IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE POLAR BEAR ENDANGERED SPECIES ACT LISTING AND § 4(d) RULE LITIGATION	**Misc. Action No. 08-764 (EGS)** **MDL Docket No. 1993**
This Document Relates To: ***Defenders of Wildlife v. U.S. Department of the Interior, et al.*, No. 1:09-cv-0153** ***Center for Biological Diversity, et al. v. Salazar, et al.*, No. 1:08-cv-2113**	

MEMORANDUM OF THE NATIONAL TRADE ASSOCIATIONS IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT ON THE 4(d) RULE, AND IN SUPPORT OF FEDERAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT ON THE 4(d) RULE

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73 Fed. Reg. 28255-77 (May 15, 2008) 2
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Greenwire, "Endangered Species: Some See EPA's Climate Proposal Prodding Interior on ESA" (April 23, 2009) 20
H.R. Rep. No. 93-412 (1973) 8
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Ruhl, *Climate Change and the Endangered Species Act: Building Bridges to the No-Analog Future*, 88 BOSTON U. L. REV. 1 (2008) 14, 19, 21
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INTRODUCTION

The National Trade Association Intervenors[1] support the Endangered Species Act ("ESA") § 4(d) rule for the threatened polar bear. 50 C.F.R. § 17.40(q), *adopted at* 73 Fed. Reg. 76249 (Dec. 16, 2008), AR4D012925. The 4(d) rule is lawful, rational, supported by the record, and well within the flexibility that the ESA provides for threatened species, which are by definition less imperiled than endangered species.

The special 4(d) rule for the polar bear consists of two principal parts. Within the polar bear's range, § 17.40(q)(2) continues the Marine Mammal Protection Act's ("MMPA's") constraints on "take" of (and commerce regarding) polar bears. The MMPA provisions have allowed polar bears and oil and gas development to co-exist in Alaska without a single polar bear fatality. The Federal Defendants and Alaska Intervenors group have shown that this portion of the polar bear 4(d) rule is lawful, and that the rule did not require a National Environmental Policy Act ("NEPA") document. The National Trade Associations join in those arguments.[2]

The National Trade Association Intervenors focus our analysis on demonstrating that § 17.40(q)(4) is also lawful. In that portion of the 4(d) rule, exercising its broad ESA § 4(d) discretion, the U.S. Fish and Wildlife Service ("FWS") declined to extend "take" liability under ESA § 9 to an "otherwise lawful activity" occurring outside "the current range of the polar bear." 50 C.F.R. § 17.40(q)(4). This part of the rule removes the threat under the ESA of ill-founded

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[1] The "National Trade Associations" are the American Petroleum Institute, Edison Electric Institute, National Petrochemical and Refiners Association, Chamber of Commerce of the United States of America, National Mining Association, National Association of Manufacturers, and American Iron and Steel Institute.

[2] To avoid repetition, we incorporate the introductions and arguments provided by Federal Defendants and the Alaska Intervenors. The "Mem. in Support of Fed. Defs' Cross-Mot. for Summ. J. On The 4(d) Rule . . ." (Feb. 2, 2010, doc. 156) will be referred to as "Fed. Br." The "Joint Mem. . . . of Pls. Defender of Wildlife . . . in Support of Summ. J." (Dec. 4, 2009, doc. 136) will be referred to as "Pl. Br."

lawsuits, unnecessary regulatory proceedings, and potential liability for many thousands of otherwise lawful activities outside the polar bear's current range, including energy and industrial activities permitted under the Clean Air Act ("CAA"), application of pesticides in conformance with the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), and economic activities that emit greenhouse gases ("GHGs") whose regulation Congress and the U.S. Environmental Protection Agency are currently evaluating.

In 2008, the FWS listed the polar bear as a species threatened by future global climate change, based on its estimation of potential effects of climate change on the bears' sea-ice habitat. *See* 73 Fed. Reg. 28212, 28255-77, 28292-93 (May 15, 2008). As a result, FWS needed to establish a clear policy regarding the treatment of GHG emissions under the ESA, especially because Plaintiffs have alleged that those emissions harm the polar bear. There are billions of natural and human-caused sources of GHG emissions in the United States and worldwide. Anthropogenic sources of carbon dioxide and other GHGs include electric power generation, motor vehicle operation, ranching, farming, commercial and residential heating, and even the simple act of human breathing. With the ESA listing of the polar bear as threatened based, in part, on the alleged impacts of climate change, it was essential for FWS to determine whether these activities could be found to result in ESA § 9 "take" of polar bears, and thus be subject to civil and criminal penalties under 16 U.S.C. § 1540(a) and (b). FWS's determination, as set forth in the 4(d) rule, is not only lawful and rational, it promotes certainty in the law, eliminates unwarranted liability, and avoids dubious litigation.

The 4(d) rule is not a political act, as Plaintiffs have suggested. Rather, the 4(d) rule incorporates bipartisan policies adopted by two separate Administrations. Former Interior Secretary Kempthorne stated that the polar bear's listing:

> should not open the door to use the ESA to regulate greenhouse gas emissions from automobiles, power plants, and other sources. That would be a wholly inappropriate use of the Endangered Species Act. ESA is not the right tool to set U.S. climate policy. The Endangered Species Act neither allows nor requires the Fish and Wildlife Service to make such interventions.

"Remarks of Secretary Dirk Kempthorne, Press Conference on Polar Bear Listing, May 14, 2008," AR4D014143. As developed in Section II, this sound conclusion is based on causation and other legal limits under the ESA, and limits imposed by science.

A 2009 statute gave the Obama Administration the unusual discretionary authority to immediately "withdraw" the Bush Administration's 4(d) rule for the polar bear (and some ESA § 7 rules that were, in fact, withdrawn).[3] Current Interior Secretary Salazar decided to retain the 4(d) rule challenged by Plaintiffs, effectively finding the rule is in the public interest. Secretary Salazar reasoned that "the Endangered Species Act is not the proper mechanism for controlling our nation's carbon emissions. Instead, we need a comprehensive energy and climate strategy that curbs climate change and its impacts."[4] In sum, two Administrations have lawfully found that GHG emissions cannot and should not be regulated under the ESA, including by suits bringing "take" claims against individual GHG emitters or a subset of such emitters.

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[3] Omnibus Appropriations Act § 429, Act of March 11, 2009, Pub. L. 111-8, 123 Stat. 524, 749 (2009). The Administrative Procedure Act normally requires public notice-and-comment procedures to repeal a rule a new Administration disagrees with. *See* 5 U.S.C. §§ 551(5), 553; *Consumer Energy Council of America v. FERC*, 673 F.2d 425, 446 (D.C. Cir. 1982).

