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VIA HAND DELIVERY

Jeffrey N. Lüthi, Clerk of the Panel
Judicial Panel on Multidistrict Litigation
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, NE, Room G-255, North Lobby
Washington, DC 20002-8004

Re: In re Polar Bear Endangered Species Act Listing and § 4(d) Litigation, MDL Docket No. 1993
Notice of Related Actions

Dear Mr. Lüthi:

On behalf of the Chamber of Commerce of the United States of America (the "Chamber"), I write to inform the Panel of four potential tag-along actions, as defined in Panel Rule 1.1, related to MDL Docket No. 1993. The cases described below and listed in the attached schedule (the "Section 7 Cases") share common factual and legal issues with the cases the Panel transferred to the U.S. District Court for the District Columbia in its December 3, 2008 Transfer Order ("Transfer Order") (the "Polar Bear Litigation"). Under Panel Rule 7.4(a), "[u]pon learning of the pendency of a potential 'tag-along action,' an order may be entered by the Clerk of the Panel transferring that action to the previously designated transferee district court."

The complaints in the cases listed on the attached schedule (*CBD II, NRDC, NWF,* and *State of California*) challenge final regulations issued by the United States Fish and Wildlife Service ("FWS") and the National Marine Fisheries Service ("NMFS") under Section 7 of the Endangered Species Act, 16 U.S.C. § 1531 *et seq*. (the "ESA"). All four cases have been designated as related to one another and assigned to Judge Patel in the Northern District of California. *Center for Biological Diversity v. Kempthorne,* N.D. Cal. Case No. 08-5546 ("*CBD II*"), Related Case Order (Docket No. 19). A copy of the complaint and docket sheet

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for each action listed on the attached schedule is enclosed for your convenience.[1/]

As discussed in more detail below, these potential tag-along actions relate to the *Chamber of Commerce* case and to claims that the Center for Biological Diversity ("CBD") alleges in its case previously filed in the Northern District of California, which was transferred to the U.S. District Court for the District of Columbia pursuant to the MDL Transfer Order in Docket No. 1993. *Center for Biological Diversity v. Kempthorne*, N.D. Cal. Case No. 08-1339 ("*CBD I*"). The potential tag-along actions assert a legal claim essentially identical to a claim pending in, and share common factual issues with, the challenges addressed in the Polar Bear Litigation. Moreover, there are a number of overlapping plaintiffs and defendants. Hence, transferring these tag-along actions will further the goals of judicial economy and convenience of the parties.

COMMON ISSUES OF FACT

Under MDL Rule 1.1 a "'tag-along action' refers to a civil action pending in a district court and involving common questions of fact with actions previously transferred under Section 1407." "The legal standards for transfer of tag-along actions are the same as those applying to initial transfer," *i.e.*, the requirements of 28 U.S.C. § 1407 must be met in order for the Panel to order transfer of a tag-along action. DAVID F. HERR, MULTIDISTRICT LITIGATION MANUAL, § 8.1 (2008). Moreover, "transfer under Section 1407 does not require a complete identity or even majority of common factual issues as a prerequisite to transfer." *Zyprexa Prods. Liab. Litig.*, 314 F. Supp. 2d 1380, 1381 (J.P.M.L. 2004); *Gadolinium Contrast Dyes Prods. Liab. Litig.*, 536 F.Supp.2d 1380, 1382 (J.P.M.L. 2008) (same). The potential tag-along actions at issue here contain sufficiently overlapping common factual issues, as well as a common legal claim, to warrant designation as tag-along actions.

