

Nos. 16-35380 and 16-35382

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ALASKA OIL AND GAS ASSOCIATION; AMERICAN PETROLEUM
INSTITUTE; NORTH SLOPE BOROUGH; IÑUPIAT 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 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

STATE OF ALASKA'S ANSWERING BRIEF

BRADLEY E. MEYEN
Sr. Asst. Attorney General
Alaska Department of Law
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
Tel: (907) 269-5232
Fax: (907) 279-8644
*Attorney for Plaintiff-Appellee
State of Alaska*

Table of Contents

	Page
Table of Authorities	ii
Table of Acronyms and Abbreviations	iv
I. Introduction.....	1
II. Jurisdictional Statement.....	3
III. Issues Presented for Review	3
IV. Statement of the Case	4
A. The State agency role in ESA listing decisions	4
B. Alaska’s interests.....	5
C. ADFG’s participation in the listing process.....	6
D. The District Court’s decision	7
V. Summary of Argument	8
VI. Argument	9
A. NMFS failed to adequately consider or respond to the ADFG State agency comments and submissions.....	9
B. NMFS’s errors here were not harmless.....	19
VII. Conclusion	20
Statement of Related Cases.....	21
Certificate of Compliance With Fed. R. App. P. 32(a).....	22
Certificate of Service	23

Table of Authorities

	Page(s)
<u>Cases</u>	
<i>Accord Gifford Pinchot Task Force v. FWS</i> , 378 F.3d (9th Cir. 2004) <i>amended</i> 387 F.3d (9th Cir. 2004)	19
<i>Alaska v. United States</i> , 545 U.S. (2005).....	5
<i>California Wilderness Coalition v. U.S. Department of Energy</i> 631 F.3d (9th Cir. 2011)	15, 19, 20
<i>Center for Biological Diversity v. Lubchenco</i> , 758 F. Supp. 2d (N.D. Cal. 2010).....	13, 16
<i>City of Sausalito v. O’Neill</i> , 386 F.3d (9th Cir. 2004)	14
<i>Defenders of Wildlife v. Norton</i> , 258 F.3d (9th Cir. 2001)	13
<i>El Paso Nat. Gas Co. v. Neztosie</i> , 526 U.S. (1999).....	3
<i>Idaho Farm Bureau Fed’n v. Babbitt</i> , 58 F.3d (9th Cir. 1995)	11
<i>Johnson v. Riverside Healthcare Sys., LP</i> , 534 F.3d (9th Cir. 2008)	11
<i>New Mexico v. BLM</i> , 565 F.3d (10th Cir. 2009)	14
<i>Sequoia Orange Co. v. Yeutter</i> , 973 F.2d (9th Cir. 1992), <i>amended</i> 985 F.2d (9th Cir. 1993).	11
<i>State v. Bundrant</i> , 546 P.2d (Alaska 1976)	6
<i>Trout Unlimited v. Lohn</i> , 645 F. Supp. 2d (D. Or. 2007).....	16
<u>Statutes</u>	
Administrative Procedure Act (“APA”)	
5 U.S.C. § 553.....	4, 8, 11
5 U.S.C. § 706.....	11, 19

Alaska Stat. § 16.05.020	5
Endangered Species Act (“ESA”)	
16 U.S.C. § 1532(18).....	4
16 U.S.C. § 1533(b) (ESA § 4(b)).....	1, 3, 8, 9, 11, 18
16 U.S.C. § 1533(b)(1)(A).....	14
16 U.S.C. § 1533(b)(4) (ESA § 4(b)(4)).	4, 8, 11
16 U.S.C. § 1533(b)(5)(A)(ii).....	4
16 U.S.C. § 1533(i) (ESA § 4(i)).....	7, 9, 11, 13
43 U.S.C. §§ 1301, 1311(a)	5
<u>Rules</u>	
9th Cir. R. 28-2.7	3
Fed. R. App. P. 28(i)	1, 8
<u>Regulations</u>	
50 C.F.R. § 424.16(c)(1)(ii) (2014)	4
59 Fed. Reg. 34274, 34275 (July 1, 1994).....	5
77 Fed. Reg. 76,706-38 (Dec. 28, 2012).....	7
<u>Constitutional Provisions</u>	
Alaska Const. art. VIII, §§ 1, 2, 4.....	5