[4] Interior news release entitled "Salazar Retains Conservation Rule for Polar Bears" (May 8, 2009) (available at http://www.doi.gov/news/09_News_Releases/050809b.html). Since the filed record ends with the Dec. 2008 adoption of the 4(d) rule, it does not include documents issued during the Obama Administration's 2009 reconsideration of the 4(d) rule. Those documents can be cited as official government documents. Fed. R. Evid. 902.

ARGUMENT

I. The ESA Does Not Limit The 4(d) Rule For The Polar Bear To Rules That Provide "Conservation" Benefits

Plaintiffs assume that ESA § 4(d) allows only rules that increase "conservation" benefits for a threatened species, and argue the polar bear 4(d) rule is unlawful because it does not advance Plaintiffs' notions of "conservation." *See* Pl. Br. at 26-42. But, as Federal Defendants have described, ESA § 4(d) imposes no "conservation" constraint. Instead, FWS has discretion to extend or not to extend the "take" prohibition to a threatened species. The structure of the statute, in conjunction with FWS's court-sanctioned interpretation of its authority, demonstrates that Plaintiffs' claim of an ESA § 4(d) violation fails as a matter of law.[5]

A. Under the ESA, "Take" Of A *Threatened* Species Is Lawful Unless Prohibited By The Agency

The ESA does not prohibit "take" of a threatened species. ESA § 9 establishes "prohibited acts" (e.g., take) with respect to "endangered species" only. 16 U.S.C. § 1538. By contrast, the ESA does not make it unlawful to "take" threatened wildlife. The ESA creates "two levels of protection" so threatened species could be treated differently from the more-imperiled endangered species. S. Rep. No. 93-307 at 3 (1973), 1973 U.S.C.C.A.N. 2989, 2992.

B. Section 4(d) Does Not Require A Conservation Focus Whenever the FWS Applies § 9 To Threatened Species

ESA § 4(d) gives the Secretary authority to extend or not extend the "take" and other ESA § 9 prohibitions to a "threatened species." That section provides that:

> [W]henever any species is listed as a threatened species . . . , the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with

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[5] Federal Defendants have explained their interpretation of ESA § 4(d) and the binding Circuit interpretation in *Sweet Home Chapt. of Comtys. for a Great Oregon v. Babbitt*, 1 F.3d 1, 7-8 (D.C. Cir. 1993). Fed. Br. at 12-17.

> respect to any threatened species any act prohibited under [§ 9(a)(1) of this Act, such as "take"] . . . with respect to endangered species[.]

16 U.S.C. § 1533(d). The commands in ESA § 4(d)'s two sentences are different but can be reconciled, giving effect to each.

The D.C. Circuit has made this reconciliation, affirming the United States' interpretation that § 4(d)'s two sentences are separate grants of authority with different criteria.

> As [federal] appellees argue, however, there is a reasonable reading of § 1533(d) . . . . According to this interpretation, the two sentences of § 1533(d) represent separate grants of authority. The second sentence gives the FWS discretion to apply any or all of the [§ 9(a)(1)] prohibitions to threatened species without obligating it to support such actions with findings of necessity [to advance "conservation"]. Only the first sentence of § 1533(d) contains the "necessary and advisable" language and mandates formal individualized findings. This sentence requires the FWS to issue whatever other regulations are "necessary and advisable," including regulations that impose protective measures *beyond* those contained in § 1538(a)(1) . . . . In light of the statute's ambiguity, the challenged FWS regulation is a reasonable and permissible construction of the ESA.

Sweet Home, 1 F.3d 1, 7-8 (D.C. Cir. 1993) (emphasis added).

Thus, Plaintiffs' arguments that the 4(d) rule violates an assumed "conservation" constraint on such rules has been explicitly rejected in controlling precedent. Under *Sweet Home*, the second sentence in § 4(d) grants FWS discretion ("may") to extend, not extend, or partially extend the "take" prohibition to a threatened species, regardless of whether this advances "conservation." This authorizes the challenged aspects of the polar bear 4(d) rule, which partially extends the § 9 "take" prohibition. ESA § 4(d)'s first sentence, which Plaintiffs read as being controlling, is inapplicable. The first sentence in § 4(d) applies only to possible rules that go "beyond" regulating "take." *Id.*

The majority of the ESA § 4(d) case law is in accord with the D.C. Circuit precedent in *Sweet Home*. For example, the Ninth Circuit recently found that § 4(d) "does not *require* regulations protecting threatened species from taking." *Trout Unlimited v. Lohn*, 559 F.3d 946,

962 n.12 (9th Cir. 2009). Similarly, the Fifth Circuit noted that "[i]n addition to [the] mandatory duty" in § 4(d)'s first sentence, the second sentence "provides discretionary authority to prohibit by regulation the taking of any threatened species" – the second sentence "is not conditioned upon any showing that" it would advance conservation interests. *State of Louisiana ex rel. Guste v. Verity*, 853 F.2d 322, 327, 333 (5th Cir. 1988) (emphasis in original).

Under § 4(d), the agency can partially apply the ESA "take" prohibition to a threatened species, but not extend "take" to certain activities that satisfy an alternative standard (here, the MMPA limits and "outside the polar bear's range" limit on incidental take).

> The language of 4(d) makes it clear that NMFS[6] "may" impose a take prohibition. The unavoidable implication is that NMFS may, in its discretion, choose not to impose a take prohibition. NMFS's decision to craft a limited take prohibition under 4(d) must be, a fortiori under this analysis, within its discretion. The rule does not state that NMFS may choose only to apply a blanket take prohibition, or no take prohibition at all. It is logically within the agency's discretion, therefore, that applying any number of different varieties of (otherwise legal) take prohibitions is also within NMFS's discretion. The court is not persuaded that choosing to promulgate a limited take prohibition under § 4(d) was arbitrary and capricious, and therefore grants defendant's motion for summary judgment.[7]

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[6] The ESA § 4(d) provides NMFS the same authority and discretion as the FWS.

[7] *Wash. Envtl. Council v. Nat'l Marine Fisheries Serv.*, 2002 WL 511479 at *8 (W.D. Wash. 2002). *See also Cal. State Grange v. Nat'l Marine Fisheries Serv.*, 620 F. Supp. 2d 1111, 1202 (E.D. Cal. 2008); *Alsea Valley Alliance v. Lautenbacher*, 2007 WL 2344927 at *6 (D. Or. 2007) ("the Secretary is not required to prohibit taking of threatened species").

