

# The SandBar

Legal Reporter for the National Sea Grant College Program

## The End of *Juliana* and the Youth Climate Justice Movement?

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### Also in this issue

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The Ebb and Flow of Legal Protections for Biscayne National Park

Coral Reefs and Commerce: Concerns with Dredging in San Juan Bay

ITLOS Issues Climate Change Advisory Opinion

At Home in the Arctic: Alaska's Attempt to De-List a Threatened Seal is Struck Down

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# The End of *Juliana* and the Youth Climate Justice Movement?

Amy Kraitchman<sup>1</sup>



Yaquina Head in Oregon, courtesy of Jim Bauer.

On May 1, 2024, the Ninth Circuit Court of Appeals (Ninth Circuit), for the second time, ordered the U.S. District Court of Oregon to dismiss *Juliana v. United States* for lack of Article III standing.<sup>2</sup> The landmark case argued that by continuing to permit natural gas terminals and other subsidized fossil fuel practices, the federal government, specifically the executive branch, had violated the plaintiffs’ constitutional rights. Previously, in 2020, the district court was ordered to dismiss the case for lack of standing, but the judge allowed the plaintiffs to cure their standing issue. The federal government opposed this ruling. By ruling in favor of the federal government again, the court has seemingly signaled the end of this decade long case.

## Article III Standing

Under Article III of the U.S. Constitution, federal courts can only hear cases and controversies that, at a minimum, arise under federal law. The U.S. Supreme Court has interpreted this to mean that in order for a federal court to have jurisdiction over a case, a plaintiff must show that they have standing to bring the case. A plaintiff has standing when they: 1) have suffered an “injury-in-fact” that is both actual or

imminent and concrete and particularized; 2) that the conduct of the defendant is “fairly traceable” to the alleged injury suffered; and 3) that the injury is likely to be redressed by the plaintiff’s requested relief.<sup>3</sup>

## History of *Juliana*

### *Initial Lawsuit*

In 2015, the Oregon-based nonprofit Our Children’s Trust filed a lawsuit in federal district court on behalf of 21 youth plaintiffs. The plaintiffs argued that the federal government had violated their constitutional right to due process and equal protection and the public trust doctrine, by failing to take meaningful steps to address the threat of climate change and by continuing to contribute “dangerous concentrations of CO<sub>2</sub>” into the atmosphere. In essence, the plaintiffs claimed that there was an “atmospheric trust” that, like the public trust doctrine, requires the government to hold in trust natural resources for the benefit and use of its citizens.

This is not the first time that Our Children’s Trust has tried this type of atmospheric trust case. In 2011, they filed 51 lawsuits—one in every state plus one against the federal government—all claiming that the government had violated

their duty as trustee in protecting and maintaining the air and atmosphere for the benefit of citizens by not avoiding substantial impairment of these resources. All 51 cases were dismissed on various legal grounds. *Juliana*, however, is different from these cases. Instead of arguing that the federal government failed to avoid impairment of environmental resources, they claimed that the government had an affirmative duty to avoid substantial impairment and had violated this duty by deliberately ignoring or acting indifferent towards the effect of continued fossil fuel use on the climate. As relief, the plaintiffs sought declaratory judgment and an order requiring the Executive Branch to create a plan on how they would decrease national reliance on and use of fossil fuels.

### 2020 Ninth Circuit Appeal

The federal government, in response to the initial complaint, attempted to dismiss the case for lack of standing. When that attempt failed, they filed their first *writ of mandamus* and motion to stay with the Ninth Circuit in 2018. A *writ of mandamus* can be filed with an appeals court when a party believes that the lower court has abused their discretion or not fulfilled their official duties but are not able to appeal or otherwise seek review of a decision. Such writs are considered an extraordinary remedy that can order a lower court to enforce a judgment from a higher court and are only meant to be used in extraordinary situations.<sup>4</sup> The Ninth Circuit denied the initial writ.

Right before trial was set to start in 2020, the federal government motioned again to dismiss the case. This time, the Ninth Circuit took up the motion and ordered the district court to dismiss the case for lack of standing.<sup>5</sup> The court stated that the relief the plaintiffs sought was not likely to substantially mitigate the injuries the plaintiffs have suffered. Nor did they think that the relief sought was within their power because they could not order the Executive branch to create a plan on how they will reduce fossil fuel reliance.

### 2023 Ninth Circuit Appeal

Following the 2020 Ninth Circuit decision to dismiss the case, the plaintiffs unsuccessfully motioned for an *en banc* hearing in 2021. If granted, the *en banc* hearing would have required all the Ninth Circuit judges to hear the case—cases appealed to the Ninth Circuit are usually heard by only 3 sitting judges chosen at random—and reconsider the ruling. Since the motion for an *en banc* hearing was not granted, the case returned to the district court judge. However, instead of dismissing the case, the district court judge granted the plaintiff’s motion for leave to cure their standing issues in 2023.

