

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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

v.

PENNY PRITZKER, in her official capacity as Secretary of Commerce; KATHRYN  
D. SULLIVAN, in her official capacity as the Under Secretary of Commerce for  
Oceans and Atmosphere and National Oceanic and Atmospheric Administration  
Administrator; NATIONAL MARINE FISHERIES SERVICE; EILEEN SOBECK,  
Assistant Administrator for Fisheries, National Oceanic and Atmospheric  
Administration; NATIONAL OCEANIC AND ATMOSPHERIC  
ADMINISTRATION, *Defendants-Appellants*,  
and  
CENTER FOR BIOLOGICAL DIVERSITY, *Intervenor-Defendant-Appellant*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ALASKA  
Nos. 4:14-cv-00029-RRB, 4:15-cv-00002-RRB, 4:15-cv-00005-RRB

**OPENING BRIEF FOR THE FEDERAL APPELLANTS**

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## **STATEMENT OF JURISDICTION**

The National Marine Fisheries Service (“NMFS”) appeals from the final judgment in three consolidated lawsuits in which Plaintiffs challenged an action by NMFS. Plaintiffs alleged that NMFS violated the Endangered Species Act (“ESA”), 16 U.S.C. 1531 *et seq.*, and the Administrative Procedure Act (“APA”), 5 U.S.C. 701-706, in listing the Arctic ringed seal as a threatened species. The district court’s jurisdiction rested on 28 U.S.C. 1331 (federal question jurisdiction), the APA, and 16 U.S.C. 1540(g) (ESA citizen-suit provision).

This Court has jurisdiction under 28 U.S.C. 1291. The district court entered a Memorandum Decision on March 11, 2016, a final judgment on March 15, 2016, and a corrected Memorandum Decision on March 17, 2016. *See* Excerpts of Record (“ER”) at 1-32. NMFS timely filed a notice of appeal on May 3, 2016, within the 60 days required by Fed. R. App. P. 4(a)(1). ER39-43.

## **STATEMENT OF THE ISSUES**

This case involves challenges to the final rule listing the Arctic ringed seal as a threatened species (the “Listing Rule”). *See* 77 Fed. Reg. 76,706 (Dec. 28, 2012) (ER71-104). The issues on appeal are:

- I. Whether the district court misapplied ESA Section 4 by requiring quantitative data that do not exist and by considering NMFS's decision not to adopt a protective regulation under ESA Section 4(d), rather than reviewing the listing decision solely based on the factors specified in Section 4(a) and (b).
- II. Whether NMFS's determination that the Arctic ringed seal is likely to become an endangered species within the foreseeable future—based primarily on the projected impacts of climate change through the year 2100 and predicted responses of the subspecies to those threats—was a reasonable exercise of the agency's scientific judgment, supported by the record.

### **PERTINENT STATUTES AND REGULATIONS**

Pertinent statutes and regulations are reproduced in the addendum to this brief.

### **STATEMENT OF THE CASE**

The ringed seal is the smallest of the ice-dependent seals. The subspecies at issue in this case, the Arctic ringed seal, has unique habitat requirements. Arctic ringed seals rest, whelp (birth), and nurse pups in snow caves (subnivean lairs) on the sea ice, which they excavate in accumulated snow overlying breathing holes that they maintain in the sea

ice. The subnivean lairs protect seals from hypothermia (threatened by both cold air and cold water temperatures) and predation. Pup survival is highly dependent on adequate snow on sea ice. Where snow depth is inadequate to protect seal pups throughout the nursing period, pup mortality rates are very high, as high as nearly 100 percent. ER75.

NMFS's primary concern in listing the Arctic ringed seal is the projected loss of snow-covered sea-ice suitable for the formation and maintenance of subnivean lairs, and the threat this loss poses to pup survival. Climate models project diminishing sea-ice extent and substantial reductions in snow depth and the duration of snow-cover throughout the Arctic ringed seal's range. ER74, 77, 82. Models project that by mid-century there will be substantial reductions in on-ice snow-cover in April, the peak month for pupping. ER74. The same models show that, by the end of the century, only a few remnant habitat areas will have snow depths suitable for ringed-seal birthing lairs. This substantial loss of habitat important to pup survival will occur at the same time as other threats, such as loss of resting and molting sea-ice habitat, ocean acidification, ocean-warming, and increased inter-species competition. Based on all these factors, NMFS concluded that the Arctic ringed seal is likely to become in

danger of extinction by the end of the century. ER82. Accordingly, NMFS listed the species as threatened under the ESA.

Oil and gas industry groups, the State of Alaska, and northern regional communities and Native corporations challenged NMFS's listing of the Arctic ringed seal as a threatened species. Although nobody argued that NMFS failed to rely on the best available science, the district court held that the final rule listing the Arctic ringed seal is arbitrary and capricious. ER29. It held that any listing must be supported by new studies that incorporate quantitative data. NMFS appeals, seeking reversal of the district court's decision invalidating the listing of the Arctic ringed seal as a threatened species.

#### **A. Legal Framework: the ESA**

The ESA, 16 U.S.C. § 1531 *et seq.*, contains substantive and procedural requirements designed to conserve endangered and threatened species and the ecosystems on which they depend. 16 U.S.C. 1531(b); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 558 (1992). Section 4 directs the Secretary to determine whether particular species are “endangered” or “threatened,” and to publish lists of such species. 16 U.S.C. 1533. A species is considered “endangered” if it is “in danger of extinction throughout all or a significant portion of its range,” while a “threatened species” is one “likely

to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” *Id.* §§ 1532(6), (20). The term “species” includes subspecies, and “any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” *Id.* § 1532(16).

### **1. Listing a species—Section 4(a) and (b)**

A species may be “listed” as endangered or threatened either on the initiative of the Secretary or as a result of a petition submitted by an “interested person.” *Id.* § 1533(b)(3)(A). In making a determination whether to list a species, NMFS must evaluate whether a species is endangered or threatened “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.” *Id.* § 1533(a)(1)(A)-(E). The ESA further provides that a determination whether to list a species must be made “solely on the basis of the best scientific and commercial data available . . . after conducting a review of the status of the species and after taking into

account those efforts, if any, . . . to protect such species.” *Id.* § 1533(b)(1)(A).

If NMFS determines that listing is warranted, it must publish a notice in the Federal Register that includes the complete text of a proposed rule to implement the action. *Id.* § 1533(b)(3)(B)(ii). NMFS must act on a proposed rule within one year of the date of its publication. *Id.* § 1533(b)(6)(A). At that point, NMFS must promulgate a final rule, withdraw the proposed rule, or extend the one-year period for consideration by not more than six months if the agency finds that there is “substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination or revision concerned.” *Id.* § 1533(b)(6)(B)(i).

## **2. Consultations and prohibitions—Sections 4(d), 7, and 9**

A species listed as endangered or threatened is afforded certain legal protections. *See* §§ 1533(d), 1536, 1538. For example, Section 7 requires each federal agency to “insure that any action authorized”: (a) “is not likely to jeopardize the continued existence” of any threatened or endangered species; and (b) is not likely to result in the destruction or adverse modification of designated critical habitat of such species. *Id.* § 1536(a)(2); *see generally Alaska v. Lubchenko*, 723 F.3d 1043, 1048 (9th Cir. 2013).

Section 7 establishes a consultation duty to ensure that an agency’s proposed action is not likely to result in jeopardy to listed species or destruction or adverse modification of designated critical habitat. *Id.* § 1536(a)(4). If the consulting agency (NMFS or the Fish and Wildlife Service (“FWS”)) concludes that the proposed action is likely to jeopardize the species or destroy/adversely modify critical habitat, the action agency must consider alternatives to the action. *Id.* § 1536(b)(3).

Section 9 of the ESA prohibits the “take”<sup>1</sup> of any *endangered* species of fish or wildlife without prior authorization. *Id.* § 1538(a). Section 9 does not automatically prohibit take of *threatened* species.

Section 4(d) authorizes the Services to extend Section 9 prohibitions, and other protective measures, to any threatened species as the Secretary deems “necessary or advisable to provide for the conservation of such species.” *Id.* § 1533(d). Such a protection is referred to as a Section 4(d) rule or regulation.

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<sup>1</sup> The statute defines “take” as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” *Id.* § 1532(19).

## **B. Listing the Arctic ringed seal**

In May 2008, NMFS received a petition from the Center for Biological Diversity (“CBD”) to list bearded, spotted, and ringed seals as threatened or endangered under the ESA, primarily due to threats to the species’ habitat resulting from climate change. 73 Fed. Reg. 51,615 (Sept. 4, 2008). On September 4, 2008, NMFS found, under ESA § 4(b)(3)(A) (16 U.S.C. § 1533(b)(3)(A)), that the petition presented substantial scientific information indicating that the petitioned actions may be warranted. ER72.

NMFS convened a Biological Review Team (“BRT”) to conduct a status review to assess the best scientific and commercial data available and past, present, and likely future threats to the Arctic ringed seal. *Id.* The BRT consisted of 11 scientists from: NMFS’s Alaska and Northeast Fisheries Science Centers; the National Oceanic and Atmospheric Administration’s Pacific Marine Environmental Laboratory; and FWS. The BRT included: eight marine mammal biologists, a fishery biologist, a marine chemist, and a climate scientist. ER72, 107. In conducting the status review, the BRT had two main tasks: (1) delineate the taxonomic groups under consideration; and (2) conduct an extinction-risk assessment to serve as the

scientific basis for assisting NMFS in making its determination whether any ringed-seal subspecies is threatened or endangered. ER119.

In the status review report (“Status Review”), the BRT recognized that there are five subspecies of ringed seals: the Arctic, Okhotsk, Baltic, Ladoga, and Samaii (which was listed as endangered in 1993). ER121(SR); ER51(PR); ER72(FR).<sup>2</sup> Before providing a risk assessment, the Status Review presents a thorough review of the life history and ecology of the ringed seal. ER121-158(SR); ER74(FR).

Arctic ringed seals have a circumpolar distribution. They range throughout the Arctic Basin and southward into adjacent seas, including Baffin Bay, Hudson Bay, and the Greenland, Labrador, Beaufort, Chukchi, Bering, White, Barents, Laptev, East Siberian and Kara Seas. ER52, 54 (fig. 1), 55, 56 (PR); *see also* ER127(SR) (fig. 2, map of Arctic ringed seal range). Although the subspecies is currently believed to number in the millions rangewide (ER143, 261(SR); ER67(PR)),<sup>3</sup> within the foreseeable future it is

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<sup>2</sup> In this brief, the abbreviations SR, PR, and FR refer, respectively, to citations of the Status Review, proposed rule and final rule.

<sup>3</sup> Data on Arctic ringed seal abundance and population trends are unavailable or imprecise due to the remoteness of the seal’s habitat, their time spent in snow caves or in the water, their seasonal movements, and their broad distribution across multiple political boundaries. ER54-55(PR).

likely that the subspecies' abundance will decline substantially and the subspecies will no longer persist in much of its current range. ER118(SR). As explained in more detail below, this is due to the fact that ringed seals are vulnerable to habitat loss from changes in Arctic sea ice and snow cover. ER115(SR).

With the exception of summer use of offshore islands and sand bars in the White Sea, Arctic ringed seals rarely come ashore. ER124(SR). When not in the water, they are found almost exclusively on sea ice. ER115(SR). They use sea ice as a substrate for resting, pupping, nursing, and molting. ER124, 128, 131(SR). The pupping and nursing period, in particular, is adapted to the seasonal availability of suitable snow-covered sea-ice with prey sources in the vicinity. ER97(FR).

There are three main ecological periods (seasons) important to Arctic ringed seal seasonal movements and habitat use: the early winter through spring period when seals rest, whelp, and nurse pups in snow caves on the ice; the late spring to early summer period between abandonment of snow caves and melting of the sea ice when the seals bask for long periods of time on the ice and undergo their molt; and the summer through fall open-water period when ringed seals feed most intensively. ER128-132(SR); ER52(PR).

In late fall or early winter, as sea ice freezes up, ringed seals use the stout claws on their foreflippers to open and maintain breathing holes in the solidifying ice. These breathing holes can be maintained in ice up to 2 meters or greater in thickness (more than the length of the average adult seal, which is 1.5 meters). ER131(SR); ER53(PR). As snow accumulates and buries the breathing holes, Arctic ringed seals excavate snow caves and rest on the ice within these subnivean lairs, which they occupy for resting, and for the birthing and nursing of the single pup that females bear annually. ER124, 131, 206(SR); ER53(PR).

The snow caves are “especially critical” to pup survival, protecting the small pups from hypothermia and predation, and reducing the energy required to maintain their body temperature. ER75(FR); ER206(SR). For example, when outside air temperatures ranged from  $-7^{\circ}\text{C}$  to  $-61^{\circ}\text{C}$ , including wind chill effects (this converts to  $19.4^{\circ}$  to  $-77.8^{\circ}\text{F}$ ), temperatures inside an occupied lair ranged from  $+5^{\circ}$  to  $-5^{\circ}\text{C}$  ( $41^{\circ}$  to  $23^{\circ}\text{F}$ ). ER131(SR). When wet, ringed seal pups can regain thermal neutrality (*i.e.*, avoid becoming hypothermic) at temperatures above  $-8^{\circ}\text{C}$  ( $17.6^{\circ}\text{F}$ ). *Id.* Seals leave the lairs to take to the water approximately every six hours, and typically return after approximately six hours. ER124(SR); ER387-388. The lairs also protect seals from predation; high pup-mortality rates from

predation are associated with inadequate snow-cover. ER246(SR). Thus, the subnivean lairs provide refuge from air temperatures too low for ringed seal pup survival, and conceal them from predators. ER131(SR); ER387-388; ER64(PR).

Sea ice also serves as a substrate for hauling out during the annual molt, which generally occurs from mid-May to mid-July. ER53(PR). During the molt, ringed seals bask on the sea ice for long periods, a behavior ascribed to the need to maintain elevated skin temperatures to facilitate the shedding and growth of skin and hair. ER133(SR); ER53(PR). Arctic ringed seals spend as much as 60% of their time on sea ice during the month of June, while they are actively regenerating epidermal tissues (skin and hair). ER125(SR). As the Marine Mammal Commission noted, this “process is energy-intensive and the seasonal persistence of ice is vital because the ice provides a resting platform during the molt.” ER378. After the molting period, seals tend to remain near the ice edge to forage, with ice continuing to provide a resting platform for most seals during the summer to fall open-water season. ER123-124, 129(SR).

The BRT judged the greatest threat to the Arctic ringed seal to be increased hypothermia due to decreasing accumulation and duration of snow cover. ER237(SR). NMFS considered the second highest threat to be

increased predation, also associated with diminished snow cover. *Id.* The BRT concluded that, within the century, snow cover likely will be inadequate for lair use over substantial portions of the Arctic ringed seal's range, including at the highest latitudes. ER303(SR). The “subspecies’ persistence will be greatly challenged” by the significantly altered patterns of ice and snow cover (ER306, 311(SR)) and the “subspecies likely will disappear from a substantial portion of its range.” *See* ER311(SR); *see also* ER299(SR) (“Strongly directional changes in ice and snow cover in the Arctic are likely to decrease the population, and, within the foreseeable future, it is likely that they will no longer persist in substantial portions of their range.”).