In promulgating the polar bear 4(d) rule, FWS followed the litigation position that had succeeded in *Sweet Home*, 1 F.3d at 7-8. FWS did so by citing *Washington Envt'l Council*, *State of Louisiana*, and *Alsea Valley*, and by asserting FWS "has almost an infinite number of options available" under § 4(d), including "permit[ing] taking." 73 Fed. Reg. 76261; *see id*. at 76264 ("by stating that regulations for a threatened species 'may' prohibit any act prohibited under section 9 of the ESA, Congress made clear that it may not be appropriate to include section 9 prohibitions for some threatened species"). Further, FWS justified 50 C.F.R. § 17.40(q)(4) – which concerns activities occurring outside the polar bear's range – not on grounds that it assisted in conservation. Rather, FWS contemporaneously stated § 17.40(q)(4) "does not impede the conservation of the species" in any way controllable under "our authority under section 4(d) of the ESA." 73 Fed. Reg. 76262. As shown in Section II, this agency explanation is both

(continued…)

While Plaintiffs (e.g., Pl. Br. at 29-33) rely heavily on *Sierra Club v. Clark*, 755 F.2d 608 (8th Cir. 1985), that decision is an unpersuasive outlier. In contrast to the above-cited D.C., Fifth, and Ninth Circuit decisions, this early Eighth Circuit opinion read ESA § 4(d) to be a substantial constraint. *Clark* found FWS could permit regulated take only where that is necessary for "conservation."

The 2-1 decision in *Clark* misreads the ESA. As Senator Simpson noted, it fails to come to grips with the two sentences in § 4(d) and the legislative intent that less-imperiled threatened species be subject to different protections than endangered species:

> *Clark* . . . is based on a misunderstanding of the differing levels of protection accorded endangered and threatened species under the Act. . . . [T]he broad flexibility which the Secretary enjoys in promulgating regulations to protect threatened species, includ[e] the authority to permit taking of individual members of such species.[8]

C. FWS's Discretion Is Also Supported By ESA Legislative History

Federal Defendants' interpretation of ESA § 4(d) is reinforced by the ESA committee reports. The House Report describes ESA § 4(d) as granting the Secretary great discretion to allow or disallow "take" of a threatened species, and describes 4(d)'s two sentences in terms showing they are independent.

(continued)
lawful and reasonable. This explanation exceeds the level necessary to uphold an agency decision: a court should "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

[8] S. Rep. No. 100-240 at 17 (1987) (additional views of Sen. Simpson). Besides being wrongly decided, *Clark* is distinguishable because it concerned regulations allowing trapping of threatened wolves (an activity directed against wildlife) and the limitation imposed in the ESA definition of "conservation" that trapping and other forms of "regulated taking" are allowed only "in the extraordinary case where population pressures" mean the species' numbers are above the carrying capacity of the ecosystem. 16 U.S.C. § 1532(3); *see* 755 F.2d at 612-18. In contrast, Plaintiffs have not argued a "regulated taking" claim here. Additionally, *Clark* reflects the mistaken view that the ESA requires the interpretation that most advances the "conservation" of listed species. *See* pages 8-10, below.

> (d) The Secretary is authorized to issue appropriate regulations to protect endangered or threatened species; he may also make specifically applicable any of the prohibitions with regard to threatened species that have been listed in section 9(a) as are prohibited with regard to endangered species. Once an animal is on the threatened list, the Secretary has an almost infinite number of options available to him with regard to the permitted activities for those species. He may, for example, permit taking, but not importation of such species . . . . [9]

Thus, ESA § 4(d) allows Interior to "permit taking" of threatened species such as polar bears. Accordingly, the more-limited provision in § 17.40(q)(4) – which just eliminates activities outside the polar bear's current range from being sources of alleged incidental take of distant polar bears – plainly is within the scope of the authority delegated by ESA § 4(d).

D. The ESA Does Not Generally Limit Federal Actions To Those That Advance "Conservation"

Contrary to Plaintiffs' more general arguments (e.g., at 1-2, 28-34), other ESA provisions do not require FWS to exercise its ESA § 4(d) discretion in favor of maximizing conservation of threatened polar bears.

As this Court has found, even an ESA provision that employs the term "conservation plan" does not require conservation or improvement actions. Instead, the language and intent of the specific ESA provision are controlling. *Spirit of the Sage Council v. Kempthorne*, 511 F. Supp. 2d 31, 42-44 (D.D.C. 2007) (construing ESA § 10(a)). Similarly here, § 4(d) does not limit FWS to rules providing additional "conservation" benefits in light of the ESA § 4(d) language on "may" allow takings, and discretion over which rules are "deem[ed] . . . advisable." As *Spirit of the Sage* illustrates, it "frustrates rather than effectuates legislative intent

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[9] H.R. Rep. No. 93-412, at 12 (1973) (emphasis added). The Senate also intended to create "two levels of protection" that impose prohibitions only for endangered species, and give the Secretary "discretion" and "[f]lexibility in regulation" that can be "tailored" to the circumstances of a particular threatened species. S. Rep. No. 93-307 at 3 (1973), *reprinted in* 1973 U.S.C.C.A.N. 2989, 2992.

simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987). It is "far-fetched" and unpersuasive to argue that the ESA compels federal agencies to do "whatever it takes" to "conserve" listed species. *Platte River Whooping Crane Trust v. FERC*, 962 F.2d 27, 34 (D.C. Cir. 1992).

Plaintiffs argue that *Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184-85 (1978), requires that a federal agency's first priority be to recover listed species. *TVA v. Hill*, however, speaks in terms of a federal duty to avoid "extinction," not a duty to promote conservation or recovery. *See* 437 U.S. at 184-85. More recently, the Supreme Court sustained FWS's interpretation that other clear statutory directives trump ESA § 7, and found *TVA v. Hill* did not require the opposite result. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 670-71 (2007); *see id*. at 674-84 (dissent).

Plaintiffs (Pl. Br. at 30) argue that FWS "must affirmatively attempt to recover the species" under *Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv.*, 378 F.3d 1059, 1070 (9th Cir. 2004). This Court rejected a similar argument in *Spirit of the Sage*, 511 F. Supp. 2d at 43. The Court found that *Gifford Pinchot* concerned a "different section of the ESA" – there, ESA § 7 as opposed to ESA § 10, and here ESA § 7 as opposed to ESA § 4(d). *Id*.[10]

Conservation or species-improvement actions are largely discretionary under the ESA. For example, ESA § 7(a)(2) is satisfied if a federal action is not likely to appreciably degrade the

[10] Moreover, *Gifford Pinchot* does not hold that ESA § 7 substantively limits agency actions to those which advance conservation. *Gifford Pinchot* merely holds that, in assessing whether a federal action would adversely modify critical habitat within the meaning of ESA § 7(a)(2), FWS must procedurally consider effects to the "survival" and "recovery" of a listed species. *See Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 930-36 (9th Cir. 2008). FWS gave such procedural consideration to conservation here. *See* 73 Fed. Reg. 76260-62.

status of a listed species or its critical habitat, compared to its status under baseline conditions.[11] Any ESA § 7(a)(1) "conservation recommendations" that FWS offers in a biological opinion do not "carry any binding force." 50 C.F.R. § 402.14(j). The Services adopted this rule after agreeing with this comment by the House Committee with ESA jurisdiction:

> [W]e do not believe that it was intended that section 7(a)(1) require developmental agency actions to be treated as conservation programs for endangered species and threatened species. We also do not believe that all of the conservation recommendations of the Secretary have to be followed for this requirement to be met. Such an interpretation would render the much debated provisions of section 7(a)(2) redundant and essentially meaningless and bring about endless litigation.

