



Submitted via certified and electronic mail

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Re: 60-Day Notice of Intent to Sue: Violations of the Endangered Species Act; Failure to Designate Critical Habitat for Bearded and Ringed Seals

Dear Secretary Ross, Acting Administrator Jacobs, and Assistant Administrator Oliver:

This letter serves as a sixty-day notice of intent to sue the National Oceanic and Atmospheric Administration, through the National Marine Fisheries Service (“NMFS”), over violations of Section 4 of the Endangered Species Act (the “Act,” or “ESA”), 16 U.S.C. § 1531 *et seq.*, on behalf of the Center for Biological Diversity. Specifically, NMFS has failed to designate critical habitat for ringed and bearded seals under the ESA. *See* 16 U.S.C. § 1533(a)(3)(A); *see also id.* at § 1533(b)(6)(C). NMFS’s failures deprive these imperiled species of important protections and put them at further risk of extinction. This letter is provided pursuant to the 60-day notice requirement of the citizen suit provision of the Act, to the extent that such notice is deemed necessary by a court. *See id.* at § 1540(g).

A. The Listing of Ringed and Bearded Seals under the ESA

Bearded and ringed seals are ice dependent species. They depend on sea ice for the reproductive activities of birthing and nursing as well as molting that are essential to the survival of these species. Multiple studies have documented how the loss and early breakup of sea ice and decreasing snowbank are negatively impacting the ice seals throughout many regions in their range. Global warming has caused a rapid decline in Arctic sea-ice cover. The Ninth Circuit Court of Appeals has recognized that for both the ringed and bearded seal, climate change models from the Intergovernmental Panel on Climate change show that sea ice habitat for the

species is diminishing, and that the disappearance of that ice means both species will likely become endangered in the foreseeable future.

In 2008, the Center submitted a formal, detailed petition 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. 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. On December 10, 2010, NMFS published in the federal register 12-month findings proposing to list the ringed seal and two distinct populations segments (DPSs) of the 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.

After NMFS failed to finalize the listings within one year as required by the ESA, the Center sued NMFS and in 2012, NMFS published a final rule 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).

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).

Neither final rule included critical habitat designations for the newly listed species, as required by the Act. Instead, 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.

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 NMFS has not finalized that proposal. NMFS has not proposed or finalized critical habitat for the Beringia DPS of bearded seals.

B. The ESA Requires that NMFS Designate Critical Habitat for Bearded and Ringed Seals

Congress enacted the Endangered Species Act “to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved,” is achieved. 16 U.S.C. § 1531(b). As the U.S. Supreme Court has recognized, “[t]he plain intent of

Congress enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.” *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978).

The designation and protection of critical habitat is one of the primary ways in which the fundamental purpose of the Act, is achieved.

When NMFS lists a species as endangered or threatened, it must also concurrently designate critical habitat for that species. Specifically, section 4(a)(3)(A)(i) of the Act states that, “to the maximum extent prudent and determinable,” the Services “shall, concurrently with making a determination . . . that a species is an endangered species or threatened species, designate any habitat of such species which is then considered to be critical habitat.” 16 U.S.C. § 1533(a)(3)(A); *see also id.* at § 1533(b)(6)(C). The use of the word “shall” makes it clear that the designation of critical habitat is required for all listed species that occur within jurisdiction of the United States. This duty is not discretionary.¹

Critical habitat is defined by the ESA as “the specific areas within the geographic area occupied by the species . . . on which are found those physical or biological features (I) *essential to the conservation of the species* and (II) which may require special management considerations or protection.” 16 U.S.C. § 1532(5)(A)(i) (emphasis added). Critical habitat may also encompass unoccupied habitat if that habitat is “essential for the conservation of the species.” *Id.* § 1532(5)(A)(ii). The purpose of critical habitat is to “carve out territory that is not only necessary for the species’ survival but also essential for the species’ recovery.” *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.* (“FWS”), 378 F.3d 1059, 1070 (9th Cir. 2004).

The legislative history of the Act show Congress clearly recognized the importance of critical habitat designation in conserving listed species:

[C]lassifying a species as endangered or threatened is only the first step in insuring its survival. Of equal or more importance is the determination of the habitat necessary for that species’ continued existence. . . . If the protection of endangered and threatened species depends in large measure on the preservation of the species’ habitat, then *the ultimate effectiveness of the Endangered Species Act will depend on the designation of critical habitat.*

H.R. Rep. No. 94-887 at 3 (1976) (emphasis added).

