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VIA CERTIFIED MAIL AND HAND DELIVERY

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Re: Sixty-Day Notice of Intent to Sue Pursuant to the Endangered Species Act in Regard to the United States Fish and Wildlife Service's Promulgation of a Special Rule for the Polar Bear, 73 Fed. Reg. 28,306 (May 15, 2008)

Dear Secretary Kempthorne and Director Hall:

Defenders of Wildlife and Richard Charter request that immediate action be taken to remedy violations of the Endangered Species Act ("ESA" or "Act"), 16 U.S.C. § 1531 *et seq.*, and the Administrative Procedure Act ("APA"), 5 U.S.C. § 551 *et seq.*, committed by the United States Fish and Wildlife Service ("FWS" or "Service") in issuing an interim final rule allowing for the "take" of polar bears, a species listed as threatened under the Act, pursuant to § 4(d) of the ESA. *See* 73 Fed. Reg. 28,306 (May 15, 2008). FWS's actions in issuing the interim final rule deny the polar bear and its habitat the legal protection necessary to ensure the conservation of the species, and are thus unlawful. Accordingly, pursuant to ESA section 11(g)(2)(C), 16 U.S.C. § 1540 (g)(2)(C), unless within sixty days of receipt of this letter FWS ensures the polar bear is properly protected in compliance with the ESA and satisfies the requirements of the APA, we intend to file suit challenging the FWS's actions in federal district court.

The Endangered Species Act

Enacted in 1973 amid growing concern over the loss of biodiversity stemming from "economic growth and development untempered by adequate concern and conservation," 16 U.S.C. § 1531(a), the ESA establishes a comprehensive statutory program to protect and

conserve imperiled species and their ecosystems. The Act establishes a listing process to identify species that are "endangered" or "threatened" with extinction and to designate their critical habitat, directs the FWS to develop plans to recover such species, prohibits federal agencies from taking actions that jeopardize such species, and bars the take of endangered species except as authorized under the Act. As the Supreme Court has emphasized, the "plain intent of Congress in passing the statute was to halt and reverse the trend toward extinction, whatever the cost." *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 699 (1995) (citing *TVA v. Hill*, 437 U.S. 153, 184 (1978)).

A species is deemed to be "endangered" under the Act if it is in danger of extinction throughout all or a significant portion of its range. 16 U.S.C. § 1532(6); 50 C.F.R. § 424.02(e). A species is considered "threatened" if it is likely to become an endangered species within the "foreseeable future." 16 U.S.C. § 1532(20); 50 C.F.R. § 424.02(m). In determining whether to list a species the FWS must consider current or future threats to the species' habitat; the potential that the species may be overused for commercial, recreational, scientific, or educational purposes; the effects of disease or predation; the inadequacy of existing regulatory mechanisms; and any other natural or manmade factors affecting the continued existence of the species. 16 U.S.C. § 1533(a)(1)(A)-(E). The Service must base its findings "solely on the basis of the best scientific and commercial information available." 16 U.S.C. § 1533(b)(1)(A); 50 C.F.R. § 424.11(b).

The ESA strictly forbids the unpermitted taking of an "endangered" animal. 16 U.S.C. § 1538(a)(1). With regard to a threatened species, however, the statute does not provide for the same level of protection. Instead, pursuant to Section 4(d) of the ESA, FWS must establish regulations that are "necessary and advisable to provide for the conservation" of the species, including extending the prohibition against the "take" of such species. 16 U.S.C. § 1533(d). On this authority, FWS has issued regulations broadly applying the Section 9 take prohibitions to threatened species, 50 C.F.R. § 17.31, unless a special rule developed pursuant to Section 4(d) applies, 50 C.F.R. § 17.21. Again, by definition "conservation" is "the use of all methods and procedures which are necessary to bring any endangered species or threatened species back to the point at which the measures provided are no longer necessary," 16 U.S.C. § 1532(3), and therefore any regulation promulgated pursuant to 4(d) must meet this standard. 16 U.S.C. § 1533(d).

Background

The polar bear (*Ursus maritimus*), the largest of the world's bear species, is distributed among nineteen arctic subpopulations—two of which, the Chukchi and the Southern Beaufort Sea populations, are located within the United States. The total polar bear population is thought to be between 20,000 and 25,000, but accurate population data for many areas is lacking and even those populations that are stable or increasing may become endangered in the foreseeable future. Indeed, the best available science relating to global warming and the polar bear indicates that the species faces extinction from the United States by mid-century. *See* 73 Fed. Reg. at 28,292.