51 Fed. Reg. 19926, 19954 (June 3, 1986). Thus, while ESA § 7(a)(1) suggests a federal agency should undertake some "programs for the conservation of" listed species, it does not require that every federal agency "action" (e.g., the § 4(d) rule) be designed to provide conservation benefits, or § 7(a)(2) would be rendered meaningless.[12]

Because conservation is highly discretionary in other sections of the ESA, ESA § 4(d) should not be read to be limited to "conservation" rules. Instead, the extent to which FWS elects to include conservation benefits in a § 4(d) rule for less-imperiled threatened species is equally within the Service's discretion.

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[11] *See* 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.02 ("jeopardize" means to "reduce appreciably the likelihood of both the survival and recovery of a listed species'); *NWF v. NMFS*, 524 F.3d 917, 930 ("jeopardize" means that an "action causes some 'deterioration in the species' pre-action condition"), 933-36. "ESA Section 7's 'no jeopardy' standard does not confer upon the action agency the affirmative obligation to promote the recovery of a listed species." *Swan View Coalition v. Barbouletos*, 2008 WL 5682094 at *10 (D. Mont. 2008).

[12] *See Platte River*, 962 F.2d at 34; *Pyramid Lake Paiute Tribe v. U.S. Dept. of Navy*, 898 F.2d 1410, 1418 (9th Cir. 1990); *National Wildlife Fed'n v. Norton*, 332 F. Supp. 2d 170, 186-87 (D.D.C. 2004); Ryan & Malmen, *Interagency Consultation Under Section 7*, Chapter 5 at 105 in ENDANGERED SPECIES ACT – LAW, POLICY, AND PERSPECTIVES (Baur & Irvin eds., 2d ed. ABA 2010) ("courts have afforded federal agencies wide latitude in determining how to best fulfill their duties under section 7(a)(1)").

E. Plaintiffs' 50 C.F.R. § 17.31 Argument Is Unpersuasive

Federal Defendants (Fed. Br. at 25) are correct that the legality of the 4(d) rule is not affected by 50 C.F.R. § 17.31. *Compare* Pl. Br. at 2, 7-8, 33. Section 17.31 essentially gives FWS the discretion at the time it lists a threatened species to either: (1) adopt a "special rule" tailored to the particular threatened species, in which case § 17.31(c) provides that the "special rule will contain all the applicable prohibitions and exceptions" and "none" of § 17.31(a) applies; or (2) do nothing in terms of a special rule, in which case § 17.31(a) provides that all the ESA § 9 prohibitions for endangered wildlife apply to that threatened species. 50 C.F.R. § 17.31. Because a special 4(d) rule for the polar bear was adopted contemporaneously with the listing of the polar bear, § 17.31(a) and the full "take" prohibition did not apply to the polar bear.

Section 17.31(a) does not create a floor against which the conservation attributes of a special rule are measured. Due to the discretion conferred upon FWS to adopt "'special rules' for individual threatened species" under "§ 17.31(c)," "FWS has . . . maintained a two-tier approach to species protection" (endangered versus threatened species) that "satisfies the statute." *Sweet Home*, 1 F.3d at 7. According to that decision, FWS must be free to adopt a "special rule" for a threatened species in order to honor the legislative intent that there can be separate tiers of protection for endangered versus less-imperiled threatened species.

II. Section 17.40(q)(4) Is Lawful And Rational

Exercising its broad discretion under ESA § 4(d), FWS declined to extend the "take" prohibition to an "otherwise lawful activity" occurring outside "the current range of the polar bear." 50 C.F.R. § 17.40(q)(4). Contrary to Plaintiffs' arguments (Pl. Br. at 26-36, 40-41), § 17.40(q)(4) is lawful, rational, and adequately supported by the record.

A. The Rule Is Lawful Under ESA § 4(d), As Construed In *Sweet Home*

Plaintiffs' argument that the 4(d) rule violates the ESA § 4(d) statute fails as a matter of law. As described in Section I, under *Sweet Home*, the second sentence of § 4(d) provides FWS with broad discretion not to extend or only partially extend the "take" prohibition to the threatened polar bear.[13] Moreover, as described below, because there can be no "take" of a polar bear from GHG-emitting activities outside the bears' range due to lack of causation, there was no "take" for FWS to apply in the 4(d) rule for these activities in the first place.

B. FWS Permissibly Reasoned The ESA Does Not Provide A Viable Legal Mechanism To Regulate GHG Emissions, Including Through ESA § 9 "Take" Suits

Plaintiffs argue that, because FWS found that the polar bear is impacted by the potential future effects of climate change, the ESA listing should have "triggered a host of federal protections" to combat that threat (e.g., regulating GHG emissions). Pl. Br. at 1. They argue it was irrational for FWS to exclude GHG emissions outside the polar bear's range from being subject to "take" litigation. Pl. Br. at 1-3, 11-15, and 27. Yet, this determination was sound on both a legal and policy basis, as explained by FWS in the record and described above. Moreover, the 4(d) rule cannot be overturned on Plaintiffs' view that the policy is "political."[14]

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[13] FWS "may, in its discretion, choose not to impose a take prohibition" at all under ESA § 4(d), or FWS can "craft a limited take prohibition." *Wash. Envtl. Council v. NMFS*, 2002 WL 511479 at *8. Consequently here, FWS can lawfully: (1) not impose an incidental take prohibition on activities taking place outside the polar bear's current range, including activities in the Lower 48 States that are thousands of miles away from that range (§ 17.40(q)(4)); (2) not apply the "take" prohibition to activities authorized under protective MMPA standards (§ 17.40(q)(2)); and (3) otherwise apply the ESA's "take" prohibition (§ 17.40(q)(1)).

[14] *E.g.*, Pl. Br. at 20-23, 33-34. All regulatory decisions have public policy components. Nothing is served by deriding them as "political." Indeed, it is the function of the popularly-elected political branches (here, the Executive Branch) to make policy decisions in implementing the law (passed by the Legislative Branch), while this is not a judicial function. *Nat'l Cable & Tel. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981-82 (2005); *Chevron U.S.A., Inc. v.*

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As explained below, FWS reasonably concluded that, due to the lack of a causal connection between any GHG-emitting activity outside the polar bear's range and effects on a polar bear, GHG emissions do not trigger either ESA § 7 consultation duties or an ESA § 9 take-avoidance duty. FWS rationally adopted a legal policy regarding ESA § 9 "take" that is consistent with its position on § 7 consultations. As two Administrations have found, the ESA is not an available tool to address global climate change. FWS appropriately concluded that allowing an incidental take suit against a GHG-emitter was not advisable and would not produce conservation benefits for the species.[15] This reasoning is compelling, and certainly not arbitrary.

