



THE STATE  
of **ALASKA**  
GOVERNOR MIKE DUNLEAVY

Department of Law

CIVIL DIVISION

1031 West Fourth Avenue, Ste. 200  
Anchorage, AK 99501  
Main: (907) 269-5100  
Fax: (907) 276-3697

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**Via Email and Certified Mail**

**Certified Mail No.: 7022 0410 0001 5917 2577**

Gina Marie Raimondo, Secretary  
U.S. Department of Commerce  
1401 Constitution Avenue NW, Rm. 5516  
Washington, DC 20230  
[TheSec@doc.gov](mailto:TheSec@doc.gov)

**Certified Mail No.: 7022 0410 0001 5917 2584**

Dr. Richard W. Spinrad, Administrator  
National Oceanic and Atmospheric Administration  
1401 Constitution Avenue NW, Rm. 5516  
Washington, DC 20230  
[Richard.Spinrad@noaa.gov](mailto:Richard.Spinrad@noaa.gov)

**Certified Mail No.: 7022 0410 0001 5917 2560**

Janet Coit, Assistant Administrator for Fisheries  
National Marine Fisheries Service  
1315 East-West Highway  
Silver Spring, MD 20910  
[janet.coit@noaa.gov](mailto:janet.coit@noaa.gov)

**Re: Sixty-Day Notice of Intent to Sue for Violations of the Endangered Species Act, 16 U.S.C. §§ 1531-1544, in Designating Critical Habitat for the Beringia DPS of the Bearded Seal and for the Arctic Ringed Seal**

Dear Secretary Raimondo, Administrator Spinrad, and Assistant Administrator Coit:

The State of Alaska gives notice pursuant to section 11(g) of the Endangered Species Act ("ESA"), 16 U.S.C. § 1540(g), of the State's intent to sue the National Marine Fisheries Service of the U.S. Department of Commerce, National Oceanic and Atmospheric Administration (collectively, "NMFS") for failure to comply with the ESA in designating critical habitat for the Beringia distinct population segment ("DPS") of the Pacific bearded seal, *Erignathus barbatus ssp. nauticus* ("bearded seal"), 87 Fed. Reg.

19,180 (Apr. 1, 2022), and for the Arctic subspecies of the ringed seal, *pusa hispida ssp. hispida* (“ringed seal”), 87 Fed. Reg. 19,232 (Apr. 1, 2022).

Alaska, as a sovereign state and pursuant to its public trust responsibilities, has an interest in managing and conserving all wildlife and natural resources within its jurisdiction, including the bearded seal and ringed seal, as well as their habitat and food sources.<sup>1</sup> As a result, Alaska shares wildlife responsibilities and jurisdiction with the federal government as a matter of constitutional law, with Alaska having the lead authority absent legislation that provides otherwise.

Alaska is also responsible for its citizens’ welfare, including their economic welfare. The oil and gas industry is Alaska’s largest non-governmental industry, and accounts for 17 percent of private sector jobs and 19 percent of private sector payroll. Revenue derived from the oil and gas industry in the form of taxes, royalties, and rentals provided Alaska with an estimated 24 percent of the State’s general fund unrestricted revenues for FY 2020. Unjustified efforts to stop or delay oil and gas exploration and development have a direct negative economic impact on Alaska and its citizens in the form of lost employment and tax revenues.

In short, Alaska’s Constitution imposes a duty on the State to responsibly manage and develop Alaska’s natural resources for the maximum benefit of its people. NMFS’s critical habitat designation for the bearded seal and ringed seal is inconsistent with the ESA, overbroad and unsupported by the record, detrimental to Alaska and the Alaskan people, and harmful to the Alaskan environment.

## **I. Background.**

On April 1, 2022, NMFS issued final rules designating critical habitat for the bearded seal and ringed seal. The designated critical habitat for the bearded seal consists of a single “specific area” containing 273,000 square miles or about 174 *million* acres.<sup>2</sup> The ringed seal’s critical habitat similarly consists of a single “specific area” containing 257,000 square miles or about 164 *million* acres.<sup>3</sup> By comparison, the State of Texas contains 268,000 square miles. These enormous and continuous blocks of purported critical habitat are inconsistent with the statutory term “critical habitat,” which is limited to specific areas that contain features essential to the conservation of the species or, in the case of

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<sup>1</sup> Alaska Const. Art. VIII §§ 1, 4; Alaska Stat. § 16.05.020.

<sup>2</sup> See *Designation of Critical Habitat for the Beringia Distinct Population Segment of the Bearded Seal*, 87 Fed. Reg. 19,180, 19,230 (Apr. 1, 2022).

