

MICHAEL C. GERAGHTY
ATTORNEY GENERAL
Bradley E. Meyen (Alaska Bar No. 8506067)
Senior Assistant Attorney General
Andrew R. Naylor (Alaska Bar No. 1210074)
Assistant Attorney General
Department of Law
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
Telephone: (907) 269-5232
Facsimile: (907) 279-2834
Email: brad.meyen@alaska.gov
Email: andrew.naylor@alaska.gov
Attorneys for Plaintiff State of Alaska

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

STATE OF ALASKA,

Plaintiff,

v.

NATIONAL MARINE FISHERIES
SERVICE; NATIONAL OCEANIC AND
ATMOSPHERIC ADMINISTRATION;
CAMERON F. KERRY, in his official
capacity as the Acting Secretary of the United
States Department of Commerce; 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; and SAMUEL D.
RAUCH III, in his official capacity as the
Acting Assistant Administrator for Fisheries,
National Oceanic and Atmospheric
Administration,

Defendants.

Case No. _____

**COMPLAINT FOR DECLARATORY
JUDGMENT, JUDICIAL REVIEW,
AND VACATUR AND REMAND TO
ADMINISTRATIVE AGENCY
(5 U.S.C. §§ 553, 701-706; 16 U.S.C.
§§ 1532-1533, 1535(a), 1540(g))**

INTRODUCTION

1. Plaintiff State of Alaska (the “State” or “Alaska”) brings this action to obtain judicial review of the listing of two Distinct Population Segments (“DPSs”) of the bearded seal (*Erignathus barbatus*) as threatened throughout their ranges under the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531-44, by the Secretary of Commerce and the National Oceanic and Atmospheric Administration’s National Marine Fisheries Service (collectively “NMFS” or the “Service”). *See Determination of Threatened Status for the Beringia and Okhotsk Distinct Population Segments of the Erignathus barbatus nauticus Subspecies of the Bearded Seal*, 77 Fed. Reg. 76740-68 (Dec. 28, 2012) (“Final Rule”).

2. Alaska brings this action under (i) Section 11(g)(1)(C) of the ESA, 16 U.S.C. § 1540(g)(1)(C), to address Defendants’ failure to perform mandatory duties pursuant to ESA Section 4, 16 U.S.C. § 1533, and the ESA’s implementing regulations; and (ii) the Administrative Procedure Act (“APA”), 5 U.S.C. §§ 553, 701-06, to address Defendants’ failure to comply with legal requirements not otherwise actionable under the ESA. *See also* D. Ak. L.R. 16.3 (administrative agency appeals).

JURISDICTION AND VENUE

3. This Court has jurisdiction pursuant to 28 U.S.C. § 1331 (federal question jurisdiction), 16 U.S.C. § 1540(g) (ESA citizen suit provision), and 5 U.S.C. §§ 702, 706 (APA jurisdiction).

4. Alaska satisfied the written notice requirement of the ESA’s citizen suit provision, 16 U.S.C. § 1540(g)(2), by providing NMFS, on or about April 12, 2013, the required 60-day written notice of NMFS’ failure to perform certain duties under the ESA. A true and correct copy

of the letter is attached hereto as *Exhibit A* and incorporated by this reference herein. NMFS has not remedied the violations set forth in the letter.

5. An actual, justiciable controversy now exists between Alaska and Defendants, and the relief requested is proper under 28 U.S.C. §§ 2201-02, 5 U.S.C. §§ 701-06, and 16 U.S.C. § 1540(g).

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

7. Alaska has exhausted all applicable administrative remedies.

8. Venue is proper in this Court pursuant to 28 U.S.C. § 1391 because this action is brought against officers of agencies of the United States in their official capacities and against the National Marine Fisheries Service and National Oceanic and Atmospheric Administration themselves. The only non-captive bearded seals located within the United States are within the State of Alaska and adjacent State, Territorial, and United States waters. The actions and decisions challenged by this lawsuit were made in substantial part in Alaska.