[1/] Another case challenging the same ESA Section 7 regulations was filed in the U.S. District Court for the District of Columbia on December 11, 2008: *Chamber of Commerce of the United States of America v. Kempthorne*, D.D.C. Case No. 08-2173 ("*Chamber of Commerce*"). Under Panel Rule 7.5(a), "[p]otential 'tag-along actions' filed in the transferee district require no action on the part of the Panel and requests for assignment of such actions to the Section 1407 transferee judge should be made in accordance with the local rules for the assignment of related actions." Accordingly, the Chamber filed a notice of related case under the local rules for the U.S. District Court for the District of Columbia. *Chamber of Commerce*, Notice of Designation of Related Civil Case (Docket No. 2). The *Chamber of Commerce* action was designated as related to the Polar Bear Litigation pending before Judge Sullivan in the U.S. District Court for the District of Columbia. Accordingly, it is unnecessary to designate that case as a potential tag-along action. Nonetheless, a copy of the complaint and docket sheet for that action is enclosed for your reference.

(1) *The Section 7 Cases Raise one of the Same Claims Raised in CBD I.*

By way of background, on May 15, 2008, the FWS issued a final rule listing the polar bear as a "threatened" species under the ESA. 73 Fed. Reg. 28,212 (May 15, 2008) (the "Listing Decision"). On the same day, in a separate final action, the FWS issued interim regulations under Section 4(d) of the ESA, 16 U.S.C. § 1533(d), which contain special rules addressing "take" of polar bears. 73 Fed. Reg. 28,306 (May 15, 2008) ("Interim 4(d) Rule"). In the preamble to the Interim 4(d) Rule, the FWS discussed the implications of the Listing Decision for both Section 9 and Section 7 of the ESA, including when an individual source emitter of greenhouse gases would be deemed to have caused an impact that would trigger the application of the ESA under either of these provisions. *See id.*

Following the Listing Decision and the Interim 4(d) Rule, plaintiffs in *CBD I* filed a Second Amended Complaint in an action then pending in the Northern District of California to challenge these decisions by the FWS. Among other things, the Second Amended Complaint in *CBD I* argues that the Interim 4(d) Rule purports to exempt all greenhouse gas emitting projects from the consultation requirements under Section 7 of the ESA and, therefore, is arbitrary, capricious, and inconsistent with law. *See CBD I,* Second Amend. Compl., at ¶¶ 9, 122, 167 (Docket No. 126). Section 7 of the ESA requires federal agencies to consult with the FWS or the NMFS to ensure that their actions are not likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of designated critical habitat. 16 U.S.C. § 1536(a)(2).

On December 3, 2008, the Panel issued its Transfer Order in Docket No. 1993, which, among other things, transferred *CBD I* (including this Section 7 claim) to the United States District Court for the District of Columbia to be consolidated for pretrial proceedings with other cases pending in that district. In its Transfer Order, the Panel found that "[a]ll actions do share factual questions springing from the listing of the polar bear as a threatened species under the Endangered Species Act, . . . the related issuance of the interim Section 4(d) rule, . . . and the consequences of those decisions." Transfer Order at 2 (internal citations omitted). As noted above, among the "consequences of those decisions" being challenged by CBD *et al.* in the *CBD I* transferred case is whether the FWS may "exempt[] federal actions resulting in greenhouse gas emissions from the consultation

requirements of Section 7 of the ESA." *See CBD I*, Second Am. Compl. ¶ 167 (Docket No. 126).[2/]

On December 11, 2008, the FWS and NMFS issued a final rule revising the consultation requirements under Section 7 of the ESA, including whether consultation is required because of potential greenhouse gas emissions associated with a proposed federal action. 73 Fed. Reg. 76,272 (Dec. 16, 2008) (the "Section 7 Rule"). On the same day, but again in a separate final action, FWS issued a final Section 4(d) rule for the polar bear, which supplants the Interim 4(d) Rule that is the subject of *CBD I*. 73 Fed. Reg. 76,249 (Dec. 16, 2008) ("Final 4(d) Rule").