<sup>3</sup> See *Designation of Critical Habitat for the Arctic Ringed Seal*, 87 Fed. Reg. 19,232, 19,287 (Apr. 1, 2022).

unoccupied areas, areas that are themselves essential to the conservation of the species.<sup>4</sup> In this case, the entire critical habitat area is considered to be occupied, reflecting the fact that ringed seals and bearded seals are two of the most common marine mammals in the Arctic.<sup>5</sup>

The enormous size of the critical habitat designations for the bearded seal and the ringed seal stands in stark contrast to other NMFS critical habitat designations. For example, in 2016, NMFS expanded the critical habitat for the endangered Atlantic right whale to cover two specific areas off the Atlantic Coast of the United States that include, in total, 39,415 square miles—about an order of magnitude smaller than the combined area identified as critical habitat for the two seal species.<sup>6</sup> Other critical habitat designations are also much smaller and, importantly, focused on specific areas. The critical habitat designated for the Stellar sea lion, for example, is limited to specific areas along the Aleutian Islands despite the species' extensive range in the Bering Sea and the Pacific Coast of much of the United States.<sup>7</sup> Similarly, the critical habitat for the leatherback sea turtle is comprised of two specific areas along the Pacific Coast containing, in total, 41,914 square miles and does not include all of the species' occupied habitat within the jurisdiction of the United States.<sup>8</sup> Indeed, it is telling that NMFS has not disclosed the actual size of the critical habitat for the bearded seal and ringed seal.

Inexplicably, NMFS listed two species that are extremely common in Alaskan waters and, in the case of the ringed seal, throughout the entire Arctic region. Both species are listed as species of "Least Concern" by the International Union of Conservation of Nature.<sup>9</sup> Because the bearded seal and ringed seal are abundant and have vast ranges with

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<sup>4</sup> 16 U.S.C. § 1532(5)(A)(i), (ii).

<sup>5</sup> Scientists recently estimated that the minimum population of ringed seals in the U.S. portion of the Bering, Chukchi and Beaufort Seas is 470,000 seals, while the minimum population of bearded seals in the U.S. portion of the Bering and Chukchi Seas is 357,329 seals. Mark A. Nelson et al., *Subsistence harvest of ringed, bearded, spotted, and ribbon seals in Alaska is sustainable*, 40 *Endangered Species Research* 1, 5 (2019). NMFS itself has estimated that there are more than 2 million arctic ringed seals, including 1 million ringed seals in the Chukchi and Beaufort Seas. 75 Fed. Reg. 77,480.

<sup>6</sup> *Critical Habitat for Endangered North Atlantic Right Whale*, 81 Fed. Reg. 4,838 (Jan. 27, 2016).

<sup>7</sup> *Designated Critical Habitat; Steller Sea Lion*, 58 Fed. Reg. 45,269 (Aug. 27, 1993).

<sup>8</sup> *Final Rule to Revise the Critical Habitat Designation for the Endangered Leatherback Sea Turtle*, 77 Fed. Reg. 4,170 (Jan. 26, 2012); *see also Designation of Critical Habitat for North Pacific Right Whale*, 73 Fed. Reg. 19,000 (April 8, 2008) (despite species' extensive range, critical habitat designated in two limited areas).

<sup>9</sup> *See* L. Lowry, *Erignathus barbatus ssp. nauticus*, IUCN Red List of Threatened Species 2015, *Erignathus barbatus ssp. nauticus* (iucnredlist.org); P. Boveng, *Pusa hispida*

suitable habitat, neither species should have been listed as threatened species under the ESA in the first place. The erroneous listings of these species have created irreconcilable tension with the analysis NMFS must undertake to designate critical habitat. As a result of this tension, the critical habitat designations are grossly excessive and in conflict with the requirement in the definition of critical habitat that they be limited to “specific areas” within the species’ habitat. Moreover, they will provide, at most, negligible conservation value to the species, as NMFS acknowledged in its Section 4(b)(2) impact analysis.

Accordingly, the critical habitat designations should be withdrawn by the agency. If they are not withdrawn, the State will bring an action challenging their legality under the ESA citizen suit provision and the Administrative Procedure Act.

## II. Legal standard.

“[W]hen the Secretary lists a species as endangered he must also ‘designate any *habitat of such species* which is then considered to be critical habitat’” unless it is not prudent or critical habitat is not then determinable.<sup>10</sup> Section 1532(5)(A)(i), in turn, defines “critical habitat” as

the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, 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.<sup>11</sup>

Thus, “‘critical habitat’ is the subset of ‘habitat’ that is ‘critical’ to the conservation of an endangered species.”<sup>12</sup> It consists of “specific areas” that contain, at the time the species is listed, “physical or biological features *essential* to the conservation of the species” which may require “special management considerations or protection.”<sup>13</sup> NMFS’s regulations define “physical or biological features essential to the conservation of the species” as “[t]he

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*ssp. hispida*, IUCN Red List of Threatened Species 2016 (errata version published 2020), *Pusa hispida ssp. hispida* (Ringed Seal) (iucnredlist.org).

<sup>10</sup> *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 365 (2018) (quoting 16 U.S.C. § 1533(a)(3)(A)(i)); *see* 16 U.S.C. § 1533(a)(3)(A)(i).

<sup>11</sup> 16 U.S.C. § 1533(a)(3)(A)(i). Critical habitat may also include “[s]pecific areas outside the geographical area occupied by the species at the time it is listed . . . that are determined to be essential for the conservation of the species.” *Id.* § 1533(a)(3)(A)(ii). As noted above, all of the critical habitat is considered to be occupied, i.e., used on a regular basis, by the species. *See* 87 Fed. Reg. 19,184; 87 Fed. Reg. 19,235-36.

<sup>12</sup> *Weyerhaeuser*, 139 S. Ct. at 368.

