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September 29, 2008

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VIA HAND DELIVERY

Clerk of the Panel
Attn: Mr. Jeffery N. Lüthi
Judicial Panel on Multidistrict Litigation
Thurgood Marshall Federal Judiciary Building
One Columbus Circle NE, Room G-255, North Lobby
Washington, D.C. 20002-8004
Tel: 202-502-2800

RE: *In re Polar Bear Endangered Species Act Listing and § 4(d) Litigation*
Judicial Panel on Multidistrict Litigation: MDL Docket No. 1993

Dear Mr. Lüthi,

Per the Panel's schedule, enclosed for filing are the original and 11 copies of the Brief of American Petroleum Institute, Chamber of Commerce of the United States, National Mining Association, National Association of Manufacturers, and American Iron and Steel Institute in Support of Alaska Oil and Gas Association's Motion to Transfer Actions to the U.S. District Court for the District of Columbia, and the Proof of Service. As required by Rule 5.13, we also have included a computer disk with a WordPerfect version of the document for Windows format.

If you have any questions, please do not hesitate to contact me at the number listed above.

Sincerely,

John C. Martin

Enclosures

BEFORE THE JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION

In re Polar Bear Endangered Species Act Listing and § 4(d) Litigation	)))	MDL Docket No. 1993

BRIEF OF AMERICAN PETROLEUM INSTITUTE, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL MINING ASSOCIATON, NATIONAL ASSOCATION OF MANUFACTURERS, AND AMERICAN IRON AND STEEL INSTITUTE IN SUPPORT OF ALASKA OIL AND GAS ASSOCIATION'S MOTION TO TRANSFER ACTIONS TO THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BACKGROUND

The American Petroleum Institute ("API"), Chamber of Commerce of the United States of America ("Chamber), National Mining Association ("NMA"), National Association of Manufacturers ("NAM"), and American Iron and Steel Institute ("AISI") (collectively "the Associations") are Plaintiffs in *American Petroleum Institute, et al. v. Kempthorne, et al.*, Case No. 1:08-cv-01496-EGS (D.D.C.) ("*API*"), and proposed Defendant-Intervenors in *Center for Biological Diversity, et al. v. Kempthorne, et al.*, Case No. 4:08-cv-01339-CW (N.D. Cal.) ("*CBD*"). The Associations support the motion of the Alaska Oil and Gas Association ("AOGA") to transfer five related actions to the United States District Court for the District of Columbia under 28 U.S.C. § 1407. *See* Motion for Transfer of Actions to the U.S. District Court for the District of Columbia, dated Aug. 29, 2008

("AOGA Mot."). These five cases involve related challenges concerning two rules issued by the United States Department of Interior's Fish and Wildlife Service ("FWS") on May 15, 2008. The first rule, which FWS issued in response to a federal district court order, listed the polar bear as a "threatened" species under the Endangered Species Act ("ESA"). *See* 73 Fed. Reg. 28212 (May 15, 2008) ("Listing Rule"). The second rule, issued under ESA Section 4(d), tailors the ESA's conservation requirements to the specific needs of the polar bear. *See* 73 Fed. Reg. 28306 (May 15, 2008) ("4(d) Rule").[1]

AOGA's motion and supporting brief, *see* Brief in Support of Motion for Transfer of Actions to the U.S. District Court for the District of Columbia, dated Aug. 29, 2008 ("AOGA Br."), fully and accurately describe the background of these related cases and, therefore, the Associations will incorporate that background by reference and simply add the following facts that have occurred since AOGA filed its Motion.

On September 2, 2008, two motions to transfer venue were filed in the *CBD* case. The first motion was filed by FWS to transfer the *CBD* case to the D.C. District Court. *See CBD*, Docket Entry No. 152, filed Sept. 2, 2008. AOGA joined in that motion. *See id.*, Docket Entry No. 156, filed Sept. 3, 2008. The second motion was filed by the Arctic Slope Regional Corporation ("ASRC") to transfer the case to the Alaska District Court, which FWS has opposed. *See id.*, Docket Entry No. 154, filed Sept. 2, 2008; Docket Entry No. 184, filed Sept. 10, 2008. Plaintiffs have opposed both of these motions. *See id.* Docket Entry No. 204, filed Sept. 25, 2008. A hearing on these motions to transfer venue is scheduled for October 16, 2008.

In addition, the Associations filed a motion to intervene as defendants in the *CBD* case. *See id*, Docket Entry No. 165, filed Sept. 4, 2008. Their motion, along with the motions of the National

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[1] FWS issued the 4(d) Rule as an interim final rule and accepted comments on the Rule until July 14, 2008. To date, FWS has not taken further action on the interim 4(d) Rule.

Petrochemical and Refiners Association ("NPRA") and Edison Electric Institute ("EEI") to intervene as defendants, and the motion of the Defenders of Wildlife to intervene as plaintiffs, have been fully briefed and the *CBD* court has indicated that it will decide these motions without oral argument.