After the BRT completed the Status Review, NMFS issued a finding in which it proposed listing the Arctic, Okhotsk, Baltic, and Ladoga subspecies of the ringed seal as threatened. 75 Fed. Reg. 77,476 (Dec. 10, 2010) (ER51-70). NMFS solicited independent peer review of the proposed rule and received comments from three reviewers. ER85(FR). Two of the reviewers—a marine mammal biologist with the Alaska Department of Fish and Game (Quakenbush) and a research scientist at the Department of Fisheries and Oceans Canada (Hammill)—questioned the magnitude and immediacy of the threats posed to Arctic ringed seals by the projected

changes in sea ice habitat and, in particular, on-ice snow-cover. ER85. A third reviewer—the Director of National Snow and Ice Data Center, University of Colorado (Serreze)—concluded that the information in the proposed rule adequately supported the “threatened” determination. ER85; ER370.

NMFS extended the deadline for the final listing determination by six months so that it could address substantial disagreement relating to the sufficiency and accuracy of model projections and analysis of future sea-ice and on-ice snow-cover. ER73(FR). In further considering this disagreement, NMFS solicited additional peer review. For this round of independent peer review, NMFS received comments from three independent scientists (Barber, Sjare, and Perovich). ER36, 86.

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, reviewed the Proposed Rule and recommended that NMFS list the Arctic ringed seal subspecies as threatened under the ESA. ER376.<sup>4</sup> The Commission generally concurred that the “greatest risk to the ringed seal species is the

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<sup>4</sup> The Marine Mammal Commission is an independent government agency established by the Marine Mammal Protection Act. The Commission provides science-based oversight of the marine mammal policies and programs of federal agencies.

ongoing, and predicted continuation of, loss of sea-ice habitat from climate disruption.” ER377. The Commission emphasized that the studies cited in the Proposed Rule present evidence that—when reduced snow cover, excessive rain, warmer temperatures, or early ice break-up in the spring cause the lairs to deteriorate or collapse—the young lose their protective cover, leading to nearly 100% pup mortality from hypothermia and predators. ER378. The Commission agreed with NMFS’s threats assessment, stating that, despite the subspecies’ current abundance, “by the end of the century, loss of sea ice and decreasing snow depths will mean that conditions for building adequate lairs will no longer be reliably present in most of the subspecies’ range.” ER379.

On December 28, 2012, NMFS published the final rule listing the Arctic ringed seal as threatened. 77 Fed. Reg. 76,706 (Dec. 28, 2012) ER71-104.<sup>5</sup> NMFS based its determination on listing factor A—the present or threatened destruction, modification, or curtailment of the species’ habitat—because of threats to habitat from climate change. Relying upon

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<sup>5</sup> In the same final rule, NMFS also listed the Okhotsk and Baltic subspecies of ringed seal as threatened, and the Ladoga subspecies as endangered. This case solely concerns the listing of the Arctic ringed seal, as plaintiffs-appellees did not challenge NMFS’s decision on these other subspecies and the district court invalidated only the portion of the rule concerning the Arctic subspecies. ER8 n.23.

climate models in the Intergovernmental Panel on Climate Change’s (“IPCC’s”) Fourth Assessment Report (“AR4”), and a more advanced suite of models analyzed by Hezel *et al.* (2012), NMFS projected impacts from climate change through 2100. ER87. NMFS determined that, with snow cover forecasted to be inadequate for the formation and occupation of birth lairs over most of the subspecies’ range, it is likely that by the end of the century Arctic ringed seals will only persist in a few isolated portions of their range. ER82.

NMFS also concluded that extending the ESA Section 9 “take” prohibitions would not “provide appreciable conservation benefits” and that a Section 4(d) regulation was “not necessary at this time.” ER84. Therefore, in the final rule, NMFS did not issue a Section 4(d) protective regulation for the Arctic ringed seal. *Id.*

### **C. District Court Proceedings**

Three sets of Plaintiffs—(1) Alaska Oil and Gas Association and American Petroleum Institute (collectively “AOGA”); (2) the State of Alaska; and (3) North Slope Borough, Arctic Slope Regional Corporation, Northwest Arctic Borough, NANA Regional Corporation, Inc., and Iñupiat Community of the Arctic Slope (collectively “NSB”)—filed lawsuits challenging the Listing Rule. CBD moved to intervene in each of the

lawsuits. The United States District Court for the District of Alaska granted CBD's motions to intervene and consolidated the three cases. The parties moved for summary judgment.

In its March 17, 2016, corrected memorandum decision (correcting errors in its March 11, 2016 memorandum decision), the court vacated the final listing rule to the extent it affects the Arctic ringed seal and remanded it to NMFS. ER30. The court found that NMFS's assessment of the threats was too speculative to support listing the Arctic ringed seal as a threatened species. The court stated that, "in the absence of evidence of the current population level, the lack of projected decline in that population, and the failure to define an extinction threshold, the evidence is insufficient to support a finding that the Arctic ringed seals are threatened with extinction in the foreseeable future." ER7. The court further stated that "[t]his, coupled with the lack of any suggested efforts to protect the Arctic ringed seals, leads the Court to conclude that the decision to include the Arctic ringed seals as threatened was arbitrary, capricious and an abuse of discretion." ER7-8. In summarizing its holding, the court stated that two factors led to its determination that NMFS's listing of the species is arbitrary and capricious: "(1) the lack of any articulated discernable, quantified threat of extinction within the reasonably foreseeable future; and

(2) the express finding that . . . the proposed protective [ESA Section 4(d)] regulations for threatened subspecies of the ringed seal were not necessary or advisable for the conservation of the Arctic ringed seal at this time.”

ER29.

## **SUMMARY OF ARGUMENT**

I. NMFS’s conclusion that the Arctic ringed seal meets the definition of a “threatened species” constituted a reasonable exercise of its scientific judgment based on the best scientific data available. The district court, in finding the Listing Rule arbitrary and capricious, applied the wrong legal standard in several different respects. Most significantly, the district court incorrectly ruled that NMFS cannot list the seal under the ESA absent quantitative data and numbers and dates for an extinction threshold. The ESA’s statutory language requires NMFS to make a listing determination based on the best scientific data available. *See* 16 U.S.C. 1533(b)(1)(A). Nothing in the ESA requires that the best scientific data available include “quantified” data or identify an extinction threshold. Rather, the ESA contemplates that the agency will exercise its scientific judgment in making predictions about the future of a species that is faced with various threats.

The district court’s ruling not only yielded an incorrect result here, but imposed an untenable and legally unjustifiable requirement that sets

the bar too high for listing a species as threatened and would make it difficult if not impossible, on remand, for the agency to list the Arctic ringed seal even after further analysis and explanation of existing data. If applied to other species, the court's ruling will likewise prevent listings where the agency determines that listing is warranted based on the best scientific data available but data of a particular type are lacking.

Related to its first error, the district court also improperly required NMFS to undertake additional studies prior to making a determination that the species is threatened. The ESA "does not require the agency to conduct its own studies" to determine whether to list a species as endangered or threatened. *Am. Wildlands v. Kempthorne*, 530 F.3d 991, 1001 (D.C. Cir. 2008).

The district court also misapplied Section 4 of the ESA by considering NMFS's decision not to adopt a protective regulation under Section 4(d) as a factor in its review of NMFS's listing decision. The protective measures that NMFS might adopt are not a relevant factor in making a listing decision; NMFS must solely consider the factors in ESA Sections 4(a) and (b). These errors alone are enough to warrant reversal of the district court's decision.

II. In addition to misunderstanding the ESA legal standards, the district court erred in finding that the administrative record did not support NMFS's finding that the Arctic ringed seal is likely to become an endangered species within the foreseeable future. NMFS's finding is supported by the record, constitutes a reasonable exercise of the agency's scientific judgment entitled to deference, and should not have been set aside. On appeal, this Court may consider the issue *de novo* and should uphold the Listing Rule.

The record shows that the Arctic ringed seal is dependent upon snow-covered sea-ice suitable for the formation and maintenance of subnivean lairs, particularly for sheltering pups during the whelping and nursing period in April and May. Without the protection of these lairs through the nursing period, pups are unlikely to survive.

Numerous studies throughout the Arctic ringed seals' range show that loss of the protection of subnivean lairs prior to the end of the nursing period (through inadequate snow accumulation, rain-on-snow events, or early snow melt or ice break up) results in very high mortality rates (as high as 100%) due to premature weaning, hypothermia, and predation. ER75. Models show that *by mid-century*, April snow accumulation will be inadequate for maintenance of snow caves in the southerly areas of the

seals' current range, including the Bering and Barents Seas, and Hudson Bay, as well as in substantial parts of the seals' range over the continental shelf in the Chukchi, Beaufort, Kara, Laptev, and East Siberian Seas, and Baffin Bay. ER228-230(SR). By the end of the century, areas with at least the minimum April snow depths adequate for the formation of snow caves will be restricted to a portion of the central Arctic, the Canadian Archipelago, and a few other isolated areas. Moreover, areas with deeper snow accumulation, which appears to be necessary to protect seals from predators, will be limited to a few small isolated pockets in the Canadian Arctic. ER228(SR).

NMFS reasonably relied on models to project sea ice and snow accumulation out to the end of the century. NMFS reviewed different models used by respected scientists and organizations and applied observational constraints to select models that performed satisfactorily at reproducing observed conditions. These models bear a “rational relationship to the characteristics of the data to which [they were] applied” and provide substantial evidence of projected sea-ice and snow-cover losses. *San Luis & Delta-Mendota Water Auth. v. Locke* (“*San Luis*”), 776 F.3d 971, 994 (9<sup>th</sup> Cir. 2014) (internal quotation marks omitted). NMFS properly determined that it should not disregard projections beyond mid-

century, when all models showed continued warming and continued declines in sea ice and snow accumulation out to the end of the century. The district court identified no flaw in NMFS's selection or application of these models.

The Biological Review Team and NMFS's scientists reasonably determined that the projected loss ice and on-ice snow-cover means that by the end of the century ringed seals will not be able to pup successfully except in a small portion of their existing range. This habitat change will cause the number of Arctic ringed seals to decline substantially, and it is likely that the species will be in danger of extinction by the end of the century throughout all or a significant portion of its range.

The district court and Plaintiffs did not question that NMFS utilized the best data available in rendering its decision and did not assert that NMFS overlooked any relevant data. Rather, the district court improperly found that NMFS must collect more data in light of existing data gaps.

### **STANDARD OF REVIEW**

This Court reviews the district court's summary judgment ruling *de novo*. *Greater Yellowstone Coal., Inc. v. Servheen*, 665 F.3d 1015, 1023 (9th Cir. 2011). This Court reviews an agency's ESA listing decision under

the arbitrary or capricious standard of the APA (5 U.S.C. 706(2)(A)). *Kern Cty Farm Bureau v. Allen*, 450 F.3d 1072, 1075-76 (9th Cir. 2006).

Under the APA, “an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Ariz. Cattle Growers’ Ass’n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983)).

Under the ESA, the agency must base its action on the best scientific and commercial data available. “The determination of what constitutes the ‘best scientific data available’ belongs to the agency’s ‘special expertise.’” *San Luis & Delta Mendota Water Auth. v. Jewell* (“*Delta Smelt*”), 747 F.3d 581, 592-93 (9th Cir. 2014) (quoting *Balt. Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 103 (1983)).<sup>6</sup> Under this standard, the agency may rely on evidence even when it is “imperfect, weak, and not necessarily dispositive.”

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<sup>6</sup> The “best scientific and commercial data available” standard is the same in ESA Sections 4 and 7.

*League of Wilderness Defenders/Blue Mtns. Biodiversity Projects v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014). Although the agency “must employ ‘the best scientific and commercial data available,’ 16 U.S.C. 1536(a)(2), it is ‘not required to support its finding that a significant risk exists with anything approaching scientific certainty,’ *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607, 656 [](1980) (plurality opinion).” *Delta Smelt*, 747 F.3d at 592. When “examining this kind of scientific determination . . . a reviewing court must generally be at its most deferential.” *Id.* (quoting *Balt. Gas*, 462 U.S. at 103).

The Court conducts a “particularly deferential review” of an “agency’s predictive judgments about areas that are within the agency’s field of discretion and expertise . . . as long as they are reasonable.” *Lands Council v. McNair*, 537 F.3d 981, 993 (2008) (*en banc*), *overruled in part on other grounds recognized by Friends of the Wild Swan v. Weber*, 767 F.3d 936, 949 (9<sup>th</sup> Cir. 2014) (internal quotation marks omitted). As part of the deference owed under the APA, the court affords “the agency discretion to choose among scientific models” and will “reject an agency’s choice of a scientific model only when the model bears no rational relationship to the characteristics of the data to which it is applied.” *San Luis*, 776 F.3d at 994 (quoting *Delta Smelt*, 747 F.3d at 621). “When specialists express

conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive.” *Lands Council*, 537 F.3d at 1000 (quoting *Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989)). “Where the agency has relied on ‘relevant evidence [that] a reasonable mind might accept as adequate to support a conclusion,’ its decision is supported by ‘substantial evidence[,]’” and the court should uphold the agency’s decision. *Delta Smelt*, 747 F.3d at 601 (quoting *Bear Lake Watch, Inc. v. FERC*, 324 F.3d 1071, 1076 (9th Cir. 2003)). Under the substantial evidence standard, to hold the agency’s finding invalid “we must find that the evidence not only *supports*” a contrary finding “but *compels* it.” *INS v. Elias-Zacharias*, 502 U.S. 478, 481 n.1 (1992) (emphasis in original); *Ursack Inc. v. Sierra Interagency Black Bear Group*, 639 F.3d 949, 958 (9th Cir. 2011) (must uphold agency finding unless the record compels a reasonable finder of fact to reach contrary result).

## **ARGUMENT**

### **I. The District Court Misapplied ESA Section 4.**

The district court erred by requiring quantitative data regarding an “extinction threshold” and by considering an irrelevant factor (NMFS’s

decision not to promulgate a protective regulation under ESA Section 4(d)), in evaluating the validity of NMFS's decision.

**A. The district court misapplied ESA Section 4 by requiring quantitative data, which are not available.**

NMFS must make its listing determinations under ESA Section 4(a)(1) based “solely on the basis of the best scientific and commercial data available.” 16 U.S.C. 1533(b)(1)(A). Under this standard, an agency “must not disregard available scientific evidence that is in some way better than the evidence [it] relies on.” *San Luis*, 776 F.3d at 995 (internal quotation marks omitted). “The standard does not, however, require an agency to conduct new tests” and does not require that the data be “dispositive.” *Id.* (internal quotation marks omitted).

The district court erred in concluding that NMFS could not list the species unless the agency quantified the predicted population reduction and defined an extinction threshold. Specifically, the court found the evidence insufficient to support a finding that the Arctic ringed seal is threatened with extinction in the foreseeable future because the agency lacked “evidence of the current population level,” failed to provide a “projected decline in that population,” and failed “to define an extinction threshold.” ER7. The district court further stated that it based its decision, in part, on the “lack of any articulated[,] discernable, quantified threat of

extinction within the reasonably foreseeable future” (ER29) and the lack of “an extinction threshold for ringed seals” or “probability of reaching that threshold within a specified time” (ER28).

The ESA contains no requirement that, in order to list a species as threatened, the agency must quantify a minimum population size or establish an extinction threshold or time for reaching such a threshold. Rather, the ESA requires the agency to make a listing determination “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). The agency must evaluate threats to a species from five 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. *Id.* § 1533(a)(1). The agency also must take into account efforts being made to protect the species. *Id.* § 1533(b)(1)(A). Congress thus established the framework for rendering listing decisions under the ESA and relied on the agency’s expertise to evaluate the relevant information in each instance. Congress did *not*

mandate that the agency define an extinction threshold, which often cannot be ascertained from the best data available.