<sup>13</sup> 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added).

features that occur in *specific areas* and that are essential to support the life-history needs of the species.”<sup>14</sup> The term “essential” is not defined in either the statute or the regulations. Its ordinary meaning is “of the utmost importance” or “indispensable.”<sup>15</sup> Thus, the physical or biological features must be of the utmost importance or indispensable to the species’ conservation, and further require special protection or management.

The ESA also provides that critical habitat is designated only to the “maximum extent” it is “prudent” to do so.<sup>16</sup> Under NMFS’s regulations, it is not prudent to designate critical habitat when “threats to the species’ habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act.”<sup>17</sup> In addition, it is not prudent to designate critical habitat when “[a]reas within the jurisdiction of the United States provide no more than negligible conservation value, if any, for a species occurring primarily outside the jurisdiction of the United States.”<sup>18</sup> As explained below, NMFS has admitted that the designation of critical habitat will provide only marginal benefits to the species, and is unlikely to result in any modifications to projects or other management actions under Section 7(a)(2).<sup>19</sup>

NMFS must also “tak[e] into consideration’ economic and other impacts before” making a critical habitat designation under Section 4(b)(2).<sup>20</sup> This provision allows the agency to exclude specific areas from critical habitat if “the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat,” unless the failure to designate such area would result in the species’ extinction.<sup>21</sup> Congress added this requirement to the ESA in 1978 to provide greater flexibility and reduce conflicts between critical habitat and other human activities. For example, Congress explained:

The result of the committee’s proposed amendment would be increased flexibility on the part of the secretary in determining critical habitat . . . Factors of recognized or potential importance to human activities in an area will be considered by the Secretary in deciding whether or not all or part of that area should be included in the critical habitat . . . *The committee expects that in some situations, the resultant critical habitat*

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<sup>14</sup> 50 C.F.R. § 424.01 (2021) (emphasis added).

<sup>15</sup> Essential, Merriam-Webster’s Collegiate Dictionary (10th ed. 2000).

<sup>16</sup> 16 U.S.C. § 1533(a)(3)(A).

<sup>17</sup> 50 C.F.R. § 424.12(a)(1)(ii) (2021).

<sup>18</sup> *Id.* § 424.12(a)(1)(iii).

<sup>19</sup> 87 Fed. Reg. 19,193-94 (bearded seal); 87 Fed. Reg. 19,245-46 (ringed seal).

<sup>20</sup> *Weyerhaeuser*, 139 S. Ct. at 371.

<sup>21</sup> 16 U.S.C. § 1533(b)(2).

*will be different from that which would have been established using solely biological criteria. In some situations, no critical habitat would be specified.*<sup>22</sup>

Critical habitat designations are reviewable under the Administrative Procedures Act (“APA”), 5 U.S.C. § 706.<sup>23</sup> An agency must consider statutory factors even where an agency has discretion.<sup>24</sup> Where an agency ignores certain statutory factors in making a determination, its decision must be set aside under the APA.<sup>25</sup>

### **III. NMFS violated the ESA in its designation of critical habitat for the bearded seal and the ringed seal.**

NMFS’s critical habitat designations for the bearded seal and the ringed seal are not in accordance with the ESA and its implementing regulations, and were made without observance of the procedures required for critical habitat designation. First, NMFS’s designation of virtually all of each species’ range within the jurisdiction of the United States conflicts with the plain language of the statute. Second, even if such a vast area can legitimately constitute a species’ “critical habitat,” NMFS failed to properly identify the specific areas on which the physical or biological features essential to the conservation of the species were found at the time of the seals’ listings in 2012, instead relying on impermissible speculation. Third, NMFS failed to sufficiently analyze whether the designation of critical habitat for each of the seals is prudent given its lack of conservation value and marginal benefit to each species. Finally, NMFS did not properly consider the economic impacts of the critical habitat designation for each of the seals. Accordingly, NMFS’s designation of critical habitat here is legally defective.

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<sup>22</sup> H.R. REP. NO. 95-1625, at 17 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9467 (emphasis added); *see also* H.R. REP. NO. 96-167, at 7 (1979), *reprinted in* 1979 U.S.C.C.A.N. 2557, 2563 (“One of the changes made by the 1978 amendments . . . is the requirement that economics and other factors be considered prior to designating critical habitat”).

<sup>23</sup> *Alaska Oil & Gas Ass’n v. Jewell*, 815 F.3d 544, 554 (9th Cir. 2016).

<sup>24</sup> *Weyerhaeuser*, 139 S. Ct. at 371; *Judulang v. Holder*, 565 U.S. 42, 53 (2011) (“When reviewing an agency action, we must assess . . . whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.” (internal quotation marks omitted)).

<sup>25</sup> *Weyerhaeuser*, 139 S. Ct. at 371.

