Submitted via certified and electronic mail

October 4, 2023

The Honorable Gina Raimondo
Secretary of Commerce
U.S. Department of Commerce
1401 Constitution Ave NW
Washington D.C. 20230

Dr. Richard Spinrad, Administrator
National Oceanic and Atmospheric Administration
1401 Constitution Ave NW, Room 5128
Washington D.C. 20230
Richard.Spinrad@NOAA.gov

Janet Coit
Assistant Administrator for Fisheries
National Oceanic and Atmospheric Administration
1315 East-West Highway
Silver Spring, MD 20910

RE: Notice of Intent to Sue for Failure to Issue Ringed Seal and Bearded Seal Recovery Plans and Failure to Conduct Five-Year Reviews

Dear Secretary Raimondo, Administrator Spinrad, and Assistant Administrator Coit,

This letter serves to notify the Secretary of Commerce and the National Marine Fisheries Service (collectively, the “Service”), on behalf of the Center for Biological Diversity (the “Center”), of our intent to sue the Service under the Endangered Species Act (“ESA”). Specifically, the Service has failed to develop and implement recovery plans for the ringed seal (Pusa hispida) and bearded seal (Erignathus barbatus) (collectively, the “listed ice seals”) as required by section 4(f) of the ESA. The Service has also failed to complete its obligatory five-year reviews of the listed ice seals’ listing status, as required by section 4(c) of the ESA. The Service’s failures deprive these imperiled species of important, statutorily mandated protections and put them at further risk of extinction. This letter is provided pursuant to the ESA’s sixty-day notice requirement.

1 16 U.S.C. § 1531 et seq.
2 Id. § 1533(f) ("The Secretary shall develop and implement . . . for the conservation and survival of endangered species and threatened species listed pursuant to this section.") (emphasis added).
3 Id. § 1533(c)(2) ("The Secretary shall conduct, at least once every five years, a review of all [listed] species . . . ") (emphasis added).
4 See id. § 1540(g)(1)(C).
I. Factual Background

Bearded and ringed seals are ice-dependent species. They require sea ice for their essential activities of giving birth, nursing, and molting.\(^5\) Ringed seals also rely on a thick layer of snow on top of the ice to build caves where they rest, give birth, and nurse their young; without these snow caves, pups freeze to death or are eaten by predators.\(^6\) Global warming has caused, and will continue to cause, a rapid decline in Arctic sea-ice cover and volume. Multiple studies have documented how the early breakup and loss of sea ice threaten bearded and ringed seals with extinction.\(^7\)

The harm from loss of sea ice—which alone is an existential threat to these species—is compounded further by other threats to the seals. Arctic oil and gas activities, for example, threaten the listed ice seals’ breeding aggregations and migration corridors with potential spills.\(^8\) Oil spills from shipping vessels also pose a risk to these species, especially as reduced Arctic ice results in increased shipping traffic.\(^9\) Further, Arctic waters are some of the most vulnerable to ocean acidification, which will negatively impact the listed ice seals through cascading trophic effects.\(^10\)

Because of these threats, in 2008, the Center submitted a formal, detailed petition to list three seal species, including ringed and bearded seals, under the ESA. On September 4, 2008, the Service published a 90-day finding that the petition presented substantial scientific or commercial information indicating that listing may be warranted.\(^11\) On September 9, 2009, the Center filed suit challenging the Service’s failure to issue a 12-month finding on the petition. Pursuant to a settlement agreement, the Service agreed to make 12-month findings for ringed and bearded seals no later than November 1, 2010. On December 10, 2010, the Service published 12-month findings in the Federal Register proposing to list the imperiled species. The Service proposed the listing of the Arctic, Okhotsk, and Baltic subspecies of the ringed seal and Beringia and Okhotsk distinct populations segments (“DPS”) of the bearded seal as threatened, and the Ladoga subspecies of the ringed seal as endangered.\(^12\) The Service identified climate change as the primary threat to these seals.

After the Service failed to finalize the listings within one year, as required by the ESA, the Center filed suit. In 2012, the Service published a final rule listing the Arctic, Okhotsk, and Baltic subspecies of the ringed seal and Beringia and Okhotsk DPSs of the bearded seal as threatened, and listing the Ladoga subspecies of the ringed seal as endangered under the ESA.\(^13\)

In 2013, the oil industry, the state of Alaska and others challenged the final listing rule in federal district court in Alaska; the Center intervened to defend the listings. In 2014, the district

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\(^6\) 77 Fed. Reg. at 76709.
\(^7\) 77 Fed. Reg. at 76721 (ringed seals); 77 Fed. Reg. at 76744 (bearded seals).
\(^8\) Id. at 76712–14 (ringed seals); 77 Fed. Reg. at 76746–47 (bearded seals).
court struck down the listing of the Beringia DPS of the bearded seal, and in 2016 the same court vacated the Arctic ringed seal listing.\textsuperscript{14} The Ninth Circuit reversed both decisions and reinstated ESA protections for bearded seals and ringed seals in 2016 and 2018, respectively.\textsuperscript{15}

In 2019, the Center sued the Service for failure to designate critical habitat for the ringed and bearded seals. Pursuant to a settlement agreement, the Service designated critical habitat in the spring of 2022.\textsuperscript{16} The Service has never published a draft or final recovery plan for either species.

