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Protected Resources Division – Alaska Division
National Marine Fisheries Service
P.O. Box 21668
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Attn: Ellen Sebastian

Re: Comments of the Alaska Oil and Gas Association and the American Petroleum Institute regarding proposed rule to designate ringed seal critical habitat — NOAA-NMFS-2013-0114

Dear Mr. Kurland:

This letter provides the comments of the Alaska Oil and Gas Association (“AOGA”) and the American Petroleum Institute (“API”) (collectively, the “Associations”) in response to the National Marine Fisheries Service’s (“NMFS”) proposal to designate critical habitat for the Arctic subspecies of the ringed seal (*Phoca hispida hispida*) under the Endangered Species Act (“ESA”). See 79 Fed. Reg. 73,010 (Dec. 9, 2014) (the “Proposed Rule”). We appreciate NMFS’s consideration of the comments set forth below.

I. INTRODUCTION

A. The Associations

AOGA is a non-profit trade association located in Anchorage, Alaska. AOGA’s 14 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, ringed seals in Alaskan waters and in the adjacent waters of the

U.S. Outer Continental Shelf (“OCS”). AOGA and its members are longstanding supporters of wildlife conservation, management, and research in the Arctic.

API is a national trade association representing over 600 member companies involved in all aspects of the oil and natural gas industry, including those that operate within the range of, and that incidentally interact with, ringed seals in Alaskan waters and in the adjacent waters of the OCS. API’s members include 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.

B. Summary of Comments

The Associations’ comments on the Proposed Rule are summarized as follows:

1. The ESA listing of ringed seals arises in the unique context of a species that is currently healthy and occupies its entire historical range. There are no current threats to the survival and recovery of Arctic ringed seals, and NMFS has projected that the current healthy status of the species will persist well into the second half of this century. Moreover, none of the few human activities that occur within the range of ringed seals pose a threat to the survival of the species. Notwithstanding this status, NMFS has proposed to designate an enormous area covering approximately 350,000 square miles of U.S. jurisdictional waters in the Beaufort, Chukchi, and Bering Seas as habitat that is “critical” to the survival of ringed seals. If finalized, this would be the largest critical habitat designation in the history of the ESA.

2. Existing regulatory programs have been extraordinarily effective in managing the potential for adverse impacts to Arctic ringed seals and other marine mammals. For example, there is a longstanding record of findings that the oil and gas industry in Alaska has no more than a negligible impact on marine mammals (including ringed seals), does not pose a threat to the survival or recovery of ringed seals, and is more rigorously regulated under the applicable provisions of the Marine Mammal Protection Act (“MMPA”) than under the provisions of the ESA. Should NMFS proceed to designate critical habitat for ringed seals, the Alaska oil and gas industry, state and local governments, and Alaska Native interests will be caught in the middle of a vast disconnect of consequences. Although it is well-established that their activities have negligible effects on ringed seals and are not the cause of the listing decision — a decision based solely upon projected future harms, and identifying no conservation benefits — both the regulatory burden and the concerted efforts of advocacy groups to use the ESA as a litigation mechanism to block or impede development of the Alaskan Arctic will be directed at these longstanding stakeholders.

3. Critical habitat designations are to be made only to the “extent prudent and determinable.” 16 U.S.C. § 1533(a)(3). The extraordinary circumstances here — i.e., a listed species that is highly abundant, occupies its entire historical range, is not threatened or otherwise negatively impacted by any of the regulated activities in its range, and is not expected to be impacted by climate change until the second half of this century (if at all) — call for NMFS to determine that designation of ringed seal critical habitat is not prudent.

4. Critical habitat designations must be supported by a finding that the essential habitat features “may require special management considerations or protection[s].” *Id.* § 1532(5)(A)(i)(II) (emphasis added). Because existing laws, including the MMPA, provide more protection for ringed seals than the ESA, there is no rational basis for NMFS to find that the potential effects to essential habitat features for ringed seal posed by oil and gas exploration, development and production, or other activities may require special management considerations. Moreover, NMFS has determined that the ESA Section 7 consultation process will not foreseeably result in any additional measures to address the potential effects of activities on ringed seals.

5. NMFS’s proposal to broadly designate a 350,000 square mile area that includes virtually all of the U.S. range of the ringed seal irreconcilably conflicts with the plain language of the ESA and with Congressional intent. In the Proposed Rule, NMFS simply identifies all areas that may be used by ringed seals or that are otherwise within the known distribution of Arctic ringed seals and, with very minor and irrelevant exceptions, summarily deems the entire area bounded by that distribution as “critical habitat.” However, the ESA requires a very specific analysis that identifies the location of essential habitat features that can be used to delineate “specific areas within the geographical area occupied by the species.” The Proposed Rule provides no substantive analysis that identifies “specific areas” within the general area occupied by ringed seals or that meaningfully explains why any such specific areas contain the features that are “essential to the conservation of the species.” If NMFS proceeds to designate ringed seal critical habitat, then it must narrow the scope of the designation to include only those “specific areas” that are “actually needed for the survival of the species.” In identifying those specific areas, NMFS should consider, among other factors, the sea-ice concentrations (if any) and types that are actually essential to ringed seal conservation, the temporal and geographic variability associated with key ringed seal life stages, and the ability of ringed seals to adapt to changes in both prey and sea-ice habitat.

6. The overbreadth of this proposed designation is compounded because the “specific areas” must contain features that are essential “at the time [the species] is listed,” and that are “then considered to be critical” — not what may be projected as “critical” at some undetermined time in the future. Habitat not presently essential may not be designated, and any final designation should be restricted to those areas that are

presently essential. Should additional action be warranted in the future, the agency may revise the designation, as appropriate, pursuant to the provisions of the ESA.

7. Should NMFS proceed to a final decision, it should exclude any identified “critical habitat” from formal designation because any marginal benefits are outweighed by the economic impacts that will result from designation. Such an exclusion is supported by (1) the absence of any tangible benefits from a designation; (2) the importance to the Alaska economy and national energy needs of oil and gas development; and (3) the strong potential for the designation to impose unnecessary costs and litigation risks on the oil and gas industry, Alaska Native communities, and state and local governments. Alternatively, any and all areas in which human and industrial activities occur, or will foreseeably occur, should be excluded from any ringed seal critical habitat designation. These areas should include all existing and planned lease sale blocks in the Chukchi and Beaufort Seas.

II. DETAILED COMMENTS

A. Context

1. The present status of ringed seals

NMFS proposes to designate “one specific area” covering approximately 350,000 square miles of U.S. jurisdictional waters in the Beaufort, Chukchi, and Bering Seas as ringed seal critical habitat. If issued in final, this proposal would mark the largest critical habitat designation in the history of the ESA. As a point of comparison, the proposed ringed seal critical habitat designation is twice the size of the polar bear critical habitat designation, which was vacated by the Alaska district court because, in part, “it went too far and was too extensive.” *Alaska Oil & Gas Ass’n v. Salazar*, No. 3:11-cv-0025-RRB, 2013 U.S. Dist. LEXIS 10559, at *63 (D. Alaska Jan. 11, 2013).

Notwithstanding NMFS’s proposal to set aside this enormous area as “critical,” Arctic ringed seals number in the millions, are not presently subject to any significant threats (and are not predicted to be until much later this century, if at all), and can be found throughout their entire historical range. In other words, although the habitat of Arctic ringed seals is projected by NMFS to decline in the next hundred years as a result of future sea-ice recession,¹ ringed seals exist today in a status that qualifies as healthy. In significant contrast, almost all other ESA-listed species are in an existing state of significant decline in abundance and range, from which “recovery” is sought. As a result, the proposed designation of ringed seal critical habitat does not meet the statutory

¹ This projection is itself highly uncertain, and it is also possible that climate change-related effects may benefit ringed seals.

requirement that critical habitat must contain features that are essential at the time the species is listed.