Also on December 11, 2008, the Center for Biological Diversity and other parties filed their complaint in *CBD II* to challenge the Section 7 Rule, arguing that the rule, like the earlier FWS actions, improperly purports to exempt greenhouse gas emitting projects from the ambit of Section 7 of the ESA and, therefore, is arbitrary, capricious, and inconsistent with law. As noted above, this same claim is pending before Judge Sullivan in the U.S. District Court for the District of Columbia in *CBD I*. Thereafter, the Natural Resources Defense Council ("NRDC") and others, the National Wildlife Federation ("NWF") and others, and the State of California filed their complaints in the *NRDC, NWF,* and *State of California* cases, also challenging the Section 7 Rule, and likewise arguing that the rule improperly exempts greenhouse gas emitting projects from the ambit of Section 7 of the ESA.

In addition to the essentially identical Section 7 claim, the Polar Bear Litigation pending before Judge Sullivan and the Section 7 Cases pending before Judge Patel all concern the underlying legal issue of causation under the ESA; *i.e.*, the appropriate legal standard for determining whether an action causing greenhouse gas emissions may affect endangered species or their habitats, such that the obligations of Sections 7 and 9 of the ESA apply. For example, the preambles to the Interim and Final 4(d) Rules extensively discuss the causation requirement for Section 7 consultation, which is addressed further in the Section 7 Rule. 73 Fed. Reg. at 28,312-28,313 (Interim 4(d) Rule); 73 Fed. Reg. at 76,265-76,266 (Final 4(d) Rule); *see generally* 73 Fed. Reg. 76,272 (clarifying the standard of causation required for Section 7 consultation).

[2/] Among the other actions covered by the Panel's Transfer Order is *Safari Club International v. Kempthorne*, No. 08-881 (D.D.C., filed May 23, 2008) ("*Safari Club*"), which involves, among other things, the issue of whether a species listed as "threatened" under the ESA is also "depleted" under the Marine Mammal Protection Act, 16 U.S.C. § 1361, *et seq.*

(2) *The Section 7 Cases Involve Factual Issues in Common with MDL Docket No. 1993.*

In addition to an essentially identical claim, the Section 7 cases share common factual issues with the challenges to the Interim 4(d) Rule in MDL Docket No. 1993 concerning the extent to which, and the circumstances under which, emissions of greenhouse gases from actions funded, authorized, or undertaken by a federal agency might adversely affect ESA-listed species and their habitats. Both the Section 7 and the Interim and Final 4(d) Rules at issue are premised, in part, on the concept that there is insufficient factual evidence to causally link emissions of greenhouse gases from a proposed federal action to impacts on a listed species from global climate change. 73 Fed. Reg. 76,272 (Section 7 Rule); 73 Fed. Reg. 28,306 (Interim 4(d) Rule); 73 Fed. Reg. 76,249 (Final 4(d) Rule). The preamble to each rule notes that current models are incapable of quantitatively linking an individual action to localized climate impacts relevant to consultation. 73 Fed. Reg. at 76,283 (Section 7 Rule); 73 Fed. Reg. at 28,313 (Interim 4(d) Rule); 73 Fed. Reg. at 76,266 (Final 4(d) Rule). Each preamble states that the best scientific data currently available do not draw a causal relationship between greenhouse gas emissions from a specific federal action and effects on listed species or critical habitat by climate change. 73 Fed. Reg. at 76,282 (Section 7 Rule); 73 Fed. Reg. at 28,313 (Interim 4(d) Rule); 73 Fed. Reg. at 76,266 (Final 4(d) Rule). The preamble to each rule notes that requiring consultation for greenhouse gas emissions from a proposed federal action "would render the regulatory concept of an 'action area' meaningless." 73 Fed. Reg. at 76,282 (Section 7 Rule); 73 Fed. Reg. at 76,266 (Final 4(d) Rule); *see also* 73 Fed. Reg. at 28,313 (Interim 4(d) Rule) (discussing "action area" concept).

