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

CENTER FOR BIOLOGICAL DIVERSITY,

Plaintiff,

v.

REBECCA BLANK, Acting United States  
Secretary of Commerce and NATIONAL  
MARINE FISHERIES SERVICE

Defendants.

CASE NO.:

**COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF**

(16 U.S.C. §§ 1531 *et seq.*)

## I. INTRODUCTION

1. In this civil action for declaratory and injunctive relief, Plaintiff CENTER FOR BIOLOGICAL DIVERSITY challenges the failure of Defendants REBECCA BLANK, Acting United States Secretary of Commerce, and the NATIONAL MARINE FISHERIES SERVICE (collectively “NMFS”) to comply with the non-discretionary listing provisions of the Endangered Species Act, as amended, 16 U.S.C. §§ 1531-1544 (ESA). NMFS has failed to finalize its listing determinations for ringed seals (*Phoca hispida*) and bearded seals (*Erignathus barbatus*) under the ESA. See 16 U.S.C. §§ 1533(b)(6)(A)(i) & (B)(i). Plaintiff requests this Court to order NMFS to comply by a date certain with the ESA’s mandatory, non-discretionary final listing determination deadline. *Id.* Compliance with this mandatory deadline is necessary to ensure the continued survival of ringed and bearded seals in the wild.

2. Ringed and bearded seals depend on sea ice for 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 snowpack are negatively impacting the ice seals throughout many regions in their range.

3. Global warming, caused by society’s emissions of greenhouse gases, has resulted in significant warming across the Arctic and a rapid decline in Arctic sea-ice cover. Average winter temperatures in some areas of the Arctic have already risen by seven degrees Fahrenheit (four degrees Celsius). Even using moderate projections of future greenhouse gas emissions levels, average winter temperatures are projected to rise by an average of 14 degrees Fahrenheit (eight degrees Celsius) and up to 20 degrees Fahrenheit (11 degrees Celsius) over the Arctic by the end of this century. Summer sea-ice extent this year fell to a new record low and summer sea-ice cover is predicted to disappear entirely in the next two decades. The disappearance of sea ice poses a grave threat to ringed and bearded seals.

4. Ringed and bearded seals are threatened by other factors as well, including but not limited to high levels of organochlorides and other pollutants in the Arctic, and proliferating oil and gas development in their habitat.

5. On this basis, on May 28, 2008, the Center submitted a formal, detailed petition

to list three seal species, including ringed and bearded seals, under the ESA. On September 4, 2008, NMFS made a positive 90-day finding on the Center's petition, initiated a 60-day public comment period and continued its status review. 73 Fed. Reg. 51615 (Sept. 4, 2008). On September 8, 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 population segments (DPSs) of the bearded seal. 75 Fed. Reg. 77476 (Dec. 10, 2010) (ringed), 75 Fed. Reg. 77496 (Dec. 10, 2010) (bearded). On December 13, 2011, NMFS published in the federal register a six-month extension of the deadline for a final listing determination for both seal species. 76 Fed. Reg. 77466 (Dec. 13, 2012) (ringed), 76 Fed. Reg. 77465 (Dec. 13, 2011) (bearded).

6. Pursuant to these federal register notices and the ESA, NMFS's final listing determination was due no later than June 10, 2012. 16 U.S.C. §§ 1533(b)(6)(A)(i) & (B)(i). NMFS is therefore currently in violation of the ESA for failing to finalize its determinations to list the ringed and bearded seals under the ESA.

7. NMFS has abrogated its mandatory statutory duty under the ESA to finalize its listing determinations for ringed and bearded seals. These seals will not receive the protections they desperately need and deserve under the ESA until the Secretary makes all of the required findings and completes the listing process.

8. Plaintiff now seeks judicial relief declaring that the Secretary has violated the ESA and the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 706 *et seq.*, by failing to finalize the listing determinations. Plaintiff also asks the Court to order the Secretary to finalize the listing determinations by a date certain.

