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26 UNITED STATES DISTRICT COURT FOR THE
27 NORTHERN DISTRICT OF CALIFORNIA

28 CENTER FOR BIOLOGICAL DIVERSITY,
29 NATURAL RESOURCES DEFENSE
30 COUNCIL, and PACIFIC ENVIRONMENT,
31 non-profit corporations,

32 Plaintiffs,

33 v.

34 DIRK KEMPTHORNE, Secretary of the Interior,
35 and U.S. FISH AND WILDLIFE SERVICE,

36 Defendants.

Case No.:

COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF

COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

1 I. INTRODUCTION

2 1. In this civil action for declaratory and injunctive relief, Plaintiffs Center for Biological
3 Diversity (“the Center”), Natural Resources Defense Council (“NRDC”), and Pacific Environment
4 challenge the failure of Defendants Dirk Kempthorne, Secretary of the Interior, and the U.S. Fish and
5 Wildlife Service (collectively “FWS”) to comply with the non-discretionary provisions of the
6 Endangered Species Act, 16 U.S.C. §§ 1531-1544 (“ESA”), with regard to the protection of the yellow-
7 billed loon (*Gavia adamsii*). Specifically, FWS has failed to determine whether it will propose listing
8 the yellow-billed loon as a “threatened” or “endangered” species, in response to a petition filed by
9 Plaintiffs and other concerned conservation groups and scientists, within the time required by the
10 statute. 16 U.S.C. § 1533.

11 2. On April 5, 2004, FWS received a petition from Plaintiffs seeking listing of the yellow-
12 billed loon as “threatened” or “endangered” under the ESA. (Petition to list the yellow-billed loon,
13 *Gavia adamsii*, as an endangered or threatened species under the Endangered Species Act (March 30,
14 2004) (“Petition”).) As set forth in the Petition, the yellow-billed loon is one of the rarest of the loon
15 species, relying on fragile Arctic habitat that is increasingly susceptible to environmental change and
16 disturbance. Global warming and accelerating pressures associated with oil and gas development in its
17 habitat have placed the yellow-billed loon in the cross-hairs of increased disturbance, habitat
18 destruction, and pollution. Immediate listing under the ESA is necessary to provide the yellow-billed
19 loon the protection it needs to survive.

20 3. Under the ESA, FWS had one year from the date it received the Petition to either issue a
21 proposed rule listing the species as threatened or endangered or to find that such listing is “not
22 warranted.” 16 U.S.C. § 1533(b). This deadline for this “12-month finding”, which FWS has no
23 discretion to extend, was due no later than April 5, 2005.

24 4. On June 11, 2007, Plaintiffs sent FWS a 60-day notice of intent to sue as required by the
25 ESA, putting the agency on notice that litigation would be filed if the required finding was not timely
26 issued. FWS has not remedied its violation of law. Accordingly, Plaintiffs request this Court to order
27 FWS to make the overdue 12-month finding on their Petition by a date certain, so that the yellow-billed
28 loon will receive the protections to which it is statutorily entitled and so desperately needs.

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

2 5. The Court has jurisdiction over this action pursuant to 16 U.S.C. §§ 1540(c) & (g)
3 (action arising under the ESA and citizen suit provision), 28 U.S.C. § 1331 (federal question), 5 U.S.C.
4 § 702 (Administrative Procedure Act), and 28 U.S.C. § 1361 (Mandamus). The relief sought is
5 authorized by 28 U.S.C. §§ 2201 (declaratory judgment) and 28 U.S.C. § 2202 (injunctive relief).

6 6. Venue is proper in the Northern District of California pursuant to 28 U.S.C. § 1391(e) as
7 at least one of the Plaintiffs resides in this judicial district and the yellow-billed loon occurs in this
8 judicial district.

9 7. Pursuant to Local Rules 3-5(a) and 3-2(c) and (d), assignment of this case to the San
10 Francisco or Oakland Division is appropriate.

11 8. By written notice sent by certified mail on June 11, 2007, Plaintiffs informed Defendants
12 of their violations more than sixty days prior to the filing of this Complaint, as required by the ESA. 16
13 U.S.C. § 1540(g). Despite receipt of Plaintiffs' notice letter, Defendants have failed to remedy their
14 violations of the ESA.

15 9. An actual, justiciable controversy exists between the parties within the meaning of 28
16 U.S.C. § 2201.

