No. 17-___

IN THE

Supreme Court of the United States

STATE OF ALASKA, ET AL.,

Petitioners,

v.

WILBUR L. ROSS, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

Jahna Lindemuth
ATTORNEY GENERAL
P.O. Box 110300
Juneau, AK 99801
(907) 269-5602
jahna.lindemuth@alaska.gov

Brad Meyen
ALASKA DEP'T OF LAW
1031 W. 4th Ave.
Suite 200
Anchorage, AK 99501
(907) 269-5232
brad.meyen@alaska.gov

Eric F. Citron
Counsel of Record
Thomas C. Goldstein
Charles H. Davis
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
ec@goldsteinrussell.com

Matthew Waldron
Shelley D. Cordova
Sarah J. Shine
ARCTIC SLOPE REGIONAL CORP.
3900 C Street
Suite 701
Anchorage, AK 99503
(907) 339-7665
Shelley.Cordova@asrcenergy.com

Matthew A. Love
Tyson C. Kade
VAN NESS FELDMAN LLP
719 Second Av.
Suite 1150
Seattle, WA 98104
(206) 829-1809
mal@vnf.com

QUESTION PRESENTED

The Endangered Species Act (ESA) requires the government to list a species as "threatened" if it is "*likely* to become an endangered species within the *foreseeable* future." 16 U.S.C. §§1532(20), 1533 (emphasis added). These statutory terms make clear that the ESA concerns immediate threats to species that are struggling or declining in numbers, as opposed to very-long-term threats to currently thriving species based on planet-wide issues like climate change. In this case, the National Marine Fisheries Service (NMFS) determined that a now-healthy population of the bearded seal is "threatened" because climate change *may* endanger its Arctic sea-ice habitat *by the year 2095*. When it acted to list the bearded seal on that basis, however, it decided that it would nonetheless refrain from requiring any action to address the identified, climate-change-based threat to the bearded seal as a consequence of the listing. The Ninth Circuit recognized that this case presents an isolated legal issue of nationwide importance—that it "turns on one issue." Pet. App. 6a. The question presented is:

> "When [the government] determines that a species that is not presently endangered will lose its habitat due to climate change by the end of the century, may NMFS list that species as threatened under the Endangered Species Act?"

Id.

PARTIES TO THE PROCEEDINGS BELOW

Petitioners: State of Alaska; Arctic Slope Regional Corporation; The North Slope Borough; NANA Regional Corporation, Inc.; The Iñupiat Community of the Arctic Slope; Northwest Arctic Borough. Petitioners Alaska Oil & Gas Association and American Petroleum Institute are filing a separate petition for writ of certiorari.

Respondents: Wilbur L. Ross, U.S. Secretary of Commerce; National Marine Fisheries Service; National Oceanic and Atmospheric Administration; Benjamin Friedman, Acting Under Secretary of Commerce for Oceans and Atmosphere and the Acting Administrator, National Oceanic and Atmospheric Administration; Chris Oliver, Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration.

Intervenors: Center for Biological Diversity.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Administrative Materials

Other Authorities

INTRODUCTION

The question presented here is whether a now-healthy species that may one day be threatened by the uncertain consequences of global climate change is in fact "threatened," *today*, within the meaning of the Endangered Species Act (ESA). Given the textual limits Congress imposed on "threatened" listings—namely, that it must be "likely" in the "foreseeable future" that the species will be on the brink of extinction—the answer is "no." That result is bolstered by the remedial tools Congress provided in the ESA, which are grossly ill-suited to addressing long-term, global threats like climate-change effects that may occur 100 years hence. In fact, listing a now-healthy species on that basis opens the door to almost unfettered future listings of myriad species, each of which will result in heavy burdens on a local human population and—as the government readily admits—no requirement that anyone do anything that might alleviate the identified threat to species survival. The alternative, meanwhile, makes all the sense in the world: The agencies can simply wait to list the species until the identified threat manifests (if ever), the species actually experiences a decline, and locally burdensome conservation efforts can actually make a difference.

Combining an exceedingly deferential standard of review with a toothless interpretation of the statutory limitations, the Ninth Circuit has given the opposite answer. On its view—which it purports to share with the D.C. Circuit—the agency's acknowledged uncertainty about the long-term effects of global climate change on an Arctic species is no barrier to listing that species as "threatened"—in

fact, it *supports* the listing. The consequences of any such listing for States and their local populations are exceptionally serious. This Court should not permit the only meaningful limits on listing decisions to be effectively dissolved, as they now have been, by the similarly erroneous answers given to the question presented by the two circuits with plausible jurisdiction over those species most readily affected by climate change.

Alaska and her citizens—particularly her Native groups—will suffer the painful consequences of this misreading of the statute alone. Alaska Native communities that have called this land home for millennia depend on the unencumbered use of their land—land they fought to retain in the settlement of their aboriginal land claims—for the survival of their traditional ways of life. Central to this tradition is a subsistence culture that depends intimately on the harvest of bearded seals, which provide not only food, but also hides used to cover the wooden frames of the umiaq, a vessel commonly used by the whaling community for the traditional spring whale hunt. Likewise, the unnecessary burdens this listing will cause on natural resource extraction in Alaska will have significant, unintended consequences on the State and Alaska Natives. Royalties and property taxes from resource extraction are crucial to the State's social-services budget, the Alaska Permanent Fund dividend that keeps many local families out of poverty, and raising the funds necessary to support the Alaska Native subsistence lifestyle—a unique cultural heritage that actually does face imminent threats to its survival. Meanwhile, impinging on these important interests because the bearded seal is now a "threatened" species is literal nonsense: The

agency admits that the species is currently abundant, and that no human activity occurring in its habitat is sufficient to justify a listing or address the long-term climatological threat the agency purported to identify.

This statutorily indefensible result should not persist; it causes harms Congress did not intend for no benefit whatsoever. Petitioners, however, have nowhere left to turn. Absent this Court's immediate intervention, the agencies will continue to stymie investment and development in Alaska through pointless ESA listings that both the Ninth and D.C. Circuits—the only available venues—will predictably affirm. The Court should grant certiorari, and reverse.

PETITION FOR A WRIT OF CERTIORARI

The State of Alaska and other listed parties respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion is published at 840 F.3d 671 (Pet. App. 1a). The district court's decision is available at 2014 WL 3726121 (Pet. App. 34a).

JURISDICTION

The Ninth Circuit's judgment issued October 24, 2016. Pet. App. 3a. A timely rehearing petition was denied on February 22, 2017. Pet. App. 82a. Justice Kennedy extended this petition's due date to July 22, 2017, *see* No. 16A1105. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

16 U.S.C. §1532(20) provides:

> The term "threatened species" means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

Other relevant provisions appear in the appendix.

STATEMENT OF THE CASE

I. Statutory Background

Concerned that "species of fish, wildlife, and plants have been *so depleted in numbers* that they are in danger of or threatened with extinction," 16 U.S.C. §1531(a)(2) (emphasis added), Congress responded with the ESA. Shortly thereafter, this Court recognized that Congress intended the Act to have a dramatic effect on the entire United States government. Once a species is deemed likely to become extinct, the ESA prioritizes its preservation over even the "primary missions" of almost every federal agency. *TVA v. Hill*, 437 U.S. 153, 185 (1978). The decision to list a species as threatened or endangered is thus enormously consequential.

1. 16 U.S.C. §1533(a)(1) imposes a mandatory duty on the "Secretary"[1] to determine, based on five enumerated factors, "whether any species is an endangered species or a threatened species," and to so designate any species that meets those statutory tests.[2] The criteria are focused on the species'

---

[1] Responsibility for ESA listings is shared between the Secretaries of Commerce and Interior, *see id.* §1533(a)(2), who act through the U.S. Fish and Wildlife Service (FWS) and NMFS respectively. For concision, we refer generically below to the "Secretary," "government," or "relevant agencies."

[2] These include: "(A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; (E) other natural or manmade factors affecting its continued existence." *Id.* §1533(a)(1).

present status and immediate threats to its viability (both temporally and geographically). In general, the Secretary must base the listing decision "solely on … the best scientific and commercial data available to him after conducting a review of *the status of the species*." *Id.* §1533(b)(1)(A) (emphasis added). The Secretary is also directed to determine whether "any species *is* an endangered or threatened species" based on the "present or threatened destruction … of its habitat or range," along with other present-tense considerations like "the inadequacy of *existing* regulatory mechanisms," or "other natural and manmade factors *affecting* its continued existence." *See id.* §1533(a)(1)(A)-(E) (emphasis added); *id.* §1531(a)(1); 50 C.F.R. §402.01(b) (2017).

Before the listing at issue, the agencies had never listed a species as endangered or threatened without evidence of vulnerably low population numbers or some other specific, local, and immediate threat. That began to change with the "threatened" listing for the polar bear in 2008, *see infra* p.30-32; *In re Polar Bear ESA Listing*, 709 F.3d 1 (D.C. Cir. 2013). But even that decision, while partly based on how global climate change would impact the bears' Arctic environment, was rooted in data demonstrating the present effects on existing and vulnerable portions of polar bear populations. As the parties and courts have acknowledged throughout this case, there is simply no precedent for listing a presently robust species as threatened solely because long-term forces might harm it at a distant date. *See, e.g.*, Pet. App. 78a-79a.

The concepts of "endangered" and "threatened" species of course require the Secretary to make

certain future-looking judgments, but those statutory definitions impose important limits on their temporal and conceptual reach. An "endangered" species must *already* be "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. §1532(6); *see also In re Polar Bear ESA Listing*, 794 F. Supp. 2d 65, 89-90 (D.D.C. 2011) ("in danger of extinction" means "on the brink of extinction"). And a "threatened" species must be "*likely* to become an endangered species within the *foreseeable* future." 16 U.S.C. §1532(20) (emphasis added). In the recent past, the agencies regarded the "foreseeable future" as extending no more than 50 years from the listing decision. Pet. App. 77a-78a. But in 2009, around the time FWS and NMFS considered these listings, the Solicitor of the Interior directed the agencies to abandon such limits and determine the span of the "foreseeable future" on a case-by-case basis. See Pet. App. 24a (citing Office of the Solicitor of the U.S. Dep't of the Interior, *Memorandum on the Meaning of "Foreseeable Future" in Section 3(20) of the Endangered Species Act*, No. M-37021 (Jan. 16, 2009)).

2. The statutory consequences of listing confirm Congress's focus on present and immediate threats to particularly vulnerable populations. "Threatened" and "endangered" status are all-but indistinguishable in this regard; either listing triggers a host of regulatory burdens on the federal government and regulated parties, including the States, local citizens, and Native groups (particularly, in Alaska). In general, steps must be taken to "halt and reverse the trend towards species extinction, whatever the cost," *Hill*, 437 U.S. at 184, and agencies must treat this as a "first priority" before all other aspects of their

missions. *Id.* at 185. Beginning with the emphasis on "revers[ing] the trend towards species extinction," *id.*, however, these provisions are difficult to parse in the context of currently healthy populations facing distant, vague threats rather than immediate, local challenges to their survival.

Notably, the agency must develop and implement a "*recovery* plan." 16 U.S.C. §1533(f) (emphasis added). Recovery plans must include "such *site-specific* management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species," as well as "objective, measurable criteria which, when met, would result in … the species['] … remov[al] from the list." *Id.* §1533(f)(1)(A)(B)(i)-(ii) (emphasis added). This obligation has no workable application to presently healthy populations that do not face an immediate threat from local forces.

In addition, the agencies must designate "critical habitat" for listed species, *id.* §1533(a)(3)(A), and the preservation of the animal's "critical habitat" is treated as particularly sacrosanct under the Act. The statute prohibits federal agencies from authorizing, funding, or carrying out "any action" that is "likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species." *Id.* §1536(a)(2). As a result, any project affecting a critical habitat or the species itself must involve a "section 7 consultation" if it requires federal approval or receives even a modicum of federal funding. The consultation will determine if the action *might* have any negative impact on the listed species or its critical habitat, and may require that

plans be modified to avoid such effects. The consultations themselves—not to mention their outcomes—create "[c]onsiderable regulatory burdens and corresponding economic costs [that] are borne by landowners, companies, state and local governments, and other entities as a result of critical habitat designation," and can result in the scuttling of a project in its entirety. Andrew J. Turner & Kerry L. McGrath, *A Wider View of the Impacts of Critical Habitat Designation*, 43 Envtl. L. Rep. News & Analysis 10,678, 10,680 (2013). These costs fall overwhelmingly on local citizens. *See id*.

The ESA also puts stringent restrictions on local interactions between humans and the listed species. For example, the statute makes it illegal, with some exceptions, to "take" a member of the listed species—a term defined quite broadly to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. §§1538(a)(1), 1532(19). The statute imposes both civil and criminal penalties for violations, *id.* §1540, both of which are treated as strict liability offenses. *See, e.g.*, *United States v. McKittrick*, 142 F.3d 1170, 1177 (9th Cir. 1998); *United States v. Nguyen*, 916 F.2d 1016 (5th Cir. 1990).

II. Procedural Background

In May 2008, the Center for Biological Diversity petitioned NMFS to list three species of ice seals as threatened or endangered "primarily due to concerns about threats to their habitat from climate warming and loss of sea ice." 77 Fed. Reg. 76,740, 76,740 (Dec. 28, 2012); *see also id.* at 76,742 ("The main concern about the conservation status of bearded seals stems

from the likelihood that their sea ice habitat has been modified by the warming climate."); Pet. App. 6a-7a. This case concerns the bearded seal (*Erignathus barbatus*), and was eventually refined down to a determination regarding the Beringia "distinct population segment" (DPS). NMFS issued its proposed listing of the "Beringia DPS" as threatened in December 2010, 75 Fed. Reg. 77,496 (Dec. 10, 2010), but then extended the notice-and-comment period for six months "to address a substantial disagreement relating to the sufficiency or accuracy of the model projections" of habitat loss. 77 Fed. Reg. at 76,741.

In its final listing decision, NMFS found that the "principal threat to bearded seals is habitat alteration stemming from climate change," focusing on sea-ice decline over shallow waters where the seals—"a long-lived and abundant animal with a large range"—whelp, nurse, molt, and rutt. *Id.* at 76,741-43; Pet. App. 11a-14a. NMFS thus relied exclusively on the first statutory factor for a listing decision—"the present or threatened destruction, modification, or curtailment of [the species'] habitat or range," 16 U.S.C. §1533—while finding that the other four statutory factors did not support listing. *See supra* n.2; 77 Fed. Reg. 76,745-48. Largely ignoring that the current seal population is healthy at "about 155,000 individuals," *id.* at 76,748, NMFS ultimately chose to list the Beringia DPS as threatened based on predictions of sea-ice decline by 2100, which NMFS found to be "within the foreseeable future." *Id.* Although it lacked data demonstrating the effect this long-distant sea-ice decline would have on the seal population, NMFS speculated that it would force the seals to "shift their

nursing, rearing, and molting areas" to "suboptimal conditions," causing a decline in population by 2100. *Id.*

Notably, this listing depended on two different long-term predictive judgments on which NMFS acknowledged there was substantial uncertainty. The first was the climate modeling used in attempting to determine the extent of summer sea-ice decline at century's end.[3] NMFS extended the comment period on its listing decision because of "disagreement among peer reviewers" regarding "the timing and magnitude of climate change effects on the availability of sea ice in the Bering Sea." Pet. App. 12a. "Because modeling for the second half of the century involved unknown variables (technological improvement, changes in climate policy)," and those models showed substantial "volatility," the agency relied on as many as "twenty-four models" from the Intergovernmental Panel on Climate Change (IPCC). *Id*. 16a. Comparing these models with observational data suggested that only one performed reliably in the western Bering Sea. *Id.* NMFS also recognized that the "farther into the future the analysis extends, the greater the inherent uncertainty," 77 Fed. Reg. at 76,741, and that significant "uncertainties" exist when making such predictions based on "hemispheric projections or indirect means," *id.* at 76,742. Nonetheless, six of these concededly unreliable models formed the basis

[3] A climate model is a mathematical projection of future surface air and ocean temperatures for a geographical region based in part on past warming trends and predicted amounts of future greenhouse emissions. *Id.* at 76,753.

of the agency's admittedly uncertain projections regarding monthly sea-ice levels from 2050 to 2100. Pet. App. 16a-17a.

Even more vexingly, the agency made uncertain guesses as to the effect that any sea-ice decline would have on bearded seals. Although "data on bearded seal abundance and trends of most populations are unavailable or imprecise" and there were "no quantitative studies" on the "relationship[] between sea ice and bearded seal vital rates," 77 Fed. Reg. at 76,742-43, the agency nonetheless used the extent of sea-ice loss as a direct proxy for species survival. In response to comments, however, NMFS candidly noted that "[d]ata were not available to make statistically rigorous inferences about how these DPSs will respond to habitat loss over time," and that "the Beringia … DPSs are moderately large population units, are widely distributed and genetically diverse, and are not presently in danger of extinction." *Id.* at 76,758.

Ultimately, NMFS speculated that, while the ice cover would be sufficient for whelping and molting through most of the century, there would "commonly be years" by 2100 without summer sea ice in the Bering Sea (but not in the Beaufort, Chukchi, and East Siberian Seas). *Id.* at 76,742-44. NMFS surmised in turn that sea-ice loss "would likely have a *negative effect* on the Beringia DPS." Pet. App. 13a (citing 77 Fed. Reg. at 76,742) (emphasis added). But it was unable to define that "negative effect" with any precision: it could not say how sea-ice loss would affect the population figures, how the seals might adapt to the changes, and how likely this was to result in a material risk of extinction.

NMFS's implementation of the listing was also statutorily anomalous. It disavowed *any* effort to follow through on the requirements the statute ordinarily imposes after a listing. For example, while the ESA typically requires agencies to immediately subordinate their primary missions to species preservation, *see supra* p.4, NMFS disclaimed any attempt to regulate agency decisions about carbon emissions or other forces contributing to the very climatological threat NMFS purported to identify for the Beringia DPS. 77 Fed. Reg. at 76,749, 76,764. In response to commenters, NMFS acknowledged that, as a result, this "listing does not have a direct impact on the loss of sea ice or the reduction of [greenhouse gases]." *Id.* at 76,764. At best, NMFS said, it might help "conservation efforts" indirectly by "enhanc[ing] national and international cooperation." *Id.* This symbolic effect was the only benefit NMFS identified; although it proposed regulations prohibiting the taking of bearded seals, it withdrew them after finding that the population is "sufficiently abundant to withstand typical year-to-year variation." *Id.* at 76,749. Moreover, due to lack of data on the seal population, NMFS was not even able to designate a critical habitat at the time of the listing decision. *Id.* at 76,749-76,750.

