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. 08-0764 (EGS)** **MDL Docket No. 1993**
This Document Relates To: ***American Petroleum Institute, et al. v. Salazar, et al.*, Case No. 1:08-cv-1496**[1]	

AMENDED COMPLAINT

INTRODUCTION

1. Plaintiffs the American Petroleum Institute ("API"), the Chamber of Commerce of the United States of America ("the Chamber"), the National Mining Association ("NMA"), the National Association of Manufacturers ("NAM"), and the American Iron and Steel Institute ("AISI") (collectively "the Associations") bring this action under Section 702 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 702, seeking review of a particular provision of a final agency action by Defendants, Ken Salazar, Secretary of the United States Department of Interior ("Secretary"), Rowan Gould, Acting Director of the United States Fish and Wildlife Service ("Director"), and the United States Fish and Wildlife Service ("FWS"). On May 15, 2008, FWS promulgated a rule listing the polar bear as a "threatened" species under the Endangered Species Act ("ESA"). *See* 73 Fed. Reg. 28211 (May 15, 2008) (the "Listing Rule").

[1] Under Fed. R. Civ. P 25(d), Ken Salazar, the new Secretary of the United States Department of the Interior, and Rowan Gould, Acting Director of the United States Fish and Wildlife Service, are substituted for their predecessors Dirk Kempthorne and H. Dale Hall.

The Associations are ***not*** challenging the Listing Rule. On May 15, 2008, under ESA Section 4(d), Defendants published in the Federal Register an Interim Final Special Rule amending 50 C.F.R. § 17.40 by adding a new paragraph (q). 73 Fed. Reg. 28306 (May 15, 2008) (hereinafter the "Interim 4(d) Rule").

2. On August 27, 2008, the Associations filed a complaint challenging a discrete provision of only one paragraph of the Interim 4(d) Rule – the discriminatory carve-out of operations in Alaska from an exemption provided to operations in all other states in paragraph (q)(4) of 50 C.F.R. § 17.40. The Associations did not challenge the remainder of the 4(d) Rule or the general exemption provided in paragraph (q)(4), both of which they believe were properly issued under the ESA in light of the Listing Rule.

3. On December 16, 2008, Defendants issued a final 4(d) Rule, which amended certain provisions of the Interim Rule. *See* 73 Fed. Reg. 76249 (Dec. 16, 2008) ("Final 4(d) Rule"). The Final 4(d) Rule retains, albeit in a more narrow fashion, the prior carve-out in the Interim Rule. The carve-out in the Final 4(d) Rule provides in paragraph 4(q) of 50 C.F.R. § 17.40 an exemption to operations in all areas outside the "current range of the polar bear" (as opposed to all states except Alaska, as the Interim 4(d) Rule provided). The Associations seek an order holding unlawful and vacating this gap in paragraph (q)(4) of the 4(d) Rule, 50 C.F.R. § 17.40(q)(4), and remanding that limited portion of the 4(d) Rule for correction of this deficiency. The Associations do not challenge the remainder of the 4(d) Rule or the general exemption provided in paragraph (q)(4), both of which they believe were properly issued under the ESA in light of the Listing Rule.

4. Further, the Associations are not challenging the Guidance published by the FWS, which interprets the 4(d) Rule. *See* May 14, 2008, Fish and Wildlife Service Memorandum,

Expectations for Consultations on Actions that Would Emit Greenhouse Gases ("FWS Guidance").

5. The Listing Rule identifies polar bears as a "threatened species" based on FWS's determination that global climate change, resulting from increased concentrations of greenhouse gases in the planetary atmosphere, threaten to injure polar bears' habitat by reducing polar ice. Under the ESA and its accompanying regulations, the "threatened species" designation presumptively triggers Section 9 of the ESA, which would require an FWS permit for activities that constitute an "incidental taking" of the designated species. FWS, however, also determined that climate change is a worldwide phenomenon, resulting from the combination of greenhouse gas emissions across the globe. Accordingly, FWS determined that neither climate change, nor any effect of climate change, can be traced to particular activities in particular locations. On that basis, FWS accompanied its Listing Rule with the Final 4(d) Rule, which generally exempts greenhouse gas emitting activities from the Section 9 requirements to which they might otherwise be subject.