PARTIES

Plaintiff

9. Alaska, as a sovereign State and pursuant to its public trust responsibilities, has an interest in managing and conserving all wildlife and other natural resources within its jurisdiction, including marine mammals such as the bearded seal, their habitat, and their food sources. *See* Alaska Const. art. VIII, §§ 1, 2, 4; Alaska Stat. § 16.05.020.

10. The State participates in the direct management of its wildlife resources and state lands and waters comprising the habitat for such wildlife, including the bearded seal, through its

Department of Fish and Game, Department of Natural Resources, and Department of Environmental Conservation. *See generally* Alaska Stat. § 16.05.020(2).

11. Alaska's legal title and regulatory interests in its natural resources extend beyond its land area to the State's offshore submerged lands and waters. Thus, Alaska's sovereign interests in its wildlife resources and its management of those resources extend to coastal areas, including areas occupied by populations of the bearded seal.

12. Alaska and its interests in the management of its state wildlife resources and habitats, and the development of its state natural resources, land management, transportation projects, municipal governments, and other activities, are harmed by the Service's listing of the bearded seal DPSs as threatened. Alaska's interests and ability to manage its wildlife resources and develop appropriate mitigation and conservation measures for the bearded seal and its habitat within Alaska's lands and waters have been displaced by the federal government's actions and regulatory programs under the ESA, resulting in increased potential liability for the State and for State-undertaken or approved projects.

13. Alaska is also responsible for its citizens' welfare, including their socio-economic welfare and the overall functioning and performance of the state's economy. Alaska's Constitution imposes a duty on the State to responsibly manage and develop Alaska's natural resources for the maximum benefit of its people. Alaska Const. art. VIII, § 2. The Final Rule will have a significant impact on Alaska's citizens by imposing additional regulations on and deterring activities such as fishing, oil and gas exploration and development, transportation, and tourism within and offshore of Alaska. Many Alaskans rely on these activities for employment, and the State and its municipalities rely on tax and royalty revenues from these activities and related commerce to provide services for their citizens.

14. Municipal governments (which are political subdivisions of the State of Alaska under Alaska Stat. §§ 29.04.010, 29.04.020) located on or near coastal areas within the range of the bearded seal DPS listed in the U.S. will be adversely affected by the listing as a result of additional regulations that will interfere with the municipalities' efforts to provide public services to Alaska residents and will impact their land use planning, platting, and regulatory activities.

15. The injuries to Alaska's interests are fairly traceable to the Service's decision to list the bearded seal DPSs as threatened species under the ESA, and are redressable by this Court.

16. Alaska has standing to bring this action, and the challenged agency decisions are final and ripe for review by this Court.

Defendants

17. Defendant National Marine Fisheries Service is an agency within the National Oceanic and Atmospheric Administration ("NOAA") of the United States Department of Commerce ("Commerce") and is the agency that has been delegated the responsibility for implementing the ESA with respect to the bearded seal.

18. Defendant NOAA is an agency within the U.S. Department of Commerce with supervisory control over the National Marine Fisheries Service.

19. Defendant Cameron F. Kerry is the Acting Secretary of the U.S. Department of Commerce and is being sued in his official capacity. The Secretary is responsible for the administration of the ESA and signed the Final Rule.

20. Defendant Kathryn D. Sullivan is the Acting Under Secretary of Commerce for Oceans and Atmosphere and the Acting Administrator of NOAA and is being sued in her official

capacity. The Under Secretary and Administrator of NOAA is responsible for the administration and implementation of the ESA and APA as they are applied to populations of the bearded seal.

21. Defendant Samuel D. Rauch III is the Acting Assistant Administrator of Fisheries for NOAA and is being sued in his official capacity. The Assistant Administrator is responsible for the administration and implementation of the ESA and APA as they are applied to populations of the bearded seal.