In contrast to the lack of conservation benefits, the listing decision has imposed immediate and substantial regulatory burdens on Alaska and its local citizens. NMFS acknowledged that the section 7 consultation requirement would apply to federal actions such as "permits and authorizations relating to coastal development and habitat alteration, oil and gas development … and cooperative agreements for subsistence harvest" by local Native groups. *Id*. In

simple terms, the local population would have to act as though the species was presently threatened, even though it was not, and nothing they could do would have any perceptible impact on its short-term or long-term survival.

Petitioners timely challenged the listing in the District of Alaska. The district court held that, "given the lack of evidence upon which the listing was based," NMFS's decision was "arbitrary, capricious, and an abuse of discretion." Pet. App. 42a. It concluded that the statutory criteria did not permit the agencies to list a species based on the admittedly uncertain effects global warming would have on that species a century in the future. It thus explained that, even based on its "[i]ndependent research," it could not find "any case in which a listing of threatened was based upon a time period that exceeded 50 years"—including the recent polar bear listing decision. *Id.* 78a (citing *Polar Bear*, 709 F.3d at 1). The district court further noted that "it does not appear from the Listing Rule that any serious threat of a reduction in the population … exists prior to the end of the 21st century," and that NMFS 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." *Id.* 78a-79a; *see also id.* 79a (NMFS found "no significant threat" to the seal population until 2090). Ultimately, because of the "lack of any articulated, discernable, quantified threat of extinction within the *reasonably* foreseeable future" and the "express finding" that no further "protective action" was necessary, the listing decision "had no effect" beyond imposing an unnecessary

consultation requirement. *Id.* 80a. The district court therefore vacated the listing decision.

The Ninth Circuit reversed. Pet. App. 33a. The court determined that there was only one key issue in the case—namely, if an agency "determines that a species that is not presently endangered will lose its habitat due to climate change by the end of the century, may [the agency] list that species as threatened?" *Id.* 6a. Purporting to align itself with the D.C. Circuit's approach to the polar bear listing decision, the Ninth Circuit held that, because the agency considered the available science and acknowledged its shortcomings, the substantial uncertainty in its determinations was not a reason to invalidate its listing decision—if anything, it was a reason to uphold it. *See, e.g.*, *id.* 19a-28a (treating as *favorable* the record evidence that "the *uncertainty* attaching to 80-year predictions of how changing climate will affect bearded seals and their habitat has been, is being, and will be greatly underestimated" (emphasis original)).

The Ninth Circuit explained that this result followed from its "highly deferential standard of review." *Id.* 30a. Indeed, the Court concluded that "candidly" disclosing the shortcomings of the projections and providing a "reasonable" methodology "for addressing volatility" in the models was "all the ESA requires" of NMFS—even if substantial uncertainty remained. *Id.* 20a-22a. Accordingly, the Ninth Circuit refused to force the agency to "calculate or otherwise demonstrate the magnitude of [the] threat" before determining that an otherwise healthy species was "likely" to become endangered within "the foreseeable future." *Id.* 29a.

4. Petitioners sought rehearing *en banc*, stressing that the Ninth Circuit's approach had rendered the statutory limitations on threatened-species listings essentially meaningless. Rehearing was denied. Pet. App. 82a.

REASONS FOR GRANTING THE WRIT

I. This Case Isolates An Issue of National Importance Regarding A Critical Federal Statute.

As the Ninth Circuit recognized, this case isolates a single legal issue of critical importance regarding the reach of the ESA—an Act that imposes severe restrictions on States, Native groups, and local inhabitants. Simply put, the question is whether a currently healthy species must be listed as "threatened"—that is, "*likely* to become an endangered species within the *foreseeable* future," 16 U.S.C. §1532(20) (emphasis added)—if the government concludes, subject to a "highly deferential" standard of review, Pet. App. 30a, that its existing habitats will be negatively impacted by global climate change a century hence. Whatever one thinks of the *answers* given in the two dominant Circuits, this *question* plainly deserves this Court's attention. Given how comprehensively the ESA projects federal oversight into the States under a broad conception of the relevant statutory terms, it is essential that this Court resolve whether that broad conception can be reconciled with the text and structure of the ESA.

This case provides an ideal vehicle for the Court to do so by precisely framing the legal question and vividly demonstrating both the stakes of the issue and the problems with the Ninth Circuit's approach.

In particular, the record in this case leaves no doubt that: (1) NMFS based its listing decision entirely on the speculative, long-term effects of climate change on a healthy species; (2) the listing decision will take a substantial, immediate toll on the State and its local population; and yet (3) the challenged action lacks positive conservation effects because the agency disclaimed any power to address the threat it purported to identify.

1. As an initial matter, the proper role of climate change in a listing determination is perfectly framed for review here. Indeed, the Center for Biological Diversity's petition to list the bearded seal requested action "primarily due to concerns about threats to [the seal's] habitat from climate warming and loss of sea ice." 77 Fed. Reg. at 76,740. In its Final Rule, NMFS found that the "principal threat" to the Beringia DPS is "habitat alteration stemming from climate change," *id.* at 76,741, and that the "main concern about the conservation status of bearded seals stems from the likelihood that their sea ice habitat has been modified by the warming climate," *id*. at 76,742. The agency justified its listing decision entirely on its analysis of the first statutory factor (*i.e.* habitat erosion), *see supra* n.2, and ultimately used its 100-year predictions of sea-ice loss as a direct proxy for the risk to species survival, *id.* at 76,743-44, even though NMFS lacked data on the effects any climate-change related habitat alteration might have on species survival.

Further, both courts below agreed that NMFS's listing decision rose and fell with the propriety of using those long-term climate-change models to designate a species as threatened. The district court

noted that NMFS failed to provide sufficient data on "the resilience of bearded seals to cope with climatic changes," and extensively quoted the agency's admitted uncertainty about climate effects on the species and its habitat—particularly in the longer term. Pet. App. 70a-77a. The Ninth Circuit thus bluntly acknowledged that the case "turned on *one* issue:" whether NMFS must list a presently healthy species as threatened if it determines that the "species[,] [which] is not presently endangered[,] will lose its habitat *due to climate change by the end of the century*." *Id.* 6a (emphasis added).

In future cases, this question will be present but confounded by other variables, making the underlying legal issue isolated by the Ninth Circuit harder for this Court to reach. In this case, however, the listing decision was solely focused on the effect of climate change on the seal's sea-ice habitat. Indeed, the agency found that *none* of the other statutory factors could justify a threatened listing, *see supra* p.9-10, while affirmatively recognizing that "the Beringia … DPSs are moderately large population units, are widely distributed and genetically diverse, and are not presently in danger of extinction." 77 Fed. Reg. at 76,758. Thus, the agency could only identify a threat to the species by adopting its 100-year climate-change model as a direct proxy for species survival. Pet. App. 76a-80a.

2. Likewise, this case demonstrates that the effects of such listing decisions on human populations are not academic. A listing determination triggers a plethora of regulatory burdens on both the federal government and regulated parties. *See supra* p.7-9. Most importantly, it requires the listing agency to

make a critical habitat designation, which determines the area that will fall under federal protection. 16 U.S.C. §1532(5). These critical habitat designations can be sizable. For instance, the designation for the polar bear encompassed an area equaling about 5% of the entire United States. 75 Fed. Reg. 76,086 (Dec. 7, 2010) (over 187,000 square miles in northern Alaska and the Outer Continental Shelf region); *see also* 79 Fed. Reg. 39,756, 39,856 (July 10, 2014) (designation of approximately 317,000 square miles as critical habitat for Loggerhead Sea Turtle). And NMFS has continued to expand the size of critical habitat designations, reaching nearly *350,000* square miles for the ringed seal. 79 Fed. Reg. 73,010 (Dec. 9, 2014).

Beyond the vast size of the critical habitat designation, and the federal superintendence that results, the section 7 consultation requirement falls heavily on regulated parties. 16 U.S.C. §1536 (a)(2); *see* Norman D. James & Thomas J. Ward, *Critical Habitat's Limited Role Under the Endangered Species Act & Its Improper Transformation into 'Recovery' Habitat*, 34 UCLA J. ENVTL. L & POL'Y 1, 4 (2016) ("Critical habitat has significant legal and economic consequences for landowners and resource users."). The scope of the section 7 consultation is almost boundless—it applies to any "action" involving any aspect of federal regulation or spending authority that may affect the designated area regardless of the reasons the species was listed. 16 U.S.C. §1536(a)(2). NMFS and FWS have defined "action" to apply to "all activities or programs of any kind authorized, funded, or carried out, in whole or *in part*, by Federal agencies in the United States or upon the high seas." 50 C.F.R. §402.02 (2017) (emphasis added). Thus,

almost any activity within the critical habitat area with any connection to federal agency action will trigger the consultation requirement.

The listing determination additionally requires the agency to "develop and implement" a recovery plan for the species, 16 U.S.C. §1533(f), which will be a significant time and resource drain for the agency—even though, when the species is currently healthy, there is no recovery to achieve. The listing decision also gives the agency the authority to enact regulations regarding the taking of any bearded seals, imposing civil and criminal penalties for violations. 16 U.S.C. §§1538(a), 1540.

Importantly, these listing consequences have serious impacts on regulated communities. The State of Alaska will lose control over the use of her local land and waters for the benefit of local citizens. The State has a clear, sovereign interest in determining the best use of its resources—including, of course, maximizing their value through reasonable mineral exploration. The federal conservatorship imposed by this listing decision will hamper those sovereign interests, both directly (by requiring federal approval for any "action" that even tangentially involves federal funding or approval) and indirectly (by making private investment in the State less desirable, decreasing public revenues that fund vital services).

Alaska currently has neither an income nor sales tax, and State infrastructure and services are thus heavily dependent on oil and gas revenues. So too is the Alaska Permanent Fund dividend, which is crucial for many citizens to stay above the poverty line. Revenues from mineral extraction also

constitute the consideration that many Alaska Native corporations realize for their Native shareholders in exchange for the aboriginal land claims they surrendered under the Alaska Native Claims Settlement Act, 43 U.S.C. §§1601-29.

Indeed, Alaska Native groups have a considerable interest in this listing decision, having long co-existed with and depended upon the bearded seal for both subsistence and cultural purposes. These Alaska Native groups depend intimately on the hunting of bearded seals to support their subsistence lifestyle and cultural traditions. *See supra* p.2-3. Although the ESA allows some exemptions for taking of species by Alaska Native groups, *see* 77 Fed. Reg. at 76,756, NMFS has the authority (now that the bearded seal is listed as threatened) to find that the Alaska Native subsistence harvest is "materially and negatively affecting the species," *id.*, which would allow the agency to limit such harvests; NMFS's present choice not to regulate the relationship between Alaska Native groups and the bearded seal can be freely changed. *See id.* at 76,763. Federal oversight of the relationship between Alaska Natives and a species they have honored and respected for centuries, under a listing that does not require Americans outside Alaska to do anything to preserve this resource, is exactly the sort of "needless economic dislocation produced by agency officials zealously but unintelligently pursuing their environmental objectives" that this Court has condemned under the ESA. *Bennett v. Spear*, 520 U.S. 154, 176-77 (1997).

Additionally, the section 7 designation process could palpably harm deep-rooted business interests in Alaska, including off-shore resource operations

that contribute to Alaska's largest industry and revenue source. The importance of these industries cannot be overstated: Royalties and property taxes derived from resource extraction fund most of the public services provided to Alaska Native communities, who depend upon these funds to survive the crushing poverty caused by their isolation in the harsh environment they call home. Indeed, these royalties are indispensable if Alaska Native communities are to retain their traditional, subsistence way of life despite the inflated cost of necessities that many Americans take for granted. In its rulemaking, NMFS recognized that "rising global demand" would make it "very likely that oil and gas development activity will increase" in this region. 77 Fed. Reg. at 76,746. NMFS concluded that the threats to the Beringia DPS from oil and gas exploration were only "moderately significant," and insufficient to justify a listing, *id.* at 76,746-47, but all such efforts remain subject to the section 7 consultation requirement that NMFS imposed based on a *different* threat. Especially because the harsh climates in Alaska reduce the possible windows for exploration, production, and development, the delays caused by such consultations could prove fatal to growth in this vital industry.

Finally, and most strikingly, this case is a unique vehicle because the agency has admitted that there is nothing on the other side of the ledger. NMFS itself recognized that there would be no conservation benefit from its decision to list the bearded seal as threatened. 77 Fed. Reg. at 76,764; Pet. App. 79a-80a. That concession was unavoidable: NMFS and FWS have now affirmatively disclaimed any effort to use a listing decision as a basis to impose any

consultation or other requirements on *any* action that contributes to global climate change *anywhere* in the United States. 73 Fed. Reg. 76,249, 76,265-66 (Dec. 16, 2008) (section 4(d) analysis for polar bear). The agencies have thus decided to place all the burdens of their decisions on the kinds of actions they themselves believe are *insufficient* to create a threat to species preservation, while doing nothing at all about the threat they've purported to identify.

Future cases will not isolate so vividly the irony of the agencies' approach to global climate change. Alaskans will be among those most affected by such forces. But rather than acting to stymie whatever contribution the Nation is making to those effects, the agencies instead have placed *another* burden exclusively on Alaska, its citizens, its Native groups, and its businesses. These entities have no ability to control the identified threat and can do nothing else to improve the long-term prospects of the bearded seal because *it is currently healthy*. This simply cannot be what Congress intended, and is most certainly arbitrary agency action.

II. The Analysis Below Is Inconsistent With The Text And Structure Of The ESA, And Threatens Serious Effects On State and Local Sovereignty.

The paradoxical results of this listing decision follow inexorably from the agency's disregard of the statutory text and structure. Neither Congress nor any natural user of the English language would treat 100-year, generalized risks as "likely" threats to a given species' survival in the "foreseeable future." Accordingly, Congress created a remedial scheme for threatened species that cannot be meaningfully

applied to distant, global climate issues—a certain sign that the relevant terms do not allow what the Ninth Circuit permitted below.

1. As explained above, the ESA provides that the Secretaries of Interior and Commerce, through FWS and NMFS respectively, "shall" determine whether a species is threatened or endangered by considering five statutory factors. 16 U.S.C. §1533(a)(1). But the only factor NMFS could apply here was the first: "the present or threatened destruction, modification, or curtailment of [a species'] habitat or range." *Id*. NMFS concluded that this single factor required listing the bearded seal as threatened because: (1) climate change may cause an increase in global atmospheric temperatures; (2) some models show that this temperature increase may decrease the amount of polar sea ice in summer months in certain areas of the seals' habitat one hundred years hence; and (3) seals now rely on that polar sea ice for certain lifecycle activities. And the Ninth Circuit affirmed because it believed that the "best available science" confirms that temperatures are rising, sea ice is receding, and that plausible, very-long-term recession will have a "negative impact" on the bearded seal, even though the agency itself acknowledged its uncertainty about the scope of that "negative impact." Pet. App. 21a n.7.

This analysis is untethered from the statutory text. To begin, a "negative impact" on the species occurring 100 years in the future cannot amount to a "likely" threat that the species will be endangered in the "foreseeable future." *See* 16 U.S.C. §1532(20). That is not a natural use of those terms, and their ill fit is reinforced by NMFS's inability to detail the

likely effects that the identified "threat" would have on species population. Although the statutory language may not require a detailed quantitative prediction of exactly when the species will cross the threshold to endangered, it requires at least some specificity as to when that threat will manifest, and the reasonable magnitude of the impact forecasted. Even very substantial and immediate "negative impacts" rarely take a healthy species to the brink of extinction.

As the district court explained, "[i]f it were … otherwise, [it] could logically render every species in the arctic and sub-arctic areas potentially 'threatened.'" Pet. App. 79a n.69. And because the Ninth Circuit has now blessed this approach, and the statute imposes a *mandatory* listing duty on the Secretary, that is the likely result. After this decision, environmental groups will predictably force NMFS and FWS to reconsider even its recent decisions rejecting efforts to force listings based on long-term global warming threats. *See, e.g.*, *Ctr. for Biological Diversity v. Lubchenco*, 758 F. Supp. 2d 945, 962-69 (N.D. Cal. 2010) (upholding NMFS decision not to list ribbon seal because evidence of effect of climate change on habitat beyond 2050 was too unreliable).

That is because the decision below removes any meaningful limits on the species subject to listing as "threatened." Under the Ninth Circuit's analysis, NMFS must take a global phenomenon and apply it as a localized threat to a particular species' habitat. To overcome this discrepancy in scope, certain assumptions about local effects and a species' ability to adapt to long-term changes must be baked into the

modeling, and as the Ninth Circuit itself recognized, models stretching so far into the future show "greater volatility, and thus less reliable predictive value." Pet. App. 16a. It is nearly impossible for the agency to accurately predict with such models whether (or when) population declines will begin, as NMFS admitted here. But by failing to require any such certainty—and in fact treating uncertainty as a factor that *favors* the listing, *see supra* p.14-15, Pet. App. 19a-28a—the Ninth Circuit deleted from the statute the requirement that the threat appear in the "foreseeable future" or that extinction will be "likely" to occur. AOGA Pet. 23-24. Instead, the answer should be: If the agency cannot *foresee* the effects of a global phenomenon on a presently healthy species, it is not "likely" to be endangered in the "*foreseeable* future."

NMFS's approach also warps the structure of the ESA by listing species with a healthy population level even though current reductions in sea-ice levels have resulted in no demonstrated harm to the species. As the district court correctly noted, under this logic, essentially any arctic or sub-arctic species could be listed as threatened *right now*, even though there is no local action that could affect that distant threat. Interpreting the ESA this way will permit immediate listing in every Arctic case, transforming Alaska into a federal reserve for cold-weather species at the discretion of the federal agencies or even private petitioners.

