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: ***Center for Biological Diversity, et al. v. Salazar, et al.*, No. 08-2113, and** ***Defenders of Wildlife v. United States Department of the Interior, et al.*, No. 09-153.**	)	

REPLY OF THE NATIONAL TRADE ASSOCIATIONS IN SUPPORT OF FEDERAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT ON THE 4(d) RULE

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INTRODUCTION

The National Trade Association Intervenors 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. Threatened species are by definition less imperiled than endangered species, and are subject to fewer ESA constraints. Federal Defendants have explained how the 4(d) rule extends, to the threatened polar bear, appropriate protections that ESA § 9 otherwise limits to "endangered species."

In this reply, the National Trade Associations continue to focus on the legality of § 17.40(q)(4). The polar bear was the first threatened species to be listed based primarily on projections that the bear would be threatened by future global climate change. As a result, it was essential for FWS to establish a clear direction on how the 4(d) rule would apply to activities associated with the emission of carbon dioxide and other greenhouse gases ("GHGs") under the ESA. The U.S. Fish and Wildlife Service ("FWS") committed no legal error when it exercised its broad discretion under ESA § 4(d), 16 U.S.C. § 1533(d), and declared that "take" liability does not extend to any "otherwise lawful activity" occurring outside "the current range of the [threatened] polar bear." 50 C.F.R. § 17.40(q)(4). This part of the rule permissibly provides protection for the polar bear while minimizing the threat, under the ESA, of ill-founded lawsuits, unnecessary regulatory proceedings, and potential liability for the millions of people associated with the innumerable sources of GHGs in the United States – including motor vehicle operation, electric power generation and consumption, ranching, and the simple act of human breathing, all

of which take place outside the polar bear's current range. This well-reasoned rulemaking reflects the considered, bipartisan policy of two different Administrations.[1]

None of the arguments in Plaintiffs' Reply is persuasive. Below, we supplement the showing made in Federal Defendants' Reply, and summarize some dispositive points.

ARGUMENT

I. The Polar Bear 4(d) Rule Is Lawful

A. The Rule Is Lawful Under ESA § 4(d)'s Second Sentence

Although ESA § 9 makes it unlawful to "take" a member of an "endangered" wildlife species (16 U.S.C. § 1538(a)(1)(B)), the ESA does not make it unlawful to "take" a less-imperiled threatened species. In light of this clear distinction, the significance of the second sentence of ESA § 4(d) is obvious: that provision on its face grants FWS broad "may" discretion to extend or not to extend some portion of the ESA § 9 prohibitions to a threatened species. "The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a)(1) . . . with respect to endangered species." 16 U.S.C. § 1533(d). The natural meaning is:

> The language of 4(d) makes it clear that [National Marine Fisheries Service][2] "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.... 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.

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[1] *See generally* "Mem. of the National Trade Ass'ns...on the 4(d) Rule" (doc. 184, filed March 26, 2010) ("NTA Br."); "Reply in Support of Fed. Defs' Cross-Motion for Summ. J. on the 4(d) Rule" (doc. 205, filed July 2, 2010) ("Fed. Reply"). We will refer to "Pls' Reply ... and Opp. ... on the § 4(d) Rule Claims" (doc. 202, filed May 25, 2010) as "Pl. Reply."

[2] With respect to certain ESA-listed marine species, the ESA provides the National Marine Fisheries Service ("NMFS") the same authority and discretion FWS has with respect to other listed species.

Wash. Envtl. Council v. Nat'l Marine Fisheries Serv., 2002 WL 511479 at *8 (W.D. Wash. 2002).

Nonetheless, Plaintiffs' opening brief argued that the special rule for the threatened polar bear violated an FWS duty found in the first sentence in ESA § 4(d) to "issue such regulations as [the FWS] deems necessary and advisable to provide for the conservation of such [threatened] species." 16 U.S.C. § 1533(d).