To be sure, the recent vacatur of NMFS's final rule listing the bearded seal as a threatened species calls the ringed seal listing rule into serious question. As the court explained in the bearded seal litigation:

Troubling to this Court is that it does not appear from the Listing Rule that any serious threat of a reduction in the population of the Beringia DPS, let alone extinction, exists prior to the end of the 21st century. Indeed, the Listing Rule itself concedes that, at least through mid-21st century, there will be sufficient sea-ice to sustain the Beringia DPS at or near its current population levels. Indeed, with respect to the second half of the century it appears that no significant threat to the Beringia DPS is contemplated before 2090. Even as to that date, NMFS acknowledges that it lacks any reliable data as to the actual impact on the bearded seal population as a result of the loss of sea-ice. Under the facts in this case, forecasting more than 50 years into the future is simply too speculative and remote to support a determination that the bearded seal is in danger of becoming extinct.

Alaska Oil & Gas Ass'n v. Pritzker, No. 4:13-cv-00022-RRB, 2014 U.S. Dist. LEXIS 101446, at *53-54 (D. Alaska July 25, 2014). The ringed seal listing rule is presently the subject of a similar legal challenge in the Alaska federal district court. See *Alaska Oil & Gas Ass'n v. Pritzker*, No. 4:14-cv-00029-RRB (D. Alaska). Should the court vacate the ringed seal listing rule, as it did the bearded seal listing rule, then there would be no legal basis for the designation of critical habitat, and the Proposed Rule, or any final rule designating ringed seal critical habitat, should be withdrawn.

2. Regulation of Arctic offshore activities

NMFS's proposal to designate ringed seal critical habitat arises in the context of a high degree of uncertainty and disagreement about the legal and economic consequences associated with any designation that NMFS may propose. The designation of ringed seal critical habitat will not result in any tangible conservation measures above and beyond those that have been implemented in the Arctic for many years. NMFS has determined that Arctic ringed seals face no present threats and, moreover, that the long-term threat facing ringed seals (as projected by NMFS) is not caused by any of the Arctic activities that will be subjected to the regulatory impacts of a critical habitat designation.

The oil and gas industry has been operating on the Alaskan North Slope and in the adjacent OCS for over 30 years with no more than a negligible effect on ice seals and other marine mammals. Oil and gas leasing, exploration, development, and production in the offshore Arctic are rigorously regulated pursuant to a variety of federal, state, and local statutes, regulations, and ordinances, including the MMPA, the ESA, the Clean Water Act (“CWA”), the Clean Air Act, the Outer Continental Shelf Lands Act (“OCSLA”), the National Environmental Policy Act, and the Oil Pollution Act of 1990 (“OPA”). It is well-established in the regulatory and scientific record that existing regulatory mechanisms sufficiently protect seal species from the impacts of authorized oil and gas activities, and from the risk of an oil spill. *See* Attachment A, pp. 14-20.²

For example, the MMPA, 16 U.S.C. § 1361, *et seq.*, is intended to ensure that marine mammals are “protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management.” 16 U.S.C. § 1361(6). The MMPA’s primary management objective is to “maintain the health and stability of the marine ecosystem.” *Id.* To accomplish this objective, the MMPA enacts a broad moratorium on the “take,” import, or export of marine mammals and marine mammal products, except as expressly authorized. *See id.* § 1371(a); *id.* § 1362(8) (defining moratorium); *id.* § 1371(a)(1)-(6) (describing exceptions); *id.* § 1373 (authorizing regulations on take and importation). In the MMPA, Congress authorized the Secretaries of Interior and Commerce, acting through the NMFS and the U.S. Fish and Wildlife Service (“FWS”) (collectively, the “Services”), to issue several different types of permits and authorizations allowing the take of marine mammals incidental to activities such as industrial projects, commercial fishing, military readiness, research, public display, and photography. *See, e.g., id.* § 1362(12); *id.* § 1371(a)(1); *id.* § 1374; *id.* § 1387.

As relevant to commercial and industrial activities, other than commercial fishing, Section 101(a)(5) of the MMPA, 16 U.S.C. § 1371(a)(5), provides two means by which the Services may authorize incidental take. First, U.S. citizens may petition the Services to issue a regulation for a period of up to five years authorizing the taking of small numbers of marine mammals incidental to a specified activity in a specified geographic region. *Id.* § 1371(a)(5)(A). The Services must grant such an authorization if it is determined that the activity (i) will have a “negligible impact on the species or stock” and (ii) “will not have an unmitigable adverse impact on the availability of such species or stock for taking for subsistence uses.” *Id.* Once the Services’ incidental take regulations are promulgated pursuant to MMPA Section 101(a)(5)(A), individual authorizations,

² Detailed information explaining and documenting the negligible effects of Arctic activities on marine mammals, including ringed seals, is set forth in the Associations’ March 25, 2011 comment letter responding to NMFS’s proposed listing rules for ringed and bearded seals. These comments are provided as Attachment A to this letter for easy reference and for inclusion in the record.

known as Letters of Authorization (“LOAs”), may be issued by the Services to specific operators within the class of activities addressed in the regulations. LOAs must, among other things, identify mitigation measures “effecting the least practicable impact” on the species or stock and its habitat, and identify requirements for monitoring and reporting of take. *Id.* § 1371(a)(5)(A)(i)(II). Second, pursuant to MMPA Section 101(a)(5)(D), U.S. citizens may request authorization for the incidental take by harassment of small numbers of marine mammals while engaged in a specified activity in a specified geographic area. *Id.* § 1371(a)(5)(D). Known as Incidental Harassment Authorizations (“IHAs”), the Services may grant these approvals for a period of one year or less, provided that the same findings required for incidental take regulations (i.e., negligible impact, no unmitigable adverse impact on subsistence, and mitigation effecting the least practicable impact) are made. *Id.*³

There is a longstanding record of findings that the oil and gas industry in Alaska has no more than a negligible impact on marine mammals (including ringed seals), does not pose a threat to the survival or recovery of ringed seals, and is more rigorously regulated under the applicable provisions of the MMPA than under the provisions of the ESA. *See* Attachment A, pp. 18-20; *see also* 79 Fed. Reg. 36,730 (July 1, 2014) (seismic survey in Beaufort Sea will have “negligible impact” on marine mammals, including ringed seals); 79 Fed. Reg. 51,963 (Aug. 25, 2014) (same); 78 Fed. Reg. 51,147 (Aug. 20, 2013) (same finding for seismic survey in Chukchi Sea); 78 Fed. Reg. 47,495 (July 1, 2013) (same); 78 Fed. Reg. 75,488 (Dec. 12, 2013) (operations at BP’s Northstar facility from 2014 to 2019 will have a “negligible impact” on marine mammals, including ringed seals). All LOAs and IHAs issued for activities in the Beaufort and Chukchi Seas contain specific measures to mitigate any potential impacts to marine mammals, including ringed seals. For example, Beaufort and Chukchi Seas MMPA authorizations routinely specify mitigation measures that include:

- Cooperation with federal, state, and local agencies to facilitate monitoring of impacts;
- Designation of qualified personnel to observe, record, and report on the effects of the authorized activities;

³ With respect to the risk of oil spills, OPA, 33 U.S.C. § 2701, establishes extensive requirements under the CWA for the prevention of, and response to, oil spills. In conjunction with the environmental protection requirements of the OCSLA, 43 U.S.C. § 1331, *et seq.*, and rigorous State of Alaska laws and regulations, a comprehensive and demonstrably effective regulatory scheme exists regarding oil spill protection and response related to oil and gas operations occurring within seal habitat.

- Measures designed to minimize exposure of seals to activities that may cause incidental harassment, such as designation of “safety zones” (and associated “shut-down” and “power-down” requirements) applicable to exploration activities; methods to identify and avoid areas used by seals for on-ice activities; and requirements to minimize potential impacts associated with aircraft;
- Communication with affected subsistence communities and submission of a “plan of cooperation” that ensures activities will not interfere with subsistence hunting and will minimize adverse impacts on the availability of marine mammals for subsistence;
- Preparation, submission, and approval of a monitoring plan that NMFS may require be peer reviewed; and
- Reporting requirements including submission of a report of monitoring and interactions within 90 days of the completion of exploration and development activities, and annual reporting for production activities, with all reports to document dates and times of the activity, and the results of required monitoring.

See 50 C.F.R. §§ 216.101-.108; *see, e.g.*, 78 Fed. Reg. 47,495; 78 Fed. Reg. 75,488.

