



c/o
North Slope Borough - Department of Wildlife Management
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April 8, 2021

Mr. Jon Kurland
Assistant Regional Administrator for Protected Resources
National Marine Fisheries Service, Alaska Region
Attn: Records Office
P.O. Box 21668
Juneau, AK 99802-1668

Submitted via Federal e-Rulemaking Portal at <http://www.regulations.gov>

Re: Comments on: (1) Proposed Designation of Critical Habitat for the Beringia Distinct Population Segment of the Bearded Seal, Docket No. NOAA-NMFS-2020-0029; and (2) Proposed Designation of Critical Habitat for the Arctic Ringed Seal, Docket No. NOAA-NMFS-2013-0114

Dear Mr. Kurland,

This letter provides the comments of the Ice Seal Committee (“ISC”) on the National Marine Fisheries Service’s (“NMFS”) proposed rules to designate critical habitat for the Beringia distinct population segment (“DPS”) of the bearded seal (*Erignathus barbatus nauticus*) and for the Arctic subspecies of the ringed seal (*Pusa hispida hispida*) pursuant to Section 4 of the Endangered Species Act (“ESA”), 16 U.S.C. § 1533.¹ We appreciate NMFS’s consideration of the comments set forth below.

¹ See Designation of Critical Habitat for the Beringia Distinct Population Segment of the Bearded Seal, 86 Fed. Reg. 1,433 (Jan. 8, 2021); Designation of Critical Habitat for the Arctic Subspecies of the Ringed Seal, 86 Fed. Reg. 1,452 (Jan. 8, 2021). NMFS subsequently published an extension of the public comment periods on these proposed rules to April 8, 2021. 86 Fed. Reg. 13,517 & 13,518 (March 9, 2021).

I. Background

The ISC, originally called the Ice Seal Working Group, was formed in December 2004 with a stated purpose “to preserve and enhance the marine resources of ice seals including the habitat; to protect and enhance Alaska Native culture, traditions, and especially activities associated with subsistence uses of ice seals; to undertake education and research related to ice seals.” Pursuant to Section 119 of the Marine Mammal Protection Act (“MMPA”), the ISC is the federally recognized co-management organization for ice seals in Alaska.

In its current configuration, the ISC consists of 10 representatives, two from each of the five regions that span ice seal range in Alaska. At least one representative from each region is an experienced ice seal hunter. As part of its role in co-management, the ISC monitors the harvest of marine mammals for subsistence use, participates in marine mammal research, and collects/analyzes data on marine mammal populations.

On January 20, 2012, the ISC adopted the Ice Seal Management Plan. The goals of the management plan are to: maintain healthy ice seal populations in Alaska waters; provide for adequate subsistence harvest of ice seals; and protect hunting privileges for Alaska Native subsistence hunters. The principles by which the members of the ISC manage ice seals include components for conservation, harvest, use, reporting and monitoring, public involvement, research, and enforcement.

NMFS should recognize that Alaska Natives living in coastal communities are an important and essential partner for any efforts to conserve ice seals (here, bearded and ringed seals) and their habitat. Alaska Natives and their ancestors have been the primary conservation stewards for thousands of years, carefully balancing subsistence needs and cultural traditions with a profound respect for bearded and ringed seals and other wildlife that share their habitat. Alaska Natives are not the cause of any of the identified threats to ice seals and their habitat, yet the Alaska Native people will primarily bear the burden of the federal regulatory initiatives being imposed to protect these currently healthy and abundant species. Based on our review of the best available science, including Indigenous Knowledge, the proposed designations of critical habitat for the bearded and ringed seals are not necessary or prudent at this time for the conservation of the species.

II. Comments on the Proposed Rules

A. The ISC endorses the comments submitted by each of its regional partner organizations.

The ISC is involved in co-management of ice seals across their entire range in Alaska; an enormous area. Five Alaska Native Organizations (“ANOs”) comprise the ISC,² each with intimate knowledge of their region, different perspectives and needs, and the key features that vary throughout the year. As such, the ISC endorses, and incorporates by reference, the comments submitted by our regional partner ANOs pertaining to the two proposed rules to designate critical habitat for the Beringia DPS of bearded seal and Arctic ringed seal.

As you are aware, some of the biologists and other staff who work for the Borough also provide technical support to the ISC. The Borough, which manages the ISC grant from NMFS, historically has been involved in marine mammal management and conservation efforts, and has been actively engaged in regulatory activities associated with polar bears, bowhead whales, eiders, and ice seals. As detailed in the Borough’s comments, the ISC agrees that designations of critical habitat for the Beringia DPS of bearded seal and the Arctic ringed seal are not prudent at this time. Should NMFS proceed with these designations, the included areas must be narrowly tailored to only include those specific areas of habitat that are actually critical to the conservation of the species and that require special management considerations or protections. As currently constructed, neither of the proposed rules are based on the best available science delineating the specific areas where, within the domestic range of the species, the identified physical or biological features are found nor that the identified physical or biological features are actually essential to the conservation of the species and in need of special management or protection.

Given that the primary threats to bearded and ringed seals are the result of climate change influenced by global emissions, NMFS has not established that there are identifiable mechanisms pursuant to the ESA that are available to protect these features. Furthermore, numerous federal statutes already impose regulatory mechanisms to prevent localized threats to ice seal habitat. Finally, NMFS’s analysis of the impacts and benefits associated with the critical habitat designations are significantly flawed. There is no consideration of the harmful effects on Alaska Native communities or the economic and other components necessary for our people to maintain our way of life. If NMFS proceeds with these designations, it must exclude the aquatic areas around our

² North Slope Borough (“Borough”), Kewarak Incorporated, Maniilaq Association, the Association of Village Council Presidents, and the Bristol Bay Native Association.

villages, Alaska Native corporation lands, other lands where development and infrastructure-related activities are occurring, and other aquatic areas (such as shipping routes) where activities occur that are vital to support and perpetuate our peoples' existence in the coastal areas of Alaska.