Finally, on September 25, 2008, the *CBD* court issued an order granting a stipulation by Plaintiffs and Defendants to extend the date for filing the administrative record and the dates for summary judgment briefs. The current schedule in that case is as follows:

Nov. 17, 2008:	Defendants file administrative record
Jan. 15, 2009:	Plaintiffs file motion for summary judgment
Feb. 12, 2009:	Defendant-Intervenors file oppositions and any cross motions
Feb. 26, 2009:	Plaintiffs file reply and any oppositions to cross-motions
March 5, 2009:	Defendants and Defendant-Intervenors file replies
Apr. 2, 2009:	Hearing on cross-motions

ARGUMENT

The Associations support consolidation and transfer of the five actions identified by AOGA (and any future-filed related actions) to the D.C. District Court for the following reasons.

I. THE STATUTORY FACTORS UNDER 28 U.S.C. § 1407 SUPPORT CONSOLIDATION AND TRANSFER.

The Associations join in AOGA's argument that transfer is supported by the statutory factors provided in 28 U.S.C. § 1407(a). *See* AOGA Br. at 6-9 (28 U.S.C. § 1407(a) authorizes transfer when (i) the actions "involv[e] one or more common questions of fact," (ii) transfer "will be for the convenience of parties and witnesses," and (iii) transfer "will promote the just and efficient conduct of such actions") (quoting 28 U.S.C. § 1407(a)). The Associations therefore will not re-argue these points and, instead, submit the following additional arguments and information.

First, as to the factor that the actions involve common questions of fact, the *API* action shares common questions of fact with the *CBD* action. The 4(d) Rule amended 50 C.F.R. § 17.40 by adding a new paragraph (q). The *API* action challenges what the Associations have referred to as "the Alaska Gap" in the 4(d) Rule, which is found in subparagraph (q)(4) of 50 C.F.R. § 17.40. Subparagraph (q)(4) explicitly recognizes that greenhouse gas emissions, by themselves, in the lower 48 States and Hawaii cannot constitute a "take" under ESA Section 9(a), 16 U.S.C. § 1538(a). That subparagraph makes clear that otherwise lawful greenhouse gas-emitting operations outside of Alaska do not have an obligation to obtain an incidental take permit under ESA Section 10 for these activities.

FWS, however, did not include activities within the State of Alaska within subparagraph (q)(4), thereby creating a "gap" in coverage of this aspect of the 4(d) Rule. Thus, parties may argue that Alaska businesses whose only connection with the polar bear is greenhouse gas emissions might need to consider whether their lawful business activities could be considered, within the construct of the ESA, to constitute a "take" of polar bears. Although FWS acknowledges that greenhouse gas emissions alone cannot be considered to give rise to a "take" of the polar bear outside Alaska, it neglected to include Alaska operations within subparagraph (q)(4) of the 4(d) Rule.[2]

The 4(d) Rule and the Alaska Gap share common factual issues that, absent consolidation, will be decided by different courts. Plaintiffs in the *CBD* case have challenged, *inter alia*, the determination by FWS in subparagraph (q)(4) of the 4(d) Rule that otherwise lawful greenhouse gas emitting activities in all States except Alaska do not need to obtain incidental take permits. Second Amended Complaint for Declaratory and Injunctive Relief, filed July 16, 2008, ¶ 164. The

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[2] Such parties may assert that Alaska businesses are required to endure the regulatory effort to obtain an incidental take permit under ESA Section 10, 16 U.S.C. § 1539, to conduct their greenhouse gas-emitting operations.

underlying issue to be determined based on the evidence in the administrative record is whether FWS correctly concluded that an incidental take permit under the ESA is not be required for otherwise lawful greenhouse gas-emitting activities. There is a risk that the *CBD* court could conclude that FWS's determination for the 49 states is invalid, while the *API* court could conclude that this determination is valid and should have been extended to Alaska. This would create a conflict as to whether activities in Alaska must obtain an incidental take permit for their otherwise lawful greenhouse gas-emitting activities. Thus, in addition to the reasons pointed out by AOGA that support consolidation and transfer for the just and efficient resolution of these actions, a risk exists not only of disparate decisions on the Listing Rule and 4(d) Rule (*see* AOGA Br. at 8-10), but also of disparate decisions impacting the Alaska Gap.

Second, as to the factor supporting transfer for the convenience of the parties, API and the Chamber are incorporated in Washington, D.C. and each of the Associations have their principal place of business Washington, D.C. Thus, the D.C. District Court certainly is the most convenient forum for the Associations, as well as for the other parties as AOGA notes, *e.g.*, the federal Defendants are all located in Washington, D.C. *See* AOGA Br. at 7-8.