No comments on the proposed ringed seal listing mentioned the need for, or absence of, an “extinction threshold.” Thus, the Listing Rule for the Arctic ringed seal does not even discuss the subject of an “extinction threshold.” This is an issue that Plaintiffs raised for the first time in the district court. Because neither Plaintiffs nor any other commenter raised this concern during the comment period, the agency did not have an opportunity to respond to the contention and, if deemed necessary, provide a more detailed response. *Cf. Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 764 (2004) (“Persons challenging the agency’s compliance with [a statute] must ‘structure their participation so that it . . . alerts the agency to the [parties’] position and contentions.’” (quoting *Vermont Yankee Nuclear Power Corp. v. Nat. Res. Def. Council*, 435 U.S. 519, 553 (1978))); *Exxon Mobil Corp. v. EPA*, 217 F.3d 1246, 1249 (9<sup>th</sup> Cir. 2000) (“Petitioners have waived their right to judicial review of these . . . arguments as they were not made before the administrative agency, in the comment to the proposed rule, and there are no exceptional circumstances warranting review.”). NMFS could not have acted arbitrarily by refusing to develop information that nobody in the administrative process asserted was necessary.

Regardless, NMFS's application of a qualitative analysis here is consistent with the ESA. The ESA and implementing regulations do not define, much less require the agency to establish, an extinction threshold. NMFS has previously considered whether it should identify a "critical risk threshold" or "extinction threshold," defining a population number (and perhaps timeframe) when the population would be at very high risk of extinction with little chance of recovery. NMFS concluded, however, that the "extinction threshold" concept does not correlate with the ESA definitions of "endangered" or "threatened" because it requires a condition worse than endangered, *i.e.* at "very high risk of extinction" rather than "in danger of extinction," and essentially precludes recovery. *See* 81 Fed. Reg. 20058-59, 20065 (2016) (listing 3 distinct population segments of Green Sea Turtles as endangered and 8 as threatened, based on demographic parameters, not a critical risk threshold).

Indeed, even when extensive quantitative data are available, the agency need not include consideration of an extinction threshold. For example, in listing the Cook Inlet beluga whale as endangered, the agency analyzed extensive quantitative data on the population size. *See* 73 Fed. Reg. 62927 (2008). NMFS's decision listing the beluga was based, in part, on a detailed population viability analysis showing a 26% probability of

extinction within 100 years and a 70% probability of extinction within 300 years. But NMFS did not develop an extinction threshold. *Id.* In listing the Southern Resident Killer Whale Population as an endangered species, NMFS noted that a population viability analysis is a useful tool in assessing the status of a species but should be used cautiously in determining whether a species is in danger of extinction, and the agency relied on a broad consideration of factors. 70 Fed. Reg. 69906, 69909-12 (2005); *see also* 62 Fed. Reg. 24348 (1997) (considering population viability analysis in making listing decision for the Stellar sea lion but not giving it greater weight than population trend data and the scientific opinion of experts).

Moreover, the agencies typically lack sufficiently detailed information to define an extinction threshold or to perform a quantitative population viability analysis. Where data necessary for making a quantitative threat analysis are unavailable, NMFS bases its decision solely on a *qualitative* assessment, as it did here.

This Court has rejected efforts to require quantitative data. In *Home Builders Ass'n v. U.S. Fish & Wildlife Ser.*, 321 Fed. App'x. 704, 705 (9th Cir. 2009), FWS lacked quantitative data of the number of Central California tiger salamanders, and so relied primarily “on measures of habitat availability as well as current and future habitat status as an

indication of the status of the species.” 69 Fed. Reg. 47,212, 47,217 (2004).

There, the plaintiffs asserted that FWS was required to state a threshold level of habitat loss that is necessary to find a species “threatened” under the ESA. *Home Builders*, 321 Fed. Appx. at 705. This Court affirmed the district court’s grant of summary judgment to FWS, stating:

FWS made express findings based on the best available scientific data about future habitat loss and concluded, in its scientific judgment, that this future habitat loss made it likely that the Central California tiger salamander will become in danger of extinction throughout all or a significant portion of its range in the foreseeable future. The FWS is not required to state a threshold level of habitat loss that is necessary to find a species is threatened.

*Home Builders*, 321 Fed. Appx. at 705 (citing *Kern*, 450 F.3d at 1081-82).

In the absence of quantitative data in *Home Builders*, the FWS ranked the likelihood that the species would become in danger of extinction within the foreseeable future, 529 F. Supp. 2d at 1118, and this Court upheld FWS’s listing decision. *Home Builders*, 321 Fed. Appx. at 705.

Similarly, in *Kern*, FWS determined that there was a high probability that threats—primarily from habitat loss and habitat fragmentation—would result in extinction of the Buena Vista Lake shrew, and the agency listed the species as endangered. 450 F.3d at 1074. This Court held that FWS’s discussion of the data and analysis of the statutorily identified factors

satisfied the ESA requirements; the agency was not required to answer additional questions before making a listing decision. *Id.* at 1081-82.

The D.C. Circuit, in affirming FWS's listing of the polar bear as a threatened species, rejected similar arguments regarding a need for quantification. There plaintiffs (including the State of Alaska) contended that the listing decision was invalid because FWS had not identified "how great a decrease in the current population would constitute endangerment." *In re Polar Bear*, 709 F.3d 1, 9 (D.C. Cir. 2013). The court stated that plaintiffs' claim failed because FWS "clearly explained how the anticipated habitat loss renders this particular species likely to become endangered. The agency considered and explained how the loss of sea ice harms the polar bear." *Id.* (citing 73 Fed. Reg. 28,212, 28,275 (2008)).

FWS had far more information on polar-bear populations than is available on ringed-seal populations, given decades of studies focused on the polar bear. Yet no quantified population decline, extinction threshold, or probability of attaining the threshold within a certain period could be provided by the agency or was required by the court. Rather, the court found the agency decision rational where the agency had "carefully and clearly explained how this particular habitat loss leaves this particular species likely to become endangered." *Id.* Thus, even with a species (like

the polar bear) that has been studied extensively for decades, such precise data and quantitative analysis as the district court erroneously demanded here may not be available; and courts have not required it.

**B. The ESA does not require an agency to undertake additional research.**

In the absence of available evidence, the ESA “does not require the agency to conduct its own studies” to determine whether to list a species as endangered or threatened. *Am. Wildlands*, 530 F.3d at 1001; *see also id.* at 998; *Friends of Blackwater v. Salazar*, 691 F.3d 428, 435 (D.C. Cir. 2012). Indeed, the timelines in the ESA generally would not allow for new studies. *See* 16 U.S.C. 1533(b)(3)(A), (3)(B), (6) (requiring findings and determinations within 90 days of receiving a petition to list a species, within 12 months of receiving a petition to list a species, and within 12-18 months of a proposed listing); *see also* H.R. Conf. Rep. No. 97-835, 97<sup>th</sup> Cong., 2d Sess. 20-24 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2807, 2860-65 (amending ESA to impose mandatory deadlines in listing process to “ensure prompt action”). Rather, NMFS must make a listing determination under Section 4(a)(1) of the ESA based on five statutorily prescribed factors, any one of which may support a listing determination (16 U.S.C. 1533(a)(1)) and “solely on the basis of the best scientific and commercial data available . . . after conducting a review of the status of the species” and

after taking into account efforts to protect the species. 16 U.S.C. 1533(b)(1)(A). The ESA does not authorize NMFS to indefinitely defer a decision on a petition to list a species while it awaits research results that might take years or decades to amass.

The D.C. Circuit directly addressed this issue in a challenge to the listing of a subspecies of goshawk. *Southwest Ctr. for Biological Diversity v. Babbitt*, 215 F.3d 58, 59 (D.C. Cir. 2000). The only issue raised on appeal was whether the ESA required the agency to conduct an on-site population count of birds when the currently available data were sparse. *Id.* The district court issued an order remanding the case to the agency with instructions to count the goshawk population. The D.C. Circuit agreed with the agency that such an order is “completely at odds with the statute.” *Id.* “The ‘best available data’ requirement makes it clear that the Secretary has no obligation to conduct independent studies.” *Id.* at 60. The principal dispute there, as here, was whether the best available evidence supports the agency’s decision. *Id.* at 61. That issue, which is discussed in Part II below, cannot properly be sidestepped by finding the “available evidence inconclusive” and requiring the agency “to find better data.” *Id.* The district court erred in doing so here.

**C. The district court misapplied ESA Section 4 by considering the agency’s decision not to adopt a protective regulation under Section 4(d), rather than reviewing the agency’s decision based on the factors specified in Section 4(a) and (b).**

In reviewing the agency’s final rule listing the Arctic ringed seal, the district court improperly considered NMFS’s decision not to issue a Section 4(d) rule. *See* ER29-30. The issuance (or non-issuance) of a Section 4(d) rule is not relevant to the validity of an agency determination that a species is threatened.

When NMFS proposed listing the Arctic ringed seal as a threatened species, it proposed issuing a Section 4(d) rule. But, in light of public comments and following further review, NMFS found it “unlikely that the proposed Section 4(d) regulations would provide appreciable conservation benefits.” ER84. As the agency explained, ringed seals already benefit from the “take” prohibitions in the Marine Mammal Protection Act. *Id.* Accordingly, NMFS concluded that the 4(d) regulations “are not necessary at this time,” while noting that such “regulations could be promulgated at some future time if warranted by new information.” *Id.* Nobody has challenged the validity of NMFS’s decision not to issue a 4(d) regulation.

The agency’s decision to list a species as threatened is a condition precedent to any decision to afford protections under Section 4(d). The

agency *first* decides whether to list a species. *If* the agency decides to list a species as threatened, it then decides whether to extend protections under Section 4(d). But the conditionality runs only one way. Although the need for making a Section 4(d) determination is conditional on making a listing determination, making a listing determination is not conditional on extending protections under Section 4(d).

The district court's consideration of NMFS's decision not to issue a Section 4(d) rule improperly adds a factor to a listing determination that the ESA does not include. The sole factors on which the agency must base its listing decisions are set forth in Sections 4(a) and (b) and do not include the agency's decision whether to afford protections to a species under Section 4(d). Neither the agencies nor the courts should "import" requirements from one part of the ESA into another. *Cf. Home Builders Ass'n of Northern Cal. v. USFWS*, 616 F.3d 983, 990 (9th Cir. 2010) (rejecting argument for importing requirements for an ESA recovery plan into a critical-habitat designation; "selective importation is an argument for Congress, not for the courts"); *Ariz. Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160, 1172 (9th Cir. 2010) (agency must consider economic impacts when designating critical habitat but, in contrast, must not when making listing decisions).

Just as it would have been improper for NMFS to consider an irrelevant factor in making its decision; it was improper for the district court to find NMFS's decision invalid based on an irrelevant factor. A court reviews an agency decision to ensure that it is "founded on a reasoned evaluation of the *relevant* factors." *Ariz. Cattle Growers' Ass'n v. USFWS*, 273 F.3d 1229, 1236 (9th Cir. 2001) (quoting *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 378 (1989)) (emphasis added). "[A]n agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has *not* intended it to consider." *Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1163 (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983)) (emphasis added). NMFS considered the relevant factors in determining that the Arctic ringed seal is threatened, and properly did *not* consider whether it would be extending protections to the species under Section 4(d).

The district court's ruling not only improperly added a factor to the listing determination, but it *effectively* converted the Section 4(d) provision from a discretionary one to a mandatory one. When Congress added the threatened category to the ESA, it chose not to extend the prohibitions in ESA Section 9(a) to threatened species. *See* 16 U.S.C. 1538(a)(1) (Section 9 prohibitions applicable to *endangered* species of fish and wildlife). In

Section 4(d), Congress gave the Services the discretion to extend some, all, or none of those same prohibitions to threatened species. *Id.* § 1533(d).

**II. NMFS'S FINDING THAT THE ARCTIC RINGED SEAL IS LIKELY TO BECOME ENDANGERED WITHIN THE FORESEEABLE FUTURE IS REASONABLE AND SUPPORTED BY THE RECORD.**

NMFS listed the Arctic ringed seal as a threatened species primarily because of threats to its habitat from climate change. Model projections show continued (and perhaps accelerated) warming in the foreseeable future, which will result in diminishing sea ice and snow cover. The survival of ringed seals depends on the availability of suitable snow-covered sea ice for the formation and maintenance of lairs, particularly for sheltering pups during the spring whelping and nursing period. The lairs, which reduce the energy required to keep warm, protect seals from hypothermia, and conceal them from predators (including polar bears, foxes, wolves, and birds), are crucial to pup survival. ER77(FR); ER61(PR); ER244(SR).

NMFS's decision to list the Arctic ringed seal is supported by the sea-ice and snow-cover losses projected to occur by the end of this century. NMFS generally determines the time horizon of its threat analysis with reference to the best available scientific data. NMFS projected sea ice and snow cover losses out to the end of the century because, regardless of which

model is used, all of the most reliable models show continued warming throughout the century. ER87 (Cmt. 3); ER89 (Cmt. 9); ER91 (Cmt. 18). NMFS projected the response of seals to those projected habitat changes through 2100 as well. ER73, ER89 (Cmt. 9).

NMFS explained that, in addition to the effects of diminished sea ice and snow accumulation, there will be the compounding impacts on ringed seals of ocean acidification and effects of ocean warming on ringed seal prey and intra- and inter- species competition for prey and sea-ice habitat. ER77. These determinations were reasonable, and ignoring multiple credible models that show sea-ice and snow-cover decreases over the long term (as the district court decision compels) would have been contrary to the ESA and would not have improved NMFS's decision.

**1. Models project continued warming through the end of the century and substantial losses in sea-ice extent and on-ice snow accumulation.**

***a. NMFS's reasonably relied on projections through the end of this century.***

Under the ESA, a species is considered "threatened" for listing purposes if it 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). Congress did not define the term "foreseeable future" and NMFS has not promulgated any regulations defining the term. Instead,

NMFS, like the FWS, determines what constitutes the “foreseeable” future on a case-by-case basis in each listing decision. ER73(FR); *In re Polar Bear*, 709 F.3d 1, 15 (D.C. Cir. 2013). The foreseeability of a species’ future status depends upon both the foreseeability of threats to the species and the foreseeability of the species’ response to those threats. ER73(FR). Here, NMFS identified habitat alteration stemming from climate change as the principal threat to ringed seals. *Id.*; *see also* ER74(FR).

Consistent with its procedure of defining the foreseeable future in terms of the specific threat at issue, NMFS determined that the best available science allowed it to make reliable predictions of sea-ice and snow-cover loss through 2100 using models and existing data on sea-ice and snow-cover in the seals’ habitat range. Both the observed and projected effects of a warming global climate are most extreme in northern high-latitude regions. ER163(SR). The Intergovernmental Panel on Climate Change’s Fourth Assessment Report (“IPCC’s AR4”), issued in 2007, was the best available science on climate change at the time the agency made its decision in December 2012. ER88-89 (Cmt. 9), 94-95 (Cmt. 31), 97 (Cmt. 45); *see also* ER159-160 (SR). No party has argued otherwise. That report forecasts continuing warming trends out to 2100,

and NMFS therefore used that date and those data in this listing decision. ER73, 88-89 (Cmt. 9).