In sum, existing regulatory programs have been very effective in managing the potential for adverse impacts to marine mammal species, including seals, in the Arctic environment. It is well-documented that oil and gas exploration, development, and production activities do not threaten the ringed seal species or its habitat because: (i) mitigation measures now in place and likely to be used in the future have been effective; (ii) no more than negligible impacts have been documented to individual seals, seal populations, or seal habitat from oil and gas activities; and (iii) development activities, and possible oil spill events, are limited and localized relative to the availability of seal habitat. Should NMFS proceed to designate critical habitat for ringed seals, the Alaska oil and gas industry, state and local governments, and Alaska Native interests will nevertheless face the regulatory burden and cost of ongoing ESA consultations and reviews despite the well-established fact that their activities have negligible effects on ringed seals and are not the cause of the ESA listing. Litigation regarding both the issuance of any critical habitat designation and the alleged “adverse modification” of critical habitat by oil and gas activities is certain.

3. Relevant provisions of the ESA

As relevant to the comments provided below, the ESA requires the designation of critical habitat for species listed as threatened or endangered only to the “extent prudent

and determinable.” 16 U.S.C. § 1533(a)(3). If designation is prudent and determinable, then NMFS and the Services are charged with designating critical habitat that is limited to:

[t]he specific areas within the geographical areas occupied by the species, at the time it is listed[,] . . . on which are found those physical and biological features (I) essential to the conservation of the species and (II) which may require special management considerations.

Id. § 1532(5)(A)(i). In addition, under ESA Section 4(b)(2), decisions to designate critical habitat may only be made after consideration of the economic impact, the impact on national security, and any other relevant impact. *Id.* § 1533(b)(2). Any area otherwise qualifying for designation as critical habitat may be excluded from designation if the benefits of excluding the area outweigh the benefits of including the area, unless excluding an area would result in the extinction of the species concerned. *Id.* All decisions regarding designation of critical habitat must be based solely on the best scientific and commercial data available. *Id.* § 1533(b)(1)(A)-(2).

The statutory structure described above is largely the product of the 1978 amendments to the ESA, in which Congress provided, among other things, an explicit definition for the term “critical habitat.” The 1973 enactment of the ESA required agencies to designate critical habitat for listed species but did not define the term “critical habitat.” Regulations in effect at that time broadly defined “critical habitat” as “air, land or water areas — the loss of which would appreciably decrease the likelihood of conserving a listed species.” Staff of S. Comm. on Environment and Public Works, 97th Cong., *A Legislative History of the Endangered Species Act of 1973, as Amended in 1976, 1977, 1978, and 1980*, at 749 (Comm. Print 1982) (“Legislative History”) (reprinting H.R. Rep. No. 95-1625 (1978)); *id.* at 731-32. Accordingly, under the 1973 regulatory definition, “the Secretary could designate as critical habitat all areas, the loss of which would cause any decrease in the likelihood of conserving the species so long as that decrease would be capable of being perceived or measured.” *Id.* at 749; *see also id.* (“regulatory definition could conceivably lead to the designation of virtually all of the habitat of a listed species as its critical habitat”).

In 1978, Congress amended the ESA because it was “particularly concerned about the implications” of critical habitat designations “when extremely large areas are involved” and to ensure that a listed species’ “true critical habitat” was protected. *Id.* at 948 (reprinting S. Rep. No. 95-874 (1978)) (referring to the Service’s proposal to designate over 15,000 square miles as grizzly bear critical habitat). The 1978 amendments also responded to the U.S. Supreme Court’s decision in *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), in which the Court enjoined construction of a near-complete dam based on its determination that the ESA required federal agencies to

“halt and reverse the trend toward species extinction — whatever the cost.” *Id.* at 154. As one member of Congress explained, “[t]he Supreme Court decision may be good law, but it is very bad public policy.” Legislative History at 822 (reprinting House Consideration and Passage of H.R. 14104, with Amendments); *see also id.* at 801, 837 (amendments were intended to inject some “commonsense” into the statute and to better “balance environmental and development interest[s] . . . [and] take into consideration more accurately the development needs of this Nation”). And, as the sponsor of the key amendment to the definition of critical habitat explained, “[T]here ought to be a showing that [critical habitat] is essential to the conservation of the species and not simply one that would appreciably or significantly decrease the likelihood of conserving it.” *Id.* at 880.

Congress therefore enacted the current definition of “critical habitat” to limit and guide agency action, and thus to curb the practice of broadly designating the habitat occupied by a species as “critical habitat”:

[T]he Office of Endangered Species ha[d] gone too far in just designating territory as far as the eyes can see and the mind can conceive. What we want that office to do is to make a very careful analysis of what is actually needed for survival of th[e] species.

Id. at 817. The definition of “critical habitat” was intended to “narrow[] the scope of the term,” *id.* at 749 (reprinting H.R. Rep. No. 95-1625), and to provide meaning to the word “critical”: “[I]f we are concerned with critical habitat, that word ‘critical’ implies essential to [a species’] survival.” *Id.* at 818 (reprinting House Consideration and Passage of H.R. 14104, with Amendments).

B. Critical Habitat Designation for Ringed Seals Is Not Prudent

The designation of critical habitat is neither automatic nor mandatory. In the 1978 ESA amendments, Congress expressly decided to add a specific new limit on the designation of critical habitat — namely, that such designations are made only to the “extent prudent and determinable.” 16 U.S.C. § 1533(a)(3). By regulation, the designation of critical habitat is not “prudent” if it “would not be beneficial to the species.” 50 C.F.R. § 424.12(a)(1)(ii). As set forth below, the designation of critical habitat for ringed seals will not result in any cognizable benefit to the species. Although “not prudent” determinations are uncommon, the extraordinary circumstances here — i.e., a listed species that is highly abundant, occupies its entire historical range, is not threatened or otherwise negatively impacted by any of the regulated activities in its range, and is not expected to be impacted by climate change until the second half of this century (if at all) — form a strong basis for NMFS to issue a “not prudent” determination.

1. Ringed seals are not subject to any present threats and are fully protected under existing law

In its final rule listing Arctic ringed seal subspecies as a “threatened species,” NMFS makes clear that the identified threat supporting listing — projected climate-induced changes to Arctic habitat — is not imminent, sufficiently predictable, or addressable in a way that has an appreciable conservation benefit. Moreover, NMFS has concluded that this identified threat will not manifest until the year 2100. *See* 77 Fed. Reg. 76,706, 76,710, 76,718 (Dec. 28, 2012) (significant impacts to snow cover affecting ringed seals not expected until 2100; “This is a long-term threat and the consequences for ringed seals will manifest themselves over the next several decades.”). Notwithstanding this future threat, NMFS found that Arctic ringed seals are “sufficiently abundant to withstand typical year-to-year variation and natural episodic perturbations in the near term.” *Id.* at 76,718. For these reasons, and taking into account existing regulatory programs protective of ice seals, NMFS correctly determined that there is no need to apply the Section 9 take prohibitions to Arctic ringed seals:

[R]inged seals currently benefit from existing protections under the MMPA, and activities that may take listed species and involve a Federal action will still be subject to consultation under section 7(a)(2) of the ESA to ensure such actions will not jeopardize the continued existence of the species. We therefore conclude that it is unlikely that the proposed section 4(d) regulations would provide appreciable conservation benefits.

Id.

Indeed, none of the activities routinely occurring within the U.S. range of ringed seals are known or expected causes of mortality or serious injury to the species (except authorized subsistence activities), or are otherwise expected to cause or contribute to the threatened status of ringed seals. Instead, as recognized by NMFS, these activities, individually and cumulatively, have no more than a negligible effect on ringed seals. *See* Attachment A, pp. 18-20; *see also* 77 Fed. Reg. at 76,730-31 (oil and gas activities pose low risk); 73 Fed. Reg. 46,774, 46,789 (Aug. 11, 2008) (“Long term research and monitoring results on ice seals in the [sic] Alaska’s North Slope have shown that effects of oil and gas development on local distribution of seals and seal lairs are no more than slight, and are small relative to the effects of natural environmental factors.”). As a result of reporting pursuant to the MMPA, it is well-documented that the level of interaction between ringed seals and the oil and gas industry in Alaska is both minimal and limited to transient observation and deflections. To our knowledge, there are no data, studies, or reasoned scientific opinions to the contrary. *See* Attachment A, pp. 14-20; *see supra* p. 7.