Furthermore, the Final 4(d) Rule expressly discusses the Section 7 Rule as evidence of the FWS's consideration of whether a federal action that produces greenhouse gas emissions is subject to consultation under Section 7 of the ESA. 73 Fed. Reg. at 76,266; *see also* 73 Fed. Reg. at 28,313 (Interim 4(d) Rule) (stating that FWS has "specifically considered whether a Federal action that produces greenhouse gas emissions is a 'may affect' action that requires section 7 consultation with regard to any and all species or critical habitat that may be impacted by climate change"). Similarly, the preamble to the proposed Section 7 Rule states that "[t]his regulation would enforce the Services' current view that there is no requirement to consult on greenhouse gas (GHG) emissions' contribution to global warming and its associated impacts on listed species (e.g., polar bears)." 73 Fed. Reg. 47,868, 47,872 (Aug. 15, 2008).

The Section 4(d) and Section 7 Rules will be reviewed based on their own administrative records, but those records will likely contain many of the same

documents.[3/] For example, the Final 4(d) Rule and the Section 7 Rule both expressly rely on related documents to support their conclusions that greenhouse gas emissions from a proposed federal action cannot be causally connected to effects on listed species from global climate change. For example, the Final 4(d) Rule cites to an October 3, 2008 memorandum from the Solicitor for the Department of the Interior, which notes that the causal link cannot currently be made between emissions from a proposed action and specific effects on a listed species. 73 Fed. Reg. at 76,266 (discussing Memorandum from Solicitor, U.S. Department of the Interior to Secretary, U.S. Department of the Interior, Re: Guidance on the Applicability of the Endangered Species Act's Consultation Requirements to Proposed Actions Involving the Emission of Greenhouse Gases (Oct. 3, 2008) ("Solicitor's Memorandum"). The Solicitor's Memorandum cites to a recent letter from EPA indicating that the climate change research community has not yet developed tools for quantifying end-point impacts attributable to emissions of greenhouse gases from a single source. Solicitor's Memorandum, at 5. Likewise, in the Section 7 Rule, the Services cite "a recent exchange of letters" in which "EPA provided a model-based analysis that projected that even the emissions of a very large coal-fired power plant would likely result in a rise in the maximum global mean temperature of less than one-thousandth of a degree." 73 Fed. Reg. at 76,282. When the administrative records for the final rules are compiled, they will almost certainly contain many more identical or similar documents.[4/]

In addition, the comments filed by the plaintiffs in *CBD I* and the Section 7 Cases make clear that the issue of regulation of greenhouse gases under the Endangered Species Act is common to both the Interim and Final 4(d) Rules and the Section 7 Rule. For example, Defenders of Wildlife's comments on the Interim 4(d) Rule argued that "the 4(d) rule flatly rejects any attempt to protect the polar bear from the significant threats to the species [sic] continued survival and recovery from greenhouse gas emissions that are causing global warming." Comments of Defenders of Wildlife on the United States Fish and Wildlife Service's

[3/] Under the Administrative Procedure Act, review of final agency action is based on the administrative record. 5 U.S.C. § 706. As noted below, this does not suggest that the administrative records should be combined in any way, and the Chamber supports procedures to ensure that each agency decision is reviewed based on its own independent record.

[4/] Because the dockets for the Final 4(d) Rule and the Section 7 rule contain nearly 60,000 documents, and nearly every document therein is labeled only "Public Comment," it is difficult at this time to determine exactly what documents the Services relied upon in their decisions. But given the overlapping factual issues described above, it is virtually certain that the administrative records will contain a number of the same documents.

Promulgation of a Special Rule for the Polar Bear, 73 Fed. Reg. 28,306 (May 15, 2008), at 7 (July 14, 2008). Similarly, comments filed by the plaintiffs in the Section 7 Cases on the proposed Section 7 Rule note that FWS listed the polar bear due to climate change and use the polar bear as an example to support the proposition that global warming should be addressed in the Section 7 consultation process. *See* Comments of the Center for Biological Diversity Re: Proposed Regulations Amending the Endangered Species Act's Section 7 Implementing Regulations, 73 Fed. Reg. 47868 (August 15, 2008), at 15 (October 14, 2008); Comments of Defenders of Wildlife, The Humane Society of the United States, et al. Re: Proposed Rules, Interagency Cooperation Under the Endangered Species Act Federal Register docket ## FWS-R9-ES-2008-0093 and 0808011023-81048-01, at 10 (Oct. 14, 2008).