## **II. JURISDICTION, VENUE, and INTRADISTRICT ASSIGNMENT**

9. This Court has jurisdiction over this action pursuant to 16 U.S.C. §§ 1540(c) & (g) (action arising under the ESA and citizen suit provision), 28 U.S.C. § 1331 (federal question), 5 U.S.C. § 702 (APA), and 28 U.S.C. § 1361 (Mandamus). The relief sought is

authorized by 28 U.S.C. §§ 2201 (declaratory judgment) and 28 U.S.C. § 2202 (injunctive relief).

10. Venue is proper in the District of Alaska pursuant to 28 U.S.C. § 1391(e), as this civil action is brought against an agency of the United States and an officer of the United States acting in his official capacity and under the color of legal authority, no real property is involved in this action, and some or all of the legal violations occurred within this judicial district.

11. By written notice sent on June 18, 2012 and received by NMFS on the same day, Plaintiff informed NMFS of its violations more than sixty days prior to the filing of this Complaint, as required by the ESA. 16 U.S.C. § 1540(g). Despite receipt of Plaintiff's notice letter, NMFS has failed to remedy its violations of the ESA. An actual, justiciable controversy exists between the parties within the meaning of 28 U.S.C. § 2201.

12. Plaintiff has no adequate remedy at law. NMFS's continuing failure to finalize its listing determinations will result in irreparable harm to the ringed and bearded seals, to Plaintiff and Plaintiff's members and constituents, and to the public. No monetary damages or other legal remedy can adequately compensate Plaintiff, its members and constituents, or the public, for this harm.

13. Plaintiff and its members and constituents are adversely affected or aggrieved by federal agency action and are entitled to judicial review of such action within the meaning of the ESA and the APA. NMFS's failure to finalize its listing determination prevents the completion of the listing process and therefore the implementation of measures to protect ringed and bearded seals pursuant to the ESA. Without the substantial protections of the ESA, ringed and bearded seals are more likely to continue to decline and become extinct. Plaintiff is therefore injured because its use and enjoyment of ringed and bearded seals described below is threatened by the decline and likely extinction of the seals. These are actual, concrete injuries to Plaintiff, caused by NMFS's failure to comply with the ESA, the APA, and their implementing regulations. The relief requested will fully redress those injuries.

14. The federal government has waived sovereign immunity in this action pursuant

to 16 U.S.C. § 1540(g) and 5 U.S.C. § 702.

### **III. PARTIES**

15. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY (“the Center”) is a non-profit 501(c)(3) corporation with offices in Alaska, Arizona, California, Florida, Minnesota, Nevada, New Mexico, New York, Oregon, Vermont and Washington, D.C. The Center is actively involved in species and habitat protection issues throughout the United States, including protection of Arctic wildlife in general and ringed and bearded seals in particular. The Center has more than 38,000 active members throughout the United States and the world.

16. Plaintiff’s members and staff include individuals with varying interests in ringed and bearded seals and their habitat ranging from scientific, professional, and educational to recreational, aesthetic, moral, and spiritual interests. Further, Plaintiff’s members and staff enjoy, on an on-going basis, the biological, scientific, research, education, conservation, recreational and aesthetic values of the Arctic region inhabited by these species. Plaintiff’s staff and members observe and study ringed and bearded seals and their habitat, and derive professional, scientific, educational, recreational, aesthetic, inspirational, and other benefits from these activities and have an interest in preserving the possibility of such activities in the future. An integral aspect of the Plaintiff’s members’ use and enjoyment of ringed and bearded seals is the expectation and knowledge that the species are in their native habitat. For this reason, the Center’s use and enjoyment of these seals is entirely dependent on the continued existence of healthy, sustainable populations in the wild. Plaintiff brings this action on its own behalf and on behalf of its adversely affected members and staff.