Table of Acronyms and Abbreviations

ADFG	Alaska Department of Fish and Game
AOGA	Alaska Oil and Gas Association and American Petroleum Institute (collectively)
AOGA Brief	AOGA's Answering Brief on Appeal
APA	Administrative Procedure Act
ER	Excerpts of Record
ESA	Endangered Species Act
Fed. Brief	Opening Brief for the Federal Appellants [Defendants]
FWS	United States Fish and Wildlife Service
NAP	Northern Alaska Plaintiffs (collectively): North Slope Borough; Arctic Slope Regional Corporation; NANA Regional Corporation, Inc.; Northwest Arctic Borough; Iñupiat Community of the Arctic Slope
NAP Brief	NAP's Answering Brief on Appeal
NMFS	National Marine Fisheries Service
SER	Joint Supplemental Excerpts of Record

I. Introduction

The State of Alaska (Alaska or State) joins the arguments in the brief of the Alaska Oil and Gas Association and the American Petroleum Institute (AOGA) and certain sections of the brief of the North Slope Borough, et al. (the Northern Alaska Plaintiffs (NAP)), contending that the action of the National Marine Fisheries Service (NMFS) in listing the Arctic ringed seal as threatened violated the Endangered Species Act (ESA) and the Administrative Procedure Act (APA).¹ The State further argues, as additional grounds in support of the judgment below, that NMFS failed to adequately consider or respond to the State's substantive comments (submitted through the Alaska Department of Fish and Game (ADFG)) under the general requirements of the APA and ESA § 4(b).

Congress provided a special role for the states and State fish and wildlife agencies in the ESA listing process as part of the statute's broader cooperative federalism framework. Also, the State at a minimum may participate in the manner afforded the general public through the traditional APA notice-and-comment rulemaking process, which is incorporated into the ESA by statute.

¹ Under Fed. R. App. P. 28(i), Alaska adopts by reference all of the AOGA Brief except for AOGA's own incorporation of the NAP Brief. Alaska also adopts by reference all of the NAP Brief except for Sections VII.A.(2) and VII.D. NAP includes: North Slope Borough; Arctic Slope Regional Corporation; NANA Regional Corporation, Inc.; and Northwest Arctic Borough; Iñupiat Community of the Arctic Slope.

On the record before NMFS, ADFG submitted its comments concluding that the proposed listing of the ringed seal as threatened under the ESA was not warranted. ADFG’s comment submissions included a copy of the executive summary for its then-forthcoming final report to NMFS—entitled, “Biology of the Ringed Seal (*Phoca hispida*) in Alaska, 1960-2010”—documenting the current health and abundance of the species, even in the face of already changing climatic and sea ice conditions (Alaska 2011 Final Report).² ADFG provided the complete Alaska 2011 Final Report to NMFS the next month.³ In May 2012 ADFG submitted a recently published article from the *Journal of Mammalogy* further documenting the point, based on studies of Hudson Bay ringed seal populations, that the species’ populations were continuing to do well even as climatic and sea-ice habitat conditions shifted.⁴

Because NMFS failed to adequately consider or respond to these substantive comments from ADFG, and because—as explained in the other appellees’ briefing—the listing of the species violated the ESA and APA, this Court should

² See SER 257-260.

³ See SER 281; SER 55-126.

⁴ SER 282-286; 285; 287-301 (ADFG letter transmitting and summarizing the *Journal of Mammalogy* article and the article itself).

affirm the district court's judgment vacating and remanding the Final Rule to NMFS.⁵

II. Jurisdictional Statement

Alaska agrees with the Statement of Jurisdiction provided in the Federal Appellants' [Defendants'] Opening Brief ("Fed. Brief"). Also, the Court may properly consider Alaska's arguments as independent, additional grounds supporting the judgment below.⁶

III. Issues Presented for Review

Alaska adopts the statement of Issues Presented for Review in Section III of the AOGA Brief, and adds the following additional issue:

1. Whether NMFS violated ESA § 4(b) and the APA by failing to meet its legal obligation to properly consider or respond to ADFG's timely submitted comments and scientific information demonstrating that ringed seal populations continue to survive and improve even in the face of changing climatic and sea-ice habitat conditions.