In fact, this approach is not even limited to Arctic species—the IPCC forecasts rising sea levels

caused by the melting of polar ice caps,[4] which could place any number of species found on the coasts or on snow-packed mountain ranges within FWS's or NMFS's current interpretation of "threatened."[5] All the agencies would have to do is show that climate change may, under some model and at some point in the future, affect that habitat—citing uncertainty as a reason to make the listing rather than a reason to withhold it.

Even more striking from a statutory perspective is the irresolvable mismatch between such global, long-term problems and the local remedial mechanisms of the ESA. Taken seriously, the conclusion that the bearded seal is threatened by climate change would require the federal government to subordinate all its programs to reducing greenhouse gas emissions—the sole cause of the identified threat. *See TVA*, 437 U.S. at 184. But that position is so patently untenable that the agencies rejected it, and elected to require *no steps by anyone* outside Alaska that would combat the *only* threat at issue. Meanwhile, the local effects imposed by the listing will harm Alaska and its people, while achieving nothing at all—the bearded seal requires no protection from Alaskan projects or under the ESA take provision because it is currently healthy; even hunting the seals requires no immediate proscription.

---

[4] Intergovernmental Panel on Climate Change, *Climate Change 2013: The Physical Science Basis*, at 1140-41 (2013), *available at* https://tinyurl.com/y7fcycnp.

[5] See, e.g., Dave Owen, Sea-Level Rise and the Endangered Species Act, 73 LA. L. REV. 119 (2012).

See supra p.12-13. The tools that Congress provided for addressing threatened and endangered species are a key indication of what those terms mean. Congress gave the agencies a scalpel, and they think they were asked to chop down trees.

To be sure, the agencies could change their mind and conclude that, to rectify the actual threat to the Beringia DPS habitat, they must impose section 7 consultation requirements and other limitations on every federally funded or regulated project in the Nation that may contribute to global climate change. Perhaps this is the intention of the environmental organizations that are petitioning for threatened or endangered status for many of these species.[6] But that would only make it obvious that the agencies had far exceeded the authority Congress intended to provide. If the statutory consequences of listing must be disavowed to make the listing plausible, the proper conclusion is that there is something wrong with the listing, not the statute.

In fact, the agencies' attempts to justify their decision not to follow their own reading of the statute to its logical conclusion leads to inconsistencies of the kind that prototypically violate the APA. In its section 4(d) decision for the polar bear, FWS explained that a section 7 consultation would only be triggered if there was a "causal connection between

---

[6] *See, e.g.*, Ctr. for Biological Diversity, A Future For All: A Blueprint For Strengthening The Endangered Species Act (Oct. 2011), https://tinyurl.com/ybbl9h8z; Todd Woody, *Enlisting Endangered Species As A Tool To Combat Warming*, Yale Env't 360 (July 22, 2010), *available at* https://tinyurl.com/ya3swupv (last visited June 12, 2017).

the proposed action and a discernible effect to the species or critical habitat that is reasonably certain to occur," 73 Fed. Reg. at 76,265-66, and then found it could not prove a direct causal link between greenhouse gas emissions and a threat to the polar bear's critical habitat. *Id*. Thus, because there is "currently no way to determine how the emissions from a specific action both influence climate change and then subsequently affect specific listed species" under the "best scientific data currently available," the agency could not use a listing decision as a means of regulating the emission of greenhouse gases in the United States. *Id*. This is, of course, the *exact opposite* of what the agencies are saying when it comes to the threat that global climate change allegedly poses to the species in general.

The ESA was not written to combat global warming, and these agencies should not be permitted to manhandle the statute to fit the square peg of climate change into the round hole of ESA regulation. That is particularly so because there remains an easy solution: The agencies can list the species when (if ever) the immediate population effects of climate change begin to manifest. At *that* point, the agencies would be relying on the kind of "forecast[ed] population trends" Congress intended when it added the "threatened" listing to the statute, S. Rep. No. 93-307, at 3 (1975), and local conservation efforts could actually make a difference. Until then, the agencies have misread the ESA to reach an issue Congress did not intend to address and the statute cannot help to fix.

III. Immediate Review Is Necessary Given The Ninth And D.C. Circuit's Approaches to Review of Listing Decisions.

While this case uniquely isolates the consequences of treating long-range climate effects as a present threat to species survival, it is not an isolated problem. Prodded by activist petitions, NMFS and FWS have begun using climate change as the sole basis for acting under the ESA, despite the textual limitations that aim it at imminent and local threats to currently vulnerable species. These cases will tend to arise most frequently in the Ninth and D.C. Circuits: These are the only forums open to Alaska (where the overwhelming effect of these Arctic-related listings is felt); and environmental petitioners attempting to compel a listing can freely forum-shop their cases to their favored, Ninth Circuit venues. *See infra* p.32-34. Meanwhile, although the Ninth Circuit purported to align itself with the D.C. Circuit, it has in fact gone substantially further in validating a broad approach to "threatened" listings. Given the two similarly problematic decisions from these two critical circuits, this Court's immediate intervention is necessary to protect States like Alaska with nowhere else to turn. Other vehicles are unlikely to arise soon from any other circuit, and—as explained above—are particularly unlikely to isolate the legal issues involved more precisely than the decision below.

Although the Ninth Circuit acknowledged that this case raised a single, dispositive, and debatable legal issue, its opinion treated this question as resolved by both in-circuit and out-of-circuit precedent. Accordingly, it cited heavily to its own

decision approving a critical habitat designation for the polar bear, *Alaska Oil & Gas Association v. Jewell*, 815 F.3d 544, 558-59 (9th Cir. 2016), as well as the D.C. Circuit's earlier decision approving the polar bear's threatened listing, *Polar Bear*, 709 F.3d at 1. As the parallel petition of the Alaska Oil and Gas Association explains, *see* AOGA Pet. 20-21, the Ninth Circuit went well beyond the D.C. Circuit by permitting speculation about species-level effects to justify the bearded seal listing decision. But the operative point is that neither of the circuits controlling the vast majority of relevant cases is likely to impose any effective limit on the listing of cold-weather species based on reasoning the agencies have now applied to the ESA.

In *Polar Bear*, the D.C. Circuit upheld the listing of the polar bear as a threatened species based, in part, on climate-change-induced habitat loss. *See* 709 F.3d at 5 (noting "three principal considerations" in the listing decision: (1) "the polar bear depends on sea ice for its survival;" (2) "sea ice is declining;" and (3) "climatic changes have and will continue to reduce the extent and quality of Arctic sea ice"). The court found that the agency's reliance on climate change modeling in the listing decision was reasonable. *Id.* at 8-10, 14-16. It also upheld the agency's approach to measuring how "likely" or "foreseeable" a threat is to a species under the statutory definition of "threatened"—concluding that a flexible, threat-specific approach was appropriate, including reliance on long-term predictions looking up to 45 years in the future. *Id.* at 14-16. Thus, both the Ninth and D.C. Circuits agreed that: (1) FWS and NMFS can rely solely on speculative effects of global climate change to justify a threatened species listing; and (2) the

agency's reliance on predictive modeling of habitat loss up to 50 years (*Polar Bear*) or 100 years (below) in the future is permissible under the ESA. Notably, both courts combined an expansive view of threats that were "likely" in the "foreseeable future" with an exceptionally deferential standard for reviewing the evidence on which the agency based its decision. If the agencies candidly assessed the science and determined that there was likely to be a "negative impact" on the species from global climate change in the distant future, that was enough to require listing as a threatened species, without any need to quantify the threat that the species would ultimately end up endangered or extinct. *See* Pet. App. 28a-30a.

That said, the polar bear listing decision at least included "long-term studies showing that" the impact on the bears' sea-ice habitat "had already been observed in some of the southern-most polar bear populations." *Polar Bear*, 794 F. Supp. 2d at 74. Thus, the D.C. Circuit's approach was tempered by data uniquely demonstrating the *present* effect of climate change on a subpopulation of the species at issue. The Ninth Circuit, on the other hand, strayed even further from the statutory mandate, concluding that the agencies could list a species facing *no* present threat. To the extent there is a practical distinction between these circuits, it is a further reason for this Court to grant review. And to the extent there is not, it demonstrates that the seriously erroneous interpretation of the ESA permitted by these Courts will not be corrected absent this Court's immediate intervention.

Indeed, the Ninth Circuit's expansion of the D.C. Circuit's already deferential approach makes further

percolation both unnecessary and unwise, especially considering the geographical scope of the Ninth Circuit. The court covers a sizable portion of the American Southwest and Northwest (plus Alaska and Hawaii), which includes some of the nation's most diverse habitats.[7] Thus, listing decisions and critical habitat designations disproportionately occur within the geographic scope of the Ninth Circuit. And the relevant agencies' homes in the District of Columbia make it the next-most-frequent venue for ESA litigation.[8]

The State is thus caught in a futile feedback loop where it is forced to contest, and lose, every listing of an Arctic species for the same reasons over and over again in the same courts—each decision becoming yet more fodder for the next Arctic listing. There are already two cases pending in the Ninth Circuit regarding other "threatened" listings NMFS has made based on climate-change considerations.[9] And several additional cases are now pending in (carefully

---

[7] According to FWS, the Ninth Circuit's states contain over 1000 species (cumulative) that have been listed as threatened or endangered. *See Listed Species Believed To Or Known To Occur In Each State*, https://tinyurl.com/yaqhj2j2 (last accessed July 21, 2017).

[8] A recent search on Westlaw for opinions citing 16 U.S.C. §1533(a) shows that, of the 105 Court of Appeals cases, 49 were from the Ninth Circuit and 28 from the District of Columbia, meaning over 70% of decisions emanated from those two circuits. Similarly, of the 378 district court decisions, 172 were from district courts within the Ninth Circuit and 122 were from the District Court for the District of Columbia (approximately 78% of decisions).

[9] CA9 Case Nos. 16-35380, 16-35382, 16-35866, 14-17513.

chosen) federal courts in California where, based on the broad standard enunciated in the Ninth Circuit's recent cases, the Center for Biological Diversity has sued the agencies for failing to list species they view as equally threatened by climate change.[10]

Leaving the Ninth Circuit's overbroad approach to the statute in place is thus likely to quickly multiply the number of problematic listings, with disastrous effects for Alaska, and eventually other States as well. For example, the U.S. District Court for the District of Montana—a favored forum for environmental challengers, *see, e.g.*, *Wildearth Guardians v. U.S. Dep't of the Interior*, 205 F. Supp. 3d 1176 (D. Mont. 2016), *Ctr. for Biological Diversity v. Jewell*, 2016 WL 4592199 (D. Mont. Sept. 2, 2016)—recently held that FWS violated the APA by *not* listing a wolverine species as threatened. *See Defenders of Wildlife v. Jewell,* 176 F. Supp. 3d 975 (D. Mont. 2016). The wolverine requires snow for reproductive purposes, *id.* at 979, but the agency rejected the listing because the species could move to higher elevations with greater snowpack in future years, *id.* at 996. The court vacated that decision, however, requiring the agency to reconsider. *See id.* at 1001-10 (relying in part on *Alaska Oil*, which the Ninth Circuit in turn relied upon here).

The agencies themselves are now facing dozens of listing petitions that rely on climate-change

---

[10] See, e.g., *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Servs.*, No. 16-cv-06040 (N.D. Cal. filed Oct. 19, 2016); *Ctr. for Biological Diversity v. U.S. Fish & Wildlife Servs.*, No. 15-cv-05754 (N.D. Cal. filed Dec. 16, 2015).

justifications.[11] The approach adopted in the Ninth and D.C. Circuits will bind the courts in any case where the agencies decline to list the species—the petitioning environmental groups are certain to run to one of those courts to challenge the decision. And it will likewise be binding in many cases where the agencies list the species and the State or affected entities seeking to challenge that determination are within the Ninth Circuit's vast expanse. Even in the few cases where a State or regulated party might have access to another venue, these courts are frequently looked to on both ESA and administrative law issues, and are likely to be followed. Timely intervention by this Court is thus appropriate and essential.

* * *

This petition presents an opportunity for this Court to check an ever-expanding interpretation of the ESA that increases federal superintendence of local affairs in the States far beyond what Congress intended. By stretching the ESA's terms beyond their limits, the agencies have improperly placed the burden of rectifying global warming on Alaska, its constituents, its businesses, and its Alaska Native groups—who depend directly on the bearded seals and indirectly on continued resource extraction in the State to maintain their traditional subsistence way of

---

[11] *See, e.g.*, 81 Fed. Reg. 70,074 (Oct. 11, 2016) (Pacific bluefin tuna); 81 Fed. Reg. 68,379 (Oct. 4, 2016) (stonefly); 81 Fed. Reg. 64,414 (Sept. 20, 2016) (Iiwi); 81 Fed. Reg. 63,160 (Sept. 14, 2016) (Joshua tree); 81 Fed. Reg. 14,058 (Mar. 16, 2016) (bumblebee).

life—even though these parties can make, at best, an immeasurably small contribution to decreasing the identified threat. Congress has the power to address climate change and it has done so before. *See Massachusetts v. EPA*, 549 U.S. 497, 528-32 (2007) (EPA has authority to regulate greenhouse gases under Clean Air Act). Congress did not, however, provide the agencies with that power under the ESA. These agencies' willingness, with the blessings of the Ninth and D.C. Circuits, to expand the ESA beyond its limits requires this Court's intervention before it completely freezes Alaska's ability to develop its natural resources for the benefit of its inhabitants.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Eric F. Citron
Counsel of Record
Thomas C. Goldstein
Charles H. Davis
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
ec@goldsteinrussell.com

Jahna Lindemuth
ATTORNEY GENERAL
P.O. Box 110300
Juneau, AK 99801

(907) 269-5602
jahna.lindemuth@alaska.gov

Brad Meyen
ALASKA DEP'T OF LAW
1031 W. 4th Ave.
Suite 200
Anchorage, AK 99501
(907) 269-5232
brad.meyen@alaska.gov

Matthew Waldron
Shelley D. Cordova
Sarah J. Shine
ARCTIC SLOPE REGIONAL CORP.
3900 C Street
Suite 701
Anchorage, AK 99503
(907) 339-7665
Shelley.Cordova@asrcenergy.com

Matthew A. Love
Tyson C. Kade
VAN NESS FELDMAN LLP
719 Second Av.
Suite 1150
Seattle, WA 98104
(206) 829-1809
mal@vnf.com

July 21, 2017

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALASKA OIL AND GAS ASSOCIATION; AMERICAN PETROLEUM INSTITUTE; STATE OF ALASKA; NORTH SLOPE BOROUGH; INUPIAT COMMUNITY OF THE ARCTIC SLOPE; NORTHWEST ARCTIC BOROUGH; ARCTIC SLOPE REGIONAL CORPORATION; NANA REGIONAL CORPORATION, INC.,
Plaintiffs-Appellees,

v.

PENNY PRITZKER, U.S. Secretary of Commerce; NATIONAL MARINE FISHERIES SERVICE; NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION; KATHRYN D. SULLIVAN, in her official capacity as the Acting Under Secretary of Commerce for Oceans and Atmosphere and the Acting Administrator, National Oceanic and Atmospheric Administration; SAMUEL D. RAUCH, III, in his official capacity as the Acting Fisheries, National Oceanic and

Atmospheric Administration,
Defendants-Appellants.

No. 14-35806
D.C. No.
4:13-cv-00018-RRB

ALASKA OIL AND GAS ASSOCIATION; AMERICAN PETROLEUM INSTITUTE; STATE OF ALASKA; NORTH SLOPE BOROUGH; INUPIAT COMMUNITY OF THE ARCTIC SLOPE; NORTHWEST ARCTIC BOROUGH; ARCTIC SLOPE REGIONAL CORPORATION; NANA REGIONAL CORPORATION, INC.,
Plaintiffs-Appellees,

v.

PENNY PRITZKER, U.S. Secretary of Commerce; NATIONAL MARINE FISHERIES SERVICE; NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION; KATHRYN D. SULLIVAN, in her official capacity as the Acting Under Secretary of Commerce for Oceans and Atmosphere and the Acting Administrator, National Oceanic and Atmospheric Administration; SAMUEL D. RAUCH, III, in his

official capacity as the
Acting Assistant Administrator for
Fisheries, National Oceanic and
Atmospheric Administration,
Defendants,

and

CENTER FOR BIOLOGICAL
DIVERSITY,
Intervenor-Defendant-Appellant.

No. 14-35811
D.C. No.
4:13-cv-00018-RRB
OPINION

Appeal from the United States District Court for the
District of Alaska
Ralph R. Beistline, District Judge, Presiding

Argued and Submitted August 4, 2016
Anchorage, Alaska

Filed October 24, 2016

Before: Raymond C. Fisher, Richard A. Paez and
Andrew D. Hurwitz, Circuit Judges.

Opinion by Judge Paez

SUMMARY*
Environmental Law

The panel reversed the district court's summary judgment in favor of plaintiffs in their action challenging federal officials' listing decision under the Endangered Species Act, concerning certain "sea ice seal" species; and held that the National Marine Fisheries Service's ("NMFS") listing decision was reasonable.

The NMFS concluded that the Okhotsk and Beringia distinct population segments of the Pacific bearded seal subspecies were likely to become endangered within the foreseeable future. NMFS used climate projections to determine that the loss of sea ice over shallow waters in the Arctic would leave the Pacific bearded seal subspecies endangered by the year 2095. Plaintiffs filed lawsuits challenging the listing decision under the ESA's citizen suit provision and the Administrative Procedure Act.

The panel held that in light of the NMFS's robust rulemaking process, and pursuant to a highly deferential standard of review, the NMFS's final rule listing the Beringia distinct population segment as threatened was not arbitrary or capricious, and its listing was supported by substantial evidence. Specifically, the panel held that the NMFS did not act arbitrarily or capriciously in concluding that the effects of global climate change on sea ice would

---

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

endanger the Beringia distinct population segment in the foreseeable future. The panel further held that the administrative record demonstrated that NMFS provided a reasonable and evidence-based justification for its mid-century and end-of-century sea ice projections.

The panel held that NMFS clearly fulfilled its procedural and substantive obligations under Section 4(i) of the Endangered Species Act, 16 U.S.C. § 1533(i), to provide the State of Alaska with a written justification.