Additionally, the FWS has already determined, and the federal district court for the District of Columbia has agreed, that the provisions of the MMPA provide a greater level of protection to marine mammals than the ESA:

[The FWS] found that the MMPA’s definition of “harassment” is more stringent than that contained in the ESA because it encompasses more activities, including “any act of pursuit, torment, or annoyance that has the ‘potential to injure . . . or . . . to disturb’” a marine mammal, including impacts to habitat. AR4D 12927 (citing 16 U.S.C. § 1362(18)(A)). Second, the agency found that the MMPA’s standard for incidental take is stricter than the standard for incidental take under the ESA because it requires no more than a “negligible impact” on the species and its habitat, whereas the ESA requires a finding that the take will not “appreciably reduce the likelihood of the survival and recovery of the species in the wild” or, for Federal actions, that the take will not “jeopardize the continued existence” of a listed species. *See* AR4D 12929 (comparing 16 U.S.C. § 1371(a)(5)(A)(i) to 16 U.S.C. §§ 1536(a)(2), 1539(a)(2)(B)). Third, the agency found that while an ESA jeopardy determination must be made at the species or subspecies level, the MMPA authorizes the agency to consider impacts at the smaller “stock” level, which allows for finer-scale protection. *See* AR4D 12929-30. Fourth, the agency found that the procedural requirements for obtaining an incidental take permit are stricter under the MMPA than under the ESA. *See* AR4D 12929. Finally, the agency found that the MMPA authorizes non-incidental take in fewer circumstances than the ESA. *See* AR4D 12932 (comparing 50 C.F.R. § 17.32(a) (allowing permits for zoological exhibition and educational purposes) to 16 U.S.C. § 1374(c)).

In re Polar Bear Endangered Species Act Listing, 818 F. Supp. 2d 214, 233 n.18 (D.D.C. 2011) (ellipses in original) (affirming FWS’s findings).⁴ Accordingly, it is well-

⁴ The MMPA’s “negligible impact” standard includes consideration of impacts to habitat. *See* 50 C.F.R. § 216.104(a)(10) (application for incidental take authorization must address “[t]he anticipated impact of the loss or modification of the habitat on the marine mammal populations involved”).

established that the existing protections of the MMPA are fully protective of ringed seals and that regulation of activities under the ESA would provide no protection to ringed seals above and beyond what is already provided under the MMPA.

2. Under the unique circumstances presented here, the facts and the law fully support a “not prudent” determination

Given the lack of any documented threats to ringed seals, the fact that the ringed seal species is healthy, wide-ranging, and abundant, and the fact that literally none of the activities that occur within the range of Arctic ringed seals pose a threat to the survival of the species (currently or in the future), NMFS would be well-supported in finding that the designation of critical habitat for Arctic ringed seals is not prudent.⁵ For example, the primary benefit of critical habitat designation occurs through implementation of ESA Section 7(a)(2), which requires federal agencies to consult with NMFS to “insure that any action authorized, funded, or carried out by such agency . . . is not likely to [1] jeopardize the continued existence of any . . . threatened species . . . or [2] result in the destruction or adverse modification of that species’ critical habitat.” 16 U.S.C. § 1536(a)(2).

“Destruction or adverse modification” means a “direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species.” 50 C.F.R. § 402.2 (emphasis added); *see Butte Envtl. Council v. U.S. Army Corps of Eng’rs*, 620 F.3d 936, 948 (9th Cir. 2010) (adverse modification of critical habitat occurs only where there are “significant adverse effects throughout the species’ range,” not to some small part of that range (quoting U.S. Fish & Wildlife Serv. & Nat’l Marine Fisheries Serv., *Endangered Species Consultation Handbook: Procedures for Conducting Consultation and Conference Activities Under Section 7 of the Endangered Species Act* at 4-34 (1998))).

In light of the enormous range occupied by ringed seals, the comparatively tiny area within this range subject to human activities and the fact that any such activities are more rigorously regulated under the MMPA than under the ESA, it is certain that there will not be any authorized activities that cause an “appreciable” diminishment of ringed seal habitat. This is confirmed in the Proposed Rule and NMFS’s associated draft Section 4(b)(2) economic assessment (“DEA”). *See* 79 Fed. Reg. at 73,020; DEA at 6-1. In short, the Section 7 consultation requirement will not provide a benefit to, or result in any protective measures over and above those that already exist for, ringed seal habitat.

Nor will a critical habitat designation provide a means for otherwise ensuring the survival or recovery of ringed seals. As discussed above, based on the best available data

⁵ *See, e.g.*, 67 Fed. Reg. 55,767 (Aug. 30, 2002) (NMFS decision to not propose designation of critical habitat for Arctic bowhead whales because there was no indication that habitat degradation was having any negative impact on the population, the population was abundant, and the population was protected by existing laws).

and information, ringed seals exist in a state that is already characterized as “healthy” and from which no “recovery” is required. Based on the findings in NMFS’s listing decision, ringed seals are also presently surviving and are predicted to maintain that status for at least the next half-century and likely until the end of the century. A critical habitat designation would not improve the already robust state of “survival and recovery” that the Arctic ringed seal species currently maintains⁶ and is predicted to maintain for decades to come.

Additionally, there are no meaningful “public education” benefits that would result from a critical habitat designation for Arctic ringed seals. The Alaska Native communities and regulated industries that undertake activities within the range of Arctic ringed seals are already fully familiar with both species and, from a federal regulatory perspective, have implemented protective measures pursuant to the strict standards of the

⁶ Ringed seals are found throughout the circumpolar oceans of the Northern Hemisphere and are the most common and widely distributed seal species in the Arctic (King 1983). Although precise ringed seal population estimates are difficult to obtain due to the inherent problems of conducting surveys over large areas of ice-covered waters far from shore, aerial surveys in the 1980s and 1990s in nearshore waters resulted in population estimates of ringed seals in Alaskan waters of several hundred thousand to more than one million and suggested a population throughout the Arctic on the order of several million (Frost et al. (1988); Moulton et al. (2002); Bengston et al. (2005)). As the density of ringed seals in more heavily ice covered waters is not known, this is considered to be a minimum estimate for the population. In addition, the best available science indicates that ringed seals have benefited from changes that have occurred with a warming climate. In a report on the biology of Alaska ringed seals, the Alaska Department of Fish and Game concluded that data collected over five decades, including time periods well before changes in sea ice or other factors attributed to climate change were present, showed that ringed seals are doing very well under current conditions (Quakenbush et al. (2011)). Ringed seals are growing faster, have average blubber thickness, are maturing at younger ages (indicating that females are in a positive nutritional state allowing them to grow faster and mature at an earlier age), and have high pregnancy rates. Quakenbush et al. (2011) also state that current environmental conditions have not had a negative effect on any of these measured factors and that hunters report that seal numbers have not decreased. The high number of pups being harvested in recent years further suggests that pups are surviving long enough to be weaned. The increased numbers of pups in the harvest along with various other factors led Quakenbush et al. (2011) to suggest that reproduction in ringed seals in Alaska has increased in the 2000s and that ringed seals are reproducing as well as or better than they have since the 1960s. The authors further suggest that the likelihood that the population is declining due to poor reproduction, pup survival, or starvation is very low.

MMPA for decades. Other than these few activities, the areas occupied by ringed seals are vast, uninhabited, and largely devoid of human activity. In short, no increased awareness or educational benefits will result from designation of ringed seal critical habitat.

In sum, there is ample support for NMFS to determine that the designation of ringed seal critical habitat is presently not prudent because it provides no benefit to the species. Such a determination would not prevent NMFS from designating critical habitat at such time that it becomes prudent to do so. The Associations strongly encourage NMFS to issue a determination that the designation of ringed seal critical habitat is not prudent.

C. NMFS Should Not Designate Ringed Seal Critical Habitat Because There Are No “Special” Management Measures Beyond Those Already Implemented to Protect Ringed Seal Essential Habitat

As part of the 1978 ESA amendments to “narrow[] the scope”⁷ of critical habitat designations, Congress included a requirement that all critical habitat designations must be supported by a finding that the identified specific areas with essential features “may require special management considerations or protection[s].” 16 U.S.C. § 1532(5)(A)(i)(II) (emphasis added). Any special management “methods or procedures” identified by the agency must be “useful in protecting physical and biological features of the environment for the conservation of listed species.” 50 C.F.R. § 424.02(j) (emphasis added). As described below, the Proposed Rule does not identify any special management measures that would be useful in protecting the physical and biological habitat features essential to conserving ringed seals.

