habitat for the ringed seal in December 2014. Yet following a pattern of missed statutory deadlines, NMFS has not made this mandatory, nondiscretionary finding, in violation of the Act. 16 U.S.C. § 1533(b)(3)(B).

45. NMFS’s ongoing failure to designate critical habitat for ice seals deprives these threatened animals of protections to which they are legally entitled, and leaves them at increased risk of injury and death in their most important habitat areas.

FIRST CLAIM FOR RELIEF

Failure to Designate Critical Habitat for the Ringed Seal

46. The Center re-alleges and incorporates by reference all the allegations set forth in this Complaint as though fully set forth below.

47. The Endangered Species Act required NMFS to designate critical habitat for the ringed seal no later than one year after its listing decision, 16 U.S.C. § 1533(a)(3)(A)(i), (b)(6)(C), and within one year of proposing critical habitat. *Id.* § (b)(6)(A)(ii). However, NMFS never finalized the proposed designation of critical habitat for ringed seals. NMFS

is therefore in violation of the Act's express statutory command to timely designate critical habitat.

48. Under the APA a reviewing court "shall . . . "compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

49. NMFS's failure to designate critical habitat for the ringed seal violates the Endangered Species Act, 16 U.S.C. § 1533(a)(3)(A), (b)(6)(A), (C), and its implementing regulations, and constitutes agency action "unlawfully withheld or unreasonably delayed" within the meaning of the APA, 5 U.S.C. § 706(1).

SECOND CLAIM FOR RELIEF

Failure to Designate Critical Habitat for the Bearded Seal

50. The Center re-alleges and incorporates by reference all the allegations set forth in this Complaint as though fully set forth below.

51. The Endangered Species Act required NMFS to designate critical habitat for the bearded seal within one year of its listing decision, 16 U.S.C. § 1533(a)(3)(A)(i), (b)(6)(C). NMFS has not proposed or finalized the designation of critical habitat for bearded seals. NMFS is thus in violation of the Act's express statutory command to timely designate critical habitat.

52. Under the APA, a reviewing court "shall . . . compel agency action unlawfully withheld or unreasonably delayed." 5 U.S.C. § 706(1).

53. NMFS's failure to designate critical habitat for the bearded seal violates the Endangered Species Act, 16 U.S.C. § 1533(a)(3)(A), (b)(6)(A), (C), and its implementing

regulations, and constitutes agency action “unlawfully withheld or unreasonably delayed” within the meaning of the APA, 5 U.S.C. § 706(1).

REQUEST FOR RELIEF

WHEREFORE, Plaintiff Center for Biological Diversity requests that this Court enter a Judgment in favor of the Center providing the following relief:

- (1) Declare that Defendants violated the Endangered Species Act and APA by failing to designate critical habitat for the ringed seal;
- (2) Declare that Defendants violated the Endangered Species Act and APA by failing to designate critical habitat for the bearded seal;
- (3) Order Defendants to designate—by a reasonable date certain—final critical habitat for the ringed seal under the Endangered Species Act, 16 U.S.C. § 1533(a)(3)(A);
- (4) Order Defendants to designate—by a reasonable date certain—final critical habitat for the bearded seal under the Endangered Species Act, 16 U.S.C. § 1533(a)(3)(A);
- (3) Grant the Center its reasonable attorneys’ fees and costs in this action, as provided by the Endangered Species Act, 16 U.S.C. § 1540(g)(4), or the Equal Access to Justice Act, 28 U.S.C. § 2412; and
- (4) Provide such other relief as the Court deems just and proper.

DATED: June 13, 2019

Respectfully submitted,

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