**A. NMFS’s designation of two-third of the species’ ranges within the United States’ jurisdiction as critical habitat is inconsistent with the statutory term “critical habitat.”**

NMFS designated as critical habitat vast areas that cover virtually all of each seal’s range within the United States’ jurisdiction.<sup>26</sup> For the ringed seal, the critical habitat designation encompasses over 257,000 square miles or 164 million acres, while the bearded seals’ critical habitat designation encompasses 273,000 square miles or over 174 million acres, accounting for a combined 324,105 square miles, or over 207 million acres, of critical habitat (excluding overlapping areas).<sup>27</sup> This area includes all United States’ waters within the Chukchi Sea, as well as substantial portions of the Bering Sea and the Beaufort Sea. Moreover, NMFS actually determined that the entire Beaufort Sea within the United States’ jurisdiction meets the definition of critical habitat for the ringed seal, but excluded about 46,000 square miles (29 million acres) from the designation on national security grounds.<sup>28</sup> In short, the entire geographic area that can be occupied by the species within the jurisdiction of the United States was determined to be critical habitat.<sup>29</sup>

“‘[C]ritical habitat’ is the subset of ‘habitat’ that is ‘critical’ to the conservation of an endangered species.”<sup>30</sup> “Under the statutory definition, critical habitat comprises areas 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,’ as well as unoccupied areas that the Secretary determines to be ‘essential for the conservation of the species.’”<sup>31</sup> Thus, under that definition, “only certain areas that are indispensable to the conservation of the endangered species” can constitute “critical habitat.”<sup>32</sup>

NMFS therefore violated the ESA because it designated as critical habitat the entire area that can be occupied by bearded and ringed seals within the jurisdiction of the United States. Any portion of the Bering, Chukchi and Beaufort Seas that may contain sea ice

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<sup>26</sup> Critical habitat may not be designated within foreign counties or areas outside the jurisdiction of the United States. 50 C.F.R. § 424.12(g).

<sup>27</sup> See 87 Fed. Reg. at 19,229-30 (bearded seal); 87 Fed. Reg. at 19,286-87 (ringed seal).

<sup>28</sup> See 87 Fed. Reg. at 19,248-50.

<sup>29</sup> See, e.g., 87 Fed. Reg. 19,191 (explaining that bearded seals occupy their entire historic range within U.S. jurisdiction); 87 Fed. Reg. 19,236 (explaining that ringed seals occupy their entire historic range within U.S. jurisdiction).

<sup>30</sup> *Weyerhaeuser*, 139 S. Ct. at 368.

<sup>31</sup> *Id.* at 368–69 (2018) (quoting 16 U.S.C. § 1532(5)(A)).

<sup>32</sup> *Id.* at 369 (emphasis added).

adequate to support the seals' birthing or molting activities in a given year was deemed to constitute critical habitat.<sup>33</sup> It is absurd to suggest that this massive area constitutes habitat that is truly indispensable to the conservation of each species. It deprives the adjective "critical" of meaning and produces an absurd result.

Further, only "*specific areas* within the geographic area occupied by the species" can constitute "critical habitat."<sup>34</sup> NMFS's decision to designate "one specific area" of critical habitat for bearded seals and ringed seals—each greater than 160 *million* acres and covering virtually all of their United States' range—is in irreconcilable tension with the plain language of the statute. It makes little sense to say that an area containing the species' historic range is a "specific area within the geographic area occupied by the species." Indeed, NMFS's tactic of using an extraordinarily broad net that necessarily pulls in most of the species' habitat, regardless of whether it is actually indispensable to conservation of the species, undermines the purpose of designating species areas as critical habitat. Any impacts to critical habitat caused by individual projects are compared to the designated critical habitat as a whole, diluting the conservation value of areas that are truly indispensable.

Finally, while NMFS's designation of the seals' critical habitat is absurdly large and includes the species' entire range within the United States, the area designated only encompasses a small portion of the seals' entire range. In particular, the ringed seal is a circumpolar species, and its range includes the Arctic, Atlantic, and Pacific Oceans—an enormous geographical area that contains millions of square miles.<sup>35</sup> Likewise, the bearded seal has a range extending well outside the designated critical habitat, including portions of the Bering, Chukchi, Beaufort, and East Siberian seas (about two times the area designated).<sup>36</sup> The same physical and biological features that FWS determined to be essential to the conservation of the two seal species are common throughout the Arctic region.

The existence of an extensive range outside the designated critical habitat that contains the same essential features indicates that the critical habitat is not truly essential

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<sup>33</sup> 87 Fed. Reg. at 19,184-88 (bearded seal); 87 Fed. Reg. 19,236-41 (ringed seal). Aside from sea ice, NMFS explained that the species' primary prey species occur throughout the entire geographic area occupied by the species. 87 Fed. Reg. 19,198 (bearded seal); 87 Fed. Reg. 19,241 (ringed seal).

<sup>34</sup> 16 U.S.C. § 1532(5)(A) (emphasis added).

<sup>35</sup> B.P. Kelly et al, *Status Review of the Ringed Seal (Phoca hispida)* 8–9 (2010), <https://www.fisheries.noaa.gov/resource/document/status-review-ringed-seal-phoca-hispida-2010>.

<sup>36</sup> 87 Fed. Reg. at 19,181; M.F. Cameron, *Status Review of the Bearded Seal (Erignathus Barbatius)* 54 (2010), <https://repository.library.noaa.gov/view/noaa/3761>.



to the conservation of these species. At the very least, NMFS should have explained why the species' entire range in the U.S. contains habitat features that are indispensable to the conservation of the bearded and ringed seals despite the presence of huge geographic areas outside that critical habitat that were occupied by the species at the time of listing and also contain the same essential habitat features.<sup>37</sup> While critical habitat cannot be designated outside of the United States, the existence of extensive occupied areas with the same essential habitat features is certainly relevant to determining what qualifies as critical habitat. NMFS, however, improperly ignored these areas and their roles in the conservation of the species.