COUNSEL

Robert Parke Stockman (argued), Meredith L. Flax, Mary E. Hollingsworth, and Katherine W. Hazard, Attorneys; John C. Cruzen, Assistant Attorney General; Environment & Natural Resources Division, United States Department of Justice, Washington, D.C.; Demian Schane, Office of the General Counsel, United States Department of Commerce, Juneau, Alaska; for Defendants-Appellants.

Kristen Monsell (argued), Emily Jeffers, and Miyoko Sakashita, Oakland, California; Rebecca Noblin, Anchorage, Alaska; as and for Intervenor-Defendant-Appellant.

Jeffrey W. Leppo (argued) and Ryan P. Steen, Stoel Rives LLP, Seattle, Washington, for Plaintiffs-Appellees Alaska Oil and Gas Association, and American Petroleum Institute.

Bradley E. Meyen, Senior Assistant Attorney General, Alaska Department of Law, Anchorage, Alaska; Murray D. Feldman, Holland & Hart LLP, Boise, Idaho; Christina F. Gomez, Holland & Hart

LLP, Denver, Colorado; for Plaintiff-Appellee State of Alaska.

Tyson C. Kade (argued), Van Ness Feldman LLP, Washington, D.C.; Matthew A. Love, Van Ness Feldman LLP, Seattle, Washington; for Plaintiffs-Appellees North Slope Borough, Inupiat Community of the Arctic Slope, Northwest Arctic Borough, Arctic Slope Regional Corporation, and NANA Regional Corporation, Inc.

OPINION

PAEZ, Circuit Judge:

The National Marine Fisheries Service ("NMFS") used climate projections to determine that the loss of sea ice over shallow waters in the Arctic would leave the Pacific bearded seal subspecies (*Erignathus barbatus nauticus*) endangered by the year 2095. This case turns on one issue: When NMFS determines that a species that is not presently endangered will lose its habitat due to climate change by the end of the century, may NMFS list that species as threatened under the Endangered Species Act? The district court answered in the negative, ruling that NMFS's listing decision was arbitrary and capricious. We hold that on the basis of the administrative record, NMFS's listing decision is reasonable. Accordingly, we reverse the district court's grant of summary judgment in favor of Plaintiffs.

I.

In 2008, the Center for Biological Diversity ("CBD") filed a petition requesting that the Secretary of Commerce list three "sea ice seal" species as endangered or threatened under the Endangered Species Act ("ESA" or "the Act"), 16 U.S.C. §§ 1531–

44. *See* 16 U.S.C. § 1533(b)(1)(3) (citing 5 U.S.C. § 553(e)) (relating to the process for consideration of a petition for rulemaking); Final Listing Rule: Threatened Status for the Beringia & Okhotsk Distinct Population Segments of the *Erignathus barbatus nauticus* Subspecies of the Bearded Seal, 77 Fed. Reg. 76,740 (Dec. 28, 2012) ("Listing Rule"). After a lengthy administrative process that included two rounds of peer review, several rounds of public notice and comment, and public hearings, NMFS concluded that the Okhotsk and Beringia distinct population segments ("DPS") of the Pacific bearded seal subspecies (*Erignathus barbatus nauticus*) were "likely to become . . . endangered species within the foreseeable future throughout . . . a significant portion of [their] range." 16 U.S.C. § 1532(20); Listing Rule, 77 Fed. Reg. at 76,740.

Plaintiffs Alaska Oil and Gas Association ("AOGA"), the State of Alaska, and North Slope Borough (collectively, "Plaintiffs") filed separate lawsuits challenging the listing decision under the ESA's citizen suit provision, 16 U.S.C. § 1540(g), and the Administrative Procedure Act ("APA"), 5 U.S.C. § 706.[1] Plaintiffs alleged, *inter alia*, that the listing

---

[1] The American Petroleum Institute was added as a plaintiff in AOGA's amended complaint; the Inupiat Community of the Arctic Slope, Northwest Arctic Borough, Arctic Slope Regional Corporation, and NANA Regional Corporation were added as plaintiffs in the North Slope Borough's amended complaint. The district court consolidated all the

decision was not based on the "best scientific and commercial data available" in violation of 16 U.S.C. § 1533(b)(1)(A); the population of bearded seals was plentiful; a lack of reliable population data made it impossible to determine an extinction threshold; NMFS's use of predictive climate projections beyond 2050 were speculative; NMFS had unreasonably "changed tack" from its previous Arctic sea-ice listing decisions; and NMFS had failed to demonstrate a causal connection between the loss of sea ice and the impact of that loss to the Okhotsk and Beringia DPS's viability. In addition, the State of Alaska alleged that NMFS failed to adequately respond to its public comments and failed to comply with the ESA's state cooperation provisions. *See id.* § 1533(i); 50 C.F.R. § 424.18(c).

The district court denied relief with respect to the Okhotsk DPS for lack of Article III standing. *Alaska Oil & Gas Ass'n v. Pritzker*, No. 4:13-cv-18-RRB, 2014 WL 3726121, at *3–4 (D. Alaska July 25, 2014) ("Pritzker"). The district court, however, granted summary judgment to Plaintiffs on their challenge to NMFS's decision to list the Beringia DPS as a threatened species. The court concluded that NMFS's decision was arbitrary and capricious because NMFS's long-term climate projections were volatile and the agency lacked data on the bearded seal's adaptability and population trends, including "a specified time" at which the seal would reach an

---

cases and granted CBD leave to intervene as a defendant.

extinction threshold. *Id.* The district court also concluded that the ESA required NMFS to provide Alaska with a separate written justification for rejecting the State's comments and granted summary judgment to Alaska on that claim. *Id.* at *10 (citing *Alaska Oil & Gas Ass'n v. Salazar*, 916 F. Supp. 2d 974, 1003 (D. Alaska 2013), *rev'd sub nom.*, *Alaska Oil & Gas Ass'n v. Jewell*, 815 F.3d 544 (9th Cir. 2016) ("Jewell")). The district court vacated the Listing Rule, explaining that NMFS's attempt to predict the bearded seal's viability beyond 50 years was "too speculative and remote to support a determination that the bearded seal is in danger of becoming extinct." *Id.* at *15.

NMFS and CBD timely appealed. As we explain below, NMFS's decision to list the Beringia DPS as threatened was not arbitrary, capricious, or otherwise in contravention of applicable law. Accordingly, we reverse the district court's grant of summary judgment in favor of Plaintiffs.

II.

We review de novo the district court's grant of summary judgment to determine whether NMFS's ESA listing decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2); *Jewell*, 815 F.3d at 554. Our review is "deferential and narrow," requiring a "high threshold for setting aside agency action" following public notice and comment. *Id*. (internal quotation marks omitted). We presume an agency's action is valid, and we will affirm that action "so long as the agency 'considered the relevant factors and articulated a rational connection between the facts found and the choices made.'" *Id.* (quoting *Nw.*

Ecosys. All. v. U.S. Fish & Wildlife Serv., 475 F.3d 1136, 1140 (9th Cir. 2007)).

III.

In October 2009, NMFS established a Biological Review Team of eight marine mammal biologists, a fishery biologist, a marine chemist, and a climate scientist to review the status of the "best scientific and commercial data available" regarding bearded seals.[2] Listing Rule, 77 Fed. Reg. at 76,740. NMFS solicited four scientists to conduct independent peer reviews of the Review Team's report. *Id.* at 76,740 & 76,750. Based on the Review Team's assessment and the peer reviewers' comments, NMFS published a proposed rule listing the Beringia and Okhotsk bearded seal DPSs as threatened under the ESA. *Id.*; *see also* Proposed Rule, 75 Fed. Reg. 77,496 (Dec. 10, 2010).

The status and peer review reports found that the bearded seal (*Erignathus barbatus*) lives throughout the Arctic and Northern Atlantic Oceans, including in the Chukchi, Beaufort, and Bering Seas; Sea of Okhotsk; Sea of Japan; and waters of Arctic Canada (Hudson and Baffin Bays), Svalbard (Norway), and Russia. Because bearded seals are widespread, have low population densities, and spend significant time under water, it is difficult to obtain a

---

[2] The district court upheld the agency's rule listing the Okhotsk DPS, a ruling not contested on appeal. *Pritzker*, 2014 WL 3726121, at *3–4. Accordingly, we limit our review to the Beringia DPS listing.

reliable estimate of their current population. Listing Rule, 77 Fed. Reg. at 76,742. The bearded seal is commonly divided into two subspecies[3]—*E. b. barbatus*, which primarily inhabits the Atlantic, and *E. b. nauticus*, which inhabits the Pacific. Noting that there were "regions of intergrading" between the Atlantic and Pacific subspecies, NMFS identified two distinct Pacific population segments. Proposed Rule, 75 Fed. Reg. at 77,499–501. One group lived exclusively in the Sea of Okhotsk (the Okhotsk DPS), and the remaining seals were found throughout the Bering and Chukchi Seas (the Beringia DPS), with very little mixing between the two groups. *Id.* at 77,500.

The review concluded that bearded seals generally prefer to hunt organisms found on the ocean floor. As a result, the seals prefer to congregate where non-contiguous sea ice floes appear over shallow water between 50 to 200 meters deep, and the seals avoid "unbroken, heavy, drifting ice or large

---

[3] The ESA defines a species as "any subspecies of . . . wildlife . . . , and any distinct population segment of any species of . . . wildlife which interbreeds when mature." 16 U.S.C. § 1532(16). The Act does not define "distinct population segment." NMFS's policy, however, provides guidance on the factors the agency must consider before determining if a population is a distinct segment. *See Nw. Ecosys. All.*, 475 F.3d at 1138, 1141–44 (discussing the distinct population segment policy and the level of deference afforded to it).

areas of multi-year ice" located over deeper waters. *Id*. at 77,498. The seals use ice floes to give birth (whelp) and to nurse their pups; to allow mothers close access to food sources while nursing; to enable their pups to gain experience with diving, swimming, and hunting away from their predators; to provide a location for males to attempt to attract females; and to provide a platform where male seals can rest while molting. Listing Rule, 77 Fed. Reg. at 76,742–44. Year-round, bearded seals require access to shallow waters, where the seals have access to "more productive" sea floors with a higher availability of food.

Using observational and predictive data from the Intergovernmental Panel on Climate Change's ("IPCC") Fourth Assessment Report, NMFS used six climate models to determine when the Beringia DPS's sea ice habitat would degrade to such an extent that it would render the Beringia DPS endangered, and it made available for public review its methodology and data. Proposed Rule, 75 Fed. Reg. at 77,497. All independent peer reviewers agreed that the Beringia DPS's continued viability depended on the availability of sea ice in the Bering and Barents Seas during crucial life stages.

After considering thousands of comments to the proposed rule, NMFS extended the review period and sought additional independent peer reviews of the sections of the status review report that generated the greatest disagreement among peer reviewers—the timing and magnitude of climate change effects on the availability of sea ice in the Bering Sea. Listing Rule, 77 Fed. Reg. at 76,741, 76,750–51. NMFS additionally updated its climate predictions to

include studies published after the Proposed Listing Rule. *Id.* at 76,741 & 76,751. NMFS also held public hearings in Anchorage, Barrow, and Nome to solicit comments. *Id.* at 76,750.

NMFS determined that lack of access to non-continuous sea ice in shallow waters would require bearded seals to make significant adaptations to survive. *Id.* at 76,744. It reasoned that lack of access to sea ice over shallow waters likely would encourage seals in the Beringia DPS to whelp and nurse on shore, increasing their risk of exposure to their primary predators—polar bears and walruses. *Id.* at 76,742. Because lack of sea ice in shallow water would require seals to forage in deeper waters that lacked the ocean floor "productivity" of shallow waters, NMFS concluded that as seals moved to deeper waters, they faced a greater risk of being unable to meet their subsistence needs. *Id.* And although bearded seals did not require year-round access to sea ice floes in shallow waters, most observational studies and peer reviewers opined that lack of access to sea ice during periods of significant life functions (birthing, nursing, hunting/foraging, molting) would likely have a negative effect on the Beringia DPS. *Id.*

Having concluded that the availability of sea ice in shallow water was crucial to the Beringia DPS's viability, NMFS evaluated several climate models to determine the magnitude and timing of climate change's impact on the availability of sea ice in areas inhabited by the Beringia DPS. *Id.* at 76,744. Those projections indicated that by 2095, sea ice in several regions where the Beringia DPS whelps will have disappeared entirely during the mating, nursing, and

birthing season (April through June). *Id.* NMFS also concluded that any periodic "gains" in sea ice as a result of climate change were not really gains for the Beringia DPS. Instead, independent peer reviewers cautioned that "gains" in sea ice were illusory—seals would simply be able to access areas they already used in earlier months, but not during the times when critical life activities occurred. *Id.* The majority of peer reviewers commented that increased sea ice formation over deep waters would not offset sea ice losses in shallow waters in the Bering, Chukchi, and Beaufort Seas. NMFS and its peer reviewers also noted that although climate change had caused sea ice patterns to shift during the year, there would be a net decrease in the total number of days in which sea ice would be available to the seals. *Id.* at 76,743–44.

NMFS published its final rule designating the bearded seal Beringia DPS as threatened in December 2012. *Id.* at 76,740. After providing 60 days' pre-filing notice under ESA Section 11, 16 U.S.C. § 1540(g)(2)(A)(i), AOGA filed suit challenging NMFS's listing decision.

IV.

The Endangered Species Act seeks to recover endangered and threatened species and to "reverse the trend towards species extinction, whatever the cost." *Jewell*, 815 F.3d at 550–51 (quoting *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978)); 16 U.S.C. § 1531(b). To achieve that purpose, the ESA requires the Secretary of Commerce, or her designee,

to identify and list endangered[4] or threatened[5] species. *See* 16 U.S.C. § 1533(a)(1) & (2); *see also Nw. Ecosys. All.*, 475 F.3d at 1137. When determining whether to list a species, the reviewing agency must make its decision "solely on the basis of the best scientific and commercial data available." 16 U.S.C. § 1533(b)(1)(A).

A.

1.

Because CBD's petition cited global warming as the primary threat to bearded seals, NMFS focused its status review on the impact of warmer temperatures on the Beringia DPS. Proposed Rule, 75 Fed. Reg. at 77,503. To determine the magnitude of climate change's effect on sea ice, NMFS utilized the IPCC's predictive models, and it attempted to apply those models to observational data that the Department of the Interior collected annually regarding sea ice in the Bering and Chukchi Seas. *Id.* at 77,503–05; Listing Rule 77 Fed. Reg. at 76,743. The IPCC's climate predictions through 2050 were based on already-collected data about present-day

---

[4] The Act defines an "endangered species" as "any [non-insect] species which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6).

[5] A "threatened species" is "any species which 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(20).

emissions.[6] Its climate projections for 2050 to 2100, however, used contemporary data to predict potential climate trends under multiple scenarios. Proposed Rule, 75 Fed. Reg. at 77,503. Those models showed greater volatility, and thus less reliable predictive value, in the Arctic. *Id.* Because modeling for the second half of the century involved unknown variables (technological improvement, changes in climate policy), the IPCC used twenty-four models with slightly differing assumptions to obtain simulations of the upper- and lower-bounds for the increase in global temperatures from 2050 to 2100. *Id.*

To account for uncertainty in the IPCC's 2050 to 2100 predictions, NMFS used two models considered to be particularly reliable with respect to Arctic sea ice, and it used "medium" and "high" emissions scenarios to project monthly sea ice concentrations between March and July for each decade, beginning in 2025 and ending in 2095. *Id.* at 77,503–04. NMFS then compared the results of those projections to its observational data regarding sea ice to determine if the IPCC models performed reliably when applied to the Arctic. *Id.* at 77,504. Six models performed

---

[6] The Fish and Wildlife Service ("FWS") previously used the IPCC's 2050 climate projections to justify its decision to list the polar bear as a threatened species. *See Safari Club Int'l v. Salazar* (*In re Polar Bear ESA Listing & Section 4(d) Rule Litig.),* 709 F.3d 1, 15–16 (D.C. Cir.2013) ("*In re Polar Bear Litig.*").

reliably in the Chukchi and east Siberian Seas, four performed reliably in the Beaufort and east Bering Seas, and one model performed reliably in the western Bering Sea. *Id.* NMFS disclosed its methodology, as well as the limits of the IPCC models, in the Proposed Listing Rule and in a Notice of Availability of Special Independent Peer Review Reports.

After confirming the models' accuracy, NMFS applied each to the areas occupied by the Beringia DPS to determine the range of temperatures per month from 2050 to 2100, and used those temperature projections to determine the impact of local warming on sea ice melt. *Id.* NMFS's projections demonstrated that by May and June 2050, there would be no sea ice in the Bering Strait, the East Siberian Shelf, or the Barents or Bering Seas. *Id.* By July 2050, sea ice would recede to less than 20% of the mean or disappear entirely from the Beaufort, Chukchi, and East Siberian seas. *Id.* Most dramatically, by the time NMFS sought a second round of public comment on its climate projections, sea ice scientists published research indicating that the IPCC climate models understated the speed at which temperatures were rising at the poles. *Id.* at 77,503. Using observational data, those studies predicted that temperatures at the Arctic were 30 years ahead of schedule and that there would be "[a] nearly sea ice free summer Arctic by mid-century." *Id.* at 77,504.

Plaintiffs contend that NMFS used climate models that cannot reliably predict the degree of global warming beyond 2050 or the effect of that warming on a subregion, such as the Arctic. Although

Plaintiffs frame their arguments as challenging long-term climate projections, they seek to undermine NMFS's use of climate change projections as the basis for ESA listings. Plaintiffs' contention is unavailing; in *Alaska Oil and Gas Association v. Jewell*, we adopted the D.C. Circuit's holding that the IPCC climate models constituted the "best available science" and reasonably supported the determination that a species reliant on sea ice likely would become endangered in the foreseeable future. 815 F.3d at 558–59; *In re Polar Bear Litig.*, 709 F.3d at 4–6, 9–11.