Addendums to briefs: All applicable statutes, etc., are contained in the briefs or addendums of the other parties. 9th Cir. R. 28-2.7.

⁵ This brief cites the Excerpts of Record as ER and the Joint Supplemental Excerpts of Record as SER.

⁶ See *El Paso Nat. Gas Co. v. Neztosie*, 526 U.S. 473, 479 (1999) ("an appellee may 'urge in support of a decree any matter appearing in the record'") (citation omitted).

IV. Statement of the Case

Alaska adopts the Statement of the Case presented in Section IV of the AOGA Brief, and provides the following additional background.

A. The State agency role in ESA listing decisions

The states and State fish and wildlife agencies play an important role in implementing the ESA and achieving the conservation of endangered and threatened species. ESA Section 4 outlines some of the unique contributions and role of the State agency in listing decisions. Under ESA Section 4(b), NMFS is required to give actual notice of a proposed listing rule to “the State agency in each State in which the species is believed to occur . . . and invite the comment of such agency.” 16 U.S.C. § 1533(b)(5)(A)(ii); *see also* 50 C.F.R. § 424.16(c)(1)(ii) (2014) (similar language). A “State agency” is “any State agency [or] department . . . which is responsible for the management and conservation of fish, plant, or wildlife resources within a State.” 16 U.S.C. § 1532(18). ADFG is such a “State agency” for the State of Alaska. ESA § 4(b)(4) provides that the APA’s notice-and-comment rulemaking requirements of 5 U.S.C. § 553 generally apply to ESA listing determination rulemakings. 16 U.S.C. § 1533(b)(4). Also, for the ringed seal decision, NMFS’s then-applicable Interagency Cooperative Policy Regarding the Role of State Agencies in Endangered Species Act Activities provided that it was the policy of NMFS to “[u]tilize the expertise and solicit the information of State

agencies in preparing proposed and final rules to: (a) List species as endangered or threatened.”⁷

B. Alaska’s interests

Alaska has interests in managing, conserving, and regulating its fish and wildlife and other natural resources, including ringed seals.⁸ Alaska also has a broader interest in international circumpolar wildlife species research and management as one of the wildlife management authorities within the range of species such as the ringed seal which is found across several jurisdictions and on the high seas. *See* SER 304-305 (Dale Decl. ¶¶ 7, 9).

Alaska’s legal title includes its offshore submerged lands and waters extending three nautical miles seaward of its coastline, *see* 43 U.S.C. §§ 1301, 1311(a); which encompass areas within the range of the ringed seal.⁹ *See* SER 333 (Feige Decl. Ex. 3, p.1) (map of global distribution of ringed seals showing occurrence of the Arctic ringed seal (*P. h. hispida*)). Actions that may affect resources within the State’s territorial jurisdiction implicate the State’s regulatory

⁷ 59 Fed. Reg. 34274, 34275 (July 1, 1994).

⁸ Alaska Const. art. VIII, §§ 1, 2, 4; Alaska Stat. § 16.05.020; ER 127; SER 304 (Dale Decl. ¶¶ 7-8); SER 320-321 (Feige Decl. ¶ 17).

⁹ *Alaska v. United States*, 545 U.S. 75, 79 (2005).

interests. Alaska also retains authority to regulate the Bering Sea crab fishery beyond the State's territorial borders.¹⁰

C. ADFG's participation in the listing process

In March 2011, ADFG, the Alaska State agency with a role in listing decisions under the ESA, submitted substantial comments to NMFS on the proposed listing of ringed seal populations as threatened or endangered, concluding that the listing was not warranted at that time.¹¹ In its comment letter, ADFG stressed the demonstrated resilience of ringed seals, which have survived through historical ice-free periods.¹² ADFG documented the current expression of the species' resilience by submitting and citing to the executive summary for its Alaska 2011 Final Report (which it later submitted in full to NMFS), which concluded that "[c]urrent environmental conditions have not had a negative effect" on ringed seals, which are growing faster, maturing younger, and becoming pregnant more often than in the 1960s and 1970s.¹³

Then, in May 2012, ADFG provided comments on NMFS's special independent peer review report, reinforcing ADFG's earlier comments that given the current indicators of healthy populations and the lack of reliable sea-ice

¹⁰ See, e.g., *State v. Bundrant*, 546 P.2d 530, 554 (Alaska 1976).