With limited exceptions, the 350,000 square mile area proposed for designation is uninhabited by humans and currently void of human activity during the presence of ice, if not year-round. Abundant undisturbed sea-ice habitat is not a biologically limiting factor for the species. Most of the area proposed for designation is currently unmanaged, because no human activities of any kind occur there, and unmanageable, because of remoteness, darkness, cold, high winds and other weather conditions, instability, ice movement, and the presence of predators (e.g., polar bears). In those few circumstances in which activities do occur on sea-ice habitat, the activities are confined to well-defined areas readily identified by NMFS, and are both a very small fraction of the area proposed for designation and, as described above, intensely managed for the protection of the Arctic environment, including specifically for the conservation of marine mammals, such as ringed seals. According to NMFS, the only substantial and identifiable threat posed to ringed seal habitat is the projected reduction of sea ice.

⁷ Legislative History at 749 (reprinting H.R. Rep. No. 95-1625).

However, NMFS does not identify any special management measures that can or will address the projected reductions in sea-ice habitat. NMFS acknowledges that “[t]he best scientific data currently available do not allow us to identify a causal linkage between any particular single source of GHG emissions and identifiable effects on the physical and biological features essential to Arctic ringed seals.” 79 Fed. Reg. at 73,017. But NMFS then summarily concludes that “special management considerations or protection may be necessary, either now or in the future, even if the exact focus and nature of that management is presently undeterminable.” *Id.* Respectfully, this unsupported conclusion does not meet the Administrative Procedure Act (“APA”) rulemaking standard to which NMFS is held. *See Motor Vehicle Mfrs. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“[T]he agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.” (internal quotation marks and citation omitted; emphases added)); *see also Cape Hatteras Pres. Alliance v. U.S. Dep’t of Interior (CHAPA I)*, 344 F. Supp. 2d 108, 124 (D.D.C. 2004) (FWS’s failure to “discuss how each identified PCE would need management or protection” fails the statutory test (emphasis added)). NMFS has not made the required “special management” finding for the habitat feature (sea ice) that it determined to be most essential to the conservation of the ringed seal.⁸

In addition, NMFS’s conclusion that special management measures may be necessary to address future oil and gas activities is contrary to the best available information. As a threshold matter, NMFS’s focus on the potential need for special management of oil and gas activities is misplaced. The special management finding required by the ESA must pertain to the PCEs — the habitat features resulting in designation of an area as critical habitat — not to activities occurring within critical habitat areas. *See CHAPA I*, 344 F. Supp. 2d at 124 (Service “must focus on the management requirements of the area’s features, not those requirements of the land merely associated with activities on the land” and has the burden to “discuss how each identified PCE would need management or protection”); *see also Cape Hatteras Access Pres. Alliance v. U.S. Dep’t of Interior*, 731 F. Supp. 2d 15, 23-26 (D.D.C. 2010); *Home Builders Ass’n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 268 F. Supp. 2d 1197, 1218 (E.D. Cal. 2003) (“[I]t is mandatory that the specific area designated have features which, in the future, may require special consideration or protection.”).

Even if the special management requirement did pertain to activities instead of PCEs (which it does not), oil and gas exploration, development, and production in

⁸ NMFS’s failure to identify any special management measures that may be required to aid the conservation of the ringed seal’s sea-ice habitat is consistent with its finding that there are no regulatory mechanisms in place to address Arctic sea-ice loss. 77 Fed. Reg. at 76,712.

Alaska, as currently and foreseeably regulated under the provisions of the MMPA, are neither a source of mortality and serious injury to ringed seals nor otherwise a cause of or contributing factor to the listing of the ringed seal as a threatened species. It is undisputed that the measures and protection afforded under the MMPA provide a greater level of protection for the ringed seal than procedures available under the ESA. *See supra* § II.B.1. NMFS has not identified or provided any analysis of any circumstance in which existing MMPA management measures have not been or would not be sufficient or effective. Nor has NMFS explained the direct contradiction between, on one hand, the proposed conclusion that special management measures may be necessary and, on the other hand, NMFS's repeated determinations that no more than a negligible impact to ringed seals and their habitat is likely because of the protections and management measures implemented under the MMPA.

Similarly, under present management authorities, ringed seals are protected from oil spill risks to such an extent that NMFS concluded that while oil spill risk, especially in the marine environment, is a serious concern, the probability of a spill impacting ringed seals is very low. *See* 77 Fed. Reg. at 76,730-31. And, in any event, NMFS has identified no "special" measures that would be needed to address the potential effects of an oil spill on ringed seals that are not already provided under existing federal, state, and local laws and regulations.

In sum, because existing laws, including the MMPA, provide more protection for ringed seals than the ESA, there is no rational basis for NMFS to find that the potential effects on ringed seal PCEs posed by oil and gas exploration, development, and production, or other forms of human disturbance, may require special management considerations to aid ringed seal conservation. NMFS's contrary and unexplained conclusions are not consistent with the record or the law, and are, therefore, insufficient under the APA's standard of review.⁹

⁹ NMFS's conclusions that shipping and commercial fishing in the Arctic may require special management for ringed seals are also insufficiently explained and otherwise unsupported. NMFS does not identify any shipping activities that are not already regulated by numerous other federal laws, including the MMPA. NMFS identifies no special measures that may be needed in addition to what is already provided by existing law. Moreover, commercial fishing is not currently allowed in the Arctic and NMFS cites to no information to suggest that the Arctic fishing moratorium will be lifted in the foreseeable future.

D. If NMFS Decides to Designate Critical Habitat, Any Such Designation Should Be Narrowly Tailored

Notwithstanding the above, if NMFS proceeds to designate critical habitat for the ringed seal, the designation must be expressly limited to only those “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 . . . essential to the conservation of the species[.]” 16 U.S.C. § 1532(5)(A)(i) (emphases added); *see* 50 C.F.R. § 424.12(b)(5). Congress established these narrowly drawn requirements to limit and guide agency action, and thus to curb the pre-1978 practice of reflexively designating “virtually all” of the habitat occupied by a species as “critical habitat” (Legislative History at 749):

[T]he Office of Endangered Species ha[d] gone too far in just designating territory as far as the eyes can see and the mind can conceive. What we want that office to do is to make a very careful analysis of what is actually needed for survival of th[e] species.

Id. at 817; *see also id.* at 749 (the definition of “critical habitat” was intended to “narrow[] the scope of the term”). Court decisions have echoed and emphasized this Congressional intent. *See Alaska Oil & Gas Ass’n*, 2013 U.S. Dist. LEXIS 10559, at *63 (polar bear critical habitat designation unlawful because, in part, it “went too far and was too extensive”); *CHAPA I*, 344 F. Supp. 2d at 122-23 (“The Service may not statutorily cast a net over tracts of land with the mere hope that they will develop PCEs and be subject to designation. . . . Agencies must rely on facts in the record and its decisions must rationally relate to those facts.”); *Spotted Owl v. Lujan*, 758 F. Supp. 621, 623 (W.D. Wash. 1991) (“critical habitat only includes the minimum amount of habitat needed” to maintain a threatened or endangered species).