The Act generally requires that critical habitat designation take place concurrently with listing because critical habitat provides important protection for imperiled species beyond that provided by listing alone. Pursuant to section 7(a)(2) of the Act, federal agencies must ensure through consultation with the Services that any action they authorize, fund, or carry out will not “jeopardize the continued existence of any [listed] species.” *Id.* at § 1536(a)(2). For species with critical habitat, each federal agency must *additionally* guarantee that its actions will not “result in

¹ The Services may only find that it is “not prudent” to designate critical habitat for a species where designating critical habitat would either increase the degree of threat to a species or would not be beneficial to the species. 50 C.F.R. § 424.12(a)(1)(i)-(ii) (2011). As Congress made clear when it passed the ESA, it only intended for agencies to invoke the “not prudent” exception to designating critical habitat in “rare circumstances.” H.R. Rep. No. 95-1625 at 17 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9467. *See Natural Res. Def. Council v. U.S. Dept. of the Interior*, 113 F.3d 1121, 1126 (9th Cir. 1997).

the destruction or adverse modification” of that habitat. *Id.* 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).

NMFS may delay designation of critical habitat if it determines that the critical habitat is not determinable at the time of listing. In that case, NMFS has one additional year to publish a final critical habitat regulation. 16 U.S.C. § 1533(b)(6)(C)(i)-(ii) (if critical habitat species is not determinable at time of final listing rule, NMFS has “one additional year [to designate critical habitat], but not later than the close of such additional year [NMFS] must publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat”).

C. NMFS’s Failure to Designate Critical Habitat for Bearded and Ringed Seals Violates the ESA

NMFS’s failure to designate critical habitat for the Beringia DPS of bearded seals constitutes a violation of the Act. 16 U.S.C. § 1533(a)(3)(A); *see also id.* at § 1533(b)(6)(C). Likewise, NMFS’s failure to designate critical habitat for Arctic ringed seals constitutes a violation of the Act. 16 U.S.C. § 1533(a)(3)(A); *see also id.* at § 1533(b)(6)(C). The final rules listing bearded and ringed seals were both published in December 2012 and ultimately upheld by the Ninth Circuit Court of Appeals. The rules did not include critical habitat designations for bearded and ringed seals, but instead stated that critical habitat was “not determinable” at the time, and that designations were forthcoming.

As described above, in cases where critical habitat is not readily determinable at the time of listing, the Act provides a one-year period for NMFS to establish critical habitat. *See* 16 U.S.C. § 1533(b)(6)(C). That period has long since expired for both bearded and ringed seals, and NMFS is in clear violation of the Act. If bearded and ringed seals are to survive, they must not be denied the strong protections of the Endangered Species Act which were intended to safeguard them from extinction.

For ice seals, critical habitat is particularly important because, although current statutes (the Marine Mammal Protection Act, or MMPA) currently prohibit take of ice seals, the seals still face threats of commercial fishing, shipping, pollutants, and oil exploration that could be mitigated by designation of critical habitat. Oil exploration, in particular, poses numerous concerns to ice seals, as recognized by NMFS:

Oil and gas exploration, development, and production activities include, but are not limited to: seismic surveys; exploratory, delineation, and production drilling operations; construction of artificial islands, causeways, ice roads, shore-based facilities, and pipelines; and vessel and aircraft operations. These activities have the potential to affect bearded seals, primarily through noise, physical disturbance, and pollution, particularly in the event of a large oil spill or blowout.

77 Fed. Reg. 76746 (bearded seal listing). NMFS also noted that the significance of all threats would likely increase in the future. *Id.* at 76747. Indeed, the Trump administration's draft plan for nationwide offshore oil and gas leases would significantly threaten ice seals by expanding leases in the Arctic. In addition, proposals to open the Arctic National Wildlife Refuge to oil and gas development, and the approval of the first oil development in federal Arctic waters (the Liberty project) pose additional threats to both species.

We are vitally concerned about and actively involved in the protection of these ice seals and their habitat. Our organizations' members and staff engage in professional, recreational, aesthetic, and scientific activities involving these species and its habitat, including observing and attempting to observe the species. On their behalf, we urge you to take prompt action to protect the species under the Endangered Species Act. Accordingly, an acceptable remedy would be prompt issuance of proposed rules identifying the critical habitat designation for the bearded and ringed seals and a date certain by which to finalize the critical habitat designations.

We are eager to address these violations and discuss with NMFS prospects for resolution at the earliest possible date. If NMFS does not act within 60 days to correct these violations of the Act, however, we may pursue litigation in federal court. We will seek injunctive and declaratory relief regarding these violations. If you have any questions, wish to meet to discuss this matter, or feel this notice is in error, please contact us. Thank you for your concern.

Sincerely,

/s/ Emily Jeffers

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