In their opening briefs, the National Trade Associations and Federal Defendants have detailed the numerous ways in which Plaintiffs' interpretation is illogical and not required by law. The Federal interpretation – that FWS has the broad discretion to adopt the polar bear rule under § 4(d)'s separate grant of authority in the second sentence – is lawful. Most importantly, the Federal interpretation: (1) is supported by controlling Circuit precedent in *Sweet Home Chapt. of Cmtys. for a Great Oregon v. Babbitt*, 1 F.3d 1, 7-8 (D.C. Cir. 1993); (2) is the appropriate interpretation because only in this manner can FWS provide meaning to § 4(d)'s two sentences and honor the ESA's structure in creating less-stringent duties with respect to threatened species; and (3) conforms to the ESA policy of not forcing mandatory "conservation" duties on entities other than the Services. *See* NTA Br. at 4-12.

In response, Plaintiffs begrudgingly acknowledge that "Section 4(d) may be read to contain two separate grants of authority." Pl. Reply at 5. But, Plaintiffs then inconsistently argue that one "cannot read the second sentence of Section 4(d) in isolation" and urge the court to read the excluded "conservation" language into § 4(d)'s second sentence. Pl. Reply at 5-25.

Plaintiffs' arguments are inconsistent and unpersuasive. Either § 4(d)'s second sentence is separate and permissive ("may") and without a "conservation" constraint, or it is not "separate." FWS, at the very least, has the *Chevron* Step Two discretion to conclude that

"reading a 'conservation' requirement into the second sentence is improper." Fed. Reply at 4; *see id*. at 2-6; NTA Br. at 4-12.

Plaintiffs' interpretation is precluded by *Sweet Home*, 1 F.3d at 7-8. In that case, the D.C. Circuit rejected plaintiffs' argument that all of ESA § 4(d) must be read as one unified command. The Court declined to require a species-specific finding that any 4(d) rule must "provide for the conservation of such species." Instead, the D.C. Circuit found FWS's reading that "the two sentences of § 1533(d) represent separate grants of authority" is a "reasonable reading" of the statute. 1 F.3d at 7-8. Because the second sentence is "separate," it should be read to be a self-contained authority that does not incorporate constraints found only in the first sentence.

Having interpreted Section 4(d) in this manner, the *Sweet Home* Court found that the second sentence of § 4(d) allowed FWS to adopt a rule that presumptively extends to threatened species all of the ESA § 9 "prohibitions" (with respect to endangered species), "without obligating it to support such actions with findings of necessity" for conservation – and independent of all constraints in § 4(d)'s first sentence. 1 F.3d at 8. Section 4(d)'s first sentence applies only if the rule is adopting some "protective measures *beyond* those contained in § 1538(a)(1)." *Id*.

Applying the *Sweet Home* reasoning to the instant case results in the following conclusion. The polar bear rule concerns "take" and the extent to which other 16 U.S.C. § 1538(a)(1) prohibitions for *endangered* species are being extended to the *threatened* polar bear, while other portions of the ESA prohibitions are not applied to this threatened species. Therefore, the polar bear rule is governed by ESA § 4(d)'s *second* sentence, and is lawful under the broad discretion granted by that sentence. The rule simply is not subject to § 4(d)'s first sentence in any form.

B. The ESA Does Not Create Mandatory Conservation Duties With Respect To Threatened Species

The foregoing leads to the inescapable conclusion that the polar bear 4(d) rule is not subject to a "conservation" constraint, a duty that appears only in the inapplicable first sentence. Because the term "conservation" was omitted in the more discretionary ("may") second sentence, sound principles of statutory construction prohibit inserting that obligation among the discretionary powers of that sentence. *See* Fed. Reply at 4. Hence, the controlling language in § 4(d)'s second sentence does not restrict rules regarding "take" to those which maximize "conservation."

More generally, it has been demonstrated, without rebuttal, that other sections of the ESA fail to impose any "conservation" duties on the private sector or on entities aside from the Services.[3] Thus, Federal Defendants' interpretation of § 4(d) is consistent with the ESA's structure.

Instead, Plaintiffs invoke the ESA's overall purpose to "halt and reverse the trend towards species extinction, whatever the cost." Pl. Reply at 4 (quoting *Babbitt v. Sweet Home Chapt. of Cmtys. for a Great Or.*, 515 U.S. 687, 699 (1995)). But, reliance on the statute's general purpose is merely legal ivy, employed to cover the gaps in their wall of statutory

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[3] *See* NTA Br. at 8-11. For example, this Court has found that the ESA § 10(a) reference to a "conservation plan" does not require an improvement in the status of the listed species. *Spirit of the Sage Council v. Kempthorne*, 511 F. Supp. 2d 31, 42-44 (D.D.C. 2007).