1. A Project's GHG Emissions Do Not Trigger ESA § 7 Consultation, And FWS Has Reasonably Adopted a Similar Policy That GHG Emissions Do Not Trigger ESA § 9 "Take" Constraints

Both the current and former Administration have interpreted ESA § 7 and its implementing rules (50 C.F.R. Part 402) as meaning that alleged climate change effects of a project's incremental GHG emissions do not trigger ESA § 7 consultation. This occurred in the preambles to the § 4(d) and listing rules, 73 Fed. Reg. 76265-66; 73 Fed. Reg. 28247, and in high-level documents.[16]

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Natural Resources Defense Council, 467 U.S. 837, 863-66 (1984) (such policy decisions are not for the judiciary). FWS decisions under the ESA provisions that include some agency discretion are not required to be "based solely on apolitical factors." *Southwest Center for Biological Diversity v. Bur. of Reclamation*, 143 F.3d 515, 523 (9th Cir. 1998). To the extent the 4(d) rule is "political," it represents a broadly shared bipartisan policy endorsed by both Democratic and Republican Administrations that deserves judicial respect. *See* pages 2-3, above.

[15] *See* 73 Fed. Reg. 76262 ("Nothing within our authority under section 4(d) of the ESA . . . would provide a means to resolve this threat" from global climate change); Fed. Br. at 29, 31-32 (noting the lack of a causal connection between a GHG-emitting activity and effects on an individual bear); Quarles & Lundquist, *The Endangered Species Act And Greenhouse Gas Emissions: Species, Projects, And Statute At Risk*, 55 ROCKY MT. MIN. L. INST. ch. 10 (2009).

[16] The documents include statements by two Interior Secretaries, a memorandum from the FWS Director (AR4D014144), science analyses from EPA (AR4D01433) and the U.S.
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The preambles and several of these documents provide or act on science-based judgments. On such science issues, judicial review "must generally be at its most deferential." *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 103 (1983). A federal "agency must have discretion to rely on the reasonable opinions of its own qualified experts even if" the "court might find contrary views more persuasive." *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 378 (1989). Other aspects of these preambles and documents interpret ESA limits, such as the "proximate cause" limit on ESA "take" liability established in *Babbitt v. Sweet Home Chapt. of Comtys. for a Great Oregon*, 515 U.S. 687, 697 n.9, 700 n.13 (1995). *See* pages 17-20, below. Such high-level interpretations of the ESA and ESA rules are entitled to deference. *See Auer v. Robbins*, 519 U.S. 452, 461 (1997); *Sweet Home*, 515 U.S. at 703, 708.

Even assuming *arguendo* for the purposes of this brief and this case only that GHG emissions affect the global climate, any global climate-induced effects on listed species are indirect, time-delayed, and cumulative. Any such effects would "depend[] on a three-part causal chain: greenhouse gas emissions cause tropospheric warming, which in turn causes secondary climate change effects, which in turn cause ecological changes that adversely affect the species." Prof. J.B. Ruhl, *Climate Change and the Endangered Species Act: Building Bridges to the No-Analog Future*, 88 BOSTON U. L. REV. 1, 44 (2008). Thus, it is the cumulative effect of billions of sources of GHGs that may affect the global climate.

As the U.S. Geological Survey Director summarized, it "is currently beyond the scope of existing science to identify a specific source of CO_2 emissions and designate it as the cause of

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Geological Survey (ARL117214), and an Interior Solicitor's opinion (AR4D014144). *See* 73 Fed. Reg. at 76265-66; Quarles & Lundquist, 55 ROCKY MT. MIN. L. INST. §§ 10.04-10.06[1], pages 10-8 to 26.

specific climate impacts at an exact location." ARL117214. A later EPA analysis showed that emissions from any single source of GHGs are "too small to physically measure or detect in the habitat of these species" far out into the future. AR4D014340.

The FWS, in its polar bear listing decision, reached the same conclusion as to §§ 7 and 9. Under binding rules, ESA § 7 consultation is triggered only if the agency proposing an action finds the action "may affect listed species or critical habitat." 50 C.F.R. § 402.14(a). In the listing decision, the FWS determined that the lack of causation between the GHG-emitting activity and harm to the species was too tenuous to support either a requirement for consultation or liability for take. 73 Fed. Reg. at 28247. The FWS reiterated these points in the preamble to the final § 4(d) rule, stating that "the [ESA's] consultation requirement is triggered only if there is a causal connection between the proposed action and a discernible effect to the species or critical habitat." 73 Fed. Reg. 76265. Because the GHG emissions and alleged climate effects of any single emitter have no measurable effect on listed species or critical habitat, FWS has interpreted the ESA § 7 rules as meaning such non-effects do not require ESA § 7 consultation. *See* FWS Director's memorandum (AR4D014144) and the Interior Solicitor's opinion (AR4D014323). The FWS likewise concluded it could not draw a causal connection sufficient to prove a taking. *See* 73 Fed. Reg. at 76265-66. As current Interior Secretary Salazar has summarized:

> we [are] taking a common sense approach to administering the ESA when it comes to climate change. We do not believe that ESA consultations are required for projects that emit greenhouse gas emissions in cases where such emissions cannot be ca[us]ally linked to specific impacts on specific species. We have made this point forthrightly[.][17]

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[17] Letter from Interior Secretary Salazar to Senator Murkowski at 2 (May 12, 2009) (available at http://www.interior.gov/news/09_News_Releases/5.12.09%20letter%20to%20Murkowski.pdf).

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Thus, two Administrations are following the same legal policy for ESA § 9 "take" that applies to ESA § 7.[18] That is, GHG emissions from a particular facility do not proximately cause an effect on an individual polar bear or its habitat and thus do not trigger an ESA § 7 consultation duty or an ESA §§ 4(d) and 9 take-avoidance duty.

This consistent application of ESA policies is reasonable, not arbitrary. *See Spirit of the Sage*, 511 F. Supp. 2d at 44-45 (reasonable for FWS to make the incidental take permit ("ITP") revocation standard consistent with the ESA's standard for ITP issuance). It was an exercise in responsible government for FWS to inform operators of licensed power plants, drivers of cars, and those involved in thousands of other activities that produce GHGs outside of the polar bear's range[19] that their activities are not unlawful because they arguably could indirectly contribute to the potential "take" of polar bears. 50 C.F.R. § 17.40(q)(4) wisely eliminates the specter of potential criminal and civil liability under 16 U.S.C. § 1540(a) and (b) for such otherwise-lawful, every-day activities. Moreover, as shown in the next subsection, FWS's action is either legally compelled or strongly supported by the causation limit on a person's liability for "take."