LEGAL BACKGROUND

I. Endangered Species Act

22. ESA Section 4(a) requires the Secretary of Commerce to determine by regulation whether species of fish, wildlife or plants are “threatened” or “endangered” under specified criteria, and if so, to list such species as threatened or endangered as appropriate.

16 U.S.C. § 1533(a)(1). Regulations concerning listing determinations must be promulgated in accordance with the requirements of Section 4(b) of the ESA and the procedural requirements of Section 553 of the APA, 5 U.S.C. § 553.

23. Under ESA Section 3(16), the term “species” includes “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” 16 U.S.C. § 1532(16).

24. To list a species, the Secretary must find that one or more of the five statutory listing factors are present: (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. 16 U.S.C. § 1533(a)(1).

25. The Secretary's determination that a species is endangered or threatened must be made:

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.

16 U.S.C. § 1533(b)(1)(A).

26. If the Secretary determines a species is endangered or threatened, he must publish the determination in the Federal Register, along with the complete text of a proposed regulation to implement such a determination. *See* 16 U.S.C. § 1533(b)(5).

27. Any publication in the Federal Register of a final regulation listing a species as threatened or endangered under the ESA must include a summary of the data upon which the regulation was based and must show the relationship of the data to the regulation. *See* 16 U.S.C. § 1533(b)(8).

28. Under Section 4(i) of the ESA, if "a State agency . . . files comments disagreeing with all or part of the proposed regulation, and the Secretary issues a final regulation which is in conflict with such comments . . . the Secretary shall submit to the State agency a written justification for [the] failure to adopt regulations consistent with the agency's comments or petition." 16 U.S.C. § 1533(i).

29. ESA Section 6 requires that "[i]n carrying out the program authorized by this [Act], the Secretary shall cooperate to the maximum extent practicable with the States." 16 U.S.C. § 1535(a); *see also* 59 Fed. Reg. 34274 (July 1, 1994) (Notice of Interagency Cooperative Policy Regarding the Role of the State Agencies in Endangered Species Act Activities).

30. ESA Section 11(g) provides that “any person may commence a civil suit on his own behalf . . . against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under [Section 4] which is not discretionary with the Secretary.”

Id. § 1540(g)(1)(C).

II. Administrative Procedure Act

31. The APA provides for judicial review of final agency actions by persons “aggrieved” by such action. 5 U.S.C. § 702. The actions reviewable under the APA include “preliminary, procedural, or intermediate agency action or ruling . . . on the review of the final agency action,” such as the Final Rule here. *Id.* § 704.

32. The APA also provides standards applicable when a federal agency proposes and adopts final rules and regulations. 5 U.S.C. §§ 553, 551(4). Specifically, agencies must provide “[g]eneral notice” of any “proposed rule making” to the public through publication in the Federal Register. *Id.* § 553(b). That notice must include “(1) a statement of the time, place, and nature of the public rule making proceedings; (2) reference to the legal authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.” *Id.* An agency’s responsibility to consider public comments on a proposed rulemaking is required by 5 U.S.C. § 553(c). Among other things, federal agencies proposing rules are required by 5 U.S.C. § 553(c) to respond to significant public comments on that rulemaking.

33. Under the APA, a reviewing court shall “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 5 U.S.C. § 706(2)(A). A reviewing court shall also

“hold unlawful and set aside agency action, findings, and conclusions found to be . . . without observance of procedure required by law.” 5 U.S.C. § 706(2)(D).

