



GREENPEACE



January 9, 2008

SENT VIA FEDERAL EXPRESS AND FACSIMILE

The Honorable Dirk Kempthorne
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Mr. H. Dale Hall, Director
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RE: Sixty Day Notice of Intent to Sue Over Violations of Section 4 of the Endangered Species Act; Failure to Issue a Final Listing Determination for the Polar Bear

Dear Mr. Kempthorne and Mr. Hall:

We write on behalf of the Center for Biological Diversity (“the Center”), NRDC (Natural Resources Defense Council), and Greenpeace, Inc. (collectively, the “Conservation Groups”) to inform you of our intent to commence an action against the Secretary of the Interior, the U.S. Department of the Interior, the Director of the U.S. Fish and Wildlife Service, and the U.S. Fish and Wildlife Service (collectively, “the Secretary”) for violations of the Endangered Species Act, 16 U.S.C. §§1531-1544 (“ESA”), and the Administrative Procedure Act, 5 U.S.C. §§ 551-559 (“APA”). This letter is provided to you pursuant to the 60-day notice requirement of the ESA’s citizen suit provision. 16 U.S.C. § 1540(g)(2).

On January 9, 2007, the Secretary published a proposed rule to list the polar bear throughout its range as a threatened species under the ESA. Proposal to List the Polar Bear as a Threatened Species (72 Fed. Reg. 1064-1099). Publication of the final listing determination was therefore required no later than January 9, 2008. 16 U.S.C. §§ 1533(b)(6). The final listing

determination was not published in the Federal Register on January 9, 2008. Accordingly, the Secretary is now in violation of the law. This legal violation is detailed further below.

I. Legal Background

Congress passed the Endangered Species Act (“ESA”) to conserve endangered and threatened species and the ecosystems upon which they depend. 16 U.S.C. § 1531(b). The Supreme Court’s review of the ESA’s “language, history, and structure” convinced the Court “beyond a doubt” that “Congress intended endangered species to be afforded the highest of priorities.” Tennessee Valley Authority v. Hill, 437 U.S. 153, 174 (1978). As the Court found, “the plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.” Id. at 184.

The ESA requires the Secretary to determine whether any species is “endangered” or “threatened,” and only those species that have been listed as “endangered” or “threatened” receive protection under the ESA. 16 U.S.C. § 1533(a). A species is “endangered” if it “is in danger of extinction throughout all or a significant portion of its range.” 16 U.S.C. § 1532(6). A species is “threatened” if it “is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.” 16 U.S.C. § 1532(20).

No matter how imperiled a species might be, it does not receive any protection under the ESA until it is officially listed as threatened or endangered. As a result, Congress aptly described Section 4 of the ESA, 16 U.S.C. §1533, the section that sets out the process for listing a species, as “[t]he cornerstone of effective implementation of the Endangered Species Act ...” S. Rep. No. 418, 97th Cong., 2d Sess. at 10; see also H. Rep. No. 567, 97th Cong., 2d Sess. at 10.

Section 4 sets forth a detailed process by which the Secretary adds to the list of threatened and endangered species. 16 U.S.C. §1533. The listing process can begin either by citizen petition or by internal agency processes. In either case, strict timelines apply once the process is initiated. In most cases, as here, the process begins when a petition for listing is received by the Secretary. 16 U.S.C. §1533(b)(3)(A).

Upon receipt of a petition to list a species under the ESA, the Secretary must determine whether the petition “presents substantial scientific or commercial information indicating that the petitioned action may be warranted.” Id. The Secretary must make this initial, “90-Day Finding,” “[t]o the maximum extent practicable, within 90 days after receiving the petition.” Id. If the Secretary determines that the petition presents substantial information that a listing may be warranted, it must “promptly commence a review of the status of the species” to determine whether listing is (1) warranted, (2) not warranted, or (3) warranted but precluded by other pending proposals that require immediate attention. 16 U.S.C. § 1533(b)(3)(B). This finding, known as the “12-Month Finding,” is due “within 12 months after receiving a petition.” Id. The Secretary has no discretion to extend the time allotted for the 12-Month Finding.

If the 12-Month Finding concludes that listing is warranted, the Secretary must promptly publish a proposed rule to list the species in the Federal Register. 16 U.S.C. § 1533(b)(3)(B)(ii). Within one year of publication of the proposed rule, the Secretary “shall publish in the Federal

Register” the final listing determination. 16 U.S.C. §§ 1533(b)(6)(A). At this point, the Secretary must publish a final rule listing the species, publish a withdrawal of the proposal or, in the rare instance where there is substantial disagreement about scientific data, delay a final determination for up to six months to solicit more scientific information. 16 U.S.C. §§ 1533(b)(6)(A)(i) & 1533(b)(6)(B)(i).