II. The ESA Requires the Service to Develop Recovery Plans and Conduct Five-Year Reviews

The ESA mandates that the Service create recovery plans for listed species. The Service, therefore, is statutorily required to create and implement such recovery plans for each listed subspecies of ringed seals and each DPS of bearded seals.

In enacting the ESA, Congress established an affirmative duty that “all Federal departments and agencies shall seek to conserve endangered species and threatened species.”\textsuperscript{17} The ESA defines conservation to mean “[using] all methods and procedures which are necessary” to recover a species.\textsuperscript{18} To effectuate its goal of conservation and recovery, section 4(f) of the ESA provides that the Service “shall develop and implement” recovery plans for the “conservation and survival” of listed species unless the agency makes a finding that “such a plan will not promote the conservation of the species.”\textsuperscript{19}

The ESA also requires that “at least once every five years,” the agency review the status of all listed species.\textsuperscript{20} The Service must conduct its review based on the best available science.\textsuperscript{21} Upon conducting the review, the Service may recommend uplisting the species, considering the same listing factors it weighed in its initial determination.\textsuperscript{22} Regulations require that a notice be published in the Federal Register before the review is conducted.\textsuperscript{23}

III. Recovery Plans Will Help Address Threats to and Aid the Recovery of the Ringed and Bearded Seals

In addition to its obligation to comply with the ESA’s mandate, the Service should be motivated to develop recovery plans for the listed ice seals because such plans will create tangible benefits for the species, outlining a roadmap towards the species’ recovery. Studies show that species with recovery plans in place are more likely to be improving and less likely to

\textsuperscript{15} Alaska Oil and Gas Ass'n v. Ross, 722 Fed. App. 666 (9th Cir. 2018) (ringed seals); Alaska Oil and Gas Ass'n v. Pritzker, 840 F.3d 671 (9th Cir. 2016) (bearded seals).
\textsuperscript{17} 16 U.S.C. § 1531(c); see also Tenn. Valley Auth. v. Hill, 437 U.S. 153, 180 (1978).
\textsuperscript{18} 16 U.S.C. § 1532(3).
\textsuperscript{19} Id. § 1533(f)(1).
\textsuperscript{20} Id. § 1533(c)(2)(A); see also 50 C.F.R. § 424.21.
\textsuperscript{21} 16 U.S.C. § 1533(c)(2).
\textsuperscript{22} Id. § 1533(c)(2).
\textsuperscript{23} 50 C.F.R. § 424.21.
be declining than those without recovery plans. The recovery plans could describe a program for increasing public awareness about the impacts of climate change in the Arctic, mitigating impacts from ocean acidification, and preventing further harm from shipping and other threats. Effective recovery plans will also facilitate international conservation and set benchmarks for future delisting.

### a. Addressing Threats from Greenhouse Gas Emissions

The Service identified climate change–caused sea ice loss as the principal threat to the listed ice seals. Since the 2012 listings, the predictions for loss of Arctic sea ice have only become more dire, and ice-free summers are now projected to arrive sooner. The Arctic may be free of sea ice in summer as early as 2035, and March sea ice volume could be 70–80% lower at the end of the century than March ice volumes in recent years.

In addition to warming the planet and reducing sea ice, carbon dioxide emissions also lead to increased carbon uptake in the oceans, causing acidification. Ocean acidification has already had deleterious effects on certain marine species, and these effects are predicted to increase with increased emissions. The Arctic and its adjacent seas are the most-impacted waters for ocean acidification. As acidification causes population losses at lower trophic levels, bearded seals and ringed seals will suffer from reduced prey availability.

Recovery plans can meaningfully address the threat of climate change to the listed ice seals. The polar bear, another marine mammal principally threatened by loss of sea ice habitat stemming from climate change, has had a recovery plan since 2016. This plan recognized that “the single most important achievement for polar bear conservation is decisive action to address Arctic warming.” It created a path of “science-based communication effort [to highlight] the urgent need for significant reductions” in global greenhouse gas (“GHG”) emissions. The goal of this communication was to “prompt the needed actions to maintain and, as needed, restore, sea-ice habitat.” The plan committed the U.S. Fish and Wildlife Service (“FWS”) to an annual minimum of $685,000 towards communicating the polar bear’s climate-induced loss of habitat to the public and $7,000,000 per year towards reducing its own GHG emissions.