We have stressed that we "must defer to the agency's interpretation of complex scientific data" so long as the agency provides a reasonable explanation for adopting its approach and discloses the limitations of that approach. *Nw. Ecosys. All.*, 475 F.3d at 1150; *see also San Luis & Delta- Mendota Water Auth. v. Jewell*, 747 F.3d 581, 602 (9th Cir. 2014) ("The determination of what constitutes the *best* scientific data available belongs to the agency's special expertise . . . . [and w]hen examining this kind of scientific determination . . . a reviewing court must generally be at its most deferential." (internal quotation marks omitted)). NMFS provided ample evidence of significant sea ice loss from 2007 to 2050, a period in which specific data supports the IPCC climate projections. Proposed Rule, 75 Fed. Reg. at 77,503–05. Those projections indicate that during months in which bearded seals used that ice for "critical life events" such as mating, birthing, and nursing, most Beringia DPS habitats will have lost most, if not all, of their sea ice. *Id.* at 77,504. By September 2010, observational data confirmed that

the amount of summer sea ice in the areas populated by the Beringia DPS was 40% below the long-term average. *Id.* at 77,503. NMFS has provided a reasonable explanation, based on the best available scientific and commercial data, for relying on those projections in its listing decision.

NMFS's projections for the second-half of the century are also reasonable, scientifically sound, and supported by evidence. There is no debate that temperatures will continue to increase over the remainder of the century and that the effects will be particularly acute in the Arctic. The current scientific consensus is that Arctic sea ice will continue to recede through 2100, and NMFS considered the best available research to reach that conclusion. One independent peer reviewer noted that nothing in "existing data would change the general picture that sea ice habitats important to bearded seals are disappearing and will continue to disappear, especially in the Bering and Chukchi seas." Excerpts of R. at 115, ECF No. 10. A second peer reviewer opined that it was "more likely than not that the *uncertainty* attaching to 80-year predictions of how changing climate will affect bearded seals and their habitat has been, is being, and will be greatly underestimated." Excerpts of R. at 118, ECF No. 10. All parties agree that there will be sea ice melt; the only uncertainty is the magnitude of warming, the speed with which warming will take place, and the severity of its effect.

The fact that climate projections for 2050 through 2100 may be volatile does not deprive those projections of value in the rulemaking process. The ESA does not require NMFS to make listing decisions

only if underlying research is ironclad and absolute. *See San Luis & Delta-Mendota Water Auth.*, 747 F.3d at 602 ("[W]here the information is not readily available, we cannot insist on perfection: [T]he best scientific . . . data *available*, does not mean the best scientific data *possible*." (internal quotation marks omitted) (emphasis added)). The ESA directs NMFS to make its determinations "solely on the basis of the best scientific and commercial data available . . . after conducting a review of the status of the species." 16 U.S.C. § 1533(b)(1)(A). After conducting that assessment, if NMFS finds it likely that a species will "become an endangered species within the foreseeable future throughout all or a significant portion of its range," it must list that species as threatened. 16 U.S.C. §§ 1532(20), 1533(b)(1)(B)(ii). NMFS provided a reasonable and scientifically supported methodology for addressing volatility in its long-term climate projections, and it represented fairly the shortcomings of those projections—that is all the ESA requires. *See Jewell*, 815 F.3d at 558 ("To the extent that Plaintiffs demand greater scientific specificity than available data could provide, [they] echo the district court's error in demanding too high a standard of scientific proof.").

The majority of independent peer reviewers agreed that NMFS's long-term climate projections were based on the "best scientific and commercial data available," that there was scientific consensus regarding the "direction and effect" of climate change, that there would be significant sea ice loss in the Beringia DPS's habitat, and that such a significant loss of habitat would almost certainly have a negative effect on the bearded seal's survival. Moreover, under

NMFS's 2007 to 2050 climate projections, even if global warming plateaued in the second-half of the century, devastating sea ice losses would still result during months that are currently critical to the bearded seal's propagation.[7] Proposed Rule, 75 Fed. Reg. at 77,501–06.

Further, climate studies released and noticed for public comment after the publication of the Proposed Listing Rule indicated that the Arctic was warming at a much faster rate than anticipated by the IPCC mid-century projections. Those studies, which are included in the administrative record, advised that observational data regarding current temperature increases indicated that Arctic sea ice may disappear as early as 2040—approximately 50 years earlier than NMFS predicted when it suggested the Beringia DPS would lose its sea ice habitat by 2095. *See Jewell*, 815 F.3d at 558–60 ("FWS also noted [in *In re Polar Bear Litigation*] that the observational record of current sea ice losses indicates that losses seem to be about 30 years ahead of the modeled values, which suggests a seasonally ice-free Arctic may come a lot sooner than expected."). The administrative record

---

[7] In the proposed and final rules, NMFS provided information regarding the negative impact of mid-century sea ice melt on the bearded seal's survival. Proposed Rule, 75 Fed. Reg. at 77,503–04 & 77,506; Listing Rule, 77 Fed. Reg. at 76,742–44. The district court did not address those projections, but instead focused on the longer-term projections, which predict a total loss of sea ice.

demonstrates that NMFS provided a reasonable and evidence-based justification for its mid-century and end-of-century sea ice projections.

The ESA does not require NMFS to base its decision on ironclad evidence when it determines that a species is likely to become endangered in the foreseeable future; it simply requires the agency to consider the best and most reliable scientific and commercial data and to identify the limits of that data when making a listing determination. In light of the data available to it during the rulemaking process, NMFS reasonably concluded that there would be continued sea ice loss over shallow waters, resulting in habitat loss that would almost certainly threaten the Beringia DPS's survival. NMFS has provided a rational and reasonable basis for evaluating the bearded seal's viability over 50 and 100 years, and it has candidly disclosed the limitations of the available data and its analysis. The ESA does not require more, and NMFS did not act arbitrarily or capriciously in concluding that the effects of global climate change on sea ice would endanger the Beringia DPS in the foreseeable future.

2.

Plaintiffs advance three principal arguments to challenge NMFS's listing decision. First, Plaintiffs contend that NMFS's use of longer-term climate projections diverges from its previous practice of setting the year 2050 as the outer boundary of its "foreseeable future" analysis. NMFS has argued, and several federal courts have agreed, that the agency may determine the timeframe for its "foreseeable future" analysis based upon the best data available for a particular species and its habitat. *In re Polar*

Bear Litig., 709 F.3d at 10–11, 15–16 (allowing NMFS to determine the timeline for "foreseeable future" threats of extinction based on the specific species, habitat, and best available science at the time of listing); *see also W. Watersheds Project v. Ashe*, 948 F. Supp. 2d 1166, 1180 (D. Idaho 2013) ("The [agency's] assessment of the 'foreseeable future' is typically based on the timeframes over which the best available scientific data allow [the agency] to reliably assess threats and the species' response to those threats . . . ." (internal quotation marks omitted)); *Ctr. for Biological Diversity v. Lubchenco*, 758 F. Supp. 2d 945, 967 (N.D. Cal. 2010) (observing that "the length of time that constitutes the 'foreseeable future' for listing purposes may vary depending on the species and the threats it faces").

We apply the same standard of review whether an agency issues a new policy or changes a previous policy position. *Cf. FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513–14 (2009). An internal guidance document that reflects an agency's "body of experience and informed judgment," but that is not promulgated through rulemaking, is typically afforded *Skidmore*[8] deference. *Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008); *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 488 (2004); *United States v. Mead Corp.*, 533 U.S. 218, 230–32 (2001). An agency must provide a reasoned explanation for adoption of its new policy—including

---

[8] *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

an acknowledgment that it is changing its position and if appropriate, any new factual findings that may inform that change—but it need not demonstrate that the new policy is better than its prior policy. *Fox Television Stations*, 556 U.S. at 515; *see also Price v. Stevedoring Servs. of Am., Inc.*, 697 F.3d 820, 829–30 (9th Cir. 2012); *Nat'l Ass'n of Home Builders v. EPA*, 682 F.3d 1032, 1037–38 (D.C. Cir. 2012).

In 2009, the Department of the Interior issued an internal memorandum notifying the FWS that its interpretation of the "foreseeable future" must be supported by reliable data regarding "threats to the species, how the species is affected by those threats, and how the relevant threats operate over time." Office of the Solicitor of the U.S. Dep't of the Interior, *Memorandum on the Meaning of "Foreseeable Future" in Section 3(20) of the Endangered Species Act*, No. M-37021 (Jan. 16, 2009); *see also* Listing Rule, 77 Fed. Reg. at 76,753 (citing Notice of Reinitiation of Status Review for Ribbon Seal, 76 Fed. Reg. 77,467, 77,468 (Dec. 13, 2011) (reevaluating the ribbon seal petition in light of new information regarding sea ice decline)). The Solicitor noted that a threat-specific evaluation of the best data available would result in different "foreseeable future" time frames for different species and for different threats. Mem. No. M-37021 at 8.

NMFS acknowledged in its final Listing Rule that, consistent with the Solicitor's opinion and beginning with the bearded seal petition, it changed its interpretation of "foreseeable future" to a more dynamic, species-specific and evidence-based definition. Proposed Rule, 75 Fed. Reg. at 77,497; Listing Rule, 77 Fed. Reg. at 76,753. In prior

petitions, NMFS had evaluated whether climate change would endanger a species by the year 2050, regardless of any research advancements regarding climate or a specific species. Listing Rule, 77 Fed. Reg. at 76,753 (explaining the use of climate projections through 2050 for the ribbon seal and polar bear). The Solicitor's advisory letter acknowledges that its interpretation represents a change in agency policy, and it provides a thorough and reasoned explanation for its recommendation that the Service adopt a data-driven threat analysis for future harm. Mem. No. M-37021 at 4, 8–9. The letter also states explicitly that the policy change seeks to conform to federal appellate decisions requiring ESA analyses to adhere to the statute's "best data available" standard. *Id.* at 8–9 (citing *Bennett v. Spear*, 520 U.S. 154, 176 (1997); *Bldg. Indus. Ass'n of Superior Cal. v. Norton*, 247 F.3d 1241, 1246–47 (D.C. Cir. 2001)).

NMFS's decision to adopt a foreseeability analysis that is responsive to new, reliable research while accounting for species-, threat-, and habitat-specific factors is well-reasoned and consistent with the ESA's mandate. On the record before us, NMFS's changed approach was neither arbitrary nor capricious.

3.

Next, Plaintiffs contend that NMFS failed to provide an evidence-based explanation for the relationship between habitat loss and the bearded seal's survival. They argue that NMFS has not provided sufficient evidence to demonstrate a nexus between the loss of sea ice and the bearded seal's risk of future extinction. They note that at the time

NMFS issued its final listing rule, the bearded seal had not suffered population losses, and they argue NMFS should have adopted a "wait and see" approach before determining whether to list the bearded seal.

Similarly, the district court took issue with NMFS's disclosure that it could only provide a range for the Beringia DPS baseline population, which would make it difficult to measure the relationship between population declines and loss of access to sea ice. *Pritzker*, 2014 WL 3726121, at *15. The district court concluded that NMFS was unable to provide a predicted "population reduction," "extinction threshold," or "probability of reaching that threshold," and that without that information, there was no reasonable basis for listing the Beringia DPS as threatened. *Id.* & n.69. The district court expressed doubt that NMFS was able to conduct a reasonable risk assessment supported by evidence when the agency could not provide population information on the current state of the species. *Id.*

The district court's effort to impose requirements for which data is unavailable or does not exist is at odds with the ESA. NMFS demonstrated that, based on the best data available at the time of listing, a decrease in sea ice availability would likely have a significant adverse effect on the bearded seal population. In rejecting the Beringia DPS final listing rule, the district court imposed ad hoc requirements that exceed the ESA's provisions. The district court's request for unobtainable, highly specified data would require NMFS to wait until it had quantitative data reflecting a species' decline, its population tipping point, and the exact year in which that tipping point

would occur before it could adopt conservation policies to prevent that species' decline. Uncertainty regarding the speed and magnitude of that adverse impact, however, does not invalidate data presented in the administrative record that reasonably supports the conclusion that loss of habitat at key life stages will likely jeopardize the Beringia DPS's survival over the next 85 years.

We recently reversed a district court's decision to vacate an ESA critical habitat rule because the court required highly specific information for which data simply did not exist. In *Alaska Oil and Gas Association v. Jewell*, the district court suggested that an agency could only designate areas containing polar bear dens as critical habitats, as opposed to conserving a greater amount of land to allow the bears to roam. 815 F.3d at 555. We rejected the district court's imposition of additional requirements because the district court's "narrow construction of critical habitat runs directly counter to the Act's conservation purposes." *Id.* We noted that the ESA was "concerned with protecting the future of the species, not merely the preservation of existing bears." *Id.*

The Service need not wait until a species' habitat is destroyed to determine that habitat loss may facilitate extinction. In *Defenders of Wildlife v. Norton*, we held that evidence of habitat loss, without a reasoned explanation providing a causal link between loss of habitat and a species' survival, was inadequate to support listing a species as threatened. 258 F.3d 1136, 1143 (9th Cir. 2001). But NMFS did not rely on habitat loss, alone, to justify its listing decision. Instead, the agency drew upon existing

research to explain how habitat loss would likely endanger the bearded seal. *See In re Polar Bear Litig.*, 709 F.3d at 9–10 (distinguishing *Defenders of Wildlife* by noting that the agency's reasoned explanation regarding the impact of habitat loss on a specific species provided an adequate basis for its listing decision). NMFS has demonstrated that it "considered the relevant factors and articulated a rational connection between the facts found and the choices made." *Nw. Ecosys. All.*, 475 F.3d at 1140 (quoting *Nat'l Ass'n of Home Builders v. Norton*, 340 F.3d 835, 841 (9th Cir. 2003)). That is all the ESA requires.

4.

In addition to contesting the causal relationship between loss of sea ice and the Beringia DPS's long-term survival, Plaintiffs contend that NMFS was required to demonstrate that the impact of climate change on the Beringia DPS "will be of a magnitude that places the species 'in danger of extinction' by the year 2100." Plaintiffs' argument misinterprets the ESA's requirement that an agency demonstrate that a species will "likely become an endangered species within the foreseeable future" before listing that species as threatened under the Act. 16 U.S.C. § 1532(20).

NMFS correctly contends that the ESA directs the agency to determine the likelihood of a species' endangerment based on one or more statutory factors: (1) the present or threatened destruction of a species' habitat or range; (2) overutilization of the species for commercial, recreational, scientific, or educational purposes; (3) disease or predation; (4) the inadequacy of existing regulatory mechanisms; or (5)

other natural or manmade factors affecting its continued existence. 16 U.S.C. § 1533(a)(1). Significantly, the ESA does not require an agency to quantify population losses, the magnitude of risk, or a projected "extinction date" or "extinction threshold" to determine whether a species is "more likely than not" to become endangered in the foreseeable future. NMFS also contends that the district court erred when it held that NMFS must demonstrate a "predicted population reduction," define an "extinction threshold," and provide information on the "probability of reaching that threshold within a specified time."

NMFS is correct; neither the ESA nor our case law requires the agency to calculate or otherwise demonstrate the "magnitude" of a threat to a species' future survival before it may list a species as threatened. Although the phrase "likely to become endangered" is not defined by the ESA or a regulation, NMFS has interpreted the term "likely" to have its common meaning (i.e., more likely than not). Indeed, most dictionaries define "likely" to mean that an event, fact, or outcome is probable. *Likely*, THE MERRIAM-WEBSTER DICTIONARY (new ed. 2016); *Likely*, OXFORD ENGLISH DICTIONARY ONLINE (3d ed. 2016); *Likely*, BLACK'S LAW DICTIONARY (10th ed. 2014); *see also Taniguchi v. Kan Pac. Saipan, Ltd.*, 132 S. Ct. 1997, 2002–04 (2012) (discussing the use of dictionaries to determine the ordinary or common meaning of a word). We agree with the D.C. Circuit that NMFS is not required to define "likely" in terms that require specific quantitative targets. *In re Polar Bear Litig.*, 709 F.3d at 14–15; *cf. Defs. of Wildlife*, 258 F.3d at

1141–43 (declining to adopt a quantitative definition when interpreting the phrase "substantial portion of its range").

We conclude that NMFS did not misinterpret or misapply the word "likely" when it concluded that the bearded seal was "likely to become an endangered species within the foreseeable future."

* * *

Although data regarding the bearded seal is limited, NMFS conducted a thorough assessment based on the best available scientific and commercial data, and it seriously considered the comments it received prior to listing the Beringia DPS as a threatened species. In arriving at that conclusion, NMFS complied with the letter and spirit of the ESA, and it afforded the public ample notice and opportunity to participate in its rulemaking process. In light of the robustness of NMFS's rulemaking process, as well as our highly deferential standard of review, we hold that NMFS's final rule listing the Beringia DPS as threatened was not arbitrary or capricious, and its listing decision was supported by substantial evidence.

B.

We turn to Alaska's argument that NMFS failed to comply with its obligations under the ESA to provide the State with a written justification explaining why it "fail[ed] to adopt regulations consistent with the [state] agency's comments." 16 U.S.C. § 1533(i) ("ESA Section 4(i)" or "Section 4(i)"); *see also* 50 C.F.R. § 424.18. Alaska state agencies, including the Department of Fish and Game, Department of Environmental Conservation, Department of Natural Resources, and Department

of Law, jointly submitted comments recommending that NMFS decline to list any sea ice seals as threatened and to revisit the issue in 20 to 50 years.

NMFS sent a letter to the Commissioner of the Alaska Department of Fish and Game, the lead agency for the State, notifying Alaska of its listing decision and identifying sections of the final listing rule where NMFS addressed the State's substantive comments. Alaska argued, and the district court agreed, that NMFS's letter to Alaska was insufficient to discharge its notification duties under ESA Section 4(i). *Pritzker*, 2014 WL 3726121, at *10.