The federal government filed a motion opposing the plaintiff’s request for leave, claiming that it violated the Ninth Circuit’s order. However, the district court denied their motion in December 2023. The district court reasoned that

leave was allowed because the Ninth Circuit did not explicitly preclude leave and that the Supreme Court’s recent decision in another case, *Uzuegbunam v. Preczewski*, created compelling authority “for a different result.”<sup>6</sup> In response, the federal government filed another writ of mandamus or motion to stay with the Ninth Circuit. Environmental nonprofits, law professors, legal clinics, and members of Congress filed *amicus*, or “friend of the court,” briefs in support of letting the case go to trial.

However, in May 2024, the Ninth Circuit ordered the district court to dismiss the case again, but this time explicitly stated that the plaintiffs are not allowed leave to cure their standing issue. The court stated that the Supreme Court’s ruling in *Uzuegbunam* did not create compelling authority to allow the case to continue. *Uzuegbunam* held that nominal damages were an adequate remedy to redress past injuries. *Juliana*, the court ruled, is differentiated from *Uzuegbunam* because the remedy sought in *Juliana* is prospective, not retrospective, and the law around prospective declaratory judgment was unchanged. The case was never argued on its merits.

### Conclusion

The Ninth Circuit remanded the case back to the district court with orders to dismiss the complaint for lack of Article III standing. The district court is not allowed to grant leave for the plaintiffs to amend their request for relief. While some legal experts see this as potentially the end of *Juliana*, Our Children’s Trust’s success last summer in *Held v. State of Montana*, and other active cases across the country in California, Alaska, Florida, Utah, Virginia, and Hawai’i (oral arguments are scheduled to start in June 2024) show that this wave of atmospheric trust cases is not slowing down anytime soon.<sup>7</sup> ❌

### Endnotes

- <sup>1</sup> NSGLC Ocean and Coastal Law Fellow.
- <sup>2</sup> United States of America et al. v. United States District Court for the District of Oregon, Eugene et al., 6:15-cv-1517 (9th Cir. May 1, 2024).
- <sup>3</sup> Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).
- <sup>4</sup> *Mandamus*, U.S. DEP’T. OF JUST., (last visited Jun. 7, 2024).
- <sup>5</sup> *Juliana v. United States*, 947 F3d 1175 (9th Cir. 2020).
- <sup>6</sup> *Uzuegbunam v. Preczewski*, 141 S. Ct. 792 (2021).
- <sup>7</sup> *Held v. State of Montana*, No. CDV-2020-307 (1st Dist. Ct. Mont., Aug. 14, 2023); see also *Active State Legal Actions*, OUR CHILD’S TR., (last visited Jun. 10, 2024).

# The Ebb and Flow of Legal Protections for Biscayne National Park

Cheyenne Sharp<sup>1</sup>



Biscayne National Park,  
courtesy of the National Parks Conservation Association.

**B**iscayne Bay, located near Miami, Florida, has been federally protected for over fifty years, ultimately becoming Biscayne National Park in 1980. As the largest marine national park, it is revered for its vibrant coral reefs and aquatic biodiversity. However, Biscayne is losing its luster—about six percent of its reefs remain, and it persistently endures anthropogenic stressors like overfishing, vessel groundings, and pollution from discarded fishing gear.

In 2014 and 2015, the National Park Service (NPS) laid out sweeping plans to protect Biscayne from both recreational and commercial fishing. After almost a decade of subsequent inaction, the National Parks Conservation Association (NPCA) brought suit against the U.S. Department of the Interior and NPS to compel NPS's progress on a proposed marine reserve zone and commercial fishing phase-out.<sup>2</sup> On March 29, 2024, the U.S. District Court for the District of Columbia held that NPS had unlawfully delayed in implementing the marine reserve zone, but NPS had no duty to implement the phase-out.

## Background

NPS manages Biscayne according to a 2015 General Management Plan (GMP) and 2014 Fishery Management Plan (FMP). The GMP is a comprehensive document that outlines “a vision for the park’s future,” setting out approaches for the promotion of resource conservation and visitor enjoyment.<sup>3</sup> In adopting the GMP, NPS acknowledged that a change in policy was necessary to avoid long-term, adverse impacts to Biscayne’s fishery resources, federally protected species, and marine habitats. Therefore, NPS endorsed the designation of a marine reserve zone (MRZ) where recreational and commercial fishing would be prohibited, while unobtrusive viewing activities could continue.

The FMP is a subsidiary document, developed jointly with the Florida Fish and Wildlife Commission (FWC), with its stated focus being “ecosystem management solely as it pertains to fisheries.”<sup>4</sup> In it, NPS decided on an approach that prioritizes a twenty percent increase in the size and abundance of targeted fish species in the park, rather than committing

Coral reef at Biscayne National Park, courtesy of the National Parks Conservation Association.



NPS to precise management actions. Still, one of the suggested techniques in the FMP was a commercial fishing phase-out that would require non-transferable, expirable special use permits to fish commercially within Biscayne.

