



MARINE MAMMAL COMMISSION

31 March 2015

Mr. Jon Kurland, Assistant Regional Administrator
Protected Resources Division, Alaska Region
National Marine Fisheries Service
P.O. Box 21668, Juneau, AK 99802

Attn: Ellen Sebastian

FDMS Docket Number NOAA-NMFS-2013-0114

Dear Mr. Kurland:

The Marine Mammal Commission (the Commission), in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the National Marine Fisheries Service's (NMFS) 9 December 2014 *Federal Register* notice (79 Fed. Reg. 73010) proposing to designate critical habitat for Arctic ringed seals (*Phoca hispida hispida*)¹. The Commission offers the following comments and recommendations.

Background

In December 2010, NMFS completed a 12-month status review and proposed to list the Arctic, Okhotsk, Baltic, and Ladoga subspecies of the ringed seal as threatened under the Endangered Species Act (75 Fed. Reg. 77476). Public comments on the associated status review revealed disagreement on the reliability of the model projections and analysis of future sea ice habitat and snow cover for Arctic ringed seals. NMFS, therefore, sought input from independent peer reviewers to address this issue and ensure that the final determination was based on the best scientific and commercial data available. On 28 December 2012, NMFS published a final rule listing the Arctic ringed seal as threatened under the Endangered Species Act (77 Fed. Reg. 76706), along with a request for information with respect to the designation of critical habitat.

Section 3(5)(A) of the Endangered Species Act defines "critical habitat" as:

- (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with section 4 of this Act, 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 4 of this Act, upon a determination by the Secretary that such areas are essential for the conservation of the species.

¹ The Society for Marine Mammalogy Committee on Taxonomy periodically updates the taxonomy and nomenclature of marine mammal species and subspecies. On the current list, this species and the four subspecies are included in the genus *Pusa* rather than *Phoca*.

Proposed critical habitat for Arctic ringed seals

In a 9 December 2014 *Federal Register* notice, NMFS proposed to designate as critical habitat for Arctic ringed seals most of the marine waters within the territorial sea and U.S. Exclusive Economic Zone within the northern Bering, Chukchi, and Beaufort Seas occupied by the Arctic ringed seal. The boundary in the north, west, and east extends to the limit of the U.S. EEZ and in the southwest is delineated by a simplified linear indication of the median position of the sea ice edge in the Bering Sea during April.

The proposed rule provides a comprehensive review and analysis of the “primary constituent elements” of habitat essential for Arctic ringed seals in the United States. As outlined in the regulations governing the designation of critical habitat (50 C.F.R. § 424.12(b)), NMFS presents and considers information pertaining to the following five habitat needs: (1) space for individual or population growth; (2) food, water, or other nutritional or physiological requirements; (3) cover or shelter; (4) sites for breeding, nursing, and reproduction; and (5) habitats protected from disturbance or representative of a species’ historical or ecological distribution. Applying these factors, NMFS determined the presence of three primary constituent elements for Arctic ringed seals in the United States: (i) Sea ice habitat suitable for the formation and maintenance of subnivean birth lairs used for sheltering pups during whelping and nursing, which is defined as seasonal landfast (shorefast) ice, except for any bottom-fast ice extending seaward from the coast line in waters less than 2 m deep, or dense, stable pack ice, that has undergone deformation and contains snowdrifts at least 54 cm deep, (ii) Sea ice habitat suitable as a platform for basking and molting, which is defined as sea ice of 15 percent or more concentration, except for any bottom-fast ice extending seaward from the coastline in waters less than 2 m deep, (iii) Primary prey resources to support Arctic ringed seals, which are defined to be Arctic cod, saffron cod, shrimps, and amphipods. The critical habitat proposed by NMFS is based on the presence of one or more primary constituent elements. The Commission concurs with NMFS’s assessment and identification of these three primary constituent elements of habitat essential for Arctic ringed seals. Although essential habitat for Arctic ringed seals also exists in areas beyond U.S. jurisdiction, the applicable regulations (50 C.F.R. § 424.12(h)) specify that critical habitat is to include only areas subject to U.S. jurisdiction.

Delineating critical habitat for Arctic ringed seals presents some unique challenges. The range of Arctic ringed seals is circumpolar, extending well beyond areas subject to U.S. jurisdiction. Throughout their range, seals can move extensively and use different types of habitat for different functions at different times of the year. The sea ice habitat suitable for the formation and maintenance of subnivean lairs used to shelter mothers and pups during whelping and nursing as well as the sea ice habitat needed by ringed seals for molting and basking (two of the three primary constituent elements identified for Arctic ringed seal critical habitat in the proposed rule) is highly dynamic and varies considerably within and among seasons and between years. Thus one cannot identify a less extensive, *specific* geographic location for breeding or molting that will reliably support these functions year after year than has been identified in the proposed rule. A similar challenge exists for identifying specific areas of particular importance for foraging as seals feed throughout their range, year-round. Thus, the Commission concurs with NMFS’s proposed determination that the full extent of the area proposed as critical habitat for Arctic ringed seals contains physical and biological features essential for the conservation of the species and that warrant special protection.

As noted above, the use of certain areas within the proposed critical habitat and the importance of those areas to Arctic ringed seals may vary considerably by season. For example, snow-covered sea ice suitable for the formation of subnivean lairs is essential to the conservation of ringed seals during the breeding season, but may be of little value to them at other times of the year. This may prompt some to argue that critical habitat should be designated only on a seasonal basis or should be dynamic to reflect changing snow and ice patterns throughout the year or on an inter-annual basis. Such an approach, however, seems at odds with the structure and mandates of the Endangered Species Act, which specifies that critical habitat should include all areas that are essential to the conservation of a listed species during any part of the year and that federal agencies are under a continuing obligation to consult with NMFS if any action it authorizes, funds, or carries out may affect critical habitat. That is, the temporal aspect of critical habitat should be considered as part of the consultation, but not for determining whether consultation should be initiated. If an action would affect critical habitat only during a time of the year when it is not serving an essential function for the species, it presumably would not constitute adverse modification of that habitat.

Although the area being proposed by NMFS as critical habitat for ringed seals is large because of the occurrence of ringed seals throughout this area, the dependence of ringed seals on specific snow and sea ice conditions, the large inter-annual variation in the distribution of different snow and sea ice habitat types, and the large areas that individual ringed seals may use in a given year, the entire area proposed constitutes important habitat that is essential for the conservation of Arctic ringed seals—that is, protection of the entire area is necessary to prevent the ringed seals that occur in the United States from becoming endangered and to bring them to the point where the protections afforded by the Endangered Species Act are no longer necessary.

In light of these considerations, the Marine Mammal Commission recommends that NMFS adopt a final rule designating as critical habitat for Arctic ringed seals the entire area identified in the proposed rule. Further, if NMFS receives comments on the proposed rule that prompts it to incorporate significant changes at the final rule stage with respect to the area considered to be critical habitat, the Commission recommends that NMFS provide additional opportunity for public review and comment. The Commission would be pleased to address any questions about its recommendations or the rationale for them.

Sincerely,

A handwritten signature in blue ink that reads "Rebecca J. Lent". The signature is written in a cursive, flowing style.

Rebecca J. Lent, Ph.D.
Executive Director