¹¹ SER 240- 280 (ADFG comments on Proposed Rule).

¹² SER 245.

¹³ SER 260. See also *supra* footnotes 2 and 3.

projections out to 2100 (the foreseeable future period chosen by NMFS), listing the ringed seal was not warranted. SER 282-301. ADFG supported its additional comments with the citation to and submission of a recent 2012 *Journal of Mammalogy* article on ringed seal populations in Hudson Bay.¹⁴

D. The District Court's decision

The district court ultimately held that NMFS's decision to list the ringed seal was arbitrary and capricious, and it vacated and remanded the Final Rule.¹⁵ ER 31-32. In its decision, the district court ruled in Alaska's favor on the Plaintiff-Appellees' joint ESA claims below. But the district court rejected Alaska's procedural claim under ESA § 4(i) that NMFS failed to adequately justify its failure to adopt a rule consistent with the ADFG State agency comments. Alaska is not pursuing that ESA § 4(i) claim and argument in this answering brief. Instead, Alaska asserts that NMFS's failure to comport with generally applicable APA notice-and-comment rulemaking requirements, which are applicable to the State as well as the general public, are an additional ground supporting the judgment below and were points raised and preserved below.

¹⁴ SER 282; SER 285; SER 287-301.

¹⁵ 77 Fed. Reg. 76,706-38 (Dec. 28, 2012) (ER 71-104).

V. Summary of Argument

The district court correctly held that NMFS's decision to list the ringed seal was arbitrary and capricious, as explained in the answering briefs of AOGA and NAP as adopted by Alaska.¹⁶

The district court's decision to vacate the Final Rule was also correct because NMFS failed to adequately consider and respond to the specific comments and information that ADFG submitted to NMFS during the listing process. This failure violated NMFS's APA duties to consider the relevant factors and articulate a rational connection between the facts found in the record and the decision made. It also violated NMFS's APA duty to respond directly to significant comments on the proposed listing rule, and therefore also violated NMFS's ESA § 4(b) obligations to follow the rulemaking requirements of the APA, 5 U.S.C. § 553,¹⁷ in making the listing determination.

Accordingly, this Court should affirm the judgment below vacating the Final Rule and remanding it to NMFS to correct the ESA and APA violations.

¹⁶ Under Fed. R. App. P. 28(i), Alaska adopts by reference the briefing sections enumerated in footnote 1 *supra*.

¹⁷ 16 U.S.C. § 1533(b)(4).

VI. Argument

A. **NMFS failed to adequately consider or respond to the ADFG State agency comments and submissions**

In listing the ringed seal, NMFS failed to meet its legal obligation to properly consider or respond to ADFG's detailed, significant comments, and submitted report and study, all documenting that ringed seal populations in Alaska and elsewhere continue to not just survive—but thrive—pre-listing, even in the face of acknowledged changes in climatic and sea-ice habitat conditions during the time period.

Alaska raised and preserved this point below in support of both its procedural and substantive challenges to the Final Rule under the APA and ESA §§ 4(i) and 4(b).¹⁸ Specifically, Alaska alleged below that under the APA, NMFS failed to adequately consider or respond to the State agency's detailed scientific and commercial information and comments, failed to consider all relevant factors in its listing decision-making, and acted in an arbitrary and capricious fashion or otherwise not in accordance with law in promulgating the final listing rule. Alaska raised this issue in its complaint, preserved the issue in its summary judgment briefing below,¹⁹ and also preserved it by joining in the

¹⁸ See, e.g., SER 334-340, Complaint (Dkt. 1 Case No. 4:15-cv-00005-RRB, March 6, 2015) ¶¶ 22, 30-33, 46-50, 58-61.

¹⁹ See SER 342, (Dkt. 51, Case No. 4:14-cv-00029-RRB, Aug. 10, 2015, at 11 n.53) (Alaska's briefing noting that its substantive challenges to the listing rule

APA-based and general ESA arguments of the other plaintiffs in the consolidated cases in the district court.²⁰

The district court considered NMFS's responses (or lack thereof) to the State agency's comments and information only as a procedural issue, and it did not reach

may be addressed by the court upon the review of Alaska's general ESA and APA claims, in which Alaska joined and adopted the arguments of AOGA and Northern Alaska Plaintiffs).