Despite Biscayne’s urgent need for intervention, NPS has taken no additional action to implement the MRZ or phase-out. In 2020, NPS and FWC developed a Memorandum of Understanding (MOU) that signaled the agencies’ mutual intentions of cooperation and consultation in monitoring the park’s fisheries health and reaching FMP goals. The MOU seemed to mark a departure from NPS’s previous plan of action, as NPS agreed to avoid restrictive management actions—presumably, including an MRZ—and to continue to allow fishing due to the activity’s statewide benefits and importance. On the other hand, the MOU requires only consultation rather than concession, “[leaving] room for flexibility and disagreement between the agencies.”<sup>5</sup> NPS has made no efforts to implement or propose draft regulations specifically for the MRZ or phase-out.

### **NPCA’s Claims Under the APA**

NPCA alleged that NPS’s inaction regarding implementation of the MRZ and phase-out violated two provisions of the Administrative Procedure Act (APA), a federal statute that allows for judicial review of administrative decisions. First, the NPCA claimed that the MOU constituted a violation of APA Section 706(2)(A) because it was an arbitrary and capricious final decision by NPS, allegedly representing a change in policy without a reasoned explanation. Second, NPCA claimed that NPS violated APA Section 706(1) by unreasonably delaying implementation of the MRZ and phase-out.

### **No Unlawful Final Decision**

The court quickly dismissed NPCA’s Section 706(2)(A) claims. One requirement of a final agency action is that it “mark[s] the consummation of the agency’s decision-making process.”<sup>6</sup> NPCA convincingly argued that the MOU was NPS’s final action representing the agency’s intentions to abandon its plans for the MRZ and phase-out. This position

Coral reef at Biscayne National Park, courtesy of the National Parks Conservation Association.



was bolstered by evidence that NPS took steps toward designating the MRZ and drafted a rule to phase-out commercial fishing before facing opposition to the plans from both local politicians and its partner, FWC.

Nonetheless, the court held that “it would be a leap too far” to recognize the MOU as the culmination of NPS’s decision-making on Biscayne’s management.<sup>7</sup> NPS argued, and the court agreed, that the MOU was merely an effort to promote cooperation and joint monitoring between NPS and FWC; it still allowed NPS to disagree with and depart from FWC’s preferences if necessary. Since there was no final agency action to analyze as potentially arbitrary and capricious, the court decided in favor of NPS on NPCA’s Section 706(2)(A) claims—but one of NPCA’s remaining Section 706(1) claims endured.

### **Unreasonable Delay**

Section 706(1) of the APA allows courts to “compel agency action unlawfully withheld or unreasonably delayed.”<sup>8</sup> For a claim to succeed under this provision, the challenged agency action must be mandatory, meaning that the agency is required to act on it, as well as discrete, meaning that it is a narrow commitment. If those prerequisites are met, the court will analyze the action to determine if it has been unreasonably delayed under the circumstances.

The court found that NPS had an obligation to implement the MRZ. Importantly, the court emphasized rulings from both the D.C. and Ninth Circuits finding that a binding duty to act may come from an agency’s commitment to a course of action in a record of decision that results from an environmental assessment. The MRZ was a fundamental

aspect of the GMP that NPS chose after years of scientific investigation and public comment because it would most effectively curb Biscayne’s deterioration. NPS had already taken significant steps toward planning the MRZ, and NPS’s record of decision stated that it would be implemented “[a]s soon as practicable.”<sup>9</sup> Therefore, the court found that NPS had established for itself a non-discretionary commitment to effectuating the MRZ. Furthermore, implementation of the MRZ was sufficiently discrete because it was one aspect of the multifaceted GMP that NPS had explicitly agreed to follow through with.

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## The MRZ was a fundamental aspect of the GMP that NPS chose after years of scientific investigation and public comment because it would most effectively curb Biscayne’s deterioration.

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Furthermore, the court held that NPS’s implementation of the MRZ was unreasonably and unlawfully delayed. A 1984 D.C. Circuit Court case provided a six-factor balancing test for making such a determination.<sup>10</sup> Here, the court found that the factors weighed heavily against NPS. For example, NPS’s nine years of inaction had no plausible justification because NPS had pledged to institute the MRZ “as soon as practicable,” intentionally rejected a ten-year monitoring period preceding the MRZ in its GMP, and already established many functional details of the anticipated MRZ. Nor did apparent political opposition or interagency conflict establish a sufficient justification. Additionally, NPS’s delay jeopardized important park interests like visitor welfare, conserving coral reefs, and ecosystem vitality. As a result, the court decided in favor of the NPCA on its Section 706(1) claim pertaining to the MRZ, ordering NPS to publish a regulation implementing the MRZ as originally planned.

On the other hand, the court found that NPS did not have a duty to take action regarding the commercial fishing phase-out. Although the FMP contemplated the execution of a phase-out, the language used in the FMP was not strong enough to evince a binding commitment. The FMP clearly states that it “focuses on Desired Future Conditions (DFCs) of the park’s fisheries resources and *not* on the exact management activities to be implemented.”<sup>11</sup> The FMP requires that NPS and FWC work together to meet the goal of improving the size and abundance of certain fish within Biscayne, not that NPS strictly adheres to approaches like the phase-out suggested in the FMP. Having found that NPS’s

implementation of the commercial fishing phase-out was not mandatory, the court declined to consider whether the action was discrete or unreasonably delayed, deciding in favor of NPS on this issue.

