

## Summary of Decision on Bearded Seal and Ringed Seal Critical Habitat Designation

On April 1, 2022, pursuant to the Endangered Species Act (“ESA”), the National Marine Fisheries Service (“NMFS”) designated critical habitat for the bearded seal and ringed seal.

**Bearded seal critical habitat designation** includes ~ 174 million acres of marine habitat based on the following physical and biological features:

- (1) sea ice habitat suitable for whelping and nursing
- (2) sea ice habitat suitable as a platform for molting
- (3) waters ≥ 200 m deep containing benthic organisms as primary prey resources

87 Fed. Reg. 19180, 19184-86 (Apr. 1, 2022).

**Ringed seal critical habitat designation** includes ~ 164 million acres of marine habitat based on the following physical and biological features:

- (1) snow-covered sea ice habitat suitable for the formation and maintenance of subnivean lairs for sheltering pups during whelping and nursing
- (2) sea ice habitat suitable as a platform for basking and molting
- (3) waters containing primary prey resources

87 Fed. Reg. 19232, 19236-39 (Apr. 1, 2022).

Both designations include areas in the Beaufort, Chukchi, and Bering Seas. Previously, in 2021, the Ice Seal Committee (“ISC”) submitted comments raising a number of concerns with the proposed designations.

When listing a species as *threatened* or *endangered* under the ESA, NMFS must also, to the maximum extent prudent and determinable, “**designate any habitat of such species which is then considered to be critical habitat.**”

16 U.S.C. § 1533(a)(3)(A)(i).

In part, the ESA defines critical habitat as “**the specific areas within the geographical area occupied by the species, at the time it is listed . . . , 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.**”

*Id.* § 1532(5)(A)(i).

NMFS is required to designate critical habitat based on the “**best scientific data available**” and after considering the economic, national security, and other impacts of the designation of a particular area.

*Id.* § 1533(b)(2).

NMFS may exclude an area from a critical habitat designation if the benefits of exclusion outweigh the benefits of inclusion, unless the failure to designate that area would result in the extinction of the species.

*Id.*

In 2023, the State of Alaska raised a number of challenges to the two critical habitat designations in the U.S. District Court for the District of Alaska. The Center for Biological Diversity (“CBD”) intervened in the litigation to help defend NMFS’s decisions.

On September 26, 2024, Judge Gleason ruled that the critical habitat designations were deficient in several respects. *State of Alaska v. Nat'l Marine Fisheries Serv.*, 2024 WL 4298114 (D. Alaska Sept. 26, 2024).

- First, the court held that NMFS erred in designating expansive areas as critical habitat without explaining why the entire area is indispensable to the survival and recovery of the seal species. *Id.* at \*10.
- Second, the court found that NMFS failed to consider conservation efforts by foreign nations when determining what areas of habitat may be indispensable to the seals. *Id.* at \*11.
- Finally, the court concluded that NMFS abused its discretion when it failed to consider excluding certain areas from the critical habitat designation (i.e., buffer zones around villages and shipping lanes) as requested by the State and North Slope Borough. *Id.* at \*15. As a result, the court vacated both critical habitat designations and remanded the decisions to NMFS for further proceedings. *Id.* at \*16.

NMFS and CBD have appealed the court's decision to the U.S. Court of Appeals for the Ninth Circuit, and the State of Alaska has filed a cross-appeal arguing that the district court should have found that it was not prudent to designate crucial habitat for the species. The Ninth Circuit has established the following briefing schedule, which may be subject to revision as briefing progresses:

- February 17, 2025.....NMFS and CBD file opening brief
- March 17, 2025.....State of Alaska files response and cross-appeal brief
- April 16, 2025.....NMFS and CBB file reply and cross-appeal response brief
- May 7, 2025.....State of Alaska files cross-appeal reply brief

Following the briefing, the Ninth Circuit will schedule and hold oral argument on the merits of the appeal and subsequently issue a decision.

While the ISC is not a party to the litigation, it could opt to participate as an *amicus curiae* (or friend of the court). In this context, the ISC could submit a brief to the court raising issues or additional considerations that should be taken into account during the appeal.

The court or the other parties must consent to the filing of an amicus brief, and it must be submitted no later than seven days after the principal brief of the party being supported (i.e., NMFS/CBD or the State of Alaska). Should the ISC consider this option, it should discuss the points and issues it would raise given its previously expressed concerns about the proposed designations.