In short, because a statute should not be construed in a way that is inconsistent with the statute's plain language and that undermines its purpose,<sup>38</sup> NMFS's decision to designate enormous areas that cover the range of the species within the United States as critical habitat is unlawful. The agency should have identified and designated the specific areas that have features that are truly essential to the conservation of each species, after taking into account the conservation value of areas outside the United States that contain habitat for, and currently support, the species.

**B. NMFS did not identify the specific areas containing the physical or biological features essential to the conservation of the bearded and ringed seals that may require special management considerations or protection and instead improperly relied on speculation.**

In determining the "critical habitat" of a listed species, NMFS must identify "the specific areas within the geographical area occupied by the species, at the time it is listed . . . 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."<sup>39</sup> The Supreme Court has made clear that the ESA should "not be implemented haphazardly, on the basis of speculation or surmise."<sup>40</sup>

Here, NMFS "concluded that the best approach to determine the appropriate boundaries for critical habitat [for bearded and ringed seals] is to base the delineation on

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<sup>37</sup> *Native Ecosystems Council v. Tidwell*, 599 F.3d 926, 935 (9th Cir. 2010) (stating agency action is arbitrary and capricious where agency "failed to consider an important aspect of the problem," or has offered an explanation for its decision that runs counter to the evidence in the record").

<sup>38</sup> *United States v. Prasad*, 18 F.4th 313, 322 (9th Cir. 2021) ("We favor an interpretation of a statute that furthers and does not obstruct the statute's purpose.").

<sup>39</sup> 16 U.S.C. § 1532(5)(A)(I).

<sup>40</sup> *Bennett v. Spear*, 520 U.S. 154, 176-77 (1997).

the boundaries identified above for the *sea ice essential features*.<sup>41</sup> Yet NMFS conceded that it is uncertain where these features may exist from year-to-year. For example, the agency stated that the “duration that [essential] sea ice habitat . . . is present in any given location can vary annually depending on the rate of ice melt and other factors.”<sup>42</sup> And NMFS determined it is “impracticable to separately identify specific areas where each of these essential features occur.”<sup>43</sup> In short, NMFS’s conclusion is overbroad and improperly based on speculation about whether physical or biological features essential to the conservation of the species were actually present in the designated critical habitat at the time of listing, as the statute requires.<sup>44</sup>

Thus, NMFS made a critical habitat determination despite recognizing it lacked the data to properly identify the “specific areas” that contained the physical or biological features essential to conservation of the bearded and ringed seals when listing occurred. NMFS admitted that it was impracticable to identify “specific areas” where there are essential features and instead used a “coarse scale,”<sup>45</sup> which amounts to drawing a line around an area the size of Texas. Consequently, NMFS did not make the necessary findings to support a legitimate critical habitat designation pursuant to § 1532(5)(A)(i).<sup>46</sup> This failure alone shows the critical habitat designation fails under APA review because the agency’s decision must be “based on a consideration of the relevant factors.”<sup>47</sup>

NMFS also did not sufficiently explain how areas with sea ice essential features require special management considerations or protection. The agency identified four “primary sources of potential threats” to the essential habitat features, and stated that “special management considerations or protections may be necessary, either now or in the

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<sup>41</sup> 87 Fed. Reg. at 19,189 (bearded seal) (emphasis added); *see* 87 Fed. Reg. at 19,241 (ringed seal).

<sup>42</sup> 87 Fed. Reg. at 19,186 (bearded seal); *see* 87 Fed. Reg. at 19,239 (ringed seal).

<sup>43</sup> 87 Fed. Reg. at 19,186 (bearded seal); *see* 87 Fed. Reg. at 19,239 (ringed seal).

<sup>44</sup> 16 U.S.C. § 1532(5)(A)(i). The Alaska Department of Fish and Game summarized data on bearded and ringed seal movements based on satellite telemetry, but NMFS did not use it as a primary source. NMFS therefore did not use all the available scientific data in its analysis.

<sup>45</sup> *E.g.*, 87 Fed. Reg. 19,186 (bearded seal); 87 Fed. Reg. 19,239 (ringed seal).

<sup>46</sup> It is likely NMFS failed to make these findings because the bearded and ringed seals are not properly listed as a threatened species given their extensive populations and enormous ranges. As explained above, the listing of species that are common throughout a vast area make it difficult to properly designate specific areas that contain features that are truly essential to conservation of the species.

<sup>47</sup> *Weyerhaeuser*, 139 S. Ct. at 371.

future.”<sup>48</sup> But NMFS failed to explain how Section 7 consultation will result in the preservation of the sea ice essential features that are at risk due to future climate change. Nor did NMFS explain how the impacts of oil and gas activity, marine shipping and transportation, or commercial fisheries will be managed through the Section 7 consultation process. In fact, NMFS asserted that *no* project changes or other critical habitat protections will result from the designation of critical habitat.<sup>49</sup> Therefore, NMFS abused its discretion in concluding that special management considerations or protection may be required to protect sea ice essential features without providing a legitimate basis for such a finding. Again, NMFS has improperly relied on mere speculation regarding the need for special management considerations or protection for sea ice essential features.