NMFS’s proposal to broadly designate a 350,000 square mile area that includes virtually all of the U.S. range of the ringed seal irreconcilably conflicts with the plain language of the ESA and with Congressional intent.¹⁰ Indeed, such an expansive designation is the very antithesis of Congress’s decision to “narrow” the scope of “critical habitat” and to prevent the designation of areas “as far as the eyes can see and the mind can conceive.” Although the Associations maintain that any designation is inappropriate (for the reasons stated in the sections above), if NMFS proceeds to designate ringed seal

¹⁰ In addition to conflicting with Congressional intent, NMFS’s proposal violates the ESA’s express mandate that “critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.” 16 U.S.C. § 1532(5)(C).

critical habitat, then it clearly must narrow the scope of the designation to include only those “specific areas” that are “actually needed for the survival of the species.”¹¹

In the Proposed Rule, NMFS simply identifies all areas that may be used by Arctic ringed seals or that are otherwise within the known distribution of ringed seals and, with very minor and irrelevant exceptions, summarily deems the entire area bounded by that distribution as “critical habitat.” *See, e.g.*, 79 Fed. Reg. at 73,012 (“ringed seals are found throughout the Beaufort and Chukchi Seas”; “surveys indicate that ringed seals use nearly the entire ice field over the Bering Sea shelf”); *id.* at 73,015 (identification of “critical habitat” based on “seasonal distribution and movements of Arctic ringed seals and satellite-derived estimates of the position of the ice edge over time”); *id.* at 73,015-16 (numerous references to identification of “critical habitat” based on seal “distribution”). However, this is precisely the approach to critical habitat designation that Congress prohibited in 1978 when it amended the ESA to require agencies to perform a “very careful analysis of what is actually needed for survival of th[e] species.” Indeed, the ESA expressly requires an analysis of where the essential habitat features “are found” — not an analysis of where the species may be found. The ESA also expressly requires the designation of “specific areas within the geographical area occupied by the species” — not the broad designation of the general area occupied by the species. 16 U.S.C. § 1532(5)(A)(i) (emphases added). The Proposed Rule provides no substantive analysis that identifies “specific areas” within the general area occupied by ringed seals or that meaningfully explains why any such specific areas contain the features that are actually “essential to the conservation of the species.” In these respects, the Proposed Rule is incompatible with the requirements of the ESA. If NMFS cannot identify any such specific areas, then designation of critical habitat is not appropriate.¹²

¹¹ NMFS refers to the entire 350,000 square mile area as “one specific area,” but this apparent construction of the ESA is plainly contrary to Congress’s intent when it used the term “specific areas” (*see infra* § II.A.3). NMFS also appears to rely upon an ESA regulation stating that when “several habitats, each satisfying the requirements for designation as critical habitat, are located in proximity to one another, an inclusive area may be designated as critical habitat.” 79 Fed. Reg. at 73,015; 50 C.F.R. § 424.12(d). However, this regulation applies only where “suitable habitat areas are extremely close together” and is intended to avoid the individual designation of “very local and disjunct habitats.” 45 Fed. Reg. 13,010, 13,016 (Feb. 27, 1980); *see also* 50 C.F.R. § 424.12(d) (providing example of “[s]everal dozen or more small ponds, lakes, and springs are found in a small local area” (emphasis added)).

¹² *See CHAPA I*, 344 F. Supp. 2d at 133 (“[T]he Service may not designate habitat, regardless of the quality of underlying scientific data, unless it follows statutory and regulatory requirements. . . . [T]he correct regulatory response when critical habitat is

Should NMFS nevertheless proceed to designate ringed seal critical habitat, then the agency should consider at least the following factors in narrowing the designation consistent with ESA requirements:

- The Proposed Rule does not provide a meaningful analysis of the temporal and geographic variability associated with critical life cycle stages (e.g., pupping, nursing) for Arctic ringed seals. Any critical habitat designation should be narrowed to only those specific places and times in which “critical” habitat is actually present – i.e., where PCEs “are found.”¹³
- In the Proposed Rule, NMFS correctly recognizes that “bottom-fast ice extending seaward from the coast line in waters less than 2 m deep” is generally not used by ringed seals for construction of lairs, basking, or molting, and is not “essential” on those bases. 79 Fed. Reg. at 73,014. NMFS nevertheless proposes to designate all nearshore waters as “critical” habitat because some seal prey species may spend portions of their lifecycles in nearshore waters. *Id.* at 73,016. However, NMFS has not demonstrated that ringed seals actively or substantially feed in those areas, that these areas are used by ringed seals to any significant degree, or that the potential ability to feed in these particular areas is “essential” to ringed seal conservation.¹⁴ Neither the scientific record nor applicable ESA

indeterminable due to lack of data is to refrain from designation.”); *see also Otay Mesa Prop., L.P. v. U.S. Dep’t of Interior*, 646 F.3d 914, 918 (D.C. Cir. 2011) (“[T]he absence of a requirement for the Service to collect more data on its own is not the same as an authorization to act without data to support its conclusions, even acknowledging the deference due to agency expertise.”).

¹³ If NMFS does not temporally restrict the designation, then it should issue a finding in its final rule that activities occurring during times of the year when minimal or no ice is present do not have any adverse effect on ringed seal critical habitat because no PCEs are present.

¹⁴ There is no single prey species that is essential to the survival or conservation of ringed seals. Quakenbush et al. (2011) used stomach contents from 1,555 ringed seals collected between 1960 and 2009 and identified 155 different fish and invertebrate prey of which 99 were common. In addition to Arctic cod and saffron cod, the authors identified walleye pollock, Pacific herring, capelin, Pacific sand lance, and prickleback as prey species, and these species were more common in the diet of ringed seals in the 2000s than in the 1960s and 1970s. Ringed seals also preyed upon a variety of invertebrates. *Id.* Ringed seals also typically feed farther offshore, particularly along the ice edge (Frost (1985); Gjertz et al. (2000); Kelly et al. (2010); Hereman et al. (2012)).

requirements supports the designation of areas containing bottom-fast ice extending seaward from the coast line in waters less than two meters deep.

- The best available science does not support a determination that areas with 15% sea-ice concentration are “critical” to ringed seal survival. As NMFS acknowledges, “a number of studies have reported an apparent preference for consolidated stable ice (i.e., landfast ice and consolidated pack ice).” *Id.* at 73,014. As to seasonal sea ice, the only two studies cited in the Proposed Rule suggest that, on average, ringed seals use seasonal ice in areas with an average of 20% and 38% ice concentration. *Id.* at 73,015. The ESA requires the designation of areas that are truly “critical,” not the designation of all areas where ringed seals may possibly be observed. The Proposed Rule does not identify the sea-ice concentration level that is “critical” to ringed seals and, instead, unlawfully designates an extremely broad area that encompasses all possible areas that could be used by ringed seals regardless of whether those areas are essential to ringed seal conservation.
- The best available science does not indicate that any particular prey species is essential to ringed seal survival. The Quakenbush et al. (2011) study reported on ringed seal diet and suggests that ringed seals preferentially prey on fish and eat a greater diversity of fish species than they did in the 1960s and 1970s. Because of ringed seals’ ability to preferentially adapt their diet, no single prey species is “critical” to the survival of ringed seals.
- The best available science also demonstrates that ringed seals use and adapt to a variety of ice conditions influenced by seasonal conditions, environmental conditions, and seal behavior throughout the Arctic to maintain healthy population levels.¹⁵ The demonstrated ability of ringed seals to adapt to a variety

¹⁵ See Bengtson et al. (2005); Burns (1970); Stirling et al. (1982); Finley et al. (1983); Frost et al. (2004); Wiig et al. (1999). Additionally, Rosing-Asvid (2006) explained that, during milder climatic periods, ringed seal habitat is less abundant while lair density is higher. Conversely, during colder climatic periods, ringed seal habitat is more abundant while lair density is lower. There was no change noted in pup production between the two climatic conditions. This relationship has also been observed in Norway (Aars et al. (2006)). Based on these findings, Rosing-Asvid (2006) concludes that alternative theories are being ignored by researchers who are focused on a single theory based on global warming. Adult ringed seals have benefited from landfast ice clearing earlier than the average dates. Mean body-mass index remained high in a year the landfast ice cleared earlier than average, which created an abundance of marine food, but declined for female ringed seals during severe ice years (Harwood et al. (2000)). This outcome was reported by other researchers (Kingsley & Byers (1998); Craig et al. (1982)). Ovulation

of conditions and the fact that ringed seals are not remotely habitat limited support a conclusion that there is no single type of habitat used by ringed seals that is “essential” to the conservation of the species.

E. Any Identified Critical Habitat Should Be Excluded from Designation Because the Associated Costs Far Exceed Any Marginal Benefits

Should NMFS proceed to a final decision, it should exclude all or a substantial part of any identified “critical habitat” from formal designation because any marginal benefits are outweighed by the economic impacts that will result from designation. Such an exclusion is supported by (1) the absence of any tangible benefits from a designation; (2) the importance to the Alaska economy and national energy needs of oil and gas development; and (3) the strong potential for the designation to impose unnecessary costs and litigation risks on the oil and gas industry, Alaska Native communities, and state and local governments.