²⁰ See *supra* note 6; see also Dkt. 31 (SER 345-348), Case No. 4:14-cv-00029-RRB (May 22, 2015) (district court's order regarding briefing schedule providing that "[i]n the absence of a clear indication to the contrary, the Court will assume that each Plaintiff joins in the arguments presented by any other Plaintiff. Consequently . . . Plaintiffs' briefs . . . should not simply restate the same arguments citing the same authorities." SER 346). See also Dkt. 51 at 8 (SER 341) (Alaska's summary judgment brief adopting enumerated sections of AOGA's summary judgment briefs); Dkt. 55 at 16-36 (SER 349- 369) (AOGA's summary judgment brief asserting, inter alia, NMFS's failure to consider the relevant factors based on ringed seals' current population status and ignoring or contradicting earlier factual findings without a reasoned explanation); Dkt. 43 at 9-23 (SER 370-384) (NAP summary judgment brief asserting, inter alia, that NMFS's listing decision was arbitrary and capricious because the agency lacked adequate information on the response of the species to projected habitat loss through 2100 and lack of record support for ultimate listing determination); Dkt. 64 at 1 (SER 385) (Alaska's summary judgment reply brief adopting enumerated sections of AOGA and NAP summary judgment reply briefing); Dkt. 67 at 1-20, 23 (SER 386-405, 408) (AOGA summary judgment reply asserting, inter alia, NMFS's failure to consider relevant factors through "record and analytical gaps" and not adequately supporting the connection between the facts found as to the species' current status and its projected condition at 2100); Dkt. 65 at 1, 5-15 (SER 409, 410-420) (NAP summary judgment reply asserting, inter alia, that NMFS's listing decision was arbitrary and capricious and lacked a rational record basis, including that "NMFS fails to demonstrate a rational connection between the facts found and the conclusion made regarding the response of the Arctic ringed seal to the projected threats associated with habitat loss").

a substantive review of the State's claims on these points.²¹ But the State's claims present additional grounds appearing in the record that support the judgment below.²²

The APA requires NMFS to respond to all significant comments on its proposed listing rule.²³ Under the APA, an agency must “respond to ‘significant comments’” that “‘would require a change in the agency’s proposed rule.’”²⁴ The “APA’s purpose is to cause [an] agency to respond to comments in a reasoned manner and explain how [the] agency resolved problems.”²⁵ These APA rulemaking standards are incorporated into the ESA § 4(b) requirements for listing rulemaking determinations.²⁶

For two main reasons, NMFS failed to follow these required standards here. *First*, NMFS failed to adequately address ADFG’s comments regarding the current

²¹ See ER 18-22 (reviewing Alaska’s claims as a procedural challenge under ESA § 4(i), but not reaching the substantive aspect of the challenges raised by the state to the standards and requirements of ESA § 4(b) and APA §§ 553 and 706).

²² See *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121 (9th Cir. 2008) (“[W]e may affirm based on any ground supported by the record.”).

²³ See *Idaho Farm Bureau Fed’n v. Babbitt*, 58 F.3d 1392, 1404 (9th Cir. 1995).

²⁴ *Id.* (citations omitted).

²⁵ *Sequoia Orange Co. v. Yeutter*, 973 F.2d 752, 758 (9th Cir. 1992) (citations omitted), *amended* 985 F.2d 1419 (9th Cir. 1993).

²⁶ See 16 U.S.C. § 1533(b)(4).

abundance and health of the Arctic ringed seal.²⁷ In support of its comments, ADFG submitted the Alaska 2011 Final Report to NMFS.²⁸ This ADFG report examined available historical data and concluded that “[c]urrent environmental conditions have not had a negative effect” on ringed seals, which are growing faster, maturing younger, and becoming pregnant more often than in the 1960s and 1970s.²⁹ In response, NMFS asserted that the current health of ringed seals was essentially irrelevant for the purposes of its listing decision, because NMFS was focused on the foreseeable future, and not present conditions.³⁰ But that answer entirely missed ADFG’s point. Ringed seals are currently thriving even in the face of climate changes that are already affecting their sea ice habitat, which calls into question NMFS’s fundamental assumption that loss of sea ice would translate into impacts to ringed seal health, and ultimately to ringed seal abundance to the extent that the subspecies will be threatened with extinction in 2095, as postulated by NMFS.³¹

²⁷ SER 248 (ADFG comment letter on Proposed Rule).