In February 2007, the United Nations Intergovernmental Panel on Climate Change declared, "[w]arming of the climate system is unequivocal," and it is "very likely" that most of

the warming since the middle of the 20th century is the result of human pollutants. Alley *et al.*, Summary for Policy Makers in Climate Change 2007: The Physical Science Basis,Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change (2007). The Arctic region is the most obvious early indicator of the effects of global warming on the planet. While the planet as a whole warmed approximately 1°F during the 20th century, some regions of the Arctic experienced warming of 4-5°F since the 1950s alone, and the region continues to warm at rates approximately twice that in the rest of the world. Arctic Climate Impact Assessment, Impacts Of A Warming Arctic, at 8 (2004). The warming of the Arctic is resulting in the dramatic melt of the region's sea ice.

The melting of the sea ice is directly impacting the polar bear. If the rate of melting observed in 2007 continues, the Arctic could be completely ice free in the summer as early as mid-century. 73 Fed. Reg. at 28,228. Melting sea ice shortens the time frame in which polar bears can hunt seals due to earlier ice break-up and later freeze-up dates, reduces availability of prey, increases distances bears need to swim because of melting ice, and increases bear-human conflicts as bears move into terrestrial and populated areas in search of food. *See* Ronald M. Nowak, *Walker's Carnivores of the World* 124 (2005).

Given the polar bears' dependence upon sea ice for access to marine prey, and direct observations of adverse effects on polar bear populations associated with reduced sea ice (reduced body condition, reproduction, survival, and population size), the polar bear's survival is clearly imperiled by global warming. United States Geological Survey ("USGS"), Forecasting the Range-wide Status of Polar Bears at Selected Times in the 21st Century (2007). Indeed, recent studies by the USGS estimating maximum carrying capacity and population persistence based on predicted climate change impacts and sea ice declines predict that polar bear populations within the United States "*will most likely be extirpated by mid century.*" *Id.* at 36 (emphasis added). Significantly, the USGS scientists warn that because their deterministic modeling approach "did not include seasonal changes in ice availability or other possible population stressors, it provided *an optimistic view of the potential magnitude of and change in population carrying capacity.*" *Id.* at 1 (emphasis added).

On February 16, 2005, the Center for Biological Diversity ("CBD") filed a petition to list the polar bear as a threatened species under the ESA. The Natural Resources Defense Council and Greenpeace subsequently joined CBD's petition. In response, FWS published a proposed rule to list the polar bear as threatened. 72 Fed. Reg. 1064 (Jan. 9, 2007). The publication of the proposed rule triggered a January 9, 2008 statutory deadline for publication of the final listing decision. On January 7, 2008, Director Hall announced that the final listing decision would be delayed, however. On April 28, 2008, a federal district court ordered the Secretary to make a final listing decision by May 15, 2008.

On May 15, 2008, FWS published a final regulation listing the polar bear as a threatened species under the ESA. 73 Fed. Reg. 28,212 (May 15, 2008). At the same time, FWS issued an "interim final" rule pursuant to section 4(d) of the ESA, without notice or opportunity for public comment, broadly declining to prohibit the take of polar bears under the ESA. 73 Fed. Reg. 28,306 (May 15, 2008). With respect to activities in Alaska, the FWS concluded that "existing conservation regulatory requirements" of the Marine Mammal Protection Act ("MMPA"), 16 U.S.C. § 1361 *et seq.*, and the Convention on International Trade in Endangered Species of Wild Fauna and Flora ("CITES"), effectively supplant the

need for take protections for the polar bear under the ESA. The FWS's 4(d) rule accordingly provides that none of the take prohibitions of the ESA apply to any activity conducted in a manner that is consistent with the requirements of the MMPA and CITES. With respect to activities within the jurisdiction of the United States outside Alaska, the 4(d) rule, without explanation, withholds any protection for the polar bear from incidental take.