### Conclusion

Following the ruling, NPCA Sun Coast Regional Director Dr. Melissa Abdo enthused, “Thanks to this ruling, national park advocates have a chance to restore this beautiful marine national park to its former glory.”<sup>12</sup> While commercial and recreational fishing may continue throughout most of Biscayne, the mandated MRZ designation is expected to rebuild the health of the park’s dazzling marine ecosystems, enhance visitor experience, and contribute to the longevity of Florida’s tourism industry.<sup>13</sup> The ruling is also notable for its enforcement of agency accountability, which is particularly vital when it comes to persistent and fast-paced environmental degradation. This district court decision is a celebrated victory for NPCA and environmental advocates, but the future of Biscayne National Park is not yet set in stone—NPS has appealed the decision and a review by the U.S. Court of Appeals for the D.C. Circuit is imminent. 🐟

### Endnotes

<sup>1</sup> NSGLC Summer Research Associate; 2L, Stetson University College of Law.

<sup>2</sup> Nat’l Parks Conservation Ass’n v. U.S. Dep’t of the Interior, No. CV 20-3706 (RC), 2024 WL 1344450, at \*1 (D.D.C. Mar. 29, 2024).

<sup>3</sup> *Id.* at \*3.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* at \*5.

<sup>6</sup> *Id.* at \*11 (quoting *Soundboard Ass’n v. FTC*, 888 F.3d 1261, 1267 (D.C. Cir. 2018)).

<sup>7</sup> *Nat’l Parks Conservation Ass’n*, 2024 WL 1344450, at \*11.

<sup>8</sup> 5 U.S.C. § 706(1) (2024).

<sup>9</sup> *Nat’l Parks Conservation Ass’n*, 2024 WL 1344450, at \*21.

<sup>10</sup> *Research and Action Ctr. v. F.C.C.*, 750 F.2d 70, 79-80 (D.C. Cir. 1984).

<sup>11</sup> *Nat’l Parks Conservation Ass’n*, 2024 WL 1344450, at \*19.

<sup>12</sup> Press Release, Nat’l Parks Conservation Ass’n, Victory! Parks Group Wins Court Ruling on Marine Reserve Zone, Bringing Greater Protections for Biscayne National Park (Apr. 1, 2024).

<sup>13</sup> *Id.*

# Coral Reefs and Commerce: Concerns with Dredging in San Juan Bay

Patricia McKee<sup>1</sup>

San Juan Harbor, located on Puerto Rico's northern coast, handles 75% of the island's non-petroleum commerce.<sup>2</sup> In 2018, the U.S. Army Corps of Engineers (Corps) announced plans to dredge San Juan Bay.<sup>3</sup> According to the Corps, the proposed dredge would enable larger ships to navigate the channel more efficiently, reducing operation costs. A more accommodating channel would facilitate the transit of tankers carrying liquefied natural gas (LNG), enhancing "short- and long-term energy goals."<sup>4</sup> The Corps suggested the Bay area would benefit economically, remedying "known shipping inefficiencies," including congestion and other cost drivers.<sup>5</sup>

Environmentalists voiced concerns that the Corps had not adequately considered the project's impact, specifically increased turbidity from dredging, on seven federally protected coral species. Others had economic concerns – a 2020 NOAA status report on coral reef conditions in Puerto Rico disclosed that the island receives almost \$2 billion annually from reef-related tourism.<sup>6</sup> Several environmental organizations challenged federal agencies' project approval, alleging non-compliance with environmental statutes.

## Legal Challenges and NEPA Compliance

In 2022, three organizations—El Puente de Williamsburg, CORALations, and the Center for Biological Diversity—jointly sued the Corps and the National Marine Fisheries Service (NMFS) for allegedly violating federal law.<sup>7</sup> These organizations asserted nine claims alleging various violations of environmental statutes, including the Clean Water Act (CWA) and Endangered Species Act (ESA). They requested declaratory and injunctive relief from the U.S. District Court for the District of Columbia, hoping to delay bidding and stall the project indefinitely. The court favored the Corps when deciding most claims in the initial complaint. However, two counts remained unresolved and, therefore, appealable.

In May 2024, the D.C. Circuit Court of Appeals heard oral arguments in this case. The crux of this appeal involved the National Environmental Policy Act (NEPA). NEPA requires federal agencies to thoroughly assess or "take a hard look" at the environmental consequences of significant federal actions.<sup>8</sup> The lead agency—the Corps—must also

communicate its findings to the public.<sup>9</sup> The Corps had finalized an Environmental Assessment (EA), determining that the dredging operation would not significantly impact San Juan or the coral.

A complete EA should evaluate the proposed action's direct impacts and its indirect and cumulative effects. The Corps must also consider all viable alternatives, including those outside its jurisdiction.<sup>10</sup> Because of this requirement, the Corps consulted with NMFS to determine whether the dredging would harm the seven on-site coral species. Although NMFS initially did not concur with the Corps' finding of no significant impact, it partnered with the Corps to address turbidity concerns and install a monitoring plan for the coral.