Section 4(b)(2) of the ESA grants NMFS the authority to exclude “any area” from critical habitat designation if it:

determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless [the Secretary] determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

16 U.S.C. § 1533(b)(2). Accordingly, NMFS can exclude any area where the costs of designation, including economic impacts, outweigh the conservation or economic benefits of designation. Such exclusions avoid unnecessarily burdening economic activity and designating areas as critical habitat where there is little or no benefit in doing so.

In addition, the ESA does not require NMFS, in making Section 4(b)(2) decisions, to limit its analysis to only those economic impacts that are certain and quantifiable. Instead, the economic analysis is necessarily a reasoned projection of what human activities may happen in the future and the economic impacts that the designation may have on those future activities. Congress intended Section 4(b)(2) to be a meaningful

rates also remained high during this period compared to much lower rates during periods of severe ice conditions. However, there was an unexpected increase in pup mortality and delayed molt of lanugal fur possibly caused by shortened lactation from the early clearing of the fast ice (Smith & Harwood (2001)).

component of the critical habitat designation process and enacted the provision to inject some “commonsense” into the statute, and to better “balance environmental and development interest[s] . . . [and] take into consideration more accurately the development needs of this Nation.” Legislative History at 801, 837. For at least the following reasons, the benefits of any ringed seal critical habitat designation are far outweighed by the costs.

1. Oil and gas exploration, development, and production on the North Slope and in the adjacent waters of the Beaufort and Chukchi Seas provide important economic, energy, and national security benefits

The North Slope of Alaska and the adjacent offshore areas of the Beaufort and Chukchi Seas are the location of nationally strategic oil and gas exploration, development, and production activities. Congress has established, and the courts have affirmed, that leasing, exploration, and development of these resources are a national priority and in the public interest. *See, e.g.*, 43 U.S.C. § 1332(3) (mandating the “orderly and expeditious development” of the OCS); 42 U.S.C. § 6508 (mandating an “expeditious program of competitive leasing of oil and gas” within the National Petroleum Reserve - Alaska); *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 545 (1987) (“the public interest . . . favor[s] continued oil exploration given OCSLA’s stated policy”); *Tribal Vill. of Akutan v. Hodel*, 859 F.2d 662, 664 (9th Cir. 1998) (recognizing the “public interest in favor of developing oil and gas reserves”). Indeed, there are very substantial economic benefits to the State of Alaska, to Alaska citizens, to Alaska Natives, and to the U.S. economy from oil and gas exploration, development, and production on the North Slope of Alaska and in the adjacent state and federal waters of the Beaufort and Chukchi Seas. Moreover, the present and future contribution of oil and gas from the North Slope of Alaska and from adjacent state and federal waters is a substantial portion of our national energy needs. Accordingly, development of domestic energy resources, including oil and gas located in and adjacent to Alaska, is a well-documented matter of national security and is consistent with the well-established mandates of federal law.

2. Designation of ringed seal critical habitat will have adverse consequences

Federal agencies have repeatedly found that the conservation benefits of designating critical habitat are, in general, minimal and elusive, while the process consumes conservation resources and imposes significant costs. *See, e.g.*, 70 Fed. Reg. 68,294, 68,295-96 (Nov. 9, 2005) (“In 30 years of implementing the [ESA], the Service has found that the designation of statutory critical habitat provides little additional protection to most listed species, while consuming significant amounts of conservation resources.”); *id.* at 68,296 (critical habitat designations “provide[] little real conservation benefit, [are] driven by litigation and the courts rather than biology, limit[] our ability to

fully evaluate the science involved, consume[] enormous agency resources, and impose[] huge social and economic costs”); 71 Fed. Reg. 77,972 (Dec. 27, 2006); 71 Fed. Reg. 74,592 (Dec. 12, 2006); 71 Fed. Reg. 63,862 (Oct. 31, 2006). Notwithstanding these findings, in proposing to designate ringed seal critical habitat, NMFS has concluded that the very marginal benefits associated with designation outweigh what NMFS has determined to be the very minimal costs of the designation. The Associations respectfully disagree with NMFS’s assessment of the respective benefits and costs of the proposed designation, and offer the following considerations.

First, in the Proposed Rule and DEA, NMFS calculates the projected cost to address critical habitat designation in future Section 7 consultations over a 10-year period. However, the agency’s assessment entirely overlooks the costs associated with the critical habitat designation under non-ESA regulatory programs. For example, in Alaska, the Army Corps of Engineers can impose significantly higher mitigation costs for CWA Section 404 permits granted for projects located in critical habitat compared to projects located outside of critical habitat.¹⁶ In addition, both the CWA’s NPDES permit program¹⁷ and OCSLA¹⁸ mandate special considerations and procedures for areas designated as critical habitat under the ESA, which, in turn, can result in additional costs to the regulated community. These costs are directly and solely attributable to the designation of critical habitat and are not “baseline” costs associated with the general protection of the species. However, no critical habitat-related costs under any regulatory

¹⁶ The mitigation costs imposed pursuant to the CWA Section 404 permit for the Point Thomson development were more than \$1 million higher than they would otherwise have been solely because the affected wetlands were located within the previously designated polar bear critical habitat. *See Alaska Oil & Gas Ass’n v. Salazar*, No. 3:11-cv-0025-RRB, Dkt. 108-1 (D. Alaska).

¹⁷ In at least two Alaska-related NPDES permits, areas designated as critical habitat have been expressly excluded from coverage. *See, e.g.*, NPDES Permit No. AK-G52-4000, Offshore Seafood Processors in Alaska (Mar. 1, 2010), *available at* <http://yosemite.epa.gov/r10/water.nsf/NPDES+Permits/General+NPDES+Permits>; NPDES Permit No. AK-31-5000, Oil and Gas Extraction Facilities in Federal and State Waters in Cook Inlet (June 4, 2007), *available at* [http://yosemite.epa.gov/r10/water.nsf/NPDES+Permits/General+NPDES+Permits/\\$FILE/AKG315000-FP.pdf](http://yosemite.epa.gov/r10/water.nsf/NPDES+Permits/General+NPDES+Permits/$FILE/AKG315000-FP.pdf).

¹⁸ Federal regulations implementing OCSLA expressly require reporting and analyses specifically related to areas designated as critical habitat. *See* 30 C.F.R. § 550.216(a) (report supporting exploration plan must include “[s]ite-specific information on . . . critical habitat designated under the Endangered Species Act”); *id.* § 550.227(b)(4) (environmental impact analysis must address critical habitat for ESA-listed species).

programs other than the ESA Section 7 consultation process are considered in the Proposed Rule or in the DEA.

Second, any designation of ringed seal critical habitat is likely to result in costly litigation.¹⁹ The polar bear has already been used as part of a broader litigation campaign by national advocacy groups against oil and gas leasing, exploration, and development in and adjacent to the Alaskan Arctic, and these same groups will use the listing of ringed seals in a similar manner. The designation of ringed seal critical habitat will result in litigation or other tactics intended to delay, impede, increase the costs of, and defeat oil and gas activities on the North Slope and in the Beaufort and Chukchi Seas. It is highly likely that the designation of ringed seal critical habitat itself will also result in costly litigation. For example, the Associations, the State of Alaska, and a coalition of Alaska Native interests recently prevailed in a challenge to the designation of critical habitat for the polar bear, resulting in the vacatur and remand of the entire final rule. *See Alaska Oil & Gas Ass'n*, 2013 U.S. Dist. LEXIS 10559.

Third, designation of critical habitat could delay, impede, and increase the costs of oil and gas activity, and may result in less oil and gas exploration and production.²⁰ These risks, and the enormous magnitude of the associated potential costs, can be better understood by considering development of offshore oil and gas in the Chukchi Sea alone. That area is thought to hold approximately 12 billion barrels of oil. In 2008, oil and gas

¹⁹ *See* 70 Fed. Reg. at 68,296 (“[The Service] has been inundated with lawsuits for our failure to designate critical habitat, and we face a growing number of lawsuits challenging critical habitat determinations once they are made. These lawsuits have subjected the Service to an ever-increasing series of court orders and court-approved settlement agreements, compliance with which now consumes nearly the entire listing program budget. This leaves the Service with little ability to prioritize its activities to direct scarce listing resources to the listing program actions with the most biologically urgent species conservation needs.”).