FACTUAL BACKGROUND

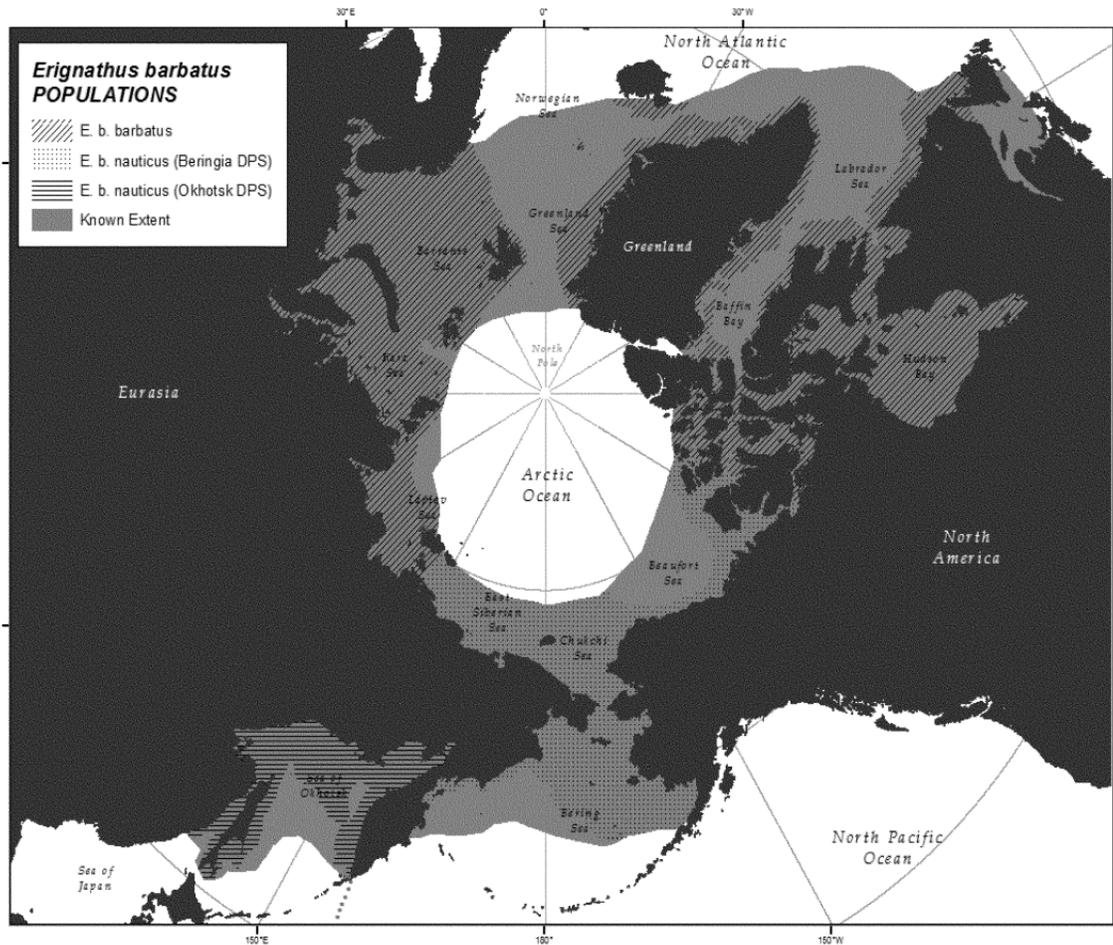
I. The Bearded Seal

34. The bearded seal (*Erignathus barbatus*) is the largest of the northern ice-associated seals, occurring in cold, seasonally or annually ice-covered Arctic and subarctic waters.

35. In the United States, bearded seals occur in Alaska and adjacent State, Territorial, and U.S. waters. While the Service asserts in the Final Rule that there are two subspecies of bearded seal, i.e., *Erignathus barbatus nauticus* and *Erignathus barbatus barbatus*, the geographic distributions of these designated subspecies are not separated by any conspicuous gaps and the validity of the subspecies designation has been questioned in the scientific literature.

36. Generally, *Erignathus barbatus nauticus* inhabits the Pacific portion of the bearded seal range, while *Erignathus barbatus barbatus* inhabits the Atlantic portion.