17. Defendant REBECCA BLANK, Acting United States Secretary of Commerce, is the highest ranking official within the Department of Commerce and, in that capacity, has ultimate responsibility for the administration and implementation of the ESA with regard to ringed and bearded seals, and for compliance with all other federal laws applicable to the Department of the Commerce. She is sued in her official capacity.

18. Defendant NATIONAL MARINE FISHERIES SERVICE (NMFS) is a federal agency within the National Oceanic and Atmospheric Administration in the Department of

Commerce authorized and required by law to protect and manage the fish, marine mammals, and other marine resources of the United States, including enforcing and implementing the ESA. NMFS has been delegated authority by the Secretary of Commerce to implement the ESA for the bearded and ringed seals, including responsibility for making decisions and promulgating regulations, including proposed and final listing decisions and the processing of petitions for such actions.

#### **IV. LEGAL BACKGROUND**

19. The ESA is a federal statute enacted to conserve endangered and threatened species and the ecosystems upon which they depend. 16 U.S.C. § 1531(b). The ESA “is the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180 (1978). The Supreme Court’s review of the ESA’s “language, history, and structure” convinced the Court “beyond a doubt” that “Congress intended endangered species to be afforded the highest of priorities.” *Id.* at 174. As the Court found, “the plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.” *Id.* at 184.

20. The ESA protects species listed as either “endangered” or “threatened” by the Secretary. A species is “endangered” if it “is in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6). A species is “threatened” if it is “likely to become an endangered species within the foreseeable future.” 16 U.S.C. § 1532(20)

21. Once a species is listed, an array of statutory protections applies. For example, Section 7 requires all federal agencies to ensure that their actions neither “jeopardize the continued existence” of any listed species nor “result in the destruction or adverse modification” of its “critical habitat.” 16 U.S.C. § 1536(a)(2). Section 9 and its regulations further prohibit, among other things, “any person” from intentionally “taking” listed species or “incidentally” taking listed species without a permit from the Service. 16 U.S.C. §§ 1538(a)(1)(B), 1539. Other provisions require NMFS to designate “critical habitat” for listed species, 16 U.S.C. § 1533(a)(3), require NMFS to “develop and implement” recovery plans for listed species, 16 U.S.C. § 1533(f), authorize NMFS to acquire land for the protection of listed species, 16 U.S.C.

§ 1534, and make federal funds available to states to assist in its efforts to preserve and protect threatened and endangered species, 16 U.S.C. § 1535(d).

22. However, none of these protections come into force until a species is officially listed as threatened or endangered under the ESA.

23. In order to ensure the timely protection of species, Congress set forth the listing process described below. The process includes mandatory, non-discretionary deadlines for the three required findings that the Secretary must meet, so that species in need of protection do not languish in administrative purgatory. The three required findings, described below, are the 90-day finding, the 12-month finding, and the final listing determination.

24. Any interested person can begin the listing process by filing a petition to list a species with the Secretary. 16 U.S.C. § 1533 (b)(3)(A); 50 C.F.R. § 424.14(a).

25. Upon receipt of a petition to list a species, the Secretary has 90 days “to the maximum extent practicable,” to make a finding as to whether the petition “presents substantial scientific or commercial information indicating that the petitioned action may be warranted.” 16 U.S.C § 1533 (b)(3)(A); 50 C.F.R. § 424.14 (b)(1). If the Secretary finds that the petition presents substantial information indicating that the listing may be warranted, the Secretary then publishes in the Federal Register a “90 day finding and commencement of status review.” 16 U.S.C. § 1533(b)(3)(A).

26. Upon issuing a positive 90-day finding, the Secretary must then conduct a full review of the status of the species. 50 C.F.R. § 424.14. Upon completion of this status review, and within 12 months from the date that he received the petition, the Secretary must make one of three findings: (1) the petitioned action is not warranted; (2) the petitioned action is warranted; or (3) the petitioned action is warranted but presently precluded by other pending proposals for listing species, provided certain circumstances are present. 16 U.S.C. § 1533(b)(3)(B); 50 C.F.R. § 424.14 (b)(3). This second determination is known as a “12-month finding.” This deadline is mandatory. There is no mechanism by which the Secretary can extend the deadline for the finding.