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27 *Id.* at 5.
28 *Id.* at 6.
29 *Id.* at 13.
30 *Id.* at 42.
31 *Id.* at 43.
provides FWS with crucial resources to advocate for climate solutions that will prevent the destruction of the polar bear’s sea ice habitat.

The Service itself has already created recovery plans for climate-threatened species. The elkhorn and staghorn coral recovery plans recognize that “[n]ational and international efforts are needed to address global climate change” to save the corals.\textsuperscript{36} The coral recovery plan “identifies reduction of atmospheric carbon dioxide concentrations as a high priority recovery strategy.”\textsuperscript{37} It calls for “action at federal and international levels” as well as “local mitigation strategies and ex situ conservation actions” to protect the listed coral species from ocean acidification.\textsuperscript{38}

As with the polar bear and elkhorn and staghorn corals, the ringed and bearded seals would benefit from recovery plans addressing climate change and Arctic sea ice loss. As FWS did for the polar bear, the Service could likewise commit resources to publicizing the dangers that climate change poses to the listed ice seals, as well as advocate for policies that would prevent Arctic sea ice loss and limit GHG emissions. Using the stories of wildlife, such as the ice seals, to help people understand the impacts of climate change can make the abstract concept more tangible. Together with the polar bear and coral recovery plans, the listed ice seals’ recovery plans can bolster the federal case for acting on climate. Future recovery plans that identify climate change as a major threat to a species will continue to strengthen public awareness that climate action is needed to keep wildlife alive.

The Service could also use the ringed and bearded seal recovery plans to decrease its own GHG emissions, just as FWS committed to decreasing its emissions in the polar bear recovery plan.\textsuperscript{39} Such reductions would be in line with federal policy.\textsuperscript{40} Because the federal government is a major GHG emitter, reductions in federal GHG emissions are meaningful on a global scale.

\textbf{b. Addressing Threats from Oil and Gas Activity}

The bearded seal and ringed seal listing decisions discuss Arctic oil and gas activities—including exploration, development, and production—and conclude that these activities pose a threat to the listed ice seals’ recovery.\textsuperscript{41} One of the biggest impacts to these species from oil and gas, the Service found, is the likelihood of oil spills: “[t]anker spills, pipeline leaks, and oil blowouts are likely to occur in the future.”\textsuperscript{42} The ESA-mandated recovery plans are a critical tool the Service has to help prepare for and mitigate these events.

The Service can and must develop recovery plans that will minimize the risk of harm from any oil and gas activity in the Arctic. The plans could, for example, increase oil spill response capabilities for the listed ice seals. The polar bear recovery plan has resulted in the construction of specialized response equipment, annual working group meetings, and the

\textsuperscript{38} Elkhorn Coral (\textit{Acropora palmata}) and Staghorn Coral (\textit{A. cervicornis}) Recovery Plan, supra note 32, at II-3.
\textsuperscript{39} Polar Bear Conservation Management Plan, supra note 27, at 43.
\textsuperscript{40} Exec. Order No. 14057, Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability (2021) (directing federal agencies to drastically reduce emissions in the coming years).
\textsuperscript{42} 77 Fed. Reg. 76740, 76746.
completion of field exercises to prepare for spills. The ice seals’ recovery plans should also include studies modelling the likely outcomes from various types of spills and leaks. Such modelling has been completed with respect to the likely effect of spills on polar bears, again showing the benefits of an active recovery plan.

The Service has recognized the potential harm to bearded and ringed seals from Arctic oil and gas activity; it must create a recovery plan to address these threats.

c. Addressing Shipping, Fishing, and Other Industrial Threats

The Service has recognized that other human activities in the Arctic pose threats to bearded seals and ringed seals. Shipping was identified as harming seals in several ways. The “most significant” risk from shipping is the “accidental or illegal discharge of oil or other toxic substances.” Noise and physical disturbance are also direct impacts of shipping activities on ice seals, and the introduction of exotic species poses an indirect threat. Icebreakers pose “special risks” to the listed seals species, as they target the ice habitat on which these animals rely.

Commercial fisheries also pose a risk to bearded seals and ringed seals. The fishing industry poses a direct threat to seals via bycatch and incidental take. The listed ice seals are also threatened indirectly by these fisheries. The fishing industries target many species that are prey for bearded seals and ringed seals, including herring (ringed seals), walleye pollock (both), capelin (ringed seals) and cod (both). Reduction in prey biomass poses a threat to these listed seals.