6. But in a sharp contradiction with FWS's own determination that climate-change-based effects on polar bears cannot be traced to emission activities in any particular location, the Final 4(d) Rule ***excludes*** "the current range of the polar bear" from the Section 9 exemption. *See* 73 Fed. Reg. at 76269 (revisions to 40 C.F.R. § 17.40(q)(4)). This regulatory gap thus exposes operations in "the current range of the polar bear" to increased permitting burdens and/or the risk of enforcement by Government authorities and citizen suits – risks that operations elsewhere in the United States do not face and that are contrary to FWS's own determinations about the nature and effects of global climate change. The Associations therefore are challenging this regulatory

gap as an irrational exercise of administrative authority that discriminates against operations in the current range of the polar bear.

JURISDICTION

7. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question jurisdiction). The Court has the authority to grant the relief sought herein pursuant to 28 U.S.C. § 2201 and 5 U.S.C. §§ 705, 706.

VENUE

8. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(e) in that Defendants Ken Salazar and Rowan Gould are officers or employees of the United States who are being sued in their official capacity as the Secretary of the United States Department of Interior and the Director of the FWS, who both reside in the District of Columbia. Venue also is proper because Defendant United States Department of Interior is an agency of the United States that has its headquarters in the District of Columbia. Defendant FWS is an agency of the United States responsible for implementing programs and regulations to protect endangered and threatened species under the ESA and that has its headquarters in the District of Columbia. All of the Defendants are residents of the District of Columbia and all or virtually all of the activities giving rise to this action occurred in the District of Columbia. Finally, API and the Chamber are incorporated in the District of Columbia and all of the Plaintiffs have their headquarters or principal places of business in the District of Columbia.

PARTIES

9. Plaintiff API is a nationwide, non-profit trade organization representing over 400 corporate members engaged in all aspects of the oil and gas industry, including production, refining, distribution, and marketing throughout the United States, including in Alaska. API is

incorporated in and has its principal place of business is in the District of Columbia. API's members are injured by the regulatory gap in the Final 4(d) Rule because it imposes an irrational and additional burden on their operations in the current range of the polar bear. As discussed in more detail below, this regulatory gap means that otherwise lawful operations in the current range of the polar bear – and only in that range – may be subject to additional permitting burdens and/or a risk that Government agencies or private citizens will seek to enforce the provisions of ESA Section 9 against those operations. The relief the Associations request for this regulatory gap would redress API's and its members' injuries.

10. Plaintiff the Chamber is the world's largest business federation, representing an underlying membership of more than 3 million businesses and organizations of all sizes. The Chamber is incorporated in and has its principal place of business in the District of Columbia. The Chamber's members operate and have various businesses and interests in every sector of the economy and transact business throughout the United States, including Alaska, as well as in a large number of countries around the world. A central function of the Chamber is to represent the interests of its members in important matters such as clean air rules, climate change, and domestic energy production before the state and federal courts, legislatures, and executive branches. As discussed in more detail below, the regulatory gap in the Final 4(d) Rule means that the Chamber's members' otherwise lawful operations in the current range of the polar bear – and only in that range – may be subject to additional permitting burdens and/or a risk that Government agencies or private citizens will seek to enforce the provisions of ESA Section 9 against those operations. The relief the Associations request for this regulatory gap would redress the Chamber's and its members' injuries.

11. Plaintiff NMA is the primary national organization that represents the interests of the mining industry before Congress, the administration, federal agencies, the judiciary, and the media. NMA's principal place of business is in the District of Columbia. NMA has more than 325 member corporations who are involved in all aspects of mining including coal, metal, and industrial mineral producers, mineral processors, equipment manufacturers, state associations, bulk transporters, engineering firms, consultants, financial institutions, and companies that supply goods and services to the mining industry. NMA's objective is to engage in and influence the public policy process on the most significant timely issues that impact its members' ability to locate, permit, mine, process, transport, and utilize the nation's vast coal and mineral resources. NMA members operate and hold ownership interests in various mining and mineral operations in many parts of the United States, including Alaska. As discussed in more detail below, the regulatory gap in the Final 4(d) Rule means that NMA's members' otherwise lawful operations in the current range of the polar bear – and only in that range – may be subject to additional permitting burdens and/or a risk that Government agencies or private citizens will seek to enforce the provisions of ESA Section 9 against those operations. The relief the Associations request for this regulatory gap would redress NMA's and its members' injuries.