Even though the Ninth Circuit had earlier held that adverse modification of critical habitat under ESA § 7(a)(2) must consider effects on "conservation," that court recently found that "destr[uction of] 234.5 acres of critical habitat" did not violate ESA § 7 because it does not "*appreciably diminish*[] the value of [the overall acreage designated as] critical habitat." *Butte Envtl. Council v. U.S. Army Corps of Eng'rs*, 607 F.3d 570, 582 (9th Cir. 2010). Similarly, the 4(d) rule does not "appreciably diminish" the viability of the polar bear. (In contrast, the "regulated hunting" cases like *Sierra Club v. Clark*, 755 F.2d 608 (8th Cir. 1985), did concern rules which might diminish the viability of the species.)

interpretation. Also, even if that hortatory language had a role in interpreting Section 4(d), that quoted language refers to "extinction," not to a duty to promote affirmative "conservation" measures for a species listed as threatened.

Moreover, *Sweet Home* found in the ESA a "two-tier approach to species protection" under which allowance of "take" and "incidental take" is "more readily available for threatened species." 1 F.3d at 7. The 4(d) rule for the threatened polar bear respects that legislative choice. In contrast, under Plaintiffs' view that 4(d) rules "shall" promote "conservation" of a threatened species, a threatened species would illogically obtain the same or greater protection than ESA § 9 provides for endangered species. *See* Fed. Reply at 4-6; NTA Br. at 4-10.[4]

Plaintiffs also continue to rely on *Sierra Club v. Clark*, 755 F.2d 608 (8th Cir. 1985). *See* Pl. Reply at 6-8. But, *Sweet Home* is dispositive in this Circuit, and *Clark* is an outlier which was criticized during the 1988 ESA amendments. *See* NTA Br. at 5-7. Also, *Clark* may retain some credibility only where a court is reviewing a rule that affirmatively allows regulated hunting of a threatened species. In those circumstances, the ESA definition that "conservation" does not allow "regulated taking" except in the "extraordinary case" (16 U.S.C. § 1532(3)) arguably may be pertinent. *See* NTA Br. at 5-7; Fed. Reply at 6 n.3.

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[4] As the ESA's distinctions between "endangered species" and less-imperiled "threatened species" illustrate, while the "Endangered Species Act of 1973 represented the most comprehensive legislation for the preservation of endangered species ever enacted by any nation" (*Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 180 (1973), the ESA still is not unidirectional. "[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice – and it frustrates rather than effectuates legislative intent 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) (emphasis in original); *see Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 171 (2007). Here, because the ESA's text stops short of requiring "conservation" actions, ESA § 4(d) should not be construed to compel "conservation" actions.

C. Plaintiffs' "Baseline" Arguments Are Unconvincing Under Both The ESA And NEPA

Plaintiffs argue that the issue of whether the special 4(d) rule for the polar bear advances "conservation" must be assessed against a baseline of what would have occurred if a special rule had not been adopted, and the presumptive extension of ESA § 9 prohibitions to a threatened species had occurred pursuant to 50 C.F.R. § 17.31(a). *See* Pl. Reply at 8-10, 14-25. As summarized in Section I.B, this argument fails because there is no "conservation" constraint in the Act that is applicable here.

Plaintiffs' argument also is unconvincing because neither the ESA nor the National Environmental Policy Act ("NEPA") mandates the "baseline" that Plaintiffs prefer. Plaintiffs argue that a NEPA document was required because the special 4(d) rule has adverse environmental consequences when it is compared to a baseline of the presumptive blanket extension of ESA § 9 prohibitions to all threatened species in § 17.31. *See* Pl. Reply at 33-40. Set forth below are the ESA and NEPA responses to the Plaintiffs' baseline arguments.