The district court, however, did not have the benefit of our opinion in *Alaska Oil and Gas Association v. Jewell*, which held that Section 4(i) did not impose a separate notification duty upon federal agencies. 815 F.3d at 562–64. Relying on *T-Mobile South, LLC v. City of Roswell*, 135 S. Ct. 808, 811 (2015), we held that nothing in Section 4(i) required separate state notification—the provision only required that the justification for rejecting a state agency's comments be addressed in writing. *Jewell*, 815 F.3d at 563. We further held that Section 4(i) "does not foreclose cross-referencing other publicly available documents," and we noted that when several state agencies submit a consolidated comment letter, a federal agency may respond with a single letter to the State. *Id.*

The State's arguments are foreclosed in light of our holding in *Alaska Oil and Gas Association v. Jewell*. NMFS's final listing rule provides thorough responses to Alaska's substantive comments, and any issues unaddressed in the rule are discussed in the agency's letter to Commissioner Campbell. Although

Alaska argues that NMFS failed to address several of its substantive comments, the record indicates otherwise. For example, NMFS addressed Alaska's argument that some bearded seals did not rely on multi-year ice in Comments 10, 24, and 32. NMFS addressed Alaska's argument that temperature oscillations could result in habitat gains in Comment 8. NMFS did not discuss in detail Alaska's hypothesis that bearded seals could survive in deep water because the majority of the record evidence found that seals preferred to feed in shallower waters, and there was no reliable data indicating that bearded seals lived year-round in deep waters or could adapt to such circumstances.[9] Finally, NMFS adopted the position of the overwhelming majority of the world's climate scientists and rejected Alaska's argument that climate projections are "hypotheses" that are not linked to observable data and that cannot provide reasonable estimates of future climate-change-related phenomena.

Thus, consistent with *Alaska Oil and Gas Association v. Jewell*, NMFS satisfied its Section 4(i) obligation to provide written responses that cite to record evidence. Although Alaska may disagree with NMFS's resolution of conflicting opinions and its final

---

[9] Alaska argues that NMFS's letter failed to address its resiliency argument, which appears in Comment 9 of the Listing Rule. Although NMFS failed to highlight Comment 9 in its letter, the state agencies' substantive concerns were adequately addressed in the final Listing Rule.

listing determination, the State received the notice, opportunity, and process required by 16 U.S.C. §§ 1533(b)(5)(A)(ii) and 1533(i). *See Jewell*, 815 F.3d at 563–64 (noting that a federal agency's rejection of a state comment does not constitute a failure to provide a substantive response). On this record, NMFS clearly fulfilled its procedural and substantive obligations under Section 4(i).

V.

The judgment of the district court is **REVERSED**.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

ALASKA OIL AND GAS
ASSOCIATION, *et al*.,
Plaintiffs,
vs.
PENNY PRITZKER, U.S.
SECRETARY OF COMMERCE, *et al.*,
Defendants.

Case No. 4:13-cv-00018-RRB
MEMORANDUM DECISION

STATE OF ALASKA,
Plaintiff,
vs.
NATIONAL MARINE FISHERIES
SERVICE, *et al*.,
Defendants

Case No. 4:13-cv-00021-RRB

NORTH SLOPE BOROUGH, *et al.*
Plaintiffs,
vs.
PENNY PRITZKER, *et al.,*
Defendants

Case No. 4:13-cv-00022-RRB

I. DECISION APPEALED

On December 28, 2012, the National Marine Fisheries Service ("NMFS") and National Oceanic and Atmospheric Administration ("NOAA") of the Department of Commerce issued a final decision listing the Beringia and Okhotsk distinct population segments ("DPS") of bearded seals (the *Erignathus barbatus nauticus* subspecies) as threatened under the Endangered Species Act ("ESA") (hereinafter referred to as the "Listing Rule").[1] These consolidated actions challenge that decision.[2] The facts underlying

---

[1] Endangered and Threatened Species; Threatened Status for the Beringia and Okhotsk Distinct Population Segments of the Erignathus barbatus nauticus Subspecies of the Bearded Seal, 77 Fed. Reg. 76739–68 (December 28, 2012); see 50 C.F.R. § 223.102 Enumeration of threatened marine and anadromous species. (10-1-13 Edition).

[2] Plaintiffs: In addition to the Alaska Oil and Gas Association ("AOGA"), the American Petroleum Institute ("API") is a plaintiff in 4:13-cv-00018. In addition to the North Slope Borough ("NSB"), plaintiffs in 4:13-cv-00022 include the Arctic Slope Regional Corporation ("ASRC"), Northwest Arctic Borough ("NAB"), NANA Regional Corporation ("NANA"), and Inupiat Community of the Arctic Slope ("Inupiat Community") (collectively "Northern Alaska Plaintiffs").

Defendants: In addition to the Secretary of Commerce, NMFS, and NOAA, defendants in 4:13-cv-00021 include Kathryn D. Sullivan, Acting NOAA

the consolidated actions are well known to parties and a matter of public record. Accordingly, the facts will not be repeated herein except to the extent necessary to understand the decision of this Court.

II. PENDING MOTIONS

At **Docket 50** Plaintiffs AOGA/API have moved for summary judgment, which NMFS has opposed and cross-moved for summary judgment.[3] The Center for Biological Diversity ("CBD") has also opposed and cross-moved for summary judgment.[4] AOGA/API have replied and opposed the cross-motions.[5]

At **Docket 54** the Northern Alaska Plaintiffs have moved for summary judgment, which NMFS and CBD have opposed and cross-moved for summary judgment.[6] The Northern Alaska Plaintiffs have replied and opposed the cross-motions.[7]

At **Docket 55** the State of Alaska (hereinafter "State") has moved for summary judgment, which NMFS and CBD have opposed and cross-moved for

---

Administrator and Samuel D. Rauch, Assistant NOAA Administrator (for convenience, unless the context clearly indicates otherwise, as used herein, "NMFS" refers to the federal defendants collectively). The Center for Biological Diversity, Inc. ("CBD") has appeared as an intervener defendant in the consolidated action.

[3] Docket 63.

[4] Docket 64.

[5] Docket 65.

[6] Dockets 63 (NMFS); 64 (CBD).

[7] Docket 66.

summary judgment.[8] The State has replied and opposed the cross-motions.[9]

The Court being fully advised in the matter has determined that oral argument would not materially assist in resolving the issues presented. Accordingly, the requests for oral argument are **DENIED**.[10]

III. JURISDICTION and VENUE

Jurisdiction is vested in this Court under 28 U.S.C. §§ 1331, 2201-02, 16 U.S.C. § 1540(g), and 5 U.S.C. §§ 553, 702–06. Venue is proper under 29 U.S.C. § 1391(e).

IV. STANDARD OF REVIEW/ISSUES PRESENTED

Because the ESA does not supply a separate standard for review, this Court reviews claims under the standards of the Administrative Procedures Act ("APA").[11] The APA provides that an agency action must be upheld on judicial review unless it is "arbitrary, capricious, an abuse of discretion, or

---

[8] Dockets 63 (NMFS); 64 (CBD).

[9] Docket 73.

[10] D.Ak. LR 7.2(a)(3)[B].

[11] *San Luis & Delta–Mendota Water Auth. v. Jewel*, 747 F.3d 581, 601 (9th Cir. 2014) (citing *Bennett v. Spear*, 520 U.S. 154, 174 (1997)); *Oregon Natural Desert Ass'n v. Bureau of Land Mgmnt.*, 625 F.3d 1092, 1109 (9th Cir. 2010); *Pyramid Lake Paiute Tribe of Indians v. United States Dept. of Navy*, 898 F.2d 1410, 1414 (9th Cir. 1990)).

otherwise not in accordance with law."[12] As applied to the ESA, the Ninth Circuit recently held:

> As a reviewing court, we must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment. Although our inquiry must be thorough, the standard of review is highly deferential; the agency's decision is entitled to a presumption of regularity," and we may not substitute our judgment for that of the agency. Where the agency has relied on relevant evidence [such that] a reasonable mind might accept as adequate to support a conclusion, its decision is supported by substantial evidence. Even [i]f the evidence is susceptible of more than one rational interpretation, [the court] must uphold [the agency's] findings.
>
> Under the ESA, the agency must base its actions on evidence supported by the best scientific and commercial data available. The determination of what constitutes the *best* scientific data available belongs to the agency's special expertise . . . When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential. Absent superior data[,]

---

[12] 5 U.S.C. § 706(2)(A).

> occasional imperfections do not violate the ESA best available standard.
>
> The best *available* data requirement merely prohibits [an agency] from disregarding available scientific evidence that is in some way better than the evidence [it] relies on. Essentially, FWS cannot ignore available biological information. Thus, insufficient . . . [or] incomplete information . . . does not excuse [an agency's] failure to comply with the statutory requirement of a comprehensive biological opinion using the best information available where there was some additional superior information available. On the other hand, where the information is not readily available, we cannot insist on perfection: [T]he best scientific . . . data available, does not mean the best scientific data possible.[13]

The Ninth Circuit has made clear that a court's review of agency decisions under the APA is extremely narrow. Under § 706(2)(A), a court may set aside an agency action only if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." When reviewing "under the arbitrary and capricious standard[,]" a court is

---

[13] *San Luis & Delta–Mendota Water Auth.*, 747 F.3d at 601–02 (internal citations and quotation marks omitted) (omissions and substitutions in the original).

deferential to the agency involved.[14] A court may not substitute its judgment for that of the agency:[15] as long as the agency states a rational connection between the facts found and the decision made it must be upheld.[16] This deference is particularly appropriate where the decision of the agency at issue "requires a high level of technical expertise."[17]

This Court's review is limited to "the administrative record already in existence, not some new record made in the reviewing court."[18]

> If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or

---

[14] *Nat'l Ass'n of Homebuilders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007).

[15] *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 416 (1971).

[16] *Home Builder's Ass'n of Northern Calif. v. United States Fish and Wildlife Svc.*, 616 F.3d 983, 988 (9th Cir. 2010) (quoting *Tucson Herpetological Soc'y v. Salazar*, 566 F.3d 870, 875 (9th Cir. 2009).

[17] *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 375–77 (1989); *see Alaska Wilderness Recreation and Tourism Ass'n v. Morrison*, 67 F.3d 723, 727 (9th Cir. 1995).

[18] *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

> explanation. The reviewing court is not generally empowered to conduct a *de novo* inquiry into the matter being reviewed and to reach its own conclusions based on such an inquiry . . .
>
> The factfinding capacity of the district court is thus typically unnecessary to judicial review of agency decisionmaking.[19]

Where, as here, the Court is reviewing an agency's interpretation of a statute, such as the ESA, the appropriate framework of review under *Chevron* is a two-step process:(1) first the court must look to the plain meaning of the statutory language, i.e., is it unambiguous; and (2) if ambiguous, whether the agency's interpretation of the statutory language is permissible.[20] In this case it is indisputable that the statute in question fails the "plain meaning" rule, it is ambiguous. "When it enacted the ESA, Congress delegated broad administrative and interpretive power to the Secretary [of Commerce]."[21] As the Ninth Circuit has found "[by] leaving an 'explicit gap' for agency promulgated regulations, the ESA

---

[19] *San Luis & Delta–Mendota Water Authority*, 747 F.3d at 602 (internal citations and quotation marks omitted).

[20] *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

[21] *Babbitt v. Sweet Home Chapter of Cmtys for Greater Oregon*, 515 U.S. 687, 708 (1995); *see* 16 U.S.C. § 1533(c)(1), *see also* 50 C.F.R. § 402.01(b) (re-delegating that authority to NMFS).

expressly delegates authority to the [agency] to decide how such listing determinations are to be made."[22] Thus, this Court examines the Listing Rule before it under *Chevron's* second step, i.e., whether the agency's interpretation is permissible.[23]

Applying the foregoing standards, the ultimate issue presented in this appeal is whether or not the decision to list the Beringia and Okhotsk DPSs of the *Erignathus barbatus nauticus* subspecies of bearded seals as threatened under the ESA was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." For the reasons set forth below, the Court concludes that under the circumstances and given the lack of evidence upon which the listing was based, the decision to include the Beringia bearded seals as threatened was arbitrary, capricious and an abuse of discretion.

---

[22] *Trout Unlimited v. Lohn*, 559 F.3d 946, 961 (9th Cir. 2009).

[23] An agency determination qualifies under the second-step of the *Chevron* rule when it meets two requirements: (1) "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law," and (2) "the agency interpretation claiming deference was promulgated in the exercise of that authority." *United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

V. STANDING

NMFS contends that the Plaintiffs lack standing to challenge the listing of the Okhotsk DPS of the bearded seals, which is located in the Sea of Okhotsk off the coast of Japan and the Russian Federation. NMFS also challenges the standing of the Northern Alaska Plaintiffs in its entirety. Standing is a threshold question affecting the jurisdiction of this Court. Accordingly, it must be determined first.

To bring an action under the APA, a party must have both constitutional and prudential standing.[24] To have standing under Article III, a plaintiff must show that it has: (1) "suffered an injury in fact," i.e. "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical"; (2) with a causal connection between the act complained of and the injury; and (3) a reasonable likelihood that a favorable decision will redress the injury.[25] "For a plaintiff to have prudential standing under the APA, the interest to be sought to be protected by the complainant must be arguably within the zone of

---

[24] *Association of Data Processing Service Organizations v. Camp*, 307 U.S. 150, 151–52 (1970).

[25] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal quotation marks and citations omitted).

interests to be protected or regulated by the statute in question."[26]

In opposition AOGA/API do not contend that they have suffered any injury in fact as a result of the Listing Rule's inclusion of the Okhotsk DPS. Instead, AOGA/API argue that they are attacking the Listing Rule in its entirety and, because it is indivisible, it stands or falls in its entirety. In addition to advancing a similar argument, the State further contends that it has standing because it is "injured by NMFS's lack of disclosure . . . and lack of consideration or evaluation of relevant factors in the listing decision." The State also contends that "[a]s one of the wildlife management authorities in the circumpolar region, Alaska has a direct interest in seeing that NMFS complies with ESA § 4 as concerns species throughout the region, especially where other individuals of the same species (from Alaska's perspective) occur within Alaska." Finally, the State argues that "[t]he Okhotsk listing is counter to Alaska's policy concern's and plans, and it presents adverse precedent for other listing decisions based on factors of concern to Alaska."[27]

---

[26] *National Credit Union Admin. v. First Nat'l Bank & Trust Co.*, 522 U.S. 479, 488 (1998) (internal quotation marks and alteration omitted).

[27] Plaintiff State of Alaska's Reply Memorandum in Support of its Motion for Summary Judgment. Docket 73 at 13–14.

A. *Listing of the Okhotsk Segment*

First, this Court rejects the indivisibility argument. The Court agrees that the factors that Plaintiffs contend render the decision to list the Beringia DPS invalid *could* likewise render the decision to list the Okhotsk DPS invalid. But that is not the test: the test is whether or not the decision to list both segments could have been made separately as opposed to being inextricably intertwined. While the NMFS chose to list both in the same listing, Plaintiffs have not cited any rule, regulation, or decision that NMFS was required to do so. In short, the Court may sever the decision to list the Beringia segment from the decision to list the Okhotsk segment.[28]

---

[28] The Court also disagrees with the supposition that, if the decision to list the Beringia DPS is unsupported by the evidence, then the listing of the Okhotsk DPS more likely than not suffers from the same infirmity. The evidence differed as to both segments, which requires separate analyses. In addition, the record reflects that NMFS initially proposed listing the Okhotsk DPS, but not the Beringia DPS. Moreover, in the absence of some party having a concrete and particularized interest, which is not apparent in this case, this Court need not reach that issue. If it were to do so, the Court would be in effect entering an advisory opinion, which is specifically forbidden. *See Flast v. Cohen*, 392 U.S. 83, 95–97 (1968).

The Court also rejects the State's additional argument regarding its interest. Reduced to its essence, the State's argument is that it has an interest in ensuring that NMFS complies with the law. The fatal flaw in the State's position is that it would confer standing to challenge almost every decision made by a Federal agency. The generalized interest advanced by the State is insufficient to confer standing under the standard laid down in *Lujan*. The Court therefore concludes that Plaintiffs have not set forth sufficient evidence of standing as to the Okhotsk DPS of bearded seals.

Accordingly, the Court will address solely the listing of the Beringia DPS.

B. *Standing of Northern Alaska Plaintiffs*

NMFS contends that the Northern Alaska Plaintiffs have not asserted a sufficient "injury in fact" that is "concrete and particularized." Even if, as NMFS argues, the interest of the Northern Alaska Plaintiffs may be speculative and remote, other factors override the objection to their standing. It is indisputable that a listing as a threaten species has a chilling effect on the extent of the scope and nature of human interaction with that species. In this case, it is also indisputable that the Northern Alaska Plaintiffs have a historic cultural relationship with the Beringia DPS of seals, including subsistence. The Northern Alaska Plaintiffs certainly have at least as much of a direct interest in the Listing Rule as does CBD; the Court would err if it did not permit CBD to

intervene on the side of NMFS.[29] Accordingly, the Court declines to dismiss the Northern Alaska Plaintiffs for lack of standing.

VI. DISCUSSION

A. *Listing Rule*

NMFS provided the following summary:

> **SUMMARY:** We, NMFS, issue a final determination to list the Beringia and Okhotsk distinct populations segments (DPSs) of the *Erignathus barbatus nauticus* subspecies of the bearded seal (*Erignathus barbatus*) as threatened under the Endangered Species Act (ESA). We will propose to designate critical habitat for the Beringia DPS in a future rulemaking. To assist us with this effort, we solicit information that may be relevant to the designation of critical habitat for the Beringia DPS. In light of public comments and upon further review, we are withdrawing the proposed ESA section 4(d) protective regulations for the Beringia and Okhotsk DPSs because we have determined that such regulations are not necessary or advisable for the conservation of the Beringia and Okhotsk DPSs at this time. Given their current population sizes, the long-term nature of the primary threat to these DPSs (habitat alteration stemming from climate change),

---

[29] *See Center for Biological Diversity v. Kempthorne*, 588 F.3d 701, 707–08 (9th Cir. 2009).