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"It is currently not possible to directly link the emission of greenhouse gases from a specific power plant, etc. to effects on specific bears or bear populations. This direct 'connect the dots' standard is required under the Act and court rulings. Therefore, the Fish and Wildlife Service's policy guidance to its field staff is not to require such consultations." "Polar Bear 4(d) rule – Q's and A's" (available at http://www.fws.gov/home/feature/2009/pdf/QandApolarbear4drule.pdf); *see* Quarles & Lundquist, 55 ROCKY MT. MIN. L. INST. § 10.04[3], pages 10-10 to 10-14.

[18] *See* 73 Fed. Reg. 76265-66. As FWS explained in finalizing the 4(d) rule, "[o]ne must be able to 'connect the dots' between an effects of a proposed action and an impacts to the species and there must be a reasonable certainty that the effect will occur." *Id*. at 76265 (citing *Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife Serv.*, 273 F.3d 1229 (9th Cir. 2001)).

[19] For similar reasons, we believe that GHG emissions from a facility within the polar bear's range could not be shown to cause "take" of an individual bear.

2. Due To Causation Limits On "Take" And Science Limits, FWS Has Reasonably Concluded That Allowing Incidental Take Suits Against GHG Emitters Is Not "Advisable" And Is Not "Necessary" To Produce Conservation Benefits

Plaintiffs complain that, under § 17.40(q)(4), they have lost the ability to bring an ESA citizen suit alleging that some economic activity located hundreds to thousands of miles away from polar bears somehow would "take" a polar bear. FWS acted lawfully and rationally for several reasons.

First and foremost, the causation limit on "take" liability and the scientific absence of a "causal connection between GHG emissions resulting from a specific" action and "take" mean that "impacts of individual GHG emitters cannot be shown to result in "'take.'" 73 Fed. Reg. 76266. Science's inability to link any source of GHGs with "take" of a polar bear is discussed at pages 13-16, above.

Legally, FWS has defined the "harm" form of "take" as any "act which actually kills or injures [listed] wildlife. . . . [including] significant habitat modification or degradation where it actually kills or injures wildlife." 50 C.F.R. § 17.3. The uncertain reach of the "harm" rule led to *Sweet Home*, 515 U.S. 687, where the Supreme Court sustained the "harm" rule. The Court did so under a limiting construction which: (1) "emphasize[s] that actual death or injury of a protected animal is necessary for a violation"; and (2) requires the plaintiff to prove the challenged action is or would be the "proximate cause" of the injury or death of an individual animal. 515 U.S. at 691 n.2, 696-703 & nn. 9 & 13. The Court reinforced "proximate cause" limits under the ESA in *NAHB v. Defenders*, 551 U.S. at 667-68.

Proximate cause avoids unfairly charging one person with responsibility for an offense when the effect was caused primarily by a third party's action. *Holmes v. Securities Investor Prot. Corp.*, 503 U.S. 258, 268 (1992). A body of case law similarly holds that there can be no

ESA "take" liability where a plaintiff cannot demonstrate that the proposed action would "cause" the harm in question. *E.g.*, *Cold Mountain v. Garber*, 375 F.3d 884, 890 (9th Cir. 2004) (ESA claims dismissed where plaintiffs "failed to establish a causal link" between an agency action and a bald eagle "nest failure"); *Pyramid Lake Paiute Tribe v. U.S. Dept. of Navy*, 898 F.2d at 1420 (any "take" of listed fish may have been caused by irrigation water withdrawals by third parties); *Alabama v. U.S. Army Corps of Eng'rs*, 441 F. Supp. 2d 1123, 1132-35 (N.D. Ala. 2006) (preliminary injunction denied where any "take" was proximately caused by a natural drought, not the Corps); *Morrill v. Lujan*, 802 F. Supp. 424, 431-32 (S.D. Ala. 1992) (though "future development" of nearby properties may cause "take," that possibility "cannot be used to stop [the challenged] project which, by itself, does not pose a threat to the" listed species). In addition, ESA § 7(b)(4) constraints on "incidental take" cannot be imposed unless the plaintiff demonstrates that the challenged action would cause "take" of a member of a listed species. *Arizona Cattle Growers'*, 273 F.3d at 1239, 1240, 1243; *Pacific Shores Subdivision Cal. Water Dist. v. U.S. Army Corps of Eng'rs*, 538 F. Supp. 2d 242, 259-60 (D.D.C. 2008).

Any plaintiff would have insurmountable difficulties in attempting to show that a particular defendant and a specific source of GHGs or the particular use of pesticides or rodenticides outside the range of the polar bear are the proximate or producing cause of "harm" (death or injury) to an individual polar bear. As the preambles to the 4(d) rule and polar bear listing rule rationally explain, the "impacts of individual GHG emitters cannot be shown to result in [cause] 'take' based on the best available science at this time." 73 Fed. Reg. 76265-66; *see* 73 Fed. Reg. 28247 and 28300; 73 Fed. Reg. 28313. Notably, the Executive Director of Plaintiff Center for Biological Diversity has admitted that "any bid to fight the construction of a power

plant by arguing that emissions might harm a species likely would be thrown out of court." Ruhl, 88 BOSTON U. L. REV. at 41 n.163. Scholars share CBD's assessment.[20]

Due to the causation and other limits on "take" and the lack of a causal connection between any source of GHGs and "take" effects to an individual polar bear, allowing a specious "take" suit against a GHG emitter would not result in "take" liability. As the 4(d) record demonstrates, the FWS reasonably and lawfully concluded that, under the standards required by the Supreme Court and Circuit Court precedent, a source of GHGs outside of the polar bear range cannot "take" an individual polar bear because there is no causal link between GHG emissions and the "take" of individual polar bears. Having concluded that a "take" cannot be established under such circumstances, FWS declined to attempt to impose "take" liability.

Hence, extending an incidental take prohibition is not "necessary" or fruitful for "conservation," and § 17.40(q)(4) "does not impede the conservation of the species" in any way addressable by the ESA. 73 Fed. Reg. 76262. As FWS concluded:

> the threat that has been identified in the final ESA listing rule – loss or habitat and related [climate] effects – would not be alleviated by . . . the full application of the provisions in sections 9 and 10 of the ESA. Nothing within our authority under section 4(d) of the ESA . . . would provide the means to resolve this threat.[21]

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[20] Doremus, "Polar Bears in Limbo," *Slate* (May 20, 2008) (available at http://www.slate.com/id/2191707/). Professor Ruhl agrees that the "stiff evidentiary[, causation,] and proof burdens *Sweet Home* imposed" make it a "daunting prosecutorial undertaking" to prove that GHG emissions from a particular project are the proximate cause of a reasonably certain death or injury to an actual animal that constitutes "harm." Ruhl, 88 BOSTON U. L. REV. at 40-42. *See also* Quarles & Lundquist, 55 ROCKY MT. MIN. L. INST. § 10.06[2], pages 10-26 to 10-28.