Hence, the challenges to the Section 7 Rule and the challenges to the Interim and Final 4(d) Rules contain numerous overlapping factual issues, including the fundamental issue of the extent to which federal actions resulting in greenhouse gas emissions affect endangered species and their habitats.

(3) *The Federal Defendants' Motion to Transfer in MDL Docket 1993 Supports This Tag-Along Designation.*

As the Federal Defendants noted in their response in support of the motion to transfer in MDL Docket 1993, "transfer and consolidation of the pending cases would 'promote just and efficient conduct' of the litigation by avoiding duplicative litigation and the potential for inconsistent judgments." MDL Docket 1993, Federal Defendant's Response In Support of Motion to Transfer, at 2 (September 29, 2008) ("Response In Support of Motion"); *see also id.* at 3. First, that the same claim is being raised by CBD in both *CBD I* and *CBD II* reflects an acknowledgement of the overlapping nature of the challenges. Moreover, because of the overlapping factual issues and common theories upon which the Interim and Final 4(d) and Section 7 Rules were promulgated, as detailed above, failure to designate the Section 7 Cases as tag-along actions would create a risk of inconsistent judgments. For example, in both cases the court will have to resolve the issue of the extent to which emissions of greenhouse gases from actions funded, authorized, or undertaken by federal agencies may affect endangered species or their habitats. An inconsistency would arise if, for example, one court ruled that emissions of greenhouse gases do not require consultation, while the other court ruled that such emissions can cause a "take," or vice versa. Likewise, the extent to which the Services have the discretion not to regulate potential *de minimis* impacts under the ESA is likely to arise in both cases. Finally, as was the case in the Polar Bear Litigation, there is a risk of inconsistent judgments because the Northern District of California cases seek vacatur of the Section 7 Rule in its

entirety, but the *Chamber of Commerce* case seeks an order remanding only a limited portion of the Section 7 Rule, and upholding the remainder of the Rule. "If plaintiffs in each case were successful, the Services would be subject to conflicting orders and could not possibly comply with all of them." *See* Response in Support of Motion, at 5.

Furthermore, when actions arise from a common factual core, they need not involve all of the same legal theories to be related. *See In re M3Power Razor Sys. Mktg. & Sales Practices Litig.*, 398 F. Supp. 2d 1363, 1364 (J.P.M.L. 2005) (*cited in* Response in Support of Motion, at 3). The Panel recognized as much in its Transfer Order in MDL Docket No. 1993. Safari Club International, a plaintiff in one of the covered actions, argued that its "action is legally distinct in that it does not challenge the listing decision or the Section 4(d) rule." Transfer Order, at 2. The Panel stated:

> We do not find this argument persuasive in these circumstances. True, the *Safari Club International* action does involve a unique legal issue regarding the import of polar bear trophies under the Marine Mammal Protection Act, 16 U.S.C. § 1631, *et seq.* Where the underlying actions spring from a common factual core, as all the actions do here, . . . much is potentially gained and little lost by centralization.

Transfer Order, at 2-3.

(4) *Designating the Section 7 Cases as Potential Tag-Along Actions Will Promote the Convenience of the Parties and Witnesses.*

Designating the Section 7 Cases as potential tag-along actions to MDL Docket 1993 and transferring them to the U.S. District Court for the District of Columbia will serve the convenience of the parties and the witnesses. As in the Polar Bear Litigation, the District of Columbia is an appropriate forum because all defendants reside in or around the District of Columbia and perform their official duties there. *See* Response in Support of Motion, at 7 (citing *Reuben H. Donnelly Corp. v. FTC*, 580 F.2d 264, 266 n.3 (7th Cir. 1978); *Williams v. United States*, Case No. 01-0024 EDL, 2001 WL 1352885, at *1 (N.D. Cal. Oct. 23, 2001)). Similarly, many of the plaintiffs in the Section 7 cases maintain offices in Washington, DC, making it a convenient forum for most of the parties.