> and the existing protections under the Marine Mammal Protection Act, it is unlikely that the proposed protective regulations would provide appreciable conservation benefits.[30]

Plaintiffs challenge the following finding in the Listing Rule:

> We have reviewed the status of the bearded seal, fully considering the best scientific and commercial data available, including the status review report. We have reviewed threats to the Beringia DPS and the Okhotsk DPS, as well as other relevant factors, and considered conservation efforts and special designations for bearded seals by states and foreign nations. In consideration of all of the threats and potential threats to bearded seals identified above, the assessment of the risks posed by those threats, the possible cumulative impacts, and the uncertainty associated with all of these, we draw the following conclusions:
>
> *Beringia DPS*: (1) The present population size of the Beringia DPS is uncertain, but is estimated to be about 155,000 individuals. (2) It is highly likely that reductions will occur in both the extent and timing of sea ice in the range of the Beringia DPS within the foreseeable future, particularly in the Bering Sea. To adapt to this modified ice regime,

---

[30] 77 Fed. Reg. 76740.

bearded seals would likely have to shift their nursing, rearing, and molting areas to ice-covered seas north of the Bering Strait, where projections suggest there is potential for the ice edge to retreat to deep waters of the Arctic basin, forcing the seals to adapt to suboptimal conditions and exploit potentially unsuitable habitats, and likely compromising their reproduction and survival rates. (3) Available information indicates a moderate to high threat that reductions in spring and summer sea ice will result in spatial separation of sea ice resting areas from benthic feeding habitat. (4) Available information indicates a moderate to high threat of reductions in sea ice suitable for molting (i.e., areas with at least 15 percent ice concentration in May-June) and a moderate threat of reductions in sea ice suitable for pup maturation (i.e., areas with at least 25 percent ice concentration in April-May). (5) Within the foreseeable future, the risks to the persistence of the Beringia DPS appear to be moderate (abundance and diversity) to high (productivity and spatial structure). We have determined that the Beringia DPS is not in danger of extinction throughout all of its range, but it is likely to become so within the foreseeable future. Therefore, we are listing it as threatened.[31]

---

[31] 77 Fed. Reg. 76748.

The ESA defines a threatened species as one that "is likely to become an endangered species within the foreseeable future through all or a significant portion of its range."[32] With respect to this provision the Listing Rule stated in response to a comment suggesting that the listing was premature:

> Whether a species is healthy at the time of listing or beginning to decline is not the deciding factor. The inquiry requires NMFS to consider the status of the species both in the present and through the foreseeable future. Having received a petition and subsequently having found that the petition presented substantial information indicating that listing bearded seals may be warranted (73 FR 51615; September 4, 2008), we are required to use the best scientific and commercial data available to determine whether bearded seals satisfy the definition of an endangered or threatened species because of any of the five factors identified under section 4(a)(1) of the ESA. These data were compiled in the status review report of the bearded seal (Cameron *et al.,* 2010) and summarized in the preamble to the proposed rule.
>
> We agree that the Beringia and Okhotsk DPSs are moderately large population units, are widely distributed and genetically

---

[32] 16 U.S.C. § 1532(20); 50 C.F.R. § 424.01(m) (10-1-12).

diverse, and are not presently in danger of extinction. However, these characteristics do not protect them from becoming at risk of extinction in the foreseeable future as a consequence of widespread habitat loss. Based on the best available scientific data, we have concluded that it is highly likely that sea ice will decrease substantially within the range of the Beringia DPS in the foreseeable future, particularly in the Bering Sea. To adapt to this modified sea ice regime, bearded seals would likely have to shift their nursing, rearing, and molting areas to ice-covered seas north of the Bering Strait, where projections suggest there is potential for the spring and summer ice edge to retreat to deep waters of the Arctic basin. The most significant threats to the Beringia DPS were identified by the BRT as decoupling of sea ice resting areas from benthic foraging areas, decreases in sea ice habitat suitable for molting and pup maturation, and decreases in prey density and/or availability due to changes in ocean temperature and ice cover, which were scored as of 'moderate' or 'moderate to high' significance (Table 7; Cameron *et al.,* 2010). The greatest threats to the persistence of bearded seals in the Okhotsk DPS were determined by the BRT to be decreases in sea ice habitat suitable for whelping, nursing, pup maturation, and molting. These threats, which were assessed by the BRT as of 'high significance,' are more severe in the range of the Okhotsk DPS than in the range of the

Beringia DPS because of the likelihood that the Sea of Okhotsk will by the end of this century frequently be ice-free or nearly so during April–June, the crucial months for these life history events.

Data were not available to make statistically rigorous inferences about how these DPSs will respond to habitat loss over time. We note that we currently have no mechanism to detect even major changes in bearded seal population size (Taylor *et al.,* 2007). However, the BRT's assessment of the severity of the demographic risks posed to the persistence of each of bearded seals DPSs was formalized using a numerical scoring system. The risks to the persistence of the Beringia and Okhotsk DPSs within the foreseeable future were judged to be moderate to high, with consistently higher risk scores assigned to the Okhotsk DPS (Table 9; Cameron *et al.,* 2010). After considering these risks as well as the remaining factors from section 4(a)(1) of the ESA, we concluded that the Beringia and Okhotsk DPSs are likely to become endangered within the foreseeable future (threatened), primarily due to the projected loss of sea ice habitat.[33]

B. *Applicable Statutes*

Section 4(a)(1) of the ESA (16 U.S.C. § 1533(a)(1)) provides:

---

[33] 77 Fed. Reg. 76758 (response to Comment 18).

(a) **Generally**

(1) The Secretary shall by regulation promulgated in accordance with subsection (b) of this section determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

(E) other natural or manmade factors affecting its continued existence.

It is evident that in this case that § 4(a)(1)(B), (C), and (D) are clearly inapplicable, leaving § 4(a)(1)(A) and (E).

Section 4(b)(1) of the ESA (16 U.S.C. § 1533(b)(1)) provides in relevant part:

(b) **Basis for determinations**

(1)

(A) The Secretary shall make determinations required by subsection (a)(1) of this section solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control,

> protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction; or on the high seas.
>
> (B) In carrying out this section, the Secretary shall give consideration to species which have been—
>
> (i) designated as requiring protection from unrestricted commerce by any foreign nation, or pursuant to any international agreement; or
>
> (ii) identified as in danger of extinction, or likely to become so within the foreseeable future, by any State agency or by any agency of a foreign nation that is responsible for the conservation of fish or wildlife or plants.

The regulations promulgated by the Secretary reiterate the provisions of ESA § 4(a)(1) and (b)(1).[34] It has been stated that "[t]he ultimate goal of the ESA is to recover listed species to the point where they no longer need ESA protection."[35] It is within this general framework that this Court must resolve the issue before it.

C. *Effect of Listing*

NMFS is authorized to issue such regulations as it may consider necessary and advisable for the

---

[34] *See* 50 CFR § 424.11(b), (c) *Factors for listing, delisting, or reclassifying species* (10-1-12).

[35] *Western Watersheds Project v. Ashe*, 948 F. Supp. 2d 1166, 1171 (D. Idaho 2013) (citing 16 U.S.C. §§ 1531(b)–(c), 1532(3)).

preservation of a listed species.[36] The ESA further provides that concurrently with the listing as threatened or endangered, the Secretary "shall . . . designate any habitat of such species which is then considered to be critical habitat."[37] The listing of a species as threatened triggers several protective provisions.[38] The most recent edition of C.F.R. Part 223 (October 1, 2013) does not itself contain any provision generally or specifically regulating activities affecting the Beringia DPS. It does, however, note that the provisions therein "are in addition to, and not in lieu of, other regulations of parts 222 through 226 of this chapter which prescribe additional restrictions or conditions governing threatened species."[39] Of these, only Part 222, which applies to both threatened and endangered species,[40]

---

[36] ESA § 4(d) [16 U.S.C. § 1533(d)].

[37] ESA § 4(a)(3)(A) [16 U.S.C. § 1533(a)(3)(A)].

[38] *See* 50 C.F.R. § 223.101(a) (10-1-12) (stating that the purpose and scope of the regulations is to provide for conservation of threatened species by establishing rules and procedures to govern activities involving them).

[39] 50 C.F.R. § 223.101(c) (10-1-2013).

[40] Governing "the taking, possession, transportation, sale, purchase, barter, exploration, importation of, and other requirements to wildlife . . . determined to be threatened or endangered pursuant to section 4(a) of the Act." 50 C.F.R. § 222.101(a) (101-2013).

applies to this case.[41] In this case, the only apparent provision that may be applicable is the general permitting procedures.[42] However, the regulations also specifically provide that a permit is required solely for threatened species to which the Secretary has applied the limitations of ESA § 9(a) [16 U.S.C. § 1538(a)] by regulation.[43]

Although it was initially proposed to apply ESA § 9(a) to the listing, in promulgating the Listing Rule NMFS determined that it was "not aware of any [information], indicating that the addition of the ESA § 9 prohibitions would apply to any activities that are currently unregulated and are having, or have the potential to have, significant effects on the Beringia or Okhotsk DPS."[44] NMFS then concluded that, because § 9(a) prohibitions would not provide appreciable conservation benefits and they could be adopted in the future if necessary, it was unnecessary to adopt them at this time.[45] NMFS noted:

> Section 7(a)(2) of the ESA requires Federal agencies to consult with us to ensure that activities they authorize, fund, or conduct are

---

[41] Part 224 applies to endangered specifies with no apparent application in this case. Part 225 is reserved. Part 226 designates critical habitat for various species, but does not designate any critical habitat for the Beringia DPS.

[42] 50 C.F.R. §§ 222.301, *et seq*.

[43] 50 C.F.R. § 222.301(b).

[44] 77 Fed. Reg. 76749.

[45] *Id.*

> not likely to jeopardize the continued existence of a listed species or a species proposed for listing, or to adversely modify critical habitat or proposed critical habitat. If a Federal action may affect a listed species or its critical habitat, the responsible Federal agency must enter into consultation with us. Examples of Federal actions that may affect the Beringia DPS of bearded seals include permits and authorizations relating to coastal development and habitat alteration, oil and gas development (including seismic exploration), toxic waste and other pollutant discharges, and cooperative agreements for subsistence harvest.[46]

D. *Analysis of Arguments*

Plaintiffs raise several alleged errors: (1) a failure to link its sea-ice projections to habitat changes, biological functions, and population changes; (2) improper use and application of the "foreseeable future" (specifically, a significant and allegedly unsupported change in the reliability of projecting 100 years into the future instead of 50); (3) failure to adequately respond to the State's comments; (4) uncertainty and lack of adequate information to support the listing, specifically the lack of available information/data to reasonably determine either an extinction threshold or whether such a threshold would be reached; and (5) an

---

[46] *Id.*; *see* 77 Fed. Reg. 76765 (response to Comment 50).

unexplained change from the initial draft that did not list the Beringia DPS as threatened.

The Listing Rule also addressed changes in ocean conditions.

> Ocean acidification is an ongoing process whereby chemical reactions occur that reduce both seawater pH and the concentration of carbonate ions when CO2 is absorbed by seawater. Results from global ocean CO2 surveys over the past two decades have shown that ocean acidification is a predictable consequence of rising atmospheric CO2 levels. The process of ocean acidification has long been recognized, but the ecological implications of such chemical changes have only recently begun to be appreciated. The waters of the Arctic and adjacent seas are among the most vulnerable to ocean acidification. The most likely impact of ocean acidification on bearded seals will be through the loss of benthic calcifiers and lower trophic levels on which the species' prey depends. Cascading effects are likely both in the marine and freshwater environments. Our limited understanding of planktonic and benthic calcifiers in the Arctic (e.g., even their baseline geographical distributions) means that future changes will be difficult to detect and evaluate.
>
> Warming of the oceans is predicted to drive species ranges toward higher latitudes. Additionally, climate change can strongly influence fish distribution and abundance.

> Further shifts in spatial distribution and northward range extensions appear to be inevitable, and the species composition of the plankton and fish communities will continue to change under a warming climate.
>
> Bearded seals of different age classes are thought to feed at different trophic levels, so any ecosystem change could be expected to affect bearded seals in a variety of ways. Changes in bearded seal prey, anticipated in response to ocean warming and loss of sea ice and, potentially, ocean acidification, have the potential for negative impacts, but the possibilities are complex. These ecosystem responses may have very long lags as they propagate through trophic webs. Because of bearded seals' apparent dietary flexibility, these threats are of less concern than the direct effects of potential sea ice degradation.[47]

After analyzing the effect of changes in ocean conditions the Listing Rule concluded:

> Bearded seals of different age classes are thought to feed at different trophic levels, so any ecosystem change could be expected to affect bearded seals in a variety of ways. Changes in bearded seal prey, anticipated in response to ocean warming and loss of sea ice and, potentially, ocean acidification, have the potential for negative impacts, but the

---

[47] 77 Fed. Reg. 76744–45.

> possibilities are complex. These ecosystem responses may have very long lags as they propagate through trophic webs. Because of bearded seals' apparent dietary flexibility, these threats are of less concern than the direct effects of potential sea ice degradation. Bearded seals of different age classes are thought to feed at different trophic levels, so any ecosystem change could be expected to affect bearded seals in a variety of ways. Changes in bearded seal prey, anticipated in response to ocean warming and loss of sea ice and, potentially, ocean acidification, have the potential for negative impacts, but the possibilities are complex. These ecosystem responses may have very long lags as they propagate through trophic webs. Because of bearded seals' apparent dietary flexibility, these threats are of less concern than the direct effects of potential sea ice degradation.[48]

The Listing Rule also concluded that the potential threat to bearded seals from disease was low, and the adequacy of existing regulatory mechanisms was also included in the risk assessment.[49] With respect to pollution and contaminants, oil and gas industry, fisheries, and

---

[48] 77 Fed. Reg. 76745.

[49] *Ibid.* It is noted that the only discussion of green-house gases was in connection with the Okhotsk segment.

shipping the Listing Rule concluded: "We find that the threats posed by pollutants, oil and gas industry activities, fisheries, and shipping do not individually or collectively place the Beringia DPS or the Okhotsk DPS at risk of becoming endangered in the foreseeable future."[50] The analysis of demographic risks concluded:

> The degree of risk posed by the threats associated with the impacts of global climate change on bearded seal habitat is uncertain due to a lack of quantitative information linking environmental conditions to bearded seal vital rates, and a lack of information about how resilient bearded seals will be to these changes. The BRT considered the current risks (in terms of abundance, productivity, spatial structure, and diversity) to the persistence of the Beringia DPS and the Okhotsk DPS as low or very low. The BRT judged the risks to the persistence of the Beringia DPS within the foreseeable future to be moderate (abundance and diversity) to high (productivity and spatial structure), and to the Okhotsk DPS to be high for abundance, productivity, and spatial structure, and moderate for diversity.[51]

Although the Listing Rule discussed conservation efforts in general, it made neither findings nor drew conclusions from conservation efforts, internationally

---

[50] 77 Fed. Reg. 76747.

[51] 77 Fed. Reg. 76747–48.

or domestically. The Court does note, however, that the tenor of the analysis in the Listing Rule was generally positive in noting ongoing monitoring of the bearded seal population by others.

The Listing Rule concluded:

> *Beringia DPS:* (1) The present population size of the Beringia DPS is uncertain, but is estimated to be about 155,000 individuals. (2) It is highly likely that reductions will occur in both the extent and timing of sea ice in the range of the Beringia DPS within the foreseeable future, particularly in the Bering Sea. To adapt to this modified ice regime, bearded seals would likely have to shift their nursing, rearing, and molting areas to ice-covered seas north of the Bering Strait, where projections suggest there is potential for the ice edge to retreat to deep waters of the Arctic basin, forcing the seals to adapt to suboptimal conditions and exploit potentially unsuitable habitats, and likely compromising their reproduction and survival rates. (3) Available information indicates a moderate to high threat that reductions in spring and summer sea ice will result in spatial separation of sea ice resting areas from benthic feeding habitat. (4) Available information indicates a moderate to high threat of reductions in sea ice suitable for molting (i.e., areas with at least 15 percent ice concentration in May-June) and a moderate threat of reductions in sea ice suitable for pup maturation (i.e., areas with

> at least 25 percent ice concentration in April-May). (5) Within the foreseeable future, the risks to the persistence of the Beringia DPS appear to be moderate (abundance and diversity) to high (productivity and spatial structure). We have determined that the Beringia DPS is not in danger of extinction throughout all of its range, but it is likely to become so within the foreseeable future. Therefore, we are listing it as threatened.[52]

The parties agree that the Listing Rule relied principally, if not solely, upon climate change as the governing factor for listing the Beringia DPS as threatened.[53] It is also undisputed that, under the regulations, climate change is not only a factor properly considered, but that a listing may be made on any one of the factors alone.[54] It is further undisputed that the term "foreseeable future" is not defined by either statute or regulation; accordingly, the agency defines it on a case-by-case basis in each listing decision.[55] With that general background, the Court will address the issues raised: first the procedural issues, then the substantive issues.

---

[52] 77 Fed. Reg. 76748.

[53] *See* 77 Fed. Reg. 76741.

[54] 50 C.F.R. § 424.11(c) (10-1-12).

[55] *See In re Polar Bear Endangered Species Act Listing and Section 4(d) Rule Litigation – MDL No. 1993*, 709 F.3d 1, 15 (D.C. Cir.), *cert. denied sub nom. Safari Club Int'l. v. Jewell*, 134 S. Ct. 310 (2013).

1. Procedural Issues

Initially, the Court rejects Plaintiffs' argument that NMFS impermissibly added the Beringia DPS after the initial publication of a proposed rule. It is undisputed that the Plaintiffs had adequate and timely notice of the intent to include the Beringia DPS. Indeed, the record is clear that Plaintiffs vigorously opposed that listing. Consequently, Plaintiffs not only cannot claim any prejudice by that action, but they cite no authority that a species cannot be added to, or removed from, a proposed listing during the rule making process. Nor, for that matter, has independent research by the Court discovered any such authority.

The State contends that NMFS failed to adequately respond to the State's comments. Section 4(I) of the EPA [16 U.S.C. § 1533(I)] provides in relevant part that where, as here, a State has filed comments disagreeing with the proposed regulation, "the Secretary shall submit to the State agency a written justification for his failure to adopt regulations consistent with the agency's comment or petition."[56]

NMFS argues that it responded to each of the State's comments in either its direct response to the State's comments or in the Listing Rule itself. As the State notes, in rejecting the argument that responding in the listing rule was sufficient, this Court itself recently held:

---

[56] *See* 50 C.F.R. § 424.18(c) (10-1-12) (containing identical language).

> First, it is clear from the fact that Congress established a *separate procedure* to respond to state agency comments, as opposed to comments from other affected parties, that Congress envisioned a *separate duty* on the part of the Service to specifically respond to those state comments not adopted in a final rule. Indeed, the statute clearly requires that *after* a final rule is issued, the Service must provide a *separate* written justification to the state agency responsible for the comments not used in the final rule. Thus, the Service's statement that adequate responses to the State's unused comments could be found *in part in the Final Rule itself* is directly contrary to ESA procedure. By not including in the response letter *all* its responses to the State's comments not ultimately included in the Final Rule, the Service did not fulfill its response obligations under the ESA.[57]

NMFS has not cited any controlling authority that this Court's earlier decision is erroneous, nor has it advanced any compelling argument that the Court should reverse itself. Accordingly, this Court holds that it does not appear that NMFS adequately responded to the State's comments.