In addition to the Borough's comments, the ISC writes separately to emphasize several key points and considerations that must be addressed and remedied before NMFS proceeds with any designation of critical habitat for these species.

B. Timing of habitat use is a necessary consideration when determining whether a specific area is "critical"

For both bearded and ringed seals, NMFS proposes to designate single areas for each species that are exceedingly large in aquatic expanse based on the simplistic assumption that these entire areas are always essential to the conservation of the two species. Based on our Indigenous Knowledge, which comprises the best available science under the ESA, we know that sea ice and snow cover features are dynamic, and that the locations of the requisite habitat features will shift in any given year and location. Notwithstanding, we also know that both bearded and ringed seals utilize different habitat features at different times to perform their essential life history functions (e.g., nursing, whelping, molting, foraging, etc.).

NMFS's suggestion that the entire area proposed for designation is always critical habitat disregards the more nuanced temporal and spatial relationships between the species and their utilization of the habitat that purportedly contains the identified physical or biological features. Specifically, the primary life history functions that NMFS identifies (e.g., nursing, whelping, molting) all occur at different times. Accordingly, the requisite physical or biological features (if properly identified by NMFS) are only essential to the conservation of the species at the times and geographic locations when and where those life history functions are being conducted. Based on existing case law, NMFS must be more specific and, contrary to its proposals, cannot utilize the Section 7 consultation process to remedy and refine the over-designation of areas that are purportedly (but not) critical habitat.³

C. NMFS must consult with the ISC on the Proposed Rules

As you know, pursuant to MMPA Section 119, the ISC is the federally recognized co-management organization for ice seals in Alaska (including

³ See 86 Fed. Reg. at 1,447; 86 Fed. Reg. at 1,469; *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 344 F.Supp.2d 108, 123 (D.D.C. 2004) ("[t]he Service may not over-designate habitat and rely on Section 7 consultations down the road to sort out its errors.").

bearded and ringed seals). The ISC is concerned and disappointed that NMFS did not consult or engage with the ISC in a meaningful way prior to publishing these proposed rules.

Fundamentally, co-management of a species requires routine consultation and communication regarding identified threats, contemplated regulatory measures, and suggested management initiatives. As a co-management partner for both bearded and ringed seals, the ISC expects to be treated as a partner that is consulted, engaged, and included in any decisions regarding proposed and final federal regulatory measures involving these species. A request by NMFS for input from the ISC late in this process and/or to submit public comments is not sufficient to satisfy the “consult and recommend” provision in our co-management agreement.

Substantively, NMFS’s failure to consult with the ISC also has contributed to another deficiency inherent in the proposed rules. Because NMFS has not incorporated Indigenous Knowledge, neither the identified physical or biological features nor the suggested locations for when and where they are essential to the conservation of the species are based on the best available science.⁴ Before NMFS conducts any additional actions regarding these proposed rules, pursuant to our co-management agreement, we request our requisite consultation and opportunity to recommend appropriate regulations. Given that we are the people that depend on the bearded and ringed seal populations for subsistence and the continuation of our way of life, this consultation and any subsequent regulatory actions must be based on our Indigenous Knowledge regarding threats to the species and the conservation actions we deem necessary to ensure their continued survival.

D. NMFS must conduct additional outreach with ice seal hunters

In addition to the failure to meaningfully consult with the ISC, we are concerned that NMFS is not sufficiently providing notice of regulatory actions or engaging with the Alaska Native ice seal hunters. From the perspective of those in Washington, DC, publication of a proposed regulatory action in the Federal Register may be sufficient. However, for the Alaska Native community, it is not practical to track Federal Register notices on a daily basis nor to engage in the substantial research required to understand many federal regulatory initiatives. Accordingly, to promote

⁴ For example, ISC board members have voiced concerns regarding the impacts of the herring fishery in Bristol Bay on ice seals and the implications for ecosystem management. Other concerns include the importance of nearshore, inshore estuaries and river mouths as refugia for young ice seal pups/subadults that allow them to hone their hunting/fishing skills in relative safety from predators such as killer whales. There are many more specific examples in the comments provided by the ISC’s regional partner ANOs and need to be addressed through a co-management process involving both the ISC and NMFS.

outreach and engagement with the Alaska Native community, the ISC suggests that NMFS prepare and distribute handouts that summarize proposed and final regulatory measures and that clearly identify implications and requirements for affected Alaska Native hunters. The ISC commits to assist NMFS in these efforts.

III. Conclusion

The ISC appreciates the efforts that NMFS has made to protect and conserve the populations of the Beringia DPS of bearded seal and the Arctic subspecies of ringed seal, and the other species dependent on our Arctic and sub-Arctic environment. However, as one of the representatives of the coastal communities and the Alaska Native people that are most directly affected by these regulatory actions, we must insist on greater and more meaningful involvement in the decision-making process. As detailed above, and in the Borough's and other ANOs' comment letters, we have significant concerns about the proposed rules that must be addressed through our co-management relationship prior to any further regulatory action. We look forward to collaborating with NMFS on any subsequent actions regarding these proposed rules, and we ask that NMFS carefully consider our requests and concerns.

Sincerely,

A handwritten signature in blue ink, appearing to read "Billy Adams", with a long horizontal flourish extending to the right.

Billy Adams
ISC Chairman