

healthy bearded seal subpopulations qualify for listing as “threatened species” under the ESA solely because of unknown and unspecified adverse effects that may occur at an unknown time and at an unknown rate in the future as a consequence of climate change in the Arctic occurring over the next century. Plaintiffs challenge the Listing Rule because it violates Sections 3 and 4 of the ESA, 16 U.S.C. §§ 1532 and 1533, and because the Listing Rule is arbitrary and capricious in violation of the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 701 *et seq.*

2. Plaintiffs respectfully request that the Court declare the Listing Rule unlawful, and vacate and remand the Listing Rule to NMFS for further consideration in compliance with the ESA and the APA.

II. PARTIES

3. AOGA is a private, non-profit trade association located in Anchorage, Alaska. AOGA’s fifteen member companies account for the majority of oil and gas exploration, development, production, transportation, refining, and marketing activities in Alaska. AOGA’s members are the principal industry stakeholders that operate within the range of, and that incidentally interact with, bearded seals in state and federal jurisdictional waters adjacent to Alaska. AOGA and its members are also longstanding supporters of marine mammal conservation, management and research in Alaska and western Canada. AOGA and its members are committed to the protection of the environment of the Alaskan Arctic and the adjacent U.S. Arctic Outer Continental Shelf to ensure that the living resources of the Arctic, including bearded seals, are responsibly managed and conserved according to the best available science to maintain the health of the ecosystem.

4. The API is a non-profit national trade association representing all aspects of America’s oil and natural gas industry. API has over 500 members, from the largest major oil

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company to the smallest of independents, from all segments of the industry, including producers, refiners, suppliers, pipeline operators and marine transporters, as well as service and supply companies that support all segments of the industry. API and its members are dedicated to meeting environmental requirements, while economically developing and supplying energy resources for consumers.

5. Because of the direct and significant interests of its members, AOGA and API have been active stakeholders in all of the processes taking place under Section 4 of the ESA regarding the bearded seal and other Arctic species, subspecies and subpopulations. AOGA and API, and their members, have previously submitted written comments, dated November 2, 2008, March 25, 2011, and May 7, 2012, regarding NMFS's proposal to list subpopulations of the bearded seal as "threatened species" under the ESA.

6. As a result of the location and nature of oil and gas activities in Alaska, Plaintiffs' members have substantial direct experience, data, and knowledge about bearded seal behavior, activity and habitat in Arctic waters adjacent to Alaska, and about interactions between the oil and gas industry and marine mammals, including bearded seals. This experience, data, and knowledge bears directly upon the best scientific data and information available regarding the status of and threats to bearded seals in the Arctic.

7. On or about June 26, 2013, Defendant Penny Priztker was sworn in as the current Secretary of the United States Department of Commerce. Penny Priztker, in her official capacity as Secretary of Commerce, directs all business of the Department of Commerce, including NMFS. In her official capacity as Secretary of Commerce, Penny Priztker is responsible for the

Listing Rule and for the associated violations of the ESA and the APA as alleged in this Complaint.

8. NMFS is an agency of the National Oceanic and Atmospheric Administration of the United States Department of the Commerce. NMFS has been delegated the responsibility for administering the provisions of the ESA, including listing determinations, with regard to certain threatened and endangered wildlife, including, but not limited to, bearded seals. The authority delegated to NMFS to administer and to implement the ESA is subject to, and must be in compliance with, the applicable requirements of the ESA and the APA.

III. JURISDICTION AND VENUE

9. This Court has jurisdiction over this action pursuant to 5 U.S.C. §§ 701-706 (APA), 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 2201 (declaratory judgments), and 28 U.S.C. § 2202 (injunctive relief). Jurisdiction in this Court is also established under 16 U.S.C. § 1540(g)(1). Pursuant to ESA Section 11(g)(2)(A), 16 U.S.C. § 1540(g)(2)(A), by letters dated March 18, 2013 and April 25, 2013, AOGA and API each provided Defendants with the requisite sixty-days notice of their intent to bring this suit under the ESA. A copy of AOGA's and API's letters are attached as Exhibits A and B.