²⁰ Increased costs and delay could occur as a result of, among other things, increased Section 7 consultation costs associated with the “adverse modification” analysis. These costs may not be insignificant, especially for large, complex offshore projects. These costs, such as those incurred in the preparation of a biological assessment (specific to critical habitat), in the conduct of field studies, and in litigation regarding the Section 7 “adverse modification” decision, could range in the millions of dollars over the relatively near term. Moreover, as indicated above, in addition to Section 7, many other local, state, and federal statutes require permitting agencies to take the designation of critical habitat into account in the issuance of permits and in setting the required levels of mitigation, which can add costs that are solely attributable to the presence of critical habitat.

companies spent approximately \$2.6 billion on leases in the Chukchi Sea, and since that time have invested billions more.²¹ The designation of ringed seal critical habitat in the leased areas devalues those leases because the designation increases the risk associated with developing the leases. It is a certainty that any designation of ringed seal critical habitat — exclusive of the ringed seal listing rule — adds new risks and impacts leaseholders in critical ways. These risks apply to existing leases in the Chukchi and Beaufort Seas as well as leases that are planned in the foreseeable future.

Finally, it goes without saying that the time, effort, and cost involved in the critical habitat designation process could be very substantial. There is no reasonable justification for the expenditure of such resources for the development of a critical habitat designation that will have no, or at best marginal and intangible, benefits, but that will result in litigation, unnecessary regulation, project delay, and a variety of economic impacts. Although the DEA briefly mentions some of these costs qualitatively, there is no evidence in the DEA that any of the costs described above were meaningfully considered by NMFS and taken into account in the cost-benefit analysis. Rather, it appears that NMFS arbitrarily valued any non-Section 7-related costs directly attributable to the critical habitat designation as \$0 or an unspecified *de minimus* amount.²²

3. The conservation benefits to ringed seals from a critical habitat designation, if any, are negligible

Sections II.B and II.C *supra* address the reasons why the conservation benefits to ringed seals from a critical habitat designation, if any, are negligible. For purposes of the Section 4(b)(2) analysis, those reasons are summarized as follows.

First, NMFS has determined that oil and gas exploration, development, and production, as they now exist, and as they may foreseeably exist in the future, do not now or for the foreseeable future threaten the continued existence of ringed seals. NMFS has made similar determinations for activities carried out by Alaska Natives. 77 Fed. Reg. at 76,733.

²¹ See <http://www.northerneconomics.com/pdfs/ShellOCS/National%20Effects%20Report%20FINAL.pdf>.

²² The DEA also arbitrarily considers only costs projected only 10 years into the future (starting in 2013). This is an unreasonable timeframe that does not accurately account for costs that will certainly be incurred beyond the year 2023. When designating polar bear critical habitat, FWS considered economic impacts (albeit insufficiently) over a 30-year timeframe. See 75 Fed. Reg. 76,085, 76,127 (Dec. 7, 2010). Moreover, it is inherently contradictory and arbitrary that NMFS would list ringed seals as “threatened” based on a 100-year “foreseeable future” and yet determine that the costs of the associated critical habitat designation can be predicted only 10 years into the future.

Second, NMFS has also determined, through various public and administrative processes, based upon the best scientific and commercial data available, that oil and gas exploration, development, and production, as they now exist, and as they may foreseeably exist in the future, as regulated pursuant to the MMPA and other federal and state laws, have no more than a “negligible impact” on Arctic marine mammals, including ringed seals.

Third, there are no measures or protections that may be necessary for the conservation of ringed seals that are not already imposed or available under the MMPA. NMFS has concluded that future Section 7 consultations addressing ringed seal critical habitat will result in no additional restrictions or project modifications. DEA at 6-1. In other words, the ringed seal critical habitat designation will result in no benefits to the species under the ESA’s mechanism for addressing the effects of federally authorized actions. Moreover, NMFS has determined that application of the Section 9 take prohibition to all activities (whether federally authorized or not) is unwarranted and unnecessary. Accordingly, excluding any and all identified critical habitat from formal designation will not result in the extinction of ringed seals because no activities subject to the ESA pose any threat to the species.

Finally, Arctic ringed seal populations are presently healthy and exist range-wide. NMFS projects that these populations will continue to maintain this status well into the second half, if not the end, of this century. The designation of critical habitat will not result in any survival or recovery benefits to an already healthy and abundant ringed seal population.

4. Weighing all relevant impacts and facts, the benefits of excluding any areas that qualify as “critical habitat” substantially outweigh the benefits of designating any such areas

For purposes of ESA Section 4(b)(2), the Associations’ focus is not on any one of the above-described impacts or facts in isolation but rather on the cumulative consequences. Viewed in this manner, the plain circumstances are these:

- Oil and gas exploration and development in Alaska and in adjacent waters are important to Alaska and to national energy needs.
- Oil and gas activities, as well as other activities occurring on the Alaska North Slope and adjacent OCS, have not in the past threatened, do not now threaten, and are not expected in the foreseeable future to threaten Arctic ringed seals or their habitat.
- Oil and gas activities are now, and for the foreseeable future will be, regulated pursuant to the MMPA to ensure they have no more than a negligible impact on

ringed seals. Other activities that do and may occur in the Alaska Arctic OCS are and will be similarly regulated.

- National advocacy groups intend to block, impede, delay, or increase the costs of oil and gas activity in and adjacent to Alaska based upon the designation of ringed seal critical habitat.
- Costly and time-consuming litigation regarding the scope of any critical habitat designation, the consequences of any such designation for oil and gas activities, and application of the designation to specific oil and gas exploration, and development projects is certain. None of this litigation, whatever the results, will provide conservation benefits for ringed seals or their habitat.
- Ringed seal critical habitat designation could have material adverse economic consequences. The potential consequences of any such designation are delay and impediment of oil and gas activities, increased regulatory costs, threatened and actual litigation (and associated costs), less exploration, fewer opportunities to discover economic reserves, and, therefore, less development and production of domestic oil and gas resources in these areas, which will affect local communities, the State of Alaska, and national security interests.
- Ringed seals have been listed under the ESA due to the projected consequences of global climate change and the predicted recession of sea ice and decline in snow cover that will occur, at the earliest, in the second half of the century. NMFS has expressly confirmed that the primary activities occurring within the Alaska range of ringed seals — Alaska Native occupation and subsistence hunting, and oil and gas exploration, development, and production — are not a present or foreseeable threat to the survival of the species. However, all of the burdens of a critical habitat designation will be disproportionately, unfairly, and unreasonably visited upon residents of the North Slope and upon those activities, and only those activities, that do not pose a present or foreseeable threat to the species or its habitat.

Respectfully, these circumstances are a compelling basis for exclusion of any and all areas that may otherwise qualify as “critical habitat,” and we encourage NMFS to exercise its Section 4(b)(2) discretion to exclude all such areas. Alternatively, and at the very least, any and all areas in which human and industrial activities occur, or will foreseeably occur, should be excluded from any ringed seal critical habitat designation. These exclusions should include all existing and planned lease sale blocks in the Chukchi and Beaufort Seas. Attachment B to this letter provides maps showing all existing lease sale blocks in the Chukchi and Beaufort Seas, which should be excluded along with any future lease sale blocks.

III. CONCLUSION

For the reasons set forth above, we believe that NMFS would be well-supported in a determination to either (1) not designate any critical habitat for Arctic ringed seals because it is not prudent to do so and/or because there are no special management measures that are reasonably foreseeable, or (2) exclude any and all areas identified as critical habitat because the economic impacts of designation substantially exceed any marginal benefits. Alternatively, any critical habitat designation issued by NMFS must be very narrowly tailored consistent with the requirements of the ESA. Specific areas of human and industrial activity, including all existing and planned lease sale blocks in the Chukchi and Beaufort Seas, should be expressly excluded to the extent those areas fall within the narrowly tailored designation.

We appreciate your consideration of these comments. If you have any questions, please do not hesitate to contact the undersigned.

Sincerely,



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Alaska Oil and Gas Association



Richard Ranger
Senior Policy Advisor
Upstream and Industry Operations
American Petroleum Institute

cc: The Honorable Bill Walker, Governor, State of Alaska
The Honorable Lisa Murkowski, United States Senate
The Honorable Dan Sullivan, United States Senate
The Honorable Don Young, United States House of Representatives

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