Recovery plans must be drafted to deal with these and other industrial threats to bearded and ringed seals. As human activity increases in the Arctic with the loss of summer sea ice, so too do the risks posed by industrial activity. Recovery plans must carefully consider these threats, plan studies to better understand them, and devise strategies to mitigate them.

d. Supporting International Cooperation

The ringed seals and bearded seals live in the waters of the United States, Canada, Greenland, Norway, and Russia. Sea ice habitat for the listed ice seals is predicted to shrink dramatically in the coming decades, with the best remaining habitat forecasted to exist outside the United States. Recovery plans could provide for invaluable international cooperation on ice seal conservation, helping to secure the seals’ existence in a future with decreasing sea ice. Cooperative conservation efforts could provide a needed support system to recover these threatened species.

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44 Id.
45 77 Fed. Reg. at 76713.
46 Id.
48 77 Fed. Reg. at 76714 (ringed seals); 77 Fed. Reg. at 76747 (bearded seals).
A recovery plan is the best way to establish how the Service will cooperate internationally on ice seal conservation. The recovery plans would also signal the United States’ leadership in and commitment to seal conservation.

e. Establishing Benchmarks for Delisting

Without a recovery plan, there is no framework to establish when the ringed seal or bearded seal should be delisted from the ESA. The polar bear and coral recovery plans identify specific delisting criteria. One of the necessary criteria for the polar bear’s delisting is that 100-year models show that an ice-free Arctic will not persist longer than four months. A delisting criterion from the coral plan identifies the maximum amount of ocean heating that would be consistent with delisting.

The Service could likewise create delisting criteria for the ice seals based on long-term models of on-ice snow depths (ringed seals) and duration of ice-free periods (both listed ice seals). Such delisting criteria would give stakeholders some amount of certainty as to when and why these seals will get delisted.

IV. A Five-Year Review Is Important for the Conservation of Ringed and Bearded Seals

In the intervening decade since the Service listed the ice seals, the burning of fossil fuels has emitted more than 360 million metric tons of carbon dioxide into the atmosphere. And, as described above, the predictions for Arctic sea ice loss have only become more dire, and ice-free summers are now projected to arrive even sooner. Additionally, advances in climate science and computing power in the last decade have improved the accuracy of climate modeling. These developments must be brought to bear in the five-year review. The Service must use the best available scientific information, including incorporating new information, to assess the current threats faced by these listed species.

V. Legal Violations of Section 4 of the ESA

The Service’s failures to develop a recovery plan for the Arctic, Okhotsk, Baltic, and Ladoga subspecies of the ringed seal; and its failure to develop a recovery plan for the Beringia and Okhotsk DPSs of the bearded seal violate the ESA. It has been more than 15 years since the Center submitted its listing petition for the ringed and bearded seals, and it has been more than a decade since the Service listed the seals. Yet the Service has never created a recovery plan (nor even a draft recovery plan) for any of these listed ice seals. Neither has the Service made a finding that a recovery plan would not promote the conservation of these species. This decade-

51 Elkhorn Coral (Acropora palmata) and Staghorn Coral (A. cervicornis) Recovery Plan, supra note 32, at III-6.
54 See, e.g., Zeke Hausfather, Evaluating the Performance of Past Climate Model Projections, Geophysical Research Letters 47(1) (2019) (“[C]limate models have grown substantially more complex than the early models . . . .”).
long delay is unreasonable and a violation of the Service’s mandatory duty under section 4(f) of the ESA.\textsuperscript{55}

Furthermore, while the Service published notices several years ago indicating that it was commencing five-year reviews of the listing status of the Arctic, Okhotsk, Baltic, and Ladoga subspecies of the ringed seal and the Beringia and Okhotsk DPSs in 2021,\textsuperscript{56} the agency has not completed those reviews. It must complete the five-year review the ESA requires for the ringed seal and the bearded seal. Its failure to do so violates the ESA.

VI. Conclusion

The Service’s failure to create recovery plans for the bearded and ringed seals are violations of the ESA.\textsuperscript{57} The Service’s failure to complete five-year reviews of the listing status of the bearded and ringed seals also violates the ESA.\textsuperscript{58} These ESA violations are subject to the ESA’s citizen suit provisions.\textsuperscript{59}

The Center may pursue litigation against the Secretary of Commerce and the Service if the Service does not act to correct these violations within 60 days. If you have questions or care to discuss this matter, our contact information is below. Thank you for your careful attention to this issue.

Sincerely,

David Derrick  
Staff Attorney  
Center for Biological Diversity  
Telephone: 510-844-7135  
dderrick@biologicaldiversity.org

Kristen Monsell, Oceans Program  
Legal Director  
Senior Attorney  
Center for Biological Diversity  
Telephone: 510-844-7137  
kmonsell@biologicaldiversity.org

\textsuperscript{55} Id.  
\textsuperscript{57} 16 U.S.C. §§ 1533(f)(1) and 1536(a)(1).  
\textsuperscript{58} Id. § 1533(c)(2).  
\textsuperscript{59} Id. § 1540(g).