[21] 73 Fed. Reg. 76262 (emphasis added); *see id*. at 76265-66 (the "indirect impacts of individual GHG emitters cannot be shown to result in "take" based on the best available science at this time" due to the lack of a "causal linkage . . between the proposed action, the effect in question (climate change), and listed species").

Moreover, the sound bipartisan legal policy, developed by both the current and former Administrations, has been that otherwise-lawful activities – such as operating power plants and oil refineries, constructing roads, farming and ranching – are not suddenly unlawful and subject to FWS prosecution under ESA § 11(a) and (b) simply because the activities produce carbon dioxide. This is a sensible federal enforcement policy. FWS can rationally extend those same policy considerations to ESA § 11(g) citizen suits. A "citizen suit is meant to supplement rather than supplant governmental action." *Gwaltney of Smithfield v. Chesapeake Bay Found.*, 484 U.S. 49, 60 (1987). As this Court knows, defending against specious ESA "take" litigation is expensive and may create lengthy project delays. *See Am. Soc'y for Prevention of Cruelty to Animals v. Feld Entertainment*, 2009 WL 5159752 (D.D.C. 2009). In § 17.40(q)(4), FWS has wisely found the public interest supports eliminating such costly and disruptive unfounded litigation.

3. FWS Lacks ESA Authority To Regulate GHG Emissions

Although Plaintiffs might prefer otherwise, no ESA provision grants GHG regulatory authority to FWS. Plaintiffs argue that, because GHG emissions allegedly are the "primary threat to the conservation of the polar bear, it was unlawful for FWS to "exempt such emissions from the reach of the" ESA. Pl. Br. at 3, 32-34. However, for the reasons provided above, an individual project's GHG emissions do not trigger ESA § 7 or § 9 duties.

More generally, FWS acted reasonably because no ESA provision grants GHG regulatory authority to FWS. As an FWS spokesman stated in 2009: "we have zero legislative authority to regulate carbon emissions. That's just not what we do."[22] Two Administrations have

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[22] *Greenwire*, "Endangered Species: Some See EPA's Climate Proposal Prodding Interior on ESA" (April 23, 2009). "[I]t is difficult to conceive of how the [FWS] would go about (continued…)

appropriately recognized that it is EPA and Congress who would have authority over GHG emissions, not FWS under the ESA.

> Some commenters to the proposed rule suggested the Service should require other agencies (e.g., the Environmental Protection Agency) to regulate emissions from all sources, including automobile and power plants. . . . [The Service's] consultative role under section 7 does not allow for encroachment on the Federal action agency's jurisdiction [to decide which action to propose and which action complies with ESA § 7(a)(2)] or policy-making under the statutes it administers.[23]

Thus, under any reasonable interpretation of ESA § 4(d) and the record, § 17.40(q)(4) and the remainder of the 4(d) rule are lawful, rational, and certainly not arbitrary.

C. The 4(d) Rule Is Not Arbitrarily Under-Inclusive Or Over-Inclusive

Plaintiffs argue the 4(d) rule is arbitrary because it is under-inclusive. In their view, the rule does not attempt to regulate all potential sources of "take," such as otherwise-lawful activities occurring outside the polar bear's range. But their view is contrary to the law and FWS findings that such sources do not cause a "take" of an individual bear or its habitat. Further, "regulations . . . are not arbitrary just because they fail to regulate everything that could be thought to pose any sort of problem." *Personal Watercraft Ind. Ass'n v. Dep't of Commerce*, 48 F.3d 540, 544 (D.C. Cir. 1995) (citing two ESA decisions which affirmed rules that only

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aggressively regulating greenhouse gas emissions through the jeopardy consultation program. The FWS does not have the pollution control expertise of EPA, nor does any provision of the ESA explicitly provide authority to engage in emissions regulation." Ruhl, 88 BOSTON U. L. REV. 1, 44 (2008). While ESA §§ 7 and 9 prohibit certain conduct, they do not provide FWS with regulatory authority. The ESA, instead of being a font of new authority, operates within the confines of an agency's statutory authority. *NAHB v. Defenders*, 551 U.S. 644 (2007); *American Forest & Paper Ass'n v. EPA*, 137 F.3d 291, 298-99 (5th Cir. 1998); *Platte River Trust v. FERC*, 962 F.2d at 33-34 (it is "far-fetched" and unpersuasive to read ESA § 7 as a general grant of authority for an agency do "whatever it takes" to conserve a listed species).

[23] 73 Fed. Reg. 28212, 28299-300; *see* 51 Fed. Reg. 19928 (June 3, 1986) (FWS "performs strictly an advisory function under section 7"; FWS cannot "use the consultation procedures of section 7 to establish substantive policy for Federal agencies"); *see* Quarles & Lundquist, 55 ROCKY MT. MIN. L. INST. § 10.06[1], pages 10-23 to 27.

addressed part of the problem, *Las Vegas v. Lujan*, 891 F.2d 927, 935 (D.C. Cir. 1989), and *Louisiana v. Verity*, 853 F.2d at 332); *see* Fed. Br. at 35. FWS could lawfully focus first on activities in the polar bear's Alaska range and that are addressable under the ESA.

Switching attacks, Plaintiffs (Pl. Br. at 15-18, 27, 34-36) argue that § 17.40(q)(4) is arbitrarily over-inclusive, because it also excludes from the scope of any ESA citizen suit the potential for a plaintiff to claim "takes" from two other lawful activities outside the polar bear's current range. The activities are the lawful application of pesticides as authorized under FIFRA, and the emission of small amounts of pollutants authorized under the CAA and CWA.

It was rational for FWS to provide regulatory certainty in these other areas. Just as a "take" suit against a particular GHG emitter would fail under proximate cause limits set by the Supreme Court, such a suit against a particular pesticide applicator or industrial facility would fail for the same reason. Rather than allow such disruptive litigation, FWS permissibly found it was "advisable" to create immunity from such misguided suits.[24]

III. In The Alternative, ESA § 4(d) Provides Significant Discretion To FWS On What It "Deems . . . Advisable," And FWS Reasonably Exercised That Discretion Here

Even assuming *arguendo* some form of the first sentence in ESA § 4(d) applies, it is not the harsh constraint urged by Plaintiffs. Rather, under FWS's reasonable interpretation, the agency has considerable discretion to "deem" certain rules not "advisable" as a policy matter to assist in "conservation."[25]

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[24] This leaves advocacy organizations with other avenues for redress. For example, environmental groups have sued EPA, alleging that its FIFRA registration of certain pesticides harms the polar bear, and that EPA must consult FWS under ESA § 7 to reduce alleged harmful effects. *See Ctr. for Biological Diversity v. Pirzadeh*, No. 09-1719-JCC (W.D. Wash.).