**C. NMFS failed to sufficiently analyze whether the designation of critical habitat for each of the seals is prudent.**

As stated above, critical habitat must be designated for a species at the time of listing only when it is prudent to do so.<sup>50</sup> As NMFS explained in a recent rulemaking, in imposing this limitation, “Congress recognized that not all listed species would be conserved by, or benefit from, the designation of critical habitat.”<sup>51</sup> NMFS’s regulation governing “prudency” determinations identified a number of different circumstances in which a designation of critical habitat would not be prudent, several of which are relevant here:

- (1) Threats to the species’ habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act;
- (2) Areas within the jurisdiction of the United States provide no more than negligible conservation value, if any, for a species occurring primarily outside the jurisdiction of the United States;
- (3) No areas meet the definition of critical habitat.<sup>52</sup>

Although various commenters contended that the designation of critical habitat would not be prudent, NMFS failed to address in detail the circumstances set forth in the agency’s regulations and failed to make a specific prudency determination in the final critical habitat

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<sup>48</sup> 87 Fed. Reg. at 19,241-42 (ringed seal). A virtually identical discussion appears in the bearded seal rule. *See* 87 Fed. Reg. 19,189-90.

<sup>49</sup> 87 Fed. Reg. 19,193-94 (bearded seal); 87 Fed. Reg. 19,246 (ringed seal).

<sup>50</sup> 16 U.S.C. § 1533(a)(3)(A).

<sup>51</sup> *Regulations for Listing Species and Designating Critical Habitat*, 84 Fed. Reg. 45,020, 45,040 (Aug. 27, 2019).

<sup>52</sup> 50 C.F.R. § 424.12(a).

rules. The agency instead discussed this issue in responding to comments and improperly dismissed it.<sup>53</sup>

The first “not prudent” circumstance clearly applies in this case. NMFS has emphasized that future federal actions that may trigger consultation under Section 7(a)(2) of the ESA based on their potential to affect one or more of the seals’ essential habitat features would also trigger Section 7 consultation under the “jeopardy” standard based on their impacts to the species. As a result, even with critical habitat designated, NMFS determined that no additional project modifications or other conservation measures will be imposed through the consultation process.<sup>54</sup> Therefore, no additional protection is provided by designating critical habitat in this case. Indeed, if that were not the case, there would be significant incremental economic costs resulting from the designation due to management action imposed to protect critical habitat for the species.

The second “not prudent” circumstance is applicable for similar reasons, and particularly in regard to the ringed seal. As stated above, the Arctic ringed seal is a common species with a circumpolar distribution throughout the Arctic region.<sup>55</sup> Its total population exceeds 2 million seals and may be substantially higher.<sup>56</sup> The ringed seal’s geographic range truly spans the globe, as depicted in NMFS’s proposed listing rule.<sup>57</sup> Its range within the jurisdiction of the United States—and the critical habitat designated for the species—is a small percentage of the species’ total geographic range.

The bearded seal’s circumstances are somewhat different because the species unit is a DPS. Nonetheless, the DPS has an extensive circumpolar range south of 85° North latitude that extends along the northern Russian coast eastward across Alaska to the central Canadian coast and as far south as the Bering Sea.<sup>58</sup> And its current population in the Bering and Chukchi Seas portion of its range is 357,328 seals.<sup>59</sup> Thus, a significant portion

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<sup>53</sup> 87 Fed. Reg. 19,221 (bearded seal); 87 Fed. Reg. 19,279 (ringed seal).

<sup>54</sup> 87 Fed. Reg. 19,193, 19,219 (bearded seal); 87 Fed. Reg. 19,246, 19,769-70, 19,271 (ringed seal); *see also* NMFS, *RIR/Section 4(b)(2) Preparatory Assessment/FRFA of Critical Habitat Designation for the Beringia Distinct Population Segment (DPS) of the Bearded Seal* 6-1, 6-2, 6-8, 8-1 (Nov. 2021) (“Bearded Seal Final Impact Analysis Report”); NMFS, *RIR/Section 4(b)(2) Preparatory Assessment/FRFA of Critical Habitat Designation for the Arctic Ringed Seal* 6-1, 6-2, 6-8, 8-1 (Nov. 2021) (“Ringed Seal Final Impact Analysis Report”).

<sup>55</sup> 75 Fed. Reg. 77,480.

<sup>56</sup> 75 Fed. Reg. 77,480.

<sup>57</sup> 75 Fed. Reg. 77,479.

<sup>58</sup> 75 Fed. Reg. 77,497-98.

<sup>59</sup> Nelson et al., *supra* n. 4.

of the bearded seal's population and its geographic range lies outside the critical habitat NMFS designated for the species, and the species arguably occurs primarily outside the jurisdiction of the United States.