27. If the Secretary finds in the 12-month finding that the listing of the species is

warranted, then he must publish in the Federal Register a proposed rule, for public comment, to list such species as endangered or threatened. 16 U.S.C. § 1533(b)(5).

28. Within one year of the publication of a proposed rule to list a species, the ESA requires the Secretary to render a final determination on the proposal. 16 U.S.C. § 1533(b)(6)(A).

29. At such time, the Secretary must either list the species, withdraw the proposal, or if there is substantial disagreement about scientific data, delay a final determination for no more than six months to solicit more scientific information. 16 U.S.C. §§ 1533(b)(6)(A)(i)(III) & 1533(b)(6)(B)(i).

30. Concurrently with a final determination to list a species, the Secretary must render a final decision concerning the designation of critical habitat for the species to the maximum extent prudent and determinable. 16 U.S.C. §§ 1533(a)(3) & 1533(b)(6)(C). If the Secretary finds that designation of critical habitat is prudent, but is not currently determinable, then the Secretary may extend the deadline to issue a final regulation concerning critical habitat by no more than one additional year. 16 U.S.C. § 1533(b)(6)(C)(ii).

31. It is critical that the Secretary scrupulously follow the ESA's listing procedures and deadlines if species are to be protected in a timely manner, because the ESA does not protect a species until the species is formally listed as threatened or endangered.

## **V. FACTUAL BACKGROUND**

32. The ringed seal is the most widespread marine mammal in the ice-covered regions of the Northern Hemisphere and the smallest and most ice-adapted of all northern pinnipeds. Five distinct subspecies of the ringed seal are recognized: the Arctic ringed seal (*P. h. hispida*) that inhabits the seasonally and permanently ice-covered waters of the Arctic Ocean and contiguous subarctic seas; the Okhotsk ringed seal (*P. h. ochotensis*) restricted to the Okhotsk Sea; the Lake Saimaa ringed seal (*P. h. saimensis*) confined to Lake Saimaa, Finland; the Lake Ladoga ringed seal (*P. h. ladogensis*) confined to Lake Ladoga, Russia; and the Baltic ringed seal (*P. h. botnica*) restricted to the Baltic Sea. Unlike other northern phocids, the ringed seal is able to inhabit and reproduce in landfast ice during the winter and spring breeding season



due to its ability to make and maintain breathing holes in thick ice and to excavate subnivalian lairs in snowdrifts over breathing holes, which it uses for resting, giving birth, and nursing pups during March to June.

33. The bearded seal is, after the walrus, the largest of the ice-associated pinnipeds that inhabit Alaskan waters. The bearded seal occurs in a patchy circumpolar distribution around the perimeter of the Arctic Ocean and the contiguous subarctic seas. Two subspecies of the bearded seal are recognized: the Atlantic bearded seal (*E. b. barbatus*) and Pacific bearded seal (*E. b. nauticus*). Bearded seals reproduce and haulout primarily on drifting pack ice over shallow water where the ice is in constant motion producing leads, polynyas and other openings. Because the bearded seal feeds predominantly on benthic prey, its distribution is generally restricted to relatively shallow shelf waters of less than 150 to 200 meters where such prey are more abundant. Both bearded and ringed seals perform seasonal migrations in conjunction with the seasonal advance and retreat of sea ice.

34. The sea-ice habitat of ringed and bearded seals is threatened by rapid Arctic climate change that is occurring at a pace that is exceeding the predictions of the most advanced climate models. Arctic surface temperatures increased twice as much as the global average during the 20th century. Winter sea-ice extent in 2006 and 2007 declined to a minimum that most climate models forecast would not be reached until 2070, and summer sea-ice extent in 2007 plummeted to a record minimum which most climate models forecast would not be reached until 2050. This year's sea-ice minimum has broken the 2007 record and is now the lowest ever recorded.