²⁸ *See supra* footnotes 2 and 3.

²⁹ SER 260.

³⁰ SER 421-422 (Section 4(i) letter).

³¹ SER 248 (State’s March 2011 comment letter). ER 57.

The State’s argument points above, which were raised in the district court,³² adequately dispose of the district court’s statement, in the ESA § 4(i) portion of its opinion, that “the State fails to advance *any* argument that the failure [of NMFS to adequately consider Alaska’s submissions] had any material bearing on the ultimate [NMFS] decision, based on projections occurring at some point after the year 2050.”³³ While it is self-evident that NMFS must have an appropriate, record-supported understanding of the starting point and status of the species’ population to project the species’ future status for ESA purposes, numerous statutory, case law, and policy guidance authorities support this point as well. *See, e.g., Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1143 (9th Cir. 2001) (“it simply does not make sense to assume that the loss of a predetermined percentage of habitat or range would necessarily qualify a species for listing. A species with an exceptionally large historical range may continue to enjoy healthy population levels despite the loss of a substantial amount of suitable habitat”); *Center for Biological Diversity v. Lubchenco*, 758 F. Supp. 2d 945, 955 (N.D. Cal. 2010) (“[t]he identification of a downward trend in habitat by itself is not sufficient to establish that a species should be listed under the ESA”); U.S. Dep’t of the Interior,

³² *See, e.g.,* Dkt. 51 at 11-13 (SER 342-344) (Alaska summary judgment brief raising these points); Dkt. 64 at 7-8 (SER 426-427) (Alaska summary judgment reply brief raising these points).

³³ ER 20.

FWS, Memo from Acting Director Daniel M. Ashe to Polar Bear Listing Determination File (Dec. 22, 2010)³⁴ at 5 (“Range reduction in and of itself does not necessarily mean that a species is in danger of extinction”), at 6 (species listed as endangered may include those “with still relatively widespread distribution that have nevertheless suffered ongoing major reductions in its numbers, range, or both, as a result of factors that have not been abated”); “Threatened species typically have some of the characteristic of [this] . . . category . . . in that they too have generally suffered some recent decline in numbers, range, or both, but to a less severe extent than endangered species.”); 16 U.S.C. § 1533 (b)(1)(A) (Service shall make listing determination “after conducting a review of the status of the species”); ER 73 (NMFS Listing Rule preamble statement that ascertaining species’ future status includes an assessment of the “foreseeability of the species’ response to those threats” to the species); ER 80 (preamble statement that “[t]hreats to a species’ long-term persistence are manifested demographically as risks to its abundance, productivity, spatial structure, and connectivity, and genetic and ecological diversity”).

³⁴ This FWS Memo document is available on that agency’s website. *See* https://www.fws.gov/endangered/esa-library/pdf/20101222_Polar_bear_listing_clarification_memo.pdf. The Court may take judicial notice of this document. *See City of Sausalito v. O’Neill*, 386 F.3d 1186, 1223 n.2 (9th Cir. 2004) (courts may take judicial notice of agency records not subject to reasonable dispute); *New Mexico v. BLM*, 565 F.3d 683, 702 n.22 (10th Cir. 2009) (citing *Sausalito*, 386 F.3d at 1223 n.2) (courts commonly take judicial notice of documents posted on agency websites).

The materials submitted by ADFG addressed the species' growth rates, productivity, body condition, age distributions, sex ratios, and pregnancy rates for ringed seals in Alaska;³⁵ and the age structure, body condition, reproductive and fetal growth rates for Hudson Bay ringed seal.³⁶ This information thus was relevant to the determination of the species' future status, even under NMFS's own framework.