Moreover, according to NMFS, the critical habitat designated within the jurisdiction of the United States provides negligible conservation value. As discussed above, NMFS has acknowledged that the designation will not result in additional management actions beyond those that will result under the jeopardy standard due to the species' listing.<sup>60</sup> Although NMFS briefly mentions certain secondary and indirect benefits that could result from the critical habitat designation, these benefits are clearly speculative—as shown by the agency's repeated use of “may” and “could” to express its uncertainty in describing them—and could not be quantified by the agency.<sup>61</sup> In addition, any benefits that may accrue, would result from the species' listing alone, which will encourage and facilitate conservation efforts regardless of whether critical habitat is designated.

Finally, none of the designated critical habitat areas actually meet the definition of critical habitat because these species are common and have vast ranges that contain the essential habitat features described by NMFS. As explained above, NMFS has designated virtually all of the Bering, Chukchi and Beaufort Seas within the United States' jurisdiction as critical habitat, rather than “specific areas” as required by the ESA. Thus, the critical habitat improperly includes the entire geographic area that can be occupied by each species within the jurisdiction of the United States, based on the estimated extent of sea ice capable of supporting the species. NMFS was unable to properly designate critical habitat for the bearded seal and the ringed seal, and instead defaulted to simply designating virtually all of the species' range within the United States as their critical habitat. NMFS should have acknowledged its inability to properly designate critical habitat and declared that the designation of critical for the seals was not prudent.

In sum, it was not prudent to designate critical habitat because critical habitat provides only marginal conservation benefits to each of the seal species. The designations are especially troubling because the species have large global populations and extensive circumpolar ranges. The ringed seal, in particular, has a global population of several million animals and an extremely large range outside the United States. Further, NMFS has acknowledged that the designation of critical habitat will not result in project modifications or other conservation requirements beyond those imposed due to the species' listings. The agency stated, for example, that “we have not identified a circumstance in which this critical habitat designation would be likely to result in additional requests for

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<sup>60</sup> 87 Fed. Reg. 19,193, 19,219 (bearded seal); 87 Fed. Reg. 19,246, 19,769-70, 19,271 (ringed seal); *see also* Bearded Seal Final Impact Analysis Report 6-1, 6-2, 6-8, 8-1; Ringed Seal Final Impact Analysis Report 6-1, 6-2, 6-8, 8-1.

<sup>61</sup> 87 Fed. Reg. 19,193 (bearded seal); 87 Fed. Reg. 19,245-46 (ringed seal).

project modifications in section 7 consultations.”<sup>62</sup> There is no requirement that critical habitat be designated when it serves no legitimate purpose and, moreover, cannot even be identified and described with specificity, as is the case here. Therefore, NMFS acted unlawfully by failing to analyze whether it was prudent to designate critical habitat.

**D. NMFS failed to adequately review the economic consequences of the critical habitat designations.**

ESA Section 4(b)(2) requires that NMFS “tak[e] into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat” and gives discretion to NMFS to “exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area.”<sup>63</sup> Thus, as the Supreme Court stated, Section 4(b)(2) “requires the Secretary to consider economic impact and relative benefits *before* deciding whether to exclude an area from critical habitat *or to proceed with designation*.”<sup>64</sup> While NMFS has discretion as to whether to exclude an area based on this analysis, it does not have discretion on whether “to consider the economic and other impacts of designation when making [its] exclusion decisions.”<sup>65</sup> NMFS erred both in its analysis of the economic impacts of the bearded and ringed seals’ critical habitat designations and whether to exclude any area in the designations.

First, NMFS did not meaningfully consider economic impact from the critical habitat designations because the 160-million-acre designations are simply too large.<sup>66</sup> It defies credulity to accept that NMFS sufficiently evaluated whether the benefits of designating one “specific area” encompassing over 160 million acres as critical habitat outweighed the economic impacts. Instead, the agency simply assumed that no project modifications or other requirements would result from activities taking place within critical habitat because impacts to habitat would be subsumed into the Section 7 “jeopardy” analysis. Again, NMFS’s decision to designate an unreasonably large area as critical habitat hampered its ability to perform analyses that the ESA requires.

For example, NMFS did not adequately address the Alaska Department of Natural Resources’ (“ADNR’s”) concern that the economic impacts would disproportionately affect Alaska Natives, the North Slope Borough, coastal communities in western and

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<sup>62</sup> 87 Fed. Reg. 19,218 (bearded seal); *see also, e.g.*, 87 Fed. Reg. 19,270 (ringed seal).

<sup>63</sup> 16 U.S.C. § 1533(b)(2).

<sup>64</sup> *Weyerhaeuser*, 139 S. Ct. at 371 (emphasis added).

<sup>65</sup> *Id.* (reversing where court of appeals failed to evaluate whether agency considered relevant factors in making discretionary decision to exclude such areas).

<sup>66</sup> *See* 87 Fed. Reg. 19,194 (bearded seal); 87 Fed. Reg. 19,246 (ringed seal).

northern Alaska, and municipal and village activities in these regions.<sup>67</sup> NMFS could not meet the “categorical requirement” that [it] “tak[e] into consideration” [these] economic and other impacts before” making the critical habitat designations because its analysis was necessarily too broad and unfocussed given the 160-million-plus-acre designations it made.<sup>68</sup> “Consideration” means “continuous and careful thought” or “a matter weighed or taken into account when formulating an opinion or plan.”<sup>69</sup> NMFS’ inadequate evaluation, which lumped together the benefits and economic impacts of designating over 160-million-plus acres of diverse areas of northern, western, and southwestern Alaska,<sup>70</sup> cannot constitute the required “careful thought” that Section 4(b)(2) mandates.