ESA and NEPA compare the effects of an action against the real-world environmental conditions/baselines, not "hypothetical" baselines or constructs. *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 524 F.3d 917, 928-30 (9th Cir. 2008) (for ESA § 7 consultation, the "existence of the dams must be included in the environmental baseline," which is the "*present...natural context*[]"). In contrast, Plaintiffs look to a situation that would exist only <u>if</u> the blanket rule of § 17.31(a) had taken effect. This construct is entirely "hypothetical" because that blanket rule never came into effect. Under 50 C.F.R. § 17.31(c), the adoption of the special rule for the polar bear eliminated application of § 17.31(a). *See* Fed. Reply at 7-8, 10-13, and 27-32. Thus, Plaintiffs' baseline is not what the law requires.

At an absolute minimum, FWS had the discretion to compare the impacts of the special 4(d) rule to the pre-existing regulatory regime under the Marine Mammal Protection Act ("MMPA"). One helpful ESA analogue concerns the allowable baseline for assessing the economic impacts of designating critical habitat under ESA § 4(b)(2), 16 U.S.C. § 1533(b)(2). The D.D.C. has determined that, because the ESA § 4(b)(2) does not specify a baseline, FWS has *Chevron* Step Two discretion "to adopt its own approach." *Otay Mesa Property L.P. v. U.S. Dep't of the Interior*, __ F. Supp. 2d __, 2010 WL 2134295 at *14 (D.D.C. 2010). *Otay Mesa* approved FWS's decision to look at the incremental economic impacts of designating critical habitat above the existing regulatory baseline at the time critical habitat is designated.[5] The *Otay Mesa* reasoning supports the argument that FWS had the discretion to compare impacts of the 4(d) rule against the then-existing regulatory baseline (protection of polar bears under the MMPA).

NEPA case law supports FWS's use of the same baseline. In assessing whether there has been an environmentally significant change in the status quo, the comparison is to the historic environmental and regulatory conditions. *See Upper Snake River Chapt. of Trout Unlimited v. Hodel*, 921 F.2d 232, 235 (9th Cir. 1990) (continued operation of a dam within historic patterns does not trigger NEPA duties); *Conservation Law Found. v. Mineta*, 131 F. Supp. 2d 19, 25-27 (D.D.C. 2001) (deference to agency's use of an historic baseline). Similarly here, FWS lawfully found that the 4(d) rule's substantial continuation of the regulatory status quo under the MMPA,

[5] In another ESA § 4(b)(2) case, the D.D.C. upheld FWS's baseline and incremental-impacts approach. The decision in *Cape Hatteras Access Preservation Alliance v. U.S. Dep't of the Interior*, 344 F. Supp. 2d 108, 126-32 (D.D.C. 2004), rejected decisions from outside the D.C. Circuit that had found FWS's approach unlawful.

without imposing new significant environmental impacts, did not trigger NEPA duties. *See* Section II, below.

D. The GHG Aspects Of The ESA 4(d) Rule Are Lawful

Plaintiffs argue that, because the polar bear was listed due to concerns it would be threatened by future global warming, it was arbitrary for FWS to preclude ESA "take" liability for GHG emissions outside the polar bear's range. E.g., Pl. Reply at 10-13. This argument is thoroughly debunked in the record, in the NTA Br. at 12-21, and in the Fed. Reply at 18-24.

There is an important difference between the ESA § 4 listing process and the limited authority that ESA §§ 7 and 9-11 provide over activities affecting listed species. The ESA requires that listing decisions be based exclusively on the best available science, including the "threatened destruction" of habitat in the future – and the definition of a "threatened species" is one "which is likely to become an endangered species [as a biological matter] within the foreseeable future." 16 U.S.C. §§ 1532(20), 1533(a) and (b)(1). Plaintiffs hypothesize that, if a species can be listed as threatened by future global climate change, the ESA should be read as magically providing authority to regulate GHG emissions. *See* Pl. Reply at 10-13.