Further, the district court's approach is counter to the Ninth Circuit's harmless error framework, where the emphasis is on the federal agency, not the challenger, to show that the error alleged "clearly had no bearing on the procedure used or the substance of the decision reached," and the challenger, once it shows the agency's failure to adequately consider a relevant factor, need not establish how that information might have changed the agency's decision.³⁷ Here, based on the authorities noted, including NMFS's own State Roles Policy, the information submitted by Alaska through ADFG was material and relevant to the ringed seal species listing decision.

NMFS attempted, albeit indirectly, to address this ADFG report and ADFG comments in the Service's response to comments made by other interested parties.

³⁵ SER 56-58.

³⁶ SER 287, 289-294 .

³⁷ *See infra* at footnotes 49 - 53 and accompanying text (citing, inter alia, *California Wilderness Coalition v. U.S. Dep't of Energy*, 631 F.3d 1072, 1091-92 (9th Cir. 2011)).

NMFS stated that: (1) NMFS currently has no way to detect ringed seal population trends; (2) while there is no evidence of population declines, there is similarly no evidence that populations are stable or increasing; (3) the ADFG report only covers a limited area of the ringed seal's range; and (4) model projections show that snow depth has been decreasing for many years, but still show that current depths are on average slightly greater than the 20 cm considered necessary for ringed seal lairs.³⁸

But these responses highlight the errors in NMFS's assumptions and the absence of required record support for its conclusions. The lack of population-level data does not require—or, indeed, allow—NMFS to give the benefit of the doubt to the species in this listing decision context.³⁹ Nor does it allow NMFS to disregard the State agency's current and reliable evidence of healthy and abundant ringed seal populations, particularly where the ADFG data was collected from an area that encompasses most of the range of the ringed seal in Alaska, extending from Hooper Bay, in the Bering Sea, to Kaktovik, in the Beaufort Sea.⁴⁰ Further, NMFS's reliance on snow model projections to opine that snow depths are currently at a 20-cm tipping point suffers from the same modeling flaws

³⁸ ER 95 (Final Rule preamble comment 34).

³⁹ *Trout Unlimited v. Lohn*, 645 F. Supp. 2d 929, 947 (D. Or. 2007); *see also Center for Biological Diversity v. Lubchenco*, 758 F. Supp. 2d 945, 955 (N.D. Cal. 2010).

⁴⁰ SER 257 (Executive Summary, Alaska 2011 Final Report).

highlighted by the ADFG and peer reviewers—i.e., the models are inadequate for projecting snow conditions important for ringed seals, either currently or in 2100.⁴¹

In the district court, the Federal Defendants also argued that NMFS's responses to comments 1, 4, and 23 and other portions of the Final Rule preamble adequately addressed ADFG's comments on current ringed seal health and abundance.⁴² And the Federal Defendants cited other introductory portions of the Final Rule preamble.⁴³ But none of these responses or Final Rule preamble statements address ADFG's primary point that ringed seals are currently faring well, even in the face of changing sea-ice conditions acknowledged by both ADFG and NMFS. Thus, NMFS failed to adequately address this point.

Second, NMFS failed entirely to consider or respond to the findings in a published study on ringed seal health. In its May 2012 comments on the independent review, ADFG provided a copy of a new study, published in the *Journal of Mammalogy*, showing that ringed seal health in Hudson Bay was better in the 2000s than it was in the 1990s when it was colder and there was more ice.⁴⁴

⁴¹ SER 244-247 (ADFG comment letter on Proposed Rule); SER 284 (ADFG comment letter on special independent peer review). *See* NAP Brief at Section VII.A.(1).

⁴² *See* Dkt. 60 at 57 and 58. Federal Defendants' Memorandum in Support of Their Cross-Motion for Summary Judgment and in Opposition to Plaintiffs' Motion for Summary Judgment in the district court. (SER 582-583).

⁴³ SER 421 (NMFS Section 4(i) letter).

⁴⁴ SER 285 (ADFG comment letter on special independent peer review).