35. In the range of the ringed and bearded seals, sea-ice extent has declined significantly during the March through July breeding and molting season in recent decades throughout most of the range, including the seasonally ice-covered Okhotsk and Bering Seas, Hudson Bay, Baffin Bay, Greenland Sea, Canadian Archipelago, Barents Sea, Kara Sea, Laptev Sea, Chukchi Sea, and Arctic Ocean.

36. Of foremost concern for these seal species, global warming will accelerate in this century. Arctic air temperatures are projected to increase by an average of 14 degrees

Fahrenheit (eight degrees Celsius) during winter by the end of the century. Climate scientists have predicted that Arctic summer sea ice is likely to disappear entirely by the 2030s. Winter and spring sea ice will also continue to decline with the accelerating loss of summer sea ice that creates large open-water areas that increase the ice-albedo feedback. The Bering, Okhotsk, and Barents Seas are projected to lose at least 40 percent of winter sea-ice area by 2050. Any remaining sea-ice habitat will likely be of low quality because the sea ice will be thinner and the ice will melt sooner, leading to breakup of the sea ice during the reproductive and molting periods.

37. Global warming will impact ringed and bearded seals directly by degrading and eliminating critical sea-ice habitat, which will have devastating consequences by reducing adult reproductive success and the survival of pups and impairing their ability to molt. Due to global warming, snowpack on sea ice is also getting thinner which is making it more difficult for ringed seals to build snow caves for raising their young and is making snow caves more prone to collapse, putting seal pups at higher risk of death from freezing and predation. Growing threats from climate change include depletion of prey resources due to changing ocean conditions and ocean acidification; increasing exposure to predators, competitors, disease, and human disturbance; and increasing shipping activity and oil and gas development, with associated risks of oil spills and noise pollution as sea-ice loss increases the accessibility of previously ice-covered regions.

38. The ringed and bearded seal also face threats from current or potential overexploitation from hunting, current oil and gas development in many parts of their range, rising contaminant levels in the Arctic, and bycatch mortality from commercial fisheries. Many of these threats will interact with global warming in cumulative and synergistic ways, further heightening the threat to the seals.

39. Section 4(b)(6) of the ESA and its implementing regulations required NMFS to finalize its listing determination for ringed and bearded seals by June 10, 2012. 16 U.S.C. § 1533(b)(6)(A)(i) & (B)(i). NMFS failed to meet this deadline.

## **VI. CLAIM FOR RELIEF**

### **Violation of Endangered Species Act, 16 U.S.C. § 1533(b)(6)(A)(i) & (B)(i), for Failure to Finalize Listing Determinations**

40. Plaintiff realleges and incorporates by reference all the allegations set forth in this Complaint, as though fully set forth below.

41. NMFS's failure to finalize its listing determinations for ringed and bearded seals within the timeframes set by the ESA is a violation of the ESA and its implementing regulations and is actionable thereunder. 16 U.S.C. §§ 1533(b)(6)(A)(i) & (B)(i); 1540(g)(1)(c).

## **VII. PRAYER FOR RELIEF**

42. For the reasons stated above, Plaintiff respectfully requests that the Court grant the following relief:

- a. Declare that NMFS is in violation of its non-discretionary duties under 16 U.S.C. § 1533(b)(6)(A)(i) & (B)(i) of the ESA for failing to finalize its listing determinations for ringed and bearded seals under the ESA;
- b. Issue permanent injunctive relief compelling NMFS to make and publish in the Federal Register final listing determinations for ringed and bearded seals under the ESA by a date certain;
- c. Award Plaintiff its costs of litigation, including reasonable attorneys fees; and
- d. Grant Plaintiff such other relief as the Court deems just and proper.

Dated: September 12, 2012.

*s/ Rebecca Noblin*

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