But, "agencies have no inherent powers" – they "are creatures of statute" and have authority "only to the extent[] that Congress affirmatively has delegated them the power to act." *Am. Bus Ass'n v. Slater*, 231 F.3d 1, 9 (D.C. Cir. 2000). The ESA is not an open-ended grant of authority 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). Stated differently, a statute's lofty declaration of goals does not trump the specific substantive powers that Congress has conferred upon the

agency to implement those goals. The ESA simply does not provide FWS or citizens with authority to regulate an individual source of GHG emissions.[6]

More particularly, proximate cause limits on liability for "take" of listed wildlife and the legal limit that "take" refers to the death or injury of an identifiable animal – coupled with the inability to determine scientifically that GHG emissions from a single source outside the range of the polar bear cause a "take" of a specific (and distant) polar bear – mean that FWS could rationally find that "take" suits are not a viable mechanism to control GHG emissions.[7] Instead, FWS responsibly decided to not expose drivers of cars, producers and consumers of electric power, cattle ranchers, and thousands of other GHG emitters to dubious ESA "take" suits and to concerns that many everyday activities are now unlawful. *See id.*

Plaintiffs' responses are legally unconvincing. Plaintiffs argue it was arbitrary for the 4(d) rule to "not address the *primary* threat to the polar bear." Pl. Reply at 10-12. FWS has rationally explained that there is no effective ESA authority to control GHG emissions. *See* sources cited in NTA Br. at 12-20 and Fed. Reply at 19-21.

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[6] *See* NTA Br. at 12-21; Fed. Reply at 19-21; 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) ("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."); *Greenwire*, "Endangered Species: Some See EPA's Climate Proposal Prodding Interior on ESA" (April 23, 2009) (FWS spokesman states "we have zero legislative authority to regulate carbon emissions. That's just not what we do."). "Nothing within [FWS's] authority under section 4(d) of the ESA" could or "would address the threat to polar bears from loss of sea ice." 73 Fed. Reg. 76262 (Dec. 16, 2008), AR4D012939. Comprehensive climate change legislation is the most appropriate and fair mechanism for regulation of GHG emissions.

[7] *See* NTA Br. at 12-20; Fed. Reply at 19-21. The seemingly insurmountable difficulties in proving that a particular source of GHGs is the proximate cause of "take" (death) of an individual polar bear are explored in Quarles & Lundquist, *The Endangered Species Act And Greenhouse Gas Emissions: Species, Projects, And Statute At Risk*, 55 ROCKY MT. MIN. L. INST. 10-23 to 28 (2009); and Comment, *Climate Change and the Endangered Species Act: The Difficulty of Proving Causation*, 36 ECOLOGY L.Q. 167, 182-98 (2009).

Plaintiffs argue that FWS should have made all forms of "take" unlawful in the 4(d) rule and left it to the courts to sort out if a GHG emitter is a culpable cause of ESA "take." Pl. Reply at 11. But two Administrations have rationally concluded it is not advisable or in the public interest to create such a specter of liability over (and to impose unwarranted litigation defense costs on) the wide range of productive economic activities that emit GHGs. *See* NTA Br. at 1-3, 12-20; Fed. Reply at 19-21.

In sum, under the flexible second sentence in ESA § 4(d), FWS had the discretion and authority to adopt the "outside the range of the polar bear" provisions in § 17.40(q)(4). Federal Defendants have provided a rational explanation for the rule that satisfies the Administrative Procedure Act ("APA"). Accordingly, the 4(d) rule for the polar bear should be affirmed.

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

Plaintiffs continue to argue that, procedurally, the 4(d) rule should have been accompanied by some NEPA document. *See* Pl. Reply at 29-45. The National Trade Associations support Federal Defendants' detailed reply. *See* Fed. Reply at 25-33.

Federal Defendants cogently argue that the 4(d) rule did not change the on-the-ground environment, nor did it materially alter the regulatory status quo under the MMPA. *See* Fed. Reply at 10-13, 26-31. Plaintiffs argue in part that, if a special 4(d) rule had not been adopted, more ESA constraints would have applied per 50 C.F.R. § 17.31(a). *See* Pl. Reply at 8-10 and 33-35. But, an FWS decision not to exercise discretionary ESA authority and to continue the regulatory status quo under the MMPA creates no NEPA duties under our unrebutted citation to *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1243-47 (D.C. Cir. 1980). *See* NTA Br. at 24.