In the district court, Plaintiffs argued that, because the models begin to diverge in their assessment of climate change at about mid-century, NMFS should have used mid-century, not 2100, as the date for foreseeable climate-change impacts to the species. NMFS directly addressed this issue in the Listing Rule. NMFS explained that the Listing Rule projects sea-ice and snow-cover losses out to the end of the century because, regardless of which model is used, all of the most reliable models show continuing downward trends in sea ice and snow-cover. *See, e.g.*, ER88-89 (Cmt. 9); ER77(FR) (“Climate models consistently project overall diminishing sea ice and snow cover at least through the current century, with regional variation in the timing and severity of those losses.”). NMFS explained that the IPCC’s AR4 represents the “scientific consensus view on the causes and future of climate change.” ER88 (Cmt. 9). NMFS determined that the climate projections in the IPCC’s AR4, as well as the scientific papers used in that report, or resulting from that report, represent the best scientific and commercial data available to inform its assessment of the potential impacts from climate change. ER89 (Cmt. 9). NMFS reasonably determined that it could not disregard the best scientific information

available which shows continuing warming trends and diminishing on-ice snow depths and sea-ice extent.

In the Listing Rule, NMFS explained that in its 2008 listing decision for the ribbon seal (another ice-seal species), it determined the foreseeable future to be 2050, which took into consideration the approach taken by FWS in conducting its status review of the polar bear. ER89 (Cmt. 9). However, in the more recent (2010) listing analyses for spotted, ringed, and bearded seals, NMFS noted that, although projections of greenhouse gases become increasingly uncertain and subject to assumed emissions scenarios in the latter half of the 21<sup>st</sup> century, projections of air temperatures consistently indicate that warming will continue throughout the century, and “the trend is clear and unidirectional.” *Id.* Consistent with these projections and this reasoning, NMFS re-evaluated the status of the ribbon seal in 2013. Despite using a longer foreseeable future in 2013 than in 2008 (in assessing the threat posed by habitat alteration stemming from climate change), NMFS nevertheless found that listing the ribbon seal was not warranted. 78 Fed. Reg. 41,371 (2013).

There may be some ecological effects, such as those that are dependent upon the precise amount of temperature change, that cannot be reasonably foreseen through 2100 using the best scientific data available,

including available climate models. But the critical factor for the ringed seal is the extent of suitable sea ice and snow cover, which can be assessed through 2100 using the models.

As NMFS explained in listing the ringed seal, “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.” ER89 (Cmt. 9). NMFS’s reliance on the IPCC AR4 projections were bolstered by a recent study by Douglas (2010). *Id.* Douglas found that the observed rate of Arctic sea-ice loss has been greater than the collective projections of most IPCC-recognized models, suggesting that the projections of sea ice declines within this century may in fact be conservative. *Id.*

***b. Projections show substantial declines in sea ice and snow cover.***

In the Arctic ringed seal’s sea-ice habitat areas, substantial declines in sea-ice extent are projected throughout most of the Arctic ringed seals’ range in July and November after mid-century. ER58(PR); ER74(FR). Moderate sea-ice declines within this century are projected for June. *Id.* Projections for May show that there will commonly be years with little or no ice in the western Bering Sea beyond mid-century. *Id.* Sea-ice extent in the Barents Sea in April and May will decline throughout the century and will

disappear rapidly in June and July in the coming decades. Projections for Hudson Bay show a reduction in the sea ice season of 7-9 weeks during the years 2041-2070, with substantial reductions in July and during the first months of winter. ER74.

Models predict that throughout the range of Arctic ringed seals, there will be substantial reductions in on-ice snow cover. Northern Hemisphere snow cover has declined in recent decades and spring melt times have become earlier. ER166(SR). The depth of snow cover depends in part on the timing of snowfall relative to ice formation. Snow accumulation on Arctic sea ice is most rapid in the autumn, with little additional accumulation in mid-winter, and a second pulse of accumulation in the spring. *Id.* Progressively later formation of sea ice will result in less snow accumulation because most snow falls on sea ice in the fall. ER58(PR) (citing Sturm *et al.*, 2002). If sea ice has not formed when the snow falls, the snow just falls into the ocean. Snow depths reach 50% of the annual maximum by the end of October and 67% by the end of November. *Id.* (citing Radionov *et al.*, 1997). By 2050, models show major delays in the freeze-up of sea ice in November. By 2090, some models show a nearly ice-free Arctic in November, except for the region of the Canadian Arctic Archipelago. *Id.*

Ringed seals require snow accumulation of at least 20-30 cm (on flat ice) in order to provide snow drifts of 50-65 cm or more necessary for birth lairs. ER53(PR); ER76(FR); ER228(SR). The Status Review report (ER228-230) breaks down the decreases in April snow depth projections by region as follows:

<b>LOCATION</b>	<b>MID-CENTURY</b>	<b>END OF CENTURY</b>
Chukchi Sea	Virtually no areas exceeding 25 cm in depth	Average less than 20 cm
East Siberian Sea	Virtually no areas exceeding 25 cm in depth	Most of the region, 15-20 cm
Central Arctic	Eastern portion, 20-25 cm; Western portion, 25-30 cm	Eastern portion, 15-20 cm; Western portion, 20-25 cm
Beaufort Sea	10-20 cm	5-15 cm
Bering Sea	Less than 5 cm	Less than 5 cm
Barents Sea	10 cm or less	Less than 5 cm
Hudson Bay	15 cm or less	Less than 15 cm
Baffin Bay	15-20 cm for most of bay, 20-25 cm in small portion of northeastern bay	Greater than 20 cm only in a small portion of northeastern bay
Canadian Arctic Archipelago	Areas exceeding 25 cm decrease	Most of the region, 20-25 cm
Greenland Sea	Areas exceeding 20 cm decrease	Less than 20 cm over most of the region
Kara and Laptev Seas	Kara Sea, most less than 15 cm; Laptev Sea, less than 20 cm	Kara Sea less than 10 cm; Laptev Sea less than 15 cm

Based on model projections, April snow depths over much of the range of the Arctic ringed seal averaged 25-35 cm in the first decade of this

century. ER74(FR). These model projections are consistent with on-ice measurements by Russian scientists. *Id.* (citing Weeks, 2010). As shown in the table above, by *mid-century*, a substantial decrease in areas with April snow depths of 25-35 cm is projected (much of it reduced to 15-20 cm). The deepest snow (25-30 cm) is forecasted to be found in certain regions of the seals' northern habitat areas. Southerly regions, such as the Bering Sea and Barents Sea, are forecasted to have snow depths of 10 cm or less by mid-century. ER203(SR). By the end of the century, April snow depths of 20-25 cm are forecasted only for a portion of the central Arctic, most of the Canadian Arctic Archipelago, and a few small, isolated areas in a few other regions. Areas with 25-30 cm of snow are projected to be limited to a few small isolated pockets in the Canadian Arctic by 2090-2099. ER204(SR); ER74(FR).

***c. NMFS's selection of models appropriately accounted for divergence in projections.***

NMFS reasonably accounted for the variation in model predictions past mid-century. There are three main contributors to the divergence in climate projections: large natural variations, the range in emissions scenarios, and across-model differences. ER57(PR); ER168(SR). NMFS and the BRT addressed each of these variables in their selection and application of models to sea ice and snow cover projections.

Given that there is no one best climate-change model, the BRT determined in its expert opinion that it would address across-model differences using the common approach of culling models that perform poorly at reproducing observed sea-ice extent conditions. ER169-170(SR) (citing Wang & Overland 2009).<sup>7</sup> Thus, the team removed “the poor performing models” but “retained several models as a measure of model variability.” ER169. Applying this approach, the BRT eliminated 17 of 23 models, retaining six models for projection of future Arctic sea-ice. ER170(SR); ER57(PR); ER97 (Cmt. 45).

The BRT and NMFS further evaluated these six models to assess their performance at reproducing the magnitude of the observed seasonal cycle of sea ice extent in 12 different regions for the Arctic ringed seal. ER57. Where none of the models satisfied the criteria for a region (as occurred in 5 of the 12 regions), NMFS relied on other existing analyses. *Id.*<sup>8</sup>

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<sup>7</sup> A model’s ability to provide credible quantitative projections of future climate is assessed by reviewing each model’s “demonstrated ability to reproduce observed features of recent climate.” ER169(SR).

<sup>8</sup> The BRT evaluated the six models independently on their performance in 12 different sub-regions for the Arctic ringed seal. ER177-199. The Status Review refers to 14 sub-regions, ER177-178, but two of these sub-regions (the Baltic Sea and Sea of Okhotsk are occupied by other ringed seal subspecies, not by the Arctic ringed seal).

With regard to variability concerning the range of emissions, the BRT and NMFS ran the six models using both intermediate and high emissions scenarios, as is the typical procedure used to represent a range of variability in future emissions. ER57(PR); ER89(FR); ER168, 178(SR). The BRT and NMFS addressed natural variability in sea ice extent by averaging projections over decades. ER168. Each model concentration was averaged for 11 years, reducing the large influence of year-to-year natural variability in sea-ice concentration at a particular time. ER170 (Fig. 8-13).

To project snow-cover depths, the BRT used one of these six models—the Community Climate System Model, version 3 (“CCSM3 model”)—under an intermediate emissions scenario, which was run seven times to incorporate natural variability. ER170(SR); ER57(PR).<sup>9</sup> Although the model predicted increased snowfall in winter as sea ice declines over the 21<sup>st</sup> century, it also predicted *reduced snow accumulation* because of the loss of sea ice as a platform to collect snow in autumn and early winter (due to later sea-ice formation). ER87 (Cmt. 3); ER200, 226-227(SR)

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<sup>9</sup> As the BRT explained, large natural variation is one of the main contributors to the divergence in climate projections. ER168. Natural variability can be incorporated into the projections by running climate models several times with slightly different initial conditions, and then averaging the results from the runs, as was done here. *Id.*

(noting the model forecasted an average increase in precipitation over the Arctic Ocean by the end of the century but the delay of 1-2 months in the date of ice formation will result in substantial decreases in spring snow depths). The CCSM3 model forecasted that the accumulation of snow on sea ice will decrease by almost 50 percent by the end of this century, with more than half of that decline projected to occur by 2050. ER58(PR); ER200(SR fig. 27). The key factor is the delay in sea ice formation, with major delays in fall freeze-up by 2050. ER58(PR). “Although the forecasted snow accumulations in the seven integrations of the model varied, all predicted substantial declines over the century.” *Id.*

In the Listing Rule, NMFS directly responded to comments that the snow-cover predictions are not appropriate “for predicting snow on sea ice at a scale that is important for ringed seals” and does not account for changes in snow climatology that might result from more open water in the winter, which could increase pulses of snow on sea ice. ER86 (Cmt. 3). NMFS explained that the snow-depth findings of the BRT are supported by a new snow-depth analysis by Hezel *et al.* (2012), which used a more advanced suite of ten models from the Coupled Model Intercomparison Project Phase 5 (CMIP5; IPCC AR5). ER87 (Cmt. 3). The ten models “all agree that snow depths will decline substantially in the future, similar to

the CCSM3.” ER87. Consistent with the analysis by the BRT and the proposed rule, Hezel *et al.* explained that the loss of sea ice as a platform to collect snow in autumn and early winter (due to later sea ice formation) resulted in a substantial reduction in the amount of snow that can accumulate on sea ice. *Id.* These model projections are consistent with observed changes in snow accumulation and snow-melt dates. *See, e.g.*, ER225(SR) (noting that multi-decadal study in Hudson Bay shows decreases in duration of ice cover, decreases in snow accumulation, and earlier onset of snow melt, citing *Ferguson et al. 2005*); *id.* (showing that snow melt in Prudhoe Bay, Alaska, advanced by 7 days in the past 30 years); ER226(SR) (decreases from 1954 to 1991 in snow depth on sea ice at Russian drift stations in the Arctic Ocean); ER60 (in most areas of the Arctic Ocean, snow melt advanced 1-6 weeks from 1979-2007).

NMFS concluded that the CCSM3 projected snow-depth reasonably well, noting the consistency of CCSM3 projections with measured snow depths published in the scientific literature (citing Radionov *et al.*, 1997, and Ferguson *et al.*, 2005) and recent model results analyzed in Hezel *et al.* ER87 (Cmt. 3). Thus, NMFS ensured that the models on which it relied bear a “rational relationship” to the data to which they were applied by using models vetted by other scientists and by checking the model results

against known sea-ice and snow-cover conditions. A court should “reject an agency’s choice of a scientific model only when the model bears no rational relationship to the characteristics of the data to which it is applied.” *Delta Smelt*, 747 F.3d at 621 (internal quotation marks omitted). NMFS’s choice of models, here, had a rational relationship to the characteristics of the data to which the models were applied, and was entitled to deference.

Plaintiffs did not challenge NMFS’s determination that the climate science and data it used to assess climate-change threats constitute the best available science. Nor did they point to alternative data that NMFS failed to consider. The district court did not find fault with any of the evidence on which NMFS relied. It merely made the sweeping determination that NMFS’s projections are too speculative. As both a factual and legal matter, a team of agency scientists is better positioned, than the district court, to make this judgment. This is particularly so in matters, as here, which require the application of scientific and technical expertise to make predictive judgments. *Lands Council*, 537 F.3d 993 (“we are to conduct a particularly deferential review of an agency’s predictive judgments about areas that are within the agency’s field of discretion and expertise”) (internal quotation marks omitted). The “traditional deference to the

agency is at its highest where a court is reviewing an agency action that required a high level of technical expertise” and “[a]s part of this deference, we afford the agency discretion to choose among scientific models.” *San Luis*, 776 F.3d at 994.

The models and scientific literature on which NMFS relied support its determination that, by the end of the century, the snow cover necessary for ringed seal pupping will be gone from all but a few remnant habitat areas. ER73(FR); ER88-89 (Cmt. 9). The models and scientific literature on which the BRT and NMFS relied represent the best scientific and commercial data available and NMFS’s reasonably relied on this information in evaluating threats to Arctic ringed seal habitat, under ESA Section 4(a)(1)(A).

**2. NMFS’s determination that the Arctic ringed seal is likely to be in danger of extinction by 2100 because of sea-ice and snow-cover loss and other impacts from climate change is supported by the record.**

The second component of a foreseeable future analysis is the species’ response to the identified threats. NMFS’s conclusion that the Arctic ringed seal is likely to be in danger of extinction by 2100 rests on the projected substantial losses of sea-ice and snow cover (discussed in Subpart 1 above) and NMFS’s knowledge of the significance of sea ice and on-ice

snow to essential life-history functions of the Arctic ringed seal. As the BRT explained, the “period over which snow accumulates on ice is ‘the primary factor influencing the quality of ringed seal breeding habitat.’” ER227 (SR, quoting Smith and Lydersen 1991).

NMFS determined that the projected changes in snow cover and sea ice will lead to increased mortality, making it likely that the species will be in danger of extinction by the end of the century. This conclusion is based on sound scientific evidence. As with the projections for habitat modification and destruction, the district court did not find fault with any of the evidence on which NMFS relied regarding the likely response of Arctic ringed seals to the projected habitat loss, and nonetheless failed to defer to NMFS’s expertise.