Finally, the Associations refer the Panel to *In re Operation of the Missouri River System Litigation*, 277 F. Supp. 2d 1378 (JPML 2003), where the JPML consolidated six actions in different district courts regarding the United States Corps of Engineers' agency actions allocating water to different States' interests in the Missouri River Basin. That case, like this one, involved challenges to final agency actions under, *inter alia*, the National Environmental Policy Act ("NEPA") and the ESA, which would be decided on the administrative record. *See In re Operation of Missouri River System Litigation*, 363 F. Supp. 2d 1145 (D. Minn. 2004), *affirmed in part and vacated in part by In re Operation of Missouri River System Litigation*, 421 F.3d 618 (8th Cir. 2005). Specifically, the issues concerned the substance of the Corps' final agency action in developing its "Master Manual" for managing

competing interests in the river basin, and the procedures used to formulate the Manual. *See Missouri River*, 363 F. Supp. 2d at 1152. The Panel in *Missouri River* consolidated the actions because it was "persuaded that the six actions involved common questions of fact, and that centralization would serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation." *Id.* at 1379.

Further,

> [t]he Panel determined that centralization of those six actions under Section 1407 was necessary in order to eliminate duplicative discovery, ***prevent inconsistent pretrial rulings (particularly with respect to requests for preliminary injunctive relief imposing or threatening to impose conflicting standards of conduct . . .) and conserve the resources of the parties, their counsel and the judiciary.***

Id. (emphasis added); *see In re Tri-State Water Rights Litigation*, 481 F.Supp.2d 1351, 1352 (JPML 2007) (relying on *Missouri River* and citing same factors).

Here, consolidation is warranted for the same reasons. The issues in these various cases concern the substance of FWS's final agency action in developing the Listing Rule and 4(d) Rule, and the procedures (under NEPA and the ESA) to develop those Rules. Also, although there is no risk of duplicative discovery in the five cases at issue here because they are administrative record review cases, the other factors that the Panel emphasized in *Missouri River* apply here for the reasons discussed above and in AOGA's Brief, *i.e.*., to prevent inconsistent rulings and conserve the resources of the parties and their counsel.

II. THE D.C. DISTRICT COURT IS THE APPROPRIATE FORUM FOR THESE CASES.

The Associations concur in AOGA's arguments regarding why the D.C. District Court is the appropriate forum for these consolidated cases. *See* AOGA Br. at 10-12. In addition, the Associations point out that the Panel in *Missouri River* "determined that the core disputes in [that] litigation primarily affect parties and interests located" in one particular circuit, and, thus, a district

court in that circuit "was an appropriate forum for this litigation." *Id.* Here, the parties primarily affected are located in Washington, D.C. because *all* parties (including the plaintiffs in *CBD*) either have their primary place of business or offices in Washington, D.C. Also, counsel for the federal defendants, the Associations, Safari Club International *et al.*, EEI, and NPRA are located in Washington, D.C.

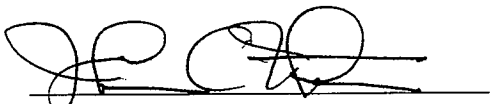
As to the interests primarily affected, the interests of the federal defendants are those of the Department of the Interior (to which Defendants Kempthorne, Hall, and FWS all belong), which has a programmatic interest in the Listing Rule and 4(d) Rules that were approved by headquarters, signed by Secretary Kempthorne in Washington, D.C., and will be administered and coordinated by guidance and directives issued by headquarters in Washington, D.C. to FWS regions throughout the country. *See, e.g., In re Swine Flu Immunization Products Liability Litigation*, 446 F.Supp. 244, 247 (1978) (in litigation of "national scope," where "[a]dministrative control over the . . . program was exercised by officials of the Department of Health, Education and Welfare, which is headquartered in the District of Columbia," the D.C. District Court was the appropriate forum). In addition, although the interests of all parties are *nationwide* interests (as these Rules potentially impact greenhouse gas-emitting activities across the United States), parties like the Associations who either have their headquarters or principal place of business in Washington, D.C., will have their primary interests in Washington, D.C., which is where they will develop strategies for dealing with their members' concerns about the impacts of these Rules.

CONCLUSION

For the foregoing reasons and those stated in AOGA's Motion and Brief, the Associations support and respectfully request consolidation of these five cases and transfer to the United States District Court for the District of Columbia.

DATED: September 29, 2008

Respectfully submitted,



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**BEFORE THE JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION**

In re Polar Bear Endangered Species Act Listing and § 4(d) Litigation	)	MDL Docket No. 1993

PROOF OF SERVICE

The undersigned hereby certifies that on this 29th day of September, 2008, a true and correct copy of the foregoing Brief of American Petroleum Institute, Chamber of Commerce of the United States, National Mining Association, National Association of Manufacturers, and American Iron and Steel Institute In Support Of Alaska Oil And Gas Association's Motion To Transfer Actions To The U.S. District Court For The District Of Columbia was served by first class mail upon the following counsel as indicated on Panel Attorney Service List:

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DATED: September 29, 2008

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Docket: 1993 - IN RE: Polar Bear Endangered Species Act Listing and § 4(d) Rule Litigation
Status: Pending on / /
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Printed on 09/22/2008

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