17 10. Plaintiff has no adequate remedy at law. Defendants' continuing failure to comply with
18 the ESA will result in irreparable harm to the yellow-billed loon, to Plaintiffs and Plaintiffs' members,
19 and to the public. No monetary damages or other legal remedy can adequately compensate Plaintiffs, it
20 members, or the public for this harm.

21 11. Plaintiffs and Plaintiffs' members are adversely affected or aggrieved by federal agency
22 action and are entitled to judicial review of such action within the meaning of the ESA and the APA.
23 Defendants' failure to comply with the ESA's mandatory deadlines prevents the completion of the
24 listing process and therefore the implementation of measures to protect the yellow-billed loon pursuant
25 to the ESA. Without the substantial protections of the ESA, yellow-billed loons are more likely to
26 continue to decline and become extinct. Plaintiffs are therefore injured because Plaintiffs' use and
27 enjoyment of the yellow-billed loon, and those areas inhabited by the loon and described below, are
28 threatened by Defendants' violation of the ESA. Defendants' failure to comply with the ESA's

1 deadlines has also resulted in informational and procedural injury to Plaintiffs, because Plaintiffs have
2 been deprived of a timely opportunity to submit additional information and otherwise participate in the
3 listing process in order to secure appropriate protective measures for the species. These are actual,
4 concrete injuries to Plaintiffs, caused by Defendants' failure to comply with the ESA, the APA, and
5 their implementing regulations. The relief requested will fully redress those injuries.

6 12. The federal government has waived sovereign immunity in this action pursuant to 16
7 U.S.C. § 1540(g) and 5 U.S.C. § 702.

8 III. PARTIES

9 13. Plaintiff CENTER FOR BIOLOGICAL DIVERSITY ("the Center") is a non-profit
10 501(c)(3) corporation with offices in San Francisco, Joshua Tree, and San Diego, California; as well as
11 in Arizona, New Mexico, Oregon; and Washington, D.C. The Center is actively involved in species
12 and habitat protection issues throughout the United States, including protection of Arctic wildlife in
13 general and the yellow-billed loon in particular. The Center has over 35,000 members throughout the
14 United States and the world.

15 14. Plaintiff NATURAL RESOURCES DEFENSE COUNCIL, Inc. ("NRDC") is a national
16 environmental advocacy group. The NRDC is registered to do business in California and maintains
17 offices in San Francisco, Los Angeles, Washington, D.C., New York City, Chicago, and Beijing.
18 Through advocacy, education, litigation, and other efforts, NRDC works to preserve threatened and
19 endangered wildlife across the United States and around the world, including Arctic wildlife in general
20 and the yellow-billed loon in particular. The NRDC has over 420,000 members nationwide, over
21 80,000 of whom reside in the State of California.

22 15. Plaintiff PACIFIC ENVIRONMENT is a non-profit environmental organization whose
23 mission is to protect the living environment of the Pacific Rim. Based in San Francisco, Pacific
24 Environment achieves this mission by strengthening democracy, supporting grassroots activism,
25 empowering local communities and redefining international policies. Pacific Environment is
26 particularly dedicated to promoting international efforts to protect biodiversity and to protect rare and
27 endangered species like the yellow-billed loon.

28 16. Plaintiffs' members and staff include individuals with varying interests in yellow-billed

1 loons and their habitat ranging from scientific, professional, and educational to recreational, aesthetic,
2 moral, and spiritual. Further, Plaintiffs' members and staff enjoy, on an on-going basis, the biological,
3 scientific, research, education, conservation, recreational and aesthetic values of the regions inhabited
4 by this species. Plaintiffs' staff and members observe and study yellow-billed loons and their habitat,
5 and derive professional, scientific, educational, recreational, aesthetic, inspirational, and other benefits
6 from these activities and have an interest in preserving the possibility of such activities in the future.
7 An integral aspect of the Plaintiffs' members' use and enjoyment of yellow-billed loons is the
8 expectation and knowledge that the species is in its native habitat. For this reason, Plaintiffs use and
9 enjoyment of yellow-billed loons is entirely dependent on the continued existence of healthy,
10 sustainable populations in the wild. Plaintiffs bring this action on their own behalf and on behalf of
11 their adversely affected members and staff.

12 17. Defendant DIRK KEMPTHORNE, United States Secretary of the Interior, is the highest
13 ranking official within the Department of the Interior and, in that capacity, has ultimate responsibility
14 for the administration and implementation of the ESA with regard to the yellow-billed loon, and for
15 compliance with all other federal laws applicable to the Department of the Interior. He is sued in his
16 official capacity.