37. The subspecies provided for in the Final Rule associated with Alaska is the *Erignathus barbatus nauticus* population, as detailed by the following map:



38. The Service further divided the *Erignathus barbatus nauticus* population, determining that two segments of this population should be designated as DPSs: (1) the Sea of Okhotsk population segment, and (2) the remaining *Erignathus barbatus nauticus* population, termed the “Beringia” population segment.

39. Bearded seals are not associated with any specific type of sea ice habitat; instead, they use a broad range of different ice types for various biological functions. However, they appear to prefer ice that is in constant motion, which naturally produces areas of open water. Bearded seals also avoid areas of continuous, thick, shorefast ice or areas of heavy, unbroken multi-year ice.

40. Bearded seal populations are currently healthy and numerous.

41. As provided in the Final Rule, the Beringia DPS is estimated to number approximately 125,000 individuals. The Okhotsk DPS is estimated to number approximately 95,000 individuals. The *Erignathus barbatus barbatus* population is estimated to number approximately 188,000 individuals.

42. No data exists to indicate that any bearded seal population is currently experiencing a decline.

II. Listing Decision

43. On December 10, 2010, NMFS published a proposed rule to list the two bearded seal DPSs as threatened under the ESA. 75 Fed. Reg. 77496-515 (Dec. 10, 2010) (“Proposed Rule”). Comments to the proposed rule were originally due by February 8, 2011, but the deadline was subsequently extended to March 25, 2011. 76 Fed. Reg. 6754-55 (Feb. 8, 2011).

44. Following the receipt of substantial scientific disagreement regarding the status of the bearded seal as provided in the Proposed Rule, the Service conducted a special independent peer review of the 2010 bearded seal status review report. *See* Report on Special Independent Peer Review of the Bearded Seal Status Review Report (Mar. 2012) (“Independent Peer Review Report”). Additional comments on the independent peer review report were solicited on April 6, 2012, together with a 6-month extension of the deadline for a final listing. 77 Fed. Reg. 20774-75 (Apr. 6, 2012).

45. On May 22, 2008, March 25, 2011, and May 7, 2012, Alaska submitted comments in response to, and in disagreement with, the first 90-day Finding, the Proposed Rule, and the Independent Peer Review Report, respectively. Alaska provided the Service with, among other relevant information, scientific and commercial data supporting a determination that designating DPSs for the bearded seal and listing the same as threatened under the ESA was not

warranted under the relevant ESA factors. The information Alaska provided to the Service included (i) information showing that the Service's projected decline of bearded seal habitat was not supported by scientific data; and (ii) data showing that the proposed DPSs were abundant throughout their respective historic ranges.

46. Notwithstanding Alaska's comments and information, on December 28, 2012, NMFS published the Final Rule designating two DPSs of the bearded seal and listing the same as threatened under the ESA. 77 Fed. Reg. at 76740-68.

47. The Service made the determination to list the two DPSs as threatened based on listing Factors A and D—the present or threatened destruction, modification, or curtailment of the DPSs' habitat or range and the inadequacy of existing regulatory mechanisms.

See 77 Fed. Reg. at 76748.

48. The Service's rationale for listing the two DPSs of the bearded seal as threatened was based entirely on projected sea ice declines 100 years into the future. The Service did *not* list the *Erignathus barbatus barbatus* subspecies as threatened after it found sufficient sea ice habitat would likely remain by the end of the century. 75 Fed. Reg. at 77507.

49. The Service determined the year 2100 as its time frame for considering foreseeable threats to the two DPSs. 77 Fed. Reg. at 76741. The decision to use the 2100 time frame was a departure from prior decisions by NMFS and the U.S. Fish and Wildlife Service ("FWS"). For example, in determining that a petition to list the ribbon seal (*Histiophoca fasciata*) as threatened or endangered under the ESA was not warranted, NMFS declined to adopt a foreseeable future time period beyond 2050 because models projected farther than that period were deemed too unreliable. *See* 73 Fed. Reg. 79822, 79823 (Dec. 30, 2008). Similarly, FWS adopted a 45-year (mid-21st century) foreseeable future period with respect to listing the

polar bear as threatened, again because of the uncertainty associated with models projecting beyond that time period. 73 Fed. Reg. 28212, 28229 (May 15, 2008).