The only place that this *Journal of Mammalogy* study appears in the administrative record is as an attachment to Alaska’s 2012 comment letter—NMFS neither cited to the study nor included it in the record as a reference for the Final Rule.⁴⁵ An internal NMFS email in the record referencing the study shows only that it was forwarded within NMFS; it does not indicate that NMFS ever actually reviewed it or considered the study’s content in the decision-making process.⁴⁶ NMFS’s generic statement that it thoroughly reviewed all references to the scientific literature⁴⁷ is insufficient to show that NMFS actually considered the study’s key finding: that ringed seals declined during “heavy ice conditions that prevailed in Hudson Bay in the early 1990s” and then recovered in the 2000s during periods of less sea ice.⁴⁸

Because NMFS failed to adequately respond to or consider ADFG’s specific comments and scientific information calling into question the basic premises on which NMFS based its listing conclusion, NMFS’s listing determination was arbitrary and capricious, failed to consider the relevant factors, and violated NMFS’s obligations under ESA § 4(b) and the APA.

⁴⁵ See SER 285, 287-301; SER 428-432.

⁴⁶ SER 433.

⁴⁷ See Dkt. 60 at 57. Federal Defendants’ Memorandum in Support of Their Cross-Motion for Summary Judgment and in Opposition to Plaintiffs’ Motion for Summary Judgment in the district court. (SER 582 and ER 86).

⁴⁸ SER 287, 294-298.

B. NMFS’s errors here were not harmless

In *California Wilderness Coalition v. U.S. Department of Energy*, this Court held that it was not harmless error for the Department of Energy to fail to comply with its statutory duty to consult with affected states in conducting a study of electric transmission congestion before it designated national interest electric transmission corridors.⁴⁹ This Court said courts “must exercise great caution in applying the harmless error rule in the administrative rulemaking context” such as this one because the doctrine “is more readily abused there than in the civil or criminal context” and “an agency could always claim that it would have adopted the same rule even if it had complied with APA procedures.”⁵⁰ Accordingly, in this context, harmless error requires a determination that the error “clearly had no bearing on the procedure used or the substance of the decision reached.”⁵¹

Here, as in *California Wilderness*, NMFS’s errors were not harmless. *First*, NMFS’s errors “limited the information” considered by NMFS and “altered the way in which [it] made its discretionary decisions.”⁵² *Second*, the errors related to “important discretionary decisions” that “were not . . . compelled by some

⁴⁹ 631 F.3d 1072, 1090-95 (9th Cir. 2011); *See* 5 U.S.C. § 706 (in review of agency decisions, “due account shall be taken of the rule of prejudicial error”).

⁵⁰ *Id.* at 1090 (internal citations and quotations omitted).

⁵¹ *Id.* at 1091-92 (citations omitted). *Accord Gifford Pinchot Task Force v. FWS*, 378 F.3d 1059, 1071 (9th Cir. 2004), *amended* 387 F.3d 968 (9th Cir. 2004).

⁵² 631 F.3d at 1093.

mathematical formulae.”⁵³ *Third*, the Court cannot be certain what impact NMFS’s errors had, given that the decisions were discretionary and where, as in *California Wilderness*, ADFG’s comments “[we]re not frivolous” but “may well have some merit.”⁵⁴ *Fourth*, NMFS’s violation of the statutorily required process undermined the legislative purpose of “permitting the States to participate in the formulation of federal policy in an area of major interest to the States.”⁵⁵

VII. Conclusion

This Court should affirm the district court’s decision vacating the NMFS’s Final Rule listing the ringed seal as threatened.

DATED March 23, 2017.

Respectfully submitted,

/s/ Bradley E. Meyen
Bradley E. Meyen
Senior Assistant Attorney General
State of Alaska
Department of Law
1031 W. 4th Avenue, Suite 200
Anchorage, AK 99501
(907) 269-5232

*Attorney for Plaintiff-Appellee
State of Alaska*

⁵³ *Id.* at 1094.

⁵⁴ *Id.* at 1095.

⁵⁵ *Id.* at 1092.

Statement of Related Cases

Pursuant to Circuit Rule 28-2.6(a) Appellee State of Alaska states that the companion cases and appeals listed in the caption (Nos. 16-35380 and 16-35382) are related, as they arise from the same District Court judgment. There are no other related cases known to the State of Alaska.

Certificate of Compliance With Fed. R. App. P. 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Ninth Cir. R. 32-1 because this brief contains 4622 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

DATED: March 23, 2017.

By: /s/ Bradley E. Meyen

Certificate of Service

I hereby certify that on March 23, 2017, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Bradley E. Meyen