***a. NMFS reasonably determined that the loss of adequate snow cover will affect pup survival and cause substantial declines in the Arctic ringed seal population.***

The Listing Rule explains that, within this century, “snow cover is forecasted to be inadequate for the formation and occupation of birth lairs over most of the subspecies’ range.” ER82. NMFS determined that the “projected decreases in sea ice, snow cover, and thermal capacity of birthing lairs will likely lead to decreased pup survival.” *Id.* Studies show

that without adequate snow cover, pup mortality can be as high as 100 percent. ER59(PR); ER75-76(FR). NMFS concluded that the increase in pup mortality in the foreseeable future likely will cause the number of Arctic ringed seals to decline substantially, and the seals will no longer persist in substantial portions of their range. ER82(FR). NMFS's assessment of the likely response of the Arctic ringed seal to habitat modifications resulting from climate change is reasonable, explained in the Listing Rule, and well-supported by the record.

As the Status Review establishes, most Arctic ringed seals are born in mid-March through April, when snow depth is maximal. ER133-134(SR). Occupation of subnivean lairs is especially critical during birthing and nursing. ER75(FR). Nursing takes place from late March through June, with a nursing period of 5 to 9 weeks. ER115, 246(SR). Ringed seals require snow depths of 45 cm or more for the excavation and maintenance of simple snow caves. The snow cover at *birth lairs* typically is deeper than lairs used only by adult seals. ER245(SR). Birth lairs require snow depths of 50-65 cm or more. ER53(PR). Such drifts typically only occur where average snow depths are *at least* 20-30 cm (on flat ice) and where drifting has taken place along pressure ridges or ice hummocks. ER76(FR) (citing numerous studies published from 1975 through 2006). The BRT indicated

that “average depths of 30 cm or more appear to be necessary for lairs of sufficient depth to adequately protect against predation.” ER228(SR).

Based on this information, NMFS conservatively determined that areas forecasted to have less than 20 cm average snow depth in April are inadequate for the formation of ringed seal birth lairs. ER76(FR). As noted above, the best available science shows that by mid-century, much of the Arctic ice that (in the first decade of the century) had average April snow depths of 25-35 cm will have reduced snow depths of 15-20 cm. By the end of the century, average April snow depths are projected to be less than 20 cm over much of the species’ range, and snow depths of 25-30 cm are expected to be limited to a few small isolated pockets in the Canadian Arctic. ER74(FR).

The impacts of reduced snow accumulation on ringed seals are well-documented in the scientific literature and thoroughly explained by the BRT in the status review and by NMFS in the Listing Rule. In general, pups in lairs with thin snow-cover are more vulnerable to premature weaning, predation, and hypothermia than pups in lairs with thick snow cover. ER206(SR) (citing Hammill and Smith 1989 and Ferguson *et al.* 2005). In years in which there has been insufficient snow cover for snow caves to persist through the nursing period, ringed-seal pups died at a high rate due

to hypothermia and predation (with pup mortality as high as 100% in such conditions). ER75(FR). Ferguson *et al.* (2005), for example, found that ringed seal recruitment<sup>10</sup> in western Hudson Bay “dropped sharply to near zero when the average snow depth in April and May was less than 32 cm.” ER206(SR); *see also* ER75(FR). Numerous other studies establish that when lack of snow cover has forced birthing to occur in the open, “nearly 100 percent of pups died from predation (Kumlien, 1879; Lydersen et al., 1987; Lydersen and Smith, 1989; Smith et al., 1991; Smith and Lydersen, 1991).” ER75. Other researchers similarly found that pups froze in their lairs when roofs of lairs were only 5-10 cm thick, and that pup mortality from freezing and predation increased when unusually warm spring temperatures caused early snow melt near Baffin Island, in the White Sea, and in the Barents Sea. *Id.* (citing numerous studies of ringed seals in those regions). The early collapse of subnivean lairs can result in premature separation of nursing pups from their mother, and exposes pups to both hypothermia and predation by polar bears, wolves, foxes, ravens, and gulls. ER75-76.

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<sup>10</sup> “Recruitment” is the process of adding new individuals to a population; “recruitment” occurs when juvenile animals survive to be added to a population.

The Listing Rule also cited studies that showed that increased rain on snow negatively affects ringed seal recruitment by damaging or eliminating the snow caves. ER75. For instance, Stirling and Smith (2004) “documented the collapse of subnivean lairs during unseasonal rains near southeastern Baffin Island and the subsequent exposure of ringed seals to hypothermia. [The researchers] surmised that most of the pups that survived exposure to cold were eventually killed by polar bears, Arctic foxes, or possibly gulls.” ER75-76. As the Final Rule explained, “[u]nseasonal warming and rains will become increasingly common as the climate warms.” ER90 (Cmt. 15). NMFS noted that the Hezel *et al.* (2012) study specifically reported a projected increase in rainfall in April and May through the end of the century. *Id.* In addition, studies show a correlation between warming events and localized declines in ringed seals. For example, the survival rate of ringed seal pups in the White Sea has decreased since 1978, a period marked by a near doubling of mild winters, shorter periods of ice cover, and lower snow accumulation. ER224(SR) (citing Lukin *et al.* (2006)). Similarly, low pup survival in Hudson Bay is correlated with shallow snow cover and warmer spring temperatures. ER225(SR). NMFS reasonably relied on this evidence to assess the species’ response to future warming events.

Even if Arctic ringed seals move north as the ice retracts northward, by 2100 April snow cover is forecasted to become inadequate for the formation and occupation of ringed seal birth lairs over most of the subspecies' range. ER76(FR); *cf.* ER223(SR) (noting that the southern extent of the ringed seals' range corresponds to the latitudes at which on-ice snow-cover—sufficient to form and maintain subnivean lairs—extends (citing McLaren (1958a))); ER224 (noting that the small size of newborn ringed seals, coupled with their prolonged nursing period, makes them vulnerable to predation by birds and that snow conditions suitable for subnivean lairs likely sets a southern limit to their distribution (citing Lydersen and Smith (1989))). By the end of the century, snow cover adequate for the formation and occupation of birth lairs is forecasted to occur in only a few isolated areas. ER76, 77, 82(FR). The best available science supports NMFS's determination that the foreseeable changes in snow cover will likely lead to decreased pup survival, substantial declines in the Arctic ringed seal population, and a failure of the seals to persist in a substantial portion of their current range. ER82. Based on this information, NMFS appropriately listed the Arctic ringed seal as a threatened species, *i.e.*, a species that is likely to become in danger of extinction in the foreseeable future throughout all or a significant portion of

its range. *Id.* Clearly if seal pups can only survive in a few remnant habitat areas by 2100, the Arctic ringed seal population will be severely reduced and the species will likely be in danger of extinction “throughout all or a significant portion of its range.” *Id.* §§ 1532(6), (20) (definitions of “endangered” and “threatened”).

The district court erred by failing to defer to NMFS’s reasonable reliance on the best scientific data available, which supported its decision with substantial evidence. A court must “defer to the agency’s finding[s] on these matters unless the record shows that the agency’s findings were not supported by substantial evidence, *i.e.*, unless the evidence in the record would *compel* a reasonable finder of fact to reach a contrary result.”

*Ursack Inc.*, 639 F.3d at 958 (emphasis in original) (internal quotation marks omitted); *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, No. 14-15836, 2016 WL 4269899, at \*9 (9th Cir. Aug. 15, 2016) (agency assumptions that were supported by substantial evidence “deserve deference”) (citing *Ursack*). Mere differences in opinion are not sufficient grounds for rejecting the analysis of agency experts, as the district court did here. *Ecology Ctr. v. Castaneda*, 574 F.3d 652, 656 (9th Cir. 2009).

Although NMFS must employ “the best scientific and commercial data available,” it is “not required to support its finding that a significant risk

exists with anything approaching scientific certainty.” *San Luis*, 747 F.3d at 592 (citation omitted). Here, substantial evidence on the impacts of climate change on snow accumulation and the seals’ need for snow depths that will be rare by 2100 support NMFS’s decision to list the Arctic ringed seal as a threatened species.

***b. NMFS reasonably relied on the BRT’s demographic risk analysis to determine that the Arctic ringed seal is likely to become in danger of extinction within the foreseeable future.***

The scientists on the BRT conducted a demographic risk analysis to determine the magnitude of the impact of sea ice and snow cover loss, and other threats, on the Arctic subspecies of ringed seal, at present and in the foreseeable future. As the BRT explained, threats to a species’ long-term persistence are manifested demographically as risks to its abundance, productivity, spatial structure and connectivity, and genetic and ecological diversity. ER298(SR); ER80(FR). Using a numerical scoring system, each BRT member judged “[t]he severity of the risk that the subspecies may be placed in danger of extinction by these demographic problems” at the present time and in the foreseeable future. ER310(SR). An average score of the BRT members’ assessments was derived for each of the four demographic risk categories. *Id.* The BRT judged the risks to the Arctic

ringed seal persistence to be moderate (diversity and abundance) to high (productivity and spatial structure). ER310(SR); ER81(FR). Based on its entire demographic risk assessment, the BRT concluded that, within the foreseeable future, the persistence of the Arctic subspecies of ringed seal “likely will be challenged as decreases in ice and, especially, snow cover lead to increased juvenile mortality from hypothermia and predation. Spatial structure likely will be disrupted by rapid loss of habitat patches, and the subspecies likely will disappear from a substantial portion of its range.” ER311(SR). NMFS concurred in the BRT’s assessment. ER94(FR) (Cmt. 29); ER82(FR) (listing determination for Arctic subspecies).

In addition to impacts of snow and sea ice loss on pup survival (discussed *supra*), NMFS and the BRT explained that diminished sea ice also will impact ringed seal basking during the molt. ER91 (Cmt. 19). Sea ice serves as the substrate for hauling out, generally from mid-May to mid-July. The BRT considered the threat to ringed seals posed by decreases in sea ice habitat suitable for molting as moderately significant to the persistence of the Arctic ringed seal. ER58(PR); ER293 (SR, Table 5). As the BRT explained, ringed seals spend approximately 60% of the time on the sea ice during the energy-demanding period when they are undergoing the annual molt of their skin and hair. ER125, 132(SR). The elevated skin

temperatures necessary for molting cannot be maintained when seals are in the water, and hauling out on land to molt (which has not been reported for healthy Arctic ringed seals) would present greater risk of predation. ER133, 308(SR). The “consequences of habitat change associated with [a] warming climate can be expected to manifest throughout the current breeding and molting ranges of ringed seals” and these “ongoing and projected changes in sea ice habitat pose significant threats to the persistence of these subspecies.” ER83(FR). NMFS agreed. ER89 (Cmt. 10).

In addition to the impacts of projected decreases in sea ice and snow accumulation on reproduction and molting, NMFS also noted that ice loss will likely impact ringed seal prey and competition for prey. Although ice loss will be greatest in the later summer and fall months when the ringed seal’s use of ice as a resting platform is at a minimum, the seals will nevertheless be affected by this loss of ice because the diminished presence of ice and warming temperatures are expected to negatively impact their prey populations. ER116(SR). For example, a contraction in the range of Arctic cod, a primary prey of ringed seals, is likely. *Id.*; ER230(SR). Changes in ocean conditions and ice cover will also lead to colonization of the Arctic Ocean by more southerly species, including potential prey,

predators, and competitors. ER77, 91 (Cmt. 18). As sea-ice specialists, ringed seals may be at a disadvantage in competing in an ice-diminished Arctic. *Id.*; *see also* ER228(SR). As the BRT explained, “[h]igh quality, abundant food is important . . . [during the] [f]all and early winter periods, prior to the occupation of breeding sites, [because access to such prey] allow[s] ringed seals to accumulate enough fat stores to support estrus and lactation.” ER130. While NMFS recognized that prey availability and competition for prey are likely to change in response to ocean warming, ocean acidification, and sea-ice loss, “the outcome of new competitive interactions cannot be specified” and the “precise extent and timing of these changes is uncertain.” ER77(FR). “[U]nlike the physical models used to predict ice and snow, there is not a broad scientific consensus on the general direction of the expected trends” in prey abundance in the Arctic Basin under diminished ice conditions. ER91 (Cmt. 18); *see also* ER88 (Cmt. 9) (reiterating that 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).

Neither Plaintiffs, nor the district court, have pointed to any credible scientific evidence undermining the assessment of the BRT or NMFS. NMFS more than adequately explained its rationale for listing the Arctic

subspecies of ringed seal. Consequently, the listing determination should be upheld. *In re Polar Bear*, 709 F.3d at 9 (“Where, as here, the foundational premises on which the agency relies are adequately explained and uncontested, scientific experts (by a wide majority) support the agency’s conclusion, and Appellants do not point to any scientific evidence that the agency failed to consider, we are bound to uphold the agency’s determination.”).

\* \* \* \* \*

NMFS’s species-specific determination here is based on the undisputedly best available science, and supported by a rational explanation for the conclusion reached. Its judgment about the effects of climate change is entitled to deference. The evidence does not compel a contrary finding. In evaluating the validity of the Listing Rule, the district court erred as a matter of law by requiring that any listing decision must be based on quantitative data that are not currently available, and might never be available. The lower court’s ruling is not only wrong but, if left in place, could continue to prevent NMFS—for some time into the future—from making a determination that the ESA authorizes and requires it to make based on the best data available. NMFS’s listing decision was a reasonable exercise of the agency’s expertise and should be upheld.

## CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed, and the agency's decision listing the Arctic ringed seal should be upheld.

Respectfully submitted,

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90-8-6-07802

## **STATEMENT OF RELATED CASES**

The Federal Appellants are aware of one related case within the meaning of Ninth Circuit Rule 28-2.6(c) pending in this Court. The case, *Alaska Oil & Gas Ass'n v. Pritzker*, 9<sup>th</sup> Cir. Nos. 14-35806 and 14-35811, raises the same or a closely related issue regarding consideration of the agency's decision not to issue an ESA Section 4(d) regulation in evaluating the listing of a species as threatened under ESA Section 4(a) and (b).

s/Katherine W. Hazard

## **CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Georgia, a proportionally spaced font. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 13,938 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii), according to the count of Microsoft Word.

s/ Katherine W. Hazard

## **CERTIFICATE OF SERVICE**

I hereby certify that on October 17, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

s/Katherine W. Hazard

# **ADDENDUM**

## **Index to Addendum**

1. ESA Section 3, 16 U.S.C. 1532: Definitions 1
2. ESA Section 4, 16 U.S.C. 1533: Determination of Endangered Species and Threatened Species
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[Chapter 35. Endangered Species \(Refs & Annos\)](#)

16 U.S.C.A. § 1532

§ 1532. Definitions

Currentness

For the purposes of this chapter--

(1) The term “alternative courses of action” means all alternatives and thus is not limited to original project objectives and agency jurisdiction.

(2) The term “commercial activity” means all activities of industry and trade, including, but not limited to, the buying or selling of commodities and activities conducted for the purpose of facilitating such buying and selling: *Provided, however,* That it does not include exhibition of commodities by museums or similar cultural or historical organizations.

(3) The terms “conserve”, “conserving”, and “conservation” mean to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking.

(4) The term “Convention” means the Convention on International Trade in Endangered Species of Wild Fauna and Flora, signed on March 3, 1973, and the appendices thereto.

(5)(A) The term “critical habitat” for a threatened or endangered species means--

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of [section 1533](#) of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of [section 1533](#) of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

(B) Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established as set forth in subparagraph (A) of this paragraph.

(C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

(6) The term “endangered species” means any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man.

(7) The term “Federal agency” means any department, agency, or instrumentality of the United States.

(8) The term “fish or wildlife” means any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory, or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof.