FIRST CLAIM FOR RELIEF
(Violation of the ESA and APA – Failure to Follow Required Procedures and Consider Relevant Factors for Listing Determination)

50. Alaska incorporates by reference the allegations set forth in paragraphs 1 through 49.

51. ESA Section 4(b)(4) generally requires that listing decisions be made consistent with the provisions of APA Section 553, 5 U.S.C. § 553, relating to notice and comment procedures for agency rulemaking. *See* 16 U.S.C. § 1553(b)(4). ESA Section 4(b)(8) requires that the Service include in a final listing determination a summary “of the data on which regulation is based and . . . the relationship of such data to such regulation.” 16 U.S.C. § 1533(b)(8).

52. In making the bearded seal listing determination, the Service did not properly comply with the listing determination requirements and procedures under the ESA and APA, *see, e.g.*, ¶¶ 22-33, *supra* and attached Ex. A. For example, the Service did not, among other things, adequately consider all relevant factors or make a rational connection between the facts found and the choice made by the Service in its listing determination, and did not observe all of the procedures required by law in making the listing determination.

53. Among other things, the Service failed to adequately support its determination that the listing of the two DPSs was warranted where the Service did not:

- (A) Provide any data on biological impacts to bearded seal populations as a result of decreased sea ice;

- (B) Provide any data on observed population declines as a result of reduced sea ice habitat;
- (C) Provide any data on projected population levels at the year 2100 together with a discussion as to whether those populations would qualify as threatened or endangered under the ESA;
- (D) Demonstrate that the 100-year models relied upon to project sea ice extent show a loss of actual bearded seal habitat, and any impact that loss would have on bearded seal populations;
- (E) Provide an adequate explanation as to why it relied on 100-year models over admittedly more reliable and accurate mid-century models to predict sea ice habitat.

54. The Service's bearded seal listing determination in the Final Rule thus was arbitrary and capricious, an abuse of discretion, otherwise not in accordance with law, or without observance of procedure by law, in violation of the ESA and the APA, and entitling Alaska to the relief requested below.

SECOND CLAIM FOR RELIEF
(Violation of the ESA and APA – Failure to Provide Adequate Justification to State Agency for Adopting Regulations Inconsistent with State Agency Recommendation and Failure to Cooperate with the State)

55. Alaska incorporates by reference the allegations set forth in paragraphs 1 through 54.

56. Section 4(i) of the ESA requires the Secretary to submit a written justification to the State agency if the State agency files comments disagreeing with a proposed regulation and the Secretary issues a final regulation in conflict with the agency's comments.

16 U.S.C. § 1533(i); *see also* 50 C.F.R. § 424.18(c).

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57. The Alaska Department of Fish and Game (“ADF&G”) submitted to the Service comments and concerns on the proposed listing of bearded seal populations as threatened under the ESA on May 22, 2008, March 25, 2011 and May 7, 2012. These comments raised numerous disagreements with the Service’s proposal to list the bearded seal and provided information showing that the proposed listing was contrary to both the law and the best available scientific and commercial data. *See, e.g.*, 16 U.S.C. § 1533(b)(1)(A).

58. On January 25, 2013, the Service issued a written response to ADF&G. However, the response to ADF&G’s comments failed to provide an adequate “written justification” for the Service’s failure to adopt regulations consistent with those comments. For example, ADF&G commented that the Service should have adopted the same foreseeable future time period as it did in its decision that listing the ribbon seal was not warranted. In response, the Service’s simply stated that it will no longer identify a single foreseeable future timeframe and will base the foreseeable future on the best available data for each respective threat. This statement is devoid of any explanation as to how the Service could reach two different foreseeable future timeframes for different species that were based on the same data for the same timeframe and for the same threat (i.e., the threatened alteration of a species’ habitat or range stemming from climate change). Statements that do not provide a substantive response to ADF&G’s comments are insufficient to meet the requirements of Section 4(i), 16 U.S.C. § 1533(i).