12. Plaintiff NAM is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. NAM's principal place of business is in the District of Columbia. NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards. NAM members operate and hold ownership interests in various manufacturing

sectors (such as the petroleum manufacturing sector) in many parts of the United States, including Alaska. As discussed in more detail below, the regulatory gap in the Final 4(d) Rule means that NAM's members' otherwise lawful operations in the current range of the polar bear – and only in that range – may be subject to additional permitting burdens and/or a risk that Government agencies or private citizens will seek to enforce the provisions of ESA Section 9 against those operations. The relief the Associations request for this regulatory gap would redress NAM's and its members' injuries.

13. Plaintiff AISI represents the North American steel industry in the public policy arena and advances the case for steel in the marketplace. AISI's principal place of business is in the District of Columbia. AISI has approximately 28 member companies, including integrated and electric furnace steelmakers, and 138 associate and affiliate members who are suppliers to or customers of the steel industry. AISI's member companies represent approximately 75% of both U.S. and North American steel capacity. AISI's members operate and hold ownership interests in various steel manufacturing and related operations in many parts of the United States and its associate or affiliate members supply various customers and projects in the United States, including in Alaska. As discussed in more detail below, the regulatory gap in the Final 4(d) Rule means that otherwise lawful activities or projects that AISI members supply in the current range of the polar bear may be subject to additional permitting burdens and/or a risk that Government agencies or private citizens will seek to enforce the provisions of ESA Section 9 against those activities or projects, thereby impacting the demand for steel from some AISI suppliers. The relief the Associations request for this regulatory gap would redress AISI's and its members' injuries.

14. Defendant Ken Salazar is the Secretary of the United States Department of Interior and is being sued in his official capacity. The Secretary oversaw promulgation of the 4(d) Rule under Section 4(d) of the ESA, 16 U.S.C. § 1533(d). The Secretary signed the 4(d) Rule, which included paragraph (q)(4), and caused it to be published in the Federal Register.

15. Defendant Rowan Gould is the Acting Director of the FWS and is being sued in his official capacity. The Director is responsible for the administration and implementation of the ESA.

16. Defendant FWS is an agency of the United States with the primary authority for implementing the ESA. FWS developed and promulgated the 4(d) Rule, including paragraph (q)(4), under the direction of the Secretary and Director.

BACKGROUND

17. The ESA directs the Secretary to determine, by regulation, whether any species is an endangered or threatened species based on five enumerated factors. 16 U.S.C. § 1533(a)(1). The Secretary must make these determinations "solely on the basis of the best scientific and commercial data available to him . . . ." *Id.* § 1533(b). An "endangered species" is "any species which is in danger of extinction throughout all or a significant portion of its range . . . ." *Id.* § 1532(6). A "threatened species" is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." *Id.* § 1532(20).

18. If a species is listed as "threatened" certain protections apply. FWS has issued regulations providing that the prohibitions for endangered species under 50 C.F.R. § 17.21 (except 50 C.F.R. § 17.21(c)(5)) also apply to threatened species unless a special rule has been promulgated under ESA Section 4(d), which contains all applicable prohibitions and exemptions.

50 C.F.R. § 17.31(a), (c). For example, parties are prohibited under Section 9 of the ESA from "taking" any endangered species. 16 U.S.C. § 1538. The term "take" "means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Id.* § 1533(19). To overcome this blanket prohibition, a private actor may seek an "incidental take permit" from the Secretary for any taking that "is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity." 16 U.S.C. § 1539(a)(1)(B); 50 C.F.R. § 17.32(b). Further, ESA Section 7 requires that any federal agency wishing to fund or permit an activity that may affect a listed species or its habitat must engage in a "consultation" process with FWS. 16 U.S.C. §§ 1536(a)(2), 1538.

19. FWS can promulgate special rules under ESA Section 4(d) that specify prohibitions and authorizations that are tailored to the particular species: "Whenever any species is listed as a threatened species pursuant to [the ESA], the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species." 16 U.S.C. § 1533(d).

20. On May 15, 2008, Defendants issued the Listing Rule, which listed the polar bear as a "threatened" species under the ESA. 73 Fed. Reg. 28211 (May 15, 2008).

21. On May 15, 2008, in conjunction with the promulgation of the Listing Rule and pursuant to its authority under ESA Section 4(d), the Secretary promulgated the Interim 4(d) Rule for the polar bear, which amended 50 C.F.R. § 17.40 to add paragraph (q). 73 Fed. Reg. 28306 (May 15, 2008).