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**Environmentalists voiced concerns that the Corps had not adequately considered the project's impact, specifically increased turbidity from dredging, on seven federally protected coral species.**

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The courts generally review challenges to NEPA under the Administrative Procedure Act (APA), which permits judicial review of federal agency actions. This review informs a checks-and-balances system, allowing courts to examine government actions to affirm their constitutionality.<sup>11</sup> The organizations contended that the Corps was arbitrary and capricious in its analysis.

## Cumulative Impacts Analysis

On appeal, the court considered four issues arising from the Corps' EA. First, the organization argued the Corps "improperly 'segmented'" its assessment, avoiding the potential implications of converting existing facilities to LNG as an indirect effect. In 2004, the Supreme Court ruled that "agency challengers"

cannot introduce NEPA arguments during litigation.<sup>12</sup> Instead, those claimants must engage during the administrative stage to ensure the agency understands the issue and can meaningfully respond. The organizations did not intervene during the administrative period, and, therefore, they forfeited their LNG arguments.

Next, the court considered the cumulative impacts of actions related to the dredging. NEPA defines a “cumulative impact” as the total environmental consequences resulting from the combined influence of present action and past and foreseeable future ones.<sup>13</sup> In this case, the organizations first argued that the Corps failed to properly identify the affected area. Although the Corps did not specify a distinct region, it broadly designated San Juan Harbor and adjacent channels and terminals. The court deemed this “study area” sufficient for the cumulative-impact analysis because the study area included the affected region.

Secondly, the organizations argued that the Corps had not identified enough “past, present, and reasonably foreseeable” actions to adequately determine the project’s cumulative impacts.<sup>14</sup> However, the court deemed the Corps’s consideration of two related actions sufficient.

### Environmental Justice Analysis

The organizations also challenged the Corps’ environmental justice analysis. In particular, this challenge encompassed the geographic scope selected by the Corps, which did not extend beyond a “one-mile radius around the Port of San Juan.” But, as the court acknowledged, the Corps composed a supplemental statement that included a five-mile “buffer zone” around the Harbor.

Next, the organizations contended the Corps should have translated all relevant materials into Spanish and extended the comment period following two hurricanes. However, per executive order, the Corps had discretion when selecting items for translation.<sup>15</sup> Moreover, the Corps has not received any formal requests for an extension, so their decision not to accept late comments was not arbitrary or capricious.

### Coral-Related Challenges

Lastly, the organizations argued that the agencies did not use the best available science during the consultation. Specifically, the organizations wanted the Corps to acknowledge a similar project in the Port of Miami, adversely affecting corals “far away from the dredging site.”<sup>16</sup> However, the Corps did evaluate the “lessons learned from Miami” during its internal communications for its current project.<sup>17</sup>

Regarding the coral, the organizations also criticized the agencies’ reliance on a monitoring plan as an “undefined and unenforceable measure.”<sup>18</sup> Comparatively, the court commended the specificity of the plan and the agencies’ promise to re-engage in consultation if it did not mitigate turbidity.

### Conclusion

For these reasons, the court affirmed the district court decision, finding the Corps’ actions were not arbitrary and capricious. While the organizations raised valid concerns about the project’s potential harm to coral reefs and local communities, the court found the Corps’ actions did comply with NEPA requirements. This case underscores the complexities and importance of NEPA. It illustrates the need for federal agencies to prepare comprehensive environmental assessments, particularly in ecologically sensitive areas. This robust system of checks and balances safeguards our economic and biological interests in coral reefs and other areas. 🦋

### Endnotes

<sup>1</sup> NSGLC Summer Research Associate; 3L, Elisabeth Haub School of Law at Pace University.

<sup>2</sup> Luis Deya, *USACE Moving Forward: San Juan Harbor Improvements Project Partnership Agreement*, U.S. ARMY CORPS OF ENGR’S (Feb. 3, 2023).

<sup>3</sup> *See El Puente v. U.S. Army Corps of Eng’rs*, 683 F.Supp. 3d 1 (D.D.C. 2023).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> NOAA Coral Reef Conservation Program, *Coral Reef Condition: A Status Report for Puerto Rico*, (2020).

<sup>7</sup> *El Puente v. U.S. Army Corps of Eng’rs*, 2024 U.S. App. LEXIS 10842 (D.C. Cir. 2024).

<sup>8</sup> 42 U.S.C. § 4321 et seq.

<sup>9</sup> 40 C.F.R. § 1501.5(e).

<sup>10</sup> 40 C.F.R. §1502.14.

<sup>11</sup> 5 U.S.C. § 706(1).

<sup>12</sup> *Dep’t of Transp. v. Pub. Citizen*, 541 U.S. 752, 764 (2004).

<sup>13</sup> 40 C.F.R. §1508.7.

<sup>14</sup> *El Puente*, 2024 U.S. App. LEXIS10842, at \*22.