10. Venue is properly vested in this court under 28 U.S.C. § 1391(e) because: (1) the species and geographic areas at issue in and affected by the Listing Rule are located in this district; (2) NMFS maintains an office in this district; and (3) AOGA resides and does business in this district, as do AOGA's and API's members. *See* 16 U.S.C. §1540(g)(3)(A).

IV. STATUTORY FRAMEWORK

A. The Administrative Procedure Act

11. The APA provides for judicial review of final agency action. 5 U.S.C. § 702. The APA also authorizes courts reviewing agency action to hold unlawful and set aside final agency action, findings, and conclusions that are arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). Decisions by NMFS to list a species as threatened or endangered under Section 4 of the ESA are subject to judicial review under this provision of the APA.

B. The Endangered Species Act

12. The ESA establishes a federal statutory program for the conservation of “threatened” and “endangered” species. As defined in Section 3 of the ESA, an “endangered species” is a species in danger of extinction throughout all or a significant portion of its range and a “threatened species” is a species that is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. 16 U.S.C. §§ 1532(6), (20).

13. Section 4(a) of the ESA, 16 U.S.C. § 1533(a), requires the Secretary of Commerce and the Secretary of Interior to determine by regulation whether any species are “threatened” or “endangered.” In order to list a species under this provision of the ESA, the Secretary must find that one or more of five statutory factors warrant a listing. Pursuant to Section 4(b) of the ESA, 16 U.S.C. § 1533(b), determinations whether to list a species under Section 4(a) must be made based on “the best scientific and commercial data available” after conducting a review of the status of the species and taking into account the efforts of states, foreign nations and political subdivisions of any state or foreign nation to protect such species.

14. Pursuant to Section 4(b)(8) of the ESA, 16 U.S.C. § 1533(b)(8), the publication in the Federal Register of a final regulation listing a species as “threatened” or “endangered” under the ESA must include a summary of the data on which the regulation is based and must demonstrate the relationship of the data to the regulation.

15. The remaining principal provisions and requirements established in the ESA apply only to listed species, and to actions affecting listed species and their designated critical habitats. For example, pursuant to Section 7(a)(2) of the ESA, once a species is listed as “endangered” or “threatened,” every federal agency that takes an action that may affect that species must “insure,” in consultation with NMFS or the U.S. Fish and Wildlife Service, that any such action “is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of [the species’ designated critical] habitat.” 16 U.S.C. § 1536(a)(2). In addition, pursuant to Section 9 of the ESA, it is unlawful to engage in the unauthorized “take” of any “endangered” species. 16 U.S.C. § 1538. The “take” prohibitions of Section 9 may also be, and most commonly are, applied to “threatened” species by promulgation of a regulation pursuant to Section 4(d) of the ESA. 16 U.S.C. § 1533(d).

V. STATEMENT OF FACTS

A. Bearded Seals

16. Bearded seals are marine mammals that inhabit the Arctic and near-Arctic. Bearded seals are circumpolar in distribution south of 85° N. latitude, extending south to the southern Bering Sea in the Pacific and into Hudson Bay and southern Labrador in the Atlantic. Bearded seals also occur in the Sea of Okhotsk south to the northern Sea of Japan.

17. NMFS recognizes two subspecies of bearded seal: *Erignathus barbatus nauticus*, which inhabits the Pacific sector of the species’ range; and *Erignathus barbatus barbatus*, which

inhabits the Atlantic sector of the range. However, there are no distinct boundaries between populations of these subspecies in the wild. NMFS has further subdivided the subspecies *Erignathus barbatus nauticus* into the Beringia DPS and the Okhotsk DPS.