[25] *See* Fed. Br. at 32-33. Notably, § 4(d) is not phrased in terms that require FWS to adopt particular "take" rules that increase the conservation of a threatened species. Instead, the first sentence of § 4(d) delegates considerable discretion. FWS has reasonably interpreted the "as he (continued…)

Specifically, FWS could permissibly "deem" it "advisable" to largely keep in place the well-understood and protective MMPA provisions for authorizing minor and non-lethal incidental take of polar bears. And FWS could permissibly "deem" it "advisable" to inform generators of electricity having all required CAA permits – and thousands of other activities that lawfully emit GHGs outside the polar bear's current range – that their businesses are not suddenly unlawful and subject to fines and injunctions on the theory that the GHG emissions "take" a polar bear. That is, what is "advisable" is a matter of FWS's policy discretion.

FWS could permissibly find it is "advisable" to provide legal certainty and increase efficiency by not creating the specter of ESA incidental take liability for productive activities occurring outside the polar bear's range. FWS did permissibly "find that for activities outside the current range of the polar bear, overlay of the incidental take prohibitions under 50 CFR 17.31 is not necessary for polar bear management and conservation . . . . [This] does not impede the conservation of the species . . . [in any manner] within our authority under section 4(d)." 73 Fed. Reg. 76262.

(continued)
deems . . . advisable" phrase to "'fairly exude[] deference' to the agency." 73 Fed. Reg. 76261; *see id*. at 76264; Fed. Br. at 32-33. A 2009 appellate opinion confirms the Service's broad discretion under both the first and second sentences in § 4(d). "[Section] 1533(d) does not require regulations protecting threatened species from taking. The combination of the discretionary "may" and the phrase "necessary and advisable" grant NMFS much leeway in crafting regulations. *Trout Unlimited*, 559 F.3d at 962 n.12. More generally, the Supreme Court has counseled in favor of judicial deference to FWS's construction of take-related terms. "When it enacted the ESA, Congress delegated broad administrative and interpretive power to the Secretary. *See* 16 U.S.C. §§ 1533, 1540(f) . . . . Fashioning appropriate standards for issuing permits under § 10 [and other sections for allowed incidental] takings that would otherwise violate § 9 necessarily requires the exercise of broad discretion . . . . When Congress has entrusted the Secretary with broad discretion, we are especially reluctant to substitute our views of wise policy for his." *Sweet Home*, 515 U.S. at 708.

IV. No NEPA Document Was Required On The 4(d) Rule

We join in the other Defendants' arguments that no NEPA document was required on this ESA § 4(d) rule. The 4(d) rule maintains the status quo of polar bear protections under the MMPA and does not add potential incidental take constraints to lawful activities occurring outside the polar bears' range. *See* Fed. Br. at 38-45.

Plaintiffs argue that NEPA should apply because FWS might have the discretion to adopt further regulations under ESA § 4(d). Pl. Br. at 46-47. But NEPA does not apply here, where FWS declines to change the regulatory status quo. *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1243-47 (D.C. Cir. 1980); *State of Alaska v. Andrus*, 591 F.2d 537 (9th Cir. 1979) (NEPA does not apply where FWS declines to displace state law on wolf hunts).

Further, as § 17.40(q)(2) preserves existing MMPA procedures for authorizing incidental take, it creates no new environmental impacts. NEPA does not apply to such federal actions that do not change the physical environment. *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772-74 (1983).[26] Instead, any NEPA analysis can take place in the context of a particular MMPA incidental take authorization, when there is a project of known dimensions that can be assessed. *E.g., Kleppe v. Sierra Club*, 427 U.S. 390, 401-02, 410-15 (1976).

Finally, the 4(d) rule seems to be within an Interior Department categorical exclusion from NEPA for "regulations . . . of [a] legal, . . . or procedural nature; or whose environmental effects are too . . . speculative, or conjectural" for current NEPA analysis. 43 C.F.R. § 46.210(i).

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[26] *See Burbank Anti-Noise Group v. Goldschmidt*, 623 F.2d 115, 116 (9th Cir. 1980) ("An EIS is not required . . . when the proposed federal action will effect no change in the status quo.:); *Committee for Auto Responsibility v. Solomon*, 603 F.2d 992, 1002-03 (D.C. Cir. 1979) ("To compel [an agency] to formulate an EIS under these circumstances [where there is no change to the status quo] would trivialize NEPA's EIS requirement and diminish its utility in providing useful environmental analysis for major federal actions that truly affect the environment.").

V. Remedies Issues Should Be Briefed Later. The 4(d) Rule Should Not Be Vacated.

We agree with Federal Defendants (Fed. Br. at 49) that, if the Court finds some merit in Plaintiffs' ESA or NEPA claims, the Court should schedule further briefing on the appropriate remedy. Under several doctrines, the Court can remand without vacating the 4(d) rule.

1. The Administrative Procedure Act ("APA") does not mandate set-aside relief. Under the APA, "injunctive" remedies "are discretionary." *Reno v. Catholic Social Servs.*, 509 U.S. 43, 57 (1993); *see* 5 U.S.C. § 702 (court may "deny relief on any . . . equitable ground").

2. Remand without vacatur is appropriate where it is likely: (1) the agency will be able to justify the same rule on remand; and (2) vacatur would have "disruptive consequences." *Heartland Reg. Med. Ctr. v. Sebelius*, 566 F.3d 193, 197-98 (D.C. Cir. 2009). The parties should be given an opportunity to provide arguments and evidence corresponding to these elements.

3. With respect to curable procedural errors, an agency must be given "an opportunity to articulate, if possible, a better explanation." *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1023 (D.C. Cir. 1999). Thus, the 4(d) rule should not be substantively invalidated for any curable procedural defect under NEPA or the APA.

4. Setting aside an agency regulation is a form of an injunction. It should be granted only if plaintiff satisfies the prerequisites that "he is likely to suffer irreparable harm in the absence of [an injunction], that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Resources Defense Council*, 129 S. Ct. 365, 374 (2008). The parties should be given an opportunity to provide arguments and evidence corresponding to these elements.

CONCLUSION

Plaintiffs' motion for summary judgment should be denied. Federal Defendants' cross-motion should be granted.

Respectfully submitted,

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