Discussion

The FWS has determined that the polar bear is a "threatened" species under the ESA. *See* 73 Fed. Reg. 28,292-293. "By definition, a 'threatened' species is one that is likely to become endangered in the foreseeable future barring significant changes in the conditions or practices that are threatening the long-term viability of that species. A listing decision is intended to cause those significant changes." *Oregon Natural Resources Council v. Daley*, 6 F. Supp. 2d 1139, 1152 (D. Or. 1998).

In making its listing decision, FWS also adopted an "interim final" rule pursuant to § 4(d) of the Act declaring that the ESA's prohibition on take does not apply to any activity affecting polar bears in Alaska that is conducted in compliance with the MMPA and CITES. 73 Fed. Reg. at 28,306 (codified at 50 C.F.R. § 17.40(q)(2)). Moreover, without any supporting rationale in the rule's preamble, the 4(d) rule eliminates the incidental take prohibitions of the ESA altogether with regard to the polar bear outside of Alaska. 73 Fed. Reg. at 28,318 (codified at 50 C.F.R. § 17.40(q)(4)). In promulgating this rule FWS plainly is in violation of the ESA and APA.

The text and structure of the ESA evidences Congress's intent that the Secretary use the flexibility in section 4(d) to tailor prohibitions to *meet* the threats faced by threatened species. Section 4(d) mandates that regulations for threatened species issued pursuant to its authority be "necessary and advisable to provide for the conservation of such species." The term "conservation" is defined in the Act as "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary." 16 U.S.C. § 1532(3). Thus any decision by the Secretary to limit the extent to which the Act's prohibitions against take apply to a threatened species must be based upon some benefit that will accrue to the recovery of the species from withholding such take prohibitions. The Secretary may not withhold take protections for a threatened species for the benefit of, or the convenience of, development interests that would otherwise be subject to such take prohibitions.

The "interim final" 4(d) rule for the polar bear plainly violates this statutory standard because the FWS fails to establish that a valid "conservation" purpose exists that justifies the regulation. In listing the species FWS determined that polar bears "are reliant on sea ice as a platform to hunt and feed on ice-seals, to seek mates and breed, to move to feeding sites and terrestrial maternity denning areas, and for long-distance movements." 73 Fed. Reg. at 28,292. As a result, the rapid loss of sea ice throughout the year, and particularly in the summer, in the Arctic, which "is unequivocal and extensively documented in scientific literature" and "projected by the majority of state-of-the art climate models," threatens the polar bear throughout its range. *Id.* Yet, the 4(d) rule promulgated by the Service wholly fails to address this principal threat to the species' continued existence. In doing so, FWS fails to comply with the ESA's mandate that regulations promulgate under section 4(d) "must provide for the

conservation of threatened species." *Sierra Club v. Clark*, 755 F.2d 608, 612-613 (8th Cir. 1985) (emphasis in original) ("Section 1533(d), when read in conjunction with the definition of 'conservation' in section 1532, limits the Secretary's discretion as to threatened species."); *Fund for Animals, Inc. v. Turner*, 1991 U.S. Dist. LEXIS 13426 (D.D.C. Sept. 27, 1991).

In addition, as the polar bear would otherwise be protected against take upon listing by FWS's general regulation, the FWS fails to establish that elimination of the ESA's take prohibitions for the polar bear conceivably serves a valid "conservation" purpose. The Service argues that, with respect to activities in Alaska, the polar bear is already substantially protected from take under the MMPA and CITES. 73 Fed. Reg. at 28,313. While the MMPA and CITES indeed provide important protections for marine mammals, their programs are not identical to the specific protections afforded listed species by the ESA. The ESA's prohibition against take is significantly broader than that under the MMPA, for example; "take" under the ESA includes "harm," 16 U.S.C. § 1532(19), which the Service defines by regulation to include "significant habitat modification or degradation [that] actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering." 50 C.F.R. § 17.3. The MMPA does not provide any similar protection for the polar bear against habitat destruction. (The FWS's failure to recognize the conservation benefits of protecting the polar bear's habitat from degradation is compounded by the Service's failure to designate critical habitat for the bear, as we discuss below.)

Moreover, the ESA's provisions for authorizing incidental take by private parties under § 10 of the Act may provide substantial benefit for the polar bear through the creation of habitat conservation plans. 16 U.S.C. § 1539(a) (requiring parties seeking incidental take permits to submit a funded conservation plan). Finally, the take prohibitions of the ESA, unlike those of the MMPA, are enforceable by citizens through the citizen suit provision of the Act, reflecting Congress's recognition that public vigilance is an important backstop to the limited resources of government agencies in ensuring that listed species receive the Act's protections. 16 U.S.C. § 1540(g).