18. According to NMFS, no accurate worldwide abundance estimates exist for bearded seals. Although the actual abundance of this species is uncertain, NMFS has conservatively estimated the worldwide population of the bearded seal species to be 438,000 individuals, approximately 57 percent of which are from the subspecies *Erignathus barbatus nauticus*. NMFS has further conservatively estimated the abundance of the Beringia DPS at 155,000 individuals and the abundance of the Okhotsk DPS at 95,000 individuals.

19. The International Union for Conservation of Nature (“IUCN”) maintains an internationally recognized ranking of the conservation status of plant and animal species known as the “Red List.” The Red List contains the IUCN’s ranking of species along a continuum of conservation concern from “least concern,” through “near threatened,” “vulnerable,” “endangered,” “critically endangered,” and “extinct in the wild,” to “extinct.” The IUCN Red List ranking for bearded seals is “least concern,” meaning that the species is reliably abundant and widespread. The IUCN justification for this ranking is that the bearded seal species exhibits a large population, broad distribution, variable feeding habits and no evidence of a decline. The IUCN rates the population trend for bearded seals to be “stable” and has concluded that “a population reduction of bearded seals has not been observed, estimated, inferred, or suspected in the past 30 years.”

B. ESA Listing of Bearded Seal DPSs

20. On March 28, 2008, NMFS received a petition from the national environmental advocacy group, Center for Biological Diversity, to list bearded seals and other Arctic seal species as threatened or endangered under the ESA. In response to the petition, NMFS conducted a status review of the bearded seal species.

21. NMFS has determined through its record and findings, and through its status review and subsequent proceedings pursuant to the ESA, that, among other things:

a. The Beringia and Okhotsk DPSs are each moderately large subpopulations that are widely distributed and genetically diverse.

b. No reduction of the Beringia and Okhotsk DPSs of bearded seals has been observed, estimated, inferred or suspected in the past 30 years.

c. There are no data demonstrating any present effect to the abundance, survival, health or reproduction of the Beringia and Okhotsk DPSs of bearded seals as a result of climate change in the Arctic or acidification of the oceans.

d. There are no data documenting how bearded seals will respond to projections of future climate change in the Arctic, including potential habitat loss (sea ice recession) and acidification of the oceans.

e. To assess the relationship, if any, between predicted future changes in sea ice cover in the Arctic and potential impacts to bearded seals requires knowledge of the relationship between environmental conditions (particularly sea ice conditions) and bearded seal vital rates. However, there are no data documenting the relationship between environmental conditions (including sea ice conditions) and bearded seal vital rates.

f. Based upon the best available data and information, it is impossible to define an extinction threshold for bearded seals, and to assess the probability of the Beringia DPS or the Okhotsk DPS reaching such an extinction threshold within any specified time frame.

g. Although the magnitude of climate change is uncertain, there is broad consensus in the scientific community that the Arctic climate will warm and that sea ice will decline in extent and thickness in the future. However, there is no similar consensus about the biological responses of bearded seals that are likely to follow physical changes to Arctic habitat or acidification of the oceans. Accordingly, the nature, direction, and magnitude of the biological responses of bearded seals that may result from climate change or acidification of the oceans are highly uncertain.

22. On December 28, 2012, NMFS issued a final rule determining that the Beringia and Okhotsk DPSs of the bearded seal subspecies *Erignathus barbatus nauticus* are “threatened species” pursuant to the ESA. 77 Fed. Reg. 76,740 (Dec. 28, 2012). The only threat to the Beringia DPS and the Okhotsk DPS of bearded seals identified by NMFS as sufficient to support its “threatened species” listing is the projected loss of sea ice due to a forecasted increase in Arctic temperatures extended out to the year 2100.

VI. FIRST CLAIM FOR RELIEF

23. Plaintiffs incorporate by reference all preceding paragraphs of this Complaint for Declaratory and Injunctive Relief.