17 18. Defendant U.S. FISH AND WILDLIFE SERVICE ("FWS") is a federal agency within
18 the Department of the Interior. Through delegation of authority from the Secretary, the FWS
19 administers and implements ESA, and is legally responsible for complying with the ESA's mandatory
20 deadlines and making decisions and promulgating regulations under the ESA, including issuing
21 proposed and final listing decisions and the processing of petitions such as the Petition to list the
22 yellow-billed loon.

23 IV. STATUTORY BACKGROUND

24 19. The ESA is a federal statute enacted to conserve endangered and threatened species and
25 the ecosystems upon which they depend. 16 U.S.C. § 1531(b). The ESA "is the most comprehensive
26 legislation for the preservation of endangered species ever enacted by any nation." Tennessee Valley
27 Authority v. Hill, 437 U.S. 153, 180 (1978). The Supreme Court's review of the ESA's "language,
28 history, and structure" convinced the Court "beyond a doubt" that "Congress intended endangered

1 species to be afforded the highest of priorities.” *Id.* at 174. As the Court found, “the plain intent of
2 Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever
3 the cost.” *Id.* at 184.

4 20. The ESA assigns responsibility to implement the statute to the Secretaries of Commerce
5 and the Interior, which in turn have delegated responsibility to the National Marine Fisheries Service
6 (“NMFS” or “NOAA Fisheries”) and FWS respectively. Generally, NMFS has jurisdiction over marine
7 species, while FWS has jurisdiction over terrestrial and freshwater species, including all birds such as
8 the yellow-billed loon. The ESA protects species listed as either “endangered” or “threatened” by FWS
9 or NMFS. A species is “endangered” if it “is in danger of extinction throughout all or a significant
10 portion of its range.” 16 U.S.C. § 1532(6). A species is “threatened” if it is “likely to become an
11 endangered species within the foreseeable future.” 16 U.S.C. § 1532(20)

12 21. Once a species is listed, an array of statutory protections applies. For example, Section 7
13 of the ESA requires all federal agencies to “insure” that their actions neither “jeopardize the continued
14 existence” of any listed species nor “result in the destruction or adverse modification” of its “critical
15 habitat.” 16 U.S.C. § 1536(a)(2). Section 9 and its regulations further prohibit, among other things,
16 “any person” from intentionally “taking” listed species or “incidentally” taking listed species without a
17 permit from FWS. 16 U.S.C. §§ 1538(a)(1)(B), 1539. Other provisions require FWS to designate
18 “critical habitat” for listed species, 16 U.S.C. § 1533(a)(3), require FWS to “develop and implement”
19 recovery plans for listed species, 16 U.S.C. § 1533(f), authorize the acquisition of land for the
20 protection of listed species, 16 U.S.C. § 1534, and make federal funds available to states to assist in
21 their efforts to preserve and protect threatened and endangered species, 16 U.S.C. § 1535(d).

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

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

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

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

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

17 27. If FWS finds in the 12-month finding that the listing of the species is warranted, then the
18 agency must publish in the Federal Register a proposed rule, for public comment, to list such species as
19 endangered or threatened. 16 U.S.C. § 1533(b)(5).

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

22 29. At such time, FWS must either list the species, withdraw the proposal, or if there is
23 substantial disagreement about scientific data, delay a final determination for up to six months to solicit
24 more scientific information. 16 U.S.C. §§ 1533(b)(6)(A)(i)(III) & 1533(b)(6)(B)(i).

25 30. Concurrently with a final determination to list a species, FWS must render a final
26 decision concerning the designation of critical habitat for the species to the maximum extent prudent
27 and determinable. 16 U.S.C. §§ 1533(a)(3) & 1533(b)(6)(C). If FWS finds that designation of critical
28 habitat is prudent, but is not currently determinable, then FWS may extend the deadline to issue a final

1 regulation concerning critical habitat by no more than one additional year. 16 U.S.C. §
2 1533(b)(6)(C)(ii).

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

6 V. FACTUAL BACKGROUND

7 32. Plaintiffs' Petition to list the yellow-billed loon as a threatened or endangered species
8 was submitted on March 30, 2004 and received by FWS on April 5, 2004. As summarized below, the
9 Petition details the factors that threaten the yellow-billed loon with extinction.