The Service does not explain how it can possibly benefit the conservation of the polar bear to deprive it of these statutory protections afforded by the ESA. Prior attempts by the FWS to rely on the existence of an alternative management scheme that provided protections similar, but not identical, to those afforded a species by the ESA have been roundly rejected as inconsistent with the intent and purposed of the Act. *Cf. Center for Biological Diversity v. Norton*, 240 F. Supp. 2d 1090, 1098 (D. Ariz. 2003) (holding that the "existence of other habitat protections does not relieve [FWS] from designating critical habitat."); *id.* at 1100 ("So long as they are useful, the more protections the better."); *see also Natural Resources Defense Council v. United States Department of the Interior,* 113 F.3d 1121, 1126 (9th Cir. 1997) ("Neither the [ESA] nor the implementing regulations sanctions nondesignation of habitat when designation would be merely *less* beneficial to the species than another type of protection.") (emphasis in original). Here, as in these prior cases, the Service has wholly failed to demonstrate why the particular protections afforded by the ESA should not be added to any protections provided under other statutory schemes.

Rather than being based on benefit to the recovery of the polar bear, the FWS's adoption of the 4(d) rule appears to have been motivated largely by considerations of convenience for regulated parties, such as oil and gas development interests. FWS asserts that

adoption of this special rule would "provide appropriate protections for the species while eliminating unnecessary permitting burdens on the public," and argues that requiring take authorization under the ESA in addition to the requirements of the MMPA and CITES would "create an additional, unnecessary administrative burden on the public." 73 Fed. Reg. at 28,315. The convenience of parties who would otherwise be subject to the take prohibitions of the Act is not a permissible factor in the Secretary's promulgation of a 4(d) rule, however. The Secretary's decision to limit the application of take prohibitions must be based exclusively on his determination that such action is "necessary and advisable to provide for the conservation of such species." 16 U.S.C. § 1533(d). To the extent that the Secretary has based a decision to withhold statutory protections from the polar bear for the convenience of regulated parties, his decision is fundamentally arbitrary and unlawful. *See Motor Vehicle Mfrs.Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.").

Moreover, the FWS has wholly failed to explain why its elimination of incidental take protections for the polar bear related to activities outside Alaska is "necessary or advisable to provide for the conservation of such species." 16 U.S.C. § 1533(d). It is black-letter law that agencies are required to provide a reasoned basis for their rulemaking decisions. 5 U.S.C. § 553(c) (agency shall incorporate in rules it adopts a concise general statement of their basis and purpose). *See, e.g., PPL Wallingford Energy LLC v. Federal Energy Regulatory Comm'n*, 419 F.3d 1194, 1198 (D.C. Cir. 2005) (agency must "articulate a satisfactory explanation" of its decision). FWS does not discuss its reasons for depriving the polar bear of protection against incidental take arising from activities outside Alaska anywhere in the preamble to the 4(d) rule. The Secretary's failure to provide a reasoned basis for adoption of this portion of the rule thus squarely violates the APA and § 4(b)(4) of the ESA, 16 U.S.C. § 1533(b)(4).

FWS's implementation of the "interim final" 4(d) rule without providing public notice and allowing the opportunity for comment also violates the ESA and APA. The fundamental protection for public involvement and reasoned decision-making in rulemaking is the APA's requirement that agencies promulgate rules in proposed form for public comment, and consider such public comment in finalizing such rules. 5 U.S.C. § 553. The APA allows for a limited exception to this general requirement for notice and comment rulemaking "when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefore in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(3)(B). This "good cause" exception is "narrowly construed and only reluctantly countenanced." *Jifry v. F.A.A.*, 370 F.3d 1174 (D.C. Cir. 2004) (citing *Tennessee Gas Pipeline Co. v. FERC*, 969 F.2d 1141, 1144 (D.C. Cir. 1992). *See, e.g., American Fed'n of Gov't Employees v. Block*, 655 F.2d 1153, 1156 (D.C. Cir. 1981) (the "use of the[ ] exception[ ] by administrative agencies should be limited to emergency situations.").