Additionally, NEPA does not apply here, because the federal action did not change the physical environment. *Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 772-74 (1983); *see* NTA Br. at 24; Section I.C, above. In assessing whether there has been a change,

the comparison is to the historic environmental and regulatory conditions. *See Upper Snake River*, 921 F.2d at 235 (continued operation of a dam within historic patterns does not trigger NEPA duties). NEPA and the ESA deal with real-world environmental conditions, not hypothetical constructs. *See id.*; *Metro. Edison*, 460 U.S. at 772-74; *NWF v. NMFS*, 524 F.3d at 928-30.

Thus, under both the ESA and NEPA, FWS did not have to compare the 4(d) rule's impacts to Plaintiffs' hypothetical baseline of what would have happened if all ESA § 9 prohibited acts with respect to endangered species had been extended to the polar bear under 50 C.F.R. § 17.31(a). The reality is that FWS did adopt a special 4(d) rule and, under § 17.31(c), that meant the presumptive extension did not occur. *See* Fed. Reply at 10-13, 27-32.

III. Remedy Issues Should Be Briefed Later, If Pertinent After A Merits Decision. The 4(d) Rule Should Not Be Set Aside Unless Plaintiffs Satisfy All The Prerequisites To Any Extraordinary Relief.

Plaintiffs argue that, if there is some curable NEPA or APA defect, the 4(d) rule is automatically vacated or "normally" must be vacated. Pl. Reply at 46 (citing a 2001 D.C. Circuit opinion). Federal Defendants state that "vacatur is the general rule," subject to exceptions under 1989 to 2002-era D.C. Circuit decisions. Fed. Reply at 34. Both are wrong as a matter of law. Due to changes and clarifications in recent, controlling case law on remedies in APA suits, those statements and arguments are no longer accurate.

It is "simply not the law" that, "if the Department violated the APA..., its actions must be vacated." *Sugar Cane Growers Co-Op. v. Veneman*, 289 F.3d 89, 98 (D.C. Cir. 2002). A set-aside or vacatur is a de facto injunction. It cannot be granted unless Plaintiffs satisfy all the prerequisites to extraordinary injunctive relief. *See* NTA Br. at 25, particularly *Winter v. Natural*

Resources Defense Council, 129 S. Ct. 365, 374 (2008).[8] In *Winter*, the Supreme Court applied the traditional four-factor test for injunctive relief, and vacated a substantive preliminary injunction for a procedural violation of NEPA. *See* 129 S. Ct. at 374-82.[9] The Court found that plaintiffs had not sustained their burden of showing that the injunction was in the overall public interest and was necessary to avoid irreparable injury, and that the balance of harms supported an extraordinary injunction. *See id.*

Since our earlier filing, the Supreme Court has confirmed that injunction prerequisites must be satisfied before an agency action can be substantively enjoined when there is only a curable and procedural defect under NEPA. *Monsanto Co. v. Geertson Seed Farms*, 130 S. Ct. 2743 (2010). A court cannot "presume that an injunction is the proper remedy for a NEPA violation except in unusual circumstances." 130 S. Ct. at 2757. Such a presumption is inconsistent with traditional standards for equitable relief, which place on plaintiffs the burden of persuasion on all perquisites to an extraordinary injunction. *Id.* A court cannot simply ask if there is some special "reason why an injunction should *not* issue; rather, a court must determine [whether] an injunction *should* issue under the traditional four-factor test" without a "thumb on the scales" in favor of an injunction. *Id.*

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[8] Set aside or "injunctive" remedies "are discretionary" under the APA. *Reno v. Catholic Social Servs.*, 509 U.S. 43, 57 (1993). The United States' understanding of the APA is that "the APA does not compel an injunction when agency action is found unlawful" – in a suit "under the APA, a party challenging agency action must demonstrate that a declaratory judgment would be inadequate and that the further relief of an injunction is necessary." *See* Brief for the Federal Respondents Supporting Petitioner in *Monsanto Co. v. Geertson Seed Farms*, No. 09-475 (S. Ct.), at 22 (available at http://www.justice.gov/osg/briefs/2009/3mer/2mer/2009-0475.mer.aa.pdf).

[9] Although *Winter* concerned a preliminary injunction, the Court made clear that it would also be "an abuse of discretion to enter a permanent injunction, after final decision on the merits," explaining that the four factors "are pertinent in assessing the propriety of any injunctive relief, preliminary or permanent." *Id.* at 381.