Second, and relatedly, NMFS incorrectly believed that it had discretion to refuse to analyze whether to exclude areas raised by commenters from the designation.<sup>71</sup> NMFS stated that it is “not exercising [its] discretion to further consider and weigh the benefits of excluding any particular area based on economic impacts against the benefits of designation.”<sup>72</sup> But NMFS must do just that, i.e., evaluate “whether to exclude an area from critical habitat” based on the relative benefits compared to the economic impacts.<sup>73</sup> The Supreme Court has explicitly rejected the argument that the agency has discretion to refuse

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<sup>67</sup> See State of Alaska, Comment Letter on Designation of Critical Habitat for the Beringia Distinct Population Segment of the Bearded Seal and Designation of Critical Habitat for the Arctic Subspecies of the Ringed Seal, at 6–8 (Apr. 8, 2021).

<sup>68</sup> *Weyerhaeuser*, 139 S. Ct. at 371.

<sup>69</sup> Consideration, Merriam-Webster’s Collegiate Dictionary (10th ed.).

<sup>70</sup> 87 Fed. Reg. 19,194, 19,213-16 (bearded seal); 87 Fed. Reg. 19,246, 19,269-72 (ringed seal).

<sup>71</sup> 87 Fed. Reg. 19,194, 19,220 (bearded seal); 87 Fed. Reg. 19,246, 19,278 (ringed seal). For example, the State of Alaska raised a 20-mile buffer around the shoreline to avoid a great deal of the economic impact from the designation. See State of Alaska, Comment Letter on Designation of Critical Habitat for the Beringia Distinct Population Segment of the Bearded Seal and Designation of Critical Habitat for the Arctic Subspecies of the Ringed Seal, at 19 (Apr. 8, 2021). The North Slope Borough also submitted comments regarding the economic impacts of the designation and requested exclusion of a 10-mile buffer-zone around all North Slope villages, all lands conveyed to the Borough and Alaska Native Corporations, and areas around oil and gas development. See 87 Fed. Reg. 19,278.

<sup>72</sup> 87 Fed. Reg. at 19,194, 19,220 (bearded seal); 87 Fed. Reg. at 19,246, 19,278 (ringed seal).

<sup>73</sup> *Weyerhaeuser*, 139 S. Ct. at 371.

to analyze whether to exclude an area from a critical habitat designation.<sup>74</sup> NMFS's refusal to consider requests for exclusion is particularly troubling here, because NMFS has emphasized that the designation of critical habitat will not result in project modifications beyond those imposed anyway due to the species' listings<sup>75</sup> and further explained that even without critical habitat, the seals will receive a "high level of baseline protections."<sup>76</sup> Because NMFS refused to evaluate the economic impacts and consider the economic impacts and relative benefits, the agency violated the ESA.

In reality, NMFS could not have properly evaluated the economic impacts of designating particular areas as critical habitat and weighed the relative benefits of including and excluding those areas as Section 4(b)(2) requires because the critical habitat consists of enormous blocks containing some 160 million acres. These areas were too large and diverse for the agency to engage in meaningful evaluation of the relative benefits and costs of excluding specific areas from the designation—further evidence that these enormous designations violate the ESA. Regardless, NMFS did not properly consider the economic impacts and relative benefits in making its designations here, which likewise violated the ESA.

#### **IV. Conclusion.**

NMFS has violated the ESA in its designation of critical habitat of the bearded seals and the ringed seals. NMFS's designation of virtually all of the geographic area within the jurisdiction of the United States that can be occupied by the species conflicts with the ESA. Furthermore, NMFS did not make the specific findings necessary to support its determination. Accordingly, pursuant to Section 11(g) of the ESA, this letter provides written notice that unless NMFS remedies these violations within 60 days, we intend to initiate litigation in federal court. If you have any questions regarding this notice, please do not hesitate to contact me.

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<sup>74</sup> *Id.* ("Section 4(b)(2) . . . directs the Secretary to consider the economic and other impacts of designation when making his exclusion decisions.").

<sup>75</sup> 87 Fed. Reg. 19,193, 19,219 (bearded seal); 87 Fed. Reg. 19,246, 19,769-70, 19,271 (ringed seal); *see also* Bearded Seal Final Impact Analysis Report 6-1, 6-2, 6-8, 8-1; Ringed Seal Final Impact Analysis Report 6-1, 6-2, 6-8, 8-1.

<sup>76</sup> 87 Fed. Reg. 19,218 (bearded seal); 87 Fed. Reg. 19,274 (ringed seal).



TREG R. TAYLOR  
ATTORNEY GENERAL

By: /s/ Ronald W. Opsahl  
Ronald W. Opsahl  
Senior Assistant Attorney General  
Department of Law  
1031 W. 4<sup>th</sup> Avenue, Suite 200  
Anchorage, AK 99501  
Telephone: (907) 269-5232  
Facsimile: (907) 279-2834  
Email: ron.opsahl@alaska.gov

RWO/cmf

cc: Doug Vincent-Lang, Commissioner