24. In the Listing Rule, NMFS determined that abundant, wide-ranging, genetically diverse and otherwise entirely healthy subpopulations of bearded seals are likely to become endangered within the foreseeable future as a result of the future effects of climate change on their Arctic habitat. However, there are no scientific data linking environmental conditions in

the Arctic habitat of bearded seals, including sea ice conditions and extent, to the health, reproduction, survival or conservation of bearded seals. Moreover, there are no data to support and, accordingly, NMFS did not establish, either an extinction threshold for bearded seals or the probability of bearded seals reaching an extinction threshold within any specified time frame.

25. Neither the best available scientific data and information, nor the administrative record as a whole, support a determination that currently healthy, abundant, wide-ranging and genetically diverse species and subpopulations -- for which there is no evidence of any current adverse impact from climate change or ocean acidification, no data linking future changes in environmental conditions and species habitat to effects on species health and survival, and no data or modeling quantifying the rates, extent, timing of future uncertain biological effects -- are “threatened species.”

26. For the foregoing reasons, by listing the Beringia DPS and Okhotsk DPS of the *Erignathus barbatus nauticus* subspecies of bearded seal as “threatened species” under the ESA, Defendants have acted in a manner that is arbitrary, capricious, an abuse of discretion and contrary to applicable law in violation of the APA, and that violates ESA Sections 3 and 4.

VII. SECOND CLAIM FOR RELIEF

27. Plaintiffs incorporate by reference all preceding paragraphs of this Complaint for Declaratory and Injunctive Relief.

28. Prior to the Listing Rule, NMFS and the U.S. Fish and Wildlife Service consistently concluded that the “foreseeable future” for the purpose of assessing climate change threats under ESA Section 4 is mid-century, and that longer-term projections and forecasts are not sufficiently reliable for purposes of ESA listing determinations. This conclusion is repeated

in numerous final listing rules, and has been successfully defended by NMFS and the U.S. Fish and Wildlife Service in federal court litigation challenging the agencies' decisions.

29. In the Listing Rule, NMFS departs from previous findings and conclusions in order to rely upon climate predictions extending out to the year 2100.

30. Neither the best available scientific data and information, nor the administrative record as a whole, supports a determination that projections of climate change in the Arctic out to 2100 that were too unreliable for use in prior ESA listing decisions are now reliable for use in the bearded seal listing determinations. Moreover, NMFS has not rationally explained its changed position on this issue.

31. For the foregoing reasons, in listing the Beringia DPS and Okhotsk DPS of the *Erignathus barbatus nauticus* subspecies of bearded seal as "threatened species" under the ESA, Defendants have acted in a manner that is arbitrary, capricious, an abuse of discretion and contrary to applicable law in violation of the APA, and that violates ESA Sections 3 and 4.

VIII. REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

A. Declare that the Defendants, in listing the Beringia DPS and Okhotsk DPS of the *Erignathus barbatus nauticus* subspecies of bearded seal as "threatened species," violated the ESA and the APA;

B. Vacate and remand the Listing Rule to NMFS, or otherwise enjoin the implementation of the Listing Rule;

C. Award Plaintiffs their reasonable attorney fees, costs, expenses and disbursements, including attorney fees associated with this litigation, pursuant to the fees and expenses recovery provisions of the ESA or the Equal Access to Justice Act; and

D. Award Plaintiffs such other and further relief as this Court may deem just and equitable.

DATED: July 2, 2013.

STOEL RIVES LLP

/s/ Ryan P. Steen

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CERTIFICATE OF SERVICE

I hereby certify that, on July 2, 2013, I filed a true and correct copy of *Alaska Oil and Gas Association and American Petroleum Institute's First Amended Complaint for Declaratory and Injunctive Relief* using the CM/ECF system. Participants in this case who are registered CM/ECF users will be served by the CM/ECF system.

I further certify that the following participants who have not yet appeared in the case have been served via the United States Postal Service— First Class Mail, postage prepaid, at their last know addresses.

I further certify that I served the attached document along with the original Summons and Complaint, that was served on Karen Loeffler, on Penny Pritzker by Certified Mail.

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