10 33. The yellow-billed loon is a large, heavy-bodied water bird. Adults generally range in
11 length between 774 and 920 millimeters and weigh between 4,000 and 6,000 grams. The best
12 distinguishing field mark of the yellow-billed loon is the shape and color (bright yellow in summer,
13 pallid yellow or ivory in winter) of the bill. Male and female yellow-billed loons have similar plumage.
14 In winter, the species exhibits gray-brown over white plumage. In summer, its plumage is
15 characterized by black feathers on the head and neck with a white anterior throat band of vertical white
16 stripes and a lower full "necklace" of vertical white stripes, a white breast, and white spots on the back
17 and wings.

18 34. The yellow-billed loon is a holarctic species, meaning that its population spans the
19 Arctic regions of both Eurasia and North America. Yellow-billed loons over-winter predominantly on
20 near-shore marine embayments and archipelagos on the west coast of North America, sometimes
21 reaching as far south as Baja California, and along the east coast of Asia. They generally are thought to
22 migrate along coastal routes next to the United States, Canada and Russia, but may also use overland
23 routes.

24 35. While population trends for the yellow-billed loon are difficult to determine due to lack
25 of research and understanding of migration patterns, scientists recognize that population numbers of the
26 yellow-billed loon are alarmingly low. Alaska's coastal plain has an estimated population of 3,000
27 yellow-billed loons. Western Alaska has an estimated population of 650 individuals making the range-
28 wide population in Alaska approximately 3,650 individuals. An estimated 8,000 yellow-billed loons

1 are thought to occur in Canada with an additional 5,000 individuals thought to occur in Eurasia. With a
2 global population estimated as low as 16,650 individuals, the yellow-billed loon is one of the rarest
3 species of waterbirds that breed regularly within mainland North America.

4 36. The habitat requirements of the yellow-billed loon are complex because this species
5 utilizes different habitat for breeding, migration, and wintering. Each of these three habitats requires
6 three elements to sustain yellow-billed loon populations: (1) ample forage, (2) minimal human
7 disturbance, and (3) an open-water environment low in toxins. The yellow-billed loon is in jeopardy
8 because there are no mechanisms in place to ensure these habitat requirements are maintained.

9 37. Yellow-billed loons breed at 62-74° N latitude on deeper, clear-water, low-rimmed lakes
10 with steady warm-season water levels, abundant food supply, and sufficiently long open-water seasons
11 for incubation and fledging of young. Breeding lakes occur in low-lying treeless tundra regions, often
12 near lowland-upland transitions, or on large river deltas with untapped lakes. Water levels must remain
13 stable throughout nest inception and incubation. Drawdown during the nesting/brooding season, or
14 refill after winter drawdown, may reduce nesting success.

15 38. Migration habitat for yellow-billed loons nesting in the Alaskan National Petroleum
16 Reserve appears to be between arctic tundra nesting grounds and near-shore marine waters in the
17 Yellow Sea adjacent to China. Stopovers occur along the way, presumably including feeding, as the
18 loons pass around Point Hope, Alaska; along the Chukchi Peninsula; near St. Lawrence Island; past or
19 across the Kamchatka Peninsula; and across northern Japan and North Korea. Yellow-billed loons
20 overwintering off southern Alaska may migrate overland to central Canadian breeding grounds.

21 39. It is thought that yellow-billed loons spend approximately eight months exclusively in
22 marine environments. For this reason, the health of the marine wintering areas is extremely important to
23 the long-term survival of this species. Based on observed declines in a number of Alaska marine birds,
24 including red-throated loons and a number of sea ducks, there likely are substantial links between avian
25 health and the health of marine ecosystems.

26 40. The yellow-billed loon is extremely sensitive to human disturbance, reacting to
27 disturbances occurring as much as 1 mile away, as well as to changes in its habitat. Unfortunately, the
28 yellow-billed loon occupies areas that are increasingly influenced by the impacts of human activities,

1 such as oil and gas exploration and development and global warming.

2 41. The earth's climate is warming due to society's production of greenhouse gases,
3 primarily from the combustion of fossil fuels for energy. The primary greenhouse gases are carbon
4 dioxide, methane, and nitrous oxide. Increasing concentrations of greenhouse gases cause the earth's
5 atmosphere to retain a greater proportion of the sun's energy, warming the earth's climate much like the
6 interior of a greenhouse. Climate science has advanced rapidly in recent years, and it has now been
7 firmly established that society's production of greenhouse gases is responsible for the unprecedented
8 rate of warming over the past century.