(9) The term “foreign commerce” includes, among other things, any transaction--

(A) between persons within one foreign country;

(B) between persons in two or more foreign countries;

(C) between a person within the United States and a person in a foreign country; or

(D) between persons within the United States, where the fish and wildlife in question are moving in any country or countries outside the United States.

(10) The term “import” means to land on, bring into, or introduce into, or attempt to land on, bring into, or introduce into, any place subject to the jurisdiction of the United States, whether or not such landing, bringing, or introduction constitutes an importation within the meaning of the customs laws of the United States.

(11) Repealed. Pub.L. 97-304, § 4(b), Oct. 13, 1982, 96 Stat. 1420.

(12) The term “permit or license applicant” means, when used with respect to an action of a Federal agency for which exemption is sought under [section 1536](#) of this title, any person whose application to such agency for a permit or license has been denied primarily because of the application of [section 1536\(a\)](#) of this title to such agency action.

(13) The term “person” means an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States.

(14) The term “plant” means any member of the plant kingdom, including seeds, roots and other parts thereof.

(15) The term “Secretary” means, except as otherwise herein provided, the Secretary of the Interior or the Secretary of Commerce as program responsibilities are vested pursuant to the provisions of Reorganization Plan Numbered 4 of 1970; except that with respect to the enforcement of the provisions of this chapter and the Convention which pertain to the importation or exportation of terrestrial plants, the term also means the Secretary of Agriculture.

(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.

(17) The term “State” means any of the several States, the District of Columbia, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, Guam, and the Trust Territory of the Pacific Islands.

(18) The term “State agency” means any State agency, department, board, commission, or other governmental entity which is responsible for the management and conservation of fish, plant, or wildlife resources within a State.

(19) The term “take” means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

(20) 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.

(21) The term “United States”, when used in a geographical context, includes all States.

**CREDIT(S)**

(Pub.L. 93-205, § 3, Dec. 28, 1973, 87 Stat. 885; Pub.L. 94-359, § 5, July 12, 1976, 90 Stat. 913; Pub.L. 95-632, § 2, Nov. 10, 1978, 92 Stat. 3751; Pub.L. 96-159, § 2, Dec. 28, 1979, 93 Stat. 1225; Pub.L. 97-304, § 4(b), Oct. 13, 1982, 96 Stat. 1420; Pub.L. 100-478, Title I, § 1001, Oct. 7, 1988, 102 Stat. 2306.)

Notes of Decisions (76)

16 U.S.C.A. § 1532, 16 USCA § 1532  
Current through P.L. 114-229.

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End of Document

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 KeyCite Yellow Flag - Negative Treatment

Unconstitutional or Preempted Limitation Recognized by *Miccosukee Tribe of Indians of Florida v. U.S. Army Corps of Engineers*, 11th Cir.(Fla.), Sep. 15, 2010

 KeyCite Yellow Flag - Negative Treatment Proposed Legislation

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[Title 16. Conservation](#)

[Chapter 35. Endangered Species \(Refs & Annos\)](#)

16 U.S.C.A. § 1533

§ 1533. Determination of endangered species and threatened species

Effective: November 24, 2003

[Currentness](#)

**(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.

(2) With respect to any species over which program responsibilities have been vested in the Secretary of Commerce pursuant to Reorganization Plan Numbered 4 of 1970--

(A) in any case in which the Secretary of Commerce determines that such species should--

(i) be listed as an endangered species or a threatened species, or

(ii) be changed in status from a threatened species to an endangered species,

he shall so inform the Secretary of the Interior, who shall list such species in accordance with this section;

(B) in any case in which the Secretary of Commerce determines that such species should--

(i) be removed from any list published pursuant to subsection (c) of this section, or

(ii) be changed in status from an endangered species to a threatened species,

he shall recommend such action to the Secretary of the Interior, and the Secretary of the Interior, if he concurs in the recommendation, shall implement such action; and

(C) the Secretary of the Interior may not list or remove from any list any such species, and may not change the status of any such species which are listed, without a prior favorable determination made pursuant to this section by the Secretary of Commerce.

(3)(A) The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable--

(i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and

(ii) may, from time-to-time thereafter as appropriate, revise such designation.

(B)(i) The Secretary shall not designate as critical habitat any lands or other geographical areas owned or controlled by the Department of Defense, or designated for its use, that are subject to an integrated natural resources management plan prepared under [section 670a](#) of this title, if the Secretary determines in writing that such plan provides a benefit to the species

for which critical habitat is proposed for designation.

(ii) Nothing in this paragraph affects the requirement to consult under [section 1536\(a\)\(2\)](#) of this title with respect to an agency action (as that term is defined in that section).

(iii) Nothing in this paragraph affects the obligation of the Department of Defense to comply with [section 1538](#) of this title, including the prohibition preventing extinction and taking of endangered species and threatened species.

**(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.

(2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a) (3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

(3)(A) To the maximum extent practicable, within 90 days after receiving the petition of an interested person under [section 553\(e\) of Title 5](#), to add a species to, or to remove a species from, either of the lists published under subsection (c) of this section, the Secretary shall make a finding as to whether the petition presents substantial scientific or commercial information indicating that the petitioned action may be warranted. If such a petition is found to present such information, the Secretary shall promptly commence a review of the status of the species concerned. The Secretary shall promptly publish each finding

made under this subparagraph in the Federal Register.

**(B)** Within 12 months after receiving a petition that is found under subparagraph (A) to present substantial information indicating that the petitioned action may be warranted, the Secretary shall make one of the following findings:

**(i)** The petitioned action is not warranted, in which case the Secretary shall promptly publish such finding in the Federal Register.

**(ii)** The petitioned action is warranted, in which case the Secretary shall promptly publish in the Federal Register a general notice and the complete text of a proposed regulation to implement such action in accordance with paragraph (5).

**(iii)** The petitioned action is warranted, but that--

**(I)** the immediate proposal and timely promulgation of a final regulation implementing the petitioned action in accordance with paragraphs (5) and (6) is precluded by pending proposals to determine whether any species is an endangered species or a threatened species, and

**(II)** expeditious progress is being made to add qualified species to either of the lists published under subsection (c) of this section and to remove from such lists species for which the protections of this chapter are no longer necessary,

in which case the Secretary shall promptly publish such finding in the Federal Register, together with a description and evaluation of the reasons and data on which the finding is based.

**(C)(i)** A petition with respect to which a finding is made under subparagraph (B)(iii) shall be treated as a petition that is resubmitted to the Secretary under subparagraph (A) on the date of such finding and that presents substantial scientific or commercial information that the petitioned action may be warranted.

**(ii)** Any negative finding described in subparagraph (A) and any finding described in subparagraph (B) (i) or (iii) shall be subject to judicial review.

**(iii)** The Secretary shall implement a system to monitor effectively the status of all species with respect to which a finding is made under subparagraph (B)(iii) and shall make prompt use of the authority under paragraph 7<sup>1</sup> to prevent a significant risk to the well being of any such species.

**(D)(i)** To the maximum extent practicable, within 90 days after receiving the petition of an interested person under [section 553\(e\) of Title 5](#), to revise a critical habitat designation, the Secretary shall make a finding as to whether the petition presents substantial scientific information indicating that the revision may be warranted. The Secretary shall promptly publish such finding in the Federal Register.

**(ii)** Within 12 months after receiving a petition that is found under clause (i) to present substantial information indicating that the requested revision may be warranted, the Secretary shall determine how he intends to proceed with the requested revision, and shall promptly publish notice of such intention in the Federal Register.

**(4)** Except as provided in paragraphs (5) and (6) of this subsection, the provisions of [section 553 of Title 5](#) (relating to rulemaking procedures), shall apply to any regulation promulgated to carry out the purposes of this chapter.

**(5)** With respect to any regulation proposed by the Secretary to implement a determination, designation, or revision referred to in subsection (a)(1) or (3) of this section, the Secretary shall--

**(A)** not less than 90 days before the effective date of the regulation--

**(i)** publish a general notice and the complete text of the proposed regulation in the Federal Register, and

**(ii)** give actual notice of the proposed regulation (including the complete text of the regulation) to the State agency in each State in which the species is believed to occur, and to each county or equivalent jurisdiction in which the species is believed to occur, and invite the comment of such agency, and each such jurisdiction, thereon;

**(B)** insofar as practical, and in cooperation with the Secretary of State, give notice of the proposed regulation to each foreign nation in which the species is believed to occur or whose citizens harvest the species on the high seas, and invite the comment of such nation thereon;

**(C)** give notice of the proposed regulation to such professional scientific organizations as he deems appropriate;

**(D)** publish a summary of the proposed regulation in a newspaper of general circulation in each area of the United States in which the species is believed to occur; and

**(E)** promptly hold one public hearing on the proposed regulation if any person files a request for such a hearing within 45 days after the date of publication of general notice.

**(6)(A)** Within the one-year period beginning on the date on which general notice is published in accordance with paragraph (5)(A)(i) regarding a proposed regulation, the Secretary shall publish in the Federal Register--

**(i)** if a determination as to whether a species is an endangered species or a threatened species, or a revision of critical habitat, is involved, either--

**(I)** a final regulation to implement such determination,

**(II)** a final regulation to implement such revision or a finding that such revision should not be made,

**(III)** notice that such one-year period is being extended under subparagraph (B) (i), or

**(IV)** notice that the proposed regulation is being withdrawn under subparagraph (B) (ii), together with the finding on which such withdrawal is based; or

**(ii)** subject to subparagraph (C), if a designation of critical habitat is involved, either--

**(I)** a final regulation to implement such designation, or

**(II)** notice that such one-year period is being extended under such subparagraph.

**(B)(i)** If the Secretary finds with respect to a proposed regulation referred to in subparagraph (A)(i) that there is substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination or revision concerned, the Secretary may extend the one-year period specified in subparagraph (A) for not more than six months for purposes of soliciting additional data.

**(ii)** If a proposed regulation referred to in subparagraph (A)(i) is not promulgated as a final regulation within such one-year period (or longer period if extension under clause (i) applies) because the Secretary finds that there is not sufficient evidence to justify the action proposed by the regulation, the Secretary shall immediately withdraw the regulation. The finding on which a withdrawal is based shall be subject to judicial review. The Secretary may not propose a regulation that has previously been withdrawn under this clause unless he determines that sufficient new information is available to warrant such proposal.

(iii) If the one-year period specified in subparagraph (A) is extended under clause (i) with respect to a proposed regulation, then before the close of such extended period the Secretary shall publish in the Federal Register either a final regulation to implement the determination or revision concerned, a finding that the revision should not be made, or a notice of withdrawal of the regulation under clause (ii), together with the finding on which the withdrawal is based.

(C) A final regulation designating critical habitat of an endangered species or a threatened species shall be published concurrently with the final regulation implementing the determination that such species is endangered or threatened, unless the Secretary deems that--

(i) it is essential to the conservation of such species that the regulation implementing such determination be promptly published; or

(ii) critical habitat of such species is not then determinable, in which case the Secretary, with respect to the proposed regulation to designate such habitat, may extend the one-year period specified in subparagraph (A) by not more than one additional year, but not later than the close of such additional year the Secretary must publish a final regulation, based on such data as may be available at that time, designating, to the maximum extent prudent, such habitat.

(7) Neither paragraph (4), (5), or (6) of this subsection nor [section 553 of Title 5](#) shall apply to any regulation issued by the Secretary in regard to any emergency posing a significant risk to the well-being of any species of fish or wildlife or plants, but only if--

(A) at the time of publication of the regulation in the Federal Register the Secretary publishes therein detailed reasons why such regulation is necessary; and

(B) in the case such regulation applies to resident species of fish or wildlife, or plants, the Secretary gives actual notice of such regulation to the State agency in each State in which such species is believed to occur.

Such regulation shall, at the discretion of the Secretary, take effect immediately upon the publication of the regulation in the Federal Register. Any regulation promulgated under the authority of this paragraph shall cease to have force and effect at the close of the 240-day period following the date of publication unless, during such 240-day period, the rulemaking procedures which would apply to such regulation without regard to this paragraph are complied with. If at any time after issuing an emergency regulation the Secretary determines, on the basis of the best appropriate data available to him, that substantial evidence does not exist to warrant such regulation, he shall withdraw it.

(8) The publication in the Federal Register of any proposed or final regulation which is necessary or appropriate to carry out the purposes of this chapter shall include a summary by the Secretary of the data on which such regulation is based and shall show the relationship of such data to such regulation; and if such regulation designates or revises critical habitat, such summary shall, to the maximum extent practicable, also include a brief description and evaluation of those activities (whether public or private) which, in the opinion of the Secretary, if undertaken may adversely modify such habitat, or may be affected by such designation.

**(c) Lists**

(1) The Secretary of the Interior shall publish in the Federal Register a list of all species determined by him or the Secretary of Commerce to be endangered species and a list of all species determined by him or the Secretary of Commerce to be threatened species. Each list shall refer to the species contained therein by scientific and common name or names, if any, specify with respect to each such species over what portion of its range it is endangered or threatened, and specify any critical habitat within such range. The Secretary shall from time to time revise each list published under the authority of this subsection to reflect recent determinations, designations, and revisions made in accordance with subsections (a) and (b) of this section.

(2) The Secretary shall--

(A) conduct, at least once every five years, a review of all species included in a list which is published pursuant to paragraph (1) and which is in effect at the time of such review; and

(B) determine on the basis of such review whether any such species should--

(i) be removed from such list;

(ii) be changed in status from an endangered species to a threatened species; or

(iii) be changed in status from a threatened species to an endangered species.

Each determination under subparagraph (B) shall be made in accordance with the provisions of subsections (a) and (b) of this section.

**(d) Protective regulations**

Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under [section 1538\(a\)\(1\)](#) of this title, in the case of fish or wildlife, or [section 1538\(a\)\(2\)](#) of this title, in the case of plants, with respect to endangered species; except that with respect to the taking of resident species of fish or wildlife, such regulations shall apply in any State which has entered into a cooperative agreement pursuant to [section 1535\(c\)](#) of this title only to the extent that such regulations have also been adopted by such State.

**(e) Similarity of appearance cases**

The Secretary may, by regulation of commerce or taking, and to the extent he deems advisable, treat any species as an endangered species or threatened species even though it is not listed pursuant to this section if he finds that--

(A) such species so closely resembles in appearance, at the point in question, a species which has been listed pursuant to such section that enforcement personnel would have substantial difficulty in attempting to differentiate between the listed and unlisted species;

(B) the effect of this substantial difficulty is an additional threat to an endangered or threatened species; and

(C) such treatment of an unlisted species will substantially facilitate the enforcement and further the policy of this chapter.

**(f) Recovery plans**

(1) The Secretary shall develop and implement plans (hereinafter in this subsection referred to as "recovery plans") for the conservation and survival of endangered species and threatened species listed pursuant to this section, unless he finds that such a plan will not promote the conservation of the species. The Secretary, in developing and implementing recovery plans, shall, to the maximum extent practicable--

(A) give priority to those endangered species or threatened species, without regard to taxonomic classification, that are most likely to benefit from such plans, particularly those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity;

(B) incorporate in each plan--

(i) a description of such site-specific management actions as may be necessary to achieve the plan's goal for the conservation and survival of the species;

(ii) objective, measurable criteria which, when met, would result in a determination, in accordance with the provisions of this section, that the species be removed from the list; and

(iii) estimates of the time required and the cost to carry out those measures needed to achieve the plan's goal and to achieve intermediate steps toward that goal.