In making all listing determinations, the Secretary must consider five statutory listing criteria: (A) the present or threatened destruction, modification, or curtailment of its habitat or range; (B) overutilization for commercial, recreational, scientific, or educational purposes; (C) disease or predation; (D) the inadequacy of existing regulatory mechanisms; or (E) other natural or manmade factors affecting its continued existence. 16 U.S.C. § 1533(a)(1). If a species meets the definition of threatened or endangered because it is imperiled by any *one or more* of these five factors, the Service *must* list the species. 16 U.S.C. § 1533(1). The Secretary must base all listing determinations “solely on the basis of the best scientific and commercial data available.” *Id.* at § 1533(b)(1)(A).

Congress amended Section 4 of the ESA in 1978 to mandate that, when the Secretary lists a species as endangered or threatened, the agency generally must also concurrently designate critical habitat for that species. Section 4(a)(3)(A)(i) of the ESA now states that, “to the maximum extent prudent and determinable,” the Secretary:

shall, concurrently with making a determination . . . that a species is an endangered species or threatened species, designate any habitat of such species which is then considered to be critical habitat

16 U.S.C. § 1533(a)(3)(A)(i); see also *id.* at § 1533(b)(6)(C).

Critical habitat is defined in Section 3 of the ESA as: “(i) the specific areas within the geographical area occupied by a species, at the time it is listed in accordance with the [ESA], on which are found those physical or biological features (I) essential to the conservation of the species and (II) that may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by a species at the time it was listed....upon a determination by the Secretary that such areas are essential for the conservation of the species.” 16 U.S.C. § 1532(5)(A). “Conservation,” in turn, means recovery of these species “to the point at which the measures provided pursuant to this chapter are no longer necessary.” *Id.* at § 1532(3).

The ESA generally requires that critical habitat designation take place concurrently with listing because critical habitat provides important protection for imperiled species beyond that provided by listing alone. Pursuant to Section 7(a)(2) of the ESA, federal agencies must insure through consultation with the Secretary that any action they authorize, fund, or carry out will not “jeopardize the continued existence of any [listed] species.” *Id.* at § 1536(a)(2). For species with critical habitat, each federal agency must additionally guarantee that its actions will not “result in the destruction or adverse modification” of that habitat. *Id.* Thus, while the Section 7(a)(2) duty not to “jeopardize the continued existence” of listed species helps to ensure their survival, the critical habitat duty allows these species to recover so that they may eventually be delisted.

The ESA also mandates that in making a critical habitat determination, the Secretary shall make such determination “on the basis of the best scientific data available.” 16 U.S.C. § 1533(b)(2). In those situations where critical habitat is not determinable at the time of final listing, the Secretary must conduct additional necessary research, and issue a final determination of critical habitat no later than one additional year from the date the final listing determination is due. 16 U.S.C. § 1533(b)(6)(C)(ii).

II. The Polar Bear Listing Process and the Secretary’s Violations

The petition to list the polar bear as a threatened species (“Petition”) was filed on February 16, 2005, and received by the Secretary on February 17, 2005. On December 15, 2005, the Conservation Groups sued the Secretary for failure to make the required 90-Day Finding on the Petition. Center for Biological Diversity v. Kempthorne, Civ. 05-5191 JSW (N. Dist. Cal.) The Secretary issued a positive 90-day finding on February 9, 2007. A Settlement Agreement and Consent Decree was then entered in Center for Biological Diversity v. Kempthorne requiring the Secretary to issue a 12-Month Finding by December 27, 2007. On January 9, 2007, the Secretary published a proposed rule to list the polar bear as a threatened species under the ESA. Proposal to List the Polar Bear as a Threatened Species (72 Fed. Reg. 1064-1099). Publication of the final listing determination was therefore required one year of January 9, 2007. 16 U.S.C. §§ 1533(b)(6). The final listing determination and critical habitat designation was not published in the Federal Register on January 9, 2008, and accordingly the Secretary is now in violation of the law.