<sup>15</sup> Exec. Order No. 12,898, 59 Fed. Reg. 7,629 (Feb. 11, 1994).

<sup>16</sup> *El Puente*, 2024 U.S. App. LEXIS 10842, at \*31.

<sup>17</sup> *Id.* at \*33.

<sup>18</sup> *Id.* at \*34.

# ITLOS Issues Climate Change Advisory Opinion

Mateos Lozano<sup>1</sup>

As a first in history, an international tribunal has issued an advisory opinion about the obligations of member States toward climate mitigation.<sup>2</sup> On May 21, 2024, the International Tribunal for the Law of the Sea (ITLOS) issued a unanimous advisory opinion that clarified several aspects of the United Nations Convention on the Law of the Sea's (UNCLOS) application to climate change, including a clarification that all of the 168 States party to UNCLOS must take the steps necessary to prevent and mitigate marine pollution caused by anthropogenic greenhouse gas (GHG) emissions.<sup>3</sup> Although the ITLOS advisory opinion is legally non-binding, it has several implications regarding climate change and international law, including but not limited to it serving as a potential reference for current and future climate litigation cases.

## Background

The ITLOS advisory opinion is a direct result of a request submitted by the newly formed Commission of Small Island States on Climate Change and International Law (COSIS) on December 12, 2022. COSIS, consisting of nine island nations, sought clarification regarding the extent to which State parties to UNCLOS are obligated “to prevent, reduce, and control pollution of the marine environment” from climate change, and to “protect and preserve the marine environment in relation to climate change impacts.”<sup>4</sup> Following the COSIS request, ITLOS received oral and written statements from more than 50 states and intergovernmental organizations that each suggested how ITLOS should respond to the COSIS request.

While the ITLOS advisory opinion is the first advisory opinion issued from an international court regarding state obligations to climate mitigation, there have been previous instances of countries requesting an opinion from international organizations on this topic. For example, in January 2023 Chile and Colombia requested a climate-related advisory opinion from the Inter-American Court of Human Rights (IACtHR), and in March 2023 Vanuatu began a campaign that resulted in a request for an advisory opinion from the International Court of Justice (ICJ).<sup>5</sup> Both the ICJ and IACtHR are expected to issue their advisory opinions within the next couple years.<sup>6</sup>

The UNCLOS treaty, adopted in 1982, does not explicitly contain language regarding anthropogenic GHG emissions. Despite this, many State parties to UNCLOS argued in their submitted statements to ITLOS that the intent of UNCLOS, upon its formation, was to adapt its scope to the current scientific consensus of marine environmental threats.<sup>7</sup> In this way, the ITLOS advisory opinion bases much of its analysis regarding the nature and risks of anthropogenic GHG emissions on research conducted by the Intergovernmental Panel on Climate Change.

## Advisory Opinion

Upon the conclusion of many tribunal meetings, ITLOS reached several findings set forth in its advisory opinion regarding the application of UNCLOS to the context of climate change. First and foremost, ITLOS determined that anthropogenic GHG emissions classify as “marine pollutants” according to the criteria of UNCLOS. Under UNCLOS, for something to be classified as a “marine pollutant,” the thing in question must be directly or indirectly introduced into the environment by humans and be a “substance or energy” that causes or is likely to cause harm to marine life or humans and impair legitimate uses of the sea like fishing. In this case, ITLOS found that anthropogenic GHG emissions met all the criteria for marine pollutants under UNCLOS since GHG emissions, a type of substance or energy, are known to cause climate change and ocean acidification, which both risk harm to the marine environment. As such, any obligations of State parties that concern marine pollutants outlined in UNCLOS should now apply, in the opinion of ITLOS, to anthropogenic GHG emissions.

Therefore, ITLOS found that State parties to UNCLOS should be obligated to take all the actions necessary to “prevent, reduce, and control” marine pollution caused by GHG emissions. In defining what State actions qualify as necessary, ITLOS notes that States must act in “due diligence” when mitigating and preventing GHG emissions. In this context, due diligence means that a State must establish a national system of legislation, administrative procedures, and efficient enforcement mechanisms that regulate GHG emissions effectively. Moreover, the exact degree to which any

particular State must act in due diligence varies and depends upon that State's available resources and capabilities, available scientific knowledge, and the risk of harm posed by the pollution involved. Given that the science heavily suggests that anthropogenic GHG emissions pose a high risk of serious harm toward the marine environment, ITLOS emphasizes that the degree to which State parties should act in due diligence to control and mitigate pollution must be high and stringent. At the same time, ITLOS clarified that if a State is acting in due diligence to prevent and mitigate pollution, a State should not be held responsible for the GHG emissions from private entities, like a corporation.

Moreover, ITLOS found that State parties to UNCLOS are obligated to prevent transboundary pollution, or pollution that originates in one State's boundary that crosses into the boundaries of one or more States. In the case of transboundary pollution, State parties must also act in due diligence to prevent and mitigate transboundary pollution that results from GHG emissions. At the same time, ITLOS noted that it would be challenging to enforce obligations to prevent transboundary pollution since ITLOS stated that it is difficult to prove whether pollution from one State caused environmental harm in another State. Regardless, due to transboundary pollution's unique nature, ITLOS emphasized that States may need to act even more stringently to prevent transboundary pollution than other kinds of pollution.