9 42. For a number of reasons, the Arctic has experienced greater and more rapid warming
10 than temperate regions. Average winter temperatures in some areas of the Arctic have already risen by
11 7° Fahrenheit. Even using moderate projections of future greenhouse gas emissions levels, average
12 winter temperatures are projected to rise by 18° Fahrenheit over the Arctic oceans by the end of this
13 century.

14 43. Global warming will likely affect the yellow-billed loon in several ways. First, warmer
15 water and reduced ocean primary productivity will likely reduce food resources available to the loon.
16 Perhaps more significantly, sea level rise will inundate important freshwater breeding ponds, while
17 increased storm surges from diminished sea ice will also result in salt water intrusion on these
18 freshwater lakes. Additionally, rising temperatures will result in drying of tundra ponds while melting
19 permafrost will lead to draining of such ponds. Such habitat alterations have, in fact, already been
20 documented in published scientific literature. Collectively, such impacts will likely lead to further
21 reductions in this already small and vulnerable population.

22 44. Yellow-billed loons are threatened by other factors as well, including habitat destruction,
23 contamination of their habitat and food sources by oil and other toxic chemicals, anthropogenically
24 enhanced predation and disease, and human disturbance. Many of these threats are linked to the
25 proliferation of oil and gas development in the yellow-billed loon's habitat, which can disrupt nesting,
26 feeding, and other behaviors in addition to directly destroying key habitat, and which also poses a risk
27 of harmful oil spills. In addition, global warming will likely increase the amount of human disturbance
28 to which the sensitive yellow-billed loon is exposed, as greater portions of the Arctic become more

1 accessible to people. Increased disturbance will almost certainly lead to decreased breeding success
2 and increased mortality of the yellow-billed loon. Many of these threats will interact with global
3 warming in cumulative and synergistic ways, further heightening the threat to the yellow-billed loon.

4 45. Plaintiffs' Petition to list the yellow-billed loon under the ESA was received by FWS on
5 April 5, 2004. FWS made a positive "90-day" finding on the Petition on June 6, 2007. *See* "90-Day
6 Finding on a Petition To List the Yellow-Billed Loon as Threatened or Endangered," 72 Fed. Reg.
7 31256 (June 6, 2007). By law, FWS was required to make a 12-month finding on the Petition no later
8 than April 5, 2005. The agency failed to do so. On June 11, 2007, Plaintiffs sent FWS a 60-day notice
9 of intent to sue over the agency's failure to make the required finding. The required finding has not
10 been made. This litigation followed.

11 VI. CLAIM FOR RELIEF

12 (Violation of Endangered Species Act, 16 U.S.C. § 1533(b)(3), for Failure to Make a 12-month 13 Finding on the Listing Petition)

14 46. Plaintiffs reallege and incorporate by reference all the allegations set forth in this
15 Complaint, as though fully set forth below.

16 47. FWS's failure to make a 12-month finding on the Petition to list the yellow-billed loon
17 as an endangered or threatened species is a violation of the ESA and its implementing regulations. 16
18 U.S.C. §§ 1533(b)(3)(B) & 1540(g). FWS's failure to perform its mandatory, non-discretionary duty
19 also constitutes agency action "unlawfully withheld or unreasonably delayed" within the meaning of the
20 APA, 5 U.S.C. § 706(1). Additionally, and/or alternatively, FWS's failure to comply with this
21 provision is arbitrary and capricious, an abuse of discretion, not in accordance with law, and a failure to
22 observe proper procedure under the APA, 5 U.S.C. § 706(2).

23 VII. PRAYER FOR RELIEF

24 For the reasons stated above, Plaintiffs respectfully request that the Court grant the following
25 relief.

26 1. Declare that FWS violated its non-discretionary duties under 16 U.S.C. § 1533(b)(3)(B)
27 of the ESA by failing to timely make a 12-month finding in response to the Petition to list the yellow-
28 billed loon under the ESA;

1 2. Issue permanent injunctive relief compelling FWS to make and publish in the Federal
2 Register a 12-month finding on the Petition to list the yellow-billed loon under the ESA by a date
3 certain;

4 3. Award Plaintiffs their costs of litigation, including reasonable attorneys fees; and

5 4. Grant Plaintiffs such other relief as the Court deems just and proper.
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7

8 DATE: December 19, 2007

Respectfully Submitted,

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