As the Conservation Groups made clear in their most recent comments to the Fish and Wildlife Service, the polar bear is now critically endangered by global warming, and any further delay in its protection is illegal. Most importantly, the melting of the Arctic sea ice on which polar bears depend has now accelerated far beyond that predicted by any climate models. In 2007 the Arctic sea ice hit a shocking new minimum, fully one million square miles below the average minimum sea ice extent between 1979-2000. There was less ice in the Arctic in September, 2007, than more than half the climate models predict for 2050. The polar bear is also being impacted earlier and more intensely by the warming and melting than had previously been predicted. Five of the world’s polar bears populations are now classified as declining by the International Union for the Conservation of Nature’s (“IUCN”) Polar Bear Specialist Group, and instances of polar bears drowning, starving, and resorting to cannibalism have been documented.

In addition, the United States Geological Survey (“USGS”) significantly advanced the understanding of sea-ice loss and its implications for polar bears in a series of reports produced at the Service’s request to assist in the listing process. See, e.g., Amstrup, S.C. et al. 2007. Forecasting the Range-wide Status of Polar Bears at Selected Times in the 21st Century. U.S. Geological Survey Administrative Report. U.S. Geological Survey, Reston, VA (“Amstrup, et al. 2007”).

The USGS conducted polar bear population modeling based on 10 climate models that most accurately simulate future ice conditions. The USGS used the Intergovernmental Panel on Climate Change (“IPCC”) A1B “business as usual” scenario of future emissions to run the

climate models. In the A1B scenario, atmospheric carbon dioxide concentrations reach 717 parts per million by 2100. These sea-ice projections were used in a number of applications, including in a Bayesian Network model developed by the USGS to most accurately project the future range-wide status of the polar bear. The results are disturbing.

The USGS (Amstrup et al. 2007) projects that two-thirds of the world's polar bears will be extinct by 2050, including all of the bears in Alaska. The "good news" is that polar bears *may* survive in the high Canadian Archipelago and portions of Northwest Greenland through the end of this century. However, their extinction risk is still extremely high: over 40% in the Archipelago and over 70% in Northwest Greenland (Amstrup et al. 2007: Table 8).

Moreover, the USGS emphasizes repeatedly that because all of the available climate models have to date underestimated the actual observed sea-ice loss, the assessment of risk to the polar bear may be conservative. Perhaps most worrisome is the observation that part of an area in the Canadian Archipelago expected to provide an icy refuge for the polar bear in 2100 lost its ice in the summer of 2007.

In short, the available evidence now indicates that polar bears are not merely threatened with becoming an endangered species. Polar bears are an endangered species. If future emissions meet or exceed the A1B scenario, the eventual extinction of polar bears is virtually guaranteed, as extinction risk will exceed 40% even in the high Canadian Archipelago in 2100, and warming will continue after 2100.

It is not, however, too late to save polar bears from extinction. If we greatly reduce greenhouse gas pollutants including carbon dioxide, methane, and black carbon, and also protect polar bears from other threats they face in addition to global warming, such as oil and gas development, toxic contaminants, and increased shipping in the Arctic, the species can still be successfully conserved. It is thus crucial for the Secretary to give polar bears the protection they deserve under the Endangered Species Act immediately, because our window of opportunity to save them is rapidly closing

The Secretary's failure to comply with the ESA's listing timeline deprives polar bears of statutorily mandated protection vitally necessary for their survival. The Secretary's violations frustrate the intent of the ESA, because the likelihood of survival and recovery of the species is reduced due to continued harm to the species from global warming, oil and gas development, and other threats.

Noticing parties under 16 U.S.C. §1540(g) need not wait 60 days from the date of the notice letter to seek judicial review where there is "an emergency posing a significant risk to the well-being of any species of fish or wildlife or plants." 16 U.S.C. § 1540(g)(2)(C). The Conservation Groups believe that this exception applies in this instance, as the polar bear is clearly faced with an emergency posing a significant risk to its well-being in the absence of ESA protection.

The members and staff of the Conservation Groups are vitally concerned about and actively involved in the protection of polar bears and their habitat. The Conservation Groups'

members and staff engage in recreational, aesthetic and scientific activities involving this species and its arctic habitat, including observing and attempting to observe polar bears. The Conservation Groups, their members, and staff are injured by the Secretary's violations, and those injuries would be remedied if the Secretary immediately issues a final listing determination for the species in accordance with the statute.

Thank you for your consideration of these urgent issues. We hope that the Secretary will act promptly to remedy the violations described above. Please contact Kassie Siegel at (760) 366-2232 x302 if you would like to discuss these matters further.

Sincerely,



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