Furthermore, ITLOS took a stance on a debate that emerged during its deliberations regarding the role of the 2015 Climate Agreement. During ITLOS sessions, some parties argued that the Paris Agreement specifically covered climate change commitments, and that UNCLOS doesn't impose any climate change obligations. ITLOS rejected these arguments, and clarified that if a State just met all of its commitments under the Paris Agreement, then that State would still not meet its obligations to control pollution under UNCLOS. As such, ITLOS argued that UNCLOS State obligations should be considered separate from the Paris Agreement commitments.

Lastly, while highlights of the ITLOS advisory opinion findings are noted above, other topics are addressed in the opinion. ITLOS has made additional findings regarding State procedural obligations to perform environmental impact assessments (EIAs) under certain circumstances, State obligations to protect and potentially restore the marine environment from climate change impacts, and more.

## Implications

Despite the fact that the ITLOS advisory opinion is legally non-binding, the Tribunal's findings will still have several implications regarding international climate law. For one, the Tribunal's opinion opens the door for other courts to reference the ITLOS advisory opinion when interpreting and

ruling on climate litigation cases globally. Furthermore, the ITLOS advisory opinion has implications for how international organizations and some nations will approach climate-related issues. Notably, the ITLOS advisory opinion will likely influence how the ICJ and IACtHR each shape their own advisory opinions on climate change in the next couple years. As such, depending on the findings of the ICJ and IACtHR, stronger legal precedent for State obligations regarding climate mitigation may be formed. The ITLOS advisory opinion may encourage the 168 States of UNCLOS to adopt and shape regulations and measures that increasingly prioritize addressing climate change. Finally, the Tribunal's opinion may influence how non-UNCLOS countries like the United States view the unwritten rules and expectations of international law.

## Conclusion

Altogether, the ITLOS advisory opinion represents a growing consensus among international organizations that States should have more obligations to address climate change. Albeit, many of the implications are speculative at this time. Regardless, the ITLOS advisory opinion is a first of its kind and will likely serve as a new legal resource during climate-related cases. ☺

## Endnotes

- <sup>1</sup> 2024 Community Engaged Intern, National Sea Grant Law Center; Junior Public Policy Major at the University of Mississippi.
- <sup>2</sup> Korey Silverman-Roati & Maxim Bönnermann, *The ITLOS Advisory Opinion on Climate Change: An introduction into the joint blog symposium*, Climate: A Sabin Center Blog, (May 22, 2024).
- <sup>3</sup> International Tribunal For The Law Of The Sea, *Advisory Opinion, Case No. 31*, ITLOS Rep. 1-153 (May 21, 2024).
- <sup>4</sup> *Id.*
- <sup>5</sup> Maria Antonia Tigre, *It Is (Finally) Time for an Advisory Opinion on Climate Change: Challenges and Opportunities on a Trio of Initiatives*, 17 Charleston Law Review, 623, (2024).
- <sup>6</sup> Paul Davies et al., *International Tribunal on the Law of the Sea Issues Landmark Advisory Opinion on Climate Change*, Latham & Walkins (May 30, 2024).
- <sup>7</sup> Constantinos Yiallourides & Surya Deva, *A Commentary on ITLOS' Advisory Opinion on Climate Change*, British Institute of International and Comparative Law (May 24, 2024).

# At Home in the Arctic: Alaska's Attempt to De-List a Threatened Seal is Struck Down

Collin Dowson<sup>1</sup>



Photo of a ringed seal, via Pixabay.com.

**W**hen you think of the Arctic circle, you may picture a largely barren wasteland, fields of ice and snow without a plant or animal in sight for miles. However, in reality, this region is teeming with life. One example of the unique wildlife found in this chilly biome is the Arctic ringed seal, a species which has learned to use its inhospitable surroundings to its advantage. These seals burrow into deep snow drifts on ice floes in order to have their young in self-made caves which are relatively protected from the cold and from the polar bears who hunt the seals as their primary source of food.<sup>2</sup> Because of this unique adaptation, the seals are highly vulnerable to changes to their environment, which resulted in the species being listed as threatened under the Endangered Species Act (ESA) in 2012. However, in recent years, the seal's protected status has come into question.