The Service relied on this "good cause" exception in adopting the "interim final" 4(d) rule without notice and comment, 73 Fed. Reg. at 28,315, but failed to provide an adequate justification for depriving the public of the opportunity to comment. The FWS argues that it

faced an emergency situation created by the court order mandating a decision on CBD's petition for listing the polar bear by May 15, 2008. The court's order did not impose any requirement on the Service to issue a 4(d) rule, however, and cannot be used to justify dispensing with normal rulemaking procedures for that rule. The FWS's invocation of potential public confusion if it were to list the polar bear and subsequently promulgate a 4(d) rule is not convincing; the Service has promulgated special 4(d) rules for particular species after their listing on numerous occasions without causing public disruption. By contrast, the Service's promulgation of an "interim final" rule that is ostensibly open for public comment yet immediately effective is likely to confuse the public and discourage public comment.

Finally, the FWS's failure to designate critical habitat for the polar bear upon listing also violates the ESA. To meet the ESA's conservation objective, FWS must designate "critical habitat" for all listed species at the time of listing, based on the best scientific data available, after considering the economic and other relevant impacts of such a designation. 16 U.S.C. § 1533(b)(3). "Critical habitat" includes "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...essential to the conservation of the species and ... which may require special management considerations or protection," 16 U.S.C. § 1532(5)(A)(i), and unoccupied habitat that is "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii).

Here, FWS maintains that it cannot designate critical habitat for the polar bear because it is "not determinable." 73 Fed. Reg. at 28,298. While conceding that "information regarding important polar bear life functions and habitats associated with these functions has expanded greatly in Alaska during the past 20 years," FWS defers from using this information to designate critical habitat, as mandated by the Act, *see* 16 U.S.C. §§ 1533(a)(3); 1533(b)(6)(C), claiming that such an effort would be "complicated," and that "the future values of these habitats may change in a rapidly changing environment." 73 Fed. Reg. at 28,292. Evading its mandatory duty in this manner is impermissible under the ESA's clear "best available science" requirement. *See Ctr. for Biological Diversity v. Evans*, 2005 U.S. Dist. LEXIS 44984, at *18 (N.D.Cal. June 14, 2005) (Congress did not contemplate paralysis while critical habitat issues were studied to death."). Indeed, "scientific findings in marine mammal conservation are often necessarily made from incomplete or imperfect information," *Brower v. Evans*, 257 F.3d 1058, 1070 (2001), but "the agency [is] legally obligated to make the hard decision [to designate critical habitat or not] *based on the evidence available.*" *Ctr. for Biological Diversity*, 2005 U.S. Dist. LEXIS 44984, at *18-19 (emphasis added). The information available to the agency presents a strong basis for designating of critical habitat for the polar bear to ensure the species receives full protection under the Act.[1]

[1] The FWS's preamble contains a brief analysis, apparently unrelated to the terms of the 4(d) rule, of the extent to which, in the Service's view, the duties of federal agencies under § 7 of the Act would be triggered by actions that involve emission of greenhouse gases that contribute to global warming. The Service asserts that "the best scientific data currently available does not draw a causal connection between GHG emissions resulting from a specific Federal action and effects on listed species or critical habitat by climate change." 73 Fed. Reg. at 28,313. The FWS elsewhere makes clear, however, that the 4(d) rule does not alter or affect the duties of federal agencies to consult pursuant to § 7 of the Act. 73 Fed. Reg. at 28310 ("[T]his special rule does not negate the need for a Federal action agency to consult with the Service to ensure that any action being authorized, funded, or carried out is not likely to jeopardize the continued existence of any endangered or threatened species, including the polar

Conclusion

This letter provides notice that Defenders of Wildlife and Richard Charter will take the necessary steps to compel FWS to lawfully protect the polar bear, and thus meet its mandatory duties under the ESA, as well as its duties under the APA. Should FWS's legal violations remain uncorrected, Defenders of Wildlife and Mr. Charter intend to file suit following the expiration of the statutory notice period.

Sincerely,

Robert G. Dreher
Vice-President for Conservation Law
Defenders of Wildlife

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to jeopardize the continued existence of any endangered or threatened species, including the polar bear."). To the extent the Service intends its cursory discussion of this issue in the rule's preamble to have any legal effect, we give notice that we believe the FWS's analysis is both factually and legally in error, and intend to challenge this position in an appropriate action.