Thus, it would be inappropriate for this Court to presume that the "normal" remedy for any procedural NEPA or APA defect is to set aside the 4(d) rule. As the D.C. Circuit has said with respect to curable APA failures to provide an adequate explanation, "bedrock principles of administrative law preclude [a court] from declaring that [an agency] was arbitrary and capricious without first affording [the agency] an opportunity to articulate, if possible, a better explanation." *County of Los Angeles v. Shalala*, 192 F.3d 1005, 1023 (D.C. Cir. 1999).

Accordingly, if the Court finds some legal error, we generally support remanding the 4(d) rule for agency correction and without vacatur. No set-aside of the 4(d) rule should occur without the benefit of detailed remedies briefing. For example, vacatur is not appropriate where it would have "disruptive consequences" or is otherwise not in the public interest. *Heartland Reg. Med. Ctr. v. Sebelius*, 566 F.3d 193, 197-98 (D.C. Cir. 2009). Vacatur of the established 4(d) rule could have serious disruptive consequences.[10]

Hence, if the Court finds some curable procedural error associated with the 4(d) rule, the 4(d) rule should not be presumptively enjoined. Instead, the Court should conduct a separate subsequent hearing to find and address all the facts, as they then may exist. Only by proceeding in this manner can the Court conduct an equitable balancing of respective harms and make a detailed, requisite public interest determination. At such a proceeding, Plaintiffs would bear the burden of persuasion on all the factors, as demanded by *Winter* and *Monsanto*. Because

[10] Many economic activities in northern Alaska may depend on the longstanding MMPA processes for allowing non-lethal harassment "takes" of polar bears – processes continued by the 4(d) rule. If that rule is vacated and if incidental take can be authorized only under ESA standards and procedures, the uncertainty regarding the scope of permissible activities could itself be disruptive, could delay economically vital activities, and may increase the costs of those activities.

Plaintiffs have not even attempted to carry that burden in the briefing thus far, no injunction or order setting the rule aside should issue.

CONCLUSION

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

Respectfully submitted,

/s/ Rachel D. Gray (w/permission 8/16/10)
Roger R. Martella, Jr. (D.C. Bar No. 976771)
Rachel D. Gray (D.C. Bar No. 485507)
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8097
Fax: (202) 736-8711
rmartella@sidley.com

Attorneys for the National Petrochemical and Refiners Association

/s/ Thomas R. Lundquist
J. Michael Klise (D.C. Bar No. 412420)
John C. Martin (D.C. Bar No. 358679)
Thomas R. Lundquist (D.C. Bar No. 968123)
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595
(202) 624-2500
Fax: (202) 628-5116
jmklise@crowell.com

Attorneys for the American Petroleum Institute, Edison Electric Institute, Chamber of Commerce of the United States of America, National Mining Association, National Association of Manufacturers, and American Iron and Steel Institute

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Of Counsel:

Edward H. Comer
Vice President & General Counsel
Henri D. Bartholomot
Director, Regulatory Legal Issues
Edison Electric Institute
701 Pennsylvania Avenue, N.W.
Washington, DC 20004
(202) 508-5000

Robin S. Conrad
Amar D. Sarwal
National Chamber Litigation Center, Inc.
Chamber of Commerce
of the United States of America
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Harry Ng
Michele Schoeppe
American Petroleum Institute
1220 L Street, N.W.
Washington, DC 20005-4070
(202) 682-8000

Quentin Riegel
Vice President, Litigation & Deputy
General Counsel
National Association of Manufacturers
1331 Pennsylvania Avenue, N.W.
Washington, DC 20004-1790
(202) 637-3000

Gregory M. Scott
Executive Vice President and General
Counsel
National Petrochemical & Refiners
Association
1667 K Street, N.W.
Suite 700
Washington, D.C. 20006
(202) 457-0480

Katie Sweeney
National Mining Association
101 Constitution Avenue, N.W.
Suite 500 East
Washington, D.C. 20001
(202) 463-2600

Kevin M. Dempsey
Senior Vice President, Public Policy and
General Counsel
American Iron and Steel Institute
1140 Connecticut Ave., N.W.
Suite 705
Washington, D.C. 20036
(202) 452-7100