## Background

The ESA seeks to protect species at a high risk of becoming extinct. Species of concern are listed as either endangered, meaning that they are in danger of extinction in all or a significant portion of their range, or as threatened, meaning that they are likely to become endangered within the foreseeable future.<sup>3</sup> These determinations are made by either the U.S. Fish and Wildlife Service (USFWS) or the National Marine Fisheries Service (NMFS), with NMFS being the lead agency responsible for the Arctic ringed seal. Once a species is listed, the area designated as its critical habitat is subject to a host of protections, primarily focused on limiting human activity in the area. In 2019, the North Slope borough (Alaska's equivalent of a county), filed a petition with the NMFS to de-list the Arctic ringed seal, out of a desire to begin commercial activity in the area currently listed as the

seal's critical habitat. When NMFS denied this petition, Alaska joined its borough in a challenge of the decision, bringing the case to the U.S. District Court of Alaska.<sup>4</sup>

When a judge is reviewing an action taken by a federal agency, they generally must be highly deferential, and use the standard of review set out by the Administrative Procedure Act (APA). The APA directs judges to only find an agency action unlawful, and thus set it aside, if it is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”<sup>5</sup> Judges often apply this standard by asking “whether the agency considered the relevant factors and articulated a rational connection between the facts found and the choice made.”<sup>6</sup> Here, the federal district court judge applied this standard to a series of complaints that Alaska brought against NMFS’ decision to keep the Arctic seal listed.

### Claims

First, Alaska maintained that the USFWS, NMFS’ sister service, had recently decided to not list the Pacific Walrus as a threatened species, and that the arguments used in making that decision should also dictate the outcome of the Arctic seal’s listing. NMFS argued, and the court agreed, that the decisions were simply too different to draw a direct comparison. USFWS’ decision to not list the walrus was based largely on the uncertainty surrounding how the walrus would adapt to increased environmental stressors, given that the species had shown a great level of behavioral adaptability in response to past changes. NMFS pointed out that the Arctic seal had not displayed a similar level of adaptability and, in fact, the seal’s burrowing behavior indicated that the species was likely less flexible and more vulnerable to change than most others. The court found that there was a rational connection between the data available to NMFS, and its conclusion that the uncertainty which controlled in the decision to not list the Pacific Walrus was inapplicable to the case of the Arctic ringed seal. Therefore, USFWS’ decision could not dictate the outcome in this case.

Next, Alaska argued that NMFS had not considered all relevant information when making its decision, because the agency had declined to consider the fifth Assessment Report (AR5) on climate change data issued by the Intergovernmental Panel on Climate Change, deciding instead to continue to use the data from the previous iteration of the report (AR4). NMFS countered by pointing out that under the ESA, when evaluating a petition to list or de-list a species, the agency is only required to evaluate “new information not previously considered.”<sup>7</sup> NMFS argued that AR4 and AR5 presented nearly identical information, save for a single scenario present in AR5, titled RCP 2.6. NMFS described RCP 2.6 as an “aggressive mitigation scenario,” requiring “unprecedented global GHG emissions reductions and new technologies.”<sup>8</sup> Because there was no evidence presented by Alaska that such a massive shift in global policy was imminent, NMFS decided

to exclude RCP 2.6 from its analysis and, after this exclusion, concluded that AR5 did not constitute new information from what was considered when evaluating AR4. The court agreed with this analysis and, finding that the exclusion of RCP 2.6 was reasonable, declined to find that NMFS’ use of AR4 rather than AR5 was a legally redressable error.

Alaska’s third major point of contention was that, according to recently gathered biological data, the global population of Arctic ringed seals has remained stable, rather than declining. In response, NMFS pointed to the analysis it conducted when it originally decided to list the seal as threatened. In its original report, NMFS based its decision on models and projections about the global Arctic seal population going decades into the future. That the seal population remains in the millions today couldn’t be new information, NMFS argued, because it was well within the predictions which formed the basis of their original decision to list the species. The court again sided with NMFS, employing the highly deferential standard called for by the APA, and stating that NMFS was not required to reconsider the seal’s status on the basis of its current population stability.

### Conclusion

The Arctic ringed seal retains its protected status, for now. But not everyone is happy with this outcome. Alaska’s governor, Mike Dunleavy, has criticized the numerous protected zones which exist along Alaska’s coastline, arguing that “no other state is burdened by the same level of federal overreach created by unnecessarily large critical habitat designations.”<sup>9</sup> Similarly, Treg Taylor, Alaska’s Attorney General, claimed that designating such large portions of the seal’s range as critical habitat was “an abuse of Federal power.”<sup>10</sup> These conflicts between the needs of animals, and the desired uses of human beings are all too common. Safe to say, this is not the last time the fate of Arctic animals will be argued in a court of law. ❄️

### Endnotes

<sup>1</sup> NSGLC Summer Research Associate; 2L Northwestern School of Law.

<sup>2</sup> *Ringed Seal*, NOAA Fisheries, (last updated May 10, 2024).

<sup>3</sup> Endangered Species Act of 1973 § 3, 16 U.S.C. § 1532.

<sup>4</sup> *Alaska v. Nat'l Marine Fisheries Serv.*, 2024 WL 1199714 (D. Alaska Mar. 20, 2024).

<sup>5</sup> Administrative Procedure Act § 10, 5 USC §706 (West 2013).

<sup>6</sup> *Alaska v. NMFS*, 2024 WL 1199714 at \*4.

<sup>7</sup> *Id.* at 2.

<sup>8</sup> *Id.* at 6.

<sup>9</sup> *Alaska Sues NMFS for Over Designating Critical Habitat for Ice Seals*, State of Alaska Department of Law, (Feb. 16, 2023).

<sup>10</sup> *Id.*

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