(2) The Secretary, in developing and implementing recovery plans, may procure the services of appropriate public and private agencies and institutions, and other qualified persons. Recovery teams appointed pursuant to this subsection shall not be subject to the Federal Advisory Committee Act.

(3) The Secretary shall report every two years to the Committee on Environment and Public Works of the Senate and the Committee on Merchant Marine and Fisheries of the House of Representatives on the status of efforts to develop and implement recovery plans for all species listed pursuant to this section and on the status of all species for which such plans have been developed.

(4) The Secretary shall, prior to final approval of a new or revised recovery plan, provide public notice and an opportunity for public review and comment on such plan. The Secretary shall consider all information presented during the public comment period prior to approval of the plan.

(5) Each Federal agency shall, prior to implementation of a new or revised recovery plan, consider all information presented during the public comment period under paragraph (4).

**(g) Monitoring**

(1) The Secretary shall implement a system in cooperation with the States to monitor effectively for not less than five years the status of all species which have recovered to the point at which the measures provided pursuant to this chapter are no longer necessary and which, in accordance with the provisions of this section, have been removed from either of the lists published under subsection (c) of this section.

(2) The Secretary shall make prompt use of the authority under paragraph 7<sup>1</sup> of subsection (b) of this section to prevent a significant risk to the well being of any such recovered species.

**(h) Agency guidelines; publication in Federal Register; scope; proposals and amendments: notice and opportunity for comments**

The Secretary shall establish, and publish in the Federal Register, agency guidelines to insure that the purposes of this section are achieved efficiently and effectively. Such guidelines shall include, but are not limited to--

(1) procedures for recording the receipt and the disposition of petitions submitted under subsection (b)(3) of this section;

- (2) criteria for making the findings required under such subsection with respect to petitions;
- (3) a ranking system to assist in the identification of species that should receive priority review under subsection (a)(1) of this section; and
- (4) a system for developing and implementing, on a priority basis, recovery plans under subsection (f) of this section.

The Secretary shall provide to the public notice of, and opportunity to submit written comments on, any guideline (including any amendment thereto) proposed to be established under this subsection.

**(i) Submission to State agency of justification for regulations inconsistent with State agency's comments or petition**

If, in the case of any regulation proposed by the Secretary under the authority of this section, a State agency to which notice thereof was given in accordance with subsection (b)(5)(A)(ii) of this section 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, or if the Secretary fails to adopt a regulation pursuant to an action petitioned by a State agency under subsection (b)(3) of this section, the Secretary shall submit to the State agency a written justification for his failure to adopt regulations consistent with the agency's comments or petition.

**CREDIT(S)**

(Pub.L. 93-205, § 4, Dec. 28, 1973, 87 Stat. 886; Pub.L. 94-359, § 1, July 12, 1976, 90 Stat. 911; Pub.L. 95-632, §§ 11, 13, Nov. 10, 1978, 92 Stat. 3764, 3766; Pub.L. 96-159, § 3, Dec. 28, 1979, 93 Stat. 1225; Pub.L. 97-304, § 2(a), Oct. 13, 1982, 96 Stat. 1411; Pub.L. 100-478, Title I, §§ 1002 to 1004, Oct. 7, 1988, 102 Stat. 2306; Pub.L. 108-136, Div. A, Title III, § 318, Nov. 24, 2003, 117 Stat. 1433.)

Notes of Decisions (358)

Footnotes

<sup>1</sup>

So in original. Probably should be "paragraph (7)".

16 U.S.C.A. § 1533, 16 USCA § 1533  
Current through P.L. 114-229.



KeyCite Yellow Flag - Negative Treatment

Proposed Legislation

United States Code Annotated

Title 16. Conservation

Chapter 35. Endangered Species (Refs & Annos)

16 U.S.C.A. § 1536

§ 1536. Interagency cooperation

Currentness

**(a) Federal agency actions and consultations**

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to [section 1533](#) of this title.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an “agency action”) is not 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 which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed under [section 1533](#) of this title or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d) of this section.

**(b) Opinion of Secretary**

**(1)(A)** Consultation under subsection (a) (2) of this section with respect to any agency action shall be concluded within the 90-day period beginning on the date on which initiated or, subject to subparagraph (B), within such other period of time as is mutually agreeable to the Secretary and the Federal agency.

**(B)** In the case of an agency action involving a permit or license applicant, the Secretary and the Federal agency may not mutually agree to conclude consultation within a period exceeding 90 days unless the Secretary, before the close of the 90th day referred to in subparagraph (A)--

**(i)** if the consultation period proposed to be agreed to will end before the 150th day after the date on which consultation was initiated, submits to the applicant a written statement setting forth--

**(I)** the reasons why a longer period is required,

**(II)** the information that is required to complete the consultation, and

**(III)** the estimated date on which consultation will be completed; or

**(ii)** if the consultation period proposed to be agreed to will end 150 or more days after the date on which consultation was initiated, obtains the consent of the applicant to such period.

The Secretary and the Federal agency may mutually agree to extend a consultation period established under the preceding sentence if the Secretary, before the close of such period, obtains the consent of the applicant to the extension.

**(2)** Consultation under subsection (a) (3) of this section shall be concluded within such period as is agreeable to the Secretary, the Federal agency, and the applicant concerned.

**(3)(A)** Promptly after conclusion of consultation under paragraph (2) or (3) of subsection (a) of this section, the Secretary shall provide to the Federal agency and the applicant, if any, a written statement setting forth the Secretary's opinion, and a summary of the information on which the opinion is based, detailing how the agency action affects the species or its critical habitat. If jeopardy or adverse modification is found, the Secretary shall suggest those reasonable and prudent alternatives which he believes would not violate subsection (a) (2) of this section and can be taken by the Federal agency or applicant in implementing the agency action.

**(B)** Consultation under subsection (a) (3) of this section, and an opinion issued by the Secretary incident to such consultation, regarding an agency action shall be treated respectively as a consultation under subsection (a) (2) of this section, and as an opinion issued after consultation under such subsection, regarding that action if the Secretary reviews the action before it is commenced by the Federal agency and finds, and notifies such agency, that no significant changes have been made with respect to the action and that no significant change has occurred regarding the information used during the initial consultation.

**(4)** If after consultation under subsection (a)(2) of this section, the Secretary concludes that--

**(A)** the agency action will not violate such subsection, or offers reasonable and prudent alternatives which the Secretary believes would not violate such subsection;

**(B)** the taking of an endangered species or a threatened species incidental to the agency action will not violate such subsection; and

**(C)** if an endangered species or threatened species of a marine mammal is involved, the taking is authorized pursuant to [section 1371\(a\)\(5\)](#) of this title;

the Secretary shall provide the Federal agency and the applicant concerned, if any, with a written statement that--

**(i)** specifies the impact of such incidental taking on the species,

**(ii)** specifies those reasonable and prudent measures that the Secretary considers necessary or appropriate to minimize such impact,

**(iii)** in the case of marine mammals, specifies those measures that are necessary to comply with [section 1371\(a\)\(5\)](#) of this title with regard to such taking, and

**(iv)** sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or applicant (if any), or both, to implement the measures specified under clauses (ii) and (iii).

**(c) Biological assessment**

**(1)** To facilitate compliance with the requirements of subsection (a) (2) of this section, each Federal agency shall, with respect to any agency action of such agency for which no contract for construction has been entered into and for which no

construction has begun on November 10, 1978, request of the Secretary information whether any species which is listed or proposed to be listed may be present in the area of such proposed action. If the Secretary advises, based on the best scientific and commercial data available, that such species may be present, such agency shall conduct a biological assessment for the purpose of identifying any endangered species or threatened species which is likely to be affected by such action. Such assessment shall be completed within 180 days after the date on which initiated (or within such other period as is mutually agreed to by the Secretary and such agency, except that if a permit or license applicant is involved, the 180-day period may not be extended unless such agency provides the applicant, before the close of such period, with a written statement setting forth the estimated length of the proposed extension and the reasons therefor) and, before any contract for construction is entered into and before construction is begun with respect to such action. Such assessment may be undertaken as part of a Federal agency's compliance with the requirements of section 102 of the National Environmental Policy Act of 1969 (42 U.S.C. 4332).

(2) Any person who may wish to apply for an exemption under subsection (g) of this section for that action may conduct a biological assessment to identify any endangered species or threatened species which is likely to be affected by such action. Any such biological assessment must, however, be conducted in cooperation with the Secretary and under the supervision of the appropriate Federal agency.

**(d) Limitation on commitment of resources**

After initiation of consultation required under subsection (a) (2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a) (2) of this section.

**(e) Endangered Species Committee**

(1) There is established a committee to be known as the Endangered Species Committee (hereinafter in this section referred to as the "Committee").

(2) The Committee shall review any application submitted to it pursuant to this section and determine in accordance with subsection (h) of this section whether or not to grant an exemption from the requirements of subsection (a) (2) of this section for the action set forth in such application.

(3) The Committee shall be composed of seven members as follows:

(A) The Secretary of Agriculture.

(B) The Secretary of the Army.

(C) The Chairman of the Council of Economic Advisors.

(D) The Administrator of the Environmental Protection Agency.

(E) The Secretary of the Interior.

(F) The Administrator of the National Oceanic and Atmospheric Administration.

(G) The President, after consideration of any recommendations received pursuant to subsection (g) (2) (B) of this section shall appoint one individual from each affected State, as determined by the Secretary, to be a member of the Committee for the consideration of the application for exemption for an agency action with respect to which such recommendations are made, not later than 30 days after an application is submitted pursuant to this section.

(4)(A) Members of the Committee shall receive no additional pay on account of their service on the Committee.

(B) While away from their homes or regular places of business in the performance of services for the Committee, members of the Committee shall be allowed travel expenses, including per diem in lieu of subsistence, in the same manner as persons employed intermittently in the Government service are allowed expenses under [section 5703 of Title 5](#).

(5)(A) Five members of the Committee or their representatives shall constitute a quorum for the transaction of any function of the Committee, except that, in no case shall any representative be considered in determining the existence of a quorum for the transaction of any function of the Committee if that function involves a vote by the Committee on any matter before the Committee.

(B) The Secretary of the Interior shall be the Chairman of the Committee.

(C) The Committee shall meet at the call of the Chairman or five of its members.

(D) All meetings and records of the Committee shall be open to the public.

(6) Upon request of the Committee, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Committee to assist it in carrying out its duties under this section.

(7)(A) The Committee may for the purpose of carrying out its duties under this section hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence, as the Committee deems advisable.

(B) When so authorized by the Committee, any member or agent of the Committee may take any action which the Committee is authorized to take by this paragraph.

(C) Subject to the Privacy Act [5 U.S.C.A. § 552a], the Committee may secure directly from any Federal agency information necessary to enable it to carry out its duties under this section. Upon request of the Chairman of the Committee, the head of such Federal agency shall furnish such information to the Committee.

(D) The Committee may use the United States mails in the same manner and upon the same conditions as a Federal agency.

(E) The Administrator of General Services shall provide to the Committee on a reimbursable basis such administrative support services as the Committee may request.

(8) In carrying out its duties under this section, the Committee may promulgate and amend such rules, regulations, and procedures, and issue and amend such orders as it deems necessary.

(9) For the purpose of obtaining information necessary for the consideration of an application for an exemption under this section the Committee may issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents.

(10) In no case shall any representative, including a representative of a member designated pursuant to paragraph (3) (G) of this subsection, be eligible to cast a vote on behalf of any member.

**(f) Promulgation of regulations; form and contents of exemption application**

Not later than 90 days after November 10, 1978, the Secretary shall promulgate regulations which set forth the form and manner in which applications for exemption shall be submitted to the Secretary and the information to be contained in such applications. Such regulations shall require that information submitted in an application by the head of any Federal agency with respect to any agency action include, but not be limited to--

(1) a description of the consultation process carried out pursuant to subsection (a) (2) of this section between the head of the Federal agency and the Secretary; and

(2) a statement describing why such action cannot be altered or modified to conform with the requirements of subsection (a) (2) of this section.

**(g) Application for exemption; report to Committee**

(1) A Federal agency, the Governor of the State in which an agency action will occur, if any, or a permit or license applicant may apply to the Secretary for an exemption for an agency action of such agency if, after consultation under subsection (a) (2) of this section, the Secretary's opinion under subsection (b) of this section indicates that the agency action would violate subsection (a) (2) of this section. An application for an exemption shall be considered initially by the Secretary in the manner provided for in this subsection, and shall be considered by the Committee for a final determination under subsection (h) of this section after a report is made pursuant to paragraph (5). The applicant for an exemption shall be referred to as the "exemption applicant" in this section.

(2)(A) An exemption applicant shall submit a written application to the Secretary, in a form prescribed under subsection (f) of this section, not later than 90 days after the completion of the consultation process; except that, in the case of any agency action involving a permit or license applicant, such application shall be submitted not later than 90 days after the date on which the Federal agency concerned takes final agency action with respect to the issuance of the permit or license. For purposes of the preceding sentence, the term "final agency action" means (i) a disposition by an agency with respect to the issuance of a permit or license that is subject to administrative review, whether or not such disposition is subject to judicial review; or (ii) if administrative review is sought with respect to such disposition, the decision resulting after such review. Such application shall set forth the reasons why the exemption applicant considers that the agency action meets the requirements for an exemption under this subsection.

(B) Upon receipt of an application for exemption for an agency action under paragraph (1), the Secretary shall promptly (i) notify the Governor of each affected State, if any, as determined by the Secretary, and request the Governors so notified to recommend individuals to be appointed to the Endangered Species Committee for consideration of such application; and (ii) publish notice of receipt of the application in the Federal Register, including a summary of the information contained in the application and a description of the agency action with respect to which the application for exemption has been filed.

(3) The Secretary shall within 20 days after the receipt of an application for exemption, or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary--

(A) determine that the Federal agency concerned and the exemption applicant have--

(i) carried out the consultation responsibilities described in subsection (a) of this section in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to

the proposed agency action which would not violate subsection (a) (2) of this section;

(ii) conducted any biological assessment required by subsection (c) of this section; and

(iii) to the extent determinable within the time provided herein, refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section; or

(B) deny the application for exemption because the Federal agency concerned or the exemption applicant have not met the requirements set forth in subparagraph (A) (i), (ii), and (iii).

The denial of an application under subparagraph (B) shall be considered final agency action for purposes of chapter 7 of Title 5.

(4) If the Secretary determines that the Federal agency concerned and the exemption applicant have met the requirements set forth in paragraph (3) (A) (i), (ii), and (iii) he shall, in consultation with the Members of the Committee, hold a hearing on the application for exemption in accordance with [sections 554, 555, and 556](#) (other than subsection (b) (1) and (2) thereof) of Title 5 and prepare the report to be submitted pursuant to paragraph (5).

(5) Within 140 days after making the determinations under paragraph (3) or within such other period of time as is mutually agreeable to the exemption applicant and the Secretary, the Secretary shall submit to the Committee a report discussing--

(A) the availability of reasonable and prudent alternatives to the agency action, and the nature and extent of the benefits of the agency action and of alternative courses of action consistent with conserving the species or the critical habitat;

(B) a summary of the evidence concerning whether or not the agency action is in the public interest and is of national or regional significance;

(C) appropriate reasonable mitigation and enhancement measures which should be considered by the Committee; and

(D) whether the Federal agency concerned and the exemption applicant refrained from making any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section.

(6) To the extent practicable within the time required for action under subsection (g) of this section, and except to the extent inconsistent with the requirements of this section, the consideration of any application for an exemption under this section and the conduct of any hearing under this subsection shall be in accordance with [sections 554, 555, and 556](#) (other than

subsection (b) (3) of section 556) of Title 5.