Additionally, many of the parties in the Section 7 cases overlap with the parties in the Polar Bear Litigation. Common plaintiffs in both sets of cases include the Center for Biological Diversity, Greenpeace, and the Natural Resources Defense Council, in addition to the Chamber. Defenders of Wildlife is a plaintiff in *CBD II* and an intervenor in *CBD I.* Common defendants include Dirk Kempthorne, Secretary of the Interior, H. Dale Hall, Director of the FWS, and the FWS.

Finally, as in the Polar Bear Litigation, a substantial part of the events or omissions giving rise to the claims in the Section 7 lawsuits occurred in the District of Columbia metropolitan area. *See* Response in Support of Motion, at 7. The Assistant Secretary for Fish and Wildlife and Parks and the Deputy Assistant Administrator for Regulatory Programs signed the Section 7 Rule in or around the District of Columbia, and the Secretary of the Interior, the Assistant Secretary for Fish and Wildlife and Parks, and the Director of the Fish and Wildlife Service briefed the public on the rule in the District of Columbia. *See* 73 Fed. Reg. at 76,268; December 11, 2008 Press Release, *available at* http://www.doi.gov/news/08_News_Releases/121108.html.

Thus, as it did with respect to the Polar Bear Litigation, the Panel should find that "these four actions involve common questions of fact, and the centralization of all actions under Section 1407 in the District of District of Columbia will serve the convenience of the parties and witnesses and promote just and efficient conduct of this litigation." Transfer Order, at 2.

(5) *The Federal Defendants' Opposition to the Related Case Designation in the Chamber of Commerce Case Does Not Preclude a Tag-Along Designation.*

In response to the notice of related case in *Chamber of Commerce*, the Federal Defendants filed an objection, arguing that an "action challenging the new Section 7 Rule and the polar bear listing litigation" do not involve common issues of fact or grow out of the same event or transaction. *Chamber of Commerce*, Federal Defs.' Objection to Notice of Related Civil Cases, (Docket No. 5), at 4 (emphasis added). The Federal Defendants' objection then goes on to focus on the differences between the polar bear Listing Decision and the Section 7 Rule. *See id.* (stating that the Polar Bear Litigation asks the court to decide "whether the administrative record for the polar bear listing rule supports FWS's determination regarding the status of the polar bear as a threatened species," based on the five

factors in the ESA governing the listing of species).[5/] They also assert that the Section 7 Rule arises from a different agency rule-making than the Polar Bear Litigation, and will be based on a different administrative record, and that there will be no common factual issues involved in the Polar Bear Litigation and the Section 7 litigation. *See id.* at 5-7.

While Defendants focus on the lack of relationship between the Listing Decision and the Section 7 Rule challenges, that was not the focus of the Chamber's related case notice. The Chamber alleged only that challenges to the Interim 4(d) Rule, not the Listing Decision, were related to the Section 7 Cases. As discussed above, many factual issues in the review of the Section 4(d) Rule will overlap with the factual issues in the review of the Section 7 Rule. Specifically, both rules involve the common factual issue of whether there is a sufficient causal relationship to connect potential greenhouse gas emissions from specific proposed federal actions to effects on listed species or their habitats. Moreover, circumstances will have changed since the filing of the Federal Defendants' Objection once the challenges covered in MDL Docket 1993 are amended to reflect promulgation of the Final 4(d) Rule. As discussed above, the Final 4(d) Rule was promulgated at the same time as the final Section 7 Rule, and the factual issues and records overlap to a large degree.

Furthermore, "the mere fact that the instant case involves a new Administrative Record is not dispositive of whether the two cases are related." *Defenders of Wildlife v. Norton*, No. 04-1230, at 14 n.9 (D.D.C. Sept. 17, 2004). Indeed, the Polar Bear Litigation already involves two separate rulemakings — the Listing Decision and the Interim 4(d) Rule — and those two rules are based on separate administrative records. The Polar Bear Litigation also involves three distinct legal challenges: (1) challenges to the Listing Decision; (2) challenges to the Interim 4(d) Rule; and (3) a challenge to the import/trophy restrictions. Also, with the promulgation of the Final 4(d) Rule, the administrative record for that action now must also be considered in the Polar Bear Litigation. Adding the Section 7 Cases, and the administrative record for the Section 7 Rule, will not overburden the court or the parties, and will further the goals of efficiency and

[5/] Although the Chamber did not argue that the Section 7 challenges were related to the challenges involving the polar bear Listing Decision, as discussed above there are nonetheless common factual issues. Likewise, the Chamber did not argue that the Section 7 challenges were related to the *Safari Club* case, which is also under MDL Docket 1993.

convenience to the parties.[6/]

The Listing Decision, the Interim and Final 4(d) Rules, and the Section 7 Rule each will be reviewed on the basis of their separate administrative records to determine, among other things, whether the facts in those administrative records support the agencies' decisions. 5 U.S.C. § 705; *see also Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (stating that an agency action is arbitrary and capricious if it runs counter to the evidence before the agency); *Am. Fed'n of State, County, & Mun. Employees v. City of Cleveland*, 484 F.2d 339, 346 (6th Cir. 1973) (stating that review of a final agency action under the Administrative Procedure Act's arbitrary and capricious standard "necessarily involves an inquiry into the facts").

Placing the Section 7 Cases before the same judge as the Polar Bear Litigation will serve the purposes of judicial economy by allowing one judge to review these overlapping records and to understand the common factual issues. *See Tripp v. Executive Office of the President*, 196 F.R.D. 201, 202 (D.D.C. 2000) ("It will often prove wasteful of time and resources for two judges to be handling cases that are so related that they involve common factual issues or grow out of the same event or transaction.") And as discussed above, to be related, issues in each case need only be common; they need not be identical. *See Zyprexa Prods. Liab. Litig.*, 314 F.Supp.2d at 1381-1382 (majority of common factual issues not required to transfer). The Panel applied this standard in its Transfer Order in MDL Docket No. 1993, and the Panel's reasoning applies equally here. Transfer Order, at 2.

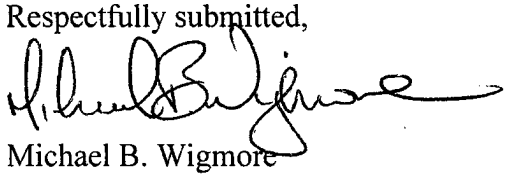
CONCLUSION

Based on these overlapping factual and legal issues, as well as an essentially identical legal claim, it would promote judicial economy and convenience of the parties for a single judge hear these related cases. The Panel should designate *CBD II*, *NRDC*, *NWF*, and *California* as tag-along actions to MDL Docket No. 1993.

[6/] The Chamber understands that all parties to the Polar Bear Litigation, including the federal defendants, have discussed using a trifurcated briefing schedule, under which they will brief each of these three challenges separately. The Section 7 Cases easily could be handled separately, or could be added as a fourth element to the briefing schedule. Moreover, as noted above, reasonable efforts could be made to ensure the independent records are kept separate for each decision.

Please do not hesitate to contact me if you have any questions or require additional information.

Respectfully submitted,



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Enclosures

cc: All Counsel of Record (with enclosures) (by Electronic and First Class Mail)

SCHEDULE OF POTENTIAL TAG-ALONG ACTIONS

Center for Biological Diversity v. Kempthorne, No. 08-5546 (N.D. Cal., filed Dec. 11, 2008) ("*CBD II*")

Natural Resources Defense Council v. United States Department of Interior, No. 08-5605 (N.D. Cal., filed Dec. 16, 2008) ("*NRDC*")

National Wildlife Federation v. Kempthorne, No. 08-5654 (N.D. Cal., filed Dec. 18, 2008) ("*NWF*")

People of the State of California v. Kempthorne, No. 08-5775 (N.D. Cal., filed Dec. 29, 2008) ("*State of California*")