59. The Service’s failure to provide an adequate written justification for the failure to adopt a regulation consistent with the State agency’s comments on the Proposed Rule violates Section 4(i), 16 U.S.C. § 1533(i), entitling Alaska to the relief requested below.

60. The Service's failure to cooperate with Alaska to the maximum extent practicable in listing the bearded seal DPSs as threatened violates ESA Section 6(a), 16 U.S.C. § 1535(a), entitling Alaska to the relief requested below.

THIRD CLAIM FOR RELIEF
(Violation of the APA – Failure to Respond to Significant Comments)

61. Alaska incorporates by reference the allegations set forth in paragraphs 1 through 60.

62. The APA requires an opportunity for public comment and an agency response to significant public comments. 5 U.S.C. § 553(b), (c).

63. Alaska submitted, and the Secretary failed to adequately consider, incorporate, or respond to, the State's detailed scientific and commercial and other information indicating that designating two DPSs for the bearded seal and listing the same as threatened was unwarranted.

64. The Secretary's failure to respond to significant comments submitted by Alaska and others violates the APA, 5 U.S.C. § 553(b), (c), entitling Alaska to the relief requested below.

FOURTH CLAIM FOR RELIEF
(Violation of the APA – Arbitrary and Capricious, Abuse of Discretion, Not in Accordance with Law)

65. Alaska incorporates by reference the allegations set forth in paragraphs 1 through 64.

66. The Service's Final Rule was arbitrary and capricious, constituted an abuse of discretion, and was otherwise not in accordance with law, or made without observance of procedure required by law, which has caused or threatens prejudice and injury to Alaska's rights and interests, for the reasons described in the preceding Claims for Relief.

67. Under the APA, this Court has authority to “hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” 5 U.S.C. § 706(2)(A), and to set aside an agency decision made “without observance of procedure required by law,” 5 U.S.C. § 706(2)(D). Alaska is therefore entitled to the relief requested below.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff State of Alaska respectfully requests that the Court enter judgment in its favor and providing the following relief:

- A. Declare that NMFS violated the ESA and the APA;
- B. Declare that NMFS’ actions, as set forth above, are arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law and made without observance of procedure required by law;
- C. Vacate and remand the Final Rule with an Order requiring NMFS to fully comply with the ESA and the APA;
- D. Award Alaska its reasonable attorney fees and costs incurred in bringing and maintaining this action pursuant to 16 U.S.C. § 1540(g) and any other applicable authorities; and
- E. Grant Alaska such other and further relief as the Court may deem necessary and proper.

DATED: June 21, 2013.

MICHAEL C. GERAGHTY
ATTORNEY GENERAL

By: s/ Bradley E. Meyen

Bradley E. Meyen, Alaska Bar No. 8506067
Senior Assistant Attorney General
Department of Law
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
Telephone: 907-269-5232
Facsimile: 907-279-2834
Email: brad.meyen@alaska.gov

s/ Andrew R. Naylor (consent)

Andrew R. Naylor (Alaska Bar No. 1210074)
Assistant Attorney General
Department of Law
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
Telephone: 907-269-5232
Facsimile: 907-279-2834
Email: andrew.naylor@alaska.gov

HOLLAND & HART LLP

s/ Murray D. Feldman (consent)

Murray D. Feldman
Holland & Hart LLP
P.O. Box 2527
Boise, ID 83701
Telephone: 208-342-5000
Facsimile: 208-343-8869
Email: mfeldman@hollandhart.com

Pro Hac Vice application to be submitted

Attorneys for Plaintiff State of Alaska