(7) Upon request of the Secretary, the head of any Federal agency is authorized to detail, on a nonreimbursable basis, any of the personnel of such agency to the Secretary to assist him in carrying out his duties under this section.

(8) All meetings and records resulting from activities pursuant to this subsection shall be open to the public.

**(h) Grant of exemption**

(1) The Committee shall make a final determination whether or not to grant an exemption within 30 days after receiving the report of the Secretary pursuant to subsection (g) (5) of this section. The Committee shall grant an exemption from the requirements of subsection (a) (2) of this section for an agency action if, by a vote of not less than five of its members voting in person--

(A) it determines on the record, based on the report of the Secretary, the record of the hearing held under subsection (g) (4) of this section and on such other testimony or evidence as it may receive, that--

(i) there are no reasonable and prudent alternatives to the agency action;

(ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;

(iii) the action is of regional or national significance; and

(iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section; and

(B) it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.

Any final determination by the Committee under this subsection shall be considered final agency action for purposes of chapter 7 of Title 5.

(2)(A) Except as provided in subparagraph (B), an exemption for an agency action granted under paragraph (1) shall constitute a permanent exemption with respect to all endangered or threatened species for the purposes of completing such agency action--

(i) regardless whether the species was identified in the biological assessment; and

(ii) only if a biological assessment has been conducted under subsection (c) of this section with respect to such agency action.

(B) An exemption shall be permanent under subparagraph (A) unless--

(i) the Secretary finds, based on the best scientific and commercial data available, that such exemption would result in the extinction of a species that was not the subject of consultation under subsection (a) (2) of this section or was not identified in any biological assessment conducted under subsection (c) of this section, and

(ii) the Committee determines within 60 days after the date of the Secretary's finding that the exemption should not be permanent.

If the Secretary makes a finding described in clause (i), the Committee shall meet with respect to the matter within 30 days after the date of the finding.

**(i) Review by Secretary of State; violation of international treaty or other international obligation of United States**

Notwithstanding any other provision of this chapter, the Committee shall be prohibited from considering for exemption any application made to it, if the Secretary of State, after a review of the proposed agency action and its potential implications, and after hearing, certifies, in writing, to the Committee within 60 days of any application made under this section that the granting of any such exemption and the carrying out of such action would be in violation of an international treaty obligation or other international obligation of the United States. The Secretary of State shall, at the time of such certification, publish a copy thereof in the Federal Register.

**(j) Exemption for national security reasons**

Notwithstanding any other provision of this chapter, the Committee shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security.

**(k) Exemption decision not considered major Federal action; environmental impact statement**

An exemption decision by the Committee under this section shall not be a major Federal action for purposes of the National Environmental Policy Act of 1969 [42 U.S.C.A. § 4321 et seq.]: *Provided*, That an environmental impact statement which discusses the impacts upon endangered species or threatened species or their critical habitats shall have been previously prepared with respect to any agency action exempted by such order.

**(l) Committee order granting exemption; cost of mitigation and enhancement measures; report by applicant to Council on Environmental Quality**

(1) If the Committee determines under subsection (h) of this section that an exemption should be granted with respect to any agency action, the Committee shall issue an order granting the exemption and specifying the mitigation and enhancement measures established pursuant to subsection (h) of this section which shall be carried out and paid for by the exemption applicant in implementing the agency action. All necessary mitigation and enhancement measures shall be authorized prior to the implementing of the agency action and funded concurrently with all other project features.

(2) The applicant receiving such exemption shall include the costs of such mitigation and enhancement measures within the overall costs of continuing the proposed action. Notwithstanding the preceding sentence the costs of such measures shall not be treated as project costs for the purpose of computing benefit-cost or other ratios for the proposed action. Any applicant may request the Secretary to carry out such mitigation and enhancement measures. The costs incurred by the Secretary in carrying out any such measures shall be paid by the applicant receiving the exemption. No later than one year after the granting of an exemption, the exemption applicant shall submit to the Council on Environmental Quality a report describing its compliance with the mitigation and enhancement measures prescribed by this section. Such a report shall be submitted annually until all such mitigation and enhancement measures have been completed. Notice of the public availability of such reports shall be published in the Federal Register by the Council on Environmental Quality.

**(m) Notice requirement for citizen suits not applicable**

The 60-day notice requirement of [section 1540\(g\)](#) of this title shall not apply with respect to review of any final determination of the Committee under subsection (h) of this section granting an exemption from the requirements of subsection (a) (2) of this section.

**(n) Judicial review**

Any person, as defined by [section 1532\(13\)](#) of this title, may obtain judicial review, under chapter 7 of Title 5, of any decision of the Endangered Species Committee under subsection (h) of this section in the United States Court of Appeals for (1) any circuit wherein the agency action concerned will be, or is being, carried out, or (2) in any case in which the agency action will be, or is being, carried out outside of any circuit, the District of Columbia, by filing in such court within 90 days after the date of issuance of the decision, a written petition for review. A copy of such petition shall be transmitted by the clerk of the court to the Committee and the Committee shall file in the court the record in the proceeding, as provided in [section 2112 of Title 28](#). Attorneys designated by the Endangered Species Committee may appear for, and represent the Committee in any action for review under this subsection.

**(o) Exemption as providing exception on taking of endangered species**

Notwithstanding sections 1533(d) and 1538(a)(1)(B) and (C) of this title, sections 1371 and 1372 of this title, or any regulation promulgated to implement any such section--

(1) any action for which an exemption is granted under subsection (h) of this section shall not be considered to be a taking of any endangered species or threatened species with respect to any activity which is necessary to carry out such action; and

(2) any taking that is in compliance with the terms and conditions specified in a written statement provided under subsection (b)(4)(iv) of this section shall not be considered to be a prohibited taking of the species concerned.

**(p) Exemptions in Presidentially declared disaster areas**

In any area which has been declared by the President to be a major disaster area under the Disaster Relief and Emergency Assistance Act [42 U.S.C.A. § 5121 et seq.], the President is authorized to make the determinations required by subsections (g) and (h) of this section for any project for the repair or replacement of a public facility substantially as it existed prior to the disaster under section 405 or 406 of the Disaster Relief and Emergency Assistance Act [42 U.S.C.A. §§ 5171 or 5172], and which the President determines (1) is necessary to prevent the recurrence of such a natural disaster and to reduce the potential loss of human life, and (2) to involve an emergency situation which does not allow the ordinary procedures of this section to be followed. Notwithstanding any other provision of this section, the Committee shall accept the determinations of the President under this subsection.

**CREDIT(S)**

(Pub.L. 93-205, § 7, Dec. 28, 1973, 87 Stat. 892; Pub.L. 95-632, § 3, Nov. 10, 1978, 92 Stat. 3752; Pub.L. 96-159, § 4, Dec. 28, 1979, 93 Stat. 1226; Pub.L. 97-304, §§ 4(a), 8(b), Oct. 13, 1982, 96 Stat. 1417, 1426; Pub.L. 99-659, Title IV, § 411(b), (c), Nov. 14, 1986, 100 Stat. 3742; Pub.L. 100-707, Title I, § 109(g), Nov. 23, 1988, 102 Stat. 4709.)

Notes of Decisions (658)

16 U.S.C.A. § 1536, 16 USCA § 1536  
Current through P.L. 114-229.

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 KeyCite Yellow Flag - Negative Treatment

Unconstitutional or Preempted Limitation Recognized by *Miccosukee Tribe of Indians of Florida v. U.S. Army Corps of Engineers*, 11th Cir.(Fla.), Sep. 15, 2010

 KeyCite Yellow Flag - Negative Treatment Proposed Legislation

[United States Code Annotated](#)

[Title 16. Conservation](#)

[Chapter 35. Endangered Species \(Refs & Annos\)](#)

16 U.S.C.A. § 1538

§ 1538. Prohibited acts

Currentness

**(a) Generally**

(1) Except as provided in [sections 1535\(g\)\(2\)](#) and [1539](#) of this title, with respect to any endangered species of fish or wildlife listed pursuant to [section 1533](#) of this title it is unlawful for any person subject to the jurisdiction of the United States to--

(A) import any such species into, or export any such species from the United States;

(B) take any such species within the United States or the territorial sea of the United States;

(C) take any such species upon the high seas;

(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(F) sell or offer for sale in interstate or foreign commerce any such species; or

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to [section 1533](#) of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

(2) Except as provided in [sections 1535\(g\)\(2\)](#) and [1539](#) of this title, with respect to any endangered species of plants listed pursuant to [section 1533](#) of this title, it is unlawful for any person subject to the jurisdiction of the United States to--

(A) import any such species into, or export any such species from, the United States;

(B) remove and reduce to possession any such species from areas under Federal jurisdiction; maliciously damage or destroy any such species on any such area; or remove, cut, dig up, or damage or destroy any such species on any other area in knowing violation of any law or regulation of any State or in the course of any violation of a State criminal trespass law;

(C) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(D) sell or offer for sale in interstate or foreign commerce any such species; or

(E) violate any regulation pertaining to such species or to any threatened species of plants listed pursuant to [section 1533](#) of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

**(b) Species held in captivity or controlled environment**

(1) The provisions of subsections (a)(1)(A) and (a)(1)(G) of this section shall not apply to any fish or wildlife which was held in captivity or in a controlled environment on (A) December 28, 1973, or (B) the date of the publication in the Federal Register of a final regulation adding such fish or wildlife species to any list published pursuant to [subsection \(c\) of section 1533](#) of this title: *Provided*, That such holding and any subsequent holding or use of the fish or wildlife was not in the course of a commercial activity. With respect to any act prohibited by subsections (a)(1)(A) and (a)(1)(G) of this section which occurs after a period of 180 days from (i) December 28, 1973, or (ii) the date of publication in the Federal Register of a final regulation adding such fish or wildlife species to any list published pursuant to [subsection \(c\) of section 1533](#) of this title, there shall be a rebuttable presumption that the fish or wildlife involved in such act is not entitled to the exemption contained in this subsection.

(2)(A) The provisions of subsection (a) (1) of this section shall not apply to--

(i) any raptor legally held in captivity or in a controlled environment on November 10, 1978; or

(ii) any progeny of any raptor described in clause (i);

until such time as any such raptor or progeny is intentionally returned to a wild state.

(B) Any person holding any raptor or progeny described in subparagraph (A) must be able to demonstrate that the raptor or progeny does, in fact, qualify under the provisions of this paragraph, and shall maintain and submit to the Secretary, on request, such inventories, documentation, and records as the Secretary may by regulation require as being reasonably appropriate to carry out the purposes of this paragraph. Such requirements shall not unnecessarily duplicate the requirements of other rules and regulations promulgated by the Secretary.

**(c) Violation of Convention**

(1) It is unlawful for any person subject to the jurisdiction of the United States to engage in any trade in any specimens contrary to the provisions of the Convention, or to possess any specimens traded contrary to the provisions of the Convention, including the definitions of terms in article I thereof.

(2) Any importation into the United States of fish or wildlife shall, if--

(A) such fish or wildlife is not an endangered species listed pursuant to [section 1533](#) of this title but is listed in Appendix II to the Convention,

(B) the taking and exportation of such fish or wildlife is not contrary to the provisions of the Convention and all other applicable requirements of the Convention have been satisfied,

(C) the applicable requirements of subsections (d), (e), and (f) of this section have been satisfied, and

(D) such importation is not made in the course of a commercial activity,

be presumed to be an importation not in violation of any provision of this chapter or any regulation issued pursuant to this chapter.

**(d) Imports and exports**

**(1) In general**

It is unlawful for any person, without first having obtained permission from the Secretary, to engage in business--

(A) as an importer or exporter of fish or wildlife (other than shellfish and fishery products which (i) are not listed pursuant to [section 1533](#) of this title as endangered species or threatened species, and (ii) are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes) or plants; or

(B) as an importer or exporter of any amount of raw or worked African elephant ivory.

**(2) Requirements**

Any person required to obtain permission under paragraph (1) of this subsection shall--

(A) keep such records as will fully and correctly disclose each importation or exportation of fish, wildlife, plants, or African elephant ivory made by him and the subsequent disposition made by him with respect to such fish, wildlife, plants, or ivory;

(B) at all reasonable times upon notice by a duly authorized representative of the Secretary, afford such representative access to his place of business, an opportunity to examine his inventory of imported fish, wildlife, plants, or African elephant ivory and the records required to be kept under subparagraph (A) of this paragraph, and to copy such records; and

(C) file such reports as the Secretary may require.

**(3) Regulations**

The Secretary shall prescribe such regulations as are necessary and appropriate to carry out the purposes of this subsection.

**(4) Restriction on consideration of value or amount of African elephant ivory imported or exported**

In granting permission under this subsection for importation or exportation of African elephant ivory, the Secretary shall not vary the requirements for obtaining such permission on the basis of the value or amount of ivory imported or exported

under such permission.

**(e) Reports**

It is unlawful for any person importing or exporting fish or wildlife (other than shellfish and fishery products which (1) are not listed pursuant to [section 1533](#) of this title as endangered or threatened species, and (2) are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes) or plants to fail to file any declaration or report as the Secretary deems necessary to facilitate enforcement of this chapter or to meet the obligations of the Convention.

**(f) Designation of ports**

(1) It is unlawful for any person subject to the jurisdiction of the United States to import into or export from the United States any fish or wildlife (other than shellfish and fishery products which (A) are not listed pursuant to [section 1533](#) of this title as endangered species or threatened species, and (B) are imported for purposes of human or animal consumption or taken in waters under the jurisdiction of the United States or on the high seas for recreational purposes) or plants, except at a port or ports designated by the Secretary of the Interior. For the purpose of facilitating enforcement of this chapter and reducing the costs thereof, the Secretary of the Interior, with approval of the Secretary of the Treasury and after notice and opportunity for public hearing, may, by regulation, designate ports and change such designations. The Secretary of the Interior, under such terms and conditions as he may prescribe, may permit the importation or exportation at nondesignated ports in the interest of the health or safety of the fish or wildlife or plants, or for other reasons if, in his discretion, he deems it appropriate and consistent with the purpose of this subsection.

(2) Any port designated by the Secretary of the Interior under the authority of [section 668cc-4\(d\)](#) of this title, shall, if such designation is in effect on December 27, 1973, be deemed to be a port designated by the Secretary under paragraph (1) of this subsection until such time as the Secretary otherwise provides.

**(g) Violations**

It is unlawful for any person subject to the jurisdiction of the United States to attempt to commit, solicit another to commit, or cause to be committed, any offense defined in this section.

**CREDIT(S)**

([Pub.L. 93-205](#), § 9, Dec. 28, 1973, 87 Stat. 893; [Pub.L. 95-632](#), § 4, Nov. 10, 1978, 92 Stat. 3760; [Pub.L. 97-304](#), § 9(b), Oct. 13, 1982, 96 Stat. 1426; [Pub.L. 100-478](#), [Title I](#), § 1006, [Title II](#), § 2301, Oct. 7, 1988, 102 Stat. 2308, 2321; [Pub.L. 100-653](#), [Title IX](#), § 905, Nov. 14, 1988, 102 Stat. 3835.)

[Notes of Decisions \(167\)](#)

**§ 1538. Prohibited acts, 16 USCA § 1538**

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16 U.S.C.A. § 1538, 16 USCA § 1538  
Current through P.L. 114-229.

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