---

[57] *Alaska Oil and Gas Ass'n v. Salazar*, 916 F. Supp.2d 974, 1003 (D. Alaska 2013) (emphasis in the original) (footnotes omitted).

2. Substantive Issues

Plaintiffs' substantive issues can be conflated into two: (1) uncertainty and lack of information to support the listing, including failure to link its sea-ice projections to habitat changes, biological functions, and population changes; and (2) improper use of a 100-year projection into the future.

Plaintiffs contend that there is a lack of data to link projected habitat declines to bearded seal biological response and the ultimate projected population trends. The Listing Rule identified five main functions of sea-ice with respect to bearded seals.

> An assessment of the risks to bearded seals posed by climate change must consider the species' life-history functions, how they are linked with sea ice, and how altering that link will affect the vital rates of reproduction and survival. The main functions of sea ice relating to the species' life-history are: (1) A dry and stable platform for whelping and nursing of pups in April and May (Kovacs *et al.,* 1996; Atkinson, 1997); (2) a rearing habitat that allows mothers to feed and replenish energy reserves lost while nursing; (3) a habitat that allows a pup to gain experience diving, swimming, and hunting with its mother, and that provides a platform for resting, relatively isolated from most terrestrial and marine predators; (4) a habitat for rutting males to hold territories and attract post-lactating females; and (5) a

> platform suitable for extended periods of hauling out during molting.[58]

NMFS then discussed in general terms the effect of these five factors on the bearded seal population.[59]

With respect to the predictions of the effect of changes in sea-ice on the Beringia DPS, the Listing Rule found:

> *Beringia DPS*: In the Bering Sea, early springtime sea ice habitat for bearded seal whelping should be sufficient in most years through 2050 and out to the second half of the 21st century, when the average ice extent in April is forecasted to be approximately 50 percent of the present-day extent. The general trend in projections of sea ice for May (nursing, rearing, and some molting) through June (molting) in the Bering Sea is toward a longer ice-free period resulting from more rapid spring melt. Until at least the middle of the 21st century, projections show some years with near-maximum ice extent; however, less ice is forecasted on average, manifested as more frequent years in which the spring retreat occurs earlier and the peak ice extent is lower. By the end of the 21st century, projections for the Bering Sea indicate that there will commonly be years with little or no ice in May, and that sea ice in June is expected to be non-existent in most years.

---

[58] 77 Fed. Reg. 76742.

[59] 77 Fed. Reg. 76742–43.

Projections of sea ice concentration indicate that there will typically be 25 percent or greater ice concentration in April–May over a substantial portion of the shelf zone in the Bering Sea through 2055. By 2095 ice concentrations of 25 percent or greater are projected for May only in small zones of the Gulf of Anadyr and in the area between St. Lawrence Island and Bering Strait. In the minimal ice years the projections indicate there will be little or no ice of 25 percent or greater concentration over the shelf zone in the Bering Sea during April and May, perhaps commencing as early as the next decade. Conditions will be particularly poor for the molt in June when typical ice predictions suggest less than 15 percent ice by mid-century. Projections suggest that the spring and summer ice edge could retreat to deep waters of the Arctic Ocean basin, potentially separating sea ice suitable for pup maturation and molting from benthic feeding areas.

In the East Siberian, Chukchi, and Beaufort seas, the average ice extents during April and May (i.e., the period of whelping, nursing, mating, and some molting) are all predicted to be very close to historical averages out to the end of the 21st century. However, the annual variability of this extent is forecasted to continue to increase, and single model runs indicate the possibility of a few years in which April and May sea ice would cover only half (or in the case of the

Chukchi Sea, none) of the Arctic shelf in these regions by the end of the century. The projections indicate that there will typically be 25 percent or greater ice concentration in April–June over the entire shelf zones in the Beaufort, Chukchi, and East Siberian Seas through the end of the century. In the minimal ice years 25 percent or greater ice concentration is projected over the shelf zones in April and May in these regions through the end of the century, except in the eastern Chukchi and central Beaufort Seas. In the 2090s, ice suitable for molting in June (i.e., 15 percent or more concentration) is projected to be mostly absent in these regions in minimal years, except in the western Chukchi Sea and northern East Siberian Sea.

A reduction in spring and summer sea ice concentrations could conceivably result in the development of new areas containing suitable habitat or enhancement of existing suboptimal habitat. For example, the East Siberian Sea has been said to be relatively low in bearded seal numbers and has historically had very high ice concentrations and long seasonal ice coverage. Ice concentrations projected for May–June near the end of the century in this region include substantial areas with 20–80 percent ice, potentially suitable for bearded seal reproduction, molting, and foraging. However, the net difference between sea ice related habitat creation and loss is likely to be negative, especially because other factors

> like ocean warming and acidification (discussed below) are likely to affect habitat.
>
> A substantial portion (about 70 percent) of the Beringia DPS currently whelps in the Bering Sea, where a longer ice-free period is forecasted in May and June. To adapt to this modified sea ice regime, bearded seals would likely have to shift their nursing, rearing, and molting areas to the ice covered seas north of the Bering Strait, potentially with poor access to food, or to coastal haul-out sites on shore, potentially with increased risks of disturbance, predation, and competition. Both of these scenarios would require bearded seals to adapt to novel (i.e., suboptimal) conditions, and to exploit habitats to which they may not be well suited, likely compromising their reproduction and survival rates. Further, the spring and summer ice edge may retreat to deep waters of the Arctic Ocean basin, which could separate sea ice suitable for pup maturation and molting from benthic feeding areas. Accordingly, we conclude that the projected changes in sea ice habitat pose significant threats to the persistence of the Beringia DPS throughout all of its range.[60]

NMFS addressed the use of the 100-year projection.

---

[60] 77 Fed. Reg. 76743–44.

Comment 5: A peer reviewer and several public comments pointed out that assessing impacts to bearded seals from climate change through the end of this century is inconsistent with: (1) Other recent ESA determinations for Arctic species, such as ribbon seal and polar bear, that considered species responses through mid-century; and (2) IUCN red list process, which uses a timeframe of three generation lengths. Related public comments, including from the State of Alaska, noted that NMFS's recent ESA listing determination for the ribbon seal and a subsequent court decision concluded that projections of climate scenarios beyond 2050 are too heavily dependent on socioeconomic assumptions and are therefore too divergent for reliable use in assessing threats to the species. A reviewer and some commenters expressed the opinion that trying to predict the responses of bearded seals to environmental changes beyond midcentury increases the uncertainty unreasonably. A few commenters suggested that the altered approach is significant because the listing determination is wholly dependent upon NMFS's use of a 100-year foreseeable future. Several commenters expressed the opinion that inadequate justification was provided for NMFS's use of a 100-year foreseeable future. Many of these commenters suggested that the best scientific data support a "foreseeable future" time frame of no more than 50 years, and some commenters such as the State of

Alaska suggested a shorter time horizon of no more than 20 years. In contrast, another peer reviewer and some commenters expressed support for use of climate model projections through the end of the 21st century.

Response: The ESA requires us to make a decision as to whether the species under consideration is in danger of extinction throughout all or a significant portion of its range (endangered), or is likely to become endangered within the foreseeable future throughout all or a significant portion of its range (threatened) based on the best scientific and commercial data available. While we may consider the assessment processes of other scientists (i.e., IUCN), we must make a determination as to whether a species meets the definition of threatened or endangered based upon an assessment of the threats according to section 4 of the ESA. We have done so in this rule, using a threat-specific approach to the "foreseeable future" as discussed below and in the proposed listing rule.

In the December 30, 2008, ribbon seal listing decision (73 FR 79822) the horizon of the foreseeable future was determined to be the year 2050. The reasons for limiting the review to 2050 included the difficulty in incorporating the increased divergence and uncertainty in future emissions scenarios beyond this time, as well as the lack of data for threats other than those related to climate change beyond 2050, and that the uncertainty

inherent in assessing ribbon seal responses to threats increased as the analysis extended farther into the future. By contrast, in our more recent analyses for spotted, ringed, and bearded seals, we did not identify a single specific time as the foreseeable future. Rather, we addressed the foreseeable future based on the available data for each respective threat. This approach better reflects real conditions in that some threats (e.g., disease outbreaks) appear more randomly through time and are therefore difficult to predict, whereas other threats (climate change) evince documented trends supported by paleoclimatic data from which reasonably accurate predictions can be made farther into the future. Thus, the time period covered for what is reasonably foreseeable for one threat may not be the same for another. The approach is also consistent with the memorandum issued by the Department of the Interior, Office of the Solicitor, regarding the meaning of foreseeable future (Opinion M–37021; January 16, 2009). In consideration of this modified threat-specific approach, NMFS initiated a new status review of the ribbon seal on December 13, 2011 (76 FR 77467).

As discussed in the proposed listing rule, the analysis and synthesis of information presented in the IPCC's AR4 represents the scientific consensus view on the causes and future of climate change. The IPCC's AR4 used state-of-the-art atmosphere-ocean

general circulation models (AOGCMs) under six "marker" scenarios from the SRES (IPCC, 2000) to develop climate projections under clearly stated assumptions about socioeconomic factors that could influence the emissions. Conditional on each scenario, the best estimate and likely range of emissions were projected through the end of the 21st century. In our review of the status of the bearded seal, we considered model projections of sea ice developed using the A1B scenario, a medium "business-as-usual" emissions scenario, as well the A2 scenario, a high emissions scenario, to represent a significant range of variability in future emissions.

We also note that the SRES scenarios do not assume implementation of additional climate initiatives beyond current mitigation policies. This is consistent with consideration of "existing" regulatory mechanisms in our analysis under ESA listing Factor D. It is also consistent with our Policy on Evaluating Conservation Efforts (68 FR 15100; March 28, 2003), which requires that in making listing decisions we consider only formalized conservation efforts that are sufficiently certain to be implemented and effective.

The model projections of global warming (defined as the expected global change in surface air temperature) out to about 2040–2050 are primarily due to emissions that have already occurred and those that will occur over the next decade. Thus conditions projected to mid-century are less sensitive to

assumed future emissions scenarios. For the second half of the 21st century, however, the choice of an emissions scenario becomes the major source of variation among climate projections. As noted above, in our 2008 listing decision for ribbon seal, the foreseeable future was determined to be the year 2050. The identification of mid-century as the foreseeable future took into consideration the approach taken by the FWS in conducting its status review of the polar bear under the ESA, and the IPCC assertion that GHG levels are expected to increase in a manner that is largely independent of assumed emissions scenarios until about the middle of the 21st century, after which the emissions scenarios become increasingly influential.

Subsequently, in the listing analyses for spotted, ringed, and bearded seals, we noted that although projections of GHGs become increasingly uncertain and subject to assumed emissions scenarios in the latter half of the 21st century, projections of air temperatures consistently indicate that warming will continue throughout the century. Although the magnitude of the warming depends somewhat on the assumed emissions scenario, the trend is clear and unidirectional. To the extent that the IPCC model suite represents a consensus view, there is relatively little uncertainty that warming will continue. Because sea ice production and persistence is related to air

temperature through well-known physical processes, the expectation is also that loss of sea ice and reduced snow cover will continue throughout the 21st century. Thus, the more recent inclusion of projections out to the year 2100 reflects NMFS's intention to use the best and most current data and analytical approaches available. AOGCM projections consistently show continued reductions in ice extent and multi-year ice (ice that has survived at least one summer melt season) throughout the 21st century (e.g., Holland *et al.,* 2006; Zhang and Walsh, 2006; Overland and Wang, 2007), albeit with a spread among the models in the projected reductions. In addition, as discussed by Douglas (2010), the observed rate of Arctic sea ice loss has been reported as greater than the collective projections of most IPCCrecognized AOGCMs (e.g., Stroeve *et al.,* 2007; Wang and Overland, 2009), suggesting that the projections of sea ice declines within this century may in fact be conservative.

We concluded that in this review of the status of the bearded seal, the climate projections in the IPCC's AR4, as well as the scientific papers used in this report or resulting from this report, represent the best scientific and commercial data available to inform our assessment of the potential impacts from climate change. In our risk assessment for bearded seals, we therefore considered the full 21st century projections to analyze the threats stemming from climate

> change. We continue to recognize that the farther into the future the analysis extends, the greater the inherent uncertainty, and we incorporated that consideration into our assessments of the threats and the species' responses to the threats.[61]

NMFS acknowledged that it lacks sufficient data on the resilience of bearded seals to cope with climatic changes;[62] or to define an extinction threshold for bearded seals and assessing the probability of reaching that threshold within a specified time;[63] and that, because the existing body of information regarding bearded seal population and trends was limited, additional studies were needed to understand the population dynamics and habitat of the bearded seal.[64]

As noted above, what constitutes the "foreseeable future" is determined by the agency on a case-by-case basis. Reduced to its essence, the argument advanced by Plaintiffs is that NMFS should not have considered the effect on the Beringia DPS beyond 50

---

[61] 77 Fed. Reg. 76752–54.

[62] 77 Fed. Reg. 76755 (responses to Comments 8 and 9).

[63] 77 Fed. Reg. 76757 (response to Comment 16).

[64] 77 Fed. Reg. 76759 (response to Comment 19); *see also* 77 Fed. Reg. 76760 (response to Comment 27) (conceding that a more thorough assessment of seal habitat and population response to the climatic changes was needed before the threat of extinction could be assessed with any level of certainty)).

years. The Court has reviewed the authorities cited by the Plaintiffs and finds them either inapposite or not controlling on the issue.[65] Likewise, this Court finds that the recent polar bear case decided by the D.C. Circuit relied upon by NMFS is also inapposite. In that case, although the Fish and Wildlife Service reviewed models projecting climate and ice changes over periods of 45, 75 and 100 years,[66] the challenged listing was based upon a 45-year period, which the District Court specifically found was not too long.[67] Independent research by the Court has not revealed any case in which a listing of threatened was based upon a time period that exceeded 50 years. Thus, in that respect this Court is writing on a clean slate.

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

---

[65] In each of the cases cited the relevant time-period considered by the agency in making the listing was less than 50 years. Although it is plausible to interpret those cases as not precluding a longer period, they cannot be plausibly construed as necessarily permitting it. The precise issue was simply not before any court.

[66] *In re Polar Bear Endangered Species Act Listing and Section 4(d) Rule Litigation*, 794 F. Supp.2d 65, 75–76, 94–95 (D. D.C. 2011), *aff'd* 709 F.3d 1 (D.C. Cir.), *cert. denied sub nom. Safari Club Int'l. v. Jewell*, 134 S. Ct. 310 (2013).

[67] *Id.* at 75.

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.[68] 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.[69]

VII. CONCLUSION AND ORDER

After reviewing the voluminous record and applicable case law, the Court has determined that the action of NMFS in listing the Beringia DPS of

---

[68] 77 Fed. Reg. 76743–44.

[69] This Court is *not* holding that the use of projections that extend out more than 50 years is impermissible in all cases. The Court's holding today is limited to the facts presented in the record before it, i.e., that an unknown, unquantifiable population reduction, which is not expected to occur until nearly 100 years in the future, is too remote and speculative to support a listing as threatened. If it were to hold otherwise, such a holding could logically render every species in the arctic and sub-arctic areas potentially "threatened."

bearded seals was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[70] In particular, with respect to two factors: (1) the lack of any articulated discernable, quantified threat of extinction within the *reasonably* foreseeable future; and (2) the express finding that, because existing protections were adequate, no further protective action need be taken at this time. Listing the Beringia DPS as "endangered" had no effect except to require all federal agencies to consult with NMFS before carrying out any action that might jeopardize the continued existence of the Beringia DPS throughout its range. A listing under the ESA based upon speculation, that provides no additional action intended to preserve the continued existence of the listed species, is inherently arbitrary and capricious.

Where, as here, the agency's action is found to be arbitrary and capricious, the appropriate action is to remand to the agency.[71] "[V]acatur of an unlawful agency rule normally accompanies a remand."[72]

Therefore, Plaintiffs' Motions for Summary Judgment at **Dockets 50, 54, and 55** are hereby **GRANTED**. The final rule shall be **VACATED** to the extent it affects the Beringia bearded seal DPS and **REMANDED** to NMFS to correct the

---

[70] 5 U.S.C. § 706(2)(A).

[71] *Nat'l Ass'n of Homebuilders*, 551 U.S. at 657–58.

[72] *Alsea Valley Alliance v. Dep't of Commerce*, 358 F.3d 1181, 1185–86 (9th Cir. 2004).

aforementioned substantive and procedural deficiencies.

The Clerk of the Court is directed to enter final judgment accordingly.

IT IS SO ORDERED this 25th day of July, 2014.

S/ RALPH R. BEISTLINE
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALASKA OIL AND GAS
ASSOCIATION; et al.,
Plaintiffs-Appellees,
v.
PENNY PRITZKER, U.S. Secretary of
Commerce; et al.,
Defendants-Appellants.

Nos. 14-35806 and 14-35811

D.C. No. 4:13-cv-00018-RRB
District of Alaska,
Fairbanks

ORDER

Before: FISHER, PAEZ, and HURWITZ, Circuit Judges.

Judges Paez and Hurwitz have voted to deny the petition for rehearing en banc and Judge Fisher so recommends.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing en banc is DENIED.

APPENDIX D

Additional Relevant Statutory Provisions

16 U.S.C. §1533(a)(1) provides:

> The Secretary shall by regulation promulgated in accordance with subsection (b) determine whether any species is an endangered species or a threatened species because of any of the following factors:
>
> (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
>
> (B) overutilization for commercial, recreational, scientific, or educational purposes;
>
> (C) disease or predation;
>
> (D) the inadequacy of existing regulatory mechanisms;
>
> (E) other natural or manmade factors affecting its continued existence.

16 U.S.C. §1533(b)(1)(A) provides:

> The Secretary shall make determinations required by subsection (a)(1) solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by

predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction; or on the high seas.