22. On December 16, 2008, Defendants issued the Final 4(d) Rule, which modified the Interim 4(d) Rule to *inter alia*, change paragraph (q)(4) (attached hereto). *See* 73 Fed. Reg. at 76262. The Final 4(d) Rule is tailored to the conservation needs of the polar bear and adopts

existing conservation regulatory requirements of the Marine Mammal Protection Act and the Convention on International Trade in Endangered Species of Wild Fauna and Flora as the appropriate regulatory provisions for polar bears within the polar bear's range under certain situations. *See* 50 C.F.R. § 17.40(q); 73 Fed. Reg. at 76250.

23. Paragraph (q)(4) of the Final 4(d) Rule provides: "None of the prohibitions in § 17.31 of this part apply to any taking of polar bears that is incidental to, but not the purpose of, carrying out an otherwise lawful activity within the United States, except for any incidental taking caused by activities in areas subject to the jurisdiction or sovereign rights of the United States ***within the current range of the polar bear***." 50 C.F.R. § 17.40(q)(4) (emphasis added); *see* 73 Fed. Reg. at 76269. Thus, the Final 4(d) Rule exempts all activities in the United States – except activities in the current polar bear range – from claims that an otherwise lawful activity could constitute an incidental taking of polar bears that requires an incidental take permit under the ESA.

24. The Listing Rule was made effective on May 15, 2008, *see* 73 Fed. Reg. at 28306, and the Final 4(d) Rule was made effective on January 15, 2009. *See* 73 Fed. Reg. at 76249.

APA CLAIM

25. Plaintiffs incorporate by reference the allegations contained in paragraphs 1 through 24 of this Complaint.

26. The preamble to the Final 4(d)Rule provides:

> There currently is no way to determine how the emissions from a specific action both influence climate change and then subsequently affect specific listed species, including polar bears. As we now understand them, the best scientific data currently available do not draw a causal connection between [greenhouse gases] emissions resulting from a specific Federal action and effects on listed species or critical habitat by climate change.

73 Fed. Reg. at 76266.

27. During the rulemaking for the Interim 4(d) Rule, the United States Geological Survey advised FWS that it is "beyond the scope of existing science to identify a specific source of CO_2 emissions and designate it as the cause of specific climate impacts at an exact location." Letter from Mark D. Myers, Director, U.S. Geological Survey, to Dale Hall, Director, Fish and Wildlife Service (May 14, 2008), *available at* http://www.fws.gov/home/feature/2008/polarbear012308/pdf/Memo_to_FWS-Polar_Bears.PDF.

28. Based on information in the record and Defendants' recognition that the best scientific data do not demonstrate the requisite causal connection between specific actions resulting in emissions and an effect on species or critical habitat, Defendants exempted all areas the United States – except the current range of the polar bear – from the otherwise applicable requirements of 50 C.F.R. § 17.31.

29. FWS's own determination and all known science, establish that an emission in the polar bear's current range has no more effect on climate change or polar ice than does an emission in Ankara. Because there is no requisite causal connection between the emissions from certain activities – regardless of location – and the effects on a species or critical habitat, there could be no basis for distinguishing between emissions from activities in all other states and emissions from activities in the current range of the polar bear. This regulatory gap therefore is arbitrary and capricious and contrary to law because it is irrational to subject operations in the polar bear's range to different and more onerous regulations concerning greenhouse gas emissions.

30. Defendants provided no explanation for this regulatory gap in paragraph (q)(4) and, thus, impermissibly neglected to provide a reasoned explanation for their decision to subject

only activities in the polar bear's current range and in no other area in the United States to the requirements for incidental takings allegedly arising out of greenhouse gas emissions.

31. Under the APA, this regulatory gap in paragraph (q)(4) is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. §§ 706(2)(A). Under APA Section 706, the Court therefore has authority to hold this regulatory gap unlawful.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment in Plaintiff's' favor, and:

1. Uphold the Listing Rule, the 4(d) Rule, and paragraph (q)(4) of the 4(d) Rule ***except*** for the regulatory gap paragraph (q)(4) excluding the current range of the polar bear, which should be held unlawful, vacated, and remanded because: (a) this regulatory gap is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law under the APA; and (b) Defendants neglected to provide a reasoned explanation for this regulatory gap in its administrative action.

2. Grant such other relief as the